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Environmental Principles. From Political Slogans to Legal Rules (2020) – a review of the monograph by Nicolas de Sadeleer

Environmental Principles. From Political Slogans to Legal Rules (2020) – recenzja monografii Nicolasa de Sadeleer

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Abstract: The subject of this article is a review of the second edition of the monograph by N. de Sadeleer entitled *Environmental Principles. From Political Slogans to Legal Rules*, devoted to the principles of environmental protection, in which the author explains the place and role of the three principles of his choice – the 'polluter pays' principle, the prevention principle and the precautionary principle – in environmental law at all levels (i.e. international, the EU and national), taking into account the ongoing evolution of functions and legal status of these principles in the transition between modern and postmodern legal models, as well as the changing models of thinking about the environment. The aforementioned monograph has the value of a comprehensive and extremely interesting study of issues of three principles crucial to environmental law, in theoretical and practical dimensions.

Keywords: environmental principles, environmental law, 'polluter pays' principle, prevention principle, precautionary principle

Abstrakt: Przedmiotem niniejszego artykułu jest recenzja drugiego wydania monografii N. de Sadeleer pt. *Environmental Principles. From Political Slogans to Legal Rules*, poświęconej zasadom ochrony środowiska, w której Autor wyjaśnia miejsce i rolę trzech wybranych przez siebie pryncypiów – zasady „zanieczyszczający płaci", zasady prewencji i zasady przezorno-

ści – w prawie ochrony środowiska na wszystkich szczeblach (to jest na poziomie prawa międzynarodowego, unijnego i krajowego), biorąc pod uwagę zachodzącą ewolucję funkcji i statusu prawnego tych zasad w przejściu między nowoczesnym a ponowoczesnym modelu prawa, z uwzględnieniem zmieniających się modeli myślenia o środowisku. Wspomniana monografia ma walor kompleksowego i arcyciekawego opracowania problematyki trzech kluczowych dla prawa ochrony środowiska zasad na płaszczyźnie teoretycznej i praktycznej.

Słowa kluczowe: zasady ochrony środowiska, prawo ochrony środowiska, zasada „zanieczyszczający płaci", zasada prewencji, zasada ostrożności

1. Introductory remarks – subject and scope of the reviewed monograph

The subject of this article is a review of the second edition of the monograph by N. de Sadeleer entitled *Environmental Principles. From Political Slogans to Legal Rules* (Oxford 2020), in which the author explains the place and role of three principles of his choice – the 'polluter pays' principle, the prevention principle and the precautionary principle – in environmental law at all levels (i.e. at the level of international, EU and national law), taking into account the ongoing evolution of the function and legal status of these principles in the transition between the modern and post-modern models of law, and also the changing ways of thinking about the environment.

The work is structured in two main parts: the author devotes the first part to examining the above principles and identifying the approach to environmental risks expressed by each of them. Each chapter in this part is devoted to one of the principles, and in each chapter the author considers in turn the sources of the principle in question, conducts a systemic analysis, and comprehensively (by referring to individual institutions that exemplify the application of the principle in question, as well as individual elements of the principle) examines the contexts of application, using specific examples of the international law, EU law, national legal orders and case law arising from such norms. Moreover, each chapter begins with introductory remarks and concludes with a summary presenting partial conclusions – this is a common feature of all the chapters of the book, which has an excellent effect on systematising the author's reflections; as there is a lot of interesting and important content, such a procedure is very useful here. In the considerations devoted to each of the principles discussed, the author combines theoretical and legal analyses with studies of specific cases of application of a given principle – which undoubtedly constitutes added value and widens the potential circle of persons interested in the issues of the study to include legal practitioners as well. What is particularly striking here is the depth of the research carried out; it is also worth noting and appreciating that

throughout the monograph, the author does not just reflect on the individual principles separately, but also identifies and analyses their interconnections and the ways in which they affect each other. Furthermore, the author conducts his reflections on the subject along the axis of his own conception of the gradual passage of environmental law through different models of thinking about nature (from healing through preventive to anticipatory – as will be developed later in this review). This causes already the first part of the monograph (which, after all, concerns the principles of environmental protection widely described in the literature on the subject) to constitute in itself a valuable contribution to the achievements of the science of law and not only, given the extensive coverage of economic, philosophical or sozological threads accompanying the formation of the principles of environmental protection.

In the second part of the study, in turn, N. de Sadeleer considers the legal status and roles of the three previously discussed principles in the context of meanders of the modern and post-modern model of law. In the first chapter of this part (and the fourth chapter of the book), the author presents the characteristics of both models, positing and defending the thesis that environmental law has been particularly affected by hallmarks of postmodernity. The fifth chapter is devoted to the changing function of the 'polluter pays', prevention and precautionary principles as directing principles (although this also seems unfortunate, I have not been able to find a better expression for rendering of the phrase *principes directeurs* than that of directing principles); the titles of the subsections speak in turn of directing principles as elements that maintain the connection to the modern model of law, limit the excesses of the post-modern model of law, relate to the human right to environmental protection and have an important function in resolving conflicts of interest in difficult cases. A kind of buckle is provided by the sixth chapter, in which the author confronts the issue of the legal status of environmental principles, referring to the subtitle of the entire study. In the final, the seventh, chapter, the operation of the previously discussed environmental principles is analysed in the context of free trade issues. This chapter, however interesting, does not seem to fully fit into the assumed structure of the argument; the chapter that binds the whole work together in terms of content seems to be the sixth chapter.

With this slight reservation, the layout of the monograph is well thought out, coherent and logical, allowing the reader to follow the gradually developing argumentation of the author. In accordance with the monograph's subtitle (from political slogans to legal principles), the author comprehensively describes the formation and evolution of the meaning of environmental protection principles, which were finally reflected in specific legal instruments and regulations. In doing so, he draws on the legislative output of the international

law, the European Union law, and even those of individual European Union (Western European) and non-European Union (United States) states, as well as on the rich jurisprudence of international tribunals, the Court of Justice of the European Union, but also the courts of various countries. The multitude of material used in the deliberations definitely deserves appreciation. Gathering such a large amount of data required a considerable amount of time and effort; more importantly, however, the way in which these materials were used can also be admired. This is because the discussion coherently and logically shows the evolution of the meaning and function of the three basic principles of environmental protection chosen by the author (namely, the 'polluter pays' principle, the prevention principle and the precautionary principle), allowing the reader to become familiar with the fluctuating contexts and ways in which they are applied. An unavoidable side effect of such a comprehensive elaboration of the collected material is the circumstance that following the author's train of thought requires some effort on the part of the reader; it is not easy to read and concentration is indispensable for the journey through the successive chapters and subchapters. However, this is, in my opinion, the necessary price of such a reliable and exhaustive analysis.

2. The nature of environmental principles as conceived by N. de Sadeleer

A very valuable element of N. de Sadeleer's work is that he draws a picture of a certain ambivalence regarding the interpretation of the environmental principles under discussion; the author does not attempt to claim that all the concepts accompanying their application are fully clear and that there are no doubts that are difficult to resolve unequivocally. Rather, he shows the possible paths that the legislature, the judicature and the doctrine can take in this regard. The precise highlighting of these difficulties of interpretation with regard to the principles in question is of great value, as it opens the door to a discussion of the principles, both in the context of legislative activity and of jurisprudence or doctrine – which may ultimately contribute to their further clarification.

The perceived general character of the principles analysed and a certain lability in their interpretation as models of thinking in environmental law evolve and move between the modern and post-modern models of law. This does not, however, in the author's opinion, prevent them from being granted the character of legal principles (and not just policy principles). The aforementioned features only impinge on the flexibility and applicability of these principles, which the author sees as an advantage. N. de Sadeleer argues that the principles in question can have legal effects, irrespective of their changing

functions, the varying degree of protection provided by these principles and the different form they may take in individual cases. At the same time, there is a reversal of the traditional logic of the considerations carried out, as the author points out the circumstance that the legal status of the principles is influenced by the functions they perform. The author takes the position that the juxtaposition of guiding principles and binding rules is an oversimplification, as it often happens that rules expressed in a normative manner (including principles) have an indefinite content, having a binding character, and at the same time leaving a certain margin of freedom. Simultaneously, he posits that environmental principles have indirect binding effects as well as act as indications for the interpretation of norms (de Sadeleer 2020: viii). But the nature of a legal principle is not intended to be the subject of an exhaustive definition in positive law; what is desirable is a flexible norm capable of adaptation to the variety of cases in which it will be applied; any attempt to define a legal principle by overly precise formulations would certainly lead to a limitation of its scope of application, eliminating its usefulness. Moreover, while a legal principle may remain vague, its scope will be progressively explained by application in different contexts (de Sadeleer 2020: 304). This is also the case in the context of all the environmental principles discussed by N. de Sadeleer, which define the conditions for action but do not define the action itself (de Sadeleer 2020: 524). This is, moreover, also the case on the ground of Polish legislation introducing the principles of 'polluter pays', prevention and precaution, i.e. Articles 6 and 7 of the Act of 27 April 2001 – Environmental Protection Law (hereinafter: EPL). In the most emphatic way, the author demonstrates this ambiguity in the context of the precautionary principle, concluding that it is not possible to create a single regulatory scheme for the implementation of this principle, as the standard of precaution will change depending on different types of conditions – therefore, decision-making based on the precautionary principle must be dynamic (specific decisions must be amendable as new scientific data emerge) (de Sadeleer 2020: 359). Difficulties in practical implementation, moreover, arise in the context of all three principles, which may seem simple only at first sight. Besides, all three principles analysed are, in the author's opinion, progressive in nature.

However, some degree of definiteness of the principle in question for the possibility of its legal effects seems to be necessary, according to N. de Sadeleer, as he argues that a legal principle can only be effective if everyone agrees on its effects, even if in a vague manner (de Sadeleer 2020: 132). The author points out that in order to assume the autonomous character and binding force of environmental principles, they must fulfil two conditions, formal and substantive: the first concerns the presence in the legal text, while the second

involves the formulation of the principles in a sufficiently normative manner (it goes to the determination of the essence of the obligation deriving from the principle in question) (de Sadeleer 2020: 457-458). The author analyses the fulfilment of these criteria at the level of international law, the EU law and national legal orders. He then concludes that, where the 'polluter-pays', prevention and precautionary principles are expressed in legal acts, they take the form of rules of indeterminate content; the high level of abstractness and lack of uniform formulation of these principles do not, however, deprive them of legal effect – although they are "somehow less binding" than more prescriptive rules, also their degree of legal foreseeability is lower (de Sadeleer 2020: 493-494). In other words, these rules have a normative character, although this differs on many levels from the normative character of more specific regulations; also their legal force varies depending on the legal system in which they are located (national legal orders, EU law, international law) (de Sadeleer 2020: 520), and their effects may be long-term rather than immediate (de Sadeleer 2020: 524). The author's reflections on this topic are quite complex, just as the idea of rules of indefinite content is not entirely clear.

N. de Sadeleer's original and somewhat complex conception, which situates the 'polluter pays', prevention and precautionary principles in environmental law as specific rules of indefinite content having a normative character, differs from both the ways of perceiving legal principles in general presented in Polish legal thought and the approaches to these specific principles presented by Polish environmental law doctrine.

Referring first to the perception of legal principles in general, it should be pointed out at the outset that the concept of legal principle is characterised by the complexity and significant degree of heterogeneity of the term (Korzeniowski 2010: 217). It is one of the most controversial legal concepts (Bukowski 2009: 44). In the classic Dworkinian conception of the distinction between rules and principles (differing in particular in that the former may or may not be realised, while the latter are directives of an optimising nature that may be – and most often are – only partially realised), legal principles constituted binding directives. H. Hart, complementing Dworkin's conception, emphasised indeed the numerous differences between principles and rules, writing that principles are, relative to rules, capacious, general or somehow underdetermined in the sense that often what could be considered as a multiplicity of different rules can be presented as exemplifications or concretisations of a single principle (Hart 1998: 347). Principles, in his view, are purposive; they refer to a purpose, intention or value and thus contribute to the clarification of rules.

Polish legal thought agrees with these findings in principle. According to J. Wróblewski, legal principles are norms of law, the significance of which

is such that they may be regarded as crucial for the whole system of law or a part of it; this role may be determined by the place in the system of sources of law, the importance of the issues addressed by a given norm or the significance for a given institution of law; they may result directly from the law in force or they may be derived from the legal system by way of interpretation (Morawski 2002: 219). In general assumptions converging with such a view is the concept of S. Wronkowska, M. Zieliński and Z. Ziembiński. It defines principles as legal norms which have a superior position in relation to other norms and which play special roles in the system of norms (Wronkowska 2005: 109-110). Differences appear at the level of the classification of types of principles; in the latter conception, legal principles are divided into principles in the descriptive sense (being ways of shaping a legal institution concerning a given field of law) and principles in the directive sense (constituting directives of conduct) (Wronkowska, Zieliński, Ziembiński 1974: 23-79). The role of legal principles was presented, among others, by P. Korzeniowski. According to this author, a legal principle improves the mechanisms of the processes: law creation, law application and law interpretation (Korzeniowski 2010: 208). Such general definitions of principles seem to fit the triad of environmental principles analysed by N. de Sadeleer.

Turning to the perception of environmental principles at this point, one can firstly share the reflection of M.M. Kenig-Witkowska, who notes, in the doctrine of environmental law, the definition of principles is rather not discussed, contenting itself with referring to general principles of law and leaving their conceptualisation to legal theory (Kenig-Witkowska 2011: 73). Instead, it is said that in the principles of environmental law we find points of view of reality, guiding ideas and inviolable regularities, for which the model is the nature surrounding man, i.e. the environment (Korzeniowski 2010: 212). At the same time, it is difficult to unequivocally establish a catalogue of environmental principles.

More importantly, however, there is also no consensus in the doctrine of environmental law on the status of individual principles. In the context of such basic principals, the existence of which is agreed upon by all representatives of the doctrine (such as the principle of sustainable development and all principles from the triad discussed by N. de Sadeleer), both positions denying their legal character and views granting them the status of legal norms with all the consequences thereof resound. It is, however, difficult to assess the proportion of beliefs in this respect at present, as many of the views on the non-legal character of the principles quoted below were expressed several or more years ago and their authors may have changed their views in the meantime in view of the dynamic development of environmental law (and the accompanying principles,

increasingly present in legal acts and judicial decisions). As guidelines for environmental policy, these principles were seen by M. Górski and M. Michalak (Górski, Michalak 2014: 45); as practical recommendations indicating optimal solutions to selected environmental problems, they were understood by R. Paczuski (Paczuski 1999: 48); as indications helpful in legislative activity and in the process of interpretation and application of environmental law norms, they were seen by A. Wąsikowska (Wąsikowska 2010: 25). A related position was also taken by M.M. Kenig-Witkowska, who wrote that the principles listed in Article 191(2) of the Treaty on the Functioning of the European Union (hereinafter: TFEU) form general guidelines for the EU environmental policy, but do not have the character of legally binding rules. They are used as guidelines for legal instruments of the Union adopted in the field of the environment, but as such they do not contain an obligation to take specific decisions. At the same time, however, she pointed out that although these principles are only general indications for the Union's environmental policy, one should not forget that they also indirectly have the value of legally binding rules. Indeed, they establish an obligation on the part of the Union to promote, plan and implement environmental policy on the basis of these principles. And therefore compliance with these principles can play an important role in deciding in specific cases that the objectives contained in Article 191 TFEU could not be achieved more easily by the Member States and should therefore be pursued by the Union in accordance with the principle of subsidiarity. The principles contained in Article 191 TFEU may also be invoked to justify the choice of the legal basis of Article 192 TFEU for a legislative act to be adopted, as well as to reinforce the integration principle expressed in Article 11 TFEU and in situations of interpreting derived from EU law (Kenig-Witkowska 2011: 74-75). Thus, this is an indirect view, on the one hand – explicitly stating the absence of the status of legally binding rules, but on the other hand – also indirectly granting them the value of legally binding rules. This indirect position seems to be somewhat similar to N. de Sadeleer's conception, which also de facto creates a certain bridge between two opposing views in this respect.

Z. Bukowski, in particular, leans towards the legally binding character of at least the principle of sustainable development. Applying the criteria developed in the doctrine, that is a special place in the hierarchical structure of the legal system, superiority in relation to other norms and other assessments of a socio-political nature, he recognises that the principle of sustainable development is among the legal principles of the legally binding character (Bukowski 2009: 45), both under Polish law and the legal order of the European Union (Bukowski 2009: 340). The position granting the principles of environmental protection a legal character is also expressed by P. Korzeniowski in a comprehensive

monograph on the principles of environmental protection. As this author points out, the principles of environmental law are an institution of environmental law that has largely determined its most important functions and objectives (Korzeniowski 2010: 506). According to him, they perform various important functions: A legal principle grounded in binding norms is realised in the process of applying the law. The interpretation of a principle so designated is also supported by judicial decisions, which broaden the possibilities for its realisation. Principles of law contribute to unifying the application of environmental law. They put the environmental law system in a general order (Korzeniowski 2010: 269). In addition to well-established legal principles of environmental protection, P. Korzeniowski also distinguishes principles-postulates, which may be at an initial stage of transformation into legally binding norms.

The mere fact that the principles of environmental protection discussed by N. de Sadeleer are of general nature, also in the prevailing opinion of the Polish doctrine, should not stand in the way of recognising that they have the character of legal principles. This is because we usually have to deal with a high degree of generality and imprecise content of principles, which is clarified in the activity of jurisprudence and doctrine (Maliszewska-Nienartowicz 2007: 29). As P. Korzeniowski writes: "The progress of the science of law manifests itself in the discovery of new meanings of general principles, with the indication of their deep and subtle differences in the interpretation of law. In the norms of law, in spite of apparent differences in their content, we can ultimately see the same basic principles applicable to the entire system of law. It is the privilege of the science of law to attempt to combine rules from a given field, precisely into general principles" (Korzeniowski 2010: 213). It seems, however, that the authors who deny the legal character of environmental principles have in mind not so much their necessarily general character as the insufficient degree of tangible effects of these principles in practice (although this is rarely justified explicitly).

In the context of Polish law, the fact that the 'polluter pays', prevention and precautionary principles have been granted the status of legal principles is undoubtedly supported by the fact of their direct inclusion in the Polish Environmental Protection Law. (Articles 6-7 of this Act), which means that the formal criterion is fulfilled. Moreover, in contrast to the EU legislator (which contented itself with a mention of the principles in question in Article 191(2) TFEU), and next to the very different models of development or the lack of development of these principles in international law, the Polish legislator explained in the normative text what these principles consist in. Of course, the definitions in question are far from precise, but, in fairness, one would have to conclude that it would be very difficult, if not impossible at all, to convey the

wealth of content of these principles in the form of short statutory provisions. The substantive criterion, i.e. the formulation of the principles in a sufficiently normative manner (identifying the essence of the obligation arising from the principle in question), also appears to be met. It may be that the very provisions constituting these principles result in obligations that are not sufficiently concrete, but they are developed on the ground of particular institutions of environmental law, which are exemplifications of the given principles. Also in the jurisprudence of Polish administrative courts, the principles of 'polluter pays', prevention and precaution are not infrequently invoked.

It is worth noting that these principles are strongly goal-oriented (Ebbesson 2009: passim). The most significant result of their instrumental nature is that they are undoubtedly not a dead letter – and everyone agrees on this. They are inherently dynamic in nature, as their application in specific cases depends not only on the circumstances of the facts, but also on factors such as the state of available scientific knowledge. The basing of environmental protection on available scientific and technical data in fact presupposes a model of continuous self-improvement (the so-called Deming loop (Prandecki 2008: 55)), i.e. a management concept based on a pattern of continuous improvement). By force of fact, such continuous self-improvement enforces a certain flexibility and dynamic nature of environmental principles. They are constant in the sense that we continuously apply these principles – but changeable in the sense that as the contexts of their application change, the interpretation and application of these principles must also undergo some transformation. Furthermore, the dynamic nature of these principles is also an aftermath of the strong colouring of environmental law with axiological considerations. In this field, there is a greater focus on values (which, by the way, are of a specific nature) than in other fields of law. It is emphasised that the extent to which people understand and feel this today, as well as the perceived scale of the visible impact of pollution on the global and local environment, bring environmental law closer to fundamental ethical values than many other regulations. If we accept the notion that law derives from the regulation of issues of a typically existential nature and that, since the dawn of civilisation, life experience has been not only a source but also an imperative, then the contemporary needs for regulation and the environmental states that stimulate these needs are saturated with axiological motivations regardless of the expressiveness of the way they are expressed in law (Boć 2015: 20). The role of the legislator's axiological motivations in the field of environmental protection is also different, as they not only lie at the heart of regulation, but, in addition to sozological knowledge, provide the stimuli for the continuous development of environmental law.

This flexible and dynamic nature of environmental principles is highlighted even more strongly against the backdrop of the specifics of European Union law. As emphasised in the doctrine, "in the case of EU law […] the system of sources of law is quite specific – complex, not similar to the systems of sources of law of the Member States. The significant role of jurisprudence and the inclusion of principles of law, preambles or inferential reasoning in the reconstruction does not abolish the rule of priority of the use of linguistic rules, but also introduces axiological, expedient or functional arguments into this first stage of interpretation" (Kalisz, Leszczyński, Liżewski 2011: 196-197). This is a feature alien to Polish administrative law – in the Polish legal system and in the continental model in general, it is the linguistic directives of interpretation that are given fundamental importance. As pointed out in the doctrine: "The fundamental role of the rules in question means that they are applied in the first place and modelled as having the strongest influence on the outcome of interpretation. In the culture of statute law, it is usually the linguistic and systemic rules that play such a role, as interpretation here is carried out on the basis of legal rules. Only certain special constructions (extra-systemic references, programmatic norms, principles of law) and special situations (gaps in the law, normative contradictions) cause modifications of the general model here. The contextual role, on the other hand, means the direct reference of the results of the use of the basic rules to the axiological or purposive and functional (to some extent also systemic) context, placing itself in the second order of application in the interpretation process. On the other hand, the verification role, usually appearing in the third iteration of the interpretation process, occurs in the situation where it is found necessary to supplement the results of the use of the earlier rules or, in a stronger version, to correct this result" (Kalisz, Leszczyński, Liżewski 2011: 28). Thus, extra-linguistic interpretative directives are important, playing a contextual and verification role, but they do not undermine the primacy of linguistic interpretation, which – apart from exceptional cases – plays a dominant and decisive role. This element also seems to contribute to a more restrained approach of the Polish doctrine to the recognition of the legal character of environmental protection principles such as the 'polluter pays' principle, the prevention principle or the precautionary principle. This is because the lack of clear and precise formulations of these principles in legal texts makes it impossible to draw significant consequences from them using only linguistic interpretation.

In my opinion, the current stage of development of environmental law, taking into account the specificity of this field, as well as the current specificity of the legal system in general (I find N. de Sadeleer's arguments concerning the post-modern model of law convincing here), justifies the assumption that

the aforementioned principles do not constitute mere policy guidelines, but are binding legal norms, the violation of which could entail, for example, the annulment of secondary legislation by the Court of Justice of the European Union.

Notwithstanding the controversy over the legal status of the triad of environmental principles in question, which is unlikely to be resolved any time soon, it is worth asking whether the question of denying or granting such a status to these principles is really as fundamental as it might seem. Writing about the high level of protection, A. Sikora notes that the classification of this element as either an objective or a principle is not decisive in terms of its legal consequences, and that the distinction between objectives and principles in EU environmental policy has always been and remains unclear (Sikora 2020: 81). However, this does not change the fact that the principles of environmental protection in both the international, EU and Polish legal orders are of significant importance – and if only for this reason, even without sharing the author's position on the nature of environmental protection principles, the reviewed monograph is worth reading.

3. Selection of analysed principles

By selecting three of the four principles mentioned by Article 191(2) TFEU, and omitting the fourth principle (the principle of rectifying damage first at source), as well as other principles recurring in environmental law (such as the principle of sustainable development), N. de Sadeleer points to the working hypothesis that, of the many environmental principles (which may be applied in very different ways), it is the 'polluter pays' principle, the principle of prevention and the precautionary principle that can be singled out as forming a matrix of important principles that interrelate and, in a sense, form the foundation of environmental law (de Sadeleer 2020: 9). In justifying this, the author points to three basic arguments: firstly, these three principles, unlike many others, are directly or indirectly recognised in international law, in EU law and in the legal orders of many countries, essentially as overarching principles of environmental laws; secondly, they are cumulatively mentioned in many international treaties and environmental instruments as binding or providing leadership for the choice of measures to mitigate environmental risks; and finally, they are linked to complementary models of thought (de Sadeleer 2020: 10-11).

In discussing the individual principles, the author evaluates them in the context of three such chronologically arranged models of thinking about nature:

– the curative model, to which the 'polluter-pays' principle corresponds; this model focused on responsibility for environmental damage, based on the

assumption that nature is unable to cope with this damage on its own and must be helped to do so (de Sadeleer 2020: 25-26);

– the preventive model, to which the principle of prevention (precautionary action) corresponds; this model, which complemented the recovery model, relied on science and scientific findings to determine a level of damage that would not interfere with the ability of ecosystems and species to recover (de Sadeleer 2020: 26-27);

– the anticipatory model, which is based on the application of the precautionary principle (foresight); in the anticipatory model, scientific uncertainty became central to the decision-making process (de Sadeleer 2020: 27-29).

The discussion devoted to the precautionary principle is the longest, as this principle seems to involve the greatest uncertainties about its understanding and application. Indeed, the scientific controversy covers essentially all the essential elements of the precautionary principle, namely: 1) the degree of scientific certainty triggering the application of the precautionary principle – starting with the absence of absolute scientific certainty, i.e. the state in which an adequate causal link between the activity and the negative environmental effects is almost certain, through the reasonable nature of suspicions about the existence of such a link, to conjecture as to the possible effects; 2) the significance of the negative effects justifying the activation of the precautionary principle – from the reservation of the serious nature of the damage to the absence of such a reservation; 3) the nature of the actions triggered by the precautionary principle – from effective preventive measures to an order to abandon the investment undertaken altogether. In a different way, the divergent versions of the precautionary principle found in legal acts are formulated by S.A. Atapattu. According to the said modifications, going further and further in their rigour, respectively: 1) Uncertainty does not justify non-action; 2) Uncertainty justifies action; 3) Uncertainty justifies reversal of the burden and standard of proof (Atapattu 2006: passim).

At the same time, the author makes it clear that the development of this principle signals a paradigm shift in environmental law, which is no longer based on scientific certainty, but on uncertainty (de Sadeleer 2020: 135). This idea itself is not new; the well-known function of the precautionary principle is to respond to a state of scientific uncertainty about the environmental consequences of certain actions. Here, however, the author identifies a new type of environmental risk (post-industrial risk) (de Sadeleer 2020: 273-280), the characteristics of which make it impossible to achieve a state of knowledge in which science will provide answers to all relevant questions. It is worth noting the very interesting consideration of the types of uncertainty accompanying post-industrial risks. This corresponds to the observation made by P. Montague,

who aptly notes that we should get used to the fact that science, in the vast majority of cases, will never provide 'enough' information for a fully rationally motivated decision to take preventive action (Montague 2003: 466-467). However, on the other hand, as M. Michalak writes: "The main problem with this principle is therefore to find a balance between its implementation and respect for other principles, above all freedom of economic activity […] so that prudence does not become a justification for restrictive measures based on irrational suspicions or an instrument to camouflage purely political, not necessarily fair, decisions" (Michalak 2009: 145) – and therefore the interpretation and application of the precautionary principle cannot be shifted too much towards the other pole either. Choosing the golden mean (which, however, as N. de Sadeleer notes, is very difficult to find) is of fundamental importance. According to A. Gossement, the principle of proportionality flows from the very essence of the precautionary principle (Frąckowiak-Adamska 2009: 258; Atapattu 2006: 208). Therefore, the most balanced interpretation proposal seems to be the one that indicates the necessity of taking action to counteract the negative consequences of an activity if there is no sufficient scientific certainty of the occurrence of such consequences, but there are nevertheless indications to assume the possibility of their occurrence. In this context, the principle is affected not when certain consequences occur which, even with special diligence, cannot be foreseen, but when the subject has not exercised foresight to foresee the negative consequences (Wierzbowski, Rakoczy 2010: 94).

Of course, just as we are not dealing with the displacement of any of the aforementioned triad of principles by another principle from this triad, neither are we actually dealing with the existence of one of the three models of thinking in a pure state. They interpenetrate each other, and the manifestation of the features of a new model does not eliminate the previous one. Thus, the way in which individual principles are applied and interpreted evolves as we move between the different models of thinking about nature. As the author points out, the roles played by the 'polluter-pays', prevention and precautionary principles change in the context of a gradual transition from a recovery model through a prevention model to an anticipatory model, a transition that occurs as new uncertain environmental risks (uncertain risk) emerge (de Sadeleer 2020: 367).

In the author's view, the 'polluter-pays', prevention and precautionary principles interact. Namely, the precautionary principle requires the presence of the prevention principle, which implies the support of the 'polluter-pays' principle. A prevention policy for which funding would not be provided by the implementation of the 'polluter-pays' principle would fail. With some adjustments, prevention techniques such as emission standards and impact assessments can also achieve anticipatory goals. As N. de Sadeleer argues, also the 'polluter-pays'

principle is able to take on both a preventive dimension (for example, through a substantial tax) and an anticipatory dimension (for example, through a deterrent tax that would apply to an activity even if its harmful character remained controversial). Thus, even if in some cases these principles lead to mutually contradictory solutions, they actually remain in a relationship of interdependence (de Sadeleer 2020: 363).

The author convincingly describes the evolutionary changes involved in the transformation of the indicated models of thinking about nature. However, in my opinion, some of N. de Sadeleer's reflections on the preventive nature of the 'polluter pays' principle may be questionable. First of all, the practice of application of this principle does not seem to provide sufficient examples to demonstrate this thesis. Yes, it can be pointed out, using the example of the Polish legal system, that on the grounds of the Act on Environmental Protection, the 'polluter pays' principle is also defined in Article 7 in a preventive manner: 1) Whoever causes environmental pollution shall bear the costs of removing the effects of this pollution. 2) whoever is likely to cause environmental pollution shall bear the costs of preventing that pollution. Thus, on the declarative level, at the level of general formulation, the 'polluter pays' principle is indeed positioned both on the level of prevention (merging on this point with the principles of prevention and precaution) and remedying the damage caused (the alternative term 'principle of material liability of the polluter' seems to focus on this aspect). However, in my opinion, it is impossible, at the present stage of application of the 'polluter pays' principle in international, EU and domestic (Polish) law, to conclude that this principle is part of the anticipatory model of thinking about nature (as seen by N. de Sadeleer). The economic instruments at the disposal of environmental law, perceived as a manifestation of the implementation of the 'polluter pays' principle, usually do not introduce burdens large enough to deter economic entities from undertaking activities that may harm the environment, and do not constitute a true internalisation of external costs, i.e. making all environmental protection costs included in the production costs of the polluting enterprise. In the practice of environmental taxes and charges, the rates applied are not based on calculations of the extent of the damage generated to the environment. They are usually determined arbitrarily and do not in any way lead to the internalisation of the environmental costs associated with a given emission. To a greater extent, environmental liability regimes may have such a deterrent dimension, but this depends on their appropriate design. In principle, it is difficult to speak even of a full implementation of the 'polluter pays' principle in the preventive dimension. It is possible (and even highly probable) that initiatives such as the European Green Deal and other reforms of the EU climate policy, aiming in particular at strengthening

the price signal within the EU greenhouse gas emission allowance trading scheme, will constitute a certain breakthrough here (at least on the grounds of the EU environmental law), however, at the moment of publishing the reviewed monograph, it is difficult to find it yet.

Apart from the triad of environmental protection principles discussed by the author, should he analyse any other principles in the context of the adopted structure of considerations? Of the four principles listed in Article 191(2) TFEU as those on which EU environmental policy is to be based, N. de Sadeleer does not analyse the principle of remedying damage first at source (also known as the proximity principle). This is the least considered principle of the EU environmental policy in the literature (which does not mean the least important). Remedying the damage at source seems to have two dimensions, the second of which is not usually considered in the literature: firstly, it goes to remedying the damage as early as possible, thus preferentially at the initial stage of the production process rather than after it has been completed (Lisowska 2005: 187); and secondly, before the pollution (which undoubtedly constitutes environmental damage) has even had time to spread. This canon favours the setting of emission standards (Lisowska 2005: 187) rather than environmental quality standards (Kenig-Witkowska 2011: 96). It also supports the use of 'clean' energy generation techniques and low-carbon sources, which involves directing the principle towards removing the cause (source) of pollution, rather than just the effect in the form of harmful emissions. There is also significant controversy surrounding the proximity principle, affecting the way it is applied. As M.M. Kenig-Witkowska points out: "Neither the doctrine of environmental law nor the acts of secondary legislation explain what the term 'remediation' means in the light of the principle formulated in this way. By analogy with other principles of Community environmental policy, it can be considered that also in the case of remedying damage primarily at source, the Community institutions have a great deal of discretion as to the measures to be taken. Since environmental damage often cannot really be completely remedied, the legislator has to decide how the damage caused can be minimised, how the environment can be restored and how further damage can be prevented" (Kenig-Witkowska 2011: 96). The omission of this principle in the context of the two axes of consideration adopted by N. de Sadeleer and running around the aforementioned models of thinking about nature and the transition between the modern and post-modern models of law seems justified, as in practice this principle does not play a significant role, nor is it as prevalent in acts of international, EU and individual state law as the other three principles mentioned in Article 191(2) TFEU.

Obviously, in addition to the principles mentioned in this provision, there is a whole range of principals which are given the status of environmental principles. Various authors have identified various such principles. Perhaps the most widespread of them is the principle of sustainable development. The concept of sustainable development has appeared in many international agreements and other legal acts; it is also the focus of doctrine. The Polish legislator has also recycled the principle of sustainable development and has done so in the most important legal act, the Basic Law. Article 5 of the Constitution states, inter alia, that the Republic of Poland shall ensure the protection of the environment, guided by the principle of sustainable development. The development of the constitutional norm is provided for in Article 3(50) EPL, which defines sustainable development as social and economic development in which political, economic and social activities are integrated with maintaining natural balance and permanence of basic natural processes in order to guarantee the possibility of satisfying basic needs of particular communities or citizens both for the contemporary generation and for future generations.

The principle of sustainable development is a special, because all-embracing, principle of environmental protection. P. Sands distinguishes four elements of sustainable development: 1) the principle of intergenerational equity (emphasising the need to preserve environmental resources for the benefit of future generations, 2) the principle of sustainable use (the degree of use of said resources is to be rational and appropriate), 3) the principle of intra-generational equity or equitable use of resources (the exploitation of resources by a country must take into account the needs of other countries), and 4) the principle of integration (emphasising the need to ensure that environmental considerations are integrated into development plans, programmes and projects and that development needs are taken into account in achieving environmental goals) (Sands 2003: 253). An analogous view is expressed by Z. Bukowski, who singles out as elements of sustainable development the integration of environmental protection with economic and social development, intra- and intergenerational equity and the inseparability of development processes and environmental protection (Bukowski 2004: 131). In contrast, a number of authors advocate the view that the principle of sustainable development in itself does not need to be defined, as it is a meta-principle, operating on the basis of other legal norms and principles, whose legal force derives from its influence on the interpretation of these norms and principles (Merkouris 2012: 42; Rakoczy 2013: 52). As K. Collins points out, perhaps sustainability should be seen as a journey, rather than a limited goal (Collins 2006: 104). It seems that the author's failure to include this principle in his reflections is due to the lack of clear links to the principles of 'polluter pays', prevention and precaution; it is also far more

capacious than the triad of principles discussed by N. de Sadeleer. Besides, it would be difficult to illustrate the modifications in its perception on the basis of the double axis of deliberation applied by the author, formed by the three models of thinking about nature and the two models of law. Its omission is therefore, in the light of the concept adopted by the author, justified.

In the context of the adopted axes of considerations, the author's omission of a number of principles of the formal or procedural nature, such as the principle of external integration, the principle of social participation or the principle of cooperation, is also justified in my opinion. This is because the interpretation of these principles does not seem to bear any relation either to the particular models of thinking about nature identified by the author, or to the changes accompanying the transition from the modern to the post-modern model of law.

4. Evolution of the role of principles in the modern and post-modern models of law

The second thesis of the study – which, as the author points out, the passage of time since the publication of the first edition of the monograph has further strengthened, as trends characteristic of the postmodern model of law, such as the fragmentation of the legal system, deregulation and the expansion of soft law, have resonated more strongly – is the claim that environmental principles have reflected the transition between modern law and postmodern law (de Sadeleer 2020: viii) – in their functions, but also in their legal status.

The second part of the thesis, describing the fluctuations in the role and significance of environmental principles in the context of the change of the legal model from modern to postmodern, is the fruit of N. de Sadeleer's original, authorial reflections. The remarks with regard to the characteristics of the two different, though constantly interpenetrating models: modern and post-modern, are based on the scientific research of other authors conducted in France, Switzerland and Belgium; while the innovative element is the attempt to define the legal status and role of environmental principles in the context of the transition between the modern and post-modern models of law.

Modern law is, as the author indicates, a law based on rational, autonomous and inscribed in a strictly defined hierarchy of specific legal norms (rules), in which principles perform complementary functions (guaranteeing the coherence of the system, rationalising it, filling in legal gaps). The shape of the adopted norms is determined by the findings of science. Postmodern law, on the other hand, is a model in which knowledge and science are no longer the basic foundation of legal norms and the trigger for action (there is an increasing recognition of situations in which science is unable to provide

binding answers; instead, there is a state of scientific uncertainty with no chance of overcoming it quickly). Lawmaking is dispersed among different actors (states no longer play the role of sole creators of laws). The sources of law form an open array of very different forms, in which various types of soft law acts and forms of regulation emphasising voluntariness and cooperation are gaining importance. Law often changes and grows in an attempt to keep up with changing circumstances (de Sadeleer 2020: 383-388). At this point, it is worth noting that, despite such a dynamic development of environmental law, the way in which environmental law standards are implemented and their effects are often questioned as inadequate in relation to their intended objectives (Gunningham 2011: 200-201; Kotzé 2012: 201), as this development does not translate into effectively combating worsening environmental threats. In the context of such characteristics of the post-modern model of law, resulting, generally speaking, in a profusion of competing values, interests and sources of law, environmental principles have a directing function (*principes directeurs*, directing principles). The designation of these principles as directing principles derives from the fact that they are goal-oriented principles that signify the path that public policy should take, define the context in which the legislator should act, and indicate the paths to follow. The author seems to deduce that directing principles are a specific product of environmental law influenced by the tendencies of the postmodern model of law (de Sadeleer 2020: 410). These principles have the role of resolving conflicts, determining priorities and ordering the structure of the legal system. Paradoxically, this role of principles means that a gateway is opened for the return of rationality, characteristic of the modern model of law (de Sadeleer 2020: 388-391). Indeed, directing principles have functions that are characteristic of both the modern model of law (ensuring consistency) and the postmodern model of law (stimulating public policy, balancing interests) (de Sadeleer 2020: 519). In any case, as the author points out, the characteristics of the modern and postmodern models of law are intertwined, and the aforementioned transition to the postmodern model signifies the smooth emergence of features of the latter model and their infiltration into the status quo rather than a firm closure of the separation of the modern model. The boundaries here are blurred and fuzzy. It is difficult not to agree with the author's diagnosis of the transition to the post-modern model, as it is impossible not to notice the parameters he identifies as indicative of this change – causing the once clear normative systems to now give the impression of legally sanctioned chaos.

The influence of the characteristics of the post-modern model forces a change in the hitherto existing function of environmental principles. As directing principles, the 'polluter pays', prevention and precautionary principles

are, in the author's opinion, rules of indeterminate content, producing legal effects that undermine the dichotomy of R. Dworkin's division into principles and rules (de Sadeleer 2020: 453-456). According to N. de Sadeleer, such an unusual status of rules is typical of the postmodern model of law, in which norms are general in nature, allowing them to be applied in many different contexts (de Sadeleer 2020: 369). Their dominant feature is thus their flexibility, which allows them to be applied on a case-by-case basis, in the context of lawmaking and application. Environmental law has, in the author's opinion, been particularly affected by the hallmarks of post-modernity. This is particularly marked by the opening up to non-legal disciplines (science, ethics, technology), the lack of a systematic and comprehensive legal order or, finally, the uncertain nature of environmental law norms (de Sadeleer 2020: 392-398). In this context, the evolution of the meaning and function of environmental principles is also apparent. In Chapter six of the monograph under discussion, the author analyses this transformation in detail, examining each aspect of it in turn, in a systematic and orderly manner. Thus, in the first place, the various functions of the triad of environmental principles in question are indicated as maintaining the link with the modern model of law, by improving (concretising) the objectives and guaranteeing the coherence of environmental law. The next important aspect, for the author, is the containment of the antics of the post-modern model of law. In this aspect, directing principles act as connectors within multi-level, disjointed and rapidly changing legal systems. Moreover, they guide legislators in environmental policy (which is particularly marked at the level of the European Union, where the principles of 'polluter pays', prevention and precaution are explicitly identified in Article 191(2) TFEU as the principles on which the EU environmental policy is to be based) and limit the margin of discretion of public administration. In addition, in the author's view, they form a link with the right to environmental protection (in my view, this is the least convincing part of the consideration). Finally, environmental principles play an important role in resolving difficult cases and weighing conflicting interests.

Looking at this part as a whole, in my opinion, the author has met the difficult task of demonstrating and explaining the changes affecting the triad of environmental principles he discusses in the context of transition of environmental law from a modern to a post-modern model.

5. Conclusion

What particularly draws attention in the monograph by N. de Sadeleer on the principles of environmental protection is the two-dimensional model of conducting deliberations; in the first part, the author performs an analysis

of the principles of 'polluter pays', prevention and precaution (both at the theoretical-legal level and in relation to the practical applications of these principals) in the context of transition between the remedial, preventive and anticipatory model, without escaping from the problem of the interrelationship between the said principles. In the second part, on the other hand, the author considers the status and functions of the principles in question at the interface between the modern and post-modern models of law. The reviewed monograph is, from the conceptual point of view, a valuable contribution to the legal thought devoted to the issue of environmental principles. The multitude of interesting observations in this extensive work makes it impossible to cite them in this review; however, there is no doubt that it is worth reading, especially because the content expressed therein constitutes a kind of invitation to travel and may be a contribution to further interesting research touching upon the meaning of the principles in question. Even if one does not share all of the author's views, one cannot deny the value of the presented monograph as a comprehensive and extremely interesting study of the issues of the three principles that are key to environmental law.

List of abbreviations

EPL – Ustawa z dnia 27 kwietnia 2001 r. – Prawo ochrony środowiska. Dz.U. 2020, poz. 1219, tekst jednolity ze zm. [Act of 27 April 2001 on Environment Protection Law, Journal of Laws 2020, item 1219, uniform text as amended].

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