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The Constitutional Grounds for the Implementation of the “Green Deal” in the Republic of Poland

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Abstract

Dynamic changes in the European climate policy are aimed at a drastic reduction of CO₂ emissions. The Union's policy has several social, economic, and political consequences. Therefore, it is subject to assessment from the perspective of the legal order, including the constitutional order of the Member States. Therefore, a question arises as to the compliance of the “Green Deal” policy with the Polish constitution. It can be very troublesome to answer them positively. The EU policy is not only implemented in the interest of the whole world, and its effectiveness is uncertain, if only due to the need for cooperation of the entire international community. An additional challenge may be the quite evident departure from the principle of sustainable development in favor of climate protection. Although the given questions are troublesome, they deserve attention and noticing an apparent collision.

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Streszczenie**Konstytucyjne podstawy wdrażania „Zielonego Ładu” w Rzeczypospolitej Polskiej**

Dynamiczne zmiany w europejskiej polityce klimatycznej, zmierzają do drastycznego ograniczenia emisji CO₂. Polityka Unii rodzi szereg konsekwencji społecznych, gospodarczych i politycznych. Podlega w związku z tym ocenie z perspektywy porządku prawnego, w tym porządku konstytucyjnego Państw Członkowskich. Pojawia się w związku z tym pytanie o zgodność polityki „Zielonego Ładu” z polską konstytucją. Pozytywna odpowiedź na nie może być bardzo kłopotliwa. Unijna polityka nie tylko jest realizowana w interesie całego świata, a jej skuteczność jest niepewna, choćby z uwagi na konieczność współdziałania całej społeczności międzynarodowej. Dodatkowym wyzwaniem może okazać się dość ewidentne odejście od zasady zrównoważonego rozwoju na rzecz ochrony klimatu. Powyższe pytania pomimo, iż są kłopotliwe zasługują za uwagę i dostrzeżenie wyraźnej kolizji.

The relationship between the constitutional order of the Member States and the systemic order of the European Union is a subject of constant discussions and colliding concepts of the existence and functioning of the Union². Even taking a deeply pro-integration approach in which the sovereignly legitimate state authority must consequently follow development trends, and try to bring them closer to them, understand them and try to submit to the process of globalization gradually³, one cannot perceive the Union's policy wholly detached from the constitutional order of its Member States. The main argument in this respect is the content of the Art. 2 (4) of the Treaty on European Union⁴, accord-

² This fact is confirmed among others by judgement of German Federal Constitutional Court of 5 may 2020, 2 BvR 859/15. K.M. Witkowska-Chrzczonek, *Konstytucyjnoprawny wymiar członkostwa Polski w Unii Europejskiej*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2013, p. 132.

³ Judgement of the High Court of Czech Republic PL. ÚS 19/08 SK issued at 26 November 2008, quoted in K.M. Witkowska-Chrzczonek, *op.cit.*, p. 132.

⁴ Treaty on European Union, consolidated text – Dz. Urz. UE C 326/13, hereinafter mentioned also as “TUE”.

ing to which the Union respects the equality of the Member States *vis-à-vis* the Treaties, as well as their national identity, inseparable from their basic political and constitutional structures. It is undeniable that issues of public security are still primarily the subject of the internal policies of the Member States⁵, which is based among other things, in the same Treaty provision, as well as in the provisions of the Treaty on the Functioning of the European Union⁶.

In this context, it is worth considering whether one of the main political goals of the Union, which is the implementation of the “Green Deal” policy, is consistent with the constitutional order of the Republic of Poland⁷. It is an issue that goes far beyond the sphere of environmental protection, the aim of which is to strive to maintain global security through internal activities in the Member States.

I. The Implementation of the “Green Deal” and Its Main Consequences

In a recent State of the Union address to the European Parliament, European Commission President Ursula von der Leyen proposed increasing the CO₂ reduction target by 2030. to at least 55%⁸. The reason for such action is recognized by the highest European authorities, the impact of this gas emission on the increase in temperature on the entire planet Earth inhabited by people⁹.

⁵ It should be noted at this point that the policy of the “Green Deal” does not fall within the security policy regulated in Chapter 2 of the Treaty on European Union, because its subject is external actions, but in this case we are dealing with internal actions of the Union.

⁶ Public security competence is partly a shared competence as set out in Art. 4 sec. 2 p.J. TFEU, to the extent that they refer to the Union as an area of freedom, security and justice.

⁷ Apart from the ongoing discussion on the scope of the Union’s competences, as well as the scope and application of the subsidiarity principle, which is the case with shared competences, there is no doubt that in this area respect for the constitutional separateness of States has a wider application. E. Cloots, *National Identity in EU Law*, Oxford 2015, p. 118.

⁸ *Statement on state of Union 2020*, https://ec.europa.eu/info/sites/info/files/state_of_the_union_pl.pdf (23.09.2020).

⁹ As it is stated in Summary for Policymakers of IPCC Report, human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C. Global warming is likely to reach 1.5°C between 2030 and 2052, if it continues to increase at the current rate. IPCC, 2018: *Summary for Policymakers*, [in:] *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C*

Apart from the discussion of climate scientists about the extent of this impact¹⁰, which has been going on for years, and the surprisingly strange lack of greater interest in the EU in reducing emissions of another greenhouse gas – methane¹¹, it is enough to make a simple observation for further considerations that the reduction of CO₂ emissions was considered crucial for the security of the whole world. “Green Deal” is implemented by efforts of the European Union and its Member States not only to protect the security of the Union itself or its members but, first of all, to protect the security of the entire globe.

At the same time, it is essential to realize that the goal of reducing greenhouse gas emissions is not only an external political declaration but also means a complex of internal actions. First of all, it is associated with the mobilization of both powerful financial resources in this direction to support investments, mainly in the so-called renewable energy sources, but also mechanisms of compulsion¹², in particular economic coercion against specific sectors of the economy. As a consequence of their application, Polish society will have to bear a substantial financial burden related to, among other things, the modernization of the energy sector. Accelerate the energy transition toward the goals set by the President of the European Commission poses a vast social and economic risk for Poland¹³. The estimated costs of its management are hundreds of billions PLN, which the average citizen will have to spend not only as a taxpayer, but also as a consumer of energy, or any other products for which energy is consumed in various forms. The implementation of the “Green Deal” therefore means the necessity of individual and col-

above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty; IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, eds. V. Masson-Delmotte, P. Zhai, H.-O. Pörtner, D. Roberts, <https://www.ipcc.ch> (8.10.2020).

¹⁰ E. Boeker, R. van Grondelle, *Fizyka środowiska*, Warsaw 2002, pp. 71–78; S. Jeevananda Reddy, *Climate Change: Myths and Realities*, Hyderabad 2008, pp. 76–85; J. Lovelock, *The Vanishing Face of Gaia*, audiobook available at Audible by Amazon.

¹¹ Despite its very important greenhouse properties, methane has only recently become a subject of EU interest, <https://biznesalert.pl/strategia-metan-unia-europejska-energetyka-gaz-klimat> (23.09.2020).

¹² Such a mechanism is the CO₂ emissions trading system.

¹³ J. Dudala, *Transformacja energetyczna może się okazać katastrofą społeczną i ekonomiczną*, <https://www.wnp.pl> (8.10.2020).

lective sacrifice for the good of the whole Earth, both in the financial sphere and in the sphere of increasing the risk of the proper functioning of the primary economic mechanisms¹⁴.

It is necessary to note that such a sacrifice may turn out to be just a drop in the ocean of the needs of the entire globe in this regard¹⁵, and as a result, it will only not be sufficient to achieve the goal. Complementing the picture of reality, it is also impossible to ignore the vital fact that, according to climatologists, the re-education of CO₂ emissions, which may have an impact on avoiding adverse changes in the Earth's climate, must be drastic¹⁶. Therefore, there can be no question of maintaining a balance between economic development and environmental protection; the latter must have absolute priority to achieve the goal.

In summary, the implementation of the "Green Deal" means that there is a need to make a rapid, costly change, with a significant risk of economic collapse, without any guarantee of achievement, in the name of global security. This observation is by no means based on the extreme views of the opponents of such a policy but is only a summary of the dry facts, which its supporters should not deny¹⁷.

II. Constitutional Basis for the Implementation of the "Green Deal" in the Polish Constitution

Considering the importance of the characterized obligations, as well as the reference to primary law of the European Union indicated in the introduction, the search for constitutional foundations for the implementation of the

¹⁴ At this point, the author omits speculations about the scale of risk, which is assessed differently by experts from various industries, who often act in their interest. In order to achieve the aim of this study, it is enough to state that such a risk exists and that no expert can deny it.

¹⁵ R.C.J. Sommerville, *Politics and Public Perceptions of Climate Change*, [in:] *Climate Change: Inferences from Paleoclimate and Regional Aspects*, eds. A. Berger, F. Mesinger, D. Sijacki, Springer 2012, p. 13.

¹⁶ Ibidem, p. 3.

¹⁷ The discourse on this subject goes far beyond the boundaries of legal discipline. It should be noted that, in fact, it is dominated by arguments of an ideological and political nature, which often are behind the interests of powerful lobbyists.

“Green Deal” policy seems necessary. At the same time, its complex characteristics may turn out to be a very significant challenge on the way to finding the constitutional foundations for its implementation. First of all, it is a set of activities aimed at the common good of the whole world. At this point, it should be noted that the reference to the need to undertake international co-operation is included in the preamble to the Constitution of the Republic of Poland. It contains a clear indication that it should be undertaken for the benefit of the “Human Family”. The term used by the Polish legislator in the Basic Law derives from the tradition of international human rights law¹⁸. Such a phrase is used, among other things, by the Universal Declaration of Human Rights¹⁹, in the introduction to which it was written: “Considering that the recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the basis of freedom, justice, and peace in the world”. The declaration formulated in the preamble to the Constitution refers to the human rights of all generations, including solidarity rights, which are the most important for the global community as a whole. The human rights doctrine distinguishes two groups of these rights²⁰. The first includes rights related to the worldwide redistribution of power:

- the right to political, economic, social, and cultural self-determination,
- the right to political, economic, and social development,
- the right to share in and benefit from the “common heritage of humanity”²¹.

The second group that seems to be the most important from the perspective of the discussed considerations includes the rights related to the limited potential of individual states. This group consists of the right to peace, as well as the right to a healthy and sustainable environment, and the freedom to humanitarian aid in disaster relief²². The second group of third-generation human rights may therefore also include the right to prevent the effects of cli-

¹⁸ M. Piechowiak, *Preambula Konstytucji Rzeczypospolitej Polskiej z 1997 r. Aksjologiczne podstawy prawa*, 2020, Legalis [online].

¹⁹ Resolution of United Nations General Assembly of 10 December 1948, A/RES/217(III), <https://www.un.org> (8.10.2020).

²⁰ B.H. Weston, *Human Rights*, “Human Rights Quarterly” 1984, vol. 6, No. 3, p. 266.

²¹ K. Drzewicki, *Prawo do rozwoju. Studium z zakresu praw człowieka*, Gdańsk 1988, p. 23.

²² M. Piechowiak, *op.cit.*

mate change, or, as the President of the European Commission declares, to avoid climate change.

In such a perspective, the preamble to the Constitution of the Republic of Poland provides a basis for interpreting its provisions in the spirit of global solidarity and striving for effective prevention of disasters, both in the mentioned paragraph and in the words closing the preamble, requiring its application while maintaining the obligation of solidarity with others. It should be noticed that when interpreting the provisions of the Constitution defining the responsibilities of the Polish state, one may be guided by the good of the entire “Human Family” only if the content of the Constitution does not directly oppose it.

Bearing in mind the goal of the “Green Deal” policy, which is to stop global warming as a phenomenon considered to be dangerous for the entire human family, as indicated before, this is not an issue only in the area of environmental protection. However, it is undoubtedly closely related to it. Under that, the effects of climate change go beyond the impact on ecosystems²³. Therefore, in terms of the location of the issue in the area of action by public authorities, they should be identified as a security and ecological policy. In this context, all activities of the Polish state should comply with the necessary programming standards set out in Art. 5 of the Constitution²⁴. According to this provision, the Republic of Poland guards the independence and inviolability of its territory, ensures human and civil liberties and rights, and the safety of citizens protects the national heritage and ensures environmental protection, guided by the principle of sustainable development. The quoted provision relates to both key issues, i.e. safety and ecological security.

However, it should be noted that in the first aspect, it indicates that security is not guaranteed to everyone, but only to those who have a citizenship relationship with the state²⁵. The issue of security under the Constitution should, therefore, be considered taking into account all factors that affect it, and the

²³ The main consequence of climate change is an increase in air and water temperature, which in turn may affect the melting of the ice sheet and rising sea levels. Phenomena such as droughts, torrential rainstorms and forest fires are also associated with climate change.

²⁴ M. Florczak-Wątor, *Komentarz do art. 5*, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warsaw 2016, No. 1.

²⁵ *Ibidem*, No. 33.

solutions adopted by the state should be the best guarantee of security for its citizens. Such an approach can have a considerable impact on the evaluation of the “Green Deal” policy. Measures adopted within its framework are established for the benefit of the entire international community, and their consequences, as previously indicated, may even constitute a significant threat to the security of the Polish state and its citizens²⁶.

In other words, the programme norm of the Constitution does not allow the Polish state to enact legal measures, the consequences of which would favorably affect the security of the entire human family and worsen the safety of Polish citizens, even if it was temporary.

Concerning the second part of the curriculum standard referred to in Art. 5 of the Constitution relating to environmental protection, it should be indicated that the principle of sustainable development should guide the state policy in this area. It means the requirement that the interference with the environment should take place in the least harmful way to its resources, and that the social benefits of this interference should exceed the potential damage²⁷. As indicated, among other things, in its ruling by the Constitutional Tribunal, “The principles of sustainable development include not only nature protection or shaping spatial order, but also due care for social and civilization development, related to the need to build appropriate infrastructure, necessary for – taking into account civilization needs – human life and individual communities. The idea of sustainable development thus includes the need to take into account various constitutional values and to balance them accordingly”²⁸. Meanwhile, as indicated earlier, the policy of the “Green Deal” implements the postulate of a drastic reduction of CO₂ emissions formulated by the international community of climate scientists, which places much greater emphasis on environmental protection than on development or maintain-

²⁶ The main security risk is the risk of blackout, i.e. power cuts. The Polish energy sector is based on production assets that are highly CO₂-neutral and should be set aside in the assumptions of the Green Deal policy. If they are not replaced by low-emission assets, or insufficient amounts are created, or if such assets are created that do not guarantee the balancing of the network, the risk of an interruption in electricity supply is a completely real threat that must be taken into account.

²⁷ M. Florczak-Wątor, *op.cit.*, No. 40.

²⁸ Judgement of the Polish Constitutional Tribunal of 6 June 2006, case No. K 23/05, OTK-A 2006, No. 6, item 62.

ing the economic balance of the state. Therefore, it isn't easy to talk about any balancing of constitutional values in her case²⁹.

Both the content of the mentioned preamble and the meaning of the mentioned programme norms should be considered crucial from the perspective of the interpretation of Art. 74 (1) of the Constitution, which is the foundation of the "right to" ecological safety. This provision states that public authorities pursue a policy ensuring environmental protection for the present and future generations. In the subjective sphere, it does not unequivocally pre-judge that the state should provide this type of security only to its citizens. Such a restriction would run counter to the idea of ensuring safety for future generations who have not yet acquired citizenship. The nature of the phenomenon of ecology, which goes beyond the borders of the country in many respects, not only in terms of climate, also speaks in favor of a broad understanding of the subjective sphere. Therefore, the obligation to ensure ecological safety can be applied to the entire human family, following the preamble to the Constitution.

Referring to the dependence of Art. 5 and Art. 74, para. 1. of the Constitution, it can be indicated that the duty to protect the environment indicated therein plays a supporting role concerning environmental safety. Ecological safety includes all activities of public authorities aimed at improving the condition of the domain³⁰. There is no doubt that the climate is part of the natural environment³¹. Hence it can be concluded that ensuring climate security should be carried out by providing environmental protection, in a manner consistent with the principle of sustainable development. The jurisprudence of the Constitutional Tribunal also supports this understanding of this provision. In one of the rulings, he stated that "Public authorities have to ensure the country's energy security, and thus to strive to satisfy both the cur-

²⁹ In particular, the implementation of the "Green Deal" policy comes at the expense of freedom of economic activity and protection of property rights.

³⁰ A. Surówka, *Bezpieczeństwo ekologiczne a gospodarowanie odpadami w świetle prawa konstytucyjnego*, "Przegląd Prawa Konstytucyjnego" 2012, No. 4, p. 154.

³¹ Art. 3 pt. 39 of the Environmental Protection Law, consolidated text: Journal of Laws of Poland 2020, item 1219, defines the environment as all natural elements, including those transformed as a result of human activity, in particular the earth's surface, minerals, water, air, landscape, climate and other elements of biological diversity, as well as the interactions between these elements.

rent and anticipated energy needs under the conditions specified in Art. 74 sec. 1 of the Constitution, thus taking into account the ecological safety of the present and future generations³². In the presented judgment, the Tribunal has weighed two values – environmental safety and energy security, which results directly from the application of the principle of sustainable development. Art. 74 sec. 1 of the Constitution could constitute a legitimation of the “Green Deal” policy if it did not mean the necessity to abandon the principle of sustainable development.

III. Conclusions

The Constitution of the Republic of Poland can undoubtedly legitimize the implementation of legal measures for the benefit of the entire “Human Family”. However, there are severe doubts as to whether this may take place in conditions of deterioration of the security of Polish citizens, as well as in violation of the principle of sustainable development. Even if the first of the mentioned conditions might be subject to legal, economic, and political discussion, the second one seems to be very obvious. Taking under consideration time pressure brought by the European Commission, it might be extremely difficult to prove that the European policy of the “Green Deal”, lies steel within the scope of sustainable development. EU policy assumes the implementation of radical measures forcing the reduction of CO₂ emissions, is therefore at odds with the values of the Polish Constitution. Striving to ensure the rule of law in Poland and the European Union, it seems necessary to take steps either to revise the EU policy or the provisions of the Constitution, however, both measures might seem to be very difficult.

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