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## **Protection of the Environment in Polish Constitutional Law in the light of the Jurisdiction of the ECHR**

**ABSTRACT:** *Over the past decades, a global trend of constitutionalising environmental protection has been observed in connection with the attribution to this issue of key importance and value deserving special legal status. This practice has not bypassed the Republic of Poland; the current constitution provides an extensive range of environmental provisions. The aim of the paper is to review the Polish constitutional law in terms of provisions guaranteeing environmental protection. The article presents the specific legal framework and analyses the role of the Polish Constitutional Court in interpreting constitutional provisions. Based on the legal analysis, the author aims to identify best practices and solutions included in the Polish Constitution, as well as to indicate existing shortcomings of environmental regulation with some remarks de lege ferenda. An important part of the paper provides an assessment of the impact of the ECtHR's case law on the practice and jurisprudence of Polish courts dealing with violations of the right to the environment. In this regard, attention is given to civil cases involving violations of personal rights in the form of health, privacy, and the ability to enjoy life in an uncontaminated environment. The outcome is a consideration of the connections between the construction of the right to the environment and the subjective rights guaranteed by the Polish Constitution.*

**KEYWORDS:** *right to the environment, constitutional law, Poland, ECHR, environmental protection, human rights*

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## 1. Introduction

Faced with the problem of the contemporary, extremely exploitative market economy, which does not provide for an internal mechanism to control the negative impact of human activity on the environment, state law turns out to be one of the few effective 'brakes', instruments for restoring the balance between the need for economic development and the very protection of the environment (Nowakowski, 2007, p. 42). The function of the law is to enforce, on the one hand, human behaviour aimed at preserving or restoring environmental equilibrium, and on the other hand, to impose specific obligations on states, the performance of which serves to achieve this goal.

In this context, the increasingly important role of legal regulations in environmental protection must be noted. A special role in establishing the importance of such regulations is the constitutionalisation of environmental protection, which involves assigning this issue a constitutional rank and giving rise to specific legal consequences<sup>1</sup>. The primary implication of its constitutionalisation is that environmental protection has become an important element of state lawmakers' axiology, emphasising the weight and significance of the values associated with this matter<sup>2</sup>. Despite the significant anchoring of environmental protection to human rights in recent decades through the recognition and guarantee of the right to the environment in numerous instruments of international law and the domestic laws of many states, the sources, scope, and existence of the right are still disputed in the literature<sup>3</sup>. There was no consensus on the scope of such rights, which involved the adoption of different adjectives to define the type of environment at stake<sup>4</sup>. These factors certainly had an impact on the restraint in recognising the subjective right to a healthy environment in the Polish legal order. Nevertheless, the example of the Republic of Poland represents an interesting case of the broader constitutionalisation process of environmental protection.

When analysing the constitutionalisation of environmental protection in Polish law, attention should be paid to its origins in the era of the People's Republic of Poland. In the first half of the 1970s, the People's Republic of Poland developed a comprehensive environmental protection program that also assumed the development of a draft

1 The right to environment has been recognised in 110 States according to a 2019 report by the UN Special Rapporteur on Human Rights and the Environment: 'There are 110 States where this right enjoys constitutional protection[...] 101 States where this right has been incorporated into national legislation[...] In total, more than 80 percent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment'. See Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/43/53, p. 3.

2 Rakoczy, 2021, p. 122.

3 Stoczkiewicz, 2021, p. 309; Cf. Hannum, 2019, p. 56; Cf. Knox, 2020, p. 85.

4 Tang and Spijkers, 2022, p. 102.

law on the protection and shaping of the environment<sup>5</sup>. In accordance with the political will at the time to give fundamental legal status to the regulation of environmental protection, the Constitution of the People's Republic of Poland was finally amended in 1976 to introduce the issue of environmental protection. Two editorials were added to the revised manuscript. Article 12 declares that the Polish People's Republic provides protection and rational development of the natural environment, and Article 71 creates a specific subjective right for citizens, stating that citizens of the People's Republic of Poland have the right to use the value of the environment and protect it. In particular, the content of Article 71 may come as a surprise, even more so from the perspective of a comparative view with the current Polish Constitution<sup>6</sup>, which does not provide such guarantees for individuals; that is, it does not guarantee the general right of the individual to live in a healthy environment. However, one should bear in mind the questionable exercise of rights and freedom in practice under communist regimes. Taking this fact into account and analysing the scope of the regulation, it should be assessed that the current Basic Law of 2 April 1997 contains a much broader and more consistent regulation of environmental issues. Current constitutional regulations consist of five provisions in Articles 5, 31(3), 68(4), 74, and 86. This will be discussed in detail in the following section. The following section focuses on the role of the Polish Constitutional Court in interpreting the constitutional regulations of environmental protection. Therefore, the object of the analysis is the relationship between Polish constitutional regulations and the ECHR, with particular emphasis on the impact of the ECtHR's jurisprudence on the application of the law in the national order.

## 2. Provisions of the Constitution of the Republic of Poland on environmental matters

Simultaneously, the fundamental provision of the Polish Basic Law, which demonstrates the approach of the Polish legislature to environmental protection, is Article 5 of the Polish Constitution, which states that the Republic of Poland shall ensure (among others) the protection of the natural environment pursuant to the principles of sustainable development. This fundamental task of the state is listed alongside the duty to safeguard the independence and integrity of its territory and guarantee the freedoms and rights of persons and citizens, as well as the security of citizens. The inclusion of environmental protection among the core values of preserving each state

5 The need to adopt regulations in this regard was noted at the Seventh Congress of the Polish United Workers' Party in 1975.

6 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended).

clearly demonstrates Polish lawmakers' exceptionally far-reaching recognition of the need to respect the environment.

All tasks enumerated in Article 5 are formulated in the form of programmatic principles, which means that they set the directions of the state's activity; however, they do not specify the means and ways of their implementation<sup>7</sup>. Their importance is further evidenced by the systematics of the Constitution<sup>8</sup>. Article 5 is placed after the provision expressing the principle of the nation's supremacy and the determination of the means of exercising supreme authority, thus designating the most important objectives of the state as indicated by the sovereign. This implies that ensuring environmental protection is among the Republic of Poland's most basic and highest priority objectives.

Article 5 explicitly links environmental protection with the principles of sustainable development. Although this is a basic constitutional principle, it has no legal definition in Polish state law. The Constitutional Court played a key role in indicating the appropriate understanding of the concept of 'sustainable development', which has addressed the content of this principle several times in its jurisprudence<sup>9</sup>. In its judgment on 6 June 2006 the Court stated that public authorities should take action to improve the current state of the environment and program further development, which is precisely what sustainable development entails. According to the Constitutional Court, this principle means not only the protection of nature or the shaping of spatial order but also due care for social and civilizational development associated with the need to build appropriate infrastructure. As the Constitutional Court notes, the idea of sustainable development includes the need to consider various constitutional values and balance them appropriately.

Another important constitutional provision that, like Article 5 discussed above, emphasises the importance of environmental protection as a constitutional value is paragraph 3 of Article 31, which states that any limitations on the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. However, these limitations do not violate the essence of the free domain and rights. Interestingly, the Polish Constitutional Court not only confirmed the admissibility of the limitations on the exercise of constitutional rights and freedom for the sake of environmental protection but also the need to establish such limitations in certain circumstances. Stating so, the court emphasised that the

7 Tuleja, 2021, p. 40.

8 Sarnecki, 2016.

9 See Judgment of Constitutional Court of 13 May 2009, Ref. No. Kp 2/09, M. P. of 2009, No. 32, position 477; Judgment of Constitutional Court of 6 June 2006, Ref. No. K 23/05, OTK-A 2006, no. 6, position 62.

environment constitutes a constitutional value of particular importance and indicated the spheres in which such limitations could be introduced, that is, freedom of economic activity and property rights<sup>10</sup>.

The next two provisions of the Constitution which address the problem of environmental protection, focus on the state's duties related to the environment. Article 68 (4) states that public authorities must combat epidemic illnesses and prevent negative effects of environmental degradation on health. This is one element of the construction of the right to health guaranteed by Article 68. This provides evidence of a clearly discernible relationship between human health and the state of the environment. Thus, the legislature gives expression to a hierarchy of values, placing environmental protection in a secondary position to the essential good of human life and health. However, it indicates that human health cannot be effectively protected without caring for the environment. The Constitutional Court also highlighted the relationship between health and the environment. In its view, the compilation of the content of Articles 68(4), 74 and 86 'makes it possible to recognise that a 'healthy' environment is a constitutional value, the realisation of which should be subordinated to the process of interpreting the Constitution'. Nevertheless, simultaneously, the Polish Constitution 'does not guarantee the subjective right to "live in a healthy environment"'<sup>11</sup>. Scholars mostly share the firm stance of the Constitutional Court<sup>12</sup>. As Professor Lech Garlicki notes, the Polish Constitution does not grant persons under the jurisdiction of the Republic the right to live in a healthy environment because of the legislature's desire to avoid the introduction of a clause of an unrealistic nature and because it is difficult to define legal consequences<sup>13</sup>.

Article 74 is devoted entirely to the State's tasks related to the environment. First, public authorities are charged with 'pursuing policies that ensure environmental security for present and future generations' (paragraph 1) and 'supporting the activities of citizens to protect and improve the quality of the environment' (paragraph 3). This formulation is typical in defining the principles of state policy but does not directly create any subjective rights on the part of the individual. The state's tasks are formulated quite vaguely and generally, all the more emphasised by the use of terms not defined in the Constitution, such as 'ecological security'. The Constitutional Court again proved helpful in interpreting this term. In its judgment dated 6 June 2006 Ref. no. K 23/05, the Court expressed the view that ecological security should be understood as a state of the environment in which an individual can not only stay safely but also use the resources of the environment in a manner that guarantees his development. Simultaneously, it was emphasised that the notion of environmental

10 Judgment of Constitutional Court of 15 May 2006, ref. No. P 32/05, OTK-A 2006, no. 5, position 56.

11 Judgment of the Constitutional Court of 13 May 2009, Kp 2/09, TK-A 2009, no. 5, position 66.

12 Banaszak, 2009, p. 438; Cf. Garlicki, 2003, p. 2; Cf. Surówka, 2012, p. 162

13 Garlicki and Derlatka, 2016.

protection falls within the scope of ecological security. The tasks of the authorities are extended in this case: first, to improve the current state of the environment; second, considering the benefits for future generations, they plan further development in accordance with the principle of sustainable development.

In another judgment referring to the content of Article 74, the Constitutional Court additionally noted that the duty of public authorities to protect the environment includes two elements: prevention and actions aimed at improving the current state with a view toward future generations<sup>14</sup>.

Another category of constitutional provisions related to the environment guarantees individual rights. As already indicated, the Polish Constitution does not guarantee the right to live in a healthy environment. However, Article 74(3) grants and protects the right to information on the state and environment. Therefore, it is included in the form of a subjective right, giving rise to certain claims on the part of an individual and capable of constituting the basis of a plea in a constitutional complaint. The subject of the right to information is 'everyone', i.e. it applies to both citizens and foreigners, and there are no obstacles to considering that legal persons are also entitled to it, provided, of course, that environmental issues fall within their sphere of activity. However, there is no requirement that a person requesting information have a legal or factual interest in obtaining it. However, it should be noted that pursuant to Article 81, the scope of the assertion of this right is determined by statutes, primarily the Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection, and Environmental Impact Assessment<sup>15</sup>. What is important is that Article 74(3) does not indicate the scope of information that must be made available; hence, especially against the background of Article 81, it can be assumed that the legislator is left with considerable regulatory freedom in this regard.

The question arises as to whether environmental protection can be linked to other subjective rights guaranteed by the constitution. Certainly, an apparent link appears to exist between the abovementioned rights to health<sup>16</sup>. In Article 68 (1), the Constitution states that everyone shall have the right to have their health protected, and further, in paragraph 3, that public authorities shall combat epidemic illnesses and prevent the negative health consequences of environmental degradation. These actions are directed towards the implementation of the duty to protect the environment and protect the constitutional value of the health of individuals.

In the case of other rights, the situation is no longer as obvious, as the Constitution and Constitutional Court are silent on other possible links with environmental

14 Judgment of Constitutional Court of 13 May 2009, Ref. No. Kp 2/09.

15 Journal of Laws no. 199, item 1227.

16 Majchrzak, 2022, pp. 263-264.

protection. However, there is a theory that, in the context of enjoying the protection created by other constitutional subjective rights, an individual can invoke the right to the environment, understood as a reflection of a subjective right<sup>17</sup>. There is a potential link with the legal protection of life (Article 38), freedom of movement, freedom to choose one's place of residence and domicile (Article 52(1), e.g. the right of access to the elements constituting the natural landscape of value), and following the ECtHR case law, the right to private life of individuals and the right to property (Articles 47 and 64).

The last category of provisions are those creating duties on the part of 'everyone'. According to Article 86, everyone should care about the quality of the environment and should be held responsible for causing its degradation. The addressees of this provision are both natural persons (citizens, foreigners, stateless persons) and legal persons, as well as organisational units without a legal personality, as long as these entities remain under the authority of the Republic of Poland.

### 3. Impact of ECtHR case law on further environmental protection in Poland

Although, as described in detail in the previous section, the Constitution of the Republic of Poland itself refers directly to the environment and its protection in 5 different provisions, there is no provision which would be the basis for claims arising from the individual's right to the environment (apart from the right to information). The need to single out such a subjective right has been a constant subject of doctrine discussion<sup>18</sup>. For example, according to Drzewicki, it could bring 'practical benefits to every citizen'<sup>19</sup>. In turn, A. Bodnar, the Polish Ombudsman from 2015 to 2021, notes that 'the individual right to live in a clean environment is of fundamental importance for the protection of human rights. This is because the recognition of this right as an individual right will allow for the effective protection of other fundamental rights of the individual, particularly the right to (protect) health'<sup>20</sup>. As D. Kuźniar rightly comments, guaranteeing the right to a healthy environment is not beyond the capabilities of the state, nor does such regulation lead to legal consequences that are difficult to determine<sup>21</sup>, as best evidenced by the numerous national constitutions containing such guarantees.

17 Krzywoń, 2012, p. 16.

18 Majchrzak, 2022, p. 261.

19 Drzewicki, 1985, p. 54.

20 Bodnar, 2020.

21 Kuźniar, 2021, p. 208.

Without further in-depth analysis of academic discussions, it should be noted that, at the level of practice, there is a certain trend of more frequent references in Polish court proceedings to the case law of the Strasbourg Court in the field of violations of individual rights related to environmental pollution, in particular, the reference to the ECtHR's interpretation of Article 8 of the European Convention on Human Rights.

*Apanasewicz v. Poland*<sup>22</sup> was one of the key cases before the ECtHR in which the Court commented on the interrelationship between environmental protection and the right to private and family life. The Court reaffirmed its theses, *inter alia*, that the adverse effects of environmental pollution must reach a certain minimum level if they fall within the scope of Article 8. The assessment of this minimum is relative and depends on all circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects.

In the following years, not only did the ECtHR decide on similar cases concerning the violation of the right to privacy of Polish citizens caused by environmental pollution<sup>23</sup>, but a number of cases were also brought before Polish courts to compensate for violations of personal property (primarily health and privacy) in connection with environmental pollution and the failure of authorities to respond to it. Repeatedly, the outcomes of these cases and the justifications for the verdicts suggest a significant influence of ECtHR jurisprudence. For example, the District Court for Warsaw-Sródmieście in Warsaw ruled in its judgment of 24.01.2019<sup>24</sup>, that the plaintiff's personal interests had been violated as a result of air pollution and the state's liability in connection with this violation. The case was brought by a noted Polish actor against the State Treasury – Ministry of the Environment and the municipal government of Warsaw—for the ineffective and delayed fight against smog, leading to a persistently harmful state of air. The plaintiff pointed out that due to severe air pollution, she could not pursue her passions and interests (cycling and Nordic walking) and often experienced psychological and emotional discomfort. State and municipal inaction in combating smog has led to the infringement of her personal interests, such as the right to enjoy the values of an uncontaminated natural environment, the right to respect private life, and the place of residence. The defendant argued that in Polish law, there is no personal interest in the right to enjoy the qualities of an unpolluted natural environment. Ultimately, the Court agreed on the plaintiff's position. Moreover, the District Court linked the issue of personal interests set out in Article 23 of the Polish Civil Code with the right to respect the home and privacy guaranteed in Article 8 of the ECHR. Here, the court fully shares the case law of the European

22 *Apanasewicz v. Poland*, no. 6854/07 judgment of 3 May 2011.

23 See *Kapa and Others v. Poland*, no. 75031/13, judgment of 14 October 2021.

24 Judgment of the District Court for Warsaw-Sródmieście, 24 January 2019, case no. VI C 1043/18.



Court of Human Rights cited by the plaintiff, primarily concerning the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, from which it follows that severe environmental pollution constitutes a violation of the right to respect the home and the right to privacy in connection with the failure of public authorities to take preventive measures. In the Court's view, there is no doubt that the state of air pollution, which has persisted for years, has adversely affected the plaintiff's quality of life (...). Eventually, the court upheld the claim in its entirety, ordering the State Treasury to pay the sum of 5000 PLN for the social purposes indicated in the claim. The judgment of the court of first instance was appealed to by the State Treasury. On 10 September 2021 a final judgment was issued by the Regional Court in Warsaw, which dismissed the appeal, holding that the Polish State was liable for poor air quality by virtue of its legal obligations in this respect. According to the court, the State, by omission, violated the plaintiff's personal interests, including her right to privacy<sup>25</sup>.

What should be noted in the context of the recent judgments mentioned above is that the courts found the plaintiffs' allegations to be well founded; in each case, the court confirmed the violation of the plaintiffs' privacy and home as a result of the state's inaction in maintaining/restoring clean air. Moreover, the judgments were issued after a long-awaited Polish Supreme Court resolution (Case No. III CZP 27/20),<sup>26</sup> in which the court ruled on the question of whether the value of the enjoyment of clean air may constitute a personal interest and thus may be protected by means of civil law measures<sup>27</sup>.

The answer to the question was fundamental, since the recognition of such value as a personal interest would entail a significant change in the perception of environmental protection in Polish law as merely the subject of the regulation of programmatic norms and would finally link the positive obligations of the state in this field with a correlated subjective right of the individual.

Although the Supreme Court expressed a negative stance that the right to live in a clean environment uncontaminated by air pollution cannot constitute a personal interest, as it is a common good, the care of which is the duty of every member of

25 Similar rulings with analogous arguments have been made in other cases, including Judgment of the District Court for the capital city of Warsaw in Warsaw of 1 October 2019, case ref. no. II C 661/19 as well as the judgment of the Regional Court in Gliwice of 9 December 2021, Case ref. III Ca 1548/18.

26 The resolution of the Supreme Court of 28 May 2021, Case No. III CZP 27/20, LEX no. 3180102.

27 Radecka, 2022, p. 112. The precise wording of the legal question was as follows: 'Does the right to live in a clean environment enabling one to breathe in atmospheric air which meets the quality standards set out in generally binding legislation, in places where a person stays for a sustained period of time, in particular in his or her place of residence, constitute a personal interest subject to protection under Article 23 of the Civil Code, in conjunction with Articles 24 and 448 of the Civil Code?'

society, just as it is the duty of the state, as an organised community and its authorities, it did not close an indirect way of benefiting from legal protection in situations of violations or threats resulting from environmental pollution. Namely, the Supreme Court stated that 'subject to protection as a personal interest are health, freedom, and privacy, the infringement of (or threat to) which can lead to the violation of air-quality standards specified in the legal regulations'. Thus, it has adopted (in a certain simplification) a logic similar to that of the European Court of Human Rights, which has consistently taken the view that the Convention does not provide general protection of the environment as such<sup>28</sup> but contains provisions that allow for the constant development of case law in environmental matters on account of the fact that the exercise of certain rights may be violated because of environmental risks and environmental harm.

A similar approach has emerged in the recent case law of Polish courts. Indeed, civil action may still be available and effective as long as the plaintiffs prove the infringement of their personal interests, such as privacy or health, resulting from their inability to enjoy life in a clean environment. Such indirect linkage of personal interests with environmental values also seems to relate to the above-mentioned A. Krzywoń's concept of the right to the environment understood as a reflection of other subjective rights.

In the context of these considerations, it is also worth noting the ECtHR judgment of 14 October 2021 in the case of *Kapa and Others v. Poland*, which was issued a few months after the Supreme Court resolution. The application was submitted by residents of Smolice who were disturbed by years of heavy traffic owing to the motorway project. The applicants raised allegations of violation of Article 8 of the Convention. In the judgment itself the ECtHR stated that it 'notes the finding of the domestic courts that the applicants' right to health and the peaceful enjoyment of their home had been infringed because the noise in their places of residence caused by traffic had gone beyond the statutory norms'. This is evidence that Polish courts follow the ECtHR practices. A violation related to the environment, such as noise pollution, can be the basis for recognising the infringement of the right to peaceful enjoyment of one's home. However, in the case under review, the Polish regional court stated that the authorities 'could not be held liable for the infringement of the applicants' personal rights' due to taking effective noise mitigation measures. This again indicates a link between the category of personal rights under Polish civil law and the human right to a healthy environment, which becomes a gateway to the indirect recognition of such rights under Polish law.

As B. Majchrzak points out, the analysed ECtHR judgment is a key example of a case which may significantly influence the shape of the legal framework for

<sup>28</sup> *Kyrtatos v. Greece*, no. 41666/98, judgment of 22 May 2003, § 52.

environmental protection in Poland, especially in light of doubts about the existence of an individual's right to the environment in the Polish normative system<sup>29</sup>.

#### 4. Role of the Constitutional Court in the interpretation of the constitutional provisions

As demonstrated above, the Constitutional Court has played an extremely important role in the provision of its interpretations because of the use of numerous undefined terms in the Constitution in the context of the environment. In this way, the Court indicated how even the basic concepts of 'environment' and 'environmental protection' are to be understood. Despite the general principle that constitutional concepts with their autonomous meanings should not be assessed solely through the prism of statutory terms, the court stated that a reference to them does not constitute an error in itself. Therefore, it may be assumed, following the Environmental Protection Law<sup>30</sup>, that 'the environment' is the totality of natural elements, including those transformed as a result of human activity, in particular the earth surface, minerals, waters, air, landscape, climate and other elements of biodiversity, as well as interactions between these elements<sup>31</sup>, and 'environmental protection' is the totality of activities (or omissions) enabling maintenance or restoration of natural balance, in particular those consisting in rational shaping of the environment and management of its resources in accordance with the principle of sustainable development<sup>32</sup>.

The key principles for environmental protection developed by the Constitutional Court are ecological security and sustainable development. The Court commented on several occasions on how to understand these terms properly<sup>33</sup>. Complementing the comments in the section above, in one of its judgments<sup>34</sup>, the Constitutional Court noted that the principle of sustainable development includes not only the protection of nature or the shaping of spatial order, but also due care for social and civilisational development, connected with the need to build an appropriate infrastructure necessary for human and individual community life, taking into account civilisational needs. Therefore, sustainable development requires considering various

29 Majchrzak, 2022, p. 253.

30 The Act of 27 April 2001, The Environmental Protection Law (i.e. Journal of Laws 2021, item 1973, as amended) hereafter referred to as 'Environmental Protection Law'.

31 Article 3 point 39 of the Environmental Protection Law.

32 Article 3 point 13 of the Environmental Protection Law.

33 Some elements of the interpretation of the terms can be found in the following: Judgment of the Constitutional Court of 6 June 2006, ref. No. K 23/05, Judgment of the Constitutional Court of 28 November 2013, ref. No. K 17/12, Judgment of the Constitutional Court of 10 July 2014, ref. No. P 19/13, Judgment of the Constitutional Court of 28 September 2015, ref. No. K 20/14

34 Judgment of the Constitutional Court of 6 June 2006, ref. No. K 23/05.

constitutional values and balancing them appropriately. The requirement to comply with the principle of 'sustainable development' means that wherever there would be interference with the 'environment', care should be taken not only to ensure that the interference is as small as possible (least harmful), but also that the social benefits achieved are at least proportionate, socially appropriate to the losses incurred.

Certainly, the Constitutional Court has had and continues to have a significant impact on the understanding of constitutional provisions related to environmental protection. Given the case law output and the clarification function associated with it, it can be noted that the interpretation used is consistent with the way these terms (such as sustainable development) are understood in international law.

## 5. Strengths and shortcomings of the Polish constitutional framework for environmental protection

The Polish Constitution contains several provisions that explicitly mention the environment, among which are the provisions mentioning the protection of the environment as a fundamental objective of the Republic of Poland, the provisions establishing the state's obligations in this respect, guaranteeing the subjective rights of individuals, and establishing a constitutional obligation for all to care for the environment. The solutions adopted in Polish Basic Law demonstrate that the problem of environmental protection is treated seriously, and its weight and significance are taken into account<sup>35</sup>. From a historical perspective, it can be unequivocally assessed that the constitution in force represents the most far-reaching recognition of the need to protect the environment of all Polish constitutions to date<sup>36</sup>. The value of the natural environment was assigned a constitutional rank. The greatest proof of the value of environmental protection in the Polish legal order is provided by Article 5, in which environmental protection is enumerated as a crucial general objective and principle of the Republic of Poland, pursued in accordance with the principle of sustainable development.

Also noteworthy and to be appreciated is the fact that a number of obligations of the state related to environmental protection and ecological security have been included at the level of the Constitution. However, the provisions that create these obligations raise questions regarding their interpretation. According to some scholars, because there is an obligation to ensure ecological security, a correlation of this obligation is the right to environmental protection and indirectly to the right to the

<sup>35</sup> Rakoczy, 2021, p. 129.

<sup>36</sup> Leśniak, 2013, p. 282.

environment<sup>37</sup>. However, most academics reject this concept as being inconsistent with the literal wording of Article 74 (4) of the Constitution which implies a program norm addressed to public authorities<sup>38</sup>.

Nevertheless, some doubts and questions are repeatedly raised by the fact that the constitutional provisions do not give rise to specific legal obligation, but rather to political ones, have no correlated rights of individuals, such as right to a healthy, clean, favourable environment, to ecological security or to assistance from public authorities in actions for the protection and improvement of the state of the environment. The fundamental difficulty, therefore, lies in determining the proper normative content of such provisions containing the state's duties and answering the question of whether they can be attributed and realised with the use of other constitutional rights of individuals.

As demonstrated in this study, both doctrine and jurisprudential practice show that such an indirect derivation of the right to the environment from the other rights of individuals is possible and has great potential. The analysis of the so far case law of Polish courts and the extent to which the courts deal with a certain inconsistency of the national lawmaker, who simultaneously established in the Constitution a value in the form of a 'healthy' and 'ecologically safe' environment, which is placed high in the hierarchy of all constitutional values<sup>39</sup>, but did not supplement it with a subjective individual's right, leads to the conclusion that there is much room for improvement under domestic law.

The literature highlights several merits, including *expressis verbis* a subjective right to the environment in national constitutions. For instance, according to Boyd, the constitutionalisation of the right to a healthy environment has led to the enactment of strong environmental laws in all studied regions<sup>40</sup>. Moreover, this resulted in stronger enforcement<sup>41</sup> and public involvement in society<sup>42</sup>. Access to justice has also noticeably increased, particularly in Latin America<sup>43</sup>. In addition, the experiences of the culturally and geographically countries closest to Poland in Central Europe provide relevant examples of successful revisions of the constitution in this regard. Of particular note is the experience of Hungary, which not only ensures the right to a healthy environment in the Hungarian Fundamental Law at the level of the state declaration, but through the development of a rich case law of the Hungarian Constitutional Court based on the provisions of the Constitution, Hungarian environmental

37 Korzeniowski, 2012, pp. 381-382.

38 Majchrzak, 2022, pp. 266-267.

39 Majchrzak, 2022, p. 296.

40 Boyd, 2010, p. 233.

41 Ibid, p. 237.

42 Ibid, p. 239.

43 Ibid.

law has been developed in recent years, particularly by developing non-derogation and precautionary principles<sup>44</sup>.

The above comments lead to the *de lege ferenda* conclusion that, at the level of Polish domestic law, the inclusion in the Basic Law of an individual right to healthy environment would be to the benefit of the Polish legal order and would constitute an expression of a strong state commitment both to protecting the interests of future generations and to protecting the environment., Such a solution certainly lies within the scope of social expectations and current trends in constitutional regulation around the world.

44 Szilágyi, 2022, pp. 497-499.

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### **Case law**

- Apanasewicz v. Poland, no. 6854/07 judgment of 3 May 2011;
- Judgment of the District Court for the capital city of Warsaw in Warsaw of 1 October 2019, case ref. no. II C 661/19;
- Judgment of Polish Constitutional Court of 15 May 2006, ref. No. P 32/05, OTK-A 2006, no. 5, position 56;
- Judgment of Polish Constitutional Court of 6 June 2006, Ref. No. K 23/05, OTK-A 2006, no. 6, position 62;
- Judgment of Polish Constitutional Court of 13 May 2009, Ref. No. Kp 2/09, M. P. of 2009, No. 32, position 477;
- Judgment of the Regional Court in Gliwice, 9 December 2021, case no. III Ca 1548/18;
- Judgment of the District Court for Warsaw-Śródmieście, 24 January 2019, case no. VI C 1043/18;
- Kapa and Others v. Poland, no. 75031/13 judgment of 14 October 2021;



- *Kyrtatos v. Greece*, no. 41666/98, judgment of 22 May 2003;
- Resolution of the Supreme Court of 28 May 2021, Case No. III CZP 27/20, LEX no. 3180102;

### ***Acts of law***

- Act of 27 April 2001, The Environmental Protection Law (Journal of Laws of 2021 item 1973 as amended);
- Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment, (Journal of Laws no. 199, item 1227);
- Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended).