



# The legal framework for countering the affordability of traditional cigarettes in Poland - a review of selected issues

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## Abstract

The aim of this study is to describe the conditions of citizens' security in connection with the elimination of the economic affordability of traditional cigarettes as they are harmful products. The most important aim of this text is to show the relationship between the content of the term "elimination of traditional cigarettes" and the concept of "citizens' security," as laid down in Article 5 of the Polish Constitution. In the field of program norms, special emphasis should be placed on the category of the "means to achieve" systemic aims. It can therefore be assumed that excise duty on certain tobacco products will be considered in this context as such means. It should be emphasized that objective circumstances, such as the harmfulness of traditional cigarettes in the context of the state's care for the security of citizens, should affect the final shape of the law in this matter.

## Keywords

healthcare, security, tobacco products, interpretation of constitution.

## 1 Introduction

The purpose of this paper is to examine the determinants of citizens' security in connection with the implementation of gradual elimination of the economic affordability of traditional cigarettes as harmful products (Ministry of Finance, 2021). Following the data provided by the World Health Organization, taking into account the "international aspect," (Etel, Perkowski et al., 2017) which is valuable for academic research, it should be assumed that the use of stimulants can be effectively suppressed by limiting their economic affordability, which is achieved, for example, by increasing the excise tax rates (WHO, 2021, 86). The constitutional aspect relevant to this paper arises from Article 5 of the Polish Constitution.<sup>1</sup> The specific objective of the

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<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, no. 78, item 483, as amended), hereinafter referred to as Constitution or Polish Constitution.

paper is to provide a description of the relationship between the content of “citizens’ security,” formulated *in extenso* in that article and the government’s responsibility to regulate the market for tobacco products, particularly so-called traditional cigarettes. A parallel issue is related to the question of whether the context of the state’s objectives, as set forth in Article 5 of the Constitution, also includes the tasks that jointly concern matters of excise tax policy and health protection (Charkiewicz, 2021). An analysis of the issue specified in the title of this paper requires a preliminary clarification of some general matters. First, it is important to exercise caution in the course of the research, if only because of the constitutional context adopted in this paper. Under certain conditions, it may be considered as a novel “pattern of constitutional control” in a working or even utilitarian sense of the term. Second, the collection of comments contained in this paper treats the elimination of traditional cigarettes as a course of action officially adopted by the state. The hypothetical value of the present paper is therefore its presentation of the relationship between the content of the “elimination of traditional cigarettes” and “citizens’ security” set forth in Article 5 of the Polish Constitution and its drawing a number of conclusions from that relationship.

## **2 Short insights into the reasons for the elimination of traditional cigarettes**

It should be noted that eliminating certain types of stimulants, especially so-called traditional cigarettes, is becoming an increasingly urgent objective of the legislator. While this objective is supported primarily by current objective medical knowledge, what is also important is the clear constitutional preference set forth in Article 5 of the Polish Constitution, which literally establishes “citizens’ security” as a goal to be pursued by the state. Third, the ongoing COVID-19 pandemic and its effects on individuals’ health, public health, and the economics of the healthcare system also seem to determine the need to eliminate of specific stimulants that are considered to be hazards to safety and health.

It seems, that there are also other vital reasons for eliminating traditional cigarettes. Whenever legal sciences deal with important social issues, such as human life or health, serious dilemmas arise, and not only of a legal nature. This is because large concepts, relevant to legal science and the functioning of society, are contrasted here: freedom, of the paradigmatic kind, associated, for example, with voluntary deterioration of one’s health, self-determination, autonomy (which in its pure formulation does not tolerate any, even if reasonably justified, limitations), healthcare costs, taxes, and legislation. The latter should be consistent; that is, it should adhere to a certain principle, such as paternalism, which allows interference in human freedom on the grounds of a higher value (health, life, duration of life).

An important prerequisite seems to be the very fact that, as confirmed by almost universal existing medical acknowledgement, the use of so-called traditional cigarettes, which involves burning a mixture of dried leaves, is a habit that is harmful, both socially and individually. The negative health effects of compulsive smoking and tobacco use, as described above, are well understood according to current medical knowledge. However, society is often unaware of the costs of smoking as a certain phenomenon among the population. These costs are enormous and associated not only with the treatment of so-called tobacco-related diseases, but also, for example, the costs of lower employee productivity and other burdens of an economic nature. Not only is the medical knowledge in this area well established, but the societal beliefs on this subject seem to be similarly formed.

Meanwhile, according to available public data and journalistic debates, cigarette sales and consequently cigarette use, are increasing in Poland. The data for the Polish economy, especial-

ly from January and February 2022, is clear and its macroeconomic assessment leaves no doubt about the scale of the problem. Cigarette sales, despite last year's 5% increase in the minimum excise tax rate, were already up in January compared to the same period last year. In the first two months of this year alone, consumers-smokers consumed more than 720 million more cigarettes than in the same period a year ago. Part of the reason for this is that, despite the excise tax hike, cigarette prices have hardly gone up in real terms, due to rising inflation.

Although the root cause of the problem discussed in this paper is limited to the Polish domestic situation, there is no doubt that the problem and its scale are global. One form of international control over the availability of tobacco products are called framework conventions. The Framework Convention on Tobacco Control (WHO FCTC) is an example of such a convention. It was the first treaty negotiated under the auspices of the World Health Organization that relies on medical information about the harmfulness of smoking, as well as the right of all people to the highest standard of health. As stated in its preamble: “[...] scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases.” Against this backdrop, it should be said that the WHO FCTC represents a paradigm shift in the development of a regulatory strategy for addictive substances. Unlike previous treaties on the control of these substances, the convention emphasizes the importance of a balanced demand reduction and supply control strategy.

The convention was intended to be a response to the globalization of the “tobacco epidemic.” Tobacco use has been, and to some extent still is today, promoted by a variety of factors with cross-border reach and effects. The basic provisions of the WHO FCTC concerning reducing demand are contained in Articles 6 to 14, with Article 6 (Price and tax measures to reduce the demand for tobacco) being of key importance. These provisions regulate price measures, primarily of a fiscal nature, intended to reduce the demand for tobacco, as well as the so-called “non-price” measures to reduce the demand for tobacco. The latter are first and foremost provided for in Article 7 (Non-price measures to reduce the demand for tobacco), as well as in other articles including Article 8 (Protection from exposure to tobacco smoke), Article 9 (Regulation of the contents of tobacco products), Article 10 (Regulation of tobacco product disclosures), Article 11 (Packaging and labelling of tobacco products), Article 12 (Education, communication, training and public awareness), and Article 13 (Tobacco advertising, promotion and sponsorship).

Under these conditions, it must be concluded that the need for a fresher scholarly look at the intersection of law and the availability of traditional cigarettes requires examination, and that the theses of legal scholarship related to the issue at hand require re-reading. Older normative solutions, especially in the light of more recent statistical data and the aforementioned tobacco epidemic, lead to the conclusion that the current fight against cigarettes is ineffective. This fight is lost, for sure. Against this backdrop, there is little doubt that the self-existent and autotelic goal of a rational legislator should include either gradual or abrupt, but in any event comprehensive, elimination of so-called traditional cigarettes. Following the aforementioned data and the quasi-legislative activity of the World Health Organization, it is reasonable to assume that measures aimed to eliminate traditional cigarettes are complex and multi-faceted. At the same time, it is assumed in the literature that an effective, and thus also popular, method of combating these stimulants is to limit their economic availability. This is often achieved through a progression of excise tax rates. However, this is not the only, and is sometimes an insufficient, legislative measure that can be applied in the area of this legal analysis. It is worth noting that addressing

the problems associated with the tobacco epidemic requires solutions that go far beyond the current ad hoc measures and necessitates a new approach.

Considerations of thorough research, however, dictate mentioning already at this stage that the problem tolerates neither apodictic judgments nor clear-cut solutions. Analogous social and legal research, carried out mainly in connection with alcohol products, clearly shows that the balance of so-called “hard prohibitionist policies” is negative. These policies are ineffective, do not achieve their intended objectives, and are very costly. Wherever prohibitionist actions are taken, there are also repercussions and social problems, including, first of all, various forms of criminality. Against this background, it is puzzling why the policy of prohibition (studied using the example of the prohibition of production, trade, and export of alcoholic products, which was in force from 1920 to 1932 in the United States) became the dominant global method with regard to, for example, narcotics and similar substances, while at the same time it was not used, even to a fragmentary extent, with regard to cigarettes.

At the same time, it must be stated that there will always be a social group that demonstrates the need to use substances with adverse health effects. If this assumption is accepted, it is appropriate to make a kind of a double statement that, to the extent that it is justified, the elimination of traditional cigarettes should be definitive, while, in the remaining scope, combating the epidemic of addictive smoking should take the form of promoting the use of novel products that are objectively less harmful to health.

The justification for a more decisive action by the government in this matter can be found in the legislation already in force, and also – and very importantly – in its constitutional context. The constitutional aspect, arising among others from Article 5 of the Constitution of the Republic of Poland, which is initially significant for the analyses of the project, already intuitively seems to provide a systemic and legal foundation for legislative and organizational changes in the matter in question. The *in extenso* requirement to ensure the safety of the public, which is formulated in that provision, appears to correlate directly with the government’s responsibilities related to shaping the tobacco products market. It also seems important that, in the context of state objectives, included fragmentarily for example in Article 5 of the Constitution, but also in other provisions related to social rights (Article 68 of the Constitution), there are also those tasks that jointly concern excise tax policy and health protection.

A few initial hypotheses can be found against this backdrop. First, a preliminary analysis of the constitutional provisions leads to the conclusion that the elimination of traditional cigarettes as harmful products, already in the current state of the law, is a means to achieve the objective of protecting the safety of citizens and their health enshrined in the aforementioned constitutional provisions. The programmatic nature of those constitutional norms dictates that the rules of correct legislation should be applied in such a way as to secure the important social objectives enshrined in the Constitution. Second, the legislator, acting on the basis of the model of rational law-making shaped in the paradigm of knowledge and perfect competencies, has certain obligations related to the appropriate creation of the statutory system, namely that it should not allow the objectively harmful products to be marketed. This should not be tolerated, especially when medical knowledge in the relevant area clearly shows the negative consequences of their use. Consequently, it will need to be decided whether the current legislator has the legitimacy to counteract the threat in question only through forms of a rather indecisive nature. Third, despite the fact that, hypothetically, the most decisive method of counteracting the problem would be a prohibition (irrespective of its legal nature), it should be stated that currently a much more socially viable option seems to be the use of so-called novelty products (e.g. liquids, pouches, etc.). Thus, in the current legislative perspective, the goal of the legislator should be to, in a

way, “promote” the use of these alternatives, such as electronic cigarettes. Such a hypothetical legislative goal is an intention that requires further objective and in-depth analysis; therefore, the need for research on legal solutions to this issue must be emphasized. Initiatives concerning novelty products may take the form, in particular, of excise tax mechanisms that charge certain categories of less harmful products proportionately less than tobacco products, which are much more harmful to health.

### **3 Elimination of traditional cigarettes and the security of citizens.**

#### **Comments on Article 5 of the Polish Constitution**

It is emphasized that “one needs not be persuaded that the wording of the Constitution, like any legal text, requires interpretation” (Wronkowska, 2016, 17). The choice of verbal and lexical expressions in the Polish Constitution is very rich and, to a large extent, it is a result of the fact that the legislator emphasizes certain aspects as particularly important. Moreover, the constitutional provisions are characterized by a noticeable conciseness, often taking quite extreme forms.

As mentioned earlier, pursuant to Article 5 of the Constitution, “The Republic of Poland shall safeguard the independence and inviolability of its territory, ensure and human and civil freedoms and rights and the security of its citizens, protect the national heritage, and ensure environmental protection in accordance with the principle of sustainable development.” Article 5 of the Constitution thus defines the fundamental goals of the state (Tuleja, 2021). This provision comprises the functions of the state and the fundamental directions and objectives of its action, with ensuring security as a fundamental value (Skrzydło, 2013, 19–20). The goals of the state take the form of programmatic principles and, therefore, comprise public actions, but without explicitly defining the means for, and ways of, achieving them. This kind of “open textuality” warrants a search for measures that will serve the implementation of specific tasks, including current ones. As has been emphasized, it is not possible to determine the content of individual obligations based solely on the content of Article 5 of the Constitution, and reference, among other things, to other constitutional provisions, as well as the rules of their interpretation are required. Thus, when looking for other similar normative contexts, it is worth noting that the concept of security is quite widespread in the Constitution and is the rationale for restricting rights and freedoms pursuant to Article 31(3), for imposing the prescription to care for the environment pursuant to Article 74(3), and for introducing consumer protection regulations pursuant to Article 76 of the Polish Constitution (Miłkowski, 2020, 34–35).

Of note is the characteristic way in which the provision in question is formulated, which is quite intuitively distant from the typical formulation of a general or fundamental norm, or another “norm-forming statement” (Gizbert-Studnicki & Grabowski, 1997, 104). This unique way is the result of the functions that this provision fulfils. This is because the function of a programmatic norm, a programmatic rule, and in part also purposive norms themselves, is to formulate the preferred states of affairs and the prescribed objectives. Article 5 of the Constitution, framed as a programmatic provision, does not as such directly give rise to marked claims that are suitable for enforcement (Garlicki & Zubik, 2016, margin ref. 4.), but it initiates a broad normative context for interpreting what has been framed as the state’s objective. It is worth noting that the criterion applied for dividing norms into purposive and fundamental consists of “the method of determination of the prescribed behaviour of the addressee of the norm.” Thus, a basic legal suggestion as to the nature of programmatic norms results from their very name. Consequently, it should be emphasized that the above circumstances affect the interpretation of

the legal text of the Polish Constitution, insofar as such regulations are contained therein. As a side note, it should be mentioned that a legal analysis of a purposive norm applicable to conduct requires a number of more complicated interpretative operations, which also involve going beyond the legal text. More abstract categories, such as axiological consistency, are then taken into account instead of the mere content of the provision. The starting point for such procedures, however, is the interpretative (Ziemiński, 2007, 196) or inferential rule, which is a component of the concept of sources of law. It lies in the trivial view that, since it is prescribed to achieve objective O, it is prescribed to take actions A that are the means of achieving objective O. Thus, it can be said that “it is prescribed to take (all) such actions A as are means to achieve objective O.” In this way, it can be seen that, in the case of programmatic norms, the conclusiveness of the inference made on their basis consists of broader interpretative procedures that are intended to serve the objectives formulated by the relevant regulation. From the standpoint of justification, it is important to show the existence of non-legal premises; for example, to show what kind of behaviour or what kind of means will in fact lead to the achievement of the constitutionally “programmed” objective – in other words, whether there is a teleological relationship between behaviour B and objective O. In view of the above, appealing to even the instrumental rationality of the legislator appears to bring beneficial results. It is not possible to determine the desired directions in legislation without taking the indications of non-legal knowledge into account. In the context of the problem under examination, the knowledge in question is medical knowledge which concerns healthcare, preventing addictions, health security, and other matters. It is knowledge that equips the legislator with the necessary substantive competence for the correct formation of legislation in a given area.

In conclusion, programmatic norms are legally binding norms, with the difference that they do not impose definite obligations, but rather *prima facie* obligations, on their addressees (Gizbert-Studnicki & Grabowski, 1997, 112). It is therefore reasonable to review the selected opinions of legal writers on the defined obligations of the state that result from Article 5 of the Polish Constitution. It makes sense to adopt a perspective that combines the aspects of civil security, health protection, and prevention of the use of stimulants, especially traditional cigarettes.

As has been emphasized, in order to grasp the nature of the objectives contained in the provision in question, the very structure of the Polish Constitution is important. Indeed, Article 5 sets out the most important political and social objectives, as is evident even from its placement. Thus, based on the *a rubrica* argument, it should be noted that this norm is located together with regulations that shape the set of principles of the system of government and the basic characteristics of the state and its tasks. It is mainly for this reason that “citizen’s security” should be understood in this context relatively broadly, as a unique sense of stability and protection. On the other hand, “ensuring the security of citizens” requires a narrow interpretation, especially understanding this structure to mean the “right to respond to” and prevent threats. It has also been noted that this provision is vague and, consequently, its modal and operative interpretation is allowed (Haczkowska, 2014, margin ref. 1.). It has been emphasized that the state has two primary objectives, to ensure the security of its citizens and to pursue the concept of the common good, which is associated with environmental protection and security. It is worth noting that although “citizens’ security” itself is present in legal language, its definition is not contained in any legal act. Thus, given the fact that this formulation itself co-organizes legal structures that are of immense importance to the system of government, its correct interpretation, consistent with legislative considerations, poses a serious challenge. To some extent, a suggestion concerning the meaning is the quite synonymous term “public security,” defined as the totality of conditions and institutions protecting, among other things, the life and health of

citizens. Other terms with a similar meaning are “internal security *sensu stricto*,” such as universal and systemic security, and “internal security *sensu largo*,” which additionally includes, among other things, the protection of life and health. It then follows that the state has an obligation to take action to ensure citizens’ security in the broadest sense, which, however, does not abrogate the legal and, to some extent, factual question regarding the methods required to do so. Therefore, the framework and functions shaped by Article 5 of the Polish Constitution are particularly relevant to law-making.

It has thus been established that the term “security” is most likely ambiguous and has been used in various ways in the Polish Constitution. As such, the contextual and polysemantic nature of the term makes it necessary to consider it within the regulations and issues it co-defines. In addition, the textual argumentation regarding the provision of Article 5 of the Constitution allows certain conclusions to be drawn, which affect, among other things, the scope of its application. A somewhat simplified statement can be made that *citizens’ security* can be treated as a binary name (terminological focus). From the linguistic perspective, *citizens’ security* is an example of a customary combination of words (collocation). Structures of this kind appear all too often in common language; however, unlike idioms, they do not have any specific, reserved meaning. Indeed, the linguistic function of such structures is revealed in the possibility of contextual clarification of their meaning, mainly through the mechanisms of interpretation. From the formal-linguistic standpoint, it seems that (*quod*) *lege non distinguente nec nostrum est distinguere*. If the order of a normative phrase has not been clarified or divided by an additional qualification (feature) contained in the text, e.g. one that makes the content of the phrase associated with security, be it military, public, energy, or of some other specific type, then the concept should be applied to all areas of state activity aimed at ensuring citizens’ security. Since the objective of “citizens’ security” has been formulated, decoding the means of achieving this objective should, under the conditions identified in the title, take the form as followings:

- since the fundamental objective  $O_1$  – *protection of the security of citizens* – has been established and its component objective is  $O_2$  – *protection of the health of citizens*, then whenever the  $M_x$  means implemented pursue the constitutional objectives  $O_x$ , they comply with its content;
- then the means  $M_1$  – *elimination of traditional cigarettes*, as a way to achieve the constitutional objectives  $O_1$  and  $O_2$ , is consistent with the content of the constitutional norm expressed in Article 5 *in medio* of the Polish Constitution.

Therefore, it should be concluded that allowing the trade in a particular type of harmful stimulants or not actively counteracting them is incompatible with the axiological premises concerning the security of citizens as an intrinsic constitutional goal of the Republic of Poland. Therefore, also in the matter under examination, the current activity of the legislator, in particular the correct choice of legislative means, should be aimed at implementing the objectives arising from the constitutional directives that determine the security of citizens. It thus appears that the initial statement regarding the function of excise tax as a means to eliminate the economic affordability of traditional cigarettes progressively is constitutionally sound.

#### 4 A few comments on the optimal regulation of traditional cigarettes

Having established that the objective of eliminating traditional cigarettes is supported by Article 5 *in medio* of the Polish Constitution, it is now necessary to address briefly the hypothetical

directions for amendments in the law. The important determinants of the optimality of legal provisions are their justification (the so-called justification perspective) and the critical-postulative argumentation (Opalek, 1974, 190). Justification, criticism, and postulates include legal arguments, which are often very different in nature and content and range from “trivial” (Smolak, 2012, 15), through functional and advisability-oriented ones, to those characteristic of the institutional approach (Gizbert-Studnicki, 2001, 123). It is emphasized that even trivial explanations of socially important matters have some relevance to law-making and the shape of its institutions. Moreover, argumentation concerning a specific legal norm that refers to the most serious supernatural, external sources or some primordial “meta-justification” and rationalization has many objective pitfalls. The nature of the postulates *de lege ferenda* is also important. These are special statements that do not have a normative strength in the strict sense (consequently, they are not norms in the basic sense of the word), but instead are “directives of a weaker type” and most often take the form of recommendations and guidelines. Such an approach to the postulated law, as well as to the directives concerning the directions of the law’s development, makes it possible to discuss future and hypothetical legal provisions, leaving aside to some extent the complex problem of validation (Grabowski, 2009, 227), in the same way as discussing law – the postulated law.

Thus, given the relevance of simple argumentation and the complex ontological nature of the legal postulates that the present paper does not purport to formulate, it is only appropriate to collect a few remarks on the optimal regulation of the issue of traditional cigarettes, leaving aside deeper, particularly systemic aspects of the problem that follow from a more comprehensive study of this topic. Therefore, it should first be noted that the issues analysed herein that are related to the subject matter of the paper are complex. On the one hand, they seem to be quite simple, while being studied in a more recent perspective. On the other hand, the cultural phenomenon of stimulants is invariably undeniable. Even knowledge based on facts and observations that confirms the harmfulness of a certain substance, as well as the form of its administration, or a belief in the harmfulness of a certain habit, do not necessarily translate into rational conduct. This condition is a serious counterweight to a fully rational framing of the law governing stimulants (e.g. legal prohibition of their use). The aforementioned cultural phenomenon seems to make it difficult to create a rational behaviour or a custom based on similar motives that would eliminate – by creating in this regard a civilizational taboo – the use of such substances (Elias, 1980, 226). Such social conditions mean that the epistemological objectivity of certain phenomena does not definitively influence the directions of law-making. It would seem, however, that the factual and non-abstract nature of such circumstances as the harmfulness of traditional cigarettes (1), their axiological unambiguity in the context of the state’s concern for the security of its citizens (2), as well as the *prima facie* availability of less harmful alternatives to traditional cigarettes (3), in the legally acceptable form of assertions, *ergo* hypotheses, and guidelines, should influence the final form of the law governing this matter. When considered as the foundation of “strong directives” for the legislator, these circumstances should have a decisive influence on the fundamental issue, on the objective of the legal text and the purpose of the law, being certain facts that affect the directions of the development of law as such.

## 5 Conclusions

The conclusions drawn should be recalled or, for the sake of a proper order, reiterated. First, an analysis of Article. 5 of the Polish Constitution appears to prove that eliminating traditional cigarettes as harmful products is a means to achieve the objective of protecting the security



of citizens and safeguarding their health. Second, in view of the above, it must be considered whether a rational legislator should allow objectively harmful products to be traded when medical knowledge in this regard clearly demonstrates the negative consequences of their use. Consequently, it will need to be decided whether the actual legislator has the legitimacy to counteract the threat in question merely through forms of a rather indecisive nature. Third, the emphasized flexibility of some constitutional provisions, given the irrational nature of some social practices or the variability of the conditions concerning public health, should be seen as the right to reinterpret them. Fourth, despite the fact that, hypothetically, the most decisive method of counteracting the problem would be full prohibition (irrespective of its legal nature and social effectiveness), it should be stated that currently a much more socially viable option seems to be the use of the so-called novelty other nicotine-content products. Thus, in the current legislative perspective, the goal of the legislator should be to, in a way, “promote” the use of these alternatives, such as electronic cigarettes. Such a hypothetical legislative goal is an intention that requires further objective and in-depth analysis; therefore, the need for research on legal solutions to this issue must be emphasized. Innovative solutions concerning novelty products may take the form, in particular, of excise tax mechanisms that charge certain categories of less harmful products proportionately less than much more hazardous tobacco products. Fifth, the findings contained in the paper take the form of mostly theoretical conclusions that are far from definitive and outline some prospects for research on the issue of eliminating traditional cigarettes.

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