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Constitutionalisation of Environmental Protection in Poland\*\*

*Abstract*

*This article aims, on the one hand, to analyse how the constitutionalisation of environmental protection in Poland has developed and, on the other hand, to review the currently adopted constitutional solutions regarding environmental protection. After briefly describing the term 'constitutionalisation', the author presents the constitutional development of Poland, with a special emphasis put on provisions regarding environmental protection. The detailed analysis of provisions is followed by the conclusions.*

**Keywords:** constitutionalisation, environmental law, constitutional law, environmental protection, Poland.

Constitutionalisation of environmental protection is a very important scientific issue both from the point of view of environmental protection and constitutional law. As a matter of fact, constitutionalisation of environmental protection leads to interaction between two fields of law – constitutional law and environmental law. Constitutional law provides the form, and environmental law – the content. The aim of this paper is, firstly, to analyse how constitutionalisation of environmental protection in Poland developed and, secondly, review the currently adopted constitutional solutions regarding environmental protection.

The idea of constitutionalisation is relatively young. The phenomenon of constitutionalisation appeared only at the end of the 18th century when the first constitutions were adopted.

Of course, 'constitution' is not a new term, since it was a type of a legal act known already to the Roman Empire. In addition, apostolic constitutions are one of the primary sources of canon law. However, in both cases 'constitution' had a meaning different from that assigned to it at present. Both in Roman law and canon law it denoted more or less a type of a legal act of no special importance or nature. Thus, constitution meaning a legal act was a better match for the present-day term of an act than the present-day constitution.

The current formula of constitutionalism derives from concepts associated with the Enlightenment. It is in the ideas of the Enlightenment where the origins of the

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present-day constitutionalism should be sought. The Enlightenment thought assumed that a superior legal act existed regulating the most fundamental and basic rules of functioning of the state and - as a consequence - the law it constitutes.

It should be noted that certain issues and contents have been incorporated in the constitutionalisation framework from the very beginning. No doubt such fixed elements of constitutionalisation are political system issues. It is not only about the model of tripartite division of powers proposed by Charles Montesquieu but about the fact that first constitutions covered political system issues. The second extremely important element of the constitution is regulations concerning the rights and freedoms of an individual. This can be seen particularly clearly in the constitution of the United States of America with strongly rooted ideas of personal rights and freedoms.

It can be even indicated that constitution, as a legal act, was created in the first place to protect personal rights and freedoms and regulate political system issues.

Looking at the development of constitutionalism it can be seen that certain ideas are universal and occur virtually in any constitution. However, it can be also observed that certain ideas acquire a constitutional status, and thus are constitutionalised. Such ideas definitely include environmental protection.

Therefore, the term 'constitutionalisation' itself means assigning a specific issue or problem a constitutional rank. It is essential that although a constitution is a unique act of law<sup>1</sup>, it does not regulate all issues related to the functioning of the state, the law and the status of an individual. Thus, the constitution does not regulate all issues. Certain ideas that were not naturally regulated by the constitution from the very beginning were incorporated in the constitutional framework due to certain circumstances and events. Thus, such ideas had to be constitutionalised for sufficiently important reasons. Assigning a constitutional rank to a certain idea entails specific far-reaching legal consequences. These consequences – as mentioned hereinafter – are mostly manifested in the sphere of axiology. Due to the settlement of a specific issue in the constitution, and hence its constitutionalisation, this issue (idea) becomes a constitutionally protected value, so its prestige and significance definitely increase. Of course, it is also significant how the constitutional legislator regulates a specific issue since the constitution alone differentiates the values it regulates, which can be seen at least in connection with the constitutional proportionality principle.

Environmental protection is an issue that was not of interest to the legislators adopting the first constitutions. The reason why first legislators did not speak about environmental protection was prosaic – the problem of environmental protection simply did not exist at the end of the 18th century. Some timid voices would highlight certain aspects that today are the object of interest for environmental law; however, neither the scale nor the range of these problems were sufficiently important and world-shaking to assign them a constitutional rank. Moreover, they were only fragmentary phenomena and it is difficult to speak about any general environmental issues.

The 19th century should be given a similar evaluation. From the analysed point of view, the 19th century is a time of very intensive development of industry and

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<sup>1</sup> I will not delve deeper into the formal and material problems of the constitution as experience teaches that in most legal systems constitution is a type of legal act.

economy on a global scale. Although the origins of the industrial revolution should be sought in 18th-century England, only in the 19th century did this phenomenon become global. Intensive development of industry had an intense bi-directional impact on the environment. Firstly, industrial development required the supply of natural resources. Secondly, different kinds of ash, wastewater and wastes were disposed of into the environment. The scale of impact was big enough to give rise to intense and dynamic degradation of the quality of the environment.

The breakthrough in thinking about the environment occurred at the end of the 1960s when the then United Nations Secretary-General U<sup>2</sup>Thand mentioned the problem of environmental protection as being grave and global. From that time the international community became widely interested in environmental protection. Of course, the interest related to its various aspects, including juridical ones. International interest in environmental protection issues gave rise to the interest of the legislator, including the constitutional legislator. The problem of environmental protection became so significant that it could not be neutral from a juridical point of view. It became clear that environmental protection should also involve legal instruments. However, the situation due to the quality of the environment was so grave that it had to be assigned a constitutional rank. The first constitution that regulated environmental protection issues was the constitution of the Kingdom of Spain and then the constitution of Portugal.

From that time on one can speak not only about constitutionalisation of environmental protection but also about assigning environmental protection a higher rank from the point of view of constitution.

An interesting fact could be observed in connection with the collapse of communism. All the states of the so-called Eastern bloc, having gained full sovereignty, adopted new constitutions corresponding to the constitutional standards of Western countries. However, it is important that all constitutions of the former Eastern bloc states were adopted in the 1990s and each of them more or less relates to environmental protection.

It is noticeable that constitutions of the former Eastern bloc states regulate environmental protection issues to a much greater extent and wider range than the constitutions of Western countries do. It suffices to compare the Constitution of the Republic of Poland of 2 April 1997<sup>2</sup> with the German Constitution or the Constitution of the Republic of Italy. Constitutional revaluation is an effect of seeing how grave and significant the problem of environmental protection is in contemporary societies. Insofar as in the 1940s and 50s the problem was not constitutionally important, in the 1990s it had already gained a constitutional rank and importance. Thus, it can be concluded that constitutions at the end of the 1990s widely regulate the issue of environmental protection, which means that environmental protection was constitutionalised. Environmental protection rose to a rank of a constitutionally protected value. This process originated in the 1970s.

A tendency to separate environmental protection issues from climate protection issues can be observed. Perhaps the next generation of constitutions will

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<sup>2</sup> Dz. U. (JL)

consider climate protection to be a problem separate from environmental protection. Thus, climate protection will be constitutionalised.

Poland has a special place in constitutionalism. The Constitution of 3 May 1791 was the first constitution in Europe and one of the first in the world. Thus, the idea of constitutionalism has a long and rich tradition in Poland. The above-identified phenomena related to constitutionalisation of environmental protection also relate to Poland. The Constitution of 3 May 1791 is in no way related to environmental protection issues. This was due to the same reasons for which other constitutions at that time did not deal with such issues at all, and namely to the fact that environmental protection simply did not exist as a constitutional problem. This issue was also not regulated in Polish constitutions from the 19th century - the Constitution of the Duchy of Warsaw of 1807 and the Constitution of the Kingdom of Poland of 1815. The Polish constitutional legislator mentioned environmental protection in the March Constitution of 1921.

Another Polish constitution – the April Constitution of 1935 – completely ignored environmental protection.

The legislator of the Constitution of 22 July 1952 was also silent in that respect. However, due to the interest of the international community in the problems of environmental protection, the Polish constitutional legislator took interest in environmental protection. On 10 February 1975, an act amending the Constitution of the Polish People's Republic was adopted. This amendment, next to decisively political solutions incorporated in the legal regime, also covered issues related to environmental protection. The Constitution of the Polish People's Republic, although obsolete, remained in force until the effective date of the Constitution of 2 April 1997.

The present Constitution of the Republic of Poland of 2 April 1997 presents a modern approach to environmental protection, which indicates that the Polish legislator takes great care of these problems. The Constitution of the Republic of Poland contains 242 articles, five of which relate directly to the environment and its protection. The Polish legislator uses the term 'environment' or 'environmental protection' as many as five times. On the other hand, all other constitutional norms relate to environmental protection issues and in particular the provisions expressing social justice and the principle of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland) and the principle of legality (Article 7 of the Constitution of the Republic of Poland). The principle of equality before the law (Article 32 of the Constitution of the Republic of Poland) and the right to be heard before the court (Article 45 of the Constitution of the Republic of Poland) are also significant.

On the other hand, issues directly related to environmental protection are regulated in Article 5, Article 31 paragraph 3, Article 68 paragraph 4, Article 74 and Article 86. The provisions of the Constitution regulating the problems of the environment and its protection can be divided into three groups. The first group contains one element only and includes the principle of sustainable development. The principle of sustainable development is the foundation of Polish environmental law, so its separate treatment is fully justified. The second group is legal norms relating to the legal status of an individual. In this group of constitutional issues, the rights and freedoms of an individual in the area of the environment and its protection,

the obligations of an individual in the area of the environment and its protection, and finally the permissibility of limitation of the rights and obligations of an individual in view of environmental protection should be looked at.

The third group of issues relates to the obligation of public authorities to protect the environment and this is the most developed group of issues.

The first group comprises the problems of sustainable development. The normative dimension of the sustainable development principle was expressed in Article 5 of the Constitution of the Republic of Poland reading: *“The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.”* According to literature, this provision regulates issues that are most important from the point of view of the legal regime, and from the point of view of tasks of the state.

The analysed issue – the sustainable development principle – is the last element of the structure of this provision. A dilemma arose regarding the role of the sustainable development principle in this provision.

The tasks of the state enumerated by the Polish legislator include ensuring the protection of the natural environment. At the same time, it specifies *“pursuant to the principles of sustainable development.”* Such a formulation of the provision gave rise to doubts about whether the wording *“pursuant to the principles of sustainable development”* refers only to the *“ensure the protection of the natural environment”* task or to all other tasks mentioned in this provision.

In my opinion, the wording *“pursuant to the principles of sustainable development”* can refer to the *“ensure the protection of the natural environment”* task only. It is difficult to imagine how to *“safeguard the national heritage”* pursuant to the principles of sustainable development and also how to *“safeguard the independence”* pursuant to the principles of sustainable development. Thus, the principle of sustainable development was normatively linked to ensuring the protection of the natural environment.

It is interesting that Article 5 of the Constitution of the Republic of Poland is significant not as much as in view of the task to ensure environmental protection articulated in it, but due to the principle of sustainable development expressed in it. However, the principle of sustainable development referred to in the above-mentioned article is not an objective in itself but only a means, way or method to achieve the objective of environmental protection. Thus, this article is significant not as much as in view of the objective but rather of a normatively articulated method of achieving such an objective.

The principle of sustainable development has no normative definition. Only in Article 3 section 50 of the Act of 27 April 2001 – Environmental Protection Law – did the legislator define sustainable development.

This provision stipulates that sustainable development is such social and economic development which includes integration of political, economic and social activities in retaining both the natural balance and the sustainability of basic natural processes - with the aim of balancing the chances to access the environment by particular communities or individuals – of both contemporary and future generations. However, defining constitutional terms using statutory definitions is not allowed.

Thus, a statutory definition can have at least an auxiliary function in explaining the meaning of a constitutional term.

The principle of sustainable development is the foundation of the Polish environmental law. The meaning and essence of the principle of sustainable development for the Polish environmental law was explained by the Constitutional Tribunal in its judgement of 6 June 2006 in the case with ref. no. K 23/05. The statement of reasons to this judgement indicates that public authorities are first of all required to *“pursue a policy ensuring ecological security to the present and future generations”* (Article 74 paragraph 1). This phrase is typical for the determination of the tasks (policy) of the state, but it does not directly give rise to any subjective rights of an individual. The term ‘ecological security’ must be understood as bringing the environment to a quality allowing the safe staying in such an environment and using such an environment to enable human development. Environmental protection is one of the elements of ‘ecological security’ but the tasks of public authorities are wider – they also cover activities improving the current quality of the environment and programming its further development. The fundamental method to accomplish this objective is – pursuant to Art. 5 of the Constitution – to be guided by the principle of sustainable development, which makes reference to international agreements, in particular those made at the conference in Rio de Janeiro in 1992 (cf. J. Boć, [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, ed. by J. Boć, Wrocław 1998, p. 24 et seq.). The principles of sustainable development comprise not only environmental protection or land management but also due care for social and civilisation development related to the necessity to build relevant infrastructure required for – taking into account the needs of civilisation – the life of man and respective communities. The idea of sustainable development incorporates a need to take different constitutional values into account and balance them properly.

This statement of reasons reflects the essence and role of the sustainable development principle in the system of Polish law. It embodies contradictory values, attempting to reconcile them as long as and to the extent that it is possible.

The principle of sustainable development is addressed both to bodies enforcing and making the law. It also has a process function. Thus, it sets directions and standards for the environmental law.

The second group of constitutional provisions are regulations concerning the legal status of an individual in the context of environmental protection. This group of issues consists of three subgroups. The first subgroup is regulations concerning personal rights and freedoms related to the environment. The second subgroup is regulations concerning the obligations of an individual related to the environment. Finally, the third subgroup is normative solutions referring to the admissibility of limitation of personal rights and freedoms in view of environmental protection.

The Constitution of the Republic of Poland is very terse about regulating personal rights and freedoms in the environmental context. Normatively, it clearly expresses one right only - the right to be informed about the environment and its protection. According to Article 74 paragraph 3 of the Constitution of the Republic of Poland, *“everyone shall have the right to be informed of the quality of the environment and its protection.”* It is essential that this right is vested in everyone - not only individuals but also legal persons and units of organisation without legal identity. In the legal regime of

Poland, the right to be informed about the environment and its protection is a right independent of the right to public information regulated by Article 61 paragraph 1 of the Constitution of the Republic of Poland and it inheres in citizens only.

The Polish legislator recognised that information about the quality of the environment and its protection is now the most significant element of environmental protection from the point of view of an individual as such information allows individuals to shape their living conditions and health in the context of their protection.

The Constitution of the Republic of Poland is a fundamental act directly imposing obligations relating to the environment on an individual. According to Article 86 of the Constitution of the Republic of Poland everyone has an obligation to care for the quality of the environment and will be held responsible for causing its degradation. The principles of such responsibility are specified by statute. It is interesting that the constitutional legislator also imposes this obligation on everyone. The obligation to care about the environment is one of the five duties directly mentioned in separate provisions of the Constitution.

It should be emphasized that the duty to care about the quality of the environment should be distinguished from the duty of the public authorities to protect the environment. As specified in Article 74 paragraph 2 of the Constitution of the Republic of Poland, *“protection of the environment shall be the duty of public authorities.”* The duty to care about the quality of the environment is much narrower than the duty to protect the environment. As a rule, public authorities are responsible for the quality of the environment. Yet, additionally, public authorities can impose certain duties on everyone. However, these can be the duties that public authorities cannot fulfil alone (e.g. the obligation to separate waste or a ban on wasting water). The above-quoted provision of the Constitution of the Republic of Poland also relates to statutory provisions in the context of liability. It is significant though that legal liability in the context of the environment and its protection was linked to deterioration in the quality of the environment.

Finally, the third group of constitutional provisions regulating environmental protection are regulations concerning the duties of public authorities related to environmental protection. One such provision has already been quoted above - it is Article 5 of the Constitution of the Republic of Poland imposing the duty to ensure environmental protection on public authorities. A similar general solution is contained in Article 74 paragraph 2 of the Constitution of the Republic of Poland. This provision reads: *“Protection of the environment shall be the duty of public authorities.”* Public authorities can fulfil the general duties towards the environment in four ways – by making laws considering environmental protection, by financing environmental protection, by regulating the issues of ecological education and, lastly, by arranging for the actual measure of environmental protection.

The constitutional duties of public authorities in the area of environmental protection include the duty expressed in Article 74 paragraph 1 of the Constitution of the Republic of Poland. This provision reads: *“Public authorities shall pursue policies ensuring the ecological security of current and future generations.”*

It should be highlighted that this provision does not impose a legal obligation but only a political one. It implies that public authorities only pursue a certain policy.

Thus, a violation of this duty cannot lead to criminal liability - it can only give rise to political liability.

It is also essential that the political obligation should refer to achieving ecological security, which means ensuring the optimum quality of the environment for human life and health. Here, the relationship between ecological security of the current generation and ecological security of future generations is clear, so Article 74 paragraph 1 of the Constitution of the Republic of Poland is linked to Article 5 of the Constitution of the Republic of Poland which expresses the principle of sustainable development.

The constitutional norms regulating the duties of public authorities in the area of environmental protection include Article 74 paragraph 4 of the Constitution of the Republic of Poland. This provision reads: *“Public authorities shall support the activities of citizens to protect and improve the quality of the environment.”*

The essence of this provision is that the Polish legislator can see its incapacity and limitations as regards ensuring the right protection of the environment. It also expresses far-reaching confidence that citizens can and are able to handle the matters of the environment and its protection. What is more, the legislator believes that civic action in this respect is better than the action of public authorities.

It should be underlined that this provision does not grant public authorities the right to support citizens' actions to protect the environment and improve its quality, but imposes an obligation to offer such support. This support is offered at the legislative, organisational, educational and – lastly – financial level.

The last constitutional obligation imposed on public authorities is the duty expressed in Article 68 paragraph 4 of the Constitution of the Republic of Poland. It stipulates that *“public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.”* It should be emphasized that the whole of Article 68 of the Constitution of the Republic of Poland does not refer to the protection of the environment but to the protection of health. The problem of the environment appears only in connection with the protection of human health. Yet, the most important thing is that the constitutional legislator established a link between health protection and environmental protection. Although the provision can lead to a disturbing conclusion that the Polish legislator assumes that public authorities will react only when the degraded environment poses a threat to human life and health, all the other provisions analysed above imply that such a conclusion is wrong. Thus, this provision should be only perceived as a manifestation of a normative link between the protection of human life and the protection of human health.

To sum up, an interesting evolution of constitutionalisation of the problems of environmental protection should be noted. This phenomenon features two principal elements. Firstly, this constitutionalisation is a relatively young phenomenon and, secondly, it is very dynamic. De lege lata it is difficult to imagine a modern constitution without making reference – to a larger or smaller degree – to environmental protection issues.

As a background to these general comments on the constitutionalisation of environmental protection, the Constitution of the Republic of Poland is an act presenting a practical comprehensive and exhaustive approach to environmental protection issues. A special constitutional achievement of the Polish legislator is the fact

that the principle of sustainable development is the foundation of environmental law in Poland. Alongside it, the legislator regulates issues of the legal status of an individual and duties of public authorities in the area of environmental protection.

The solutions adopted in the Constitution of the Republic of Poland demonstrate that the problem of environmental protection is treated seriously and its weight and significance are duly taken into account. This value was assigned a suitable constitutional rank and significance.