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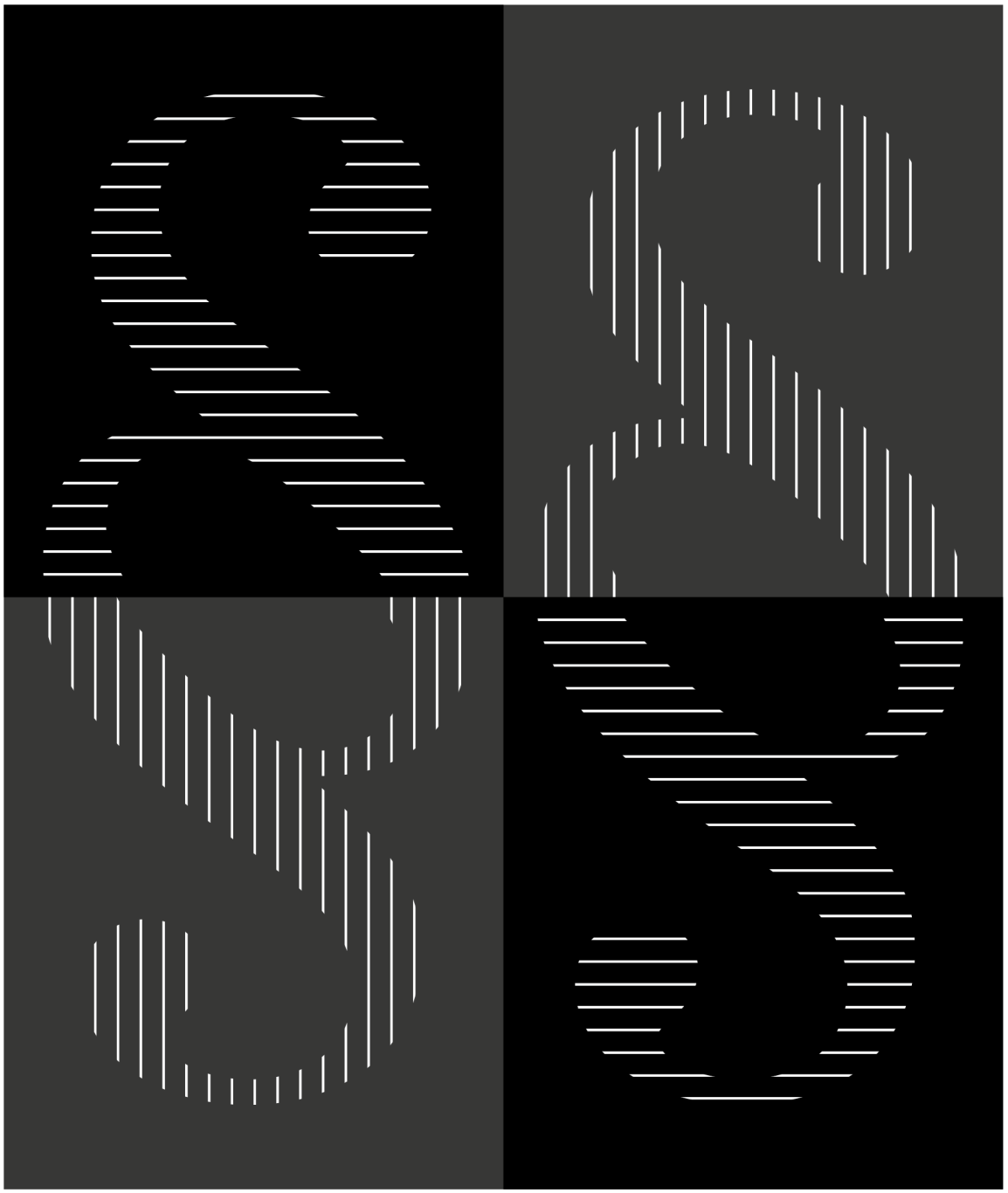

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Sustainable Development and Human Rights

red. Wojciech Bańczyk

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Table of contents

Internetowy Przegląd
Prawniczy TBSP UJ 2019/4
ISSN 1689–9601

Wojciech Bańczyk[1]

Sustainable Development and Human Rights – Introductory Remarks

Sustainable development comes out in our times both as a significant challenge to states, corporations and apparently every person, as well as a promising research field in the academic world. The adoption of Agenda 2030 showed that it is the concept of sustainable development that marks the direction in which the future world should go.

The agenda for the world extends to the necessary change of binding law, at first, only as yet another aspect of human activity, and could be proceeded either in the interpretation of existing norms, or in their inevitable novelisation. However, law could also be adopted as a mean to implement the concept of sustainable development in varied spheres of life.

The concept of sustainable development must also be interpreted from the perspective of other normative systems[2], as – in particular – some of them may better deal with resulting responsibilities that are far more complex as well as not yet fully clarified as to their detailed content[3]. At the same time, the public control and transparency[4] of hard law instruments must not be overlooked.

Therefore, the legal analysis of the concept of sustainable development should properly consider the complex legal background. Also, necessary interdisciplinary approach to the multifaceted scope of regulation must be adopted.

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[2] P. Szwedo, R. Peltz-Steele, D. Tamada, *Introduction* [in:] *Law and Development. Balancing Principles and Values*, ed. P. Szwedo, R. Peltz-Steele, D. Tamada, Singapore 2019, p. viii.

[3] See *ibidem*, on the perspective of sustainable development as a process.

[4] A. Szafrański, P. Szwedo, M. Klein, *Comparative Perspectives of Adult Content Filtering: Legal Challenges and Implications*, Catholic University Law Review 2019, vol. 68, issue 1, p. 161.

Thus, the broad-ranging content of the Agenda 2030 that covers 17 interconnected goals and 169 targets, goes far beyond environmental protection, which initially predominated the debate about sustainability[5]. Currently, the primary aim within sustainable development is eradicating poverty[6], but still it should be understood in a „balanced and integrated manner" within the three dimensions, namely: „economic, social and environmental"[7].

The overarching scope of the concept of sustainable development inevitably leads to conflicts even within the particular goals and targets. Then, it is the proper analysis of values behind them, together with proper perception of the well-being of humanity, that could solve those conflicts.

The attempts as above have been proceeded by the law faculties in Poland. Already (since 2018) at the Faculty of Law and Administration of Jagiellonian University in Kraków, as well as at the Faculty of Law and Administration of University of Warsaw there are workshops on law of sustainable development. In Kraków these are taught jointly by Prof. Piotr Szwedo and by Wojciech Bańczyk, while in Warsaw – by Prof. Adam Szafrański, by Prof. Paweł Wojciechowski and by Marcin Stębelski, PhD. Within those courses the tutoring method is implemented to help the students prepare their academic research on the issues of particular legal problems involving primarily conflicts of economic efficiency and non-economic values[8]. This idea derives from the project of Colloquium Legale tutoring program, directed on analyses of various problems positioned at the breakthrough between dogmatic legal studies and necessary broader approach, in particular involving values-oriented perspective[9]. At the Jagiellonian University in Kraków it was developed, following the pattern successfully proceeded at the University of Warsaw[10].

Such an approach led to numerous academic events aimed at developing and popularising the chosen method and subject of research[11]. One of them was the in-

[5] E.B. Weiss, *In Fairness to Future Generations and Sustainable Development*, American University International Law Review 1992/8.1, p. 20–22, still underlines that although it is essential to meet the basic needs of the poor, the result thereof is primarily to make them fulfilling the obligations in the area of preserving the planet's resources and reversing ecologic degradation.

[6] *Introduction* [in:] *Transforming our World: The 2030 Agenda for Sustainable Development*, UN General Assembly Resolution from 25th September 2015, GA/RES/70/1, para. 2, makes it explicit that this is the greatest challenge for sustainable development.

[7] *Ibidem*.

[8] http://www.okspo.wpia.uj.edu.pl/sustainable-development, 18.12.2019. Varied teaching methods are adopted – one of them is e.g. educational trip, which in 2018 was proceeded with Prof. Richard Peltz-Steele, University of Massachusetts – see: https://www.umassd.edu/news/law-news/law-faculty-news/peltz-steele-poland-2018.html, 18.12.2019.

[9] The interdisciplinary character of students' development reached by the adoption of the tutoring method is examined in the pedagogical research, see e.g. N. Borkowska, *Tutoring w edukacji*, Colloquium: Edukacja – Polityka – Historia 2018/4, p. 10 and 12.

[10] http://cl.uw.edu.pl/, 18.12.2019.

[11] See e.g. A. Szafrański, P. Szwedo, M. Klein, *op.cit.*; *Law and Development*… Among others, see e.g. the University Alliance for Sustainability's (UAS) Annual Spring Campus Conferences at Freie Universität Berlin, https://www.fu-berlin.de/en/sites/uas/events-and-resources/index.html, 18.12.2019.

ternational conference „Sustainable Development and Human Rights" organised at the Jagiellonian University in Kraków on 25th April 2019. It hosted, in particular, three ombudspersons (Prof. Gyula Bàndi, Hungary; Adam Bodnar, PhD, Poland; Prof. Mária Patakyová, Slovakia), two general consuls (Prof. Adrienne Körmendy, Hungary and Tomáš Kašaj, PhD, Slovakia), as well as scholars, including also doctoral students and students representing various countries and universities[12].

This conference, at first, was aimed mostly as a recapitulation of the 2018/2019 workshops. However, it gained a considerable interest among other scholars involved in the research subject and eventually became a broader platform for thoughts exchange in the subject of sustainable development and human rights.

In order to preserve the original researches undertaken by participants of the conference, as well as the fruitful results of their speeches and discussions presented during the conference, contributions were prepared for publication. Next to the Transformacje Prawa Prywatnego journal [The Transformation of Private Law], in which articles will also be published, this volume aims to present the broad-ranging perspective on varied dimensions of the concept of sustainable development in the interdisciplinary perspective.

Numerous approaches were chosen by the authors. Many of them follow more typical dogmatic studies of binding law and its compliance with evolving demands of sustainability. However, all of them adopted noteworthy attempts to observe the analysed issues from the inevitable broader perspective. Also, authors represent varied countries, which always likely leads to the further differentiation of the research perspectives.

Jakub Brejdak offers the readers his historical analysis of the adoption of the sustainable development principle in the Article 5 of the 1997 Polish Constitution, showing how it should be currently understood. Vivien Benda observes, on the other hand, the emerging process of usage of the direct democracy tool in the European Union perspective (the citizens' legislative initiative) on the example of the activeness to promote better protection of right to water. Arthur Champéroux covers varied approaches towards the „polluter pays" principle, in particular as referring to the both economic and moral responsibility of the polluter. Interestingly, he referred to the most recent undertakings during the 2019 Katowice Conference of the Parties to the United Nations (COP24). All their researches well prove that both content of law, as well as its legislative history, including political tensions, show the importance of the issue of sustainable development but also its particular challenges.

Two complex studies from the economic perspective are undertaken by Filip Lubiński and Jacek Mainardi. Filip Lubiński interestingly challenges the favouring of the small and medium enterprises, analysing data showing that those that most efficiently use the resources are the biggest economic units. Also, he observes that competition law could aim not only to support market structure but also might be adopted to promote innovativeness and proper management of resources. Jacek Mainardi, however, studies the macroscale of finance and the challenges connected with financing

[12] http://www.uj.edu.pl/wiadomosci/-/journal_content/56_INSTANCE_d82lKZvhit4m/10172/142652701, 18.12.2019.

and incentivizing the activities inclined towards sustainable development. Then, both authors refer to the interdisciplinary nature of the sustainable development and – in particular – its breakthrough with both economics and non-economic values.

Additionally, this volume includes two case studies. By research on examples of activities undertaken by oil industry, that are typically economic-oriented, Marcin Kamiński challenges this conventional wisdom, and analyses actions planned towards well-being of humanity. At the same time, Gabriella Szamek's contribution refers to the particular activities of the Hungarian Ombudsman for Future Generations, especially in favour of well-chosen vulnerable groups.

The volume, as presented above, seems to be a noteworthy example of research made by young scholars aiming to observe the law from the interdisciplinary perspective. Also, it proofs the broad-ranging scope of challenges connected with the legal issues of sustainable development.

Internetowy Przegląd
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Vivien Benda[1]

The Right to Water and Sanitation – is it still a Great Challenge to the European Union?

Abstract:

Drinking a glass of clean water when we are thirsty is one of the most usual everyday action in our life. If we are one of those lucky people who have access to clean water and who could afford it because accessing to safely managed drinking water services is still not granted to everyone. In this light, it is not surprising that ensuring access to water and sanitation for all is one of the Sustainable Development Goals (SDGs) which agenda aspires to transform our world till 2030. I assume that we can agree that we cannot fulfil our intergenerational obligations properly as long as there are serious intragenerational problems to be solved, like the issue of the right to water and sanitation.

This is a global ethical problem but most people identify this as the problem of developing countries; however the Member States of the European Union are also involved. The 'Right2Water' initiative, the first European Citizens' Initiative (ECI), which can be regarded as successful, highlights the problem of the water services' liberalization which can cause the exclusion of poor people of enjoying these significant human rights.

Key words: Sustainable Developments Goals, right to water and sanitation, European Citizens' Initiative

1. Introduction

At first sight, the questions raised by the examination of the right to water and sanitation might not seem to be really urgent in the states of the European Union. However,

[1] 3rd year PhD student of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University. I would like to express my gratitude to all those who have made this article possible, in particular to my consultant, Dr. Gyula Bándi, PhD.

the first successful European Citizens' Initiative, the so-called 'Right2Water' initiative[2] addressed this problem and focused on this issue. In my paper I will examine this European Citizens' Initiative and its follow-up, in order to generate a better understanding of its reflections and proposals. First of all, I will briefly review the right to water and sanitation in the context of the generations of human rights and examine the international legal environment. Subsequently, I will analyse the 'Right2Water' European Citizens' Initiative's chronology and the relevant related documents.

I think that this new European tool of direct democracy could be an opportunity to put environmental and human right issues to the European legal and political agenda. Moreover, I consider that this certain European Citizens' Initiative is a real success as it led to the start of the legislative process and, after its campaign and success, the European Union addressed the issue, which is one of the main achievements of the Initiative.

2. Development

2.1. The right to water and sanitation in the international dimension of human rights

According to the widespread conception of Karel Vasak we can distinguish three generations of human rights. The first generation is based on the negative obligations of the states, therefore they are often called 'liberty rights', while the second generation requires positive actions and contains economic, social and cultural rights. The third generation of human rights includes the so-called solidarity rights[3].

In agreement with Amy Hardberger we can ascertain that in the literature it is not unanimous in which generation of rights can we classify the right to water and sanitation[4]. John Scanlon, Angela Cassar and Noémi Nemes share this view too as they state that on the one hand this right is one of the most essential elements of other rights[5], but on the other hand, the clear classification is missing from the international documents[6].

There is no direct mention of the right to water and sanitation in the International Bill of Human Rights but according to Scanlon, Cassar and Nemes the Universal Declaration of Human Rights[7] may include implicitly the right as it is essential to satisfy standards of other rights, such as the right to life[8]. However, the International Covenant

[2] Water and sanitation are a human right! Water is a public good, not a commodity! Commission registration number: ECI(2012)000003.

[3] K. Vasak, *A 30-year struggle. The sustained efforts to give force of law to the universal Declaration of Human Rights*, The Unesco Courier: A window open on the world 11/1977, p. 29.

[4] A. Herdberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, Northwestern Journal of International Human Rights 2/2005, p. 331–333.

[5] E.g. the right to life or the right to dignity.

[6] J. Scanlon, A. Cassar, N. Nemes, *Water as a Human Right?*, IUCN Environmental Policy and Law Paper 51/2004, p. 3–12.

[7] G.A. Res. 217A (III) UN Doc. A/810, at 71 (1948).

[8] J. Scanlon, A. Cassar, N. Nemes, *op.cit.,* p. 3–4.

on Economic, Social and Cultural Rights[9] neither mentions the right to water and sanitation, although it plays an important role in the interpretation of the right's content as we will see below. We need to mention that two of the Geneva Conventions of 1949[10] have reference to the issue but they are not classical human rights documents as they contain the State's obligations but not the individuals' entitlements.

Two conventions focusing on vulnerable groups of people consider the right to water and sanitation too. The Convention on the Elimination of All Forms of Discrimination against Women associates it with the right to adequate standard of living[11], while the Convention on the Rights of the Child states that the States Parties shall take appropriate measures to combat disease and malnutrition, among other things with providing safe drinking water[12].

Let us turn our attention to the non-legally binding instruments of international law. We can observe the greater recognition of the right to water and sanitation as an individual human right – for example, the Dublin Statement on Water and Sustainable Development declares that it is 'vital' to recognize that the access to clean water and sanitation is a basic human right for all[13]. Further on, we will glance at two other significant non-legally binding instruments.

I think that despite the fact of the classification problem mentioned above, we can and we need to classify the right in the generations of rights. I consider that we can ascertain that it is not only a component of another right, mostly the right to life or dignity. In this case, the States' negative obligations would dominate, so they shall just refrain from interfering the exercise of the right. This is also supported by the United Nation's General Assembly's resolution[14] in which they clearly expressed that the right to water and sanitation is an individual human right.

Thus, we can state that it is an individual human right but we need to decide whether is it a second or a third generation right. I think we can claim that the latter option is the answer to the question. According to Gyula Bándi, the third generation of rights – which are significant in the environmental law – expect states' active obligations, just like the second generation rights, but it also indicates the duty of cooperation between states[15]. This obligation of cooperation appears in the Committee on Economic, Social and Cultural Rights' General Comment No. 15. in which the Committee also de-

[9] International Covenant on Economic, Social and Cultural Rights, adopted 16th December 1966, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966).

[10] Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12th August 1949, Art. 20 and Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12th August 1949, Art. 85.

[11] Convention on the Elimination of All Forms of Discrimination against Women, adopted 18th December 1979, G.A. Res. 34/180, Art. 14 h).

[12] Convention on the Rights of the Child, adopted 20th November 1989, G.A. Res. 44/25, Art 24, para. 2 c).

[13] Principle 4 of the Dublin Conference on Water and Sustainable Development, 31st January 1992, Dublin.

[14] UN G.A. Resolution (A/RES/64/292).

[15] Gy. Bándi, *Környezetjog*, Budapest 2011, p. 62–63.

clared that even there is no explicit mention to the right in the International Covenant, it is implicitly part of it because the enumeration of the elements of the adequate standard of living is not exhaustive[16]. According to the Comment: „the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive"[17]. In the field of international cooperation, the Committee states that the State parties shall recognize the importance of cooperation and take joint and separated actions to the full realization[18]. Moreover, this obligation to cooperate is consistent with Edith Brown Weiss conception of intragenerational equity – the equity among those who are living today – which is complementary to the intergenerational equity[19].

The General Comment mentioned above is really determining because the Committee defined the elements of the right's content. According to the Comment[20] the following factors must be applied in all circumstances. The water supply must be sufficiently and continuously *available* for each person's personal and domestic use. Of course, there are *quality* requirements too, for examples the water must have acceptable colour, odour and taste, it must be free form contamination such as micro-organisms or chemical substances. The Comment also allocates the dimensions of the required *accessibility*, which are the physical, economic, information accessibility and the non-discrimination in this field.

On the one hand, as we have seen above, the United Nation addressed the right to water and sanitation as an individual right, for example 2003 was the International Year Of Freshwater[21]. On the other hand, the Millennium Development Goals (MDGs), which agenda determined the period between 2000 and 2015, did not contain an individual goal related to this issue. We need to mention that this did not mean that the agenda did not consider the problem. According to the Millennium Declaration, the State parties resolved that they will 'halve the proportion of people who are unable to reach or to afford safe drinking water'[22]. Moreover, it set other obligations for the States, for example the need to improve water management strategies in order to stop unsustainable water exploitation[23].

Comparing the Sustainable Development Goals (SDGs) to the MDGs, we can find out that there is an individual goal – Goal 6: Clean water and sanitation – related to the issue but there is connection with other goals, for examples Goal 1: No poverty,

[16] General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20th January 2003 (contained in Document E/C.12/2002/11.), Chapter I, para. 3.

[17] *Ibidem*.

[18] *Ibidem*, Chapter I, para. 3, Chapter III, para. 30.

[19] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, American University International Law Review 1/1992, p. 21–22.

[20] General Comment No. 15, Chapter II. Normative content of the right to water, para. 12.

[21] UN G.A. Resolution A/55/582/Add.8, 27th November 2000.

[22] United Nations Millennium Declaration UN G.A., Resolution A/RES/55/2, 18th September 2000, p. 5.

[23] *Ibidem*, p. 5–6.

Goal 2: Zero hunger, Goal 11: Sustainable cities and communities. The scope of Goal 6, among other things, extends to the universal and equitable access to safe and affordable drinking water and sanitation for all, to the improvement of the water quality and sustainable water-use efficiency, to the implementation of integrated water resources management and to the protection and restoration of water-related ecosystems.

All in all, we can state that the right to water and sanitation is a relatively new element of the international human right law but thanks to the United Nation it becomes addressed as an individual and a significant human right, while its content begins to crystallise too. I think this approach had a considerable impact on the European Union.

2.2. The European Union and the right to water – before the ECI

We can distinguish three main periods of the relevant secondary law legislation in the European Union. The first era was between 1975 and 1986, in this period the EU reflected to diverse topics, for example the quality of surface water[24] or the protection of groundwater[25]. The second era, which can be dated between 1991 and 2000, is relevant in the light of the 'Right2Water' ECI as the so-called 'Drinking Water Directive'[26] was adopted in this period. We can state that the 'Right2Water' ECI's main achievement – as we shall see below – was a legislative proposal on this directive. Currently, we are in the third era, in which we can classify the 'Marine Strategy Framework Directive'[27] and so-called 'Water Framework Directive'[28], which was also a target of the ECI, but the Commission did not consider this Directive's legislative revision[29].

We also need to examine the primary law, in which the Articles 191 – 193 of the Treaty on the Functioning of the European Union (TFEU)[30] determine generally the environmental policy. Article 192 (2) describes a derogation from the ordinary legislative procedure set in Article 192 (1). This derogation means that in certain cases, after the consultation with the European Parliament, the Economic and Social Committee, and the Committee of the Regions, the Council shall adopt – with a special legislative procedure – measures affecting quantitative management of water resources or measures affecting, directly or indirectly, the availability of these resources[31]. According

[24] Council Directive 75/440/EEC of 16th June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States.

[25] Council Directive 80/68/EEC of 17th December 1979 on the protection of groundwater against pollution caused by certain dangerous substances.

[26] Council Directive 98/83/EC of 3rd November 1998 on the quality of water intended for human consumption.

[27] Directive 2008/56/EC of the European Parliament and of the Council of 17th June 2008 establishing a framework for community action in the field of marine environmental policy.

[28] Directive 2000/60/EC of the European Parliament and of the Council of 23rd October 2000 establishing a framework for community action in the field of water policy.

[29] P. Thieffry, *General Framework of EU Water Law*, https://www.era-comm.eu/EU_water_law/part_2/index.html, 18.05.2019.

[30] Treaty on the Functioning of the European Union (TFEU) signed on 13th December 2007, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

[31] TFEU Art. 192 (2) b).

to Pierre Thielbörger, this derogation provides the possibility to the Member States to keep their dominant role in the field of water resource management. He points out the fact that it is problematic because the Member States refrain of losing their rights in this sensitive and important area. He also mentions that the European Union's approach is not right-oriented as on the one hand, most of the acts demonstrated above belong to the field of the European environmental law or consumer protection law, and on the other hand, the Charter of Fundamental Rights of the European Union[32] does not contain the right to water and sanitation. In his opinion, this non-right-based approach may result in the resolution of the European Parliament in which the EP emphasized the human right character of the issue [33] and the 'Right2Water' European Citizens' Initiative itself[34].

2.3. The success story (?) of the 'Right2Water' European citizens' initiative

2.3.1. Briefly about the instrument itself

The European Citizens' Initiative is a unique tool of direct democracy which allows the European citizens to put issues on the European agenda. It is technically an agenda initiative and disadvantage of this tool is the lack of legislative obligation. It is based on the European citizenship, which was introduced by the Maastricht Treaty[35] and which bears, among others, political rights such as the right to participate in European Citizens' Initiative[36]. These political rights – besides the European Citizens' Initiative, the right to vote and to stand as a candidate at municipal elections in the Member State in which they reside[37], the right to vote and be a candidate in the European elections[38], the right to petition to the European Parliament[39] and the right to submit a complaint to the European Ombudsman[40] – can be identified as supranational rights as the Court of Justice of the European Union stated in the *Delvigne Case*[41]. This means that these rights can be exercised directly at the European level and this also involves the fact that the Member States shall respect them[42].

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[32] Charter of Fundamental Rights of the European Union (2000/C 364/01).

[33] Resolution of 4th September 2003 on water management in developing countries, art. W, para. 1.

[34] P. Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*, Berlin 2013, p. 32–36.

[35] Treaty on European Union, signed in Maastricht on 7th February 1992.

[36] Treaty on European Union (TEU), signed in Lisbon on 13th December 2007, Art. 11, para. 4, Official Journal C 326, 26/10/2012 P. 0001 – 0390 and TFEU Art. 24. (1).

[37] TFEU Art. 22 (1).

[38] TFEU Art. 22 (2).

[39] TFEU Art. 24 (2).

[40] TFEU Art. 24 (3).

[41] Judgment of the Court (Grand Chamber) of 6th October 2015, *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde*, C-650/13, ECLI:EU:C:2015:648.

[42] M. Szabó, K. Debisso, L. Gyeney, A. Pünkösty, *Az Európai Unió jogának alapjai*, Budapest 2018, p. 296–297.

Besides the primary law, the European Citizens' Initiative's details are regulated in the Regulation no. 211/2011 of the European Parliament and Council[43]. The first step to a successful initiative is to set up a citizens' committee with at least seven natural persons – who are European Citizens – from at least seven different Member States[44] and after that, registration of the proposed initiative by European Commission is also needed. This step requires the initiative to meet several conditions, such as – among other requirements – the citizens' committee must be made according to the Regulation, the initiative must not manifestly fall outside the framework of the Commission's powers[45], it should not be abusive, frivolous or vexatious[46], cannot be contrary to the values of the Union as set out in Article 2 TEU[47]. If the Commission registers the proposed initiative, the organisers have 12 months to collect at least one million eligible signatories coming from at least one-quarter of all Member States[48] and we need to mention that the number of required valid statements of support is also determined in the Regulation[49]. As I have mentioned before, even if the initiative meets the above-mentioned requirements, the Commission has no legislative obligation, only a communication and a public hearing are required within three months[50].

In view of the foregoing, the 'Right2Water' initiative's first achievement before the successful collection of signatures and the legislative procedure, was the registration by the Commission, because – according to Anastasia Karatzia – it is difficult to characterize the Commission's admissibility test. It is not unanimous whether the rejection or the submission is motivated by legal or political reasons. She points out the lack of transparency at this level as the decision is made 'behind closed doors' and the real motivation is not obvious from the communication of the Commission[51]. Moreover, the Commission had a really strict approach in that period of time (between 2012 and 2015) in the field of registration, 20 of 51 initiatives were refused registration[52].

2.3.2. The chronology of the 'Right2Water' ECI

The first successful ECI is linked to the European Public Services Union (EPSU), which is a regional organisation considering the water issue since 1990 alongside with groups such as the European Public Health Alliance. The EPSU decided officially

[43] Regulation no. 211/2011 of the European Parliament and of the Council of 16th February 2011 on the citizens' initiative, OJ L 65, 11.3.2011, p. 1–22.

[44] Regulation no. 211/2011, Art. 3, para. 2.

[45] Regulation no. 211/2011, Art. 4, para. 2 (b).

[46] Regulation no. 211/2011, Art. 4, para. 2 (c).

[47] Regulation no. 211/2011, Art. 4, para. 2 (d).

[48] Regulation no. 211/2011, Art. 2, para. 1.

[49] Regulation no. 211/2011, Annex VII.

[50] Regulation no. 211/2011, Art. 10, para. 1 (c) and Art. 11.

[51] Reprinted from A. Karatzia, *The European Citizens' Initiative in Practice: Legal Admissibility Concerns*, European Law Review 4/2015, p. 512.

[52] European Commission's report on the application of Regulation (EU) No 211/2011 on the citizens' initiative, COM(2015) 145 final, p. 3.

about the launch of the ECI in 2009 and announced it in a water forum in Marseille in 2012. The ECI was registered by the European Commission[53] in May 2012[54]. We must add that the successful registration was not usual in the practice of the European Commission. According to its report of 2015[55], between 2012 and 2015 the Commission registered 31 initiatives but refused the submission of 20 initiatives.

The main proposals and goals of the ECI moved into two directions. On the one hand, it considered the water and sanitation issue within the EU – e.g. „To guarantee water (safe, clean and affordable) and sanitation services to all of the populations in the EU Member States", „To refrain from turning water services into commercial services by excluding water from internal market rules. This can be achieved by a commitment of the European Commission", „Not to liberalise water and sanitation services" etc.; on the other hand, it promoted the universal access to water and sanitation worldwide, related with the EU water policy – „To increase access to water and sanitation worldwide, by making the achievement of universal access to water and sanitation part of EU development policy"[56]. I think that the problem in worldwide relation needs no further explanation but the question arises – why is this issue important within the EU? To give an example, according to the report made by the European Roma Rights Centre, in more than half of the places visited (places within the EU such as in Hungary, Slovakia, France and places in European states that are not Members of the EU such as Montenegro, Macedonia, Albania, Moldova), the nearest water source was more than 150 meters away, sometimes the Roma people need to walk kilometres to access fresh water. The problem is exacerbated by the fact that mostly women and young girls – so a vulnerable group within a marginalised group – must collect water and they are often attacked by animals, such as stray dogs[57].

The collection ended in September 2013 with nearly 1,9 million signatures, mostly from Germany, Austria and Belgium. After the submission of December 2013, the Commission answered on 19th March 2014[58]. If we take a look at this answer we can notice that the Commission mentioned the UN and its approach several times, for example it referred to the Resolution 64/292 in which the General Assembly declared the individual human right character of this right[59]. According to the Commission, there are three crucial elements to secure and improve access

[53] Commission registration number: ECI(2012)000003. Date of registration: 10/05/2012.

[54] L. Parks, *Framing in the Right2Water European Citizens' Initiative*, Paper prepared for presentation at the ECPR general conference, 3–6 September 2014, Glasgow, http://bit.ly/2YDTa67, 22.05.2019, p. 8–9.

[55] Report from the Commission to the European Parliament and the Council, Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative, COM (2015) 145 final.

[56] About the campaign, Water is a human right!, https://www.right2water.eu/about, 22.05.2019.

[57] *Thirsting for justice*, A report by the European Roma Rights Centre, European Roma Rights Centre, March 2017, http://bit.ly/2JYhjQy, 24.05.2019, p. 25–30.

[58] Water and sanitation are a human right! Water is a public good, not a commodity!, European Commission, http://bit.ly/2Qf2JFz, 22.05.2019.

[59] Communication from the Commission on the European Citizens' Initiative „Water and sanitation are a human right! Water is a public good, not a commodity!", COM(2014) 177 final, Brussels, 19th March 2014, p. 3.

to water and sanitation. The water quality requirements, which was set in the 1970s, mean one of these elements. The requirements are laid down by the 'Water Framework Directive', the 'Drinking Water Directive' and the 'Urban Wastewater Treatment Directive'. The Commission also emphasised the importance of the holistic approach in the field of water management. The second vital element is the obligation to provide access to water and wastewater services, while the third element is the affordability. On the one hand, the Commission declared that in the European Union's water policy the affordability of water services is critical, but on the other hand, the EU has no role in setting the water prices[60]. The Commission also mentioned the actions in relation to the ECI, such as ensuring better quality in accordance with the 7th Environmental Action Programme[61], taking efforts towards the full implementation of EU water legislation by the Member States, reviewing the EU water legislation, taking measures in the national level in relation with water affordability to safeguard disadvantaged people and providing the minimum water supply to all citizens by the Member States and correctly implementing the Water Framework Directive[62].

The next step was the legislative proposal of the Commission, which can be considered as a great achievement as the Commission is not legally obliged to this. This step meant the start of the ordinary legislative procedure too.

In the Proposal, the Commission addressed the human right character of the right to water and sanitation and referred several times to the UN's documents, especially to the SDGs and to the Resolution 64/292. It also mentioned the European Council's Resolution[63] which emphasized the importance of the recognition of the right to water and basic sanitation as a fundamental human right. It also referred to the Declaration[64] by Catherine Ashton who stated on behalf of the EU in 2010, that highlighted the State's obligations and the requirements of the drinking water, physically accessible, affordable and acceptable[65]. We could draw the conclusion that the EU started to address the right, supposedly because of the UN, before the 'Right2Water' and the SDGs, but they ultimately catalysed the process. The Proposal contained new definitions (Article 2) such as the definition of vulnerable and marginalised groups. It would have also introduced a complex assessment system which would have consisted of the overall risk-based approach (Article 7), a hazard assessment (Article 8), domestic distribution risk assessment (Article 10) and monitoring (Article 10). I consider that in the light of the 'Right2Water', Article 13 deserves more attention in which we can find an exact reference to the ECI

[60] *Ibidem*, p. 3–4.

[61] Decision No 1386/2013/EU of the European Parliament and of the Council of 20th November 2013 on a General Union Environmental Action Programme to 2020 'Living well, within the limits of our planet'.

[62] COM (2014) 177 final, p. 8.

[63] Resolution No 1696/2009 of the Parliamentary Assembly of the Council of Europe.

[64] Declaration by the High Representative. Catherine Ashton, on behalf of the EU to commemorate the World Water Day (Doc 7810/10), 22nd March 2010.

[65] Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM (2017) 753 final, Brussels, 1st February 2018, p. 12–13.

and its answer and to Goal 6. The Article foresees two main obligations of the Member States. One is to improve access to drinking water and to promote its use via several measures such as encouraging people to use tap water, which is also beneficial regarding the serious plastic waste problem. Second is a special obligation focusing on the vulnerable and marginalised groups. It distinguishes three dimensions of the concept of equitable access: geographic differences, difficulties faced by vulnerable and marginalised groups (e.g. refugees, nomadic communities, homeless people, minority cultures etc.), financial affordability. Concerning this latter dimension, the Commission expressed that the water pricing policy must pay attention to the principle of recovery of costs and to the principle of polluter pays. We need to add that the Proposal considered the requirements of the Aarhus Convention[66] as it introduced two new articles, Article 14: Information to the public and Article 15: Access to Justice[67].

After the European Parliament's plenary adopted its amendments on the Proposal[68], the Council of the European Union adopted its General Approach[69]. If we examine this General Approach, we can draw the conclusion that it contains many modifications of the Proposal described above and these modifications made the General Approach much more restrained, which caused understandably disappointment to the initiators and supporters. I would like to illustrate this point by comparing the new version of Article 13 to the version of the Proposal. This stated that the Member State's obligation is to take all necessary measures to improve access to water for all. To fulfil these obligations the Proposal enumerated the required measures such as identifying people without access to water, free equipment in public spaces for free access to water, promoting water intended for human consumption by campaigns, encouraging the use of water intended for human consumption, providing free water in restaurants and other similar facilities. I find it remarkable that the proposal contained special obligations regarding vulnerable people, so the Members States would have been obliged to take all necessary measures to ensure access to water intended for human consumption and they should have immediately informed these people of the quality of the water they are using and of any action that can be helpful to avoid the negative effects of any kind of contamination of the water[70]. According to the General Approach, the member States are free to choose measures to promote tap water, its terminology is permissive as it states that „Measures to promote tap water intended for human consumption **may**

[66] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25th June 1998.

[67] Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM (2017) 75 final, Brussels, 1st February 2018, p. 12–13, 19–24.

[68] Amendments adopted by the European Parliament on 23rd October 2018 on the proposal for a directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM (2017)0753 – C8–0019/2018 – 2017/0332 (COD).

[69] Proposal for the Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast) – General approach, 6876/1/19 REV, Brussels, 27th February 2019.

[70] Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM (2017) 75 final, Brussels, 1st February 2018, p. 12–13, 54–55.

include (…)". It also withdrew the obligation of providing free water equipment in public places. Moreover, the special obligations focusing on the vulnerable and marginalised groups are completely removed[71].

3. Conclusion

Despite the fact that the right to water and sanitation is a relatively 'young' member of the family of the human rights, it is a significant right *per se* but it is also an essential element of the realization of other important human rights. It is noteworthy that besides its intergenerational aspect, it is related to the requirements of the intragenerational equity. This equity among those who are living today is related to the objectives of the 'Right2Water' ECI, which proposals focused on the universal side of the issue but also considered the question in the European context.

In the light of the foregoing, it is considered that the 'Right2Water' European Citizens' Initiative focused on the non-liberalisation and the issue of the financial affordability, and the European Commission addressed these in its communication but the Commission's Proposal had narrow spectrum. It put emphasize to the quality and the possible alternative measures but it has also special respect for the vulnerable and marginalised groups. By contrast, the General Approach is quite brief on these issues. Despite these the ECI was successful as it led to the start of the legislative process and it catalysed the recognition of the right to water and sanitation of a fundamental, significant and individual human right, which can be – among others – thanked the United Nation's approach and its important documents and agendas, especially the Goal 6 of the Sustainable Development Goals.

In summary, the Council and through it, the Member States are still able to obstruct the full realization of ECI. But on the other hand, we can state that this moderated version is a great achievement too, because a unique tool of the Direct Democracy worked in the field of the universal human rights, even the process is long and the pursuing of the human right and environmental interest took years.

* * *

Prawo do wody i urządzeń sanitarnych – czy wciąż stanowi duże wyzwanie dla Unii Europejskiej?

Wypicie szklanki czystej wody, gdy jesteśmy spragnieni, jest jedną z najbardziej typowych codziennych czynności w naszym życiu. Jeśli jesteśmy pośród tych szczęśliwych ludzi, którzy mają dostęp do czystej wody i którzy mogą sobie na nią pozwolić, ponieważ nie wszyscy mają dostęp do bezpiecznie zarządzanych usług związanych z wodą pitną. W tym świetle nie jest zaskakujące, że zapewnienie wszystkim dostępu do wody i infrastruktury sanitarnej

[71] Proposal for the Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast) – General approach, 6876/1/19 REV, Brussels, 27th February 2019, p. 66–67.

jest jednym z Celów Zrównoważonego Rozwoju, który to program dąży do przekształcenia naszego świata do 2030 r. Zakładam, że możemy się zgodzić, iż nie jesteśmy w stanie wypełnić naszych zobowiązań międzypokoleniowych właściwie, dopóki istnieją poważne problemy wewnątrzpokoleniowe, które wciąż należy rozwiązać, takie jak kwestia prawa do wody i urządzeń sanitarnych.

Jest to globalny problem etyczny, jednak większość ludzi identyfikuje go jako problem krajów rozwijających się, pomimo tego, że dotyczy on również państw członkowskich Unii Europejskiej. Inicjatywa „Right2Water", pierwsza europejska inicjatywa obywatelska (European Citizens' Initiative, ECI), którą można uznać za udaną, podkreśla problem liberalizacji usług wodnych, który może powodować wykluczenie osób ubogich z korzystania z tych istotnych praw człowieka

Słowa kluczowe: cele zrównoważonego rozwoju, prawo do wody i infrastruktury sanitarnej, europejska inicjatywa obywatelska

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Sustainable Development in the Constitution of the Republic of Poland – the Origins

Abstract:

Polish Constitution was one of the first fundamental laws in Europe containing principles of sustainable development. The principle was mentioned in Article 5 of the Polish Constitution, with the goals of the state. In the 1990s in Poland scientists were not sure how to translate the term *sustainable development* into Polish language, what makes question about law makers' intension even more reasonable. Over many years Polish legal doctrine has been divided in opinion how to understand the sustainable development term. Some lawyers argue that this idea should be only interpreted with connection to environmental protection issue. Other representatives of law science consider sustainable development in a definitely wider context, including economic and social issues. Even the case law of Polish courts is inconsistent in understanding that principle. The overhaul of Bulletin of Constitutional Committee of the National Assembly can give answer what exactly constitutional makers understood by the principles of sustainable development. Records form the work on Article 5 shows which legal acts and global events were kind of benchmark for Polish legislators. This allows us to formulate some guides how to interpret the principles of sustainable development in the Polish Constitution.

Key words: sustainable development, constitution, environmental protection, Agenda 21

1. Introduction

Each epoch had its own ideas that determined social relations at a given time. Undoubtedly, sustainable development is one of such ideas that have a strong influence on the present day. It is a concept present in business, ecology, politics and law, and can also be found in the Constitution of the Republic of Poland, as it appears already

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in the very first chapter, which defines the constitutional principles of the state. Despite the undoubted importance of the concept of sustainable development for the contemporary world of ideas, its normativity is often questioned by lawyers. Therefore, we should ask ourselves what prompted the constitution makers to mention the principles of sustainable development in Article 5 among such typical goals of the state as guarding the independence and integrity of territory or ensuring the freedoms and rights of persons and citizens. It seems that learning about these motivations may allow for the formulation of some interpretative guidelines for the mentioned principles. Although, it should be noted that the purpose of the paper is not to interpret Article 5 of the Constitution of the Republic of Poland as such but rather to understand the intentions that accompanied the members of the Constitutional Committee of the National Assembly when including the principle of sustainable development among the responsibilities of the state. These responsibilities, according to some researchers, account for different values that have no connection with each other[2].

2. History of the concept

In the 21st century we could have seen a sharp rise in the popularity of the idea of sustainable development but the history of the concept is much longer. Its origins can be traced back to the 17th century, when the German manager of the silver mine Hans Carl von Carlovitz published a work entitled *Sylvicultura oeconomica, oder haußwirthliche Nachrichtund Naturmäßige Anweisung zur wilden Baum-Zucht*, in which he described the negative effects of cutting down forests[3]. At the turn of the 16th and 17th centuries the development of the Saxon mines led to deforestation of the entire region. As a result, the price of wood increased so much that many mines could not afford to buy it, which eventually led to the bankruptcy of many of them. In such a way, both the biological and socio-economic environment of Saxony underwent a severe degradation. Hans Carlovitz formulated the thesis that forests should be cut in a sustained way, so that the loss of trees should be compensated by planting more[4]. In the following years, among others, Jean-Baptiste Colbert took up the subject of sustainable forest management in his work.

However, it was not until the second half of the 20th century that the concept of sustainable development gained more attention. In 1972 the Club of Rome, an international organization dealing with global threats, published *The Limits to Growth* report. It developed the Malthusian theory of resources, along with the thesis that the parameters related to the use of resources by humanity are characterized by exponential growth, while the available resources remain constant[5]. Therefore, it quickly

[2] A. Bałaban, *Konstytucyjna zasada zrównoważonego rozwoju* [in:] *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, ed. L. Garlicki, A. Szmyt, Warsaw 2003.

[3] U. Grober, *Der Erfinder der Nachhaltigkeit,* Munich 2010, p. 98.

[4] *Ibidem*, p. 99.

[5] Thomas Malthus (1766–1834) was a British economist, who claimed that excess population would stop growing due to shortage of food supply leading to starvation.

leads to a situation where further growth will be impossible due to a lack of resources. The report was a great contribution to many debates at both academic and political levels. It also resulted in establishment of the World Commission on Environment and Development, also known as the Brutland Commission (named after the chairman of the commission – Gro Harlem Brutland). The task of the Commission was to develop a political concept that would be a response to global problems described previously by, among others, the Club of Rome. The Commission's work ended with the publication of the official document, called the Brutland Report, which included the definition of sustainable development as 1) a process that meets current needs, without depriving future generations of their needs and 2) a stable development which takes into account processes, in which the exploitation of resources, direction of technical progress, areas of investment and the institutional change all remain in harmonious and non-controversial relationship, allowing to meet current needs as well as the needs of future[6].

Another noteworthy stage in the evolution of the concept of sustainable development was the United Nations Conference on Environment and Development in Rio de Janeiro, also called the Earth Summit. It took place 20 years after the Stockholm Conference, which was the first time when the problems of the natural environment were discussed in such a wide group of participants. In the capital of Brazil, the subject of the debate was extended to include economic and social topics, which was expected to result in the development of a new philosophy of life in the post-industrial era. The summit ended with the preparation of the Agenda 21 document, which introduces the methods of developing and implementing sustainable development in local communities based on both ecological and socio-economic aspects[7].

The 20th century ended with the development of the Millennium Development Goals. 189 countries declared their will to implement by 2015 a number of proposals aimed at reducing poverty and hunger, ensuring equal status of women and men, improving health, improving education, combating AIDS, protecting the environment and building global partnership between nations. Development aid was provided for the implementation of the objectives as well as numerous investment and financial programs were launched.

The latest document of the United Nations that sets the conceptual framework for sustainable development is the Agenda for Sustainable Development 2030 adopted in 2015. It contains 17 goals, which are specified by 169 priorities related to them. In the further part of the work I will refer to the content of some of them.

[6] Report of the World Commission on Environment and Development Our common future, New York 1987, p. 15.

[7] Action Programme – Agenda 21, Rio de Janeiro 1992, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, 14.07.2019.

3. The concept of sustainable development in the Polish law

The term of sustainable development for the first time appeared in the Polish law in the 1990s. On 10th May 1991, the Sejm adopted a resolution on the ecological policy of the state. It contains the term of eco-development, defined as sustainable development. The resolution pointed to the urgent need to ensure individual ecological security for Polish citizens and stated that the implementation of this objective should be based on the principles of the social and ecological market economy[8]. Parliament brought the topic of the ecological policy of the state because there were immense negligence on that field after more than four decades of the communist regime. In 1991 almost one in three Poles lived in a state of ecological danger. Moreover, morbidity caused by environmental pollution was increasing[9]. In legislation the concept of sustainable development appears for the first time on 7th July 1994, due to the Land Use Act (Dz.U. z 1994, Nr 89, poz. 415). The first legal definition of sustainable development can be found in the Environmental Protection Act (Dz.U. z 1980, Nr 3, poz. 6) of 31st January 1980, which was added as a result of the amendment of the Act (Dz.U. z 1997, Nr 133, poz. 885) on 29th August 1997 and it stipulates that „sustainable development is such a socio-economic development in which, in order to balance the opportunities for access to the environment of individual societies or their citizens – both contemporary and future – a process of integrating political, economic and social activities while maintaining the natural balance and durability of basic natural processes takes place"[10]. It is worth noting, however, that this definition appeared already after the Constitutional Committee of the National Assembly deliberated on the content of Article 5 of the Constitution of the Republic of Poland. Therefore, it seems reasonable to examine whether the statutory definition matches the intentions of the constitution makers.

4. Work on Article 5 of the Constitution of the Republic of Poland

On 7th February 1995 the Constitutional Committee of the National Assembly debated on the rewriting of the first chapter of the Uniform Draft of Constitution of the Republic of Poland (in variant approach)[11]. That project was a fruit of work in many specialized sub-committees. In the draft, which came under the Commission's deliberations, the current article on the goals of the state was the third Article. However, as the majority of the members of the Constitutional Committee have called for, due to their importance and importance for the whole state system, the principles

[8] Resolution of the Sejm of the Republic of Poland of 10th May 1991 on ecology policy (M.P. z 1991, Nr 18, poz. 118).

[9] *Ibidem*.

[10] Land Use Act of 7th July 1994 (Dz.U. z 1994, Nr 89, poz. 415).

[11] A. Słowikowska, *Geneza zasady współdziałania Kościoła i państwa w projektach Konstytucji Rzeczpospolitej Polskiej z 1997 roku*, Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego 2013, vol. 10, p. 103.

of state unitarity as well as the supremacy of the nation were transferred before the article on the goals of the state, which eventually became the fifth Article. The mere attempts to include normative goals of the state aroused controversy. The deputy of the Freedom Union (Unia Wolności) Jerzy Chmielewski postulated the deletion of the whole article, arguing that it contains obvious content and is an attempt to ideologize the Constitution. He pointed out that the state, by definition, must safeguard the independence and its territory and issues such as human rights or national heritage are already addressed in the subsequent chapters of the Constitution. However, Piotr Winczorek, the expert of the Constitutional Committee, objected to such a view, claiming that the article discussed has definitely a normative value. He indicated that Article 5 is formulated in a little bit „slogan" way, which – in principle – should be avoided during creating normative acts. He noted, however, that lofty slogans cannot be completely eliminated from the text of constitution, because it would give it a character of only procedural regulation[12]. It was Piotr Winczorek who asked for putting the concept of sustainable development to Article 5. When analyzing the work of the Constitutional Commission of the National Assembly on the formulating of Article 5 in the context of sustainable development, the following issues can be specified: 1) an appropriate definition of the development to be written in the Constitution of the Republic of Poland and 2) normativity of the term of sustainable development. Regarding the first of these, the debate during the Constitutional Committee was a reflection of the problems with translation of the *sustainable development* term occurring in the Polish law. This term, apart from the currently dominant translation, was also referred to an eco-development or continuous development.

From the very beginning Zdzisław Sadowski, a representative of the Polish Economic Society, pointed to the economic roots of the term of sustainable development. He stated that the term *sustained* is out of focus and ambiguous, and thus he proposed the wording: „permanent and comprehensive social and economic development"[13]. In addition, he pointed out that contemporary development based on innovation is just the opposite of sustainability. It seems that Zdzisław Sadowski referred to the theory of Austrian economist Joseph Schumpeter, who is the author of the theory of economic development based on innovation. Schumpeter believed that the persisting emergence of new entrepreneurs with revolutionary ideas is a force that is able to bring economic growth. He accepted the fact that such a change results in a loss of position by enterprises that previously enjoyed a well-established, or even monopolistic, market position. This is so-called *creative destruction*[14].

Clear objection to the arguments stated by Sadowski was expressed by Irena Lipowicz, a deputy of the Freedom Union at that time. She appealed to her own experience in the Silesian region and pointed out that years of this „comprehensive" development led to significant ecological degradation of the Silesian region. She even stated

[12] The Bulletin of Constitutional Committee of the National Assembly, vol. 13, p. 9–10.

[13] The Bulletin of Constitutional Committee of the National Assembly, vol. 13, p. 10.

[14] J. Schumpeter, *Teoria rozwoju gospodarczego*, Warszawa 1960.

that „the comprehensive development should be banned by law". Irena Lipowicz also pointed out that „sustainable development has an established meaning in the world literature. It means the principles of ecological development, and therefore the one that would take into account the needs of the natural environment"[15]. The majority of the Constitutional Committee agreed with this argument. This may indicate that sustainable development should be linked more closely to environmental issues and less to economic or social aspects.

The issue of Article 5, however, returned as the topic of the debate of the Constitutional Committee on 7th March 1997, along with amendments to the first chapter of the Constitution. Among the proposed amendments was, among other things, the proposal to add to the article the protection of animal rights but it did not meet the appreciation of the majority of members of the Commission[16].

The issue of sustainable development was reconsidered by Alicja Grześkowiak, a senator from the 'Solidarity' Electoral Action (Akcja Wyborcza „Solidarność"). In her amendment she postulated the deletion of the term of sustainable development. Senator Grześkowiak referred to the previously mentioned argument regarding the lack of a constitutional character of the concept and pointed out that there is no such principle in the constitutions of other Western European countries. She also drew attention to the trend that is often present in the post-communist countries to write in the constitution phrases that do not have any legal value. Kazimierz Działocha, who at that time was a member of the Democratic Left Alliance (Sojusz Lewicy Demokratycznej), pointed out, however, that sustainable development as a concept exists in many acts of international law, where it has a definite meaning. He indicated that he specifically refers to the definition from the European Social Charter[17]. Senator Jerzy Madej highlighted the growing significance of sustainable development in legal science after the Earth Summit in Rio and the publication of Agenda 21[18]. He also emphasized that the lack of the concept of sustainable development as such in European constitutions is an opportunity for Poland to become a forerunner in changing the way we think about the environment. These comments convinced Senator Alicja Grześkowiak to keep the discussed principles in the text of article of the Constitution[19].

5. The concept of sustainable development in the constitutions

It is worth to mention that Constitution of the Republic of Poland was one of the first fundamental laws that included principle of sustainable law. Many constitutions adopted in the 1990s, especially those from Central and Eastern European countries, included

[15] The Bulletin of Constitutional Committee of the National Assembly, vol. 13, p. 10.

[16] The Bulletin of Constitutional Committee of the National Assembly, vol. 44, p. 6.

[17] *Ibidem*, p. 7.

[18] *Ibidem*.

[19] *Ibidem*.

phrases indirectly referring to the concept of sustainable development. For example, in the Constitution of the Czech Republic of 1992, Article 7 states that „the state shall concern itself with the prudent use of its natural resources and the protection of its natural wealth"[20]. In contemporary constitutions we find many similar expressions related to the protection of natural resources. However, there were provisions more relevant to the concept of development discussed in this work already in the nineties. In Article 5 of the 1992 Constitution of the Republic of Slovenia we read that one of the aims of the state is to „provide for the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia"[21]. It seems that the makers of the Constitution of the Republic of Slovenia referred to the idea of sustainable development when writing about the *harmonious development of society and culture in Slovenia*. What is interesting, two years after entering into force of the Constitution of the Republic of Poland, new constitution was enacted in Switzerland, which in Article 2 states, that „it shall promote the common welfare, sustainable development, internal cohesion and cultural diversity of the country"[22]. Since the end of 20th century it we can observe a process of constitutionalization of the sustainable development term. These examples also show a certain terminological problem that has been noticed by the members of the Constitutional Committee of the National Assembly, namely the definition meant to reflect the substance of development. The question is whether development should be „harmonious" (harmonijny), „versatile" (wszechstronny), „permanent" (ciągły) or perhaps „sustainable" (zrównoważony) as it was adopted in the Constitution of the Republic of Poland.

At the end of the 1990s, discussion regarding the adequate translation of the term sustainable development took place on the pages of the Państwo i Prawo journal. Maria Kenig-Witkowska used the phrase of *continuous development* in her article „Koncepcja *sustainable development* w prawie międzynarodowym"[23]. In the footnote to the article one can read that „the term sustainable development has a lasting connotation in both juridical and legal language, and is usually quoted in the original version, even when the text is in a language other than English. (…) such translations as ecological development, eco-development, etc. these terms seem to be definitely less fortunate, if not even misrepresenting the essence of the problem itself"[24]. It should be noted that since the publication of the cited Article 20 years ago, the term sustainable development has occurred at the same frequency in the original and translated version. Numerous

[20] The Constitution of the Czech Republic, http://www.psp.cz/en/docs/laws/constitution.html, 29.06.2019.

[21] The Constitution of the Republic of Slovenia, https://www.us-rs.si/en/about-the-court/legal-basis/constitution, 29.06.2019.

[22] Federal Constitution of the Swiss Confederation, https://www.admin.ch/opc/en/classified-compilation/19995395/index.html, 29.06.2019.

[23] M.M. Kenig-Witkowska, *Koncepcja sustainable development w prawie międzynarodowym,* Państwo i Prawo 1998, vol. 8.

[24] *Ibidem*, p. 45.

publications have appeared on the Polish publishing market, in which the mentioned term is translated into the Polish language[25]. Magdalena Sitek did not agree on the correctness of that translation in a previously mentioned polemic on the pages of Państwo i Prawo journal. In her opinion: „the concept of sustainable development should not only aim to guarantee the continuous development of particular categories of policies (economic, environmental, social, etc.), but to harmonize them or, to put it in a different way, to balance them. Such an essential role of the sustainable development concept comes from international legal acts"[26].

The dispute over the translation is very similar to the one that had taken place several years earlier at the Constitutional Commission. It seems that it is an issue that evolves so dynamically that it is difficult to say whether any of the interpretations can fully reflect the essence of the concept. Magdalena Sitek, however, very rightly pointed out that the fact of using the phrase „pursuant to the principles of sustainable development" in the Constitution of the Republic of Poland has a decisive influence on further Polish understanding of the term of sustainable development. As I have already mentioned, from the perspective of time it can be seen that Polish science, following the Constitution of the Republic of Poland, mainly uses the phrase sustainable instead of eco or harmonious development.

6. The acts of international law referred to in the course of work on Article 5 of the Constitution of the Republic of Poland

Analysis of the process of formulating Article 5 of the Constitution of the Republic of Poland pointed out that the constitution makers referred to international law when speaking about sustainable development. They mentioned the two particular legal acts – Agenda 21 and the European Social Charter. While the former is to this day one of the most important and most frequently cited documents in studies on the issue of sustainable development, the latter is relatively rare in this context.

Agenda 21, as it was already mentioned in this work, was the final act of the Earth Summit in Rio de Janeiro. The document counted over five hundred pages and consisted of four parts:

1) social and economic issues,
2) protection and management of natural resources,
3) issues related to strengthening the role of various social groups in the implementation process of Agenda 21, including women, youth, trade unions, rural population, local authorities, industry, science,
4) implementation possibilities.

[25] E.g. D. Brodowicz, M. Michalska, M. Kalinowska, *Zrównoważony rozwój. Wybrane zagadnienia*, Warszawa 2017; Z. Bukowski, *Zrównoważony rozwój w systemie prawa*, Toruń 2009; S. Kozłowski, *Zrównoważony rozwój – program na jutro*, Poznań 2008.

[26] M. Sitek, *„Sustainable development"–ciągły czy zrównoważony rozwój?,* Państwo i Prawo 1999, vol. 2, p. 82.

Already from the terminology existent in individual parts, it can be concluded that the document focused on both ecological and socio-economic aspects[27]. Agenda 21 imposed the obligation on governments to draw up development plans and strategies. However, it should be pointed out that in case of any specific solutions, it was not binding on the signatory states, which meant that the possibilities of real enforcement of certain assumptions were significantly reduced. It was not until the documents related to the Millennium Development Goals were published that allowed for a more effective commitment of states to implement the idea of sustainable development.

The second legal act, which was an inspiration for the Constitutional Committee of the National Assembly, was the European Social Charter. It is a Council of Europe treaty which was opened for signature on 18th October 1961. The Charter was established to support the European Convention on Human Rights which is principally for civil and political rights, and to broaden the scope of protected fundamental rights to include social and economic rights. Poland ratified the document in 1997, with the exception of the obligation to provide employees with a remuneration ensuring a fair standard of living. Thus, it can be said that the work on the ratification of the document lasted somewhat parallel to the proceedings of the Constitutional Committee of the National Assembly, which may be the reason why this document was referred to during the discussion on the wording of Article 5 of the Constitution of the Republic of Poland. It is interesting because in the document itself the sustainable development term does not appear even once. In the 1960s, when the document was created, the idea was not so widespread. Is it therefore impossible to find any elements related to sustainable development in this document? In the preamble of the European Social Charter we read:

> the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms; (…) The member States of the Council of Europe agreed to secure to their populations the social rights specified therein in order to improve their standard of living and their social well-being[28].

This is the phrase that seems to reflect the efforts that states have undertaken to increase the quality of life. Today, discussions on the definition of sustainable development point to the issue of improving the quality of life on Earth as the essence of sustainable development[29].

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[27] F. Dodds, M. Strauss, *Only One Earth: The Long Road via Rio to Sustainable Development*, London 2012, p. 57.

[28] The European Social Charter, https://www.coe.int/en/web/european-social-charter, 29.06.2019.

[29] J. Blewitt, *Understanding Sustainable Development,* London 2008, p. 158.

7. Conclusion

The analysis of the process of formulating Article 5 of the Constitution of the Republic of Poland in this paper shows that members of the Constitutional Committee of the National Assembly had a huge problem with defining sustainable development. Monika Florczak-Wątor in the commentary on the Constitution of the Republic of Poland points out that discussion on principles of sustainable development was very intense and revived[30]. Bogusław Banaszak in the commentary on the Constitution of the Republic of Poland, of which he was also an editor, claims that sustainable development is a new term in legal. The meaning of this term has clarified in the 1990s and it relates to the civilization development, which is not jeopardizing natural environment[31]. Paweł Sarnecki indicates that sustainable development has clarified meaning in the international law like the United Nations legal acts or the European law but he does not give any particular example. However, he specifies that this principle insists that intervention into natural environment should be proportional to the benefits for the society, which are resulting from that intervention[32]. On the one hand, the desire to refer the principle of sustainable development to the issue of environmental protection was evident during the work of the Committee, which is suggested by the language itself. It should be pointed out that also Polish courts refer to the principles of sustainable development in this context[33]. Particularly administrative courts treats principles of sustainable development as a directive of interpretation in cases, in which environment is a protected value. There are voices in the doctrine, which are inclining towards such an interpretation[34]. For example, Waldemar Wołpiuk explicitly points out that it is a substantial directive on environmental protection[35]. On the other hand, there is no doubt that the constitution makers took inspiration from international acts, in which the idea of sustainable development is perceived very broadly and is applicable to numerous spheres of socio-economic life. It could indicate that the term of sustainable development present in the Constitution of the Republic of Poland should also be understood more broadly. The Constitutional Tribunal, in one of the very few judgments regarding Article 5, defined sustainable development in a fairly broad way. Apart from environmental protection, it also

[30] M. Florczak-Wątor, *Commentary on article 5* [in:] *Commentary on the Constitution of the Republic of Poland*, ed. L. Bosek, M. Safjan, Warszawa 2016.

[31] B. Banaszak, *Commentary on article 5* [in:] *Commentary on the Constitution of the Republic of Poland*, ed. B. Banaszak, Warszawa 2012.

[32] P. Sarnecki, *Commentary on article 5* [in:] *Commentary on the Constitution of the Republic of Poland*, ed. L. Garlicki, M. Zubik, Warszawa 2016.

[33] E.g. II OSK 2760/14, II SA/Ol 1267/16. In those cases principles of sustainable development is used as directive, which allows to balance between the value of environment portection and economic freedom.

[34] Z. Bukowski, *Zrównoważony rozwój w systemie prawa,* Toruń 2012.

[35] W.J. Wołpiuk, *O konstytucyjnym zadaniu państwa w zakresie ochrony środowiska – zgodnie z zasadą zrównoważonego rozwoju,* Prakseologia 2004, vol. 144, p. 27.

includes care for social and civilization development, connected with the necessity of building the appropriate infrastructure necessary for the life of people and individual communities[36]. Also Andrzej Bałaban is in favour of such understanding of the principle of sustainable development. He points out that the values mentioned in Article 5 may be of independent importance in decoding norms found in other parts of the Constitution of the Republic of Poland[37].

In my opinion the constitution makers were willing to meet the standards of the constitutions of Western countries but at the same time willing to be thoroughly modern. Because of that an extremely high emphasis was placed on responding to the problems vividly discussed at that time in world legal science. Undoubtedly, one of these was the sustainable development. Some members of the Constitutional Committee wanted Poland to become the precursor of this idea in European constitutionalism. At the same time, among the standard goals of the state, the greatest opportunities for applying the principle of sustainable development were seen in the field of environmental protection. It is also worth noting that when creating the Constitution of the Republic of Poland, all provisions guaranteeing social rights were formulated with utmost caution in order to avoid unimaginable claims. Therefore, the combination of sustainable development and environmental protection was a fairly safe solution. Undoubtedly, the problems in defining the concept of sustainable development by the members of the Constitutional Committee of the National Assembly and the lack of decisiveness regarding the range of state policies on which this principle would apply resulted in current interpretation problems. In addition, the discussed idea is still alive and expands its meaning, which does not help to develop its uniformed interpretation. Nevertheless, I reckon that the Constitution of the Republic of Poland cannot be interpreted without taking into account today's way of understanding sustainable development by the international law, in which it applies to many fields of life, including social and economic issues.

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Zrównoważony rozwój w Konstytucji Rzeczpospolitej Polskiej – geneza

Konstytucja Rzeczpospolitej Polskiej była jedną z pierwszych konstytucji w Europie, w których zawarto zasadę zrównoważonego rozwoju. Została ona wyrażona w artykule 5, który wskazuje na główne cele państwa. W wielu europejskich konstytucjach brak jest regulacji dotyczących wprost celów państwa. W latach dziewięćdziesiątych środowisko naukowe w Polsce miało problem z dokonaniem tłumaczenia terminu *sustainable development*, które oddawałoby istotę tego pojęcia. Również doktryna prawa przez lata zmagała się z interpretacją

[36] K23/05, OTK 2006/6/62, the last paragraph of the grounds of judgment. The case concerned powers of local authorities in the process of locating state roads, http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/5216-lokalizacja-drogi-krajowej/, 29.06.2019.

[37] A. Bałaban, *op.cit.*, p. 20.

zasady zrównoważonego rozwoju. Część prawników uważa, że zasada ta ma zastosowanie jedynie do ochrony środowiska. Wiele głosów w doktrynie skłania się jednak do szerszej interpretacji tej zasady, obejmującej również kwestie społeczne i ekonomiczne. Analiza Biuletynu Komisji Konstytucyjnej Zgromadzenia Narodowego może wskazać na motywy i inspiracje, które przyświecały twórcom polskiej konstytucji przy formułowaniu zasady zrównoważonego rozwoju.

Słowa kluczowe: zrównoważony rozwój, konstytucja, ochrona środowiska, Agenda 21

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The Birth and Foundation of an International 'Polluter Pays' Principle

Abstract:

Global warming causes the gathering of the international community already for 25 years, starting with the Conference of the Parties to the United Nations Framework Convention on Climate Change. Today, more than ever, the challenge and urgency that climate change poses imply serious threat to the human world. Considering the regional inequality around the globe, this crisis prompts the question of solidarity from developed countries towards emerging and less developed countries. Accordingly, this situation brings the interrogation of the responsibility of protection of the environment and populations. In order to act, many appeals to the Polluter Pays Principle. We will first establish the juridical ground of such a principle, to determine its application – especially in international law, whereas the second point will be the assessment of the Katowice summit, as it describes the progress of the international community. Arguably, the Damocles sword that dangerous climate change constitutes would be one of the greatest opportunities to organize the biggest international cooperation in history.

Key words: Global Warming, development, Polluter Pays principle, environmental output, Paris agreement, sustainable

1. Introduction

„The Katowice outcome is crucial for the world moving forward with global response to climate change. It is critical for building up confidence. The time to finalize the Katowice rule-book is now and it is up to all of us, present and committed" – stated the President of the 24th Conference of the Parties to the United Nations Framework Convention on Climate Change and Secretary of State H.E. Michał Kurtyka at the Opening

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Ceremony of COP24 in Katowice, the 3rd December 2018. This speech introduction outlines the countdown that is starting before the scientific expectation of global warming that is considered as a climatic catastrophe and the urgency for the governments to react and work all together against this disastrous perspective.

To present the COP in a nutshell, we should state that this is the supreme decision-making organ of the Convention. All states that signed the Convention are Parties to the Convention and are represented at the COP, during which they are discussing the implementation of such convention and any other legal instruments that are helping the grouped action to adopt effective and precise implementation. This yearly conference corresponds to the moving forward negotiations on the topic of sustainable development, via legal involvement of the parties following the respect of international law. Treaties and resolutions are frequently coming out of this to act against global warming. Such negotiations are commonly about the technical process put in place to bind the countries to their engagement in lower the gas emission.

At the end of the day, it consists more in the creation of a global sustainable economic system, where energetic costs transition and environmental damages are setting the boundaries. This is a place where economy and climate meet, like the Dynamic Integrated Climate Economy theory[2] shows and calculates, whereas some other authors would argue more about the social dimensions with the principle of fairness between polluters and the price of pollution in terms of obligations and responsibilities towards the environment and nature themselves[3] or towards the future generations[4]. One might say that, as opposed to a too focused, too simplistic conceptualization of sustainable development, some authors also propose more global systemic schemes of thoughts as the idea of trajectories of societies, by using the „IPAT equation", conceptualized by Ehrlich and Holdren[5]. This equation describes how the combination of growing population, affluence and technology contributes towards the impacts of human activity on the environment.

For a quick reminder of the COP's international history, the first annual co-operational meeting was held in Berlin, in March 1995. Unless a Party offers to host the session, which is usually the case following the tradition of rotation between the five different regions of the world (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe and Western Europe and Others) the conference would be in Bonn by default, and the host in 2018 was Poland, precisely in Katowice, a city of the Silesian region.

So, the COP24 is the informal name for the 24th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC

[2] W. Nordhaus, Nobel Price of economy, *An Optimal Transition Path for Controlling Greenhouse Gases,* Science, vol. 258 (5086), 20th November 1992, p. 1315–1319.

[3] In that sense of distributive justice and society's responsibility, see J. Rawls, *A Theory of Justice*, Cambridge, MA, 1971, p. 8.

[4] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, American University International Law Review 1992, vol. 8, no. 1, p. 19–26.

[5] P.R. Ehrlich, J.P. Holdren, *Impact of population growt*h, Science 1971, 171/3977, p. 1212–1217.

is a „Rio Convention", adopted after the „Rio Earth Summit" in 1992. Today, there are 196 countries that are taking part of the process. The main goal of the COP meetings is to assess progress in dealing with climate change, to negotiate the Kyoto Protocol, which is an agreement linked to the UNFCCC setting internationally binding emission reduction targets to establish legally binding obligations for countries to reduce their greenhouse gas emissions. Therefore, the climate change is defined as the change in climate due to human activities. Indeed, the change of atmospheric composition and climate change is impacting as an additional element in natural climate variability. To fight the climate change in long term perspective, the answer by the defenders of the planet consists in building our future society following the scheme of the sustainable development doctrine.

According to the Intergovernmental Panel on Climate Change (IPCC) special report, published the 8th October 2018, 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 pace. „With more than 6,000 scientific references cited and the dedicated contribution of thousands of expert and government reviewers worldwide, this important report testifies to the breadth and policy relevance of the IPCC"[6]. To summarize the impact of the global warming on our planet, scientists are exposing the rising of the rate of natural catastrophes, extreme weather, augmentation of the sea level and drastic modification of our ecosystem. Considering this disastrous perspective, the COP24 in Katowice was supposed to give a global political answer by uniting all the countries in the world around a convention proposing binding objectives. If it seems that the result of the summit is halfway satisfying, we can underline the damaging disappearance of any form of human rights that are transmitted to the Marrakesh conference[7] offering a reflection on environmental refugee or climate refugee – by this term we think about „people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life"[8].

This paper outlines and proposes a reflection about the debate on the Polluter Pays Principle, which made its way through the convention, but which did not obtain a real consensus in its implementation. Starting from developmental objectives and then describing paths of more sustainable developments that also address climate change, may be the easiest way for many developing countries to take the first steps in longer-term action on climate change. The approach has a basis in the Convention, which – together with a proposed reporting structure – would provide enough stringency for a first step with a clear regulation about a solid Polluter Pays Principle. The main expression

[6] Hoesung Lee, Chair of the IPCC.

[7] The Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration took place in Marrakech, Morocco on the 10th and 11th December 2018.

[8] E. El-Hinnawi, *Public discourse of the UN*, 1985, UN Environment Programme (UNEP) expert.

of the principle through the prism of international law would be a carbon law that all states will have to nationally apply.

Here comes the time to argue on the reasons why carbon law appears more and more vital. First, we must consider the fact that the two hundred and fifty biggest companies are representing a third all man-made green-gas emission and only thirty percent of them plan to reduce their emission. Besides, with the example of Great Britain, we can observe other failed attempts of regulation in the past with the texts Climate Change Act of 2008[9], which is applied to governments and is aiming to reduce the greenhouse gas by eighty percent between 1990 and 2050, or the S172 companies act 2006 concerning the corporate and the responsibility and dialogues of stakeholders[10] world in the United Kingdom. These two acts are interesting for their aim and what these would mean if they were applied at international level, but they also reveal limited results, mainly because of the obligation's scope, which is very small. Moreover, we can notice the incapacity to force governments to apply any binding law on the name of the industry wealth (e.g. *Case people and Planet vs HM Treasury*, 2009).

The paper is organized as follows. The next section outlines the legal basis for the creation of the Polluter Pays Principle (2), which has the ambition to become a broad tool to implement a sustainable development in order to prevent or to limit global warming, especially since the Paris agreement that was still a work in progress in Katowice (3).

2. The Polluter Pays Law Principle as a ground for sustainable development

One Polluter Pays Principle (PPP) for a global answer against global warming and in favor of sustainability must find its roots in international law and be transformed into a concrete and adaptable instrument for the sake of the environment. This constitutes the whole challenge for the international community.

2.1. Theory and foundations of the Polluter Pays Principle

The Brundtland report states that „sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[11], their future human needs and quality of life. This thought brings to the table human life, economic resources, nature and the environment as fundamental values that must be taken into consideration in the path of development of countries and companies. Therefore, the objective of a sustainable process is to achieve more production with lower cost of raw material, which is why sustainability is usually

[9] The Climate Change Act 2008 (c 27), Act of the Parliament of the United Kingdom to ensure that the net UK carbon account for greenhouse gases for the year 2050 is at least 80% lower than the 1990 baseline.

[10] The Corporate Governance Code, Section F proposal which should stipulate (d) the impact of the company's operations on the community and the environment, *(e) the impact of the company's operations on social and human rights issues* and this aligns with the concept of 'Environmental, Social and Governance', which appears in the UN Principles for Responsible Investment.

[11] World Commission for Environment and Development, 1987.

mentioned with concepts like recycling, renewable energies and green energies or environment friendly technology.

The implementation of the PPP is an attempt to look for a better economic production model which is by essence following the doctrine of sustainable development. The PPP is a commonly accepted practice that those who produce pollution should bear the direct costs and the costs of preventing damage to human health or the environment[12]. For instance, a factory that produces potentially poisonous substance as a byproduct of its activities is usually held responsible for its safe disposal[13]. The PPP was first mentioned in the recommendation of the Organization for Economic Co-operation and Development (OECD) of 26th May 1972[14] as „principle to be used for allocating the costs of pollution prevention and control is the so-called Polluter-Pays Principle" and reaffirmed in the recommendation of 14th November 1974[15] where:

> the Polluter-Pays Principle (…) means that the polluter should bear the expenses of carrying out the pollution prevention and control measures introduced by public authorities in Member countries, to ensure that the environment is in an acceptable state. In other words, the cost of these measures introduced by public authorities in Member countries, to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.

In 1992 in Rio, PPP was introduced as Principle 16 of the UN Declaration on Environment and Development. Also the European Community took up the OECD recommendation in its first Environmental Action Program (1973–1976) and then in a Recommendation of 3rd March 1975, regarding cost allocation and action by public authorities on environmental matters. Since 1987 the principle has also been enshrined in the Treaty of the European Communities and in numerous national legislations world-wide. Therefore concept of PPP can be customarily considered as a hard law byproduct[16], although it is also a soft law[17] tool influencing the international scene through

[12] A. Bleeker: „PPP is a manifestation of the principle of equity known to common law systems. There are indeed strong arguments supporting claims that the PPP is in essence an equity or 'fairnes' principle as it seeks to assign responsibility to a polluter and to hold him accountable for the pollution, it has created in order to avoid passing on costs to third parties who did not contribute to the creation of that pollution. In particular, the PPP is used to obtain an equitable distribution of pollution damage costs between polluters and the general public" – A. Bleeker, *Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice*, European Energy and Environmental Law Review, December 2009, Department of European Legal Studies College of Europe, p. 290.

[13] C. Hilson, *Regulating Pollution: A UK and EC Perspective*, Oxford 2000, p. 120.

[14] Guiding Principles Concerning International Economic Aspects of Environmental Policies [C (72) 128].

[15] Implementation of the Polluter-Pays Principle [C (74) 223].

[16] A. Williams: „Traditionally, international rules existed primarily in the form of treaties or customary law" – A. Williams, *Reconciling Tourism and the environment: a task for international environmental law?*, Vermont Journal of environmental law 2007, vol. 9, p. 38.

[17] „Soft law" describes high level declarations of intent, consensus declarations agreed by states, technical standards, codes of conduct and guidelines that are not aligned with the classical sources of law

the lens of the sustainable development goals of the UN, where it takes its root. The idea here is to build an international regime to coordinate the different national standards and put up some effective measures. Thus, the PPP is also a „soft law instrument" within public international law[18]. This draws another dimension of the international legal system as a framework for cooperation and harmonization mechanisms in the direction of transboundary and national regulation to fight, in this case, the global warming and the concerning excessive pollution.

Indeed, climate change is a global problem requiring the cooperation of all countries to be addressed effectively. Although greenhouse gas emissions from the industrialized North have been far greater than from the developing South, even though the latter are also growing rapidly. Therefore, the principle of „common, but differentiated responsibilities"[19] between industrialized and developing countries has been successfully established in the negotiations. Countries are all gathered around the importance of sustainable development and have recognized it in the United Nations Framework Convention on Climate Change (UNFCCC) process. Article 3.4 of the Convention (1992) states as a principle that: „Parties have a right to, and should promote, sustainable development". The negotiations have, however, tended to focus on emission targets more than sustainable development, and we can guess that this is partly due to the predominance of the powerful financial interests of Northern countries.

The links between sustainable development and climate change have received increasing attention in the recent literature and led to the main perspective of implementing a carbon tax. Such idea is the most concrete completion of the substantive work behind the legal momentum of the PPP and this is a decisive turn to put in action a sustainable system thanks to international law. This would circumvent one common major issue about international law, that is that most of the legal texts are commonly too vague to be used directly in court because „the search for precise norms disqualifies *ab initio* most norms of customary international law which are usually imprecise, while many treaty norms are also vaguely worded. Given this background, it is not surprising that soft law instruments and general principles of international law are only rarely considered"[20].

This tax corresponds to the concept of carbon law, which is an environmental tax on the emission of carbon dioxide, aiming at reducing and controlling the greenhouse gas effect causing global warming. Thus, the carbon law is a concrete application

defined in the United Nations, Statute of the International Court of Justice, 18th April 1946, TS 993, 39 AJIL Supp 215, art. 38 [SICJ]; V.D. Degan, *Sources of international law*, The Hague 1997, p. 237–240; P.M. Dupuy, *Soft Law and the International Law of the Environment*, 12 Michigan Journal of International Law 1991, p. 420–428; C. Chinkin, *The Challenge of Soft Law*, 38:4 The International and Comparative Law Quarterly 1989, p. 850–859 (discussing international soft law).

[18] For an outline of the evolution of the international legal system see M. Shaw, *International law*, Cambridge 2003, p. 1–42.

[19] Mentioned for the first time during the Earth Summit in RIO, 1992, and resides in UNFCCC Article 3 para. 1 and Article 4 para. 1.

[20] P. Cullet, *International Environmental Law in Domestic Courts: Switzerland,* International Environmental law Research Centre, IELRC working paper, p. 9.

of the Polluter Pays law Principle. Also, it is an open proposition to the parties of the COP21 in order to reduce their carbon emissions and it is complementary with the negotiable emission quotas.

2.2. The carbon law as an adaptable tool for sustainable development

In order to explain what a carbon law would be, at first we must establish that this tax is a Pigouvian[21] tax. In this case it means that this tax would imply that polluters will have to pay a different bill depending on their own pollution. The more they are polluting, the more they will have to pay, and the price of the pollution would have to be set in advance. This way, following the price of the pollution, polluters would be able to foresee this cost in the final price of the final product[22]. The researched effects are to discourage big companies from using polluting production and promote eco-friendly production[23]. A slow increase of the Pigouvian tax would try to convince big polluters to rethink the way they are producing their goods and lead them in a long-term vision, to guide the new investments towards greener activities and production. We got few examples of governmental impulses that have had efficient results as such as the Irish plastic bag tax in 2002. Considering the article of the American broadsheet newspaper „The Balance": „within a few weeks, plastic bag usage fell 94%. One year later, everyone had bought reusable cloth bags. The revenue goes to the environment ministry for enforcement and clean-up". Same with a relatively close example in British Columbia, with the implementation of a carbon tax in 2008 that covers about 70% of the province's greenhouse gas emissions. Again, from the American newspaper we see that „between 2007 and 2014, emissions fell 5,5% despite an 8,1% increase in population, and real gross domestic product rose 12,4% during that period".

At this point, we can see two ways to implement a carbon tax in our society, one tax for the big polluters and one tax for small polluters. This proportional tax is made for the polluters to internalize all the costs of production for the planet and citizens of the world, leading to a sustainable model.

A tax for the big polluters would correspond to the process of instituting the carbon market. The concept of carbon market enables companies to produce a limited quantity of greenhouse gas, which precisely means that if a company is polluting more than what was allowed, it will have to buy some rights to pollute from another company. So, a company which did not use all its rights to pollute, would be able to sell them. This

[21] A. Pigou, *The Economics of Welfare*, London 1920, chap. VI Income Tax, p. 638.

[22] A. Bleeker: „To think of the PPP in terms of efficiency. This is a more economic rationale which sees the principle as a means towards achieving a more efficient allocation of resources in economic production. Pollution is a negative environmental externality (or side-effect) of economic activity. The PPP calls for the internalisation of such negative externalities in the cost of the product" – A. Bleeker, *op.cit.*, p. 291.

[23] „About 40 countries impose carbon taxes on companies that burn coal, oil, or gas, which produce greenhouse gas emissions. These emissions cause climate change, which can bring about more natural disasters, raises sea levels, and increase droughts" – K. Amadeo, *Pigouvian Taxes, Their Pros and Cons, and Examples*, The Balance, 2019, https://www.thebalance.com/pigouvian-tax-definition-and-examples-4157479.

market could exist at a national level or international level. Such a juridical mechanism corresponds to the Kyoto protocol. Also it already exists as we can see with the European Union Emissions Trading System/ Scheme (EUETS), which is the most important carbon market existing so far, in term of emissions' quantity. To describe the functioning of the system, we will take the European example. Each year, every installation bigger than 20 MW receives a quota of emission. A company then would have to either respect the quota of pollution or buy or sell some right to pollute. In the case of a company's failure to respect the emission limits, the regulator of the market will have to fine this company for every ton of none allowed carbon emitted, plus the company will have to buy some rights from another company. This market organization started in 2005, with the test phase until 2007, then the second period was between 2008–2012 corresponding to the Kyoto protocol agreement. The most interesting characteristic about this implementation at the European level could be that every State must present a national plan to allocate quotas to companies and this one must be presented to the European Commission. This follows the process of implementation of the international law, with a convention, through a national regulation. It the end, such regulation could be regarded as a development of the concept of corporate social responsibility[24] in the sense that companies will bear the cost of their deeds. Therefore, companies are forced to be responsible by themselves and towards the public.

This idea reinforces the dimension of the ethic and morale[25] in the PPP and corresponds fully with the doctrine of sustainable development at the same time. Finally, the PPP is fundamentally an economic principle translated into a legal instrument. Consequently, these two sides of the PPP articulate „an element of 'equity' or 'fairness' reflected in the PPP by its focus on internalizing negative externalities into the price of products, rather than imposing these costs on society"[26].

One tax for small polluters will affect consumers directly. This tax corresponds to the idea of sanctioning certain individual behaviors that are causing pollution. There is this example of carbon law in France[27], where owners of heavy polluting cars pay a tax every year to compensate the pollution. This kind of PPP is also dissuasive and promotes the acquisition of new less polluting cars, for example. Consequently, it stigmatizes polluting behaviors in the daily life of consumers, so we can speak of a carbon law on an individual level or scale. Such measures would have the benefit of stimulating the market to always propose new less polluting goods but at the same time it is promoting a huge waste of old goods that are still usable. Thus, we may speculate over the fact that industrial lobbies would mainly be content about this kind of regulation,

[24] *Introduction to Sustainable Development*, International Hellenic University, 2015, p. 47.

[25] S. Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, Journal of International Law 2005, vol. 18, issue 4, p. 747–775; S.C. Jagers, G. Duus-Otterström, *Dual climate change responsibility: on moral divergences between mitigation and adaptation, Environmental Politics, Volume 17, Issue 4: Perspectives on Justice, Democracy and Global Climate Change*, London 2008, p. 576–591.

[26] A. Bleeker, *op.cit.,* p. 291.

[27] Enshrined in 2014, called *Contribution Climat-Énergie* or *Taxes intérieures de consommation.* It generated 6,4 billion euros in 2017 and this information comes from the Institute for Climate Economics.

because it enhances the production of the market. However, the consumers are suffering from such regulation since they receive obligations only, with either a tax, either a sort of forced purchase. Also, a polluting good will lose some value on the market because of the implied tax, reducing the consumer power as well.

In the end, we can see different ways to conceive the implementation of the PPP but we are witnessing the same philosophy of regulation that is mainly punishing polluters with a sanctioning tax. This pattern brings the question of balancing between benefits from having a dissuasive tax or promoting investment and environmentally friendly behavior instead.

3. The Polluter Pays Principle advancement during the Katowice COP 24

This last summit during the previous Polish winter shows the urgency towards the global warming crisis with an international political ambition, although many issues remain like the clarity of the Paris agreement and countries' involvement.

3.1. Focus on the international ambition for the Carbon Law in Katowice 2018

In order to summarize the main mission of the international summit, parties tried to transform the Paris agreement into a concrete juridical document, with the creation of an international functioning carbon law indicating clearly all the rules and objectives of such a treaty. This way, countries and NGOs were discussing and negotiating the mechanisms of the Kyoto Protocol permitting the creation of a hypothetical international carbon market. Besides the carbon market, the parties are participating in the financing of the Green Climate Fund. This Fund was created in order to collect, redistribute and invest into green projects in less developed countries. To sum up, the international fund aims at allowing the energetic transition and technology transfer in emerging and less developed countries. Therefore, it is supposed to create a money movement from the developed countries (northern countries mainly) towards developing ones (southern countries). The Green Fund then states in which group countries are considered for the money distribution.

Considering the organization and the distribution pattern of the Green Fund, we could conceive such a fund as another expression of the PPP, since only developed countries, which have been the biggest polluters for a long time already, are contributing to it in solidarity with southern countries. Therefore, we have an example of the PPP as a law principle based on the initiative of investment, ruled by transparency and engagement. Furthermore, a carbon tax would be an efficient way to finance such a fund every year, as some experts already proposed for the European tax organization[28].

At the end of the conference, the Polish Government published the *Solidarity and Just Transition Silesia Declaration* report, which reports all the engagements taken consecutively from the COP24 and affirms all the new objectives. Juridically speaking,

[28] P. Coste (former ambassador of France and vice-president of Carbonium), H. El-Haité (former minister of environment in Morocco), A. Michaelowa (main author of the 5th GIEC report), J. Ruet (member of the Think20, G20).

the document is not binding as it is a resolution from the Republic of Poland. If we shall have a literal analysis, the legal document reaffirms the goal of transitioning to a sustainable development and environment, and assesses the fact that the transition would vary depending on the regions of the world, considering their level of development. In terms of juridical discussion here, we could emphasize a right to the equitable access to sustainable development considering that certain countries and areas are less advantaged, thus it is an obligation – maybe more moral – to help countries in need, as the document is not legally binding since it is a soft law writing[29].

Accordingly, the soft law dimension is here more to influence and to give a general direction for the further regulations, despite the critics urging the situation that is no less than alarming. We can talk about an inclusive transition, with extra-care for vulnerable countries. This precision follows the line of the Kyoto protocol stating that some countries would have to contribute to financially and technologically help countries in need. Since the energetic transition is barely mentioned once, the Polish Government puts the accent on the right to live in a decent environment, which cannot be achieved without the work of everyone. The solidarity in the work would be the key to success against the global crisis. In addition, the involvement of the public through debates, representation and participatory process seems to be considered as a fundamental element, which could lead to an extension of the political expression for citizens. Nonetheless, these last propositions seem to be a right that the people must claim directly to the State, because there is no reform planned now, so it is merely a suggestion.

If the COP24 made some progress on the Paris agreement, the global result cannot be considered as a frank victory, especially when it comes to the assessment of the remaining international discordance about the environment protection matter.

3.2. Multiple obstacles and the stalemated situations about Polluter Pays Principle implementation

This section will go through Katowice results' analysis and the assessment of the current situation about the negotiation. We will try to evaluate these with three factors that correspond to the adoption of the Paris rule-book, the rise of the ambition to reduce green gas emission and finally the precision around the financial issue. First, did the rule-book[30] of Paris get adopted? The objective is to harmonize the content and the schedule of national contribution, including every five years adjustment assessment and the precision around the mechanisms for transparency and the examination of the control committee before the implementation in 2020. A package-deal got adopted and indicates that the national contributions will be given to this committee, plus reviewed by experts and published publicly in the name of transparency. This is meant to insure the participation of every State. Therefore, the committee

[29] For example, the 1992 Rio Declaration and other documents are not hard, binding international law – indeed, they are often cited as the quintessential examples of soft law; M.C. Cordonier Segger, *Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development*, CJCCL 2017, 3 (1), p. 177.

[30] *Paris Climate Change Agreement*, adopted in 2015, at the COP 21.

will have the power to use „naming and shaming" mechanisms[31] on a State, because the Paris agreement originally did not bring any other obligations than the respect of the procedural obligation. Nonetheless, the Katowice COP24 did not provide any agreement on the international exchange for the carbon quotas, which is truly alarming for a hypothetical carbon law.

Second, did the ambition of lowering the green gas emission get brought up? Many countries like Argentina or Canada said that they were considering raising their contribution[32]. This result is on the one hand encouraging, but on the other hand nothing concrete has come from such promises yet. As a matter of assessment with the current situation, the Stern and Stiglitz report recommended, in 2017, to implement a carbon tax going from USD 40–80 per ton of carbon emission and USD 50–100 in 2020[33], whereas 75% of the emissions world-wide were taxed around USD 10 per ton in 2018[34].

The last point will be the question of financing. Funds are obviously the core of the Paris agreement and therefore it is important to understand their origin. To start, they are gathered in the Green Climate Fund. As of May 2018, the Green Climate Fund[35] has raised the equivalent of USD 10,3 billion in pledges from 43 State governments, 3 regional governments, but also one city, which can also contribute to the Green Climate Fund. These participations are based on the commitments made under the UN Framework Convention on Climate Change (UNFCCC). Among these concerted efforts, advanced economies have formally agreed to jointly mobilize USD 100 billion per year by 2020 in order to fill up the Green Climate Fund. The objective is for all pledges to be converted into contribution agreements within one year from the time at which they are made. Therefore, the main idea here is the transfer of money from the northern countries to the southern countries, through the investment fund, which is in place to build international projects mainly in the southern countries. Such transfer process is supposed to balance the differences between the two hemispheres in terms of economical levels, in order to fight global warming in the most inclusive manner.

The Green Fund only used USD 5,2 billion so far, in 111 projects, and the rest of the financial incomes are still blurry since developed countries are arguing[36] about the fact

[31] Described by P. Rosanvalon in *La Contre-démocratie*, Cambridge 2008, p. 8–64; E. Alt, *La société civile face à la corruption*, Archives de politique criminelle 2017/1, n° 39, p. 89–101; A. Uhlin, *Civil Society and Regional Governance: The Asian Development Bank and the Association of Southeast Asian Nations*, Lanham 2016, ch. 5–6.

[32] France recently did it on the 28th of August in doubling the contributions.

[33] S. Nicholas, S. Joseph, *Report of the high-level commission on carbon prices*, World Bank, 2017, p. 10.

[34] Observations of C. Métivier, S. Postic, *IEAGHG Information Paper: 2018 IP02, Status of Carbon Pricing in 2017,* Institute for Climate Economics, p. 2.

[35] Created in 2010 by the UNFCCC.

[36] See the article of „Deutsche Klimafinanzierung" newspaper about the responsibility of the pollution, the capability to contribute to the fund and the willingness of the country to contribute, as a hint to understand the arguments of the countries to finance the GCF; J. Kowalzig, *Refilling the Green Climate Fund: Will rich countries' pledges match expectations?*, Oxfam 2019, https://www.germanclimatefinance.de/2019/05/13/will-pledges-green-climate-fund-match-expectations/, 27.08.2019.

that the Fund should not be financed more than fifty percent from public funds, whereas southern countries are expressing their concerns around the fact that it should be even more than fifty percent.

If we can celebrate the progress of the debate, the last assessment of the situation seems to be no less critical with the exit from the treaty of the United States of America, Kuwait and Saudi Arabia. Plus, it seems that Brazil is still arguing on the technicalities about the carbon law because the latest version was not as favorable as before, where the country was benefiting from the regulation more – it was receiving double the amount of money. In addition to this assessment, Turkey is discussing its position as a developed country to not pay the dues to the Green fund and receive from the fund instead. Also, more locally Poland is still defending the coal industry[37], which could seem unlikely for the host country of the COP24, especially since it also affects health and environmental conditions of Polish citizens, as does Germany with the opening of coal mines and factories. Overall, all the objections of some states are responsible for an ineffective enforcement of the carbon tax and the PPP itself. The next summits already have many challenges just in order to obtain an international consensus and like always, to rise the annual ecological objectives.

4. Conclusion

The PPP would be a doctrine of responsibility, with the imprint of ecological ethics but also a way to express a mutually benefiting undertaking, with the example of the Green Fund, aimed at living in a healthy environment. Aforementioned, the principle is primarily a juridical obligation, but at the same time the moral dimension is appearing as an imperative of solidarity for the present but also for the future. According to the theory of the principle of fairness[38] („generally acknowledged norms of fairness that have traditionally been seen as valid across a wide range of issue areas and at different levels – from interpersonal to international relations"), such normative basis should be promoted and implemented by the states thanks to the mobilization of the international community. Such juridical concept as the PPP could also be considered one day as a part of a list of planetary rights, which could be several subjective rights, among preventive, curative and punitive measures. One regional or international right would therefore fulfill a new generation of Human Rights, such as the proposition of the ecocide movement or the creation of the environmental refugee status as it has been discussed in Marrakesh during the Intergovernmental Conference on the Global Compact for Migration on the 10th and 11th December. We should conclude on the persisting dissensions around any kind of effective implementation of the mechanism

[37] „There is no plan today to fully give up on coal" – President Andrzej Duda said in his opening remarks on Monday. „Experts point out that our supplies run for another 200 years, and it would be hard not to use them" – from „The New York Times".

[38] L. Ringius, A. Torvanger, A. Underdal, *Burden Sharing and Fairness Principles in International Climate Policy*, International Environmental Agreements: Politics, Law and Economics 2002, 2, p. 1–22.

counterbalancing the society environmental impact leading to the immobilization of the international scene despite the urge of the situation.

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Fundament międzynarodowej zasady „zanieczyszczający płaci"

Zmiany klimatyczne są problemem, który dotyczy przyszłości wszystkich państw, niezależnie od teraźniejszego stanu rozwoju. Zasada „zanieczyszczający płaci" jest konkretnym sposobem walczenia z rosnącymi toksycznymi emisjami. Ten sposób powoduje, że firmy i państwa będą odpowiedzialne za swój wpływ na środowiskowo i ten wpływ może być kontrolowany.

Słowa kluczowe: zmiany klimatyczne, rozwój, zanieczyszczający płaci, wpływ na środowiskowo, Porozumienie Paryskie, zrównoważony

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Actions Taken by Oil Companies – Opportunity or Threat for Sustainable Development?

Abstract:

The oil industry is being considered as one of the main contributors to the persisting climate change problem. What is more, the analysis show that the major companies acting in this sector do not properly addresses climate change issues in their strategies, posing a threat to the achievement of the 13. sustainable development goal. At the same time, oil industry is capable of enhancing the attainment of other sustainable development goals, such as the economic growth. In particular the activities of oil majors in the poorer countries might be significantly beneficial for the proper development of the regions and stimulate the economic growth of the whole society. As the investments made by the oil companies might contribute to the achievement of many sustainable development goals, this sector shall be at the same time hold responsible for adjusting its action to climate change defiance. In this regard, several possibilities might be used. Firstly, the states might impose strict rules concerning usage of their natural resources. Secondly, the investors might exert pressure by setting up rules allowing them only to invest in the projects which take into account the climate change risk. Thirdly, the societies might bring the lawsuits against the oil companies which actions are non-compliant with the climate change objective. The adequate use of aforementioned possibilities might result in the oil companies being one of the leaders of the achievement of whole sustainable development agenda.

Key words: sustainable development, climate change, oil, natural resources, shareholders

1. Introduction

Implementing sustainable development approach towards multiple objectives is one of the main projects undertaken by the United Nations. Whereas, in order to achieve

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the set goals, it is necessary that many actors take action, some sectors possess more power to influence the final outcome. The oil industry is definitely one of a few industries capable of exerting huge impact on its own. It is therefore of utmost importance to properly engage this industry in achieving the sustainable development goals. While some goals, mostly connected to economic growth, are rather simple to be influenced by this sector, attaining the others, mostly related to the environment protection, come at odds with oil companies' strategies. Nevertheless, there exist some measures which might be undertaken in order to overcome these discrepancies. Having amended their strategies, oil industries shall constitute an indispensable factor contributing to changing the world in the sustainable way.

2. Sustainable development

Sustainable development is a commonly used term nowadays. However, historically speaking, this concept appeared recently. The idea, in all its splendour, was presented in 1987 in the *Our common future* report, issued by the United Nation's special commission[2]. This document provided the definition of sustainable development. It is defined as a development that meets the needs of the present without compromising the ability of future generations to meet their own needs. As follows from that definition, the idea seeks to find balance between contemporary and future generations' necessities. There exist three basic components essential for this concept: environmental protection, economic growth and social equity. All of these components are intertwined. In order to pursue sustainable development, each of the factors shall be recognized, properly addressed and the balance between them shall be established.

The term sustainable development was enshrined in many documents issued by the United Nations[3]. As the idea provides for a wide scope of application, there are many rules concerning it. As it is stipulated in the report issued in 1997[4], principles of interrelationship and integration, as well as number of principles and concepts related to environment and development, international cooperation, transparency or dispute avoidance are applicable to described concept. Not elaborating on those rules, it is worth to emphasize that sustainable development provides many ideas, rules and principles as far as wide variety of possible application in many domains and sectors. The flexibility granted by this concept enables it to be applied as the main idea driving particular activities. In this way the idea is used in the overall plans performed by the United Nations. In 2015, the United Nations General Assembly adopted 2030

[2] World Commission on Environment and Development, *Our common future*, UN General Assembly, Doc. A/42/427, Sect. 4, https://www.un.org/ga/search/view_doc.asp?symbol=A/42/427&Lang=E, 02.07.2019.

[3] See M. Kening-Witkowska, *Koncepcja „sustainable development" w prawie międzynarodowym*, Państwo i Prawo 1998, p. 46–48.

[4] See Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva 26–28 September 1995, https://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm, 02.07.2019.

agenda for Sustainable Development (hereinafter: Agenda)[5]. As stated in this document, Agenda is a plan of action for people, planet and prosperity. In order to proceed this plan, Agenda consists of 17 Sustainable Development Goals (hereinafter: SDG) with 169 associated targets which are integrated and indivisible. The goals cover wide range of issuing problems, from eliminating poverty and hunger, through conserving the oceans and ensuring sustainable consumption to gender inequality[6].

Before elaborating on the relations between abovementioned elected SDG and the oil industry, it is worth mentioning that the concept of sustainable development is not uniquely enshrined on the international level. European Union indicates sustainable development of Europe as one of its goals stipulated in the Treaty on the European Union. As the concept is not currently defined under European law[7], it is commonly used in many regulations and directives. The sustainable development is particularly applied in the European Union energy law[8]. It means that also the oil industry is covered by European law enhancing sustainable development. What is more, sustainable development is also reflected in the national legislation, even in the constitutions[9].

3. Sustainable development and the oil industry

The oil industry constitutes a very prominent and influential part of modern global economy. Just a short glimpse into the statistics provides a hint about the potential of this industry. According to International Energy Agency[10] capital expenditure only in oil and gas upstream in 2019 will amount globally to 497 billion dollars. In order to properly assess this figure, it is worth noticing that gross domestic product of Poland in 2018 was equal to 586 billion dollars[11]. Bearing in mind these statistics, there is no doubt that the oil industry might significantly contribute to the achievement of SDG described above.

The conclusion that it is crucial to match the oil industry with SDG was drawn by United Nations Development Programme, International Finance Corporation and International Petroleum Industry Environmental Conversation Association. Those three institutions in collaboration issued the *Mapping the oil and gas industry*

[5] Resolution adopted by the General Assembly on 25th September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, 02.07.2019.

[6] More information available at https://www.un.org/sustainabledevelopment/, 02.07.2019.

[7] S. van Hees, *Sustainable Development in the EU: Redefining and Operationalizing the Concept,* Utrecht Law Review 2014, vol. 10, issue 2.

[8] See K. Talus, *Introduction to EU Energy Law*, Oxford 2016, p. 119–139.

[9] See Art. 5 of the Constitution of the Republic of Poland, adopted 2nd April 1997 (OJ. 1997, position 78.483).

[10] International Energy Agency, *Oil 2019. Analysis and forecasts to 2024*, https://www.iea.org/oil2019/, 25.06.2019.

[11] See https://countryeconomy.com/gdp/poland, 21.06.2019.

to the sustainable development goals: an atlas report[12]. As the authors of the report correctly emphasize, the oil sector is an important global industry and it can have both positive and negative impact on a range of areas covered by the SDG[13]. As obvious as it may sound, influential sectors may indeed either genuinely contribute to the achievement of set goals or, on the other hand, make it extremely challenging or even impossible to accomplish them. One might even conclude that without the relevant impact on the part of major industries and actors, the attainment of the worldwide objectives might become out of our reach.

Nevertheless, the report, mentioning the potential risks of mismatch of the oil industry and SDG, provides the readers with more optimistic attitude towards that challenge. According to the authors, there are opportunities to integrate SDG into core business activities of oil and gas companies[14]. What is more important, the report claims that the oil industry may significantly contribute to each of 17 SDG. From eliminating poverty and hunger, through providing affordable energy and reducing inequalities to protecting life below water and on earth, the oil industry might influence the achievement of all of objectives set by the United Nations. Some of them do not seem to be specifically related to the oil industry. However, due to the fact that SDG are interlinked and that the oil industry possess huge potential, such as generating jobs or being a significant taxpayer[15], each one of SDG might be mapped with concerned industry. As the main objective of this article is not to describe the possible contributions by the oil industry to each of SDG, the author limits himself only to dwell into two of these goals. Firstly, the opportunities for the oil industry to influence the attainment of decent work and economic growth goal will be described. Secondly, relation between the oil industry and climate change goal will be drawn. These two selected goals constitute an indicative example of how the same activity might perfectly match with one objective and at the same time struggle to even avoid hampering the achievement of other. Thereafter, the stark contrast between the effort needed to attain these two goals will be described. Following that, the author intends to present three possible solutions for enhancing the oil industry's impact on the attainment of climate change goal, which seems to be at odds with major oil companies' strategies.

4. The oil industry and economic growth

As some authors claim, the development of fossil fuels such as oil improves the overall progress of humanity and the average income per person[16]. There is no doubt that the oil industry constitutes a crucial role in the economy of many countries. It is worth

[12] IFC, IPIECA, UNDP, *Mapping the oil and gas industry to the sustainable development goals: an atlas*, 2017, http://www.ipieca.org/resources/awareness-briefing/mapping-the-oil-and-gas-industry-to-the-sustainable-development-goals-an-atlas/, 20.06.2019.

[13] *Mapping the oil*…, p. VII.

[14] *Ibidem*, p. VIII.

[15] *Ibidem*, p. 1.

[16] See. A. Epstein, *The moral case for fossil fuels*, New York 2014.

mentioning that significant part of budget revenues of countries such as Russia[17], Iran or Saudi Arabia[18] constitutes revenues created by the oil industry. Due to the shale revolution, we also witness the enormous development of this sector in the United States[19]. However, the main objective of SDG is to achieve significant improvement specifically in the countries which are not well developed and were the problem of poverty exists. Those are the regions where the oil industry may be found particularly relevant.

The eighth SDG consists of promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. It can be easily divided in two parts. Firstly, the objective is to stimulate the adequate economic growth. Therefore, the achievement of it requires more macroeconomic attitude and activities. Secondly, this goal concerns the employment issues as well. In this regard, its attainment depends heavily on the attitude provided by the employers and the proper politics enhanced by each country. Since the fulfillment of the eighth SDG is a complex matter, it is worth pointing out the element which might play the crucial role for developing economic growth and guaranteeing decent work, mostly in the developing countries.

From the macroeconomic perspective there is no doubt that the oil industry might exert very positive impact on the state or even global economy. It suffices to take into account the capital investments in the oil and gas upstream cited above, to understand the potential of this sector in contributing to the economic growth[20]. Especially the economic situation of the countries not pertaining to G-20 might be significantly improved by the discoveries of oil reserves. Due to the incomes flowing from oil deposits development, the country may flourish, at least from the macroeconomic perspective. There are strong evidences that oil sector development in Caspian Region stimulates economy of its countries[21]. The same applies for the countries in Africa, like Cameroon[22]. Most recently, Mozambique's huge oil deposits' discovery poses a magnificent opportunity for this country. African Development Bank prepared a special report *Mozambique Country Strategy Paper 2018–2022*[23]. In this document

[17] N. Sabitova, C. Shavaleyeva, *Oil and Gas Revenues of the Russian Federation: Trends and Prospects*, https://core.ac.uk/download/pdf/82763422.pdf, 25.06.2019.

[18] European Central Bank, *Fiscal policy challenges in oil-exporting countries a review of key issue*, https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp104.pdf?4b00f0923bf45bc0d2e8d59dca04f095, 25.06.2019.

[19] International Energy Agency, *Oil 2019*…

[20] *Mapping the oil*…, p. 42.

[21] R. Jahangir, B. Dural, *Crude oil, natural gas, and economic growth: impact and causality analysis in Caspian Sea region*, International Journal of Management and Economics 2018, vol. 54, issue 3, https://content.sciendo.com/abstract/journals/ijme/54/3/article-p169.xm, 25.06.2019.

[22] J.G. Tamba, *Crude oil production and economic growth: Evidence from Cameroon, in Energy Sources, Part B: Economics*, Planning and Policy 2017, vol. 12, issue 3, https://www.tandfonline.com/toc/uesb20/curren, 25.06.2019.

[23] African Development Bank, *Mozambique Country Strategy Paper 2018–2022*, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/MOZAMBIQUE_-_CSP_2018–2022__Final_.pdf, 24.06.2019.

the importance of oil related projects in generating revenues for country and creating jobs is highlighted. However, there is an impression that majority of income coming from the development of oil fields lands in the budgets of major oil companies. It is true that oil majors such as Shell, BP, Chevron and ExxonMobil provide significant capital expenditures each year[24] which are commonly related to the infrastructure investments in countries like Mozambique. Just to provide an example, ExxonMobil invests in the development of Mozambique's deposits[25]. Shell is also commercially interested in this country's natural resources[26]. Whereas, the major oil companies might contribute to the developments of the state such as Mozambique, their primary goal is to increase the profits and satisfy the shareholders. As helpful for the country's economy their actions might seem, it takes much more than only major oil firms investments to provide a sustainable and lasting effect for economic growth and job creation. It seems that there is one solution, on which the emphasize shall be put – local procurement and supplier development[27].

As correctly stated, in addition to direct employment opportunities, greater chances for job creation can exist through local sourcing of goods and services, capacity-building and encouraging economic diversification away from dependence on upstream oil[28]. The World Bank stated that also developing local content in the oil sector is of crucial importance[29]. According to the report prepared by the World Bank, countries shall adopt suitable local content policy in order to enhance the development of local economy. It is also essential for the country to set appropriate provision in the contracts for procurement of goods and services. Each state shall guarantee that adequate level of contractors, subcontractors, materials etc. come from local enterprises. In effect, the local economy obtains a relevant impulse for increase. The more local content in the oil industry development, the more opportunities for local enterprises, more jobs locally created and more money in the state's budget. As the oil industry investments are frequently related to the projects performed by major oil companies, there is a high possibility that the most income flowing from such projects will be received by these companies and local economy will be affected only in slight part. For instance, in Nigeria only 13% of oil revenue stayed on local government level[30]. It is therefore necessary, in order to achieve the eight SDG, to ensure more local content in the oil sector. As the capital expenditures and investment in the oil sector persists on high level, its capability of creating the jobs and enhancing economic growth is evident and logical. However, in order to ensure the more sustainable economic growth, guaranteeing more local content in oil related projects is desired.

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[24] See *ExxonMobil gambles on growth*, The Economist, 30th May 2019.

[25] For more information https://www.exxonmobil.co.mz, 24.06.2019.

[26] See for example https://www.ft.com/content/a83be082-e642–11e8–8a85–04b8afea6ea3, 23.06.2019.

[27] *Mapping the oil*…, p. 42.

[28] *Ibidem*, p. 43.

[29] World Bank, *Local content policies in the oil and gas sector*, https://openknowledge.worldbank.org/bitstream/handle/10986/15930/78994.pdf?sequence=1&isAllowed=y, 24.06.2019.

[30] D. Yergin, *The Quest w poszukiwaniu energii*, Warsaw 2013.

5. Climate change and the oil industry

Climate change poses a great threat for the humankind. It creates an unprecedented challenge as well, which require the joint action taken by all countries, enterprises and citizens. As the origins, scientific proofs of existence, the severity of consequences of climate change[31] is out of scope of this article, it shall be emphasised that the achievement of this SDG is of utmost importance.

13. SDG enhances to „take urgent action to combat climate change and its impacts". There are actions undertaken on the international level aiming at combating the climate change[32]. It suffices to mention the adoption of Paris Agreement[33] or the ongoing works, in forms of conference of the Parties to the United Nations Framework Convention on Climate Change[34]. Nevertheless, as correctly stated in the report[35], the Paris Agreement was a significant political step in addressing the risks of climate change, however it is clear that additional action beyond the current nationally determined contributions is needed in order to achieve the aims of the Agreement. These additional actions shall come mainly from the sectors like the oil industry. This statement might be backed by two scientific facts. Firstly, around 80% of all CO_2 emissions comes from fossil fuel use[36]. What is worth noticing, CO_2 emissions are estimated to account for more than half of global warming[37]. Therefore emissions connected to fossil fuels like oil shall be hold responsible for significant contribution to the global warming. Secondly, according to Intergovernmental Panel on Climate Change (hereinafter: IPCC), in order to achieve climate change targets, emissions stemming from the oil industry have to decline[38]. What is even more important, to achieve even less ambitious goals than recommended by IPCC oil production shall decline[39]. According to some analysis the decline of the use of oil by 2030 shall amount

[31] M. Popkiewicz, A. Kardaś, S. Malinowski, *Nauka o klimacie*, Warsaw 2018, p. 16–22.

[32] For more see *Goal 13: Take urgent action to combat climate change and its impacts,* United Nations, 2015, http://www.un.org/sustainabledevelopment/climate-change-2/, 30.06.2019.

[33] Paris Agreement signed 12th December 2015, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en, 25.06.2019.

[34] For more information https://www.un.org/sustainabledevelopment/climate-change/, 30.06.2019.

[35] *Mapping the oil…*, p. 65.

[36] R.E.H. Sims, R.N. Schock, A. Adegbululgbe, J. Fenhann, I. Konstantinaviciute, W. Moomaw, H.B. Nimir, B. Schlamadinger, J. Torres-Martínez, C. Turner, Y. Uchiyama, S.J.V. Vuori, N. Wamukonya, X. Zhang, *Energy supply* [in:] *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer, Cambridge, United Kingdom and New York, NY, USA, 2007, p. 261.

[37] *Mapping the oil…*, p. 65.

[38] Intergovernmental Panel on Climate Change, Global warming of 1,5°C. An IPCC Special Report on the impacts of global warming of 1,5°C 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, https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf, 30.06.2019.

[39] See *ExxonMobil gambles on growth*, The Economist, 9th February 2019.

to 37% and by 2050 to 87% in comparison to the 2010 level[40]. International Energy Agency prepares scenarios concerning energy and emissions[41]. In the scenario called the New Policies Scenario, International Energy Agency takes into account economic and population growth, energy market and technology as well as existing and new policy scenarios to the extent known during preparing the document. It is therefore a scenario based on the current knowledge and plans. Agency prepares also the Sustainable Development Scenario. This scenario is an integrated part of energy policy, taking into account measures required to attain three SDG: ensuring universal access to affordable, reliable, sustainable and modern energy services by 2030, substantially reducing the air pollution which causes deaths and illness, and taking effective action to combat climate change. This scenario is therefore more forward-looking and explicitly takes into account non-existing actions required to attain SDG related to climate change. Comparing the New Policies Scenario and the Sustainable Development Scenario, it is worth noticing that world primary energy demand in the Sustainable Development Scenario (expressed in Mtoe) shall decline by 8,3% till 2025 and 31,6% in 2040. Bearing in mind this scenario, one might draw conclusions that in order to meet described objectives, states and enterprises have to adapt its strategies involving measures which are not included in current strategies.

Comparing to the described above challenges for the oil industry concerning the attainment SDG related to decent work and economic growth, the contribution for the achievement of climate change target is far more challenging. According to the aforementioned reports prepared by scientists, the need for action by the oil industry is urgent. What makes this challenge more complicated for the oil enterprises is the fact, that unlike other SDG, the achievement of climate change target requires the significant change[42] of strategies and actions performed by them, including decreasing production level in the long term and shifting towards other business activities. As proposed in the report *Mapping the oil and gas industry to the sustainable development goals: an atlas*[43], the oil industry shall integrate 13. SDG into core business. The oil industry should adopt strategic plans for a net zero emission future. As emphasised in aforementioned report, business strategies need to harmonize with national strategies, including the plans stipulated in Paris Agreement. What is important, in order to attain set objectives, national strategies, according to the described above scenarios, prepared by International Energy Agency, shall also impose more stringent aims concerning among other oil demand. What is more, notwithstanding the national strategies, the oil enterprises shall carefully undertake actions aiming at the achievement of SDG concerning climate change on its own. It shall be also mentioned that the oil

[40] K. Trout, L. Stockman, *Drilling towards disaster: why U.S. oil and gas expansion is incompatible with climate limits*, http://priceofoil.org/2019/01/16/report-drilling-towards-disaster/, 30.06.2019.

[41] International Energy Agency, *World Energy Outlook 2017*, p. 114–148.

[42] R. Debarre, T. Fulop, B. Lajoie, *Consequences of COP21 for the Oil and Gas Industry*, https://www.accenture.com/t00010101t000000__w__/br-pt/_acnmedia/pdf-11/accenture-strategy-energy-perspectives-consequences-cop21.pdf, 27.06.2019.

[43] *Mapping the oil…*, p. 66.

industry should mitigate emissions within its own operations. It includes *inter alia* minimizing methane emissions.

The abovementioned plans, predictions and even the duties imposed on the oil enterprises sound appealing. Nevertheless, the reality does not coincide with them. It seems that the biggest oil companies does not align its strategies with set recommendations. What is more, some of the oil majors implement strategies contradictory to the achievement of objectives related to climate change. As stems from the report prepared by Transition Pathway Initiative[44], there are significant discrepancies between the strategies of 10 major oil companies and the climate change targets. As stated in the report, no company has proposed to reduce its carbon intensity sufficiently to be aligned with a 2 Degrees or Below 2 Degrees benchmark by 2050. What is more, no company currently plans to achieve net-zero emissions by 2050. The situation does not improve concerning the targets to be achieved by 2040, as only Total and Shell would see them become aligned with the least stringent Paris Pledges benchmark by 2040. What is striking, is that the remaining 8 big oil enterprises never come into alignment with any of the benchmarks. The presented above requirements for achieving climate change targets presuppose that oil demand and oil production shall decline. Meanwhile, ExxonMobil plans to significantly increase its production[45]. According to the consultancy firm Wood Mackenzie, seven international oil companies combined will produce 23 million barrels of oil equivalent per day by 2023, which is 3 million more than was forecasted just in the previous year[46]. It follows from these statistics that oil companies instead of decreasing its production, increase it. It poses a serious threat for the achievement of climate change objectives stipulated in SDG. As professor Simon Dietz points out: „there is a long way to go. None of the largest global oil & gas firms currently set a path that would align them with limiting global warming to 2 °C or below before 2050[47].

Taking indicated discrepancies into account, one might realize the seriousness of the challenge laying ahead the oil industry. Currently strategies implemented by major oil enterprises poses rather a threat to the achievement of chosen SDG, than an opportunity. Nevertheless, taking into account the financial capabilities and the role that oil will play in foreseeable future, the oil industry possess the potential for contributing to the attainment of climate change objective. As suggested by executive secretary of United Nations Framework Convention on Climate Change during 40th anniversary conference, the oil might become the leader „that take us

[44] S. Dietz, C. Garcia-Manas, D. Gardiner, W. Irwin, A. Matthews, M. Nachmany, R. Sullivan, F. Ward, *Carbon Performance Assessment in Oil and Gas: Discussion paper*, 2018, http://www.lse.ac.uk/GranthamInstitute/tpi/wp-content/uploads/2018/11/Oil_and_gas_discussion_paper_061118.pdf, 27.06.2019.

[45] See *ExxonMobil gambles on growth*, The Economist, 9th February 2019.

[46] See https://www.forbes.com/sites/woodmackenzie/2019/02/22/can-oil-companies-grow-and-cut-greenhouse-gas-emissions/#313de5194a2c, 30.06.2019.

[47] See more https://www.forbes.com/sites/mikescott/2018/11/14/oil-majors-have-started-their-low-carbon-journey-but-progress-is-painfully-slow/#4c9dd24f4209, 30.06.2019.

to the new, sustainable energy mix"[48]. However, in order to become the leader, oil companies have to perform the strategies compatible with climate change objectives. As shown above, it seems that oil companies might not be willing to promptly adapt their strategies to climate change objectives. It might be therefore crucial to force them to change their behaviours. In this regard three methods, described below, might be necessary to implement.

6. Possible actions concerning the oil industry and climate change goal

One might distinguish three factors influencing the strategies of oil companies[49]. Firstly, their strategies are influenced by corporate model – mostly by the management boards and stakeholders. In this regard, emphasis shall be put on the role of stakeholders. As far as private companies are concerned, stakeholders might exert irresistible pressure enterprise's behaviour. Secondly, oil companies' strategies are susceptible to the national politics. The crucial role shall be played by national energy strategies and national plans concerning environmental protection, as they are legally binding for all the entities. Stipulating environmental plans in the form of national legal acts, like strategies, provides with coherent legal framework. Within the national framework it is more evident what are the public authorities responsible for implementing the plan, the possible way for judicial appeal is set and the rules for imposing administrative penalties are commonly known and well-established. Moreover, the national plans are part of broader national legal system and other national legally binding acts might easily reefer to the obligations following them. What is more, it is the national authority that finds itself in the best position for protecting national environment. Due to the specific knowledge of the country's resources and capabilities, the national plans are, by their very nature, more detailed and better suited for the environmental protection of a given country. On the other hand, it shall be mentioned that the binding effect of obligations stemming from the plans set up on the international level depends on each country's legal system. As in general, such plans constitute a basic and helpful tool for protecting the global environment, due to sometimes insufficient implementing measures provided, it is for the utmost importance that rules stipulated at national level guarantee the obedience with goals set internationally. In this respect, the national environmental protection plans constitute a concrete measure for granting detailed and legally binding regulations, fulfilling, even to the greater extent, internationally established goals within each country. Thirdly, international regime influences adopted strategies. As described above, the legal framework and obligations are created by the treaties such as Paris Agreement. The oil industry have to take them into account while adopting their strategies. However, the international framework is not solely sufficient to render the strategies compatible with set climate

[48] Statement by Christiana Figueres, Executive Secretary United Nations Framework Convention on Climate Change, IPIECA 40th Anniversary conference, https://unfccc.int/news/ipieca-40th-anniversary-conference, 30.06.2019.

[49] See J. Skjaerseth, T. Skodvin, *Climate change and the oil industry*, Manchester 2003.

change objectives. It is therefore the role of national framework as well as corporate actors to make the oil companies' strategies compatible with SDG related to climate change. In this regard three types of actions might be undertaken.

Firstly, each country has a right over its natural resources. According to the resolution adopted by the United Nation's General Assembly[50] all member states possess the right to exploit freely its own natural resources. Art. 18 of the International Energy Charter[51] states that „each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources". Moreover, this right was acknowledged in United Nations Framework Convention on Climate Change, were subsequently was stipulated: „recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies"[52]. As follows from aforementioned documents, each country might freely manage its own resources. What is more, the exploitation of them shall be compatible with environmental policies adopted by the country[53]. The international framework imposes obligation concerning climate change mainly on states. In result, states through national energy strategies and environmental plans shall adopt measures aiming at fulfilling international obligations. As the exploitation of natural resources comes within the competences of states, it is for them to decide over the oil production deriving from its fields. In this regard, especially countries which recently discovered oil deposit, like Mozambique, shall be diligent. In the bidding process for exploration and production licences, the states shall take into account its obligations concerning climate change. It does not mean that they should not grant any new oil production licences at all. It is probable that the national interests of some countries concerning natural resources are at odds with climate change SDG. For example, India extract and plans to extract and burn way more coal that it should in order to fulfil the goals set in the Paris Agreement[54]. What may impede the achievement of this particular SDG, may, on the other hand, come in handy in achieving other SDG. Nevertheless, this discrepancies must not lead to abandoning the efforts for fulfilling some international obligations, by invoking, for example, attaining other internationally recognised goals. As finding the proper compromise would amount to the perfect solution in such situation, the states shall, to the maximum extent consistent with other obligation,

[50] Resolution adopted by General Assembly, 21st December 1952, n. 626 (VII), right to exploit freely natural wealth and resources, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/079/69/IMG/NR007969.pdf?OpenElement, 01.07.2019.

[51] The International Energy Charter of 20th May 2015, https://energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_Certified_Adopted_Copy.pdf, 01.07.2019.

[52] United Nations Framework Convention on Climate Change: resolution adopted by the General Assembly, 20th January 1994, https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention, 01.07.2019.

[53] See more J. Osiejewicz, *Globalne zarządzanie zasobami ropy i gazu w perspektywie prawnomiędzynarodowej*, Warsaw 2018, p. 41–42.

[54] *Power generation. Down and dirty*, The Economist, 24th August 2019.

stipulate in their environmental protection plans as well as in the acts concerning granting licences the conditions compatible with climate change SDG. As the oil companies willing to exploit resources have to be obedient to the national regulations, the use of state's right to freely manage its own resources, might incentivise oil companies to change their behaviour. In the most exigent scenario, if the oil company did not accept the conditions concerning climate change stipulated by the state, it might be deprived from the possibility of being granted the access to the oil production reserves. It might eventually result in the situation in which the oil companies with the most climate change consistent strategies will receive more business opportunities than the companies with strategies incompatible with this goal.

Secondly, the investors and stakeholders are also entitled to exert the pressure on the oil industry. It is worth to notice that associations with the investors concerned about the achievement of climate change goal are created. In December 2017 the so called „Climate Action 100+" was launched. It is an initiative of 320 investors aiming at ensuring that the world's largest corporate greenhouse gas emitters took necessary action on climate change. Investors participating in this initiative have more than USD 33 trillion in assets under management have signed on to the initiative[55]. The one member of the initiative, namely Church of England Pensions Board, might be praised for recent success. Church of England Pensions Board is one of the main stakeholders of Royal Dutch Shell. In March 2019 this investor undertook the initiative to impose carbon footprint targets, binding for Shell management and workers[56]. Targets aim to decrease greenhouse gas emission from oil extraction, refining and all fuels sold by Shell. What is important, the achievement of targets will be linked with remunerations. In 2019 the remuneration of around 150 executives will be linked to these targets. However, in 2020 as much as 16 000 workers' remuneration will partially depend on the achievement of carbon footprint targets. This action provides for a huge incentive for many employers and is deemed to be a successful measure aiming at assuring the accomplishment of targets[57]. As stated by the director of ethics and engagement for the Church of England, the actions undertaken by Shell set a benchmark for the rest of the oil sector[58]. This statement indicates the trend of investors exerting the pressure on oil companies regarding the attainment of climate change objectives. In May 2019, British Petroleum shareholders vote to require the company to disclose the information on how its strategy matches the goals of Paris Agreement[59]. It is therefore apparent that shareholders might effectively contribute to the change of actions pursued by the oil enterprises. The aforementioned examples of shareholders' successful

[55] Information concerning Climate Action 100+ available at http://www.climateaction100.org/, 01.07.2019.

[56] More information available at https://uk.reuters.com/article/uk-shell-carbon/shell-sets-its-first-carbon-reduction-targets-on-output-consumption-idUKKCN1QV2L2, 01.07.2019.

[57] More information available at: https://edition.cnn.com/2018/12/14/perspectives/shell-executive-pay-carbon-emissions/index.html, 01.07.2019.

[58] More information available at: https://www.bbc.com/news/business-46424830, 01.07.2019.

[59] See *Oil majors face shareholder resolutions on climate change*, The Economist, 30th May 2019.

influence are not widespread. In order to attain SDG concerning climate change, more active shareholders' approach is required.

Thirdly, there is the possibility of bringing the lawsuits against the oil companies attitude towards climate change objective. In 2018 New York's attorney general sued ExxonMobil[60]. According to the lawsuit, ExxonMobil „provided false and misleading assurance that it is effectively managing the economic risks posed to it business by the increasingly stringent policies and regulations that it expects governments to adopt to address climate change"[61]. The case is still pending. Nevertheless, it shows that it is possible to hold the oil companies reliable for not properly taking into account climate change proxy. Other institutions might follow the lead and scrutinize the discrepancies between oil companies' strategies and climate change objective. There are also some initiatives seeking compensation from the oil companies for the damages related to climate change[62]. As the analysis of this attends falls out of the scope of this articles, it is worth to acknowledge the fact that in certain jurisdiction exists a possibility for the citizens to file a lawsuit against the contribution of oil companies to climate change. Not assessing the chances of such lawsuits, one might conclude that apart from the actions on the state's level and on the shareholders' level, also other institutions, organizations and citizens might influence the achievement of climate change related goals by the oil industry.

7. Conclusions

Achieving SDG constitutes an enormous challenge for international community, states, regions and multiple industries. All of the actors have to participate actively in attaining the goals set by the United Nations. However, it is evident that some industries, while naturally contributing to the attainment of particular goals, might struggle to properly influence certain SDG. As stated above, the oil industry might easily stimulate the economic growth, provide decent work or even provide the citizens with access to energy. Nevertheless, the activities performed by oil companies are difficult to reconcile with SDG related to the environment protection, in particular combating climate change. Bringing together the attainment of all SDG by the oil industry is undoubtedly difficult. However, with the proper actions taken by the states, shareholders, relevant institutions and even communities, existing discrepancies between oil companies' strategies and SDG might be mitigated or even overcome. As the deadline for attaining SDG comes, it is time to take action in order to ensure, that one of the most important industries in the world would contribute properly to the development of humanity.

[60] The text of lawsuit available at: https://eidclimate.org/wp-content/uploads/2019/04/NY-AG-lawsuit-Copy.pdf, 01.07.2019.

[61] More information concerning the case available at: https://www.nytimes.com/2018/10/24/climate/exxon-lawsuit-climate-change.html, 02.07.2019.

[62] More information available at: https://www.reuters.com/article/us-oil-climatechange-rhode-island/rhode-island-sues-major-oil-companies-over-climate-change-idUSKBN1JS28M, 01.07.2019.

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Działania podejmowane przez przedsiębiorstwa działające w sektorze naftowym – szansa czy zagrożenie dla zrównoważonego rozwoju?

Sektor naftowy uważany jest za jeden z głównych sektorów, który przyczynia się do problemu zmian klimatycznych. Co więcej, analizy wskazują, że wiodące przedsiębiorstwa naftowe w swoich strategiach nie biorą w wystarczającym stopniu pod uwagę zmian klimatycznych, przez co tworzą zagrożenie dla osiągnięcia trzynastego celu zrównoważonego rozwoju. Jednocześnie sektor naftowy jest w stanie wpłynąć korzystnie na osiągnięcie innych celów zrównoważonego rozwoju, takich jak wzrost gospodarczy. Działania podejmowane przez przedsiębiorstwa naftowe, w szczególności w biedniejszych krajach, mogą przynosić znaczące korzyści dla odpowiedniego rozwoju regionów oraz stymulować wzrost gospodarczy całych społeczności. Skoro inwestycje dokonywane przed przedsiębiorstwa naftowe mogą znacząco przyczynić się od osiągnięcia wielu celów zrównoważonego rozwoju, sektor ten musi jednocześnie stać się odpowiedzialny za dostosowanie swoich działań do wyzwań związanych ze zmianami klimatycznym. W tym względzie istnieje kilka możliwości, które mogą zostać wykorzystane. Po pierwsze, państwa mogą nałożyć rygorystyczne zasady dotyczące wykorzystania ich zasobów naturalnych. Po drugie, inwestorzy mogą wywrzeć presję poprzez ustanowienie zasad pozwalających im na inwestowanie jedynie w projekty, które biorą odpowiednio pod uwagę wyzwania związane ze zmianami klimatycznymi. Po trzecie, społeczności mogą pozywać przedsiębiorstwa naftowe, których działania są niezgodne z celem zwalczania zmian klimatycznych. Odpowiednie wykorzystanie wymienionych środków może sprawić, że sektor naftowy stanie się jednym z liderów prowadzących do zrealizowania całej agendy zrównoważonego rozwoju.

Słowa kluczowe: zrównoważony rozwój, zmiany klimatyczne, ropa, zasoby naturalne, udziałowcy

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Competition Law and Sustainable Development of Economy

Abstract:

Since the beginning of economics as an independent scientific field, the market structure was one of its most important areas of interest. The first works looking for the regularities that govern the processes of the use of limited resources drew attention to the impact of the number and nature of economic entities on the economic effects of their activities. At the same time, a tragic conflict between the objectives of competition law appeared – on the one hand limiting the largest enterprises to create competition conditions on the internal market, on the other, supporting the most significant domestic entrepreneurs to enable them to compete successfully with foreign entities.

The widening area of interest of economic sciences creates a pretext to look at other interdependencies between the structure of markets and their economic results. Initially, attention was paid only to the relationship between the market power of a given entity and its impact on the general price level. Nowadays, one should look at the effects it has on more complex economic dependencies. Economics, which is a social science, in the twenty-first century should address issues that have the most significant impact on modern societies. The issue of sustainable development is likely to become its main research area.

This paper aims to present the links between the industrial organization (the degree of dominance of the largest companies) and the realization of Social Development Goals. Putting the most important market structure theories together with empirical data, I will try to answer the question of the effect that strong concentration has on sustainable development.

Key words: competition law, sustainable development, industrial organization, law & economics

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Whoever could make two ears of corn, or two blades of grass,
to grow upon a spot of ground where only one grew before,
would deserve better of mankind, and do more essential
service to his country, than the whole race of politicians
put together[2]

1. Introduction

The primary purpose of this work is to present the unobvious influence of the institutional system that is competition law on the sustainable development of the economy. Like all institutions, the provisions of this branch of law create incentives that influence the behavior of individuals and organizations[3]. The subject of the analysis are here those activities that have the most pronounced impact on spheres traditionally associated with the issue of sustainable development. To concretize the area of study, the most widespread agenda – the Sustainable Development Goals presented by the United Nations in 2015 – was used[4]. As will be noted in this work, sustainable development is defined here as economic progress that is achieved without abusing natural resources.

To determine the impact of the essential norms of competition law on the implementation of the Sustainable Development Goals the analytical apparatus of one of the most important social sciences – economics – will be used. The choice is not accidental here. As will be shown the effort of economic sciences from the very beginning of their existence was associated with solving the problems of sustainable development. Economics is also strongly connected with the analysis of institutions of competition law, which due to the focus on phenomena such as market structure, is finally forced to accept more economic approach[5].

The analysis carried out with the use of economic tools allows to understand better the Janus-faced economic policy concerning competition. It was noticed at the beginning of competition protection law – the rulers were interested in benefiting from market relations on the one hand, and in having active industrial entities within their borders on the other hand[6]. As will be shown, the optimal implementation of the sustainable development goals cannot be guaranteed either by free competition or by increasing concentration. An effective competition policy aimed at achieving sustainable development as well as other socially desirable goals should exert a powerful influence on markets. This allows us to understand the dual nature of competition law provisions that „interfere and limit economic freedom on the one hand, and on the other, do so to protect the essence of this freedom"[7].

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[2] J. Swift, *Gulliver's travels*, Oxford 2005, p. 185.

[3] J.R. Commons, *Institutional Economics*, Pittsburgh 1931, p. 648.

[4] United Nations, *The 2030 Agenda for Sustainable Development*, 2015.

[5] D. Schmidtchen, M. Albert, S. Voigt, *The More Economic Approach to European Competition Law*, Tubingen 2007, p. 277.

[6] P. Chmielnicki, *Creating economic institutions and Polish legislation*, Warsaw 2015, p. 208.

[7] PUOKiK, 102/9/A/2014, Judgment of Constitutional Court, 16th October 2014, Ref. Act SK 20/12.

2. Economic analysis of law

Due to the purpose of this work, which is to examine the impact of competition law on the implementation of sustainable development goals, the analytical tools used here are of an economic nature. The relationship between the science of economics and the concept of sustainable development is stable and can be found in the commonly accepted definitions of these concepts. While the best description of economics is considered to be the science of limited resources and their alternative uses[8], sustainable development is defined as economic progress that is achieved without abusing natural resources[9].

At the beginning of its history, economics conducted research indicating the need to give sustainability to development. In one of the earliest treatises of classical economics, *An Essay on the Principle of Population* (1779), Thomas Robert Malthus drew attention to the geometric growth of population accompanying the linear increase in food production[10]. According to the eighteenth-century economist, these two tendencies should lead in the long run to food shortages on a large scale and thus – an unavoidable demographic disaster. The conclusions drawn by the first researchers of the economy have led Thomas Carlyle to designate economics as „dismal science"[11]. This name maintained for several decades. It was not until the nineteenth century when some of the most critical events in the history of the economy took away from economics its gloomy name.

The period during which economics gave up its fatalist research, which was part of its previous study, was the first industrial revolution. Significant changes that took place then in production efficiency solved the fundamental economic problems of earlier eras such as food shortages[12]. Since then, economists studying relation between progress and abuse of natural resources have stopped warning about the imminent catastrophe and began to investigate which of the social institutions can contribute the most to maintaining sustainable development. Thus, centuries of the emergence of interdisciplinary fields of economics, usually aimed at the application of the already educated conceptual apparatus to the analysis of phenomena which are the area of interest of other social sciences, began. One of the most important fields created in this way is the economic analysis of law. It aims to examine the social effects of individual legal institutions with the help of economic tools[13]. One of the areas where research is most often undertaken using economic law analysis tools is environmental protection and sustainable development.

The analysis of the provisions of competition law conducted in this work using the conceptual apparatus of economics allows us to understand their ambiguous impact

[8] L. Robbins, *An Essay on the nature and significance of Economic Science*, London 1932, p. 15.

[9] *Oxford Dictionary*, Oxford Reference, Oxford 2019.

[10] T.R. Malthus, *An Essay on the Principle of Population*, London 2008, p. 36.

[11] R.L. Heilbroner, *The Worldly Philosophers*, New York 2002, p. 101.

[12] L.T. Wyatt, *The Industrial Revolution*, Greenwood 2008, p. 39.

[13] R. Cooter, T. Ulen, *Law and Economics*, Harlow 2014, p. 3.

on the implementation of the sustainable development goals most strongly associated with the economy. The first industrial revolution laying the foundations for today's economy has brought economists not only solutions to old problems but also new dilemmas. In the proper part of this work, an attempt will be made to determine to what extent these problems can be solved and how much should be expected from the return of dismal science.

3. Sustainable Development Goals

To conduct an economic analysis of the effectiveness of competition law norms in the implementation of Sustainable Development Goals, the scope of this work should be clarified first. Due to its limited volume, only two of the seventeen UN targets for sustainable development will be analyzed here. They were selected due to their unique, strong relationship with the issues described above regarding the functioning of the economy. These are **the Eighth Goal**: suitable employment and economic growth, and **the Ninth Goal**: innovation and infrastructure[14].

The problem that led to the analysis of the impact of competition law institutions on the implementation of sustainable development objectives carried out in this work is the strategy adopted by the UN to achieve them. According to official UN documents, this Eighth Goal and the Ninth Goal are to be completed by „encouraging the formation and growth of micro, small, and medium-sized enterprises"[15]. Searching for the way to achieve the goals of sustainable development in the development of the sector of micro, small and medium enterprises is not a distinguishing feature of the UN from other international organizations. Also, the World Bank in its recent statements points to the strategy that „promotes small and medium-sized enterprises (SME) growth through both systemic and targeted interventions"[16]. Even in official documents of the European Union can be found a conviction of the need to support this part of economic entities in order to achieve the goals of sustainable development: „the expansion of the private sector, notably micro-, small- and medium-sized enterprises, is a powerful engine of economic growth and the primary source of job creation"[17].

With the accession of Poland to the EU in 2004, this category also appeared in Polish legislation and the governing authorities began to favor this part of the economy[18]. In the following years, differences in the treatment of enterprises by the authorities due to their size were to deepen because of the Regional Operational Programs[19].

[14] United Nations, *The 2030 Agenda for Sustainable Development*, 2015.

[15] Goal 8, UN Sustainable Development Knowledge Platform, 2015.

[16] World Bank, *The Big Business of Small Enterprises: Evaluation of the World Bank Group*, 2014.

[17] The European Commission, *Accountability Report 2012 on Financing for Development*, 2012.

[18] Commission Regulation (EC) No 364/2004 of 25th February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development.

[19] For example: The Regional Operational Programme of the European Regional Development Fund (ERDF ROP) 2014–2020 (approved by Community decision on 12th February 2015).

The attitude of Polish government towards SMEs has not changed till nowadays. At the beginning of 2019, the SME Package came into force, containing about 50 additional facilities for the smallest enterprises – including help in tax, credit and debt collection[20]. The current legal definition of SMEs in force in Poland and EU is contained in Annex I to the Commission Regulation (EC) 800/2008[21].

From such constructed strategies to achieve the Sustainable Development Goals emerges a problem that is the subject of the economic analysis of law undertaken in this work. The agendas presented by the most important international organizations striving to achieve the goals of sustainable development by supporting the smallest enterprises and self-employment seem to contradict the empirical material accumulated by the economists[22]. The studies carried out over the last decades show that the percentage of small businesses operating in the economy remains correlated not only with the poor overall state of the economy but also with the failure to achieve its Sustainable Development Goals. Countries with the smallest average size of enterprises are those located in the poorest regions of the world – having the lowest per capita GDP, the least favorable export structure and the highest economic inequalities. Numerous studies conducted by economists involved in sustainable development lead to conclusions that the economically active in the sphere of the smallest companies and self-employment negatively affect the implementation of the objectives of sustainable development. As will be explained, this is primarily due to the low level of economic efficiency accompanying the smallest enterprises leading to excessive consumption of scarce resources.

In the following chapters of this work, legal and economic arguments will be presented to prove that to achieve the goals of sustainable development, the states and international organizations should change the strategy chosen for enterprises due to their size. According to the perspective proposed here, this change could be reflected in the application of competition law which would pay more attention to the effectiveness of the company's functioning in the context of sustainable development goals than to its size. The effectiveness of such an approach and arguments for it in the form of collected empirical material will be presented in the next two subsections. The first one will concern the Eighth Goal: suitable employment and economic growth. As it will be presented, these goals are possible to achieve in the long run only thanks to the activities of the largest enterprises that meet economies of scale and are capable of creating jobs. In the second of these chapters, the question of the Ninth Goal: innovation and infrastructure creation will be discussed. It will be demonstrated how, along with the increase in the size of the enterprise, the number of innovations created

[20] Journal of Laws 2018 item 2244, The Act of 9th November 2018 on the amendment of some acts to simplify entrepreneurs in tax and economic law.

[21] Commission Regulation (EC) No 800/2008 of 6th August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).

[22] Overview R.D. Atkinson, M. Lind, *Big is Beautiful. Debunking the Myth of Small Business*, Cambridge 2018, p. 63.

by them in the economy increases and the amount of infrastructure enabling the operation of other economic entities.

4. Scale effects as a result of concentration

4.1. Assumptions underlying the perfect competition

In this chapter, the main focus will be devoted to one of the major mistakes underlying the law supporting SMEs – the omission of scale effects. Polish laws favoring the smallest enterprises as justification often indicate their greater competitiveness[23]. In order to indicate the error of such a way of thinking, a more thorough analysis of the competition process itself should be made first. Perfect competition is the fundamental phenomenon by which the efficiency of market functioning is explained[24]. The allocation of resources achieved within the framework of competition is to be, according to the mainstream of economics, their optimal application. Other models of the functioning of markets are described in the context of this theory of economics as decreasing the total efficiency of the economy and thus – contrary to the Eighth Goal of sustainable development[25].

The perfect market model has been at the heart of many state institutions influencing the functioning of economy – including competition law[26]. However, the use of this model as a signpost for the activities of state regulators has been criticized from the very beginning. As Kalecki pointed out: „Excellent competition is the most unrealistic assumption (…) Certainly the competition was always very imperfect. Perfect competition when you forget about its role as a comfortable model becomes a dangerous myth"[27].

The tendency of a competitive system to transform itself into concentrated as well as unreachable maximum economic efficiency in the competition process results from the same reason. The reason for this is the underlying model of competition offered by the mainstream economics, that in an extreme way deviates from the market realities. Out of a dozen or so simplifying assumptions, there is no such indication of the possible advantage of other forms of the functioning of markets as it is of decreasing marginal revenues[28]. There are numerous theoretical proofs and empirical studies proving the occurrence (and indeed dominance) in the modern economy of growing marginal revenues. Achieving this type of income, also known as scale effects, is the main subject of this chapter.

We have a growing marginal revenue when the cost of production per unit grows slower than the productivity caused by the increase in the scale of production. This dependence, as will be demonstrated below, is common in the economy and, together

[23] K. Sobczak, *Competitiveness of the SME sector in Poland* [in:] *Forming Competitiveness and Competitive Advantage of Small and Medium Enterprises*, ed. A. Adamik, Warsaw 2011, p. 32.

[24] A.P. Jacquemin, H.W. Jong, *Markets, Corporate Behaviour and The State*, Hague 1976, p. 316.

[25] G. Mussati, *Mergers, Markets and Public Policy*, Dordrecht 1995, p. 33.

[26] J. Pelkmans, *Market Integration in the European Community*, Hague 1984, p. 143.

[27] M. Kalecki, *Selected Essays on the Dynamic of the Capitalist Economy*, Cambridge 1971, p. 158.

[28] S. Keen, *Debunking economics. The naked emperor dethroned?*, London 2001, p. 116.

with further technological innovations, enters the area of subsequent sectors. Its theoretical sources can be found already in the basics of planimetry – on the example of the relationship between the field of a regular figure and its circumference. This ratio is twice smaller in the case of a square with area of four, than a square with area of one. Such underlying mathematical dependencies have their reflection in the economic reality – the most straightforward example here can be the amount of raw material necessary for fencing fields.

4.2. Division of labor inside the enterprise

Although the increase in the significance of the phenomenon of scale effects is closely related to the technological advancement initiated only by the first industrial revolution, the growing economies of scale have already been noted on the eve of these events. The marked attachment of mainstream economics to the efficiency of allocation guaranteed by perfect competition seems to be in contradiction with the underlying economic work. Mainstream economics often indicates *An Inquiry Into the Nature and Causes of the Wealth of Nations* published in 1776 by Adam Smith as the foundation of its field defining the subject and methods of its analysis.

Convincing the mainstream economy with the optimal allocation of goods as part of the competition process is to have its source in Smith's philosophical idiom, the „invisible hand of the market". The problem here is the interpretation of this one-time metaphor used by Smith in isolation from the economic system he has constructed. In contrast to the accidentally used definition of the „invisible hand", Smith devoted an entire chapter at the beginning of his *opus magnum* to metaphor crucial to understanding the functioning of the economics of scale[29]. This metaphor is explaining the benefits of the growing division of labor „pin factory". The problem is that these two philosophical idioms in their modern meaning lead to contradictory conclusions: „The pin factory is used to describe the decreasing costs and growing revenues. Invisible hand refers to rising costs and declining revenues"[30]. The simplest way to explain this is by saying that an economy operating according to the principle of „pin factory" would be theoretically most effective if it had one large enterprise and the economy of an „invisible hand" when the number of enterprises would reach infinity.

In the economy acting under the principle of the „invisible hand" it is possible to operate in perfect competition and achieve maximum economic efficiency thanks to the free market. The industrial processes occurring as described in the „pin factory" must ultimately lead to a concentration on the market. Stigler noticed the problem and that this leads to: „Either the size of the market limits the division of labor and, as usual, branches of industry are monopolized, or industries are competitive, and the claim [about the pin factory] is untrue"[31]. What Smith saw at the beginning of the transformation of the global economic system (1776), later – thanks to technological progress – had

[29] A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Chicago 1990, p. 17–29.

[30] D. Warsh, *Knowledge and The Wealth of Nations*, New York 2007, p. 47.

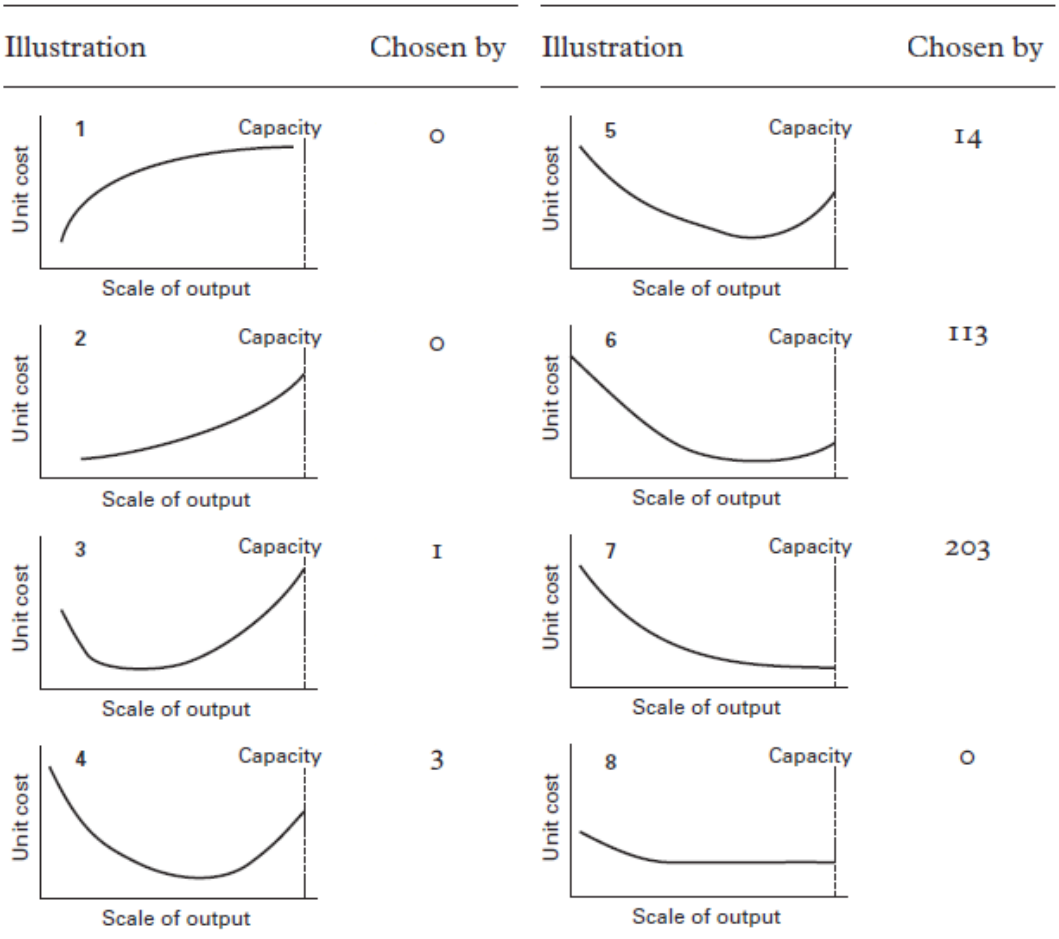
[31] G.J. Stigler, *The division of Labor is limited by the extent of the market*, Chicago 1951, p. 3.

become the norm of the functioning of developed economies in the following decades. It is time to move on to the critical part of this work, in which materials proving the dominance of enterprises achieving growing economies of scale in 20th and 21st century will be presented.

4.3. Scale effects in developed economies

Economic historians point out that the size of the company and production facilities began to increase at the beginning of the 19th century[32]. According to Ely's statement: „because of the discoveries and inventions, especially the use of steam in industry and transport, it became necessary to create large enterprises"[33]. This came about immediately after the first industrial revolution and at the same time during the creation of the early works in the field of economics.

Figure 1. Cost curves declared in US companies (n=334)



Source: W.J. Eiteman, G.E. Guthrie, *The shape of the average cost curve*, Nashville 1952, p. 832–838.

[32] Z.J. Acs, D.B. Audretsch, *Innovation and Small Firms*, Cambridge 1991, p. 106.

[33] R.T. Ely, *The Nature and Significance of Corporations*, New York 1887, p. 75.

Since then, the pursuit of concentration has become the most characteristic feature of developed economies. The most critical studies confirm that the majority of American enterprises derive growing economies of scale. One of the most interesting studies on this subject was carried out in the mid-twentieth century by Eiteman and Guthrie[34]. The authors presented to the managers of production plants, eight graphs presenting cost curves, of which only three were similar to those placed in neoclassical economic textbooks. The cost curves are a graphic representation of the impact of increasing production on the average cost of unit production – their sloping shape is the most straightforward proof of the occurrence of economics of scale. Of the 334 managers asked to indicate the chart best reflecting the relationship between costs and efficiency in their factories, only one representative pointed to curve III. That looks exactly like those we will see in microeconomics textbooks[35]. Managers in 95% of cases pointed to graphs that were in contradiction with the mainstream models presented by the economics.

Similar research was carried out by Blinder, the vice-president of the American Association of Economists, at the end of the twentieth century[36]. He constructed a questionnaire covering two hundred companies of all sizes – from medium to large. In total, the turnover of these companies accounted for the moment to nearly 8% of the US GDP. Self-critical of the previously adopted assumptions of Blinder's tone makes his application worth quoting: „Depressingly bad news (for economic theory) is that only 11% of GDP is produced in the conditions of rising marginal costs"[37].

The research conducted at the highest level of generality indicates that the assumptions underlying the dominant mainstream of economics are not met in developed economies. The situation is exacerbated by the fact that the same theories served as justification for numerous regulations affecting the functioning of developed economies directly. The next section will show how laws that do not take into account the scale's effectiveness may affect the condition of the entire economy. A list of numerous economic studies offering a broad perspective on the implementation of the Sustainable Development Goals is an essential argument for functioning in regulatory systems of rules that take into account the effectiveness of the largest enterprises.

4.4. Economics of scale

Among contemporary researchers, the influence of the market structure on its effectiveness is confirmed by the fact that competition may be abused. This is best reflected in Heller's works[38]. He states that to achieve the maximum possible economic efficiency the state should implement the anti-trust policy – to avoid abuse of market position

[34] W.J. Eiteman, G.E. Guthrie, *The shape of the average cost curve*, Nashville 1952, p. 832–838.

[35] H.R. Varian, *Microeconomic Analysis*, New York 1992, p. 8.

[36] A. Blinder, *Asking about Prices: A new approach to understanding price stickiness*, New York 1998, p. 102.

[37] *Ibidem*, p. 105.

[38] M. Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, New York 2008, p. 185.

and simultaneously pro-trust policy – to help the economy achieve economies of scale. The combination of these two areas of activity should constitute a national „competition policy", which is the equivalent of the concept functioning at the level of the European Union[39]. The competition policy understood rationally as supporting the strategic concentration does not require departing from its current objectives, since it has been established decades ago when „fragmentation of production among too many competitors transferred extremely high costs to consumers"[40].

In the 21st century three economists from the Federal Trade Commission came to the same conclusion, stated that the monopoly position is usually achieved through the highest efficiency and the winners identified by the competition process should not be punished after they won the fight for the market[41]. As research shows, large companies not only do not block the growth of smaller enterprises but rather allow them to function. In an advanced industrial economy many small and large companies are mutually interdependent partners in joint activity[42]. For example, the business of 56% of small companies in Denmark is to cooperate with larger companies. In Norway, 55% of small businesses rely on such activities[43].

These high correlations are the result of increasing economies of scale described in previous sub-chapters. One of the earliest studies carried out on this subject shows that production costs drop by an average of as much as 30% with each of its quantitative doubling[44]. In 2016, the report of the Council of Economic Advisers to the President of the United States expressed the opinion that the progressing concentration on many markets must be primarily to the observed increased efficiency of the most significant market players[45]. In one of the studies in which the effects caused by the strengthening of the market position were neutralized, it was estimated that the increase in market share by 1% is associated on average with 0,14% increase in profits measured by sales maneuverability[46]. The same conviction confirm the data collected by the US Bureau of Labor Statistics[47]. As it has already been pointed out, these studies excluded at the same time that the improved results were the effect of the dominant position being gained by growing enterprises. For example, Loecker and Eeckhout in their recent study showed that the growing economic difference between marginal costs and prices

[39] C. Decker, *Economics and the Enforcement of European Competition Law*, Cheltenham 2009, p. 159.

[40] The Boston Consulting Group, *Perspectives on Experience*, Boston 1970, p. 49.

[41] W.F. Adkinson., K.L. Grimm, C.N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, Washington 2008, p. 13.

[42] S. Tracy, *Accelerating Job Creation in America: The Promise of High-Impact Companies*, Washington 2011, p. 28.

[43] Eurostat, *Statistics on Small- and Medium-Sized Enterprises: Dependent and Independent SMEs and Large Enterprises*, 2015.

[44] The Boston Consulting Group, *Perspectives on Experience*, Boston 1970, p. 12.

[45] Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power*, 2016.

[46] D.M. Szymanski, S.G. Bharadwaj, P.R. Varadarajan, *An Analysis of the Market Share-Profitability Relationship*, Raleigh 1993, p. 1–18.

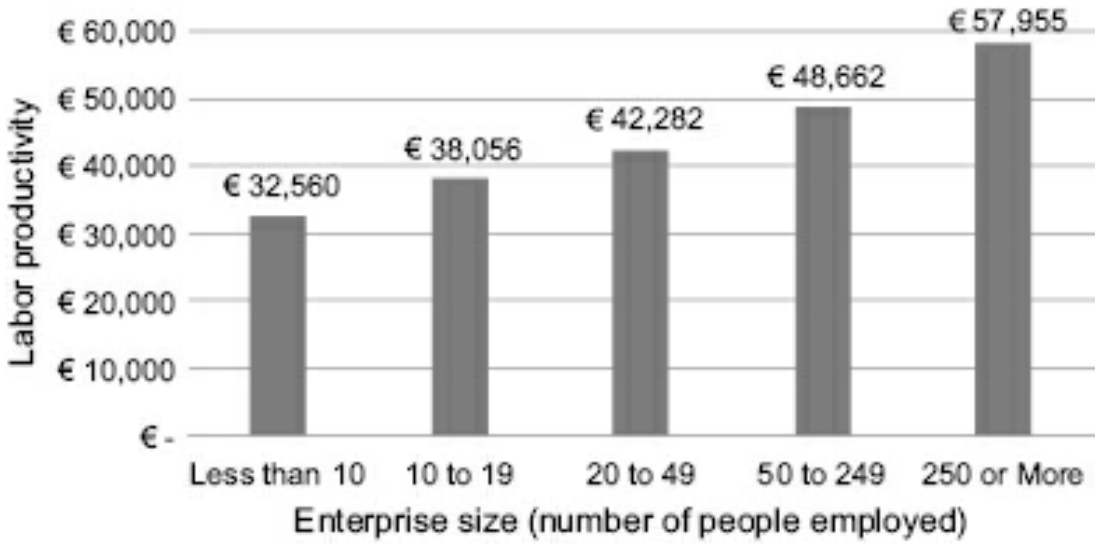
[47] M.D. Giandrea, *Industry Competition and Total Factor Productivity Growth*, Washington 2006, p. 399.

is caused primarily by the decisions of small enterprises, which by definition have less market power[48].

4.5. Impact of concentration on employees

The growing economies of scale resulting from the concentration of enterprises and the increase in productivity caused by them are easily perceived in the example of the primary factor of production – work. It is not without reason that competition policy demands that decision maker who uses it remember citizens not only as consumers but also as employees[49]. The data collected by the World Bank shows that large companies offer more stable employment, higher wages and more non-pay additions. The Eurostat research presented here shows a clear and distinct relationship between the size of enterprises and their effectiveness *sensu stricto*[50].

Figure 2. Productivity of labor in European companies



Source: Eurostat, Structural Business Statistics Overview, Labor Productivity by Size of Enterprise, 2018.

The recapitalization should undoubtedly explain this dependence in large enterprises. In their exhaustive research Atack, Margo and Rhode pointed out that throughout the history of American industry the number of horsepower per employee in companies with over a thousand employees was almost ten times greater than the amount of horsepower per employee in companies with up to five employees[51].

Wagner, who carried out the relevant research for the Federal Republic of Germany, comes to similar conclusions. He also draws attention to the much lower unionization ratios in smaller companies and the lack of institutionalized opportunities there

[48] J.D. Loecker, J. Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, Cambridge 2017, p. 687.

[49] H.W. Jong, *The Structure of European Industry*, Hague 1981, p. 163.

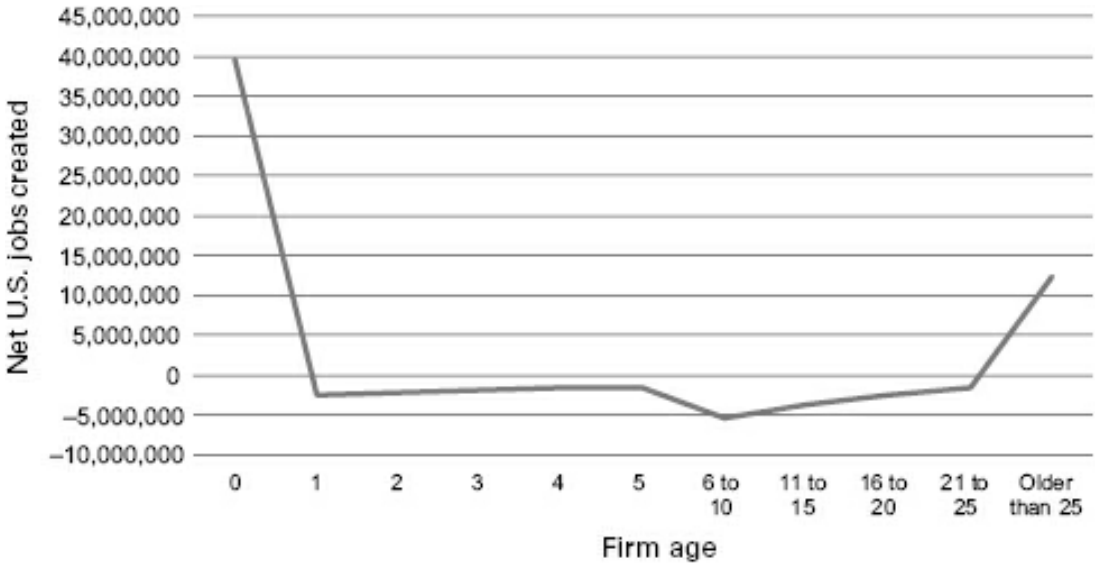
[50] Eurostat, *Structural Business Statistics Overview, Labor Productivity by Size of Enterprise*, 2018.

[51] J. Atack, R.A. Margo, P.W. Rhode, *The Division of Labor and Economies of Scale in Late Nineteenth Century American Manufacturing: New Evidence*, Chicago 2015, p. 215–244.

for employees to take part in grassroots management of the company[52]. The most egalitarian of the fifty-three countries examined at this stage is Denmark, with almost 25% of employees employed in the largest companies.

Small companies often present themselves as generating jobs. Research, however, finds confirmation for this thesis only in periods of the highest unemployment[53]. It is not the size of enterprises that answers the question of which companies are capable of creating jobs – it is their age[54].

Figure 3. Number of jobs created by companies operating in the US



Source: US Census Bureau, Business Dynamics Statistics, Washington 2014.

The data presented in Figure 3 shows that over the years 2000–2013 only the youngest and oldest companies created jobs[55]. When analyzing the shape of this curve, it should be remembered that creation of jobs by the youngest enterprises is a kind of pleonasm – these jobs are created together with young companies and are, like in the first months, often removed from the economy. As it has already been marked, jobs generated by smaller companies are characterized by instability – their number increases during periods of high unemployment and falls in periods characterized by full employment[56].

[52] J. Wagner, *Firm Size and Job Quality: A Survey of the Evidence from Germany Small Business Economics*, Berlin 1997, p. 411–425.

[53] G. Moscarini, F. Postel-Vinay, *The Contribution of Large and Small Employers to Job Creation in Times of High and Low Unemployment*, Nashville 2012, p. 2509–2539.

[54] J. Haltiwanger, R.S. Jarmin, J. Miranda, *Who Creates Jobs? Small versus Large versus Young*, Harvard 2013, p. 347–361.

[55] M. Ratcliffe, *A Century of Delineating a Changing Landscape: The Census Bureau's Urban and Rural Classification, 1910 to 2010*, Washington 2012.

[56] B.W. Pugsley, E. Hurst, *What Do Small Businesses Do?*, Washington 2011.

In the US economy only 1% of the population works in companies less than two years old, while 60% of the population work in enterprises overage of over a decade[57].

5. Impact of concentration on the innovativeness of the economy

5.1. Technological progress

The subject of the fifth, the penultimate of the chapters contained in this paper, is the relationship between competition protection law and Ninth Sustainable Development Goal – the acceleration of technological progress. Facilitation provided by the laws of numerous legal systems, including Polish, the smallest enterprises are often justified by their allegedly increased innovativeness[58]. In order to verify this justification, this chapter will review economic research on the relationship between the size of the enterprise and the amount of innovation they create. At the very beginning, it is worth mentioning that innovations have been the subject of economists' reflections for as long as the economies of scale analyzed in the previous chapter of this work. Smith, discussing both of these issues in the same part of his most significant work, states: „It is far more likely that people find easier and faster ways to achieve a goal when all their attention is directed to one particular subject rather than being dispersed into a great variety of things"[59]. And also in this case we see an absolute inability of mainstream economics to consider phenomena taking place in the real economy.

It foresees that there would be very little expenditure on research and development in a truly competitive market[60]. None of the companies investing in innovation would be sure whether it will cover the initial outlay before the rest of the market players copy its product. Unable to explain technological progress as a result of market players' activities, mainstream economics considers it a mere consequence of their actions[61]. This chapter will present arguments for the theory of growth, which not only explains the links between the operation of market entities and innovations but also explains how the increase in the size of companies may result in increased technological progress.

There is a relationship between the scale effects described in the previous chapter and innovation. The survey which covered more than one thousand European companies in its area indicates the existence of growing economies of scale, primarily in enterprises from the highly developed technology sector. As will be shown in the next subsections, they are in principle the largest enterprises in the economy[62]. Concen-

[57] S.A. Shane, *The Illusions of Entrepreneurship. The Costly Myths That Entrepreneurs, Investors, and Policy Makers Live By*, New Heaven 2010, p. 25.

[58] PARP report, *Small and medium enterprises in Poland 2018*, p. 7.

[59] A. Smith, *op.cit.*, p. 23.

[60] R.D. Atkinson, M. Lind, *op.cit.*, p. 272.

[61] F.R. Crafts, *Exogenous or Endogenous Growth? The Industrial Revolution Reconsidered*, Cambridge 1995, p. 745–772.

[62] A. Vezzani, S. Montresor, *The Production Function of Top R&D Investors: Accounting for Size and Sector Heterogeneity with Quantile Estimations*, Seville 2013.

tration in the high technology sectors is above all a source of general social well-being. Most innovative companies need to reinvest profits from successful investments in subsequent projects to achieve technological progress to stay in the game for emerging technology markets[63].

One of the studies focusing exclusively on European companies was crowned with the conclusion that „the ability of a high technology company to increase its knowledge base depends on its increasing size; the more significant the investor in research and development, the higher the rate of technological progress"[64]. This relationship is well-known among other things in the fast-growing pharmaceuticals sector. The Office of Congress Technology in one of its reports concluded that the riskiness of investment in research into pharmacy, stable market position and high profits are necessary for new companies to be involved in innovative activities[65]. OECD experts have come to the same conclusions on a larger scale: „there is a high correlation between the profits of pharmaceutical companies and their expenditure on research and development"[66].

5.2. Sources of innovation in the economy

We slowly come to the most interesting theoretical justification of the technical development in the market system which is the concept of different types of competition or the bimodal economy – one of the greatest achievements of John Kenneth Galbraith[67]. To understand these phenomena, it should be remembered that numerous expert opinions point to an increase in research and development expenditures accompanying the growing scale of sales[68].

In this way, the market structure is divided into peripheries and the center is based on economies of scale and a source of technological innovations[69]. Galbraith himself went even to calling the oligopolistic center a „planning sector" to indicate the strategic role that it played in the functioning of the economy as a whole[70]. This previously mentioned precursor statistical research of Chandler and Hikino[71] should be credited with proving that while in the center of the economy there are large companies characterized by growing economies of scale and long-term activities, the peripheries

[63] C. Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, Chicago 2012.

[64] A. Vezzani, S. Montresor, *The Production Function of Top R&D Investors: Accounting for Size and Sector Heterogeneity with Quantile Estimations*, New York 2015.

[65] US Congress, Office of Technology Assessment, *Pharmaceutical R&D: Costs, Risks and Rewards*, Washington 1993, p. 2.

[66] Organisation for Economic Co-operation and Development, *Pharmaceutical Pricing Policies in a Global Market. OECD Press*, Paris 2008.

[67] J.K. Galbraith, *The New Industrial State*, Princeton 2007, p. 52.

[68] G. Symeonidis, *Innovation, Firm Size and Market Structure: Schumpeterian Hypotheses and Some New Theme*, Paris 1996.

[69] J.B. Foster, R.W. McChesney, R.J. Jonna, *Monopoly and Competition in Twenty-First Century Capitalism*, New York 2011, p. 1–39.

[70] J.K. Galbraith, *The New Industrial State*, Princeton 2007, p. 13–14.

[71] A.D. Chandler, T. Hikino, *The Large Industrial Enterprise and the Dynamics of Modern Economic Growth*, Cambridge 1997.

are composed mainly of small companies in which the size advantage does not offer them[72]. It is in the center of the economy that paths to be followed in the future should be seen.

According to a study carried out jointly by Nolan, Zhang and Liu, the increased pressure of the world's most economically significant countries at the center of the company's economies made it possible to increase the effectiveness of investments in research and development on a global scale, thanks to the achievement of economics of scale[73]. Summing up the review of contemporary economists' opinions on the multiplicity of levels of competition and the bimodality of the economy, Bowring's observation should be used[74]. He pointed out that, contrary to popular belief, the largest companies are not a factor that petrifies modern economic progress and on the contrary – thanks to their dynamic efficiency and competitive advantages, they give the entire economy a pace of development.

5.3. Investments in research and development

In previous subsections a long-standing argument has been presented, showing convincing examples of increased activity in the field of innovation accompanying the most significant market players. The purpose of this subsection is to check how the results of empirical market research are related to these theories. The positive relationship between the size of the enterprise and its impact on technological progress seems to be supported by several studies. In 1996 Cohen and Klepper published an article in which they point to a close relationship between part of the revenue invested in research and development, and the size of the enterprise. The authors of this study pay attention not only to higher expenditure on development in the case of large companies but also their increased efficiency[75].

Scientific articles published in recent years by Knott and Vieregger confirm that the efficiency of one dollar invested in research and development is closely related to the increase in the size of the investor's enterprise[76]. The strength of this dependence should probably be explained in part by a larger recapitalization of companies of above-average sizes. Acs and Audretsch analytically derived a positive correlation between the saturation of capital resulting from the size of the company and its increased innovation[77]. Large enterprises representing 1,5% with the most significant number of company patents are responsible for 48% of all licenses issued in the United States between 1999 and 2008[78].

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72 T.K. McCraw, *Regulation in Perspective: Historical Essays*, Cambridge 1981.

73 P. Nolan, J. Zhang, C. Liu, *The Global Business Revolution and the Cascade Effect: Systems Integration in the Global Aerospace, Beverage and Retail Industries*, New York 2007, p. 146.

74 J. Bowring, *Competition in a Dual Economy*, Princeton 1986, p. 11.

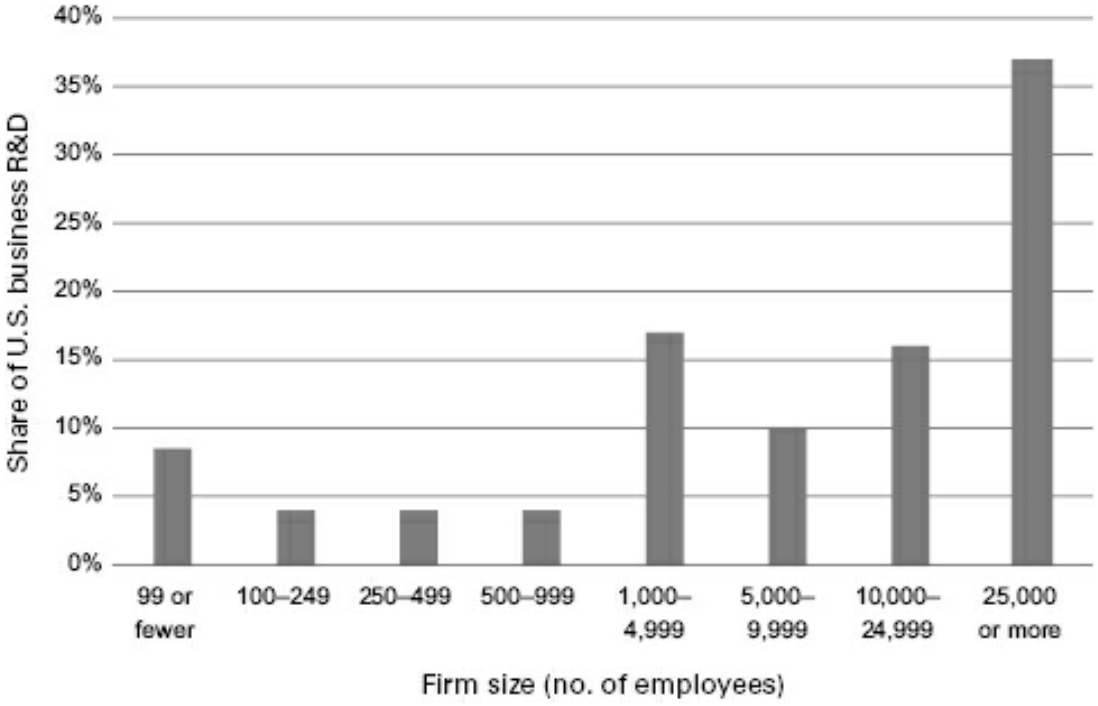
75 W.M. Cohen, S. Klepper, *A Reprise of Size and R & D*, Oxford 1996, p. 948.

76 A.M. Knott, C. Vieregger, *Reconciling the Firm Size and Innovation Puzzle*, Washington 2016.

77 Z.J. Acs, D.B. Audretsch, *Innovation and Small Firms*, Cambridge 1991, p. 50.

78 J. Hicks, *Knowledge Spillovers and International R&D Networks*, Washington 2012.

Figure 4. Shares of American companies in innovative investments



Source: National Science Foundation, Business Research and Development and Innovation, Arlington 2015.

Figure 4 here shows how massive part of national innovation providers, despite their small number, are the largest companies. Nager, who with his colleagues surveyed more than 1 000 researchers involved in the implementation of patents in the United States, Europe and Japan, discovered that about 75% of patents are granted to companies employing over five hundred people[79]. In another study to uncover the distribution of sources of technological progress in the economy, it was found that a single IBM company received more patents than all five hundred and four small enterprises that were subject to this analysis summed together[80].

The relationship between the size of the company and its tendency to promote innovative solutions in the economy is well visible in the European Union. Research conducted in this area shows that countries with smaller medium-sized enterprises, such as Italy or Spain, have lowest corporate spending on research and development in the EU area[81]. The OECD research conducted in thirty-three countries shows that the question should no longer be about the existence of a positive relationship between the size of the enterprise and the number of innovations implemented by them

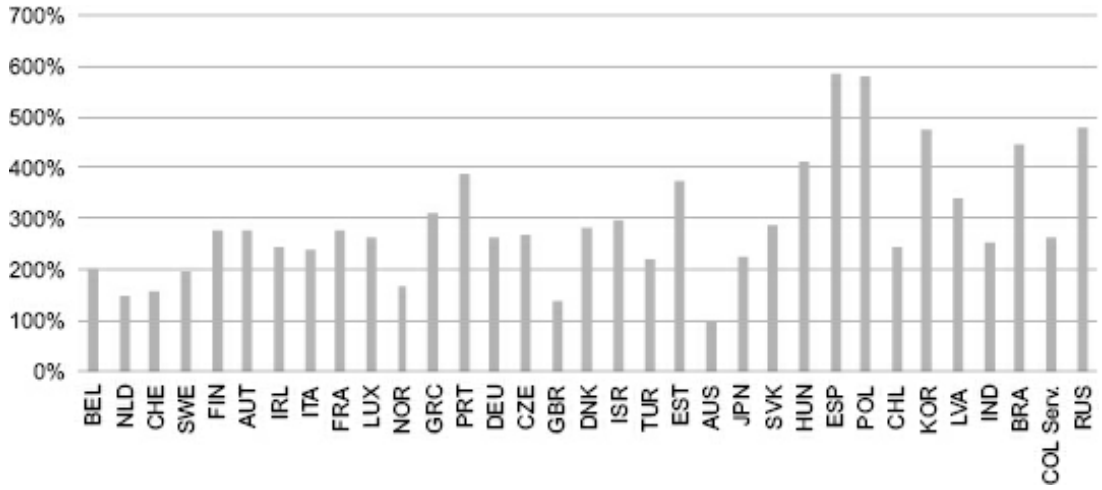
[79] A. Nager, D. Hart, S. Ezell, R.D. Atkinson, *The Demographics of Innovation in the United States*, Washington 2016.

[80] A. Breitzman, D. Hicks, *An Analysis of Small Business Patents by Industry and Firm Size*, Glassboro 2008, p. iii.

[81] P. Pagano, F. Schivardi, *Firm Size Distribution and Growth*, Stockholm 2003, p. 272.

but about the strength of this dependence. The correlation coefficient varies in this case between countries, from two in Australia to six in countries such as Spain or Poland[82].

Figure 5. Correlation between the size and innovativeness of companies



Source: OECD, OECD Science, Technology and Industry Scoreboard 2015, Paris 2015.

In the summary of this subsection, it should be stated that the accumulated empirical material and the consensus among the researchers of the subject speak for the innovativeness growing together with the size of the companies. Today, it is almost universally admitted that due to the possibility of applying technological achievements on a greater scale, large companies not only have a more significant initiative in the area of innovation implementation but also show greater efficiency in this respect[83]. In the present-day private sector, only those with a certain position in the market and stable profits of the company, convinced of the possibility of commercialization of achievements, will be ready to invest in research on innovations.

6. Conclusions

The theoretical arguments and accumulated empirical material presented in this paper were aimed at proving that the proper functioning of competition protection law can increase the chances of achieving the Sustainable Development Goals. The presented justifications of the legislations of Poland, the EU and global organizations favoring SMEs cannot withstand clashes with scientific research carried out in the framework of economic sciences[84]. The most important conclusion flowing

[82] Organisation for Economic Co-operation and Development, *OECD Science, Technology and Industry Scoreboard 2015: Innovation for Growth and Society*, Paris 2015.

[83] W.M. Cohen, S. Klepper, *A Reprise of Size and R & D*, Oxford 1996, p. 948.

[84] Polityka Insight, *Research: Small and medium-sized enterprises in Poland – barriers and development*, 2015, p. 13.

from the material presented in this work should be the possibility of raising general social well-being through the revaluating of economic law policies, in particular – competition policy. The reading of the above arguments allows us to understand the scientific consensus that large-scale modern enterprises are responsible for the optimal use of limited resources of societies. Due to numerous controversies regarding the optimal size of enterprises in this work, the dependencies between the size of the enterprise and its economic efficiency were considered. The field on which these disputes usually take place is the application of competition law. For this reason, the subject of the analysis has been made here in situations where companies are allowed to function undisturbed despite the distortion of competition. The statement best summarizing the point of view presented in the paper is that the role of competition is to raise the current level of life in the economy and to improve the consumer's well-being in the long term. The way to do this is to increase the production achieved by the economy, which is why the new standard of competition policy should be the priority of productivity growth.

This work criticized the mainstream of economic thought which sees the goal of competition protection law as achieving some perfect market structure. Instead, a perspective that is presented here sets the regulating authorities the goal of establishing and applying rules that enable businesses to achieve „maximum possible efficiency"[85]. The description of numerous contemporary functioning forms of market was intended to show that the mainstream economics claim is that only sectors with competitive structures could behave in a competitive manner[86]. The description of numerous contemporary forms of market functioning was intended to show that the mainstream economics claim that only sectors with competitive structures could behave competitively is false. According to the perspective presented by here, the first test carried out in the application of competition policy should be the question: „does the behavior increase the efficiency of production or distribution and transfer some of the benefits to the general public?"[87].

Summing up the material presented in this work, it should be stated that the achievements of the economic analysis of the law support the use of competition protection law as a useful tool to achieve the Sustainable Development Goals. Ensuring long-term economic growth, combined with maintaining the economy's innovativeness and consistent with the concept of sustainable development, is possible. However, bodies applying competition law must take into account the voice of economists who advocate size neutrality and evaluation of enterprises through the prism of their effectiveness.

[85] D. Hart, *Antitrust and Technological Innovation in the U.S.*, Dallas 1999.

[86] G.J. Stigler, *The Case against Big Business*, New York 1952, p. 123–141.

[87] T.W. Arnold, *The Bottlenecks of Business*, New York 1940, p. 125.

* * *

Prawo ochrony konkurencji a zrównoważony rozwój gospodarki

Już u początków ekonomii jako samodzielnej dziedziny naukowej struktura rynku stanowiła jeden z jej najważniejszych obszarów zainteresowań. Pierwsze dzieła doszukujące się prawidłowości rządzących procesami wykorzystywania przez ludzi ograniczonych zasobów zwracały uwagę na wpływ liczby i charakteru podmiotów gospodarczych na ekonomiczne efekty ich działalności. Od razu zarysował się również tragiczny konflikt pomiędzy celami prawa ochrony konkurencji – z jednej strony ograniczania największych przedsiębiorstw w celu stworzenia warunków konkurencji na rynku wewnętrznym, z drugiej wspierania największych krajowych przedsiębiorców, aby umożliwić im zwycięskie konkurowanie z podmiotami zagranicznymi.

Rozszerzanie się obszaru zainteresowań nauk ekonomicznych (obejmującego na dziś dzień już praktycznie całą sferę ludzkiej aktywności) stwarza pretekst do przyjrzenia się innym współzależnościom zachodzącym pomiędzy strukturą rynków a ich ekonomicznymi rezultatami. Tak jak początkowo zwracano uwagę jedynie na związek pomiędzy siłą rynkową danego podmiotu a jego wpływem na ogólny poziom cen, tak teraz należy przyjrzeć się efektom, jakie wywiera ona na bardziej skomplikowane ekonomiczne zależności. Ekonomia, będąca nauką społeczną, w XXI wieku podejmować powinna się zagadnień najmocniej wpływających na współczesne społeczeństwa. Jej głównym obszarem badawczym mają szansę stać się zagadnienia zrównoważonego rozwoju.

Niniejsza praca ma na celu przedstawienie powiązań pomiędzy strukturą różnych rynków i stopniem ich zdominowania przez największe przedsiębiorstwa a realizacją celów zrównoważonego rozwoju. Zestawiając z danymi empirycznymi najważniejsze teorie dotyczące wpływu struktury rynku na ekonomiczne rezultaty, postaram się odpowiedzieć na pytanie, jaki wpływ na zrównoważony rozwój ma występująca na poszczególnych rynkach silna koncentracja.

Słowa kluczowe: prawo ochrony konkurencji, zrównoważony rozwój, ekonomiczna analiza prawa

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Financial Regulation and Sustainable Development

Abstract:

Every human being has the right to participate in, contribute to and enjoy economic development. To protect the realization of this very right the United Nations made a blueprint of sustainable development goals, so-called Agenda 2030. Although the goals are interconnected, some of them seem to be unachievable simultaneously. Even though there is a significant empirical evidence that industry is one of the biggest polluters worldwide, countries are obliged to combat climate change (the 13th goal) and to develop industry (the 8th goal). To overcome this inconsistency, the incentives for investing in environmentally-friendly undertakings should be created.

My text aims to analyze the European Commission's Action Plan on financing sustainable growth. I will briefly discuss its main goals, then I will give more details on those actions which are focused on participants of financial markets. I will also demonstrate changes in Markets in Financial Instruments Directive proposed by the European Securities and Markets Authority. The aim of these changes is to accomplish the Commission's goals. I will also briefly discuss the Commission's proposal to incorporate sustainable development issues in macroprudential regulation.

Since 2011 there is a regulation making banks integrate sustainable development issues in their investment process. I will briefly discuss the most crucial issues of Bengali regulation and compare them with the European proposals. In my opinion, the regulation of Bangladesh Bank seems to be more efficient.

Key words: sustainable development, finance, macroprudential regulation

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1. Introduction

Article 1 of the Declaration on the Right to Development[2] statutes that „every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". This very right shall be realized by taking by states all necessary actions to ensure for everybody *inter alia* health care, housing and fair distribution of income. Furthermore, states should also cooperate aiming to promote the new economic order based on interdependence and mutual interest.

The declaration, however, does not include any mechanism which could protect its goals. „Unprotected" human rights are just political declarations. The political declaration could, of course, pave the way for an important social or economic change but the risk involved in not having such a mechanism must be taken into account. For example, under some conditions, the declaration could be breached without any consequences, because declarations are not usually enforced in court or a formal procedure[3]. Even if a little chance of suffering ostracism from the international community would prevent the state from breaching the right, it was still possible that the general terms of the declaration could be understood differently by the parties of the declaration.

This problem was answered by the United Nations (UN) which set the Development Goals. At the end of the second millennium in the 2000 world leaders made a statement to start a global anti-poverty movement. As Ban Ki-Moon, UN Secretary General noted this promise: „[the statement] was translated into an inspiring framework of eight goals and, then, into wide-ranging practical steps that have enabled people across the world to improve their lives and their future prospects"[4]. The eight goals mentioned are the Millennium Development Goals (MDGs). Seven of them addressed issues regarding public health (for example combating HIV/AIDS, reducing child mortality or improving maternal health), gender equality or environmental problems, the eight goal – creating a global partnership for development – was the political one.

The MDGs came to their deadline in 2015 and were mostly treated as a success[5]. Their momentum was used to create the new more ambitious goals – Sustainable Development Goals (SDGs). The weakness of the SDGs, however, is that they are too complex and sometimes seem to be unachievable at the same time.

One of the targets of the 9th goal suggests that the states shall rise the industry's share of employment and gross domestic product. At the same time, the 13th goal aims to fight climate change. The problem is that… the industry is the biggest polluter.

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[2] Declaration on the Right to Development adopted by the General Assembly (UN) resolution 41/128 of 4th December 1986.

[3] M.M.T.A. Brus, *Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement* [in:] *Legal Validity and Soft Law*, ed. P. Westerman, J. Hage, S. Kirste, A.R. Mackor, Springer Verlag, 2018.

[4] United Nations, *The Millenium Development Goals Report 2015*, New York 2015, p. 3.

[5] *Ibidem*, p. 9.

While SDGs are not legally binding and the Paris Agreement forces the climate action, the states are likely to limit their proindustrial action every time it could interfere with the realization of the Paris Agreement. The industry, however, plays an important role in the global economy and limiting it would have a negative impact on the whole society. This problem might seem to be answered in targets 9.1 and 9.4 of the 9th goal. The aim of these targets is to build „sustainable and resilient infrastructure", which is not defined, though might be understood as a support for transition to the green economy. Furthermore, measurements of target 9.1. are not sufficiently quantified[6]. The only possible solution of this problem is to make the industry more environmentally-friendly. This would be very expensive, so it raises the question of how we could finance the transition to the green economy.

In my opinion financing this transition will be impossible without strong and efficient regulation. In this text I will discuss the European Commission (EC) Action Plan on Sustainable Finance and the proposal made by European Securities and Markets Agency (ESMA) regarding changes in the Delegated Regulation to Markets in Financial Instruments Directive (MiFID II). I will compare these solutions with the one used by the Bangladesh Bank – the central bank and financial authority of Bangladesh. Such a comparison is useful because Bangladesh was the first country to adopt sustainable finance regulation and one of a very few which have done it so far.

2. Financing environmentally-friendly initiatives

The previously mentioned Paris Agreement[7] obliged its parties to reduce their greenhouse gasses emissions. Under Article 3 of this agreement developed countries are burdened of leading the fight against climate change by undertaking economy-wide absolute emission targets. They also have to mobilize the climate finance from a variety of sources, instruments and channels (art. 9 sec. 3) and to provide financial resources to developing countries (art. 9 sec. 1).

From the perspective of the EU Member States, most of which are developed countries, these obligations are of utmost importance. Although the EU countries have been leading the global transition to a low-carbon economy so far[8], there is still a lot of work to be done. The European Commission estimates that our investments shall be increased by €170 billion yearly to reach our sustainability goals in the energy sector alone[9]. And the energy is not the only area that needs to be changed. Neither agriculture nor industry is sustainable today.

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[6] A. Tukker, *SDG 9* [in:] *Review of targets for the Sustainable Development Goals: The science perspective*, International Council of Science, Paris 2015.

[7] An agreement within the United Nations Framework Convention on Climate Change, contained in the Report of the Conference of the Parties of this framework convention, FCCC/CP/2015/10/Add. 1, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf, 22.06.2019.

[8] High-Level Expert Group on Sustainable Finance, *Financing a sustainable European economy. Final Report 2018*, 2018, p. 2.

[9] *Ibidem*, p. 9.

Even though we have strictly defined goals, the means are still unclear. First of all, one must emphasise that the amount of money needed is too high to be covered by the public sector alone[10]. Nevertheless, in the previous years it was the EIB and National Public Banks and Institutions that paid for plenty of the „green infrastructural projects"[11]. It seems that encouraging the private sector to finance environmentally-friendly initiatives is the biggest challenge in front of the regulator.

One can divide designing a proper regulation into a few steps. Firstly, the regulator ought to set its objectives. Then, it should decide how these objectives will be achieved. Typically, the regulator can choose between direct action (i.e. using public funding to provide solutions needed) or design strategies. These strategies can be explained in a way of the metaphor. Let us assume that the market can be compared to the street in the city center. Some drivers would like to park on the sidewalks because they do not want to park at the expensive underground car park. The cars parked at the sidewalk, however, are very problematic for the inhabitants and passerby. For some of them, such as mothers with strollers, it would be almost impossible to pass by a parked car. The mayor, or in our metaphor: the regulator, who wants the streets to be more friendly for mothers with children rather than drivers, decided to erect concrete bollards. These bollards will prevent drivers from parking on the sidewalk. Our regulator used a design strategy to achieve its goal[12].

As mentioned before, funding of the transition to a low-emission economy is beyond states' capacity. So, the only reasonable choice is to use one of the strategies. The strategy which is the most common among the theorists of regulation today is the nudge strategy. Frankly speaking, since 2017 when Richard Thaler[13], who co-invented this strategy, received Nobel Memorial Prize in Economic Sciences, „nudges" have become the buzzword.

Behind the „nudge strategy" one can understand „structuring the architecture of decisions (…) so that it is easier for consumers or others (such as regulatees) to act in ways that are beneficial"[14]. If the regulation complies with the principles of the nudge strategy, it will not use just simple prohibitions. In many cases it will use a complicated system of incentives and disincentives. Sometimes the consumers or regulatees, or citizens would not even realize that they are objects of social engineering.

The nudge theory implies that every regulatee should be able to opt-out from the regulation easily. One of the classic examples of the regulation which keeps the principles of the nudge theory is the regulation of the transplantation[15]. According to Article 5 section 1 of the Polish Act on Collection, Storage and Transplantation of Cells, Tissues

[10] *Ibidem*, p. 2.

[11] *Ibidem*, p. 35.

[12] In this paragraph I am expanding the example given in R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation. Theory, Strategy and Practice*, Oxford University Press, 2012, p. 122.

[13] See for example R. Thaler, C.R. Sunstein, *Nudge*, Yale University Press, New Haven, MA, 2008.

[14] R. Baldwin, M. Cave, M. Lodge, *op.cit.*, p. 123.

[15] R. Thaler, C.R. Sunstein, *op.cit.*, p. 177–179. Authors are analyzing the German regulation, which is very similar to the Polish one, which I am using in the example.

and Organs[16] the organs can be taken from the corpse of everybody who has not objected such a taking while being alive. This implicit consent is an incentive to act in a way seen by the regulator as a beneficiary one, however, if one does not want to be a donor, the opt-out (regulated in the Article 6 of this act) will be easy.

Some of the public intellectuals highly criticise „nudges". For example, Elizabeth Kolbert, The New Yorker book reviewer, raises the question whether we can assume that the regulator is rational, if all of us are irrational[17]. Pierre Schlag, the professor of law at the University of Colorado, goes even further – in his opinion „nudges" are ineffective if we want to balance of interests between two or more groups with contradictory goals, especially if one of the groups cannot effectively take part in the process of decision-making[18].

It is noteworthy that there is a concern about whether the nudge strategy applies to the corporations. „Where potential harms may emerge from the cumulative actions of numbers of decision-makers, the nudging of particular decision-makers may not suffice to control the harm's emergence. This suggests that nudging has limited potential, especially in those industries where production chains are complex and extended"[19]. Sustainable finance regulation will set rules for the market, where financial instruments (bonds or equity) are both issued and bought by corporations. Having said that one must notice that using the nudge strategy for sustainable finance will probably end as a failure.

It shall be noticed that the regulator from our metaphor definitely is not respecting the principles of the nudge strategy. What is more, for the situation we were talking about in the metaphor, the nudge strategy seems to be irrelevant. The mayor did not want just to discourage most of the drivers from parking on the sidewalk, he wanted to discourage all of them. In such a situation, the possibility of the opt-out and the small amount of free will could make the goals of regulation unachievable. The second reason why the mayor did not use the nudge strategy was the fact that the one group of stakeholders (i.e. passerby) cannot effectively negotiate with the second one (i.e. drivers). It is very important from the sustainable finance point of view. One of the main ideas behind sustainable development is intergenerational equity. This principle means that „that in their development choices states must preserve the environmental capital they hold in trust for future generations and ensure that it is transmitted in conditions equivalent to those in which it was received"[20]. Future generations cannot negotiate, so as it was mentioned before the nudge strategy might be inappropriate.

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[16] Ustawa z dnia 1 lipca 2005 r. o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów (Dz.U. z 2017, poz. 1000 with later amendments).

[17] E. Kolbert, *What was I thinking?*, The New Yorker, 25th February 2008, https://www.newyorker.com/magazine/2008/02/25/what-was-i-thinking, 12.08.2019.

[18] P. Schlag, Nudge, *Choice Architecture, and Libertarian Paternalism*, Michigan Law Review 2010, p. 920–922.

[19] R. Baldwin, M. Cave, M. Lodge, *op.cit.*, p. 125.

[20] V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm,* The European Journal of International Law 2012, vol. 23, no. 2, p. 380.

As the High-Level Expert Group on Sustainable Finance has noticed, financing sustainable development implies a shift in the time preference of the investors. Today many of them want to get the profit over a time horizon where the economic returns cannot even materialise[21]. The investors who are looking for strategic fundamentals rather than near-term profits would never put their money on the green economy projects. Firstly, environmentally-friendly investments are usually industrial or infrastructural ones. These investments usually are taking a lot of time to be built and then they are bringing fruits for a long period. They are usually financed by debt and if the debtor does not want to roll over his debt many times, the debt will be a long-term one. Long-term debts (for example 5- or 7-years corporate bonds) are usually risky, so they will be unsuitable for the investors who are looking for a quite safe portfolio. Such a debt is unsuitable for profit seekers who are looking for a possibility of arbitrage.

Concluding, the regulator ought to change the habits of the investors. It could be done in many ways using, for example, the fiscal policy (lower taxation on profits from green investments) or the macroprudential one (lower bank capital requirements for assets such as green bonds).

Keeping in mind experts' advises the European Commission (EC) has prepared the Action Plan on financing sustainable growth[22]. In this plan, the EC presented ten actions to be taken aiming to achieve sustainable development goals. These actions can be divided into three groups: those which are supposed to reorient capital flows towards a more sustainable economy[23]; those which are supposed to integrate sustainability with risk management[24]; and those which are supposed to foster transparency[25]. I will describe shortly the most interesting proposals.

Firstly, the Commission suggests establishing an EU classification system for sustainable activities. Such a classification would help in labelling the environmentally-friendly activities. Commission prepared the proposal for a regulation of the European Parliament and the Council on the establishment of a framework to facilitate sustainable investment[26]. According to Article 3 of the proposed regulation an economic activity will be considered as environmentally sustainable if it meets criteria such as contributing to at least one of the environmental objectives (which are defined in the Article 5 of this act), not harming any other of the objectives, complying with the technical criteria (which would be detailed in EC's delegated regulations) and – as Article 13

[21] High-Level Expert Group on Sustainable Finance, *op.cit.*, p. 10.

[22] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic, and Social Committee and the Committee of the Regions. Action Plan: Financing Sustainable Growth, COM (2018) 97 final.

[23] *Ibidem*, p. 4–7.

[24] *Ibidem*, p. 7–9.

[25] *Ibidem*, p. 9–11.

[26] Proposal for a regulation of the European Parliament and the Council on the establishment of a framework to facilitate sustainable investment, COM (2018) 353 final.

stipulates – complying to the principles of International Labour Organisation's Declaration on Fundamental Rights and Principles at Work.

The previously mentioned objectives are climate change mitigation and adaptation, sustainable use and protection of water and marine resources, a transition to a circular economy, waste prevention and recycling, pollution prevention and control, protection of healthy ecosystems. The proposed regulation also describes (in Articles from 6 to 11) how these objectives shall be understood.

Labelling the environmentally-friendly activities is very important in the EU strategy and the European Green Bond Standard (EGBS) is the most important label. EGBS is designed to be a voluntary standard created for the issuers who want to show that they comply with the best market practices. The issuer who follows the EGBS will be verified by the external verifier with the EU accreditation[27]. It could be relevant globally, so it would be also able for the issuers outside the EU, who would decide to comply with the standard[28]. In my opinion the way this financial instrument is constructed could be somehow compared to the Fairtrade standard used for certification of goods which are friendly for both environment and suppliers from developing countries. This standard is also based on external audit and voluntary decision of the producer[29]. By such a regulation, however, the regulator does not create any incentives. It is just a solution for the issuers who are motivated to be environmentally-friendly by other factors. The EGBS might be well-suited for them but it could change the market in a very limited way.

This problem has been noticed by the Technical Expert Group on Sustainable Finance. They treat the EGBS as a basis on which new public policies will be built. These policies ought to incentivise green bond issuance[30]. The fact that even experts who designed the standard are seeing the necessity of other reforms show that without other institutional solutions the EGBS will be the revolution that stops halfway. Among the policies recommended by the expert group, one can find increasing transparency[31] or a tax reform[32]. Unfortunately, all of these recommendations are very general.

According to the EC, the other action that shall be taken is an incorporation of sustainability into financial advice. This idea is based on the MiFID II requirement, which obliges financial institutions to offer instruments that are suitable for their clients[33]. The ESMA has prepared some technical advice to the EC regarding the proper regulation of this issue. The ESMA proposes that financial institutions will have to ask the investors about their preferences on environmental, social and governance (ESG)

[27] EU Technical Expert Group on Sustainable Finance, *Report on EU Green Bond Standard*, 2019, p. 23.

[28] *Ibidem*, p. 57.

[29] Fairtrade Labelling Organisations, *An Inspiration for Change*, Bonn 2007, p. 9, https://www.fairtrade.org.pl/wp-content/uploads/2016/08/publ_7_flo_ar2007.pdf, 19.08.2019.

[30] EU Technical Expert Group on Sustainable Finance, *op.cit.*, p. 25.

[31] *Ibidem*, p. 44–45.

[32] *Ibidem*, p. 49.

[33] Communication…, p. 6–7.

issues. According to ESMA's proposal, ESG issues should be as important as the risk/reward profile[34].

Such an assumption is, in my opinion, unrealistic. Even though the pressure from society could be very important during the process of decision-making, for most of the institutional investors return on investment will be the most important factor. The reason why the profit is so important is very easy – the remuneration of the company's directors depends on profit. What is more, also the investors must prefer being socially responsible than more profitable. Just asking the clients without other incentives will not be, in my opinion, as efficient as they are supposed to be.

On the other hand, there is a way in which a similar solution could work. The Article 173 (VI) of The French Energy Transition for Green Growth Act[35] statutes that all investment companies have to let clients know how ESG parameters are implemented into the company's investment strategy. If a company does not implement the strategy, it must explain its behaviour. This is a classic name-and-explain strategy. The main advantage of such a strategy is that under some conditions it could be shaming for those who do not comply. If most of the institutional investors comply with the rules, those who do not will found themselves under the critique of the public opinion. This regulation complies requirements of the nudge strategy: regulatee has a possibility of an easy opt-out, however, it is motivated implicitly to act in a way that will be beneficial to all. Here there is no *praescriptio iuris* (like in organ donations), but the corporate governors, who know that their companies could comply or be punished, and who know that with the punishment of their companies their remunerations are punished too, will never decide not to comply. Unless they would make an agreement, which would be, of course, the violation of the competition law and has, therefore, a really small probability. As one can see, „nudges" might be efficient while regulating corporations only when opt-out is punished. The French solution, unfortunately, seems to be better than the one proposed by the ESMA.

To sum up, most of the proposed EU regulation regarding sustainable finance is voluntary. Furthermore, it does not create strong incentives to act in an environmentally-conscious way. Even though the experts realize that these voluntary instruments require an institutional environment to work properly, the EC does not create any significant incentives.

There is, however, the one significant exception I would like to discuss now.

3. The macroprudential regulation to the rescue?

The eight action proposed by the Commission is the incorporation of sustainability into prudential requirements. For me it is the most interesting proposal made by the EC.

[34] ESMA, *Final Report. ESMA's technical advice to the European Commission on integrating sustainability risks and factors in MiFID II*, 2019, p. 20–21.

[35] La loi no 2015–992 du 17 août 2015 relative à la transition énergétique pour la croissance verte.

In the IMF's organising framework of the macroprudential policy[36] we can find a very simple definition of the macroprudential policy: it is a policy aimed at maintaining financial stability[37] by using prudential tools to limit systemic risk. The systemic risk is „a risk of disruptions to financial services that is caused by an impairment of all or parts of the financial system and can have serious negative consequences for the real economy"[38]. Such a disruption we could see in the late 2000s when the global financial crisis occurred.

Among the various causes of this crisis, the most important one was too high financial leverage of the financial institutions. The financial leverage could be broadly defined as usage of external financing (such as debt) to make expected profits (but also potential losses) of the undertaking higher[39]. The leverage is usually described by the debt-to-equity ratio – for financial institutions at the beginning of the crisis this ratio was very high (Lehman Brothers had 31 to 1)[40]. If the company has such a high leverage ratio, even a little drop in the value of their assets could destroy them.

There is, however, one good reason to take this risk. Debt is much cheaper than equity, so the less equity you have, the more profitable you are. No one should be, therefore, surprised that financial institutions want to have a high leverage ratio as possible. Highly leveraged institutions, however, can go bankrupt easily. Because of their interdependence, every bankruptcy generates the possibility of next bankruptcies, so it generates systemic risk. Limiting systemic risk is the main objective of macroprudential regulation. Therefore the main tool of the macroprudential policy is the regulation on capital requirements.

In the EU minimal capital requirements are defined in Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms[41] (hereinafter: CRR). The CRR divides financial institutions' capital on Tier 1 capital and Tier 2 capital. The Tier 1 capital consists of financial instruments such as *inter alia* shares, perpetual bonds or retained earnings. The Tier 2 capital consists of capital instruments which are superior to the Tier 1 ones (i.e. in case of insolvency Tier 1 instruments are ranked below Tier 2 ones) and subordinated loans (i.e. loans that ranks below other loans if the company is insolvent). According to Article 92 of the CRR, the minimal Tier 1 capital requirement is 6% and the minimum total capital (i. e. Tier 1 + Tier 2) requirement is 8% of the total risk exposure (which could be also described as risk-weighted assets, RWA).

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36 IMF, *Macroprudential Policy: An organizing framework*, 2011.

37 *Ibidem*, p. 7.

38 *Ibidem*.

39 T. Berent, *Ogólna teoria dźwigni finanasowej* (The General Theory of Financial Leverage), Warsaw 2013, p. 414.

40 L. Kotlikoff, *Jimmy Stewart is dead*, Hoboken, NJ, 2010, p. 29.

41 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26th June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Official Journal of the European Union 2013 L176/1.

RWA is calculated in a very sophisticated way. By using advanced statistical tools financial instruments are divided into groups (quality steps) dependent on their riskiness. Take the valuation of the risk of credit for a corporation for example. According to Article 122 of the CRR, the credits would be divided into six quality steps. For very reliable debtors, the risk weight is only 20%. The risk weight on credits of debtors who have a very high probability of default is set at 150%. Most debtors have neither very high nor very small probability of default, so their risk weight will be either 50% or 100%. Some of the debtors such as small and medium enterprises and natural persons are too small to have their riskiness properly calculated, so their risk-weight will be (as a rule) 75%[42] unless their debt is mortgage-backed – in such a case risk-weight could be just 35%[43]. The capital requirement is, therefore, eight percent of the sum of all assets weighted by their risk.

By setting the risk weights the regulator can conduct its economic policy. To understand why it is possible, a few facts need to be reminded. Banks are not just lending money from party A to party B. Giving a loan is as a matter of principle just an accounting operation, by which both bank's assets (money it will get from the debtor) and liabilities (the bank will have to pay the money to the debtor) are raised. During the economic boom a bank could easily get money when needed (i.e. it has to pay a debtor) as a loan from the interbank market (so it pays its liabilities by incurring other liability). Loans from the interbank market are much cheaper than the long-term loans or the equity, so by using this strategy a bank can increase its margin (the interests they will get from the debtor minus their cost of capital). As a result, it is incentivised to behave in this way by its profit and loss account. The minimum capital requirement is a limit for this behaviour. And the risk weights are, therefore, a very powerful instrument of the policy.

The bank seeks for the investment with as low risk weight as possible. Let us assume that the bank can choose between two investments – the investment A and the investment B – with a similar risk/ return profile. The risk weight of investment A is 25% and one of the investment B is 75%. Obviously, the bank would choose investment A, because it has lower costs and has a similar expected return. From the point of view of financial stability, i.e. the principle of the macroprudential regulation, such a difference would be a catastrophe. It will reorient cashflows from the one sector of the economy (the sector of „B-like investments") to the other one (the sector of „A-like investments"). Too much money in some parties of the economy and lack of money in the other one usually results in high instabilities and – in a worst-case scenario – economic crises. Otherwise, the situation of sustainable finance is unusual, because the regulator does want to reorient cashflows. The macroprudential policy, the one and only systemwide solution affecting how financial resources are allocated, is the most powerful mean to achieve this goal.

[42] Article 123 of the CRR.

[43] Article 124 section 3 of the CRR.

Bangladesh Bank, the Bengali central bank and financial regulator, is the world's pioneer of integrating sustainability with the financial regulation since 2011[44]. The goal of the Bangladesh Bank guidelines is to mitigate social and environmental risk – in the country which experienced rapid industrialisation in recent years the control over these risks is even more important than in Europe. The 2011 guidelines were revisited in 2017 aiming to guarantee the achievement of goals set in governmental 10-year Perspective Plan, National Sustainable Development Strategy and 7th Five Year Plan of Government of Bangladesh[45].

The Bengali regulation lies between macro- and microprudential one. It is certainly achieving the goal of macroprudential policy (i.e. mitigation of the systemic risk), though by the classically microprudential means (i.e. concentrated on the single exposures rather than the bank as a whole).

According to the Bangladesh Bank's guidelines, every loan proposal must be firstly screened whether the initiative to be financed is included on the exclusion list[46]. If it is, a bank cannot give a loan. Such a solution might seem controversial, however, most of the excluded activities are illegal ones[47].

If the bank can give a loan, it can either give a loan or (in some sectors) will be obliged to check the ESG issues on the provided checklist[48]. This checklist differentiates, for example, between the situation in which the client has addressed NGOs protest and has not done so. When the bank completes the checklist, it receives the risk classification of the loan. The low-risk loans can be given easily[49], the medium- or high-risk ones could be given only under some conditions. Firstly, the identified risk ought to be mitigated. Borrowers usually do not have any influence on actions taken by debtors (or bond issuers) whose behaviour, however, could affect the riskiness of the debt. Therefore, there is a common practice that some obligations and prohibitions are incorporated into the legal arrangement between debtor and borrower (these obligations and prohibitions are called covenants). If the debtor does not obey the covenants, it is obliged to change its behviour within a short period or return money immediately. Under the Bengali regulation fulfilling ESG standards (such as pollution or working conditions) must be a covenant of the credit[50]. Secondly, medium-risk loans must be approved by the heads of department and high-risk ones by the board of governors[51]. Escalating the simple business decision to the top management could be treated as a disincentive.

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[44] Bangladesh Bank, *Guidelines on Environmental & Social Risk Management (ESRM) for Banks and Financial Institutions in Bangladesh*, 2018, https://www.bb.org.bd/aboutus/regulationguideline/esrm_guideline_feb2017.pdf, 26.06.2019, p. 2.

[45] *Ibidem*, p. 3.

[46] *Ibidem*, p. 9.

[47] *Ibidem*, p. 22.

[48] *Ibidem*, p. 9–10.

[49] *Ibidem*, p. 18.

[50] *Ibidem*, p. 38.

[51] *Ibidem*, p. 18.

Alongside with microprudential means, the Bengali regulation also uses the macroprudential ones. Having a high environmental and social risk at the portfolio level impacts a bank's CAMELS rating (this rating checks the general standing of the bank) and as a result bank's capital requirements[52].

The Bengali regulation is certainly not a nudge one. In my opinion, it addresses some of the nudges' weaknesses. Firstly, in Bangladesh you cannot easily opt-out from this regulation (even though it is *de iure* just a guideline, a soft law), because if a bank does not obey the guidelines, its rating will decrease. Secondly, as it was put above, nudging particular decision-makers might not control harm's emergence.

The macroprudential regulation alone would work if we had many undertakings that want to make environmentally-friendly investments and nobody who wants to finance them. Otherwise, we need to nudge both financial institutions and the real economy. Some of the Bengali solutions (such as covenants) seem to be good motivators for the real economy.

The central position of the financial system in the market economy makes it the best channel to affect the behaviour of the other sectors.

The European Bank Authority set a deadline for the report on the incorporation of ESG into risk management and supervision and the report on classification and prudential treatment of assets from sustainability perspective on 2021[53]. So far no legislative proposals were made.

My suggestion is that the EBA shall check how does it work in Bangladesh.

4. Conclusions

I would like to give a few concluding remarks.

I. **Financing sustainable development is the most important issue in front of the financial regulator.** It requires a reorientation of the cash flows in the whole economy and due to its central position financial sector is the only one where the regulator can achieve that.

II. **There are no simple solutions in financial regulation.** The proper regulation is the complex system of incentives and disincentives for different parties. Every mistake in the construction of such a system will be used by the regulatees to get around the regulation. The infrastructure which will encourage systemwide change must be created. Even if green bonds are great, they will be not used without incentives to do so. So far there are no convincing and detailed proposals for such incentives.

III. **The best way to cause systemic change is to change macroprudential regulation** because it can create the incentives needed. This most promising action is, unfortunately, much less developed than the other ones. The report on possible regulation is to be completed in 2021, so we probably will have not to see the enforced regulation

[52] *Ibidem*, p. 21.

[53] S. Eley, *EBA Work Plan on Sustainable Finance*, https://www.ebf.eu/wp-content/uploads/2019/04/Slavka-Eley-Head-of-Banking-Markets-Innovation-and-Products-EBA.pdf, 26.06.2019, p. 6.

within the next five years. Such regulation also requires time to affect the economy, which would take the next few years. The EU has lost here a lot of time.

IV. **There is a lack of cooperation between the EU entities.** For example, ESMA acted as if their experts did not know the recommendations of the Technical Expert Group. Lack of consultation between entities might help think them outside-the-box, however, it makes achieving consensus more difficult. Such a consensus among experts would be beneficial if the projected regulation was criticised by lobbyists.

V. The sustainable finance regulation is an on-going issue. Because of the EU's meritocratic principles during the legislation process many documents such as action plans or reports are published. These reports could change the course of the future regulation. The Technical Expert Group's report on the green bond standard published in June 2019 contains plenty of proposals which were not made in the EC's action plan from March 2018. In my opinion the expert group's proposals are better. As it was mentioned before, report on possible incorporation of ESG measurements into risk management is set to be published in 2021. Until then we will have no full picture of the proposed sustainable finance regulation. And despite all the reports made by professionals, the European Parliament and the Council, which are the legislators, will get the final word. The final regulation will likely be completely different from this one which I try to foresee in this very article.

* * *

Regulacja finansowa a zrównoważony rozwój

Każdy człowiek ma prawo uczestniczyć w rozwoju gospodarczym. ONZ przygotował plan działania mający na celu poprawną realizację tego prawa – Agendę 2030, zawierającą Cele Zrównoważonego Rozwoju. Chociaż cele te są wzajemnie powiązane, czasem mogą być trudne do zrealizowania w tym samym czasie. Na przykład państwa są zobowiązane by walczyć ze zmianami klimatu i zarazem rozwijać przemysł – i to mimo empirycznych dowodów, że przemysł w największym stopniu zanieczyszcza środowisko. Niekonsekwencję tę można przezwyciężyć tworząc regulacje, które zachęcałyby do inwestowania w przedsięwzięcia przyjazne środowisku.

Przeanalizowałem plan działania Komisji Europejskiej dotyczący finansowania zrównoważonego rozwoju. W niniejszym artykule przedstawiam jego główne cele, a także prezentuję postulowane przez ESMA zmiany w dyrektywie MiFID II.

Porównam także proponowane zmiany z istniejącymi w Bangladeszu regulacjami, obligującymi banki do włączania czynników środowiskowych do ich analizy biznesowej. W mojej ocenie bengalskie regulacje charakteryzują się wyższą skutecznością.

Słowa kluczowe: zrównoważony rozwój, finanse, regulacje makroostrożnościowe

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„No one will be left behind" – Hungarian Ombudsman for Future Generations' General Opinion about the Sustainable Development Goals implementation in Hungary

Abstract:

The United Nations has adopted the Sustainable Development Goals (SDGs) in 2015. The 17 Goals and 169 targets should be achieved with regards to the principles of „no one will be left behind" and „reach the furthest behind first". This exceptionally ambitious development programme connects with human rights on several levels. The knowledge and experience of the National Human Rights Institutions (NHRIs) may prove to be highly valuable for political decision-makers when executing the SDGs; it may help to designate the right directions of development. Such NHRI in Hungary is the ombudsman and their deputies. The Commissioner for Fundamental Rights and their deputies may initiate inspections and conduct examinations on the basis of individual complaints. The revealed constitutional breaches and conclusions are published in reports. They may suggest legislative proposals and issue an informational statement to raise the awareness of the concerned public or the press. The legal basis of the operation of the Ombudsman for Future Generations, one of the deputies of the Commissioner for Fundamental Rights, is laid down in the Fundamental Law of Hungary: in Article P) – obligation to preserve the common heritage of the nation (natural resources, biodiversity, cultural heritage), Article XX (right to physical and mental health) and Article XXI (right to healthy environment). The main goal of the Ombudsman for Future Generations is to represent and protect the interests of future generations. In my article I will analyse the connection between the SDGs and human rights and also I would

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like to present a suitable practice of how NHRI can be helpful in the implementation of the SDG.

Key words: Sustainable Development Goals (SDG), National Human Rights Institutions, Hungarian Ombudsman for Future Generations

1. Introduction[2]

The United Nations has adopted the Sustainable Development Goals (SDGs) in 2015. The 17 goals and 169 targets should be achieved with regards to the principles of „no one will be left behind" and „reach the furthest behind first". This exceptionally ambitious development programme connects with human rights on several levels. The knowledge and experience of the National Human Rights Institutions[3] (NHRIs) may prove to be highly valuable for political decision-makers when executing the SDGs; it may help to designate the right directions of development. In this article I would like to present the Hungarian institutional protection of the rights of future generations. I would like to share our good practice regarding the SDG implementation in Hungary, in line with the SDG's 17.14 point: „Enhance policy coherence for sustainable development"[4]. First I introduce the connections between human rights and the SDGs, after which I review the Hungarian ombudsman system and the legal basis. In the following part I deal with our work regarding the General Opinion of the Hungarian Ombudsman for Future Generations. Finally I present a suitable practice of how NHRI can be helpful in the implementation of the SDGs.

[2] There has not been many academic research up till now conducted in Hungary or in general in the theme of Sustainable Development Goals and the implementation of SDGs. One of the existing examples is the HOFG's General Opinion, which is basically the original GAP Analysis. In this topic see also J. Zlinszky, B. Hidvéghiné Pulay, M. Szigeti Bonifert, *Implementation of the Sustainable Development Goals – experience transfer from central and eastern european countries to the EU*, Iustum Aequum Salutare 2018, XIV, 4, p. 141–155, http://ias.jak.ppke.hu/hir/ias/20184sz/11_Zlinszky_etalii_IAS_2018_4.pdf, 29.07.2019; L. Pintér, D. Almássy, E. Antonio, S. Hatakeyama, I. Niestroy, S. Olsen, G. Pulawska, *Sustainable Development Goals and Indicators for a Small Planet, Part I: Methodology and Goal Framework*, Singapore 2014, https://www.asef.org/images/stories/publications/ebooks/ASEF_Report_Sustainable-Development-Goals-Indicators_01.pdf, 27.07.2019; L. Pintér, D. Almássy, S. Hatakeyama, *Sustainable Development Goals and Indicators for a Small Planet Part II: Measuring Sustainability*, Singapore 2014, https://www.asef.org/images/stories/publications/documents/ENVforum-Part_II-Measuring_Sustainability.pdf, 27.07.2019.

[3] National Human Rights Institutions (NHRIs) are state-mandated bodies, independent of government, with a broad constitutional or legal mandate to protect and promote human rights at the national level. NHRIs address the full range of human rights, including civil, political, economic, social and cultural rights. In 1993 adopted The United Nations' the Paris Principles. This Principles set out the minimum standards required by national human rights institutions to be considered credible and operate effectively. See the Paris Principles: https://www.un.org/ruleoflaw/files/PRINCI~5.PDF, 24.07.2019. See more about NHRI: https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx, 27.07.2019.

[4] *Transforming our world: the 2030 Agenda for Sustainable Development* (in following: Agenda 2030), https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, 27.06.2019.

2. Development

2.1. The right to healthy environment at international level

When reflecting on human rights and environmental protection, it is important to realise one significant deficiency in the international regulation: namely, that the right to a healthy environment was not included in the international human rights treaties. In cases concerning applications with the subject of environmental harms the European Court of Human Rights derives its decision from the right to life, the protection of property and private home. This is represented very well in the case *Lopez Ostra versus Spain*. In this case the Court referred, among others, to the Article 8 of the Convention, which provides: „1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[5].

51. „Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation".

58. „Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life"[6].

Among others, thanks to the active role of the European Court of Human Rights, the human rights guarantees have been a useful legal tool in the enforcement of environmental protection since the 1990s. Nowadays, we can see that the right to a healthy environment can benefit people in the present (individually and collectively) and future generations[7].

2.2. The SDGs

Since 1987 it has been unquestionable that sustainable development[8] needs human rights as prerequisites. The concept of the sustainable development is an international

[5] European Convention on Human Rights, Rome, 4th November 1950.

[6] *Lopez Ostra vs. Spain*, 41/1993/436/515, Application no. 16798/90.

[7] *Human Rights and Sustainability – Moral responsibilities for the future*, ed. G. Bos, M. Düwell, London and New York 2016, p. 47.

[8] „Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs" – Brundtland Report, *Our Common Future*.

construction, firstly appeared in international law[9]. Vice-President Weeramantry's Separate Opinion in *Gabcikovo – Nagymaros case* stated: „The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community"[10]. The development then will be sustainable, if intergenerations (environmental protection) and intragenerations (fair economy and social development) equity is insured[11]. Furthermore, environmental protection is a prerequisite to every human right and to the wider concept of human dignity. These thoughts were also instrumental in the concept of the 2030 Agenda for Sustainable Development. The Agenda 2030, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 SDGs, which are an urgent call for action by all countries – developed and developing – in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. The 17 goals and 169 targets should be achieved with regards to the principles of „no one will be left behind" and „reach the furthest behind first". This exceptionally ambitious development programme connects with human rights on several levels. This Agenda is determined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can achieve their potential in dignity and equality, and in a healthy environment[12]. It is also determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations[13]. The interlinkages and integrated nature of the SDGs are of crucial importance in ensuring that the purpose of the new Agenda is realized. This Agenda has a transformational vision[14]. It is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome. It is informed by other instruments such as the Declaration on the Right to Development[15]. This Agenda reaffirms the outcomes of all major United Nations conferences and summits, which have laid

[9] G.M. Durán, E. Morgera, *Environmental Integration in the EU's External Relations*, Hart Publishing, 2012, p. 34–35.

[10] International Court of Justice Reports of Judgments, Advisory Opinions and Orders Case Concerning The Gabcikovo-Nagymaros Project (Hungaryislovakia) Judgment of 25th September 1997, *Republic of Hungary vs. Slovak Republik*, Separate Opinion of Vice-President Weeramantry, p. 92.

[11] V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, The European Journal of International Law 2012, vol. 23, no. 2, p. 380.

[12] Agenda 2030, Preamble/ People.

[13] Agenda 2030, Preamble/ Planet.

[14] Agenda 2030, Preamble/ Partnership.

[15] Agenda 2030, Declaration 10 (Our shared principles and commitments).

a solid foundation for sustainable development and have helped to shape the new Agenda. These include the Rio Declaration on Environment and Development, the World Summit on Sustainable Development, the World Summit for Social Development, the Programme of Action of the International Conference on Population and Development, the Beijing Platform for Action and the United Nations Conference on Sustainable Development[16]. The governments have the primary responsibility for follow-up and review made in implementing the SDGs until 2030. The Governments must make a Voluntary National Review to the High-level Political Forum[17]. The indicators are also important to assist the executing work. Quality, accessible, timely and reliable disaggregated data will be needed to help with the measurement of progress and to ensure that no one is left behind[18].

2.3. Hungarian ombudsman system and the legal basis

The knowledge and experience of the NHRIs may prove to be highly valuable for political decision-makers when executing the SDGs; it may help to designate the right directions of development. Such NHRI in Hungary is the ombudsman and their deputies. The mandate of the Commissioner for Fundamental Rights and their office is determined by Article 30 of the Fundamental Law of Hungary adopted in 2011 and based on Act CXI of 2011 on the Commissioner for Fundamental Rights (in following: Act), both having entered into force on 1st January 2012. Based on 2. § (2) of the Act the Commissioner for Fundamental Rights in the course of their activities shall pay special attention, especially by conducting proceedings ex officio, to the protection of the rights of the child, the values determined in Article P) of the Fundamental Law (hereinafter referred to as „the interests of future generations"), the rights determined in Article XXIX of the Fundamental Law (hereinafter referred to as „the rights of nationalities living in Hungary") and the rights of the most vulnerable social groups. Based on 18. § (1) of the Act anyone can turn to the Commissioner for Fundamental Rights if, in their judgment, the activity or omission of among others the public administration organ, the local government, the public body with mandatory membership and an organ performing public services („authority") infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto („impropriety"), provided that this person has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to them.

As stated in 18. § (3) of the Act the Commissioner may not conduct inquiries into the activities of the Hungarian Parliament, President of the Republic, Constitutional Court, State Audit Office, courts and Prosecution Service, with the exception of its investigative service.

16 Agenda 2030, Declaration 11 (Our shared principles and commitments).

17 Agenda 2030, Declaration 47 (Follow-up and review).

18 Agenda 2030, Declaration 48 (Follow-up and review).

The Commissioner can conduct ex officio proceedings in order to terminate such improprieties related to fundamental rights, which have arisen in the course of the activities of the authorities. Ex officio proceedings may be aimed at conducting an inquiry into improprieties affecting not precisely identifiable larger groups of natural persons, or at conducting a comprehensive inquiry into the enforcement of a fundamental right, under 18. § (4) of the Act.

Based on 2. § (2) of the Act the Commissioner gives an opinion on the draft rules of law affecting their tasks and competences; on long-term development and land management plans and concepts, and on plans and concepts otherwise directly affecting the quality of life of future generations. The same section says that the Commissioner also makes proposals for the amendment or making of rules of law affecting fundamental rights and/ or the recognition of the binding nature of an international treaty. Based on 2. § (3) of the Act the Commissioner may initiate the review of rules of law at the Constitutional Court as to their conformity with the Fundamental Law. In the course of their activities, the Commissioner cooperates with organisations aiming to promote of the protection of fundamental rights, as stated in 2. § (5) of the Act. Furthermore, the Commissioner participates in the preparation of national reports based on international treaties, relating to their tasks and competences, and monitors and evaluates the enforcement of these treaties under Hungarian jurisdiction, pursuant to 2. § (4) of the Act.

Sustainable Development relies on responsibility to equity with future generations[19]. The cost and benefits of every project depends of the perspective of the present generations[20]. In these days most legal systems recognize that the future generations have rights too, these rights have meaning only if we, the living, respect them[21]. The theory of intergenerational equity based that all generations have an equal place in relation to the natural system, and that there is no claim for preferring past, present or future generations in relation to the system[22].

> There are three normative principles of intergenerational equity. First, each generation must conserve options. (…) Second, each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received. (…) The same notion underlies the difference here. Third, each generation should provide its members with equitable rights of access to the legacy of past generations and conserve this access for future generations[23].

This principle mean guidance but do not assess how each generation should manage its resources[24]. Among others based on this principles somehow is necessary appearer

[19] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, American University International Law Review 1992, vol. 8, issue 1, p. 19.

[20] *Ibidem*.

[21] *Ibidem*, p. 20.

[22] *Ibidem*, p. 20.

[23] *Ibidem*, p. 22–23.

[24] *Ibidem*, p. 23.

the viewpoint of future generations in the legal system. In the protection of future generations' interest the diversity of forms and causes of short-termism invites a diversity of institutional answers[25]. In Hungary this mission belongs to the Hungarian Ombudsman for Future Generations (HOFG). The Commissioner has two deputies, one of which is the HOFG. The HOFG is entrusted with a number of special powers provided under the Act to foster the interests and needs of future generations. Its constitutional mandate has two main pillars: the human right to a healthy environment[26], the right to physical and mental health[27] and a novel provision under Article P)[28] enshrined in the Fundamental Law since 2011 stipulating the 'common heritage of the nation'. It provides that „all natural resources constitute the common heritage of the nation and thus shall be preserved, maintained and protected by the state and by every citizen for the benefit of future generations". Based on such constitutional language, in the practice of the HOFG the „interests of future generations" are understood as issues relating to mainly environmental interests and cultural heritage protection[29]. Based on 3. § (1) of the Act the HOFG is responsible for the protection of the interests of future generations, shall monitor the enforcement of the interests of future generations, and shall regularly inform the Commissioner, the institutions concerned and the public of their experience regarding the enforcement of the interests of future generations. The HOFG shall draw the attention of the Commissioner, the institutions concerned and the public to the danger of infringement of rights affecting a larger group of natural persons, the future generations in particular. The HOFG may propose that the Commissioner instituted proceedings ex officio. The HOFG shall participate in the inquiries of the Commissioner and may propose that the Commissioner turned to the Constitutional Court. The HOFG shall monitor the implementation of the sustainable development strategy adopted by the Parliament, and may propose the adoption, amendment of legislation on the rights of future generations. Last but not least the HOFG shall promote, through their international activities, the presentation of the merits of domestic institutions related to the interests of future generations.

As we see, the powers of HOFG include conducting investigations into maladministration complaints and environmental nuisance claims on the basis of citizen's

[25] *Institutions for Future Generations*, ed. A. Gosseries, I. Gonzalez-Ricoy, Oxford, New York 2017, p. 7.

[26] See Fundamental Law Article XXI.

[27] See Fundamental Law Article XX.

[28] „(1) Natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural values shall comprise the nation's common heritage; responsibility to protect and preserve them for future generations lies with the State and every individual.

(2) The regulations relating to the acquisition of ownership of arable land and forests, including the limits and conditions of their use for achieving the objectives set out under Paragraph (1), and the rules concerning the organization of integrated agricultural production and on family farms and other agricultural holdings shall be laid down in an implementing act".

[29] Based on Fundamental Law Article P, Article XX and Article XXI.

complaints or by launching ex officio investigation into environmental pollution cases. The HOFG's proceedings are concluded with a report containing recommendations to the public authority for the sake of full compliance with the constitutional provisions. Noncompliant authorities would be listed in the Annual Report of the Ombudsman, which is submitted to the Parliament. The HOFG may submit legislative proposals to the legislature suggesting new laws or amendments to existing ones. The HOFG may also intervene in court proceedings concerning the judicial review of environmental permits. They can issue general opinions to promote the effective realization of the interests of future generations. Lastly, the HOFG may propose the Commissioner for Fundamental Rights to challenge the constitutionality of any act that is believed to be in violation of the right to a healthy environment or Article P) of the Fundamental Law.

2.4. The HOFG's General Opinion

The HOFG uses a General Opinion as a tool for investigating and analysing a systemic problem or challenging matter and raising public attention to such. The HOFG's involvement in the SDG implementation process stems from the fact that the Ombudsman's reports are relevant for the national implementation in many ways.

Firstly, due to its human rights based mandate, the HOFG has experience with translating general human rights objectives to specific recommendations, an exercise which is an essential feature of the implementation of the SDGs as well[30]. It is important to see, just like human rights standards, the Agenda also sets aspirational and often abstract goals while the national implementation of the SDGs calls for exact, well-defined measures[31]. The HOFG's recommendations can assist the government in translating holistic SDG objectives into exact implementation steps, since it expressly identifies those policies that are necessary in order to fully observe human rights standards and corresponding SDGs[32].

Secondly, the recommendations of the HOFG can help the government to identify those vulnerable groups that should be first targeted in the SDG's implementation process[33]. Taking into account the HOFG's recommendations can ensure that the national implementation of the SDGs complies with the Agenda's requirement to „reach out for the furthest behind first"[34].

Thirdly, the national implementation of the Agenda ultimately calls for new legislation or changes in the ways in which existing laws are applied by public authorities[35].

[30] Summary of the Hungarian NHRI's engagement with the SDGs Promoting Ambitious National Implementation of the SDGs by the Hungarian Ombudsman for Future Generations, p. 2 (in following: HOFG's General Opinion), www.ajbh.hu/documents/14315/2872607/Summary+of+HNHRI+-+OFG+engagement+with+the+SDGs/937ca9ea-cdf8–81f6-a245–1cc5302e4c68, 28.06.2019.

[31] HOFG's General Opinion, p. 2.

[32] HOFG's General Opinion, p. 2.

[33] HOFG's General Opinion, p. 2.

[34] HOFG's General Opinion, p. 2.

[35] HOFG's General Opinion, p. 2.

In its reports, the HOFG makes recommendations exactly to that effect: they can recommend legislative steps or advocate for changes in the interpretation and the application of existing laws[36]. Hence, the HOFG's recommendations can be seen as readily available guidelines for the Government in selecting necessary implementation steps[37]. Against this background, at the end of 2017 the HOFG issued a General Opinion aiming to support the effective and ambitious implementation of the SDGs in Hungary[38]. The General Opinion emphasized that national SDG implementation should be inextricably linked to constitutional human rights standards to be in line with the spirit of Agenda 2030[39]. The HOFG summarized the most relevant recommendations from their case practice to serve as a guideline for the Government in designing ambitious targets and the overall focus of the national implementation of the SDGs[40]. The General Opinion also offers new national indicators to many Goals to assist in the measurability of the implementation[41].

As to its scope, this General Opinion zoomed in on the goals that were in the focus of the 2018 session of the HLPF, which goals coincide with the special expertise of HOFG in the field of environmental advocacy: Goal 6 (ensure availability and sustainable management of water and sanitation for all), Goal 7 (ensure access to 3 affordable, reliable, sustainable and modern energy for all), Goal 11 (make cities and human settlements inclusive, safe, resilient and sustainable), Goal 12 (ensure sustainable consumption and production patterns) and Goal 15 (protect, restore and promote sustainable use of terrestrial ecosystems).

The General Opinion identifies ca. 60 measures and policy changes that are most urgent for realizing the above goals in an ambitious way. These recommendations have been included in previous reports of the HOFG addressed to various authorities or agencies. The General Opinion reiterates them and links each of them to a specific SDG target to reveal the interrelations of the SDGs and domestic human rights requirements[42]. It also highlights when a certain recommendation relates to more than one SDG target thereby raising awareness on the interconnectedness of the SDGs[43]. The General Opinion also identifies a handful of possible new, national human rights-based indicators, which could measure the progress of national implementation[44]. The table on page 102 provides one example of a summary of the most important recommendations as to the key steps needed in the national implementation.

[36] HOFG's General Opinion, p. 2.
[37] HOFG's General Opinion, p. 2.
[38] HOFG's General Opinion, p. 2.
[39] HOFG's General Opinion, p. 2.
[40] HOFG's General Opinion, p. 2.
[41] HOFG's General Opinion, p. 2.
[42] HOFG's General Opinion, p. 3.
[43] HOFG's General Opinion, p. 3.
[44] HOFG's General Opinion, p. 3.

The identification of groups left behind is a clear objective and guaranteed outcome of the daily work of the Hungarian NHRI[45]. It is important to mention that in an effort to reach out and allow for a direct submission of citizens complaints of potential human rights infringements, the Hungarian NHRI holds on-site events in the countryside for those citizens who are restricted in the enforcement of their rights (on account of their financial position, age, level of education or some kind of disability, etc.) several times a year[46].

The HOFG stressed that in selecting the focus areas for national implementation, the Government should consider the following aspects:

a) beside short-term policies, it is essential to prepare comprehensive action plans, which can yield long-term positive changes[47],
b) when designating priority areas for national implementation, it is important to have a systematic approach, i.e. targeting Goals that can trigger a positive snowball effect arising from the holistic nature of the SDGs[48],
c) the Agenda puts a lot of emphasis on monitoring the progress of the implementation. Effective monitoring can only be carried out if we have accurate data and knowledge about the starting situation as well as the problems to be solved, hence data collection and maintenance by national authorities is essential[49].

In the preparation of the General Opinion, the HOFG consulted with the Chair of the National Statistical Office[50] (who was closely involved in the preparation of the UN Global Indicator List being a co-chair of the UN High-level Group for Partnership, Coordination and Capacity-Building for post-2015 monitoring) and in the General Opinion the global indicators were also taken into account when formulating suggestions regarding potential national indicators. The report was sent to the National Statistical Office, the State Audit Office (which was preparing to conduct an internationally

[45] Summary of the Hungarian NHRI's engagement with the SDGs, for GANHRI upon its request for identifying NHRIs experiences, best practices and challenges in SDG implementation, monitoring and measurement, with a focus on Goal 16, p. 3 (in following: NHRIs experiences, best practices and challenges in SDG implementation), https://www.ajbh.hu/documents/14315/2872607/Summary+of+the+Hungarian+NHRI%27s+engagement+with+the+SDGs/e3aa1667–4c81-cd5a-2571-ba4a80a978e1, 28.06.2019.

[46] NHRIs experiences, best practices and challenges in SDG implementation, p. 3.

[47] NHRIs experiences, best practices and challenges in SDG implementation, p. 5.

[48] NHRIs experiences, best practices and challenges in SDG implementation, p. 5.

[49] NHRIs experiences, best practices and challenges in SDG implementation, p. 5.

[50] The Hungarian Central Statistical Office (HCSO) is a government office. Main task of the HCSO is designing and conducting surveys, recording, processing and storing data, data analyses, and dissemination, protection of individual data. The HCSO provides data for the parliament and public administration, social organizations, local authorities, scientific bodies, economic organizations, the general public and the media as well as for international organizations and users abroad. Official data regarding the socio-economic situation as well as the changes in the population of the country are published by the HCSO. The President of the HSCO is dr. Gabriella Vukovich. The legal basis of the HCSO is the Act CLV of 2016 on Official Statistic.

coordinated performance audit on the preparatory works for the national implementation of the SDGs), various Ministries, including the Ministry of Foreign Affairs.

See we one example from the General Opinion:[51]

SDG target 12 – ensure sustainable consumption and production patterns – Recommendations as to the implementation steps needed (based on the Ombudsman's practice)[52]

12.4. By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.	1. In the case of the universal environmental licensing procedure, for activities involving hazardous substances, the County Disaster Management Directorate, in cases of exceeding the threshold, the National Directorate General for Disaster Management should be involved in the permitting process. 2. The existing legal obligation to provide collateral security or the liability insurance system should be effectively implemented and enforced.
12.5. By 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse.	1. The framework for applicable fines relating to illegal waste dumping should be transparent, immediate and of an amount capable of having a deterrent effect. 2. The legislator should create consistency between the various types of fines relating to illegal waste dumping. 3. A ministerial decree on the payment of public utilities in waste management should be enacted, in which the amount of the fee is proportional to the amount of waste produced.
12.7. Promote public procurement practices that are sustainable, in accordance with national policies and priorities.	1. Green public procurement procedure should be developed, implemented and operated.
12.8. By 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature.	1. The amount of food additives should also be indicated on food labels, next to their name and category. 2. To facilitate the realization and promotion of a sustainable consumer lifestyle, awareness campaign and educational trainings should be put in place.

[51] See more Goals: HOFG's General Opinion.

[52] The table is own editing.

2.5. The NHRIs involvement in the VNR process

In March 2018 the Government asked for the HOFG's input in the VNR process, undertaken by Hungary for the HLPF's session in July 2018. The HOFG prepared a summary report which later formed an annex to the Government's VNR report in which it summarized the most important recommendations that were stressed in the General Opinion. Also worth mentioning is that the Government reiterated our main message stressing the importance of building the SDGs and targets on the principles of guaranteeing human rights, solidarity and global partnership. The HOFG emphasized that as a part of SDG implementation in Hungary, in addition to the short-term public policies bearing fast and spectacular results, those long-term strategic steps that require more comprehensive modifications being independent from government election terms should also be prepared[53]. He also highlighted that Agenda 2030 lays great emphasis on the measurability of progress, calling attention to the importance to have accurate data and knowledge on the initial situation and the problem to be solved[54].

The HOFG hosts the secretariat of the Network of Institutions for Future Generations (NIFG), an independent, non-formal network of national institutions worldwide working to protect the interests of future generations. A report of the former UN Secretary General, Ban Ki-moon, issued in 2013, entitled *Intergenerational Solidarity and the Needs of Future Generations*[55], listed 8 national institutions aimed at safeguarding the interest of future generations as noteworthy model institutions, which report inspired communication between such institutions and the establishment of NIFG. NIFG was founded in 2014 in Budapest by the institutions highlighted in the UN Secretary General's 2013 report as 'model institutions' working to realise intergenerational equity in everyday policy-making. NIFG works towards ensuring that the interests, rights and well-being of future generations are endorsed by decision-makers; it shares best practices among existing institutions and grassroots initiatives, and strives to build capacity and promote the establishment of similar local, regional and national institutions. In June 2019 NIFG published a Discussion Paper entitled *Looking to 2030 and Beyond – How Institutions for Future Generations Can Assist in SDG Implementation*[56]. NIFG would like to highlight how various institutions representing the interests, rights and well-being of future generations are unique and important assets in national and international long-term governance as well as how they can specifically be useful enablers in the implementation of the SDGs.

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[53] *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2018*, p. 54 (in following: Report), www.ajbh.hu/documents/14315/2993057/Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2018/ef5f4ffa-ef99–8cf8-e4d3–47ebb39b1026, 28.06.2019.

[54] Report, p. 54.

[55] https://sustainabledevelopment.un.org/content/documents/2006future.pdf, 28.06.2019.

[56] *Looking to 2030 and Beyond – How Institutions for Future Generations Can Assist in SDG Implementation*, http://futureroundtable.org/documents/2238847/3008114/SDG+Policy+Paper/88e3ec40-c4ae-9f93–1c94-b2862121c593, 28.06.2019.

3. Conclusion

The goal of the execution of Agenda 2030 is to transform our world, reduce inequalities within and between countries. It is now clear that our current tendencies are unsustainable, hence the need to put humanity on a more sustainable track in economic, environmental and social sense as well. The National Human Rights Institutions, such as the Ombudsman, are highly suitable to help enforce the SGDs, because the protection of the most vulnerable groups is one of its basic tasks. Therefore they are well placed to identify these groups, on which the national governments should focus in the course of the implementation. They can actively contribute to the implementation of an SDG, as demonstrated by our national example. Sharing experiences has a major role to play, as it contributes greatly to the successful implementation of the goals. It is no coincidence that the OECD devotes attention and reports to promote a coherent political attitude to sustainable development[57].

The intention of this article was to present the Ombudsman for Future Generations and the Commissioner for Fundamental Rights in Hungary in general, as well as to demonstrate a good practice, namely the contribution to the Voluntary National Review.

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„Nikt nie zostanie pominięty" – opinia węgierskiego Rzecznika Praw Przyszłych Pokoleń na temat implementacji na Węgrzech Celów Zrównoważonego Rozwoju

Organizacja Narodów Zjednoczonych przyjęła Cele Zrównoważonego Rozwoju (Sustainable Development Goals, SDG) w 2015 r. 17 celów i 169 zadań należy osiągnąć w odniesieniu do zasad „nie pominąć nikogo" i „dotrzeć w pierwszej kolejności do tych, którzy najbardziej tego potrzebują". Ten wyjątkowo ambitny program rozwoju powiązany jest z prawami człowieka na kilku poziomach. Wiedza i doświadczenie krajowych instytucji praw człowieka (National Human Rights Institutions, NHRI) mogą okazać się bardzo cenne dla decydentów politycznych podczas realizacji celów zrównoważonego rozwoju; mogą pomóc w wyznaczeniu właściwych kierunków rozwoju. Taką instytucją na Węgrzech jest rzecznik i jego zastępcy. RPO i jego zastępcy mogą inicjować inspekcje i przeprowadzać kontrole na podstawie indywidualnych skarg. Ujawnione naruszenia konstytucyjne i wnioski są publikowane w sprawozdaniach. RPO i zastępcy mogą zasugerować propozycje legislacyjne i wydawać oświadczenia informacyjne w celu podniesienia świadomości zainteresowanej opinii publicznej lub prasy. Podstawa prawna działania Rzecznika Praw Przyszłych Pokoleń, jednego z zastępców RPO, została ustanowiona w węgierskiej ustawie zasadniczej: w art. P – obowiązek zachowania wspólnego dziedzictwa narodu (zasoby naturalne), różnorodność

[57] Policy Coherence for Sustainable Development 2018 – Towards Sustainable and Resilient Societies, Published on 28th May 2018, http://www.oecd.org/about/sge/policy-coherence-for-sustainable-development-2018–9789264301061-en.htm, 22.06.2019; Policy Coherence for Sustainable Development 2017 – Eradicating Poverty and Promoting Prosperity, Published on 29th May 2017, https://www.oecd.org/publications/policy-coherence-for-sustainable-development-2017–9789264272576-en.htm, 22.06.2019.

biologiczna, dziedzictwo kulturowe, art. XX – prawo do zdrowia fizycznego i psychicznego i art. XXI – prawo do zdrowego środowiska. Głównym celem Rzecznika Praw Przyszłych Pokoleń jest reprezentowanie i ochrona interesów przyszłych pokoleń. W moim artykule przeanalizuję związek pomiędzy Celami Zrównoważonego Rozwoju a prawami człowieka. Chcę również przedstawić odpowiednią praktykę, w ramach której krajowe instytucje praw człowieka mogą być pomocne we wdrażaniu Celów.

Słowa kluczowe: cele zrównoważonego rozwoju (SDG), krajowe instytucje praw człowieka, węgierski rzecznik praw obywatelskich dla przyszłych pokoleń