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## **TO A CLEAN ENVIRONMENT OR THE RIGHT TO ENERGY SECURITY – THE CHANGE OF CONSTITUTIONAL PRIORITIES**

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**Summary.** The purpose of the article is to demonstrate how the state's constitutional priorities change in practice. Using the example of two constitutional values, namely the right to a clean environment and energy security, it demonstrates how a sudden change in the realities of the functioning of the state affects their perception in the public space (politics, public opinion, the space of European Union activities). The author of the article first of all tries to answer the question of whether the protection of the environment must absolutely give way to the objectives of state policy in the sphere of energy security or maybe the two priorities can function 'in parallel'.

**Keywords:** environmental protection, national energy security, constitutional priority, coal, RES.

**Prawo do czystego środowiska, czy prawo do bezpieczeństwa energetycznego, czyli jak zmieniają się priorytety konstytucyjne.** Celem artykułu jest pokazanie, jak w praktyce zmieniają się priorytety konstytucyjne państwa. Na podstawie przykładu dwóch konstytucyjnych wartości, czyli prawa do czystego środowiska oraz bezpieczeństwa energetycznego, zostało ukazane, jak nagła zmiana realiów funkcjonowania państwa, wpływa na ich postrzeganie w przestrzeni publicznej (polityce, odbiorze społecznym, przestrzeni działalności Unii Europejskiej). Autor artykułu próbuje przede wszystkim odpowiedzieć na pytanie, czy ochrona środowiska, musi bezwzględnie ustępować założeniom polityki państwa w sferze bezpieczeństwa energetycznego, czy jednak oba te priorytety mogą funkcjonować „równolegle”.

**Słowa kluczowe:** ochrona środowiska, bezpieczeństwo energetyczne państwa, priorytet konstytucyjny, węgiel, OZE.

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### 1. 1 Introduction

In recent years, environmental issues have been one of the most important topics of political and scientific debate both in our country and on international and EU level. If we look at the environmental issue in the context of the growing climate crisis and the concurrently increasing environmental awareness of the public and institutions in power, the interest in environmental issues is fully understandable. In fact, one must admit that the environment and its protection

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have become one of the main priorities related to the formation of policies of many countries, including priorities in the creation and application of laws.

On the grounds of Polish constitutional law, it is undoubtedly possible to put forward the thesis that environmental protection has become one of the constitutional priorities over the course of several, perhaps more than a dozen, years (Lis-Staranowicz, Doktor-Bindas, 2021, p. 111). The Constitution of the Republic of Poland of 1997 contains many so-called pro-environmental regulations, which might imply that the document itself was already drafted in a certain awareness of the importance of pro-environmental topics. On the other hand, however, the act does not guarantee citizens a subjective right to a clean environment (or an environment of adequate quality), with the result that a large part of the constitutional provisions are applicable only to the extent regulated by laws.

This article is devoted to the problem of environmental protection in the context of changes taking place in the area of national energy security. More specifically, it shows how constitutional priorities function in practice, with their specific cycle of ‘replacement and substitution’.

## 2. Environmental protection priority

Constitutional priorities should be understood as certain demands or values, based on which the provisions of the Basic Law should be read. They are, in fact, an example of informal constitutional amendment. The essence of constitutional priorities is their variability, as they are not fixed and factually respond to emerging problems of social, economic and sometimes political nature. Thus, in recent times (over the last year), there have been some developments that seem likely to reverse the so-called upward trend in the importance of environmental rights in favour of other priorities, specifically national security, including energy security. Many questions and concerns arise against this background.

In order to assess whether and how the constitutional priority of environmental protection has taken shape in our country, it is first necessary to identify who generally sets these priorities (Lis-Staranowicz, Doktor-Bindas, 2021, p. 114).

These priorities are undoubtedly determined primarily by the political organs of the state, i.e., the Council of Ministers, the Parliament and the President. The Council of Ministers conducts the state’s domestic and foreign policy (Article 146 of the Polish Constitution). Parliament also plays an important role, enacting laws that implement the provisions of the Constitution (Articles 118–121 of the Polish Constitution). Parliament, as a body representing diverse political views, has the tools to set constitutional priorities in the manner most consistent with the will of the people or through political consensus. Finally, the President, who has the right of legislative initiative and the right to sign laws, may, respectively, either submit a bill to the Sejm for a specific law, or terminate the proceedings in a manner he deems just (by signing the law, vetoing it or referring it to the Constitutional Tribunal; Articles 118 and 122 of the Polish Constitution).

The Constitutional Tribunal should undoubtedly be referred to as the body that sets constitutional priorities. It is a body that ‘weighs’ constitutional rights and freedoms, or constitutional principles, giving priority to some and marginalising the other. However, it seems that every court, in deciding the dispute pending before it, is faced with the necessity of resolving the conflict of values, freedoms, rights and duties. Particular importance among the national judiciary in Poland is ascribed to the Supreme Court.

At the same time, citizens exercising their political rights put pressure on their representatives to implement constitutional values, norms and provisions (Lis-Staranowicz, 2020, p. 81). They have the right to strike, the right to petition, the right to assemble and, above all, the right to vote.

In view of the above, one must acknowledge that environmental protection is a constitutional priority, recognized as such on several levels, namely on the normative plane, the plane of law application (judicial) and the activities (various initiatives and actions) of citizens themselves.

The normative plane is formed by international regulations (which are, in fact, the starting point for the creation of all other regulations), EU regulations and national regulations (Doktor-Bindas, 2020, p. 97 et seq.). As for the latter, it should be emphasized that Polish Constitution contains an extensive environmental regulation, which authorizes the thesis of the special importance of the environment and its protection for the Polish legislature (Czekałowska, 2015, p.120). Some even argue that the 1997 Constitution of the Republic of Poland is, in general, one of the more 'environment-friendly' constitutions in all of Europe. The main problem in the area related to the protection of so-called environmental rights under the Polish Basic Law is that it has formally included them in the category of economic, social and cultural rights. In practice, therefore, it will be very difficult to reconstruct specific subjective rights based on their content. In addition, none of the constitutional environmental provisions contains a right to clean air that is literally called an individual right. Environmental regulations take the form of programmatic norms, which essentially means that they only set the direction of state bodies in a general way. Their possible pursuing will always depend on the relevant statutory regulations.

Polish statutory regulations primarily consist of the Environmental Protection Law of 2001,<sup>2</sup> but also, as the practice of application of the law has demonstrated, the Civil Code,<sup>3</sup> especially Articles 23 and 24, which regulate the issue of personal property (Doktor-Bindas, 2020, p. 115 et seq., Grzeszak, 2018, p. 25). This is where we come to another area where constitutional priorities regarding the environment are established, as these very provisions have constituted the basis for initiating legal proceedings before Polish courts in the broadly defined sphere of environmental protection.

The most famous example is the trial of activist from Rybnik, O. Palarz. In the first instance, the District Court in Rybnik (where the lawsuit in this case was filed in 2015)<sup>4</sup> dismissed the claim, as in its opinion the plaintiff did not prove that he suffered bodily injury or health disorder as a result of the smog. In its ruling, the court referred to the judgement of the Supreme Court of 10 July 1975 in the case I CR 356/75, making the violation of a person's right to an unpolluted environment conditional on a violation or threat to personal property under Article 23 of the Civil Code. The court further referred to the judgement of the Court of Appeals in Katowice of 1 February 2018,<sup>5</sup> in which the court stated that the condition for awarding compensation is the existence of bodily injury or disorder of health. According to the district court, the plaintiff could not claim compensation for unspecified wrongs if there was no bodily injury or disorder of health (physical or mental), which are necessary conditions for the legitimacy of the claim. As evident from the above, the District Court in Rybnik did not consider the right to clean air as an intrinsic personal good that could be protected under the provisions of the Civil Code. It made the award of compensation contingent on proving a violation of other goods protected by Article 23 of the Civil Code, such as bodily injury or health disorder, which, according to the court, the plaintiff failed to prove.

The Regional Court in Gliwice, hearing an appeal against the judgement of the above court, disagreed with its arguments and referred a legal question to the Supreme Court. It recognized, among other things, that the human right to pollution-free air shows the

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<sup>2</sup> Act of 27 April 2001 Environmental Protection Law, Journal of Laws 2001, No 62, item 627.

<sup>3</sup> Act of 23 April 1964 Civil Code, Journal of Laws 1964, No 16, item 93.

<sup>4</sup> Ref. II C1259/15.

<sup>5</sup> Ref. I ACa 813/17; similarly in the judgement of the Court of Appeals in Katowice of 23 January 2014, V ACa 649/1

prerequisites of a personal good – it is closely related to the individual, the essence of humanity and the nature of man, inalienable and effective in relation to other persons (Trzewik, 2021, p. 57–63). However, the Supreme Court did not share this view. In a resolution dated 28 May 2021, the Civil Chamber held that the right to live in a clean environment, enabling one to breathe air that meets quality standards, is not a personal good subject to protection under the Civil Code. At the same time, the Chamber stressed that the effects of environmental pollution can be combated by invoking such goods as the right to health, freedom or privacy (Skorupka, 2022, p. 112-120; Krystman, 2022, p. 38-46).

### 3. Energy Security Priority

The recent year has shown that another priority has begun to dominate virtually every sphere of our state's functioning. Namely, the energy crisis caused by the war in Ukraine, and, also to be noted, the long-standing negligence of successive government majorities on the issue of so-called green, or alternative, energy (i.e. not based solely on fossil fuels). The starting point for the change in state policy was undoubtedly the enactment of the so-called Sanctions Law, a law that was precisely a direct response to the war across our eastern border.<sup>6</sup> The regulation made it possible to freeze the funds and economic resources of those present on the so-called 'sanctions list' (i.e., individuals supporting the aggression against Ukraine) and to ban the import of coal from Russia and Belarus. The explanatory memorandum to this law says explicitly that the reduction in the amount of coal imported from Russia will be compensated by importing it from other countries and increasing mining efforts in Poland. This is in clear contradiction to the demands pushed, at least until recently, by the EU and the policy of the entire community (including Poland), according to which mines are to be slowly extinguished and member countries are to switch to energy from renewable energy sources (RES).

Many subsequent decisions related to the direction of the Polish government's policy were also made in this 'spirit', including, among others, the provisions of the so-called Law on Support for Heat Consumers,<sup>7</sup> which introduced the possibility of waiving quality standards for solid fuels for up to two years if 'extraordinary events occur in the market'. In the project's justification, the applicant noted: 'The current exceptional situation is directly affecting energy markets, with the risk that citizens may not be able to purchase heating coal, which may contribute to an increase in energy poverty. In recent years, meeting the demand for thermal coal in the utility sector has been done with imported raw material in Poland, and the events of recent months and the change in the geopolitical situation have translated into a reduction in the import of energy raw materials within the European Union and an increase in their prices. A measure that could lower the price and improve the availability of coal for households, among others, would be to waive the quality requirements for solid fuels marketed for use in the residential and municipal sectors.'<sup>8</sup>

Thus, the aforementioned act introduced into the Act on the system for monitoring and controlling fuel quality<sup>9</sup> Article 6a, according to which, if extraordinary events occur in the market that affect the conditions of supply of solid fuels and that cause difficulties in complying with quality requirements or threaten the energy security of the Republic of Poland, the minister responsible for energy in consultation with the minister responsible for climate may, by means

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<sup>6</sup> Act of 13 April 2022 on special solutions for countering support for aggression against Ukraine and serving to protect security; Journal of Laws 2022, item 835.

<sup>7</sup> Act of 15 September 2022 on special solutions for certain heat sources in connection with the situation on the fuel market, Journal of Laws 2022, item 1967. Sejm paper 2131, available at [www.sejm.gov.pl](http://www.sejm.gov.pl) (accessed on: 26.11.2022).

<sup>8</sup> Sejm paper 2543, available at [www.sejm.gov.pl](http://www.sejm.gov.pl) (accessed on: 26.11.2022).

<sup>9</sup> Act of 25 August 2006 on the system for monitoring and controlling fuel quality; Journal of Laws of 2022, items 1315 and 1576.

of an ordinance, for a specified period, not exceeding 24 months, waive the quality requirements for solid fuels. Regulation of the Minister of Climate and Environment on the subject dated 24 October 2022<sup>10</sup> suspended quality requirements for solid fuels until 30 April 2023.

In turn, the Act of 28 September 2022 on the principles of implementation of programs to support entrepreneurs in connection with the situation in the energy market in 2022–2024<sup>11</sup> allowed for lignite to be sold to all customers, including households. According to Article 13 of the cited law, the ban on the sale of lignite or products obtained from the thermal processing of lignite to so-called retail customers, and therefore households, does not apply until 30 April 2023. The burning of lignite coal causes huge amounts of harmful particulate matter, sulphur oxides or mercury to enter the air. This is because it is a raw material that is much less calorific (has a lower calorific value) than hard coal, and as a result, it must be burned in higher amounts than hard coal.<sup>12</sup>

Admittedly, the public debate emphasizes that the European Union member states, in response to Russian aggression against Ukraine, were in a sense forced to reorganize their previous energy policies and return to the ‘old raw materials’.<sup>13</sup> The most difficult situation was faced by countries heavily dependent on gas from Russia (e.g., Germany) and those that predominantly needed coal to obtain it (e.g., Poland). However, it should be noted at this point that other European countries are also switching to ‘coal mode’ – these include France, the Netherlands, Austria, Greece and the Czech Republic. This shows that the war has changed our view on many energy-related issues. Energy security is treated today as a postulate of so-called first necessity, although in fact it has been one of the most discussed issues in the context of domestic and foreign policies of states for many years (Robel, 2015, p. 140).

The climate crisis, which transformed our thinking about environmental protection and led, among other things, to declarations that the use of coal for home heating or electricity generation should end, seems much less noticeable today. In turn, the energy crisis we are facing prompts us to ask a perverse question – is there perhaps a human right to coal?<sup>14</sup> The author of this thesis believes that the ‘right to coal’ can be stipulated from the Constitution of the Republic of Poland – not in a direct way however, but as a consequence of the obligation to respect certain human and civil rights and freedoms, but also the special treatment of certain social groups. The examples to be cited include Article 66(1) of the Polish Constitution, which stipulates the right to safe and hygienic working conditions (in this regard, detailed OSH standards specify the maximum and minimum temperatures at which professional work can be performed); Article 68(1), which guarantees the right to health care (the realization of this right would not be possible, for example, if outpatient clinics and hospitals were unheated); Article 70 granting the right to education (specific regulations provide minimum requirements for the temperature at which school activities can take place); Article 68(3) requiring authorities to provide special health care to children pregnant women, the disabled and the elderly (and thus, in the case of hospitals, clinics, nursing homes and other public places that house people in need of special support, public authorities must ensure that the premises can be heated – in many cases with coal).

Undoubtedly, the above regulations are also related to the issue of ‘placement’ in our Constitution of the very concept that is energy security. Without addressing this broad issue in

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<sup>10</sup> Journal of Laws of 2022, item 2186.

<sup>11</sup> Journal of Laws of 2022, item 2088.

<sup>12</sup> Source: [teraz-srodowisko.pl](https://teraz-srodowisko.pl), *Ruszyła sprzedaż węgla brunatnego. Lepiej założyć maseczkę?*, J. Spiller, 13 October 2022, (accessed on: 10.11.2022).

<sup>13</sup> Source: [Oko.press](https://oko.press), *UE szuka zastępstwa za rosyjski gaz: węgiel „podnosi brzydki łeb”. Zagrozi celom klimatycznym?*, K. Kojzar, 16 July 2022, (accessed on: 15.11.2022).

<sup>14</sup> Source: [Wyborcza.pl](https://wyborcza.pl), *Z konstytucji można odczytać prawo obywatela do węgla*, A. Bodnar, 4 August 2022 (accessed on: 15.11.2022).

detail, it is sufficient to mention that the issue should be considered primarily in the context of Article 5 of the Polish Constitution, which proclaims the principle of sustainable development, and in the context of other constitutional principles, such as economic freedom, where sustainable development is relevant (Krzywoń, 2012, p. 3; J. Robel, 2015, p. 148). The problem is that assumptions of energy security should be linked in practice to the goals of environmental protection, also implemented in the context of the assumptions of sustainable development (Jurgilewicz, Ovsepyan, 2017, p. 80). According to Article 30(50) of the Environmental Protection Law, sustainable development is understood as ‘social and economic development that includes a process of integrating political, economic and social activities, maintaining natural balance and sustainability of basic natural processes, in order to ensure the possibility of satisfying the basic needs of individual communities or citizens of both the present and future generations’.

#### 4. Summary - do priorities have to be mutually exclusive?

Looking at the current energy situation in Poland (and to some extent in Europe as a whole), one would have to hypothesize that one priority – environmental protection – has given way to another – national energy security. It is difficult to assess with 100% certainty that the trend involving the current return to coal is only temporary. Many facts indeed point to this conclusion. Undoubtedly, this is the direction in which the European Union’s policy will continue to follow, as assured by European Commission President Ursula von der Leyen when she appealed to EU member states not to reach for coal-based energy sources and to prioritize massive investments in renewable energy sources.<sup>15</sup> For the time being, the Polish government’s actions have moved in a completely different direction, as evidenced, for example, by the statutory regulations indicated above.

Do the constitutional priorities have been mutually exclusive and is it not possible for them to function in parallel? In answering these questions, several points should be made. First, it should be emphasized with full conviction that the consciousness of Polish citizens has undergone a very large, even fundamental change in the perception of the importance of the environment for their life and health and the functioning of the state itself. Even if one of the main worries of Poles today is heating their homes in times of energy crisis, it is reasonable to hope that the behaviour and good habits of citizens will not be permanently changed in this direction. Second, although the setting of our country’s energy policy is the responsibility of politicians (mainly the Council of Ministers), the latter cannot disregard other factors, including social expectations, European Union policy or pro-environmental trends in the international space. Third, the current crisis has also shown that the future of the energy sector lies not in fossil fuels, which, in addition to pollution, also generate dependence on other countries (such as Russia), but in diversified RES technologies. Not only do they allow countries to develop and manage their own internal energy markets, but they also have one major advantage – they favour the environment. In fact, RES are explicitly treated as a solution for energy security and an important element of the energy policy of countries, and the goal of their development is not only to fill energy shortages with green technologies, but most of all – to diversify energy sources, which constitutes the basis of national security (Olczak, 2020, p. 116). This is why energy security and a clean environment need not be at all mutually exclusive, but – on the contrary – can even become close allies.

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<sup>15</sup> Source: *Oko.press*, *UE szuka zastępstwa za rosyjski gaz: węgiel „podnosi brzydki łeb”. Zagrozi celom klimatycznym?*, 16 July 2022, (accessed on: 15.11.2022).



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