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**Constitutional Framework for Planning Acts as Legal Forms of Administration's
Activity in Environmental Protection
(on the Example of Poland)****

Abstract

Planning acts constitute a very important instrument for conducting environmental protection policy in Poland. Despite the relative freedom of public authorities in shaping their provisions, these acts are adopted on the basis of explicit authorisations contained – in principle – in universally binding law, primarily in statutes. The aim of the article is to draw attention to the fact that a quite detailed normative framework for adopting environmental planning acts is also present at the level of the Constitution of the Republic of Poland. Determining its scope, however, requires defining the legal nature of the indicated acts, which is an issue that raises certain problems. They are visible especially in the context of the administrative law doctrine.

Keywords: Constitution of the Republic of Poland, environmental protection, planning act, normative act, Council of Ministers, local government, cooperation between the public powers, healthy environment, ecological security, principle of proportionality, social dialogue, right to a fair trial.

1. Introduction

Environmental planning acts form an extensive structure of related documents in the Polish legal system.¹ They are issued both at the central level and by local public administrative bodies (at all levels of local government). Among the above-mentioned acts, there are the so-called acts of general planning, but also acts relating to conducting highly specialised activities in specific areas of the state's territory.² All of them, as elements of the legal system of public administration in Poland, require the existence of specific legal grounds for adopting them. With regard to general acts, they follow from the Act of 6 December 2006 on the Principles of Development Policy³ (hereinafter PDP) and the Act of 27 April 2001 – the Environmental Protection Law⁴ (hereinafter EPL).

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¹ Górski & Kierzkowska 2012, 217.

² *Ibid.* 212–213.

³ Journal of Laws of 2021, item 1057, as amended

⁴ Journal of Laws of 2021, item 1973, as amended.



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Specialist planning acts are regulated by numerous statutes in the field of environmental protection law. This study is limited to the analysis of the latter acts i.e. those based on EPL regulations, having assumed that this is sufficient to achieve the main purpose of their consideration.

In the context of the above-mentioned legal bases of environmental planning acts, the issue of key importance seems to be the constitutional framework for their adoption, because they result from the act of the highest binding force. They determine the actions of both the body adopting a specific planning act and the legislator establishing the statutory framework (systemic, substantive, or procedural) of these acts. Despite the importance of the issue, a rather surprising phenomenon can be observed that the problem of the constitutional framework of planning acts is, in fact, completely ignored in the Polish legal literature, and yet the connection between the provisions of the Constitution of the Republic of Poland of 2 April 1997⁵ (hereinafter the Constitution, Fundamental Law) and planning acts in environmental protection is quite clearly visible. According to Art. 74 (1) of the Constitution, public authorities shall pursue policies ensuring the ecological security of current and future generations. Thus, the provision refers to the concept of administrative policy aimed at ensuring an appropriate state of the environment.⁶ Administrative policy is defined as “*an ordered set of actions and omissions distinguished in the organisational structure of the public administration system of an entity, aimed at changing or maintaining the current state, and consisting in determining, weighing and selecting values significant for the entity implementing the administrative policy.*”⁷ It should be emphasised that planning acts are considered the basic instrument of this policy as well as its formal expression.⁸ Most often they are defined as: acts issued by public administration bodies setting out the goals, tasks, and directions of action of the addressees, together with an indication of the measures for their implementation.⁹ It is worth noting, however, that the aforementioned goals, tasks, and directions are only a refinement of the category that is ‘original’ or ‘primary’ in relation to them, i.e. the value. In other words, planning acts will be acts of various legal form, prospective in nature, issued by public administration entities, specifying the values to be implemented and the means used to achieve this. The indicated group of these acts is to serve the implementation of the constitutional value of ecological security, which is clearly stated in Art. 74 (1) of the Constitution. This justifies the claim that Fundamental Law determines that the necessity to issue environmental planning acts at least indirectly within the limits set out, in particular, in constitutional regulations.

⁵ Journal of Laws No. 78, item 483, as amended.

⁶ Cf. Judgements of the Constitutional Court: of 6 June 2006, case ref. K 23/05 (OTK ZU no. 6/A/2006, item 62); of 28 November 2013, case ref. K 17/12 (OTK ZU no. 8/A/2013, item 125).

⁷ Cieślak, 2013, 7.

⁸ Cf. Gajewski 2017, 47.; Suwaj 2009, 309–310.

⁹ Cf. Gajewski 2017, 66; Górski & Kierzkowska 2012, p. 186; Kokocińska 2014, 150–151; Wróbel 1990, 193.

2. Legal nature of planning acts in environmental protection

1. The issue affecting the scope of the provisions of the Constitution relating to the issue in question is the determination of the legal nature of environmental planning acts. This is part of a broader issue of the nature of all planning acts (regardless of their subject matter), defined in statutory regulations by various names, e.g. plan, programme, strategy, concept, priorities, study, policy, or report. Unfortunately, their legal qualifications often lead to divergent conclusions.

On the one hand, the legal doctrine aims to distinguish an independent, specific legal form of administration (apart from typical forms, e.g. a normative act, an administrative act, or a public-law contract) – the so-called planning acts, due to the possibility of indicating some of their common specific features.¹⁰ On the other hand, however, it is pointed out that such a postulate is unjustified due to the fact that the heterogeneity of this category of acts takes the form of either a generally binding normative act, an internal normative act, an administrative act, or a material and technical act – being a different type of document such as a study, concept, development, design, or analysis.¹¹

In this context, the problem of the legal nature of the so-called planned norm arises, the resolution of which directly influences the decision whether planning acts can be considered normative acts. In other words, it boils down to the controversy over the answer to the question whether a norm prescribing the pursuit of a certain goal or task (and therefore a value) by certain means¹² is a legal norm, and thus whether an act containing it is a normative act.

According to the first position, the significant differences between planned norms and legal norms make it impossible to include the planned norms in the category of legal norms. The first norms are of a concrete nature, as they define specific tasks that are to be carried out in a specified time. Moreover – unlike typical legal norms – they should be implemented 'unconditionally'. Planned norms do not specify the circumstances whose occurrence would justify their application, and thus do not contain the classical hypothesis. Additionally, after completing the task (goal) set in them, they lose binding force and become pointless. Thus, the planned norms do not contain general and abstract rules of conduct that could be applied repeatedly.¹³

On the other hand, according to the opposite view, planned norms should be treated as legal norms – a special kind of general norms. This is because they may constitute a legal basis for other normative acts (other planning acts) or individual acts (including contracts or administrative acts).¹⁴ Moreover, their normative nature is supported by the nature of their binding force – they are binding upon certain entities, and their implementation is ensured by various legal means.¹⁵

¹⁰ Stahl 2013, 371–372.

¹¹ Ibid. 370; Gajewski 2017, 74.

¹² Cf. Szydło 2006, 150.

¹³ Dąbek, 2007, 152; Szydło, 2004, 58–59.

¹⁴ Cf. Brzeziński 1961, 39–46.

¹⁵ Cf. Gosiewski 1975, 96.

2. All the above-mentioned problematic issues are fully related to the planning acts in environmental protection. Hence, the response to these doubts may take place, in particular, through the prism of the analysis of the indicated scope of the activity of public administration. Moreover, the results obtained in this way can be treated as relatively reliable in the universal dimension as well due to the large variety of environmental planning acts.

Therefore, first of all, it is appropriate to set the objective boundaries of the considerations. They result from Art. 14 (1) of the EPL, according to which the environmental protection policy is conducted on the basis of the development strategy, programmes, and programming documents indicated in the provisions of the PDP. They include in particular: the medium-term national development strategy, 'other development strategies', voivodeship development strategies, supra-local development strategies, and commune development strategies (Art. 9 PDP), programmes for the implementation of a partnership agreement (Art. 5 (1a) PDP), and operational and development programmes (Art. 15 (4) PDP).

The medium-term national development strategy is adopted by the Council of Ministers, specifying the basic conditions, goals, and directions of the country's development in the social, economic, and spatial dimensions for a period of 10–15 years, and detailed activities for a period of 4 years that are implemented by other development strategies, voivodeship development strategies, and programmes (Art. 9 (2) PDP). Therefore, the so-called 'other development strategies' should be 'consistent' with the medium-term strategy (Art. 13 (1) PDP). With the help thereof, the Council of Ministers or the voivodeship parliament (a body of a local government unit), by way of resolution, define the basic conditions, goals, and directions of development relating to sectors, areas, regions, or spatial development (Art. 9 (3) PDP). An example of such a 'different strategy' is the document "*National Environmental Policy 2030 – Development Strategy in the Area of Environment and Water Management*."¹⁶ The voivodeship development strategy is to be 'consistent' with the previously mentioned strategies, i.e. the mid-term national development strategy and the national strategy for regional development (Art. 11 (1aa) of the Act of 5 June 1998 on Voivodeship Self-Government;¹⁷ hereinafter VSG). It is adopted by the voivodeship parliament, which defines in particular: the strategic goals in the social, economic, and spatial dimensions, the directions of activities undertaken to achieve strategic goals, and the system of their implementation (Art.11 (1c) VSG). Identical elements should be included in the strategies of supra-local development and in particular those of communes adopted by the councils of the respective communes. Their 'coherence' with the voivodeship development strategy is also required (Art. 10e (2) and (3), Art. 10g (1) and (3) of the Act of 8 March 1990 on Municipal Self-Government¹⁸).

¹⁶ Resolution No. 67 of the Council of Ministers of 16 July 2019 on the adoption of the "*National Environmental Policy 2030 – Development Strategy in the Area of Environment and Water Management*", Monitor Polski of 2019, item 794.

¹⁷ Journal of Laws of 2022, item 547, as amended.

¹⁸ Journal of Laws of 2022, item 559, as amended.

Programmes for the implementation of the partnership agreement (concerning the use of funds from the European Union budget) are generally adopted by the Council of Ministers. They contain in particular: selected goals to be achieved in accordance with the partnership agreement, a description of the activities that may receive funding under this programme, a financial plan, and an indication of the institutional system – the institutions and entities involved in the implementation of the programme and their connections (Art. 14 and PDP). At the same time, when developing the draft of the above-mentioned partnership agreement, the medium-term development strategy of the country, 'other development strategies', and the voivodeship development strategy are taken into account (Art. 14e (3) PDP).

Operational and development programmes are to implement the above-mentioned development strategies (Art. 15 (1) PDP), defining, *inter alia*, the main goal and specific objectives in relation to the medium-term development strategy of the country or other development strategies, priorities, and directions of intervention and the programme implementation system (Art. 17 (1) PDP). These programmes take the form of resolutions of relevant authorities, in particular: the Council of Ministers, the voivodeship parliament, the poviats council, and the commune council (Art. 19 (2–4) PDP).

Pursuant to Art. 14 (2) of the EPL, the environmental protection policy is also carried out by means of voivodeship, poviats, and communal environmental protection programmes. They are adopted by means of resolutions, respectively, of the voivodeship parliament, poviats council, and commune council, as bodies of the relevant units of local government (Art. 18 (1) EPL). The regulations as to the content of these programmes is very sparse. They only state that the programmes are to be prepared in order to implement the environmental policy, 'taking into account' the objectives included in the above-mentioned development strategies, programmes, and programming documents indicated in the provisions of the PDP (Art. 17 (1) EPL). In particular, the statute does not require compliance of environmental protection programmes with each other. In addition, an important regulation is Art. 186 (1) of the EPL, according to which the authority competent to issue the emission permit (and thus the administrative decision) will refuse to issue it if this were inconsistent with the action programmes listed in Art. 17 of the EPL. Therefore, the legislator expressly allows, *inter alia*, that environmental protection programmes provide for specific restrictions directed at entities located outside the administrative apparatus, i.e. those 'operating installations' that require a permit.

The EPL is also the basis for the adoption of an 'air protection programme' by the voivodeship parliament in the event of exceeding the permissible or target level of substances in a given zone (Art. 91 EPL). The programme is primarily aimed at achieving these levels of substances in the air, and at the same time should take into account the objectives contained in other planning and strategic documents, including the national air protection programme, voivodeship environmental protection programmes, and regional operational programmes (Art. 91 (9b) EPL). The statute specifies the content of the air protection programme by including e.g. the indication of: the planned environmental effect of remedial actions, entities and bodies responsible for their implementation, action schedule, and obligations and limitations resulting from the programme (which may apply to administrative bodies, entities using the environment

and other natural persons; Art. 91 (7a) EPL). It should be emphasised that in the light of Art. 84 (1) of the EPL, the programme is created by means of an act of local law, i.e. a normative act generally applicable in a specific part of the territory of the state.

In the event that the permissible or target levels of substances in the air are exceeded in a large area of the country and the measures taken by local government authorities do not reduce the emission of pollutants into the air, the Minister responsible for climate may develop a 'national air protection programme'. In the statute, this is defined as "*a document of a strategic nature, setting the goals and directions of activities that should be included in air protection programmes*" (Art. 91c (1) EPL). The Minister informs about the adoption of this document in the form of an 'communiqué' (Art. 91c (2) EPL). The regulations do not provide a basis for designating any rights and obligations in the national programme for entities remaining outside the administration structures.¹⁹

Another planning act resulting from the EPL regulations is the 'short-term action plan', which is a resolution of the voivodeship parliament. The premise for adopting it is the risk of exceeding the alarm, information, permissible, or target levels in the air in a given zone. The aim of the plan is to reduce the risk of such exceedances and to limit the effects and duration of such exceedances (Art. 92 (1) EPL). The short-term action plan should include in particular: a list of entities using the environment that are obliged to limit or stop the release of gases or dusts into the air from the installation, the manner of organising and restricting or prohibiting the movement of vehicles and other devices powered by internal combustion engines, the procedures of bodies, institutions, and entities using the environment, and the behaviour of citizens in the event of exceedances (Art. 92 (2) EPL). The elements defined in this way indicate that the document is an act of local law.²⁰

On the other hand, the environmental protection programme against noise is adopted by the voivodeship parliament on the basis of strategic noise maps. They contain information about areas at risk of noise and areas where the permissible noise levels are exceeded. The programme includes in particular: a description of measures to reduce noise levels in the environment, including the schedule for their implementation, as well as obligations and limitations resulting from the implementation of this programme (Art. 119a (4) EPL). In the light of Art. 84 (1) of the EPL and the elements of the content of the environmental protection programme against noise specified in the statute, it should be considered an act of local law.

3. In particular, in the light of the above documents in the field of environmental protection, it is reasonable to say that the assessment of their legal nature cannot be reduced only to recognising them as a specific legal form of administrative activity – a planning act. More detailed findings are necessary from classifying these acts within a typical catalogue of administrative activities, especially as normative acts (generally binding or internal) or administrative acts. The main argument determining this is the need to define the scope of control of planning acts, including the protection of the addressees of these acts. The regulations specifying the control capacity of public authorities do not use the general concept of a planning act. Instead, they refer to the category of 'normative act' (e.g. Art. 79 (1) of the Constitution), 'statute' and 'provisions

¹⁹ Gruszecki 2019, 184.

²⁰ Cf. Dubowska 2015, 103–108.

of law' (Art. 188 of the Constitution), 'act of local law', 'administrative decision', or "a public administration act or action relating to rights or obligations under the law" (Art. 3 (2) of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts²¹). Additionally, it is worth noting that since the Constitution does not refer to the concept of a planning act, this study would be difficult without more detailed distinctions. Whether we are dealing with a normative act or e.g. an administrative act is important from the point of view of the regulatory scope of certain provisions of the Constitution (e.g. Art. 93 (1) and Art. 94 of the Fundamental Law). As a result, this influences the establishment of the constitutional framework of environmental planning acts as referred to in the title of this paper, especially of those of competence-defining nature.

Considerations concerning the legal nature of the above-mentioned acts should be started with an assessment of their normative value. In this context, it can be noted that the environmental protection planning acts presented so far are documents with different content, *prima facie* unlike typical normative acts (statutes or regulations). In the analysed acts, there are so-called indicative provisions (data, information, and forecasts as to the state of reality and its development), influential ones (encouragement of specific actions with the help of psychological, organisational, or economic motivation), and imperative ones (directly defining the behaviour of the addressees by establishing binding goals, tasks, values, and methods of acting, associated with negative legal consequences in case of failure to implement them).²²

From the point of view of qualifying planning acts as normative acts, the most important are of course the imperative provisions. Only they are characterised by one of the features of legal norms, namely the obligations resulting from them, i.e. prescribed or forbidden behaviour patterns of the addressee that are binding upon them.²³ Additionally, the answer to the question whether, due to the presence of such provisions in a given act, it can be considered a normative act requires the adoption of several suppositions. They have been developed in the jurisprudence of the Constitutional Court, for which the meaning of the concept of a normative act is extremely important, as it determines the scope of the authority's jurisdiction capacity.²⁴

First, normative acts are understood as all acts which – regardless of their provisions – are qualified by the legislator as sources of law in terms of the Constitution (e.g. statutes, regulations, acts of local law). Second, normative acts are understood as all acts which – regardless of their name – contain legal norms, i.e. norms that are, in principle, general and abstract, with the proviso that nowadays legal doctrine does not emphasise the abstract feature, accurately pointing out that legal norms are often of a general and a specific nature²⁵. Third, a specific presumption of the normativity of legal acts should be adopted which will ensure the broadest possible control of their constitutionality or legality, corresponding to the assumptions of a democratic state ruled

²¹ Journal of Laws of 2022, item 329, as amended.

²² Cf. Strzyczkowski 1985, 125; Strzyczkowski 1990, 147–149; Szydło 2006, 153–157.

²³ Cf. Ziemiński 1994, 73, 81.

²⁴ Federczyk & Majchrzak 2014, 153.

²⁵ Order of the Constitutional Court of 7 January 2016, case ref. U 8/15 (OTK ZU no A/2016, item 1).

by law.²⁶ Fourth, if we find any normative provision (novelty) in an act, it is a normative act.²⁷ Fifth, the normativity of an act may also be determined by provisions which, although they do not establish complete legal norms, are an element of a norm whose framework is included in another legal act.²⁸

In the context of the above interpretative guidelines, it should be assumed that all the enumerated environmental planning acts can be considered normative acts.²⁹ This is, of course, dependent on the specific provisions adopted in a given act, which are shaped on the basis of relative freedom. Nevertheless, the provisions of the statutes provide grounds for formulating such content of the analysed documents as has a normative value. This conclusion includes the following elements of statutory regulations: (1) a clear indication that the planning act is an act of local law (the so-called formal criterion); (2) introducing a requirement that a given planning act be 'consistent' with another or included in another act;³⁰ (3) making the content of the administrative decision dependent on the provisions of the planning act; (4) an imperative to achieve goals, directions, or actions, the failure of which may cause negative legal effects (in particular in the form of an allegation of failure to perform public tasks); and (5) clear authorisation to formulate in the planning act obligations and limitations concerning specific entities, including those located outside the administrative apparatus. All these regulations show that in a given case we are dealing with a normative act.

In particular, the requirement of 'consistency' or 'being included' defining the relationship between two planning acts means that the entity adopting the 'dependent' act is guided by the legal norm (general and abstract) whose elements are determined by substantive and procedural statutory regulations, as well as relevant fragments of the 'superior' planning act. If we refer to the regulation contained in Art. 186 (1) of the EPL or a similar one, which makes issuing a decision dependent on the provisions of the planning act, we note that it defines a typical general abstract norm subject to specification in this decision. One of its components is the relevant provision of the planning act, which may shape the scope of rights or obligations of external entities.³¹ Moreover, the imperative to perform a specific task does not mean that the planned norm containing it loses the character of a legal norm because it is concrete³².

As mentioned above, the Constitutional Court also treats the feature of abstractness flexibly in assessing the normativity of an act. Moreover, striving to implement a strictly defined venture sometimes lies at the heart of typical normative acts

²⁶ Order of the Constitutional Court of 12 March 2020, case ref. U 1/17 (OTK ZU no A/2020, item 11).

²⁷ Judgement of the Constitutional Court of 12 July 2001, case ref. SK 1/01 (OTK ZU no 5/2001, item 127).

²⁸ Judgement of the Constitutional Court of 22 September 2006, case ref. U 4/06 (OTK ZU no 8/A/2006, item 109).

²⁹ With regard to the planning acts of the Council of Ministers – cf. Gajewski 2017, 131–133; for all planning acts indicated in PDP – cf. Kokocińska 2014, 150–153.

³⁰ In contrast: Judgement of the Constitutional Court of 3 July 2012, case ref. K 22/09 (OTK ZU no 7/A/2012, item 74).

³¹ In contrast: Czerwiński 2018, 135.

³² Cf. Dąbek 2007, 152; Szydło 2004, 58–59.

– statutes – without depriving them of their normative value.³³ In addition, the imperative to achieve a strictly defined state of affairs is, on the grounds of the planning act, a repeatable rule of behaviour, 'repeatedly applied', because it requires taking a number of specific actions contributing to the achievement of the desired result. At the same time, the lack of specified circumstances in which the planned norm is applicable (no clear indication of its hypothesis) also does not constitute an argument against its normativity. Legal doctrine has long distinguished the construction of the so-called task-oriented (task-oriented directional) norm,³⁴ which is characterised by the fact that it orders a specific entity of public administration to implement or strive to achieve given values (e.g. a voivode is obliged to prevent threats to life and health). The normative definition of the conditions of behaviour may be very general or even omitted, so it is not the actual state of affairs that will update the task and directional norms but the intent of the acting subject.³⁵ The same situation is shaped on the grounds of the planning act, defining only goals, tasks (values), and directions of action.

To sum up, bearing in mind the guidelines for assessing the normativity of an act adopted in the jurisprudence of the Constitutional Court, planning acts in the protection of the environment may be considered normative acts. Taking into account the addressees of the imperative provisions of these acts, they include both acts of universally binding law and acts that are binding only within the structure of public administration bodies.

3. Constitutional determinants of a systemic and competence nature

1. First of all, referring to the systemic and legal context, it is worth considering whether the Fundamental Law contains regulations indicating entities that should be assigned tasks and competences in the field of environmental protection to be implemented by means of planning acts. This question is answered in Art. 146 (1) and (2) of the Constitution,³⁶ which introduces the presumption of the competence of the Council of Ministers to 'conduct the policy of the state', which can be rebutted by the opposite evidence, i.e. the normative competence of another public authority body.³⁷ This presumption should also be understood as allowing any public action necessary or possible to be taken for the purpose of policy-making.³⁸ At the same time, this 'conducting' is a complex process, embracing: development of specific concepts of solutions (current, medium-, and long-term), taking decisions in an appropriate legal form, their implementation by the Council of Ministers itself and its supervision of their

³³ E.g. the Act of 7 September 2007 on the Preparation of the Final Tournament of the UEFA European Football Championship EURO 2012 (Journal of Laws of 2020, item 2008); the Act of 24 February 2017 on Investments in the Construction of a Waterway Connecting the Vistula Lagoon with the Bay of Gdańsk (Journal of Laws of 2021, item 1644).

³⁴ Cf. Wróbel 1990, 213–216.

³⁵ Cieślak 1992, 63, 68.

³⁶ Pursuant to these provisions: "The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government".

³⁷ Wyrzykowski 1999, 438.

³⁸ Sarnecki 2001, 6.

implementation by other bodies, controlling the course of this implementation, and, if necessary, correcting it.³⁹ Undoubtedly, adoption by the Council of Ministers of planning acts which are an expression of 'specific concepts' in the field of identifying, weighing, and selecting significant values to be implemented (cf. the definition of 'administrative policy' quoted at the beginning of this study) is an element of the process.

The objective scope of the above policy covers all areas of social relations, regardless of whether they were listed in the exemplary list contained in Art. 146 (4) of the Constitution.⁴⁰ In particular, therefore, the policy pursued by the Council of Ministers, including when using planning acts, relates to environmental protection. This is confirmed in the above-mentioned regulations on development strategies, programmes, and programming documents resulting from the provisions of the PDP in connection with Art. 14 (1) EPL. At the same time, it is worth pointing out that Art. 146 (4) of the Constitution clearly empowers the Council of Ministers to "ensure the security (internal and external) of the state" (cf. points 7 and 8 of this provision). This concept includes, *inter alia*, "ensuring ecological security for present and future generations", as stated in Art. 74 (1) of the Constitution.⁴¹ Therefore, this aspect of state policy should be of particular concern to the Council of Ministers, and thus an important element of the content of the planning acts adopted by the indicated body.

2. In opposition to such an assignment of tasks and competences, one can find the regulation of the Constitution according to which the local government participates in the exercise of public authority by performing a significant part of public tasks assigned to it on the basis of the subsidiarity principle (Art. 16 (2) in connection with the preamble to the Constitution). What particularly results regarding this principle is that the competences to perform public administration are entrusted to the lowest possible level, being as close to the citizen as possible (in this order: commune, powiat, voivodeship), and at the same time capable of performing tasks.⁴² In the analysed context, this means the necessity to guarantee in statutes a significant scope of powers for local government bodies to adopt environmental planning acts. We are dealing with the implementation of this assumption on the basis of regulations concerning voivodeship, powiat, and communal environmental protection programmes as well as the air protection programme, short-term action plan, and programme of environmental protection against noise. All of these are the subject of resolutions of the relevant bodies of local government units.

Against the background of these statutory regulations, a certain regularity can be seen that reflects the constitutional assumptions. These planning acts which are more of an implementation nature in relation to environmental protection policy provide for subjectively, objectively, and territorially specific values (goals, tasks) and measures for their implementation; in particular, they result in orders or prohibitions directed at entities located outside the public administration system and are adopted by government

³⁹ Ibid. 4–5.

⁴⁰ Ibid. 9.

⁴¹ Cf. dissenting opinions of the Judges: Mirosław Granat and Teresa Liszcz to the Order of the Constitutional Court of 20 May 2009, case ref. Kpt 2/08 (OTK ZU 5/A/2009, item 78); Jurgilewicz 2013, 161.

⁴² Bąkowski 2007, 79.

bodies of a commune, poviát, or voivodeship. On the other hand, the sphere of general environmental planning, taking into account generally defined values (goals, tasks), a general reference to the entire territory of the state, and the harmonisation of environmental values and values from the sphere of other social relations, is the domain of the Council of Ministers, including the Minister responsible for the environment.

3. The regulation of environmental planning acts presupposes that their adoption is connected with the necessity to include in their content as well the axiology of other spheres of state influence for which different public authorities are responsible, and that the implementation of the value of a given act may take place at different levels of territorial division – i.e. central, voivodeship, poviát, and commune. These are the premises for making reference in the planning acts in environmental protection to the constitutional principle of cooperation between the public powers. This is because in those cases where the scopes of activity of two or more bodies of public authority – objectively or territorially designated – intersect,⁴³ there is a basis for the application of the “*systemic principle of cooperation between the public powers, aimed at ensuring the integrity and efficiency of public institutions*” (cf. preamble to the Constitution).⁴⁴ The forms of implementing this principle may be very diverse and include in particular the obligation of the authority adopting the planning act to consult with other authorities or to seek their opinion regarding its draft⁴⁵ (cf. Art. 6 PDP, Art. 91 (1), Art. 92 (1), Art.119a (6) EPL).

4. One of the obvious foundations of a democratic state ruled by law (cf. Art. 2 of the Constitution) is the principle of legalism,⁴⁶ which in Art. 7 of the Fundamental Law takes the following wording: “*The organs of public authority shall function on the basis of, and within the limits of, the law*”. At this point, it will be referred to the normative basis for the application of a specific legal form of the environmental planning act.

Taking into account the previous findings concerning the nature of this act (as a normative act), the constitutional determinant contained in Art. 94 in conjunction with Art. 87 (2) of the Constitution should be indicated. Pursuant to this regulation, planning acts of local government bodies, containing legal norms generally applicable in the area of operation of these bodies, may be established only “*on the basis and within the limits of authorisations contained in the statute*”. In other words, a direct basis of the law-making competence of a competent authority, other than a constitutional provision, is required in a specific scope and form.⁴⁷ This authorisation must be included in the ‘statute’, i.e. in an appropriate normative act of the parliament, established in a special procedure regulated essentially in the Constitution itself.⁴⁸ The above-presented regulations relating to environmental planning acts indicate that constitutional orders are *in genere* implemented in this respect. Some doubts, however, are raised by these authorisations, which do not clearly indicate the form of the local law act but require interpretation on

⁴³ Biernat 1979, 38.

⁴⁴ Cf. Judgements of the Constitutional Court of: 24 July 2013, case ref. Kp 1/13 (OTK ZU no 6/A/2013, item 83); 20 June 2017, case ref. K 5/17 (OTK ZU no A/2017, item 48).

⁴⁵ Cf. Błachucki 2019, 106, 108; Ofiarska 2008, 18.

⁴⁶ Sokolewicz 2007, 3–4.

⁴⁷ Działocha 2001, 2.

⁴⁸ Garlicki 2006, 130–131.

the basis of the content and effects of a given planning act (this applies to voivodeship, powiat, and communal environmental protection programmes or short-term action plans).

The limits of issuing acts of internal law (also called 'acts of internal management' or 'internally binding acts') are determined mainly by Art. 93 of the Constitution. It expressly refers only to resolutions of the Council of Ministers and regulations of the Prime Minister and ministers. Nevertheless, the Constitutional Court rightly assumes that all acts of domestic law (of which the constitutional catalogue is merely an example) must comply with the requirements of Art. 93 of the Constitution⁴⁹. The features of such an act include the following: 1) it may apply only to organisational units subordinate to the authority issuing the act (Art. 93 (1) of the Constitution); 2) may only be issued pursuant to a statute (Art. 93 (2) of the Constitution); 3) is subject to control of compliance with generally applicable law (Art. 93 (3) of the Constitution); and 4) may not constitute the basis for decisions against citizens, legal persons, or other entities (Art. 93 (2) of the Constitution), because in no case may it bind entities that are not subject to the authority issuing such an act⁵⁰. However, in the judgment of 28 June 2000, case ref. K 25/99⁵¹, the Constitutional Court stated that the above 'subordination' is "*a constitutional and legal bond in which superior organisational entities may interfere, in an objectively and constitutionally defined scope, in the activities of subordinated entities at every stage and to the extent, by means of freely selected for a given situation of measures*". The Court also found that "*the criterion of organisational subordination (...) should be understood more broadly than hierarchical subordination in the meaning adopted in administrative law.*"⁵²

The criteria for distinguishing acts of internal law adopted in the Constitution give rise to some doubts in light of the regulations in the acts of environmental planning. Defining the relationship between these acts in the form of 'consistency' or 'being included', which in fact means binding the body adopting the 'dependent' act with another act, refers in particular to the relationship between: (1) the Council of Ministers and the voivodeship parliament (e.g. voivodeships with a medium-term national development strategy); (2) the Council of Ministers and the powiat council or commune council (e.g. an order to include in the powiat and communal environmental protection programme the goals included in the development strategies); (3) the minister and the voivodeship parliament (requirement to include the national air protection programme in air protection programmes adopted by the voivodeship government); and (4) the voivodeship parliament and the commune council (commitment to the coherence of the commune development strategy with the voivodeship development strategy). In this respect, there are *prima facie* links between entities independent of each other, that is, between which there is no 'subordination' within the meaning of Art. 93 of the Constitution. Despite this, the legislator introduced competence norms, including: a resolution of the Council of Ministers, a ministerial communiqué (on the national air protection programme), or a resolution of the voivodeship parliament (without clearly

⁴⁹ Judgements of the Constitutional Court of: 1 December 1998, case ref. K 21/98 (OTK ZU no 7/1998, item 116); 19 October 2010, case ref. K 35/09 (OTK ZU no 8/A/2010, item 77).

⁵⁰ Ibid.

⁵¹ OTK ZU no 5/2000, item 141.

⁵² Ibid.

indicating that it is an act of local law). The aforementioned acts may contain normative content addressed to the organs of local government units, the independence of which has been guaranteed in Art. 165 (2) of the Fundamental Law, which excludes the relationship of subordination described in Art. 93 (1) of the Constitution. In this context, environmental planning acts affecting entities outside the circle of organisational units subordinate to the authority issuing a given act should be established in the form of a generally binding normative act (i.e. a regulation of the Council of Ministers, a ministerial regulation, or an act of local law).⁵³ The legal literature, however, indicates the possibility of adopting a 'compromise' solution, i.e. distinguishing a third category of sources of law intermediate between generally applicable acts and internal law. It is referred to as 'sui generis sources of law', 'informal sources of law', or 'unorganised sources'.⁵⁴ Nevertheless, the distinguished concept contradicts the intentions of the authors of the Constitution, for whom the constitutional system of sources of law is dualistic and dichotomous. For warranty reasons (primarily towards an individual), it is based on an exhaustive division into the sources of universally binding law and the sources of internal law.⁵⁵ Thus, it excludes the existence of any third, intermediate category of sources of law.⁵⁶

5. The consequence of distinguishing environmental planning acts as normative acts is the necessity to refer them to the principle of the hierarchical structure of the system of legal sources, which can be derived from Art.8 (1), Art. 87, Art. 91 (2) and (3), Art. 92 (1), Art. 93 (3), Art. 94, and Art. 188 of the Constitution. One of its main consequences is the requirement that the content of the norms contained in planning acts comply with the higher-order norms,⁵⁷ i.e. statutes, ratified international treaties, the law established by an international organisation, and the Constitution, and in relation to internally binding acts also other acts of universally binding law. It is worth noting that the application of this rule is problematic in the context of the statutory dependence of the content of the planning act – an act of local law (e.g. air protection programme) on the provisions of a resolution of the Council of Ministers or a communiqué of the minister responsible for climate. It means the introduction of a requirement that an act of universally binding law must conform to an internal act, which is inconsistent with the constitutional regulation. This may constitute another argument in favour of the legitimacy of statutory granting to the above-mentioned acts of environmental planning (i.e. the resolution and the communiqué) of the value of generally binding law.

4. Constitutional determinants of a substantive nature

1. Referring to the constitutional framework for shaping the key elements of the provisions of environmental planning acts, i.e. the values that require implementation and the means to achieve this, the axiological function of the Fundamental Law should

⁵³ Cf. Gajewski 2017, 136–137.

⁵⁴ Cf. Błachucki 2014, 121; Kokocińska 2014, 152–153; Stahl 2013, 365.

⁵⁵ Cf. Judgement of the Constitutional Court of 12 December 2011, case ref. P 1/11 (OTK ZU no 10/A/2011, item 115).

⁵⁶ Ibid.; Garlicki 2006, 127.

⁵⁷ Cf. Kordela 2016, 20–21.

be indicated in the first place.⁵⁸ This act fully delimits the field of axiological choices of the 'sub-constitutional' legislator (as well as the organs applying the law), which includes not only the catalogue of values subject to implementation, but also the definition of their content.⁵⁹ In other words, it is from the Constitution that the essential values that should be achieved through planning acts derive. At the same time, constitutional values will often be detailed on the basis of these acts (e.g. constitutional value: 'ecological security' – with the more specific value: 'healthy air').

The catalogue of constitutional values related to environmental protection results from Art. 5, Art. 31 (3), Art. 68 (4), Art. 74, and Art. 86 of the Fundamental Law. Taking into account the jurisprudence of the Constitutional Court, these provisions are the basis for the reconstruction of values in the form of: 'healthy environment'⁶⁰, 'ecological security' (understood as "*obtaining such a state of the environment that allows for a safe stay in this environment and enables the use of this environment in a way ensuring human development*"),⁶¹ and "*wide access to information on the state and protection of the environment*". However, only the last value is the source of the corresponding subjective right of the individual – cf. Art. 74 (3) of the Constitution.⁶² The remaining norms mentioned above do not constitute the right to 'live in a healthy environment'⁶³ or any other subjective rights on the part of the individual.⁶⁴

Against the background of the aforementioned regulations, one can additionally ask about the value (and its content) which results from the constitutional obligation to protect the environment (included in Art. 5, Art. 74 (2), and Art. 86 of the Constitution). It should be assumed that it does come down not only to a 'healthy environment' and 'ecological security', but refers to all positive conditions of the 'environment' and its state – e.g. non-deteriorated, or – more broadly – optimal from the point of view of various environmental measures (e.g. valuable habitat, bio-diversity, and so on).

2. Acts of planning (and not only environmental planning) are a natural plane on which the authorities responsible for their adoption make decisions resolving 'axiological conflicts'. They appear in particular when the implementation of a specific environmental value requires restrictions in the implementation of another value or vice versa (e.g. environmental security versus freedom of economic activity or property). Then it is necessary for the public authority to apply the 'value weighting mechanism', which is also provided for by the Fundamental Law. In such a situation, shaping the content of the environmental planning act should first of all take place in accordance with the 'principle of proportionality'. In the first place, it results from Art. 31 (3) of the Constitution, which, however, applies only to the axiology of protection of human and

⁵⁸ Kryszewski & Prokop 2017, 21.

⁵⁹ Cieślak 2017, 183.

⁶⁰ Judgement of the Constitutional Court of 13 May 2009, case ref. Kp 2/09 (OTK ZU no. 5/A/2009, item 66).

⁶¹ Judgements of the Constitutional Court: of 6 June 2006, case ref. K 23/05 (OTK ZU no. 6/A/2006, item 62); of 28 November 2013, case ref. K 17/12 (OTK ZU no. 8/A/2013, item 125).

⁶² Pursuant to this provision: "*Everyone shall have the right to be informed of the quality of the environment and its protection.*"

⁶³ Judgement of the Constitutional Court, case ref. Kp 2/09.

⁶⁴ Judgement of the Constitutional Court, case ref. K 23/05.

civil rights and freedoms defined in the Fundamental Law. Therefore, in particular, it concerns interference with *"wide access to information about the environment and its protection"*, but does not refer to interference with a 'healthy environment' or 'ecological security', due to the lack of constitutional subjective rights in this regard. Therefore, 'complementarily', the principle of proportionality is also derived from Art. 2 of the Constitution and the general clause of the democratic state ruled by law. According to the Constitutional Court, this results in the conditions for the legal limitation of the values constituting the axiological foundation of the rights of variously understood public entities (especially local government units), as well as human and civil rights and freedoms guaranteed only at the statutory, not constitutional, level.⁶⁵ Thus, the conditions resulting from Art. 2 of the Constitution may be relevant, for example, in a situation of a collision of values in the form of 'optimal state of the environment' and 'independence of local government' (especially in the financial dimension). The conflict will manifest itself, for example, in the context of imposing by a planning act new environmental protection tasks on this local government without increasing revenues to the local budget at the same time.

Under both Art. 31 (3) and Art. 2 of the Constitution, the value weighting mechanism influencing the results of environmental planning comes down to the obligation to meet the following conditions: (a) suitability – the introduction of limitations in the implementation of a certain value can lead to the achievement of another value; (b) necessity – restrictions are necessary to protect this other value; (c) proportionality *sensu stricto* – the positive effects in the form of the realisation of a given value adequately balance the lower degree of realisation of another value.⁶⁶

3. In addition to weighing the values encoded in the principle of proportionality, the principle of sustainable development as laid down in Art. 5 of the Constitution is also of great importance, especially in the context of environmental protection.⁶⁷ This conclusion is related to the adoption of the definition of the aforementioned constitutional concept proposed by the Constitutional Court in the Judgment, case ref. Kp 2/09. According to the Court, although the terms used in this provision of the Fundamental Law have an autonomous meaning, the reference in their context to statutory definitions is not in itself a mistake. Therefore, though with caution, for the purposes of resolving specific cases, the Constitutional Court defined 'sustainable development' – pursuant to Art. 5 (50) of the EPL – as *"such social and economic development which extends to the process of integrating political, economic, and social actions, with maintaining the environmental balance and sustainability of basic natural processes, with a view to guaranteeing the capability of satisfying basic needs of particular communities or citizens of both the present and future generations"*. Moreover, for the Court, this means a requirement that the interference with

⁶⁵ Judgement of the Constitutional Court of 11 February 2014, case ref. P 24/12 (OTK ZU no. 2/A/2014, item 9).

⁶⁶ See e.g. Judgements of the Constitutional Court of: 16 July 2009, case ref. Kp 4/08 (OTK ZU no. 7/A/2009, item 112); 6 July 2011, case ref. P 12/09 (OTK ZU no. 6/A/2011, item 51).

⁶⁷ According to this provision: *"The Republic of Poland (...) shall ensure the protection of the natural environment pursuant to the principle of sustainable development"*.

the environment should be as limited as possible (causing as little harm as possible), and the social benefits should be proportional and socially adequate to the damage caused.⁶⁸

With this approach, in principle, of sustainable development, two groups of values are coded, i.e. socio-economic development and 'appropriate state of the environment', as well as guidelines for weighing these values, i.e. integrating them, to guarantee the possibility of meeting the basic needs of the modern and future generations. Moreover, in light of the jurisprudence of the Constitutional Court, this 'integration' of values should also take into account the principle of proportionality.

5. Constitutional determinants of a procedural nature

1. In the context of the appropriate shaping of the procedure for adopting environmental planning acts, the principle of social dialogue resulting from the preamble and detailed in Art. 20 of the Constitution can be indicated in the first place. Social dialogue is a process of negotiating key decisions in public matters in order to socialise decision-making mechanisms and counteract the processes of marginalisation of various interests.⁶⁹ Public authorities in particular are the addressees of this obligation. In the procedural dimension, it includes the creation of a negotiating method of resolving disputes, forms of information exchange, presentation of positions, and institutional guarantees of social discourse, including legislative discourse. The legislator's duty is to provide the necessary legal and institutional infrastructure, as well as to guarantee that there will be a dialogue procedure in every significant dispute, allowing for a solution to be sought.⁷⁰ Materialising these assumptions on the grounds of environmental planning acts is, *inter alia*, the requirement to consult their drafts with social and economic partners (cf. Art. 6 PDP), or ensuring public participation in the procedure leading to the adoption of an act (Art. 17 (4), Art. 91 (9), Art. 119a (5) EPL), which consists in particular in the possibility of submitting comments and motions to the draft document. An element of the implementation of the principle of social dialogue may also include ensuring everyone the right to access information on the environment (cf. Art. 74 (3) of the Constitution), exercised in the course of the planning act creation procedure and after its completion, pursuant to the principles set out in the Act of 3 October 2008 on Sharing Information on the Environment and Its Protection, Public Participation in Environmental Protection, and on Environmental Impact Assessments⁷¹.

2. An essential legal construction of each procedure before public authorities is the establishment of appropriate means of appealing the decisions made by these authorities. This statement, of course, also applies to environmental planning acts. However, Art. 78 of the Constitution, which provides for the right of each party to appeal against judgments and decisions issued at first instance, does not apply to these acts. As stated above, the analysed planning acts are normative (general) acts, and therefore do not take the form of judgments or decisions addressed to parties to court and

⁶⁸ Judgement of the Constitutional Court, case ref. Kp 2/09.

⁶⁹ Stefaniuk 2009, 328.

⁷⁰ Judgement of the Constitutional Court of 7 May 2014, case ref. K 43/12 (OTK ZU no. 5/A/2014, item 50).

⁷¹ Journal of Laws of 2022, item 1029, as amended.

administrative proceedings. The principle set out in this provision of the Fundamental Law *"is applicable only where rights and freedoms are subject to specification and individualisation, i.e. when it is possible to issue individual legal decisions."*⁷² Environmental planning acts do not have this feature.

In the above context, therefore, attention should be paid to Art. 45 (1) of the Constitution. According to that provision, *"everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial, and independent court."* The recognition of this regulation as relevant to the acts of environmental planning is conditioned by the adoption of a specific understanding of the concept of case on constitutional grounds. According to the Constitutional Court, the right to a fair trial covers the widest possible range of cases heard by courts in relation to their primary function – the administration of justice. Nevertheless, the essence of the administration of justice and judicial protection of the rights of an individual is necessarily related to the examination by a court of a specific, individual case brought by a non-public entity or against a non-public entity. Hence, against the background of environmental planning acts, the condition for recognising that we are dealing with a case in terms of the Constitution is a direct, objective, and real violation of an individual's legal interest by specific provisions of such a planning act. It is only in this situation that the case is 'created' in the constitutional sense.⁷³ In other words, in accordance with the guarantees resulting from the Fundamental Law, a complaint to the court against an act of environmental planning should serve the entity only when the act produces legal effects directly in the sphere of rights or obligations of this entity (cf. e.g. Art. 90 (1) VSG⁷⁴).

3. Supplementarily, it should be mentioned that the analysed planning acts may be subject to the control of the Constitutional Court. The explicit legal basis is the Fundamental Law, so this control is a direct consequence of the application of the Constitution. The aforementioned planning acts, as normative acts (universally or internally binding), fall within the jurisdiction capacity of this Court, which decides, *inter alia*, in matters of: (1) *"the conformity of legal provisions issued by central State organs⁷⁵ to the Constitution, ratified international agreements, and statutes"*; (2) constitutional complaint concerning the constitutionality of a normative act, on the basis of which a court or a public administration body finally adjudicated on the freedoms, rights, or obligations of the complainant specified in the Constitution; and (3) legal questions of the court as to conformity of a normative act to the Constitution, ratified international agreements, or

⁷² Judgement of the Constitutional Court of 13 March 2000, case ref. K 1/99 (OTK ZU no. 2/2000, item 59).

⁷³ Cf. Judgement of the Constitutional Court of 1 July 2021, case ref. SK 23/17 (OTK ZU no. A/2021, item 63). See also: Judgement of the Constitutional Court of 16 September 2008, case ref. SK 76/06 (OTK ZU no. 7/A/2008, item 121).

⁷⁴ Pursuant to this provision: *"Anyone whose legal interest or right has been violated by a provision of a local law act issued in a case falling in the field of public administration may challenge the provision to an administrative court."*

⁷⁵ They include both generally applicable provisions and provisions of internal legal acts – cf. Judgement of the Constitutional Court of 20 April 2020, case ref. U 2/20 (OTK ZU no. A/2020, item 61).

statute, if the answer to such question of law will determine an issue currently before such court.⁷⁶

6. Conclusion

Statutory regulations concerning planning acts in environmental protection constitute grounds for the conclusion that they can be considered normative acts. Depending on the group of their addressees, they fall within the scope of generally applicable law or internal acts. Determining their legal nature allows for a more accurate identification of the constitutional framework for the adoption of environmental planning acts. Their constitutional determination seems to be obvious in indicating the substantive values to be implemented in the above-mentioned acts (i.e. the values of the 'optimal' – in various respects – state of the environment) and the mechanism of balancing them against other 'colliding' values (resulting from the principle of proportionality and sustainable development). In addition, already at the level of the Constitution, there has been a general allocation of powers to issue planning acts (the Council of Ministers and local government), combined with the need for cooperation between the public powers in the event of overlapping competences of different bodies. The Fundamental Law also defines the requirements for the legal (statutory) basis of environmental planning acts and stipulates that the planning norms comply with the higher-order norms. Moreover, the Constitution indicates the basic procedural framework for adopting planning acts. They include the participation of the public in the procedure of drafting an act, as well as the challengeability of the 'decisions' made, conditioned by the fulfilment of certain prerequisites.

⁷⁶ Art. 188 in connection with Art. 79 and Art. 193 of the Constitution.

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