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THE SPECIFICITY OF LEGAL SUBJECTS IN POLISH AND ITALIAN ENVIRONMENTAL PROTECTION LAW

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ABSTRACT

It should be noted that both the Polish lawmaker and the Italian lawmaker are aware of the specificity of legal subjects in the public domain. They can see that public administration bodies and public institutions cannot be described in normative terms, definitions and expressions used in legal language. New criteria for their separate treatment are needed.In addition, it is justified to treat them separately from all public administration bodies and public subjects. This only serves as proof of the rank and significance of such authorities.

Key words: public administration body, environmental protection, environmental law

For some time changes have been observed in environmental protection law that may be referred to as changes in the context of being a legal subject. It refers to creating specific entities, characteristic of environmental law only, or established solely for the purposes of tasks or actions related to environmental protection law. However, the changes inspire deeper considerations and reflections concerning legal subjects in environmental protection law and their specificity. This is due to the fact that interesting phenomena occur in environmental protection law that must be analysed in detail. This paper is an attempt at such an analysis.

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At the beginning it must be indicated that the analysis neglects issues related to legal subjects in environmental protection law such as animals being legal subjects or the environment itself being a legal subject. Firstly, these issues have already been reviewed in literature[1]. Secondly, this aspect does not apply strictly to juridical elements. Legal subjects are described in normative terms and until the lawmaker chooses not to clearly regard animals or the environment as legal subjects, the problem remains only at the axiological or ethical level. The ideas supporting the aforementioned must be treated only as *de lege ferenda* postulates although vivid academic discussion is underway[2]. These are also disputes on the verge of jurisprudence and philosophy. If the dispute regarding treatment of animals and perhaps the environment as legal subjects is settled, it is likely the Polish lawmaker will respond by implementing relevant regulations. *De lege lata* the lawmaker remains uncertain about further direction of development of non-legal sciences.

However, given the rule that being a legal subject must have clear grounds, such silence should be interpreted as a lack of consent.

The starting point for further considerations is an assumption that there is no doubt that entities whose specificity will be investigated are legal subjects. Thus, the focus will be not on analysing this normative characteristic but on identifying the specificity of such legal subjects determined by the requirements of environmental protection law. However, such legal subjects are both entities having impact on the environment as well as authorities of public administration.

The analysis of the specificity of being a legal subject in Polish environmental protection law must start with the notion of user of the environment. The legal definition of this term is included in Art. 3 par. 20 of the

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[1] J. Białocerkiewicz, „Legal status of animals. Animal rights or legal protection of animals",Toruń 2005; B. Rakoczy, „The State Treasury and local government units as plaintiffs in matters related to environmental protection", Gdańsk Legal Studies from 2009, 207 – 215.

[2] T. Pietrzykowski, „Dispute over animal rights", Katowice 2007; T. Gardocka, A. Gruszczyńska, „Status of the animal. Philosophical and legal issues", Toruń 2012; D. Probucka, „The philosophical foundations of the idea of animal rights", Kraków 2013; S. Pollo, „Humans and animals: questions of ethics", Roma 2016.

act of 27 April 2001 Environmental Protection Law[3], stating that a user of the environment is "a) an entrepreneur within the meaning of the Act of 6 March 2018 – Law on Economic Operators (Dz. U. (Journal of Laws) item 646) and a foreign economic operator within the meaning of the Act of 6 March 2018 on the Rules of Participation of Foreign Economic Operators and Other Foreign Parties in Economic Transactions in the Territory of the Republic of Poland (Dz. U. (JL) item 649), as well as agricultural producers in the scope of crops, livestock breeding, horticulture, vegetable growing, forestry and inland fisheries,

b) an organisational unit which is not an economic operator within the meaning of the Act of 6 March 2018 – Law on Economic Operators,

c) a natural person who is not the entity referred to in a) who uses the environment in the scope where its use requires a permit".

This definition is not expected to introduce a new category of legal subject. None of the letters creates a new type of legal subject. It is aptly noted in literature that this term is used in the Act multiple times to denote the addressee of its provisions with regard to obligations following from the Act[4]. An identical view was presented independently by M. Bar[5].

The term 'user of the environment' was used in the Act not in order to create a new type of legal subject but to denote the addressee of the norms of the Act, in particular with regard to obligations. These, in turn, are generally imposed on the subjects mentioned in the above definition.

A user of the environment is any economic operator regardless of any criteria related to the type of economic activity, the scale and scope of environmental impact or environmental hazard. In this case the only decisive formal criterion is the status of an economic operator. There is no doubt that the lawmaker makes a cross-reference to the concepts laid out in the definition of an economic operator presented in the Law on Economic Operators, which is proved by the fact that entities running specific

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[3] Dz. U. 2018.799 consolidated text of 2018.04.27

[4] M. Bar, M. Górski, J. Jendrośka, J. Jerzmańki, M. Pchałek, In: „Environmental Protection Law. A Commentary", ed. M. Bar, M. Górski, J. Jendrośka, J. Jerzmańki, M. Pchałek, W. Radecki, S. Urba, Warsaw 2014, 67.

[5] M. Bar, In: „The Act – Envrionmental Protection Law" ed. J. Jendrośka, Wrocław 2002, 67.

agricultural activity are also included in the definition of a user of the environment.

The formal criterion also underlies the inclusion of organisational units under letter b). Also in this case the lawmaker did not adopt any other eligibility criterion. The status of an organisational unit is sufficient. *Lege non distinguente* it is not important whether or not the specific organisational unit is a legal person. Thus, this category of notions is inclusive both of legal persons and entities without legal personality but having legal capacity (e.g. housing cooperatives) as well as organisational units without legal personality and legal capacity. This refers to every organisational unit, irrespective of the scope of its activity and tasks, except units with the status of an economic operator.

The most varied one is the third category of entities classed by the lawmaker as users of the environment. This category includes natural persons. However, in this case the formal criterion fails because the status of a natural person alone does not provide sufficient grounds for considering such a person a user of the environment. The legislator introduces two prerequisites – one positive and one negative.

A negative prerequisite is that the natural person referred to in c) cannot be an economic operator. This is fully justified since if such a person were an economic operator, he/she would be considered a user of the environment regardless of his/her actual impact on the environment and the scope of such impact. It would not be advisable to include such a category of entities separately under letter c).

Indeed, the lawmaker performs a dichotomous division of natural persons from the point of view of their eligibility as users of the environment. One of the categories is natural persons running economic activity and the other is natural persons who are not economic operators. In the first group of natural persons their affiliation with the category of subjects classed as users of the environment is due to the status of the economic operator alone. The second group of natural persons must necessarily satisfy the positive prerequisite.

In c) the lawmaker indicates that a natural person who is not an economic operator is a user of the environment only if he/she uses the environment in the scope where its use requires a permit. A significant element of this definition is that the permit as a *sine qua non* condition is not linked

with the natural person but with the use of the environment. Thus, this provision does not take into consideration if the specific natural person is permitted to use the environment but if the specific use of the environment requires a permit. A natural person who is not an economic operator will be a user of the environment if such use requires a permit irrespective of whether the specific natural person obtains such a permit.

The notion of the user of the environment was also used in the Act of 13 April 2007 on Preventing and Remedying Environmental Damage[6]. Apparently, the problem with identification of entities included in this category of subjects does not exist because the lawmaker itself in Article 3 (20) of the above-mentioned act makes a cross-reference to the Environmental Protection Law.

Nevertheless, the definition of a user of the environment given in the Act on Preventing and Remedying Environmental Damage differs from the definition following from the Environmental Protection Law. The definition in the Act on Preventing and Remedying Environmental Damage, apart from a cross-reference to the Environmental Protection Law, contains an additional prerequisite. According to the Act, responsibility is not incurred by every user of the environment, but only by a subject whose operations pose a risk of environmental damage or a direct threat of environmental damage. Therefore, we are dealing with an eligible user of the environment despite the fact that the name of the group of subjects used by the Act on Preventing and Remedying Environmental Damage and by the Environmental Protection Law is identical.

The construction of a state legal person, which is more and more often used by the lawmaker, must also be qualified among specific subjects in environmental protection law. According to Art. 40 of the Civil Code a state legal person is a legal subject separate from the State Treasury.

This construction is used in environmental protection law mainly for purposes connected with public finance. Using such a construction with respect to a specific organisational unit the lawmaker declares, as a rule, that this is a state legal person within the meaning of the Act of 27 August 2009 on Public Finance.

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[6] Dz. U. 2018.954 consolidated text of 2018.05.21

Such treatment was given to the National Fund for Environmental Protection and Water Management, State Water Holding – Polish Waters and to a national park.

However, in this case the specificity of Polish legal subjects is that the state performs its constitutional and statutory tasks related to environmental protection. The Polish legislator sometimes adopts a solution different from typical solutions characteristic of administrative law. Thus, it consciously gives up regulatory forms of activity of public subjects for the sake of civil law constructions. Treating them in the first place as civil law subjects the Polish legislator appreciates the means provided by private law.

Nevertheless, it does not mean that the system of Polish law completely gives up the instruments of administrative law and regulatory activity of the state.

To this extent, the specificity of legal subjects in Polish environmental protection law is primarily manifested in the introduction of a subject category – an environmental authority.

Organisation of environmental protection not only requires making good and effective law but also, or perhaps mostly, the presence of an efficient executive apparatus. Only such an apparatus can ensure the effectiveness of legal norms in practice. Such effectiveness, as a matter of fact, determines the quality of environmental protection. The executive apparatus in the system of Polish law consists mainly of public administration authorities. As mentioned above, the Polish lawmaker chose an administrative and legal model of environmental protection law, in the first place with regard to effectiveness, possibility of undertaking measures *ex officio*, as well as the speed of administrative proceedings.

Adopting an administrative and legal model of environmental protection with a supplementary role of courts and, in broader terms, other judicial authorities, requires the lawmaker to create a suitable structure of such authorities and to commission tasks to them. Aware of the necessity to create such a structure and simultaneously of its complexity, the lawmaker introduced the term 'environmental authority'.

Thus, in the first place it must be explained what an environmental authority is. It is significant because firstly gmina (municipal) authorities can be undoubtedly classed as environmental authorities and secondly en-

vironmental authorities are confronted with environmental institutions and these are deprived of regulatory competences.

Environmental authority is a normative term. It is defined in Art. 3 par. 15) of the Environmental Protection Law. This provision reads:

"For the purposes of this Act:

5) environmental authority – means an administrative authority appointed for rendering public tasks related to environmental protection according to their level of competence described in Division I Title VII".

As shown by the above-quoted definition of the environmental authority, it is a public administration authority. In turn, this term has been defined in the doctrine. Literature also classifies authorities. Including elaborate quotes from literature regarding this term is pointless. Let me only indicate some representative ones for the purposes of this article[7].

The definition of an environmental authority emphasises two circumstances. Firstly, the lawmaker indicates that this is a type of administrative authority. Secondly, these are authorities appointed for the purposes of public tasks in the area of environmental protection. Thirdly, such public tasks fall within the competence of such authorities as described in Title VII, Part I of the Environmental Protection Law.

Insofar as the first element is defined by the doctrine, the other two are strictly normative. The scope of public tasks in the area of environmental protection is determined by the lawmaker, who indicates competent authorities by making a cross-reference to the respective part of the Environmental Protection Law.

Such normative elements cause specific difficulty in interpretation of the term 'environmental authority'. On the one hand, the lawmaker accentuates that a characteristic of an environmental authority is the fact that it performs public tasks in the area of environmental protection. On the other hand however, the lawmaker indicates that the competence of such authorities is defined in the Environmental Protection Law.

Any public administration body performing public tasks in the area of environmental protection is an environmental authority. In this case the

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[7] J. Boć," The administrative law", Wrocław 2010; J. Zimmermann, „The administrative law", Warszawa 2014; M. Wierzbowski, „The administrative law", Warszawa 2017; E. Ochendowski, „The administrative law. General part", Warszawa 2018.

criterion would be performance of a public task in the area of environmental protection. Leaving out the difficulty defining the environmental protection task, it must be assumed that every authority performing at least one public task in the area of environmental protection will be an environmental authority. However, the type of authority is not significant, in particular whether it is a state or local administration body, a collegial or a monocratic body. Finally, its place in the hierarchy of public administration authorities is not important either. Its constitutive characteristic is performing public tasks (at least one) in the area of environmental protection.

Nevertheless, this clear-cut criterion is subject to certain normative distortion because the lawmaker goes beyond the statement that this is an authority performing a public task in the area of environmental protection. Further, under Title VII Part I of the Environmental Protection Law, it indicates that such as task is performed according to the competence of authorities defined in the act. Thus, the competence of such an authority must be defined in this part of the act. This criterion definitely narrows the interpretation of an environmental authority. It is not sufficient that it is a public administration body performing public tasks in the area of environmental protection, but cumulatively its competence must be described in Title VII Part I of the Environmental Protection Law. *A contrario* any authority not satisfying the above-mentioned requirements is not an environmental authority.

However, such a conclusion is not correct. Irrespective of the catalogue of environmental authorities listed in the Environmental Protection Law, a number of authorities perform tasks that may be deemed environmental protection tasks. For instance, these include the State Water Holding – Polish Waters, and first and foremost the director of the regional water management authority. Another example is regulatory authorities of local government units – the gmina (or municipal) council and the poviat council. Another example may be veterinary administration bodies acting mainly based on the Act of 29 January 2004 on Veterinary Inspection and in the first place the district veterinarian and the regional veterinarian.

With regard to the aforementioned, a significant problem appears, namely, what should be regarded as the criterion determining whether or not the specific authority can be deemed an environmental authority. Is it performing public tasks in the area of environmental protection or being

mentioned as an environmental authority by relevant provisions of the Environmental Protection Law?

In resolving this doubt it must be pointed out that the Polish legislator adopts a cumulative criterion, which is both performing public tasks in the area of environmental protection and listing the body among environmental authorities in the Environmental Protection Law. However, this criterion is mis-leading as it does not cover a number of bodies that do perform public tasks in the area of environmental protection but are not listed in the Environmental Protection Law as environmental authorities.

This dilemma can be resolved adopting the concept of an environmental authority in the narrow and in the broad sense. In the narrow sense, the environmental authority is a body that performs public tasks in the area of environmental protection and that is simultaneously listed in the Environmental Protection Law. In the broad sense, the environmental authority is a body that performs public tasks in the area of environmental protection and that is simultaneously listed in the Environmental Protection Law.

Hence, the above-listed bodies should be deemed environmental authorities in the broad sense.

In turn, the catalogue of environmental authorities in the broad sense is provided in Art. 372 of the Environmental Protection Law. This provision reads " Having found that the causes for suspending the activity or use pursuant to decisions mentioned herein ceased, the regional inspector for environmental protection, local administrator, mayor or president of the city, at the request of the party concerned, will issue the consent to resume the suspended activity or use".

This catalogue of environmental protection authorities in the narrow sense is a closed catalogue which can only be changed by amending the act. However, it has several interesting characteristics that are worth analysing in more detail.

The catalogue of environmental authorities in the narrow sense includes both state administrative bodies and local administrative bodies. The state administrative bodies are, among others, the minister of environment, the voivode, the regional director for environmental protection and the general director for environmental protection. The head of the gmina administration, the mayor of town or city and the regional council form a group of local government bodies.

With regard to the division based on whether the authority is a state or local administration body, it may be assumed that state environmental authorities and local environmental authorities exist. A state environmental authority is the minister of environment, the voivode, the general director for environmental protection and the regional director for environmental protection. On the other hand, the voivodeship marshal, the starost (poviat head), the head of the gmina (mayor of town or city) must be deemed local environmental authorities. A regional council should also be included in this group.

Within a group of state administration bodies it is also significant that this group is composed of government administrative bodies and non-combined administrative bodies. Government administration is composed of the minister of environment and the voivode. On the other hand, the general director for environmental protection and the regional director for environmental protection are non-combined administrative bodies.

In addition, a division into monocratic and collegial bodies can be observed. Except for the regional council, other authorities are monocratic bodies. The regional council is the only collegial body.

In the system of Italian law specific legal subjects can also be observed. However, here different assumptions and criteria are applied following from specific characteristics of Italian law, its traditions, culture, philosophy and axiology. Nevertheless, it does not mean that the fundamental assumptions required for comparative studies are not maintained. R. Tokarczyk is right to observe that "the object of comparative law studies is typical legal phenomena referred to herein as the units of law and forms of legal thought. The first include the following, […] : components of legal norms (hypotheses, dispositions, sanctions), legal norms, legal regulations, institutions of law, branches of law, systems of law, families of systems of law, and types of law. Moreover, one can also compare different lawmaking techniques, legal procedures, contents of legal decisions, and law enforcement rules. The forms of legal thought that are most often compared are ideas, ideologies, doctrines and law programmes"[8].

[8] R. Tokarczyk, „Comparative law", Warsaw 2008, 34.

M. Rainer views this problem differently and identifies three elements – institutional, system and global comparative law. Only within these three elements can he see more detailed levels of comparative law[9].

Thus, despite certain discrepancies to be identified, comparative law studies can be carried out at the level of specific legal subjects in environmental protection law both in Polish and Italian law.

Insofar as in the system of Italian law no specific and special subject category modelled on the user of the environment is introduced, such specificity can be observed at the level of environmental protection organisation itself. Likewise in the system of Polish law it covers public administrative bodies.

The legislative decree fundamental for Italian environmental protection law Il Decreto Legislativo "Norme in materia ambientale" no. 152 of 3 April 2006, equivalent to the Polish Environmental Protection Law, makes use of subjects competent in environmental matters (soggetti competenti in materia ambientale), defined as public administrative bodies and public institutions that, with regard to their knowledge and responsibility in the area of environmental protection, may be interested in environmental impact following from the implementation of plans, programmes or projects[10].

The term 'environmental subject' covers both public administration bodies and public institutions. Leaving out more precise digressions on public institutions and their significance and functioning in Italian law, which would go beyond the subject matter of this paper, it can be stipulated that public institutions are to a large extent equivalent to environmental institutions. They are non-regulatory authorities that simultaneously perform public tasks as a servicing administration. On the other hand, the doctrine of Italian law defines administrative bodies similarly to the doctrine of Polish law. Similar characteristics are emphasised among which regulatory activities are the most important[11].

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[9] M. Rainer, „Course of comparative legal systems", Torino 2004, 6.

[10] K. Szuma, In: „Environmental regulations - Environmental code. Italian Envrionmental Code", ed. K. Szuma, B. Rakoczy, Warsaw 2013, 21 et seq.

[11] L. Delpino, F. del Giudice, „Administrative law", , Simone 2013, 117.

However, the status of a public authority or institution alone is not sufficient to qualify specific subjects as environmental subjects. Italian literature pays attention to the criterion of competence, performance of tasks and knowledge on environmental protection. However, this is not about global treatment but only about environmental impact, whereas such impact must be a consequence of implementation of plans, project or programmes[12].

Comparing the Italian and Polish solutions a number of significant similarities and differences can be observed, which is important from the point of view of comparative law. The key similarity between the two systems of law is the fact that both legislators can see the specificity of the subjects of environmental protection law (environmental law). This specificity of subjects is manifested in that separate categories of subjects are formed for the needs of environmental protection law. Generally, they are not new legal subjects but out of the general group of legal subjects (including public administrative bodies) the legislators select those with normatively defined characteristics and create a separate legal category. Specific distinguishing characteristics of the subjects are significant from the point of view of environmental protection. They differ in both regimes but they are characteristic of the specific regime of law.

What is significant is that in both cases the specificity of legal subjects gives separate treatment to public administrative bodies. In the system of Polish law the lawmaker chose to identify both a category of specific public administration bodies and subjects who are the addresses of environmental protection law norms and who at the same time are not public administration bodies. In the case of Polish law they are termed users of the environment.

The Italian lawmaker reduced separate treatment to public subjects only. However, it must be emphasised that the analysed scope of the term

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[12] L. Costato, F. Pellizzer, „Brief Commentary on the Environment Code", Cedam 2007; F. Marchello, M. Perrini, S. Serafini, „Environment law", Simone 2007; S. Maglia, „Environmental law. In light of Legislative Decree 152/2006 and subsequent amendments", Warsaw 2009; B. Caravita, „Environmental law", Bologna 2005; L. Tramontano, F. Cappilli, „Environment Code. Explained. The Environmental Consolidated Act commented with legal and jurisprudence", Piacenza 2011; S. Maglia, „Environment code. Updated with the SISTRI and the 2010 corrective decrees at T. U. A", Piacenza 2011.

used in the Italian Environmental Code is not limited to public administrative bodies only. It also includes public institutions that are not public administrative bodies.

The criteria for separate treatment of subjects are also slightly different. Polish law perceives them as public administrative bodies performing environmental protection tasks. In Italian law, the criterion for separate treatment, apart from the type of subject covered by the definition, is the link to environmental impact connected with the implementation of plans, projects, strategies etc.

The most significant comparative conclusion is that both regimes of law can see the specificity of public administrative bodies and public institutions as well as the need for emphasizing it and simultaneously giving it a separate treatment.

To sum up, it should be noted that both the Polish lawmaker and Italian lawmaker are aware of the specificity of legal subjects in the public domain. They can see that public administrative bodies and public institutions cannot be described in normative terms, definitions and expressions used in legal language. New criteria for their separate treatment are needed.

In addition, it is justified to treat them separately from all public administrative bodies and public subjects. This only serves as proof of the rank and significance of such authorities.

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