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CONCEPT OF LIABILITY IN POLISH ENVIRONMENTAL LAW

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The key issues in every field of law, including environmental law, are sanctions and liability for violation of their provisions. Without sanctions, without an ability to activate mechanisms of liability, law would be a set of wishes and would not play its role. The present article is an attempt to find an answer to the question whether environmental law has developed its own concept of liability or makes use of the forms of liability that had already been developed and what the tendencies in the field are.

1. SCOPE OF ENVIRONMENTAL LAW

Detailed establishment of the scope of environmental law is a difficult task, if feasible at all. I will make use of Jerzy Sommer's concept, modifying it a little. He includes five thematic sections in environmental law:

1) Emission control law, which is the largest set of regulations governing the protection of water, air and soil against pollution, protection against noise and radiation, and waste management;
2) Traditional natural resources law, which is a set of regulations governing the protection of precious wildlife areas and animal, plant and fungus species;
3) Mineral resources law regulating the use of mineral resources: fossil fuels, water, agricultural areas and forests, as well as the use of wildlife resources (e.g. fish and game);
4) Regulations governing decision-taking in the field of environmental protection, especially spatial planning, environmental impact assessment, access to information on the environment and also organisational issues;
5) Regulations governing the control of products from the point of view of their impact on the environment; these include, inter alia, laws on the production of chemical, cosmetics, fertilizers, pesticides and herbicides, genetically modified organisms etc.[1]

[1] J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury [Environmental law effectiveness and its conditions: Issues of its structure adroitness]*, Wrocław 2005, p. 40–42.

It is worth noticing, however, that waste management law has an evident tendency to get independent (there are several acts on this issue in Poland) and be separated from environmental law, which does not change its essence as a set of provisions governing the protection of the environment[2].

It is not easy to find an answer to the question whether environmental law perceived this way is a separate branch of law. Although there are opinions, originating from the former century, that environmental law demonstrates features of independent, or at least getting independent, branch of law[3], an opinion that the question whether environmental law is a separate branch of law should be treated as open is more convincing. We can speak, however, about a legal system of environmental protection as an entirety of those legal norms that are to define requirements in the field of environmental protection. Environmental law can also be recognised as a branch of law in the didactic or cognitive sense[4].

The legal system of environmental protection consists of dozens of acts and even more abundant secondary legislation, but the nucleus of this field of law is constituted by four normative acts:

1) Act – Environmental law[5],
2) Act on nature protection[6],
3) Act – Water law[7],
4) Act on waste[8].

2. CONCEPT OF LIABILITY

According to a commonly accepted definition by Wiesław Lang, liability consists in accepting negative consequences prescribed by law in connection with events or states of things being subject to negative normative classification and legally attributed to a specified entity in a given legal order[9]. Referring these features to the sphere of environmental protection, we can differentiate the following structural elements of liability in environmental protection:

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[2] Compare J. Jerzmański, *Ustawa o odpadach. Komentarz [Act on waste: Commentary]*, Wrocław 2002, p. 52.

[3] The most outstanding representatives of this approach are L. Jastrzębski, *Prawo ochrony środowiska w Polsce [Environmental law in Poland]*, Warszawa 1990, pp. 74–75 and R. Paczuski, *Prawo ochrony środowiska [Environmental law]*, Bydgoszcz 2000, p. 73.

[4] A. Lipiński, *Prawne podstawy ochrony środowiska [Legal basis for environmental protection]*, Warszawa 2010, p. 24.

[5] Act of 27 April 2001 – Environmental law (uniform text, Journal of Laws of 2013, item 1232, with amendments that followed).

[6] Act of 16 April 2004 on nature protection (uniform text, Journal of Laws of 2015, item 1651, with amendments that followed).

[7] Act of 18 July 2001 – Water law (uniform text, Journal of Laws of 2015, item 469, with amendments that followed).

[8] Act of 14 December 2012 on waste (Journal of Laws of 2013, item 2,1 with amendments that followed).

[9] W. Lang, Struktura odpowiedzialności prawnej [Liability structure], *Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika*, vol. 31 – Prawo VIII [Law VIII], Toruń 1968, p. 12.

1) A liable entity that can be a natural person, a legal person or an organisational unit with no legal identity;
2) An event or state of things being subject to negative normative classification; it may be harm to the environment, threat of damage or just a violation of environmental protection requirements;
3) A rule of attributing an event or state of things to a liable entity; it may be the rule of culpability as grounds for liability for crimes and misdemeanours, the principle of risk that is characteristic of some forms of civil liability or the rule of a proximate cause typical of the forms of administrative liability;
4) Negative consequences for a liable entity which may have personal impact (e.g. imprisonment as a penalty for crime) or pecuniary (e.g. damages, a fine or an order to stop business activities endangering the environment).

3. TYPES OF LIABILITY IN ENVIRONMENTAL PROTECTION

3.1. INTRODUCTION

Environmental law is a basic protection act in the Polish legal system. It contains Chapter VI – Liability in environmental protection, which is divided into three parts:
Part I. Civil liability (Articles 322–328),
Part II. Criminal liability (Articles 329–361),
Part III. Administrative liability (Articles 362–375).

In order to understand the legislative concept of liability, it is not only what is contained in Chapter VI, but also what is not contained in it. I mean two groups of provisions.

The first one contains provisions on liability for crimes against the environment that are not contained in the Act – Environmental law. It has been intentionally done by the legislator, who, four years ago, included groups of features of the most important crimes in this area in Chapter XXII – Crimes against the environment of the Criminal Code[10], making it unnecessary to specify these crimes in the basic act protecting the environment.

The second one contains provisions on administrative pecuniary penalties and increased (sanction-like) fees, which are not included in Part III – Administrative liability of Chapter VI of Environmental law but in its Part VI – Financial legal measures.

The legislator's stand results from a substantial error consisting in the failure to notice the basic difference between administrative pecuniary penalties and increased fees on the one hand, and standard (not increased) ones on the other hand. An administrative pecuniary penalty and an increased fee are measures of legal responsibility and a standard (not increased) fee is not because an administrative pecuniary penalty is a sanction for infringement of the requirements of a decision – due to a negative normative assessment of this infringement, and an increased fee is a sanction for a lack of a required decision

[10] Act of 6 June 1997 – Criminal Code (Journal of Laws No. 88, item 553 with amendments that followed).

– due to a negative normative assessment of this lack. On the other hand, a standard (not increased) fee is not a sanction because there is nothing blameworthy, nothing that is subject to a negative normative assessment, in the fact that an entity uses the environment based on a decision and in accordance with its requirements. In Chapter V of Environmental law, the legislator tried to hide this feature including standard fees, increased fees and administrative pecuniary penalties in one common category of financial legal measures. Most probably, the legislator got the impression that if a legal measure is not classified as a liability measure, it will cease to be one. But it will not, because the legislator's role is not to decide what is a liability measure and what is not because this results from the essence of the given measure. That is why there is no doubt that the administrative pecuniary penalties and increased fees prescribed in Environmental law are liability measures, which should have been placed not in Chapter V but in Chapter VI of the statute.

Environmental law has not developed its own form of liability. What is called liability in environmental protection is, in fact, a combination of three basic forms of liability: civil, criminal and administrative ones[11]. Obviously, one can add, as it was once proposed, employee, professional, organisational (statutory in social organisations), constitutional (before the Tribunal of State) and international liability[12], but:

– international liability is a problem typical of international law,
– constitutional liability is, in Poland, a totally dead letter as is the Tribunal of State,
– organisational (statutory in social organisations) liability is a debatable issue,
– as far as employee liability (including professional one) is concerned, although at the time of the first Polish act on environmental protection[13] it was the subject matter of a separate monograph[14], in the current legal state nobody refers to this issue at present.

That is why it is necessary to keep discussing the three types of liability: civil, criminal and administrative ones distinguished in Chapter VI of Environmental law.

Seemingly, Environmental law developed its own type of liability in the form of responsibility for prevention and remediation of damage to the environment (protected species, water and soil). In Poland, it is the issue covered in a different act[15], transposing Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage[16]. However, it is applicable only to some types of damage and its legal character

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[11] W. Radecki, *Odpowiedzialność prawna w ochronie środowiska [Liability in environmental protection]*, Warszawa 2002, p. 84.

[12] R. Paczuski, *Prawo ochrony środowiska [Environmental law]*, Bydgoszcz 2000, p. 136.

[13] Act of 31 January 1980 on environment protection and development (uniform text, Journal of Laws of 1994 No. 49, item 196, with amendments that followed).

[14] W. Radecki, *Ochrona środowiska jako obowiązek pracowniczy w świetle obowiązującego w PRL ustawodawstwa [Environmental protection as employees' duty in the light of the legislation of the Polish People's Republic]*, Bydgoszcz 1987, especially Chapter 7: *Odpowiedzialność prawna za naruszenie pracowniczego obowiązku ochrony* środowiska *[Liability for infringement of the employees' duty to protect the environment]*, pp. 40–68.

[15] It is Act of 13 April 2007 on prevention and remedying of environmental damage (uniform text, Journal of Laws of 2014, item 1789, with amendments that followed).

[16] See B. Rakoczy, *Odpowiedzialność za szkodę w środowisku. Dyrektywa 2004/35/WE Parlamentu Europejskiego i Rady. Komentarz [Liability for damage to the environment. Directive 2006/35/EC of the European Parliament and of the Council: Commentary]*, Toruń 2010.

is controversial. Basically, it is classified as administrative liability[17], however, there are opinions that it is administrative in its form but civil in its contents[18]. Anyway, it is not an independent form of liability but links elements of administrative and civil as well as criminal liability if one takes into account that a failure to undertake prevention and remediation activities has the features of offences.

3.2. CIVIL LIABILITY

The assumption made by the Polish legislator is clear: liability for harm caused by having impact on the environment is subject to Civil Code[19] unless the statute (i.e. the Act – Environment law) stipulates otherwise (Article 322 of Environmental law).

Article 323 (1) of Environmental law envisages a solution that reminds statutory claims: *rei negatoria* and *rei vindicatio*. The legislator awards it to everyone who is endangered by harm or who has incurred harm caused by unlawful impact on the environment. The entitled party may demand that the entity responsible for harm:

1) make restitution of the state according to the law, and
2) undertake preventive measures, especially install facilities and devices protecting against danger and infringement, or
3) if it is impossible or excessively difficult – cease to do what causes danger or infringement.

Pursuant to Article 323 (2), if danger or infringement refers to the environment as the common good, a claim can be made by:

– the Treasury,
– a territorial self-government unit,
– an environmental organisation.

Article 324 of Environmental law refers to Article 435 § 1 CC, which links liability based on risk with the fact whether an enterprise responsible for damage is set in motion by natural forces. This means that pursuant to the Civil Code, an enterprise causing damage in the environment is liable:

– under Article 435 § 1 CC if it is set in motion by natural forces due to risk,
– under Article 415 CC if it is not set in motion by natural forces due to its fault.

Article 324 of Environmental law changes this regulation in such a way that if an enterprise causing damage belongs to companies of increased risk or high risk of industrial breakdown as laid down in Article 248 of Environmental law (the classification depends on the type, category and amount of dangerous substances in the company and is specified in detail in secondary legislation), it is liable under Article 435 § 1 CC due to risk even if it is not set in motion by natural forces.

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[17] M. Górski, *Odpowiedzialność administracyjnoprawna w ochronie środowiska [Administrative liability in environmental protection]*, Warszawa 2008, p. 22 and subsequent ones.

[18] W. Radecki, *Ustawa o zapobieganiu szkodom w środowisku i ich naprawie. Komentarz [Act on preventing harm to the environment and remedying them: Commentary]*, Warszawa 2007, p. 18.

[19] Act of 23 April 1964 – Civil Code (uniform text, Journal of Laws of 2014, item 121, with amendments that followed) hereinafter referred to as CC.

Eventually, Article 325 of Environmental law establishes a rule under which liability for damage caused by the impact on the environment is not excluded based on a circumstance in which the activity causing damage is carried out based on a decision and within its limits, which in fact means that lawlessness is not a condition for liability.

3.3. CRIMINAL LIABILITY

Looking at Part II – Criminal liability of Chapter VI of Environmental law, we can notice that it envisages only liability for misdemeanours, calling that criminal liability. And this is right because, as it is established in criminal law doctrine, liability for offences is also criminal liability, although carrying reduced legal consequences[20]. However, the core of the regulation on liability in environmental protection is liability for crimes, but the most important crimes against the environment are classified in Chapter XXII of the Criminal Code entitled Crimes against the environment, which is composed of only eight articles, which can be divided into two clearly distinct groups:

1) crimes connected with the protection of nature, including the traditional conservation of nature (Article 181 and Articles 187 and 188 of the Criminal Code).
2) crimes connected with pollution, including waste and radiation (Articles 182–186 of the Criminal Code).

There are many crimes theoretically classified as ones against the environment, which are not included in Chapter XXII and which can be divided into:

I. Statutory crimes, including:
   1. Crimes against common safety, which have features of acts that have a direct harmful impact on the environment, e.g. violent release of nuclear energy or of ionising radiation (Article 163 § 1(4) of the Criminal Code), spread of a contagious disease of plants or animals (Article 165 § 1(2) of the Criminal Code) or unlawful manufacturing, processing, accumulating, using and trading in dangerous substances and devices (Article 171 of the Criminal Code).
   2. A crime of felling trees in a forest with a purpose of appropriation (Article 290 of the Criminal Code).
   3. A crime of hampering or preventing environmental inspection (Article 225 § 1 of the Criminal Code).

II. Crimes not included in the Code but classified in other statutes, which in jurisprudence[21] are divided into four groups:
   1. Crimes supplementing Chapter XXII of the Criminal Code:
      a) A crime of polluting marine waters[22],

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[20] A. Marek, [in:] *System Prawa Karnego. Tom 1. Zagadnienia ogólne [Criminal law system: Volume 1 – General issues]*, (ed.) A. Marek, Warszawa 2010, p. 46.

[21] W. Radecki, Przestępstwa przeciwko środowisku [Crimes against the environment], [in:] *System Prawa Karnego. Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym [Criminal law system. Volume 8 – Crimes against the state and public goods]*, (ed.) L. Gardocki, Warszawa 2013, pp. 448–449.

[22] Article 35a of the Act of 16 March 1995 on prevention of polluting marine waters by ships (uniform text, Journal of Laws of 2015, item 434).

b) Crimes connected with international and domestic conservation of plant and animal species[23],
c) Crimes of causing various threats, including endangering the environment in connection with the use of genetically modified organisms[24].

2. Crimes against natural resources:
   a) A crime of animal poaching and other hunting-related crimes[25],
   b) A crime of fish poaching and other fishing-related crimes[26],
   c) Crimes of unjustified or inhumane slaughter of animals and ill-treatment of animals[27],
   d) Crimes of banned animal testing[28],
   e) Crimes of serious damage to the environment or direct danger of such damage as a result of illegal geological activities or mining[29].
3. Crimes connected with the use of waters:
   a) A crime of hampering and preventing the use of water for rescue purposes, a crime of causing danger to water facilities, a crime of destroying or impairing soil under water or water banks while using waters[30],
   b) Crimes of unlawful dumping of sewage to the sewerage[31].
4. Other crimes against the environment:
   a) Crimes of using chemicals in the way that may endanger the environment[32],
   b) Crimes of lawless trade in asbestos or products containing asbestos[33],
   c) A crime of defiance of the state sanitary inspector's decision to banning some activities due to the protection of the environment[34],

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[23] Articles 127a, 128 and 128a of the Act of 16 April 2004 on nature protection (uniform text, Journal of Laws of 2015, item 1651 with amendments that followed).

[24] Articles 58–64 of the Act of 22 June 2001 on microorganisms and genetically modified organisms (uniform text, Journal of Laws of 2015, item 806).

[25] Articles 52 and 53 of the Act of 13 October 1995 – Hunting law (uniform text, Journal of Laws of 2013, item 1226, with am Act of amendments that followed).

[26] Article 27c of the Act of 18 April 1985 on freshwater fishery (uniform text, Journal of Laws of 2015, item 652).

[27] Article 35 of the Act of 21 August 1997 on animal protection (uniform text, Journal of Laws of 2013, item 856, with amendments that followed).

[28] Article 66 of the Act of 15 January 2015 on protection of animals used for scientific and educational purposes (Journal of Laws, item 266).

[29] Article 176 of the Act of 9 June 2011 – Geological and mining law (uniform text, Journal of Laws of 2015, item 196).

[30] Articles 189–191 of the Act of 18 July 2001 – Water law (uniform text, Journal of Laws of 2015, item 469, with amendments that followed).

[31] Article 28 (4) and (4a) of the Act of 7 June 2001 r. on municipal supply of water and sewage systems (uniform text, Journal of Laws of 2015, item 139).

[32] Articles 31–34 of the Act of 25 February 2011 on chemical substances and their mixtures (uniform text, Journal of Laws of 2015, item 1203).

[33] Article 7b of the Act of 19 June 1997 on the ban on use of materials containing asbestos (uniform text, Journal of Laws of 2004 no. 3, item 20, with amendments that followed).

[34] Article 37b of the Act of 14 March 1985 on the State Sanitary Inspection (uniform text, Journal of Laws of 2015, item 1412).

d) Crimes of unauthorised construction works that may endanger the environment[35],
e) Crimes connected with the use of substances that may endanger the ozone layer[36].

The catalogue of crimes against the environment is abundant but the catalogue of misdemeanours against the environment is incomparably larger. These are not only misdemeanours contained in the Misdemeanour Code[37] but also the so-called non-Code offences. Passing the MC in 1971, the legislator was not able to realise the significance of environmental protection, but one cannot overlook the importance of Chapter XIX – Forest, field and garden sabotage (Articles 148–166) including a characteristic codification of forest misdemeanours; in addition, single provisions on destroying levees (Article 80), destroying plants strengthening banks (Article 81), a failure to meet the requirements of fire safety in forests and fields (Article 82 § 3 and § 4), polluting some waters (Article 109), felling trees in forests to appropriate wood (Article 120), destroying, impairing or removing plants (Article 144), or littering in public places (Article 145). What is most important, however, is what is not contained in the MC. Almost every act on environmental protection contains provisions composed of several and sometimes even dozens of editorial units (articles, items, points, letters etc.), each of which characterises a different misdemeanour. For example:
– Act – Environmental law: Articles 329–360,
– Act – Water law: Article 192 (1) and (2), Article 193 (1)–(6), Article 194 (1)–(15),
– Act on nature protection: Article 127 (1) (a)–(e), (2) (a)–(d), (3), (5) and (6), Article 131 (1)–(14),
– Act on waste: Articles 171–192.

A common feature of liability for crimes and misdemeanours is that only natural persons are liable and only if they are found at fault while committing an act (in case of crimes: usually intentional, sometimes unintentional; in case of misdemeanours: usually intentional or unintentional, sometimes exclusively intentional). A limited exception to this rule is liability of collective entities[38]. A collective entity (a legal person or an organisational unit with no legal personality) can be liable for some crimes (never misdemeanours) provided that a natural person affiliated to the collective entity has been convicted for crime (or has been attributed crime commission in a different legal form). The exception to the rule of an exclusive natural person's liability for crimes or misdemeanours is limited because an entity other than a natural person is never liable for misdemeanours, and may be liable for a crime only if a natural person representing a collective entity or acting on its behalf has been found guilty of a crime, but not every one but only those that are laid down in the Act on liability of collective entities.

[35] Article 90 of the Act of 7 July 1994 – Building law (uniform text, Journal of Laws of 2013, item 1409, with amendments that followed).

[36] Articles 52 and 53 of the Act of 15 May 2015 on substances impoverishing the ozone layer and some fluorocarbons (Journal of Laws, item 881).

[37] Act of 20 May 1971 – Misdemeanour Code (uniform text, Journal of Laws of 2015, item 1094), hereinafter referred to as MC.

[38] Act of 28 October 2002 on collective entities' liability for forbidden acts carrying penalty (uniform text, Journal of Laws of 2015, item 1212).

It is important for environmental protection because Article 16 (1 (8)) of the Act on liability of collective entities indicates crimes against the environment, which result in a collective entity's liability when committed by a natural person. These are not all crimes against the environment but only those laid down in the Criminal Code and six special acts. A collective entity cannot be liable for any other crime against the environment and for a misdemeanour against the environment.

According to a constitutionally ordered concept implemented by the Misdemeanour Procedure Code[39], a common court (not an administrative court or an administrative organ) is the only organ authorised to examine a case of a crime and a misdemeanour and impose a penalty. The only exception to the rule is a fine-related procedure in connection with misdemeanours that are dealt with by the police or an entitled administrative organ. A fine-related procedure is a simplified mode that depends on the perpetrator's will to be punished and is known in every reasonable legal system.

3.4. ADMINISTRATIVE LIABILITY

Part III – Administrative liability of Chapter VI of Environmental law consists of 14 articles regulating:

1) The so-called administrative damages as a consequence of inability to impose an obligation to limit the impact on the environment and its endangerment and to restore the appropriate state (Articles 363–375),
2) Different variants of halting actions endangering the environment (Articles 363–375).

Halting actions endangering the environment as an administrative sanction for the infringement of protection requirements is also envisaged in other acts concerning environmental protection, especially the Water law and acts on waste.

4. LIABILITY FOR ADMINISTRATIVE TORTS IN ENVIRONMENTAL PROTECTION

Liability for forbidden acts carrying administrative pecuniary penalty, most often called 'administrative torts', deserves a separate discussion because it is not absolutely clear which branch of law it should belong to. This form of liability occurred in the Polish law on environmental protection in the early 1960s as a supplement to liability for crimes and misdemeanours, a supplement in the sense that only organisational units that could not be liable for crimes and misdemeanours were liable for administrative torts. This form of liability expanded to a great extent in the last decade of the 20th century and in particular in the 21st century sometimes substituting for liability not only for misdemeanours but also for crimes. That is why a question whether this is still administrative law or already criminal law seems to be justified.

[39] Act of 24 August 2001 – Misdemeanour Procedure Code (uniform text, Journal of Laws of 2013, item 395, with amendments that followed).

In 1990s, in Polish literature, a suggestion appeared that probably fines were a new form of criminal liability[40]. The idea was further developed and reflected in a three-word term "environmental criminal law" (a loan translation of the German *Umweltstrafrecht*[41]):

– which, *sensu stricto*, deals with liability for crimes against the environment,
– which, *sensu largo*, deals with liability for crimes and misdemeanours against the environment,
– which, *sensu largissimo*, deals with responsibility for crimes, misdemeanours and administrative torts against the environment[42].

The opinion is not an isolated one. Luminaries of the Polish criminal law doctrine firmly state that the provisions of administrative law prescribing various types of financial sanctions, often called "pecuniary penalties", imposed on business entities, their managers or governors as well as natural persons for administrative torts, do not belong to criminal law even in the broadest sense (*sensu largissimo*). These legal regulations have nothing in common with criminal law[43]. In fact, they have a lot in common with criminal law, which can be easily proved if one takes into account the evolution of the regulations on liability for administrative torts. This concerns three models of administrative pecuniary penalties in the field of environmental protection.

The first model that can be called a "tariff one" is laid down in the Acts: Environmental law and on nature protection. To put it simply, an organ imposing a penalty establishes the level of environmental requirements infringement (e.g. to what extent the admissible level of water or air pollution has been exceeded or what type and size the illegally felled tree was) and then, based on adequate tables, it calculates and imposes a penalty, which in terms of criminal law, is a "fixed penalty notice" but this fixing is based on the use of tariffs. It is true that similarity of this model to criminal law seems to be the smallest because the contemporary criminal law, as a rule, does not apply fixed penalty notices any longer. However, it is not so, in fact. Environmental law has developed an instrument of postponement of penalty payment provided that the perpetrator undertakes steps to eliminate the cause for a penalty. If the undertaking proves to be successful, the incurred cost is deducted from the amount of the penalty imposed and as they are usually higher than the penalty, the punished entity does not pay anything. Should the undertaking prove to be unsuccessful, the punished entity has to pay the full amount. The similarity to the criminal suspension of penalty execution is so evident that even the first model may be said to be similar to criminal liability.

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[40] W. Radecki, Kary pieniężne w polskim systemie prawnym. Czy nowy rodzaj odpowiedzialności karnej? [Pecuniary penalties in the Polish legal system: Are they a new type of criminal liability?], *Przegląd Prawa Karnego* 1996, no. 14–15, pp. 5–18.

[41] However, the German *Umweltstrafrecht* covers liability for crimes against the environment only; see inter alia M. Kloepfer, H.P. Vierhaus, Umweltstrafrecht, München 1995.

[42] W. Radecki, Polskie prawo karne środowiska – próba spojrzenia syntetycznego [Polish environmental criminal law – a synthetic look attempt], *Ius Novum* 2009, no. 1, p. 70.

[43] A. Marek, [in:] *System Prawa Karnego. Tom 1. Zagadnienia ogólne [Criminal law system: Volume 1 – General issues],* (ed.) A. Marek, Warszawa 2010, p. 46.

The second model was developed in the 21st century mainly in detailed statutes regulating waste disposal[44] and it can be called "flexible penalty imposition". The legislator assigns the minimum and maximum pecuniary penalty (the maximum is usually a few, but may also be several dozen, times higher than the maximum fine, which is PLN 5,000 under the Misdemeanour Code, but it happens that the minimum pecuniary penalty is higher than the maximum fine under MC) and then indicates a provision that should be taken into consideration when imposing the penalty. It is quite easy to notice the similarity with the directives on penalty imposition laid down in Article 53 of the Criminal Code and Article 33 MC. The basic differences are:

– firstly, administrative organs (in general, voivodeship environmental protection inspectors) impose pecuniary penalties and the final decision may be appealed against to an administrative court, not a common court;
– secondly, even if the legislator recommends taking the level of an act's harmfulness into account, they do avoid specifying it as "social" harmfulness, most probably in order to avoid treating liability for administrative torts in the same way as liability for crimes and misdemeanours. But the answer to the question what kind of harmfulness it is, there is no sensible answer but "social";
– thirdly, there is no information whatsoever on the objective aspect, to put it simply, fault because, according to the dominating theoretical opinion, administrative liability is objective in nature, regardless of fault. But is it only "objective" or already "absolute"? And this is not the same.

It is worth mentioning that, in the Act on the international movement of waste, the legislator preceded the features of the subjective aspects of torts with a statement that they can be committed "just unintentionally", but the features of the objective aspects of those torts were not preceded with the words. It is clear that torts of the first group can be committed intentionally or unintentionally, but there is no liability if a perpetrator cannot be ascribed being "just unintentional". A question must arise what to do with torts of the second group, those most serious according to the statute conception. A criminal law specialist, having in mind the rule of Article 8 of the Criminal Code (it may be committed without intent if the law so stipulates), will answer with no hesitation that they can only be committed intentionally. An administrative law specialist might give a completely different answer – they can be committed without being just unintentional since administrative liability assumes an objective character. It must also be noticed that the Constitutional Tribunal recommends that, in case of objective liability, a violator of a provision should be able to be released from liability by proving that the infringement of provisions results from circumstances for which he is not responsible[45].

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[44] Chronologically, these are the following Acts: of 20 January 2005 on recycling vehicles disposed of (uniform text, Journal of Laws of 2015, item 140, with amendments that followed), of 29 June 2007 on international movement of waste (uniform text, Journal of Laws 2015, item 1048), of 24 April 2009 on batteries (uniform text, Journal of Laws of 2015, item 687), of 13 June 2013 on packaging and packaging waste management (Journal of Laws, item 888), of 11 September 2015 on electric and electronic equipment disposal (Journal of Laws, item 1688).

[45] Ruling of the Constitutional Tribunal of 1 July 2014 – SK 6/12, text in Journal of Laws 2014, item 926.

The third, mixed model appeared in the second decade of the 21st century in acts on waste, firstly in the amended Act of 2011 on municipal waste[46], and after a year in a new Act on waste[47]. In this model, some administrative torts carry fixed pecuniary penalties, some others carry pecuniary penalties based on complicated calculations, still some other penalties are imposed in the amount "from… to…".

The legislator's use of flexible sanctions, with sometimes quite detailed calculation of circumstances influencing the penalty imposition at the same time, timid attempts to introduce a subjective aspect (Act on international movement of waste), and judgements of the Constitutional Tribunal recently disapproving of absolute liability for administrative torts clearly make administrative torts be closer to criminal law than administrative law.

5. DEVELOPMENT TENDENCIES

Observing the development of legislation on environmental protection in recent years, one can notice an evident tendency to substitute liability for administrative torts for liability for misdemeanours. It can be easily illustrated with many examples but I will present two. The first one is a comparison of the "ozone" acts: the first one[48] with the new one[49]. In the first one, there were regulations on pecuniary penalties (Chapter 8) as well as criminal provisions (Chapter 9) characterising misdemeanours (Articles 38–45) and crimes (Article 47a). In the new one, Chapter 11 – Administrative pecuniary penalties and penal regulations characterises several dozen administrative torts (Articles 47–50) and two crimes (Articles 52 and 53); there are no misdemeanours there. The second example is the comparison of regulations on unlawful animal testing: the former[50] and the new ones[51]. Chapter 8 – Penal regulations of the former Act characterised crimes (Articles 38–41) and misdemeanours (Articles 42–46); there were no administrative torts. In the new Act, Chapter 9 characterises crimes and Chapter 10 – administrative torts; there are no misdemeanours.

But this is not all. The recent amendment of the Act on forests, which until 2015 did not have any penal provisions, is very characteristic. The legislator rightly assumed that the most important forest crimes are characterised in the Criminal Code and the most important misdemeanours in the MC. The situation changed with the introduction

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46 Act of 13 September1996 on maintaining cleanliness and order in municipalities (uniform text, Journal of Laws of 2013, item 1399, with amendments that followed).

47 Act of 14 December 2012 on waste (Journal of Laws of 2013, item 21, with amendments that followed).

48 Act of 20 April 2004 on substances impoverishing the ozone layer (uniform text, Journal of Laws of 2014, item 436).

49 Act of 15 May 2015 on substances impoverishing the ozone layer and some fluorocarbons (Journal of Laws, item 881).

50 Act of 21 January 2005 on animal testing (Journal of Laws No. 33, item 289 with amendments that followed).

51 Act of 15 January 2015 on protection of animals used for scientific and educational purposes (Journal of Laws, item 266).

of the latest amendment[52], which introduced the rules of liability for infringement of two EU directives on trade in wood. If we take into consideration that they refer to obtaining wood, inter alia, from rain forests, which endangers the environment on a global scale, i.e. they are very important issues, one could expect introduction of liability for crimes with indication that also legal persons are liable for such crimes. However, the legislator added Chapter 9a – Administrative pecuniary penalties to the Act on forests, thus characterising only administrative torts in Articles 66a-66g.

6. CONCLUSIONS

Over the several dozen years of the history of the Polish law on environmental protection, no special form of liability typical of only environmental law has been developed. We have a combination of three "classical" forms of this liability: civil, criminal and administrative ones. As far as criminal and civil liability is concerned, the legislator in fact adopted a "code-related" concept, which means that civil liability is subject to the Civil Code with some modifications introduced by the Act – Environmental law. And with regard to criminal liability in both variants (for crimes and misdemeanours), although neither the Criminal Code nor the Civil Code contains exhaustive lists of crimes and misdemeanours against the environment, through the rules of liability included in the Code applicable to non-code crimes and misdemeanours, both Codes integrate environmental criminal law *sensu stricto* and *sensu largo*. The situation with administrative torts, i.e. forbidden acts carrying an administrative pecuniary penalty, is completely different. They dominate in liability for environmental protection, and the evolution of legislation places liability for administrative torts closer to liability for crimes and misdemeanours, giving grounds for differentiating environmental criminal law *sensu largissimo*, which is not developed on the stable foundation determining general rules of liability.

The actual situation shows features of a flagrant paradox. The Misdemeanour Code developed with great diligence at the beginning of the1970s is becoming a legal act of less and less usefulness in the field of environment protection because its provisions are becoming marginal in comparison with the regulations on liability for administrative torts. Moreover, even the penal provisions *sensu stricto* are becoming less important than those on administrative torts, which the latest amendment to the Act on forests confirms best.

It must be mentioned that unlike liability for crimes and misdemeanours, which the provisions of the Criminal Code and Misdemeanour Code regulate respectively, liability for administrative torts is not covered by one general act determining conditions and rules for this liability. The scientific output is also meagre because, apart from a monograph[53] published several years ago, there is no broader theoretical discussion of the new phenomenon of stormy development of liability for administrative torts. It

[52] Act of 20 March 2015 amending the Act on forests and some other acts (Journal of Laws, item 671).

[53] D. Szumiło-Kulczycka, *Prawo administracyjno-karne [Administrative-criminal law]*, Kraków 2004.

is true that the issue has been discussed at numerous scientific conferences recently but a conclusion resulting from them that there is an urgent need to develop an act on the rules of liability for administrative torts has not encountered any legislative initiatives.

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CONCEPT OF LIABILITY IN POLISH ENVIRONMENTAL LAW

Summary

Environmental law, understood as a set of provisions governing the protection of components of the environment and the protection against harmful impact on the environment, has not been fully developed as a branch of law yet. In the several dozen years' long history of the Polish environmental law, a special form of liability typical of environmental law has not come into being. We deal with a combination of three "classical" forms of such liability: civil, administrative and criminal. As far as civil liability is concerned, the legislator adopted a "code-related" concept, according to which civil liability is applicable only under the Civil Code with some modifications resulting from the Act – Environmental law. With regard to criminal liability in its two variants, i.e. for crimes and for misdemeanours, although neither the Criminal Code nor the Misdemeanour Code contains an exhaustive list of crimes and misdemeanours against the environment, through code-related rules of liability applicable to non-code crimes and misdemeanours, both Codes function as "clamps" fastening environmental criminal law *sensu stricto* (crimes) and *sensu largo* (crimes and misdemeanours). The situation is completely different concerning administrative liability for forbidden acts carrying administrative pecuniary penalties, which are called administrative torts. Liability for such acts already dominates liability in the environmental protection and evolution of legislation places liability for administrative torts closer to liability for crimes and misdemeanours giving grounds for differentiating environmental criminal law *sensu largissimo* (crimes, misdemeanours and administrative torts), which is not, however, built on a stable foundation determining general rules of liability.

Key words: *environmental protection*, *civil*, *criminal and administrative liability*, *crime*, *misdemeanour*, *administrative torts*

KONCEPCJA ODPOWIEDZIALNOŚCI W POLSKIM PRAWIE OCHRONY ŚRODOWISKA

Streszczenie

Prawo ochrony środowiska, rozumiane jako zbiór przepisów o ochronie komponentów środowiska i ochronie przed szkodliwymi oddziaływaniami na środowisko, nie jest jeszcze w pełni ukształtowaną gałęzią prawa. W kilkudziesięcioletniej historii polskiego prawa ochrony środowiska nie doszło do powstania szczególnej formy odpowiedzialności prawnej, właściwej tylko prawu ochrony środowiska. Mamy tu do czynienia z kombinacją trzech „klasycznych" form takiej odpowiedzialności: cywilnej, administracyjnej i karnej. Jeśli chodzi o odpowiedzialność cywilną, to ustawodawca przyjął koncepcję „kodeksową", według której odpowiedzialność cywilna następuje na podstawie kodeksu cywilnego z modyfikacjami wniesionymi ustawą – Prawo ochrony środowiska. Jeśli chodzi o odpowiedzialność karną w obu wariantach, tj. za przestępstwa i za wykroczenia, to wprawdzie ani kodeks karny, ani kodeks wykroczeń nie zawierają wyczerpujących list przestępstw i wykroczeń przeciwko środowisku, ale poprzez kodeksowe zasady odpowiedzialności stosowane do przestępstw i wykroczeń pozakodeksowych oba kodeksy są klamrami spinającymi prawo karne środowiska *sensu stricto* (przestępstwa) i *sensu largo* (przestępstwa i wykroczenia). Zupełnie inaczej rzecz się ma z odpowiedzialnością administracyjną za czyny zabronione pod groźbą administracyjnej kary pieniężnej, zwane deliktami administracyjnymi.

Odpowiedzialność za takie czyny już zajmuje dominującą pozycję w instrumentarium odpowiedzialności prawnej w ochronie środowiska, a ewolucja ustawodawstwa zbliża odpowiedzialność za delikty administracyjne do odpowiedzialności za przestępstwa i wykroczenia, dając podstawę do wyróżnienia prawa karnego środowiska *sensu largissimo* (przestępstwa, wykroczenia i delikty administracyjne), które wszakże nie jest zbudowane na trwałym fundamencie określającym generalne zasady odpowiedzialności.

Słowa kluczowe: *ochrona środowiska*, *odpowiedzialność cywilna*, *karna i administracyjna*, *przestępstwo*, *wykroczenie*, *delikt administracyjny*