державною владою. Заслуга І. Л. Солоневича полягає в тому, що він намагався показати своєрідність російської психології та історії, а також розкрити у всій повноті й глибині «російську ідею», яка вбирала б у себе весь історичний досвід російського народу, російської державності. І. А. Ільїн та І. Л. Солоневич негативно оцінювали теорію марксизму й передбачали швидку кризу радянської влади в Росії.

Ключові слова: російська юридична думка в еміграції; Г. К. Гінс, Н. М. Алексєєв, І. А. Ільїн, І. Л. Солоневич.

Ivannikov I. Russian Emigrant Legal Thought of the XX Century. The article is devoted to the history of the understudied jurisprudence Russian legal thought of the emigration in the twentieth century. The author studies the different views on the history of Russian law and the state, the nature of law and state of the most famous lawyers among the number of Russian emigration of the twentieth century. G. K. Gins develops the idea of solidarity, which is based on the idea of building relationships between people on terms of mutual benefit. The future of the state should evolve from liberalism to solidarism. N. N. Alekseev thought, that new perfect russian state should be the guarantee state to their citizens, ideokratic (to serve the general public idea), legal, which protects their own citizens. I. A. Ilyin sees Russia in future as unitary state with a single citizens composition and unified monarchical government. The I. L. Solonevych merit is that he is trying to show the peculiarity of Russian psychology and Russian history, as well as to reveal in its entirety and depth «the russian idea» that would absorb an entire historical experience of the russian people and russian statehood. I. A. Ilyin and I. L. Solonevych negatively evaluated the marxist theory as well as predicted imminent crisis of the soviet power in Russia.

Key words: russian legal thought in exile; G. K. Gins, N. N. Alekseev, I. A. Ilyin, I. L. Solonevych.

УДК 349.6(438)

E. Czech

Polish Experience in Usage of the Polluter Pays Principle Exemplified by Article 22 Paragraph 2 Point 1 of the Act on Prevention of Environmental Damage and their Compensation, and the Possibility of their Application in Reformation of Ukrainian Law

The functioning of the Polluter Pays Principle in Polish legal system is definitely not free of disputable issues. The intention of the Author of the paper was that the experience gained from functioning of indicated ambiguous solutions of Polish Legislator would be assessed as helpful and useful in such creation of regulations in Ukrainian law, that are free of similar controversial solutions. Their possible elimination is justified in a specific way, by a kind of legal good that is under legal protection, especially of the norms of environmental law.

Key words: Polluter Pays Principle, environmental damage, exemption from the cost of preventive and compensational acts, responsibility for environmental damage.

Formulation of Scientific Problem and its Meaning. General character of principles of law does not exempt from their application in combination with common norms. Quite the contrary, their general and superior character, in relation to other norms in legal system, causes that the range of their application is wider than the rest of the norms included in certain legal order. This seemingly clear rule, however, has considerable consequences impacting on legal situation of entities.

Very frequently such consequence is the lack of certainty of such situations. The reason for this state may be noticed in over-generalized character of principles of law, that makes possible to use them as basis of judgments. It should be indicated as well that some of the principles were established in Polish law as the golden mean which enables the entities applying law to formulate judgments with specified contents. In the scope of regulations, on the basis of which management and environmental protection is conducted, this significant rule is undoubtedly the principle of sustainable development. Its such often usage in jurisdictive practice of Polish courts is unquestionable and beyond discussion. In my opinion much attention should be paid to another rule of environmental law. This is the Polluter Pays Principle. In Polish legal order it is expressed in article 7 of the Act on Environmental Protection Law (Act on 27th April 2001, Journal of Laws: Dz.U.2008.25.150 with amendments, hereinafter referred to POŚ) [1].

Functioning of this principle in Polish legal order is definitely not free of numerous disputable issues. It is as well the part of Ukrainian system of law starting from the 90 s [8]. The author's of this paper hope is

that experience gained from functioning of, not always simple and unequivocal solutions of Polish Legislator, would be assessed as helpful and useful in such creation of new regulations in Ukrainian law, as well as amending existing ones, that are free of similar controversial solutions. Their possible elimination is justified in a specific way, by a kind of legal good that is under legal protection, especially of the norms of environmental law.

The Polluter Pays Principle in the context of its impact on unequivocalness of application of article 22 paragraph 2 point 1 of the Act on Prevention of environmental damage and their compensation. While considering the Polluter Pays Principle in general aspect, it might be claimed that it is the frequent object of widely circled discussions in society of lawyers. Nevertheless, it seems that paying attention to several specific matters is vital. In the field of Polish law, difficulties with applying this rule are undoubtedly connected to the fact that it must find relations with norms of not only one branch of law, but in this case at least two – administrative and civil law, where environmental issues are regulated. This principle is certainly not any kind of exception in the scope of functioning of such rules as *lex retro non agit* or *ignorantia iuris nocet*. There are as well such principles that are related to a specific branch of law, as *nullum crimen nulla poena sine lege*. Therefore the question is: how should the Polluter Pays Principle be understood? Will it take different dimension inside the groups of these legal norms even if the objects of their protection are the elements of the environment? There can be noticed additional influence on legal situation presented in this way, that makes it even more ambiguous. This is the influence of such solutions present in Polish system of law, on the basis of which Polish legislator gives protection to the elements of the environment, where legal constructions that are traditionally related to civil norms, are included in norms of administrative law. The example of this kind of solutions in Polish law is the Act on Prevention of environmental damage and their compensation. By means of this act the directive 2004/35/WE concerning responsibility for the environment in reference to prevention and compensation of damage in the natural environment was implemented [2]. Applying both of these normative acts should lead to realization of the Polluter Pays Principle.

Legal solutions applied by Polish Legislator raise doubts in the scope of whether in cited act the possibility to separate situation of taking responsibility for environmental damage or states of immediate emergency by this damage from situation of paying the cost of undertaking preventive or compensatory acts, is foreseen or not.

In the contents of article 9 of the Act on Prevention of environmental damage and their compensation it was defined that in the case of appearing of environmental damage or states of immediate emergency by this damage, the entity using the environment is obliged to undertake acts specified in the provisions of article 9. The contents of article 2 in relation to article 6 point 9 of this normative act indicate that those obligations burden the entities using the environment. On the other hand, by means of article 22 paragraph 2 Legislator creates possibility for those entities not to pay the cost of undertaking preventive or compensatory acts in case of proving that circumstances indicated afterwards in this regulation appeared.

In the Polish science of law it is indicated that on the basis of contents of article 22 point 2 of legal act that is being commented, there is exemption from the cost, not from just the obligation of undertaking preventive or compensatory acts. This obligation still burdens the entity using the environment [3, p. 98]. I agree with such standpoint, however, I feel necessity to signalize that the construction applied in Polish law has many drawbacks and disadvantages. This may result in disagreement in interpretation in the field of article 22.

The way of understanding the phrase «entity using the environment does not pay the cost of undertaking preventive or compensatory acts» should be assessed as controversial. Contents of article 22 paragraph 2 may lead to the conclusion that if entity using the environment does not pay the cost, he also does not have obligation to undertake preventive or compensatory acts. According to the rule, that cost is the consequence of realization of that obligation. The role, which the state Legislator attaches to undertaking preventive or compensatory acts, what is expressed for instance in article 15 paragraph 4 or article 16 of the Act on Prevention of environmental damage and their compensation, indicates that financial calculations among the entities have secondary significance in relation to the best possible assurance of the natural environment protection from environmental damage or states of immediate emergency by this damage.

In the science of law it is reasonably indicated that by virtue of article 22 paragraph 2 there is established the possibility of exemption from responsibility for covering the cost of preventive and compensatory acts, just in case of appearance of determined premises [3, p. 22].

There must be distinguished the responsibility for just environmental damage or states of immediate emergency by this damage, which is expressed in the obligation of undertaking acts specified in article 9, from the responsibility for covering the cost of preventive and compensatory acts. In practice such separation of these responsibilities may lead to the situation when in the cases specified in article 22 paragraph 2, an entity using the environment, who commissioned for a fee a part of preventive and compensatory acts to another entity, will try to refuse to pay, citing the provisions of article 22 paragraph 2. It is clear that such acts of an entity using the environment would cause the infringement of the principle of the contract statements. It should be estimated as at least rarer that in practice there appear such situations when the entity, to whom undertaking preventive and compensatory acts was commissioned, would agree that due consideration would be performed by the entity indicated in article 22 paragraph 3. At the same time it should be noticed that in the regulation cited above, there was not foreseen the possibility to lay a claim by another entity, not the entity using the environment, who undertook preventive and compensatory acts in relation to environmental damage or states of immediate emergency by this damage. The Legislator does not indicate as well initial entire cover of the cost of preventive and compensatory acts by this entity. Linguistic meaning of the phrase «to make an attempt» means as much as to oblige to do something, to take decision on being occupied with something, or to be burdened by an obligation to do something [4, p. 477]. Therefore, the scope of the contents of this definition does not exclude for instance realization of obligation taken by one entity, by means of other entities. On the other hand the contents of article 22 paragraph 3 excludes on the basis of this provision, the possibility to lay regress claim by another entity, not the entity using the environment, who undertook preventive and compensatory acts in relation to environmental damage or states of immediate emergency by this damage. Moreover, the norm of article 22 paragraph 3 indicates the possibility to lay a claim for refund only the cost of actions indicated above and specified in article 21. The justification of Polish Legislator's approach to this issue might be sought in the view that as far as other entities than indicated above are concerned, certain claims are vested by virtue of appropriate solutions included in for instance Civil Code [5].

Such defined legal situation and far-reaching interpretation doubts related to it, cause necessity to make reference to the Polluter Pays Principle in the context of this, whether its application might have impact on restriction of these ambiguities.

There should be more attention paid to this standpoint of the science of law, where it is indicated that in practical view the Polluter Pays Principle is mainly realized by means of using economic instruments such as fees for using the environment or financial penalties for emitting pollutions in the way inconsistent with conditions specified in the permit for using the environment [6, p. 37]

It is also indicated that the results of Polish Legislator's solutions in the scope of Prevention and Precaution Principles regulation is normalization of the cost of these actions. Article 7 of POŚ was devoted to this issue, where the Polluter Pays Principle was expressed [7, p. 54].

Defining the entity, who is burdened with the obligation of covering the appropriate cost, Polish Legislator uses phrases such as «who causes environmental pollution», «who may cause environmental pollution». On the other hand, in the article 22 paragraph 2 point 1 it is indicated that entity using the environment does not cover the cost of undertaking preventive and compensatory acts in defined cases when he proves that environmental damage or states of immediate emergency by this damage were caused by another indicated entity and, that they appeared despite application of appropriate security measures by entity using the environment.

It must be noticed that just cumulative appearance of the premises specified in article 22 paragraph 2 point 1 results in exemption from the cost of undertaking preventive and compensatory acts. Proving, by entity using the environment, that environmental damage or states of immediate emergency by this damage were caused by another indicated entity, is the only one of indicated positive premises. At the same time, defining the entity who is to cover the cost of undertaking preventive and compensatory acts, was done in the same way as in the case of defining addressees of the norms, which contents express the Polluter Pays Principle, what means the entity who causes specified disadvantageous state in the environment.

Conclusions and perspectives for further researchs. As far as the state of legislation existing nowadays in Poland is concerned, it should be claimed that cumulative application of the Act on Prevention of environmental damage and their compensation and the Polluter Pays Principle, expressed in article 7 of POŚ, does not eliminate the vital disputable issue appearing in the field of article 22 of the Act on

Prevention of environmental damage and their compensation, i.e. whether the Legislator's will is, by virtue of these norms to exempt from the responsibility for environmental damage or states of immediate emergency by this damage, or just to exempt from covering the cost of undertaking preventive and compensatory acts. These activities are thus the consequence of appearance of these two states disadvantageous from the environmental point of view.

Such situation in Polish law should be claimed as absolutely undesirable and demands amendment as soon as it is possible. This is the result, let us name it conventionally from the point of view of applying legislative technic, the mechanical trial to differentiate cost of activities heading to eliminate the state of damage in the environment or the state of immediate emergency by this damage, from responsibility for these states. An example of functioning of presented legislative solution in Polish legal order for certain constitutes this example of legislative technic, which should cause that Ukrainian legislation, by means of creation or reformation its law, ought to introduce such legal solutions that would allow to avoid problems with their application, analogic to these indicated above.

Sources and Literature

1. Act on Prevention of environmental damage and their compensation, 13 th April 2007 // Journal of Laws Dz.U. – Nr 75. – Position 493 with amendments.
2. Directive 2004/35/WE, 21st April 2004r. on responsibility for the environment in reference to prevention and compensation of damage in the natural environment, OJ 2004, L 143/56, 30 th April 2004
3. Radecki W. Ustawa o zapobieganiu szkodom w środowisku i ich naprawie / W. Radecki – Warszawa, 2008.
4. Popularny słownik języka polskiego / pod red. B. Dunaja. – Warszawa, 2000.
5. Act on 23rd 1964, Civil Code, Dz. U. nr 16, position 93 with amendments.
6. Gruszecki K. Prawo ochrony środowiska. Komentarz / K. Gruszecki. – Warszawa, 2007.
7. Rakoczy B. Komentarz do art. 7 ustawy Prawo ochrony środowiska / [w:] J. Ciechanowicz – McLean, Z. Bukowski, B. Rakoczy // Prawo ochrony środowiska. Komentarz. – Warszawa, 2008.
8. Економіко-правові важелі боротьби з забрудненням та іншими порушеннями природного середовища [Електронний ресурс]. – Режим доступу : http://ua.textreferat.com/referat-4599-4.html.

Чех Е. К. Польський досвід у застосуванні принципу «забруднювач платить» на прикладі ст. 22 параграфа 2 пункту 1 Закону про запобігання шкоді навколишнього середовища та її відшкодування й можливість використання досвіду в реформуванні українського права. Функціонування принципу «забруднювач платить» у польському правопорядку не позбавлене спірних моментів. Прикладом цього є норма ст. 22 параграфа 2 пункту 1 Закону про запобігання шкоді навколишнього середовища та її відшкодування. При цьому виникає сумнів, чи хотів польський законодавець попередити шкоду, чи звільнення від відповідальності за шкоду середовищу й стану безпосередньої загрози цими збитками. Метою автора статті є те, щоб досвід, отриманий у функціонуванні вказуваних неоднозначних рішень польського законодавця, став корисним при створенні таких норм українського права, що дасть змогу уникнути схожих суперечливих рішень. Їх можлива ліквідація обґрунтовується особливим характером блага, що підлягає правовій охороні, тобто середовища.

Ключові слова: принцип «забруднювач платить», шкода навколишньому природному середовищу, звільнення від відповідальності за шкоду навколишньому середовищу, відповідальність за шкоду навколишньому природному середовищу.

Чех Е. К. Польский опыт применения принципа «загрязнитель платит» на примере ст. 22 параграфа 2 пункта 1 Закона о предотвращении ущерба окружающей среде и его возмещении и возможность использования опыта в реформировании украинского права. Функционирование принципа «загрязнитель платит» в польской правовой системе, безусловно, не лишено спорных вопросов. Норма статьи 22 параграфа 2 пункта 1 Закона о предотвращении экологического ущерба и его компенсации может быть примером такого положения дел. В этой области отмечены некоторые сомнения, то ли волей законодателя было освободить субъектов правового регулирования от стоимости проведения профилактических действий и ограничиться только компенсацией за вред от их деятельности, или же освободить от ответственности за ущерб окружающей среде в состоянии острой необходимости. Целью автора статьи было поделиться полезным опытом, накопленным в сфере функционировании указанной нормы польского права с точки зрения максимальной эффективности в создании аналогичных норм в украинском законодательстве, которые бы не содержали сходных недостатков. Их устранение весьма оправдано, исходя из особенного значения объектов правовой защиты нормами экологического права.

Ключевые слова: принцип «загрязнитель платит», вред окружающей среде, ответственность за вред окружающей среде, освобождение от ответственности за вред окружающей среде.