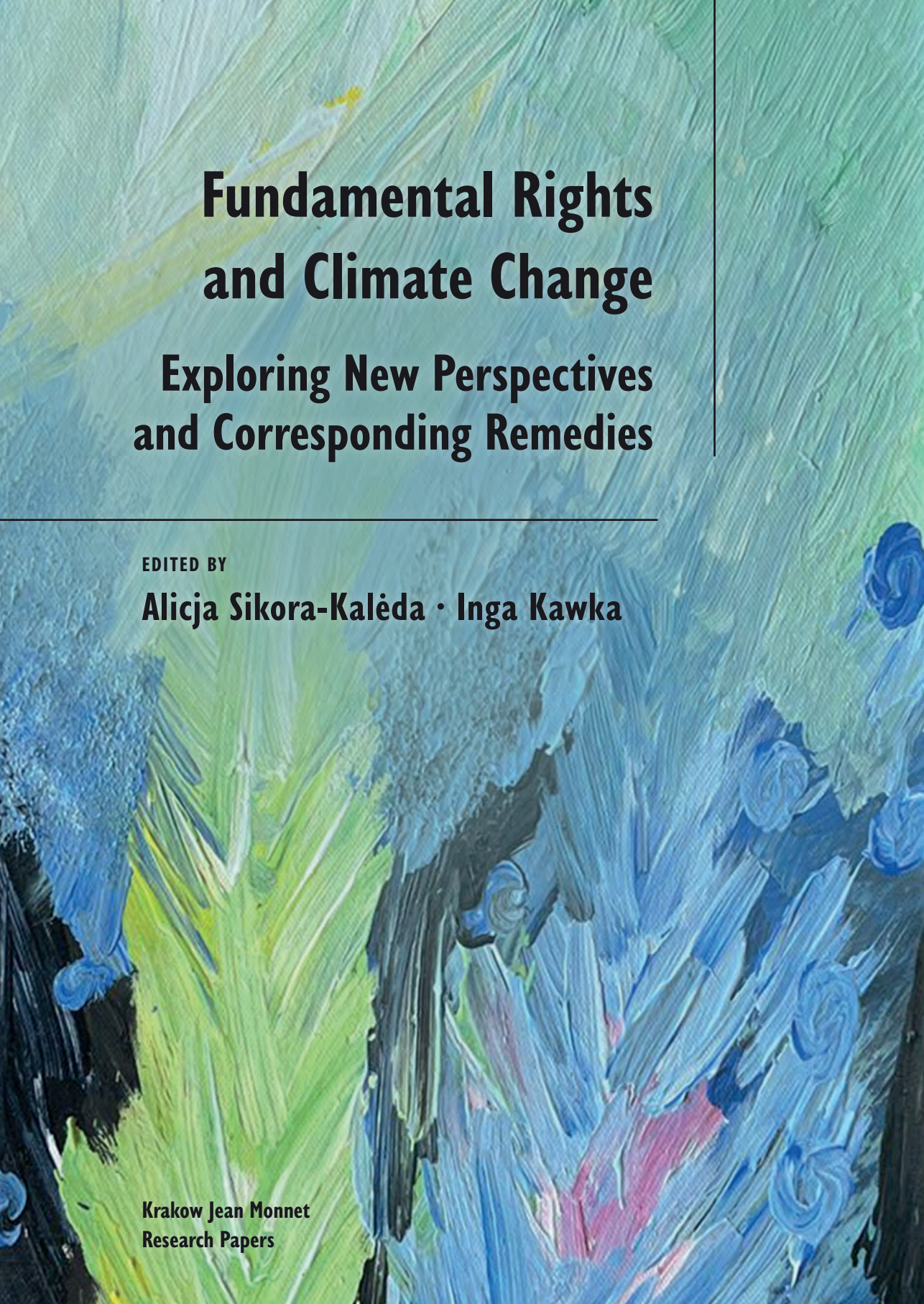

Fundamental Rights and Climate Change

Exploring New Perspectives and Corresponding Remedies

EDITED BY

Alicja Sikora-Kalėda · Inga Kawka

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Table of Contents

Introduction

The environment is where we all meet;
where we all have a mutual interest;
it is the one thing all of us share.

Lady Bird Johnson

The monograph outlines the growing importance of fundamental rights in the European Union, particularly in the context of environmental protection and the fight against climate change. These rights have become a cornerstone in shaping policies that address ecological challenges while balancing economic and social aspects. The European Green Deal (EUGD), a landmark initiative, embodies the EU's commitment to transitioning into a climate-neutral, modern economy by 2050. This ambitious goal requires comprehensive legislative action and coherence in implementing policies across various sectors, ensuring that all measures align with and uphold fundamental rights as enshrined in the EU legal framework.

This monograph is the culmination of scholarly work inspired by discussions from the conference titled 'Fundamental Rights and Climate Change in EU Law and Beyond – Mapping Fundamental Rights, Nature's Rights, and Corresponding Legal Remedies,' organized in September 2023 as part of the Jean Monnet Module project, 'Sustainability and Climate Change in EU Law.' This academic event, hosted by the Chair of European Law at the Jagiellonian University, brought together experts from diverse fields to discuss and exchange perspectives on sustainability and the legal frameworks within the EU. The insights shared during the conference laid the foundation for the analyses presented in this book, highlighting the complex interplay between fundamental rights, environmental challenges, and legislative coherence.

The chapters of this book reflect a collective scholarly effort to explore diverse aspects of fundamental rights and their intersections with environmental law within the EU framework. The opening chapter, authored by Alicja Sikora-Kalėda investigates the limits of human rights as instruments to advocate for global climate action. It examines how climate litigation impacts human rights and evaluates the potential evolution of environmental rights in EU law. Ilona Przybojewska contributes with an analysis of how poor environmental conditions can lead to state liability, referencing a notable 2021 Polish Supreme Court resolution. Her work probes the extent to which environmental issues can be recognized as affecting personal rights and the broader implications of this recognition.

This monograph aims to serve as a comprehensive resource for legal practitioners, scholars, and policymakers, encouraging further dialogue on the integration of environmental and human rights within the EU legal system.

Alicja Sikora-Kalėda
Inga Kawka

Fundamental Rights and Climate Change – Exploring New Perspectives and Corresponding Remedies
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Alicja Sikora-Kalėda[1]

The views expressed are of the author and in no way reflect the views of the Council or the European Council.

Rights in the Era of Climate Change

Contemplating the Limits of Human Rights as Instruments of Pressure for the Planetary Cause

Abstract: One of the ways to address a "triple planetary crisis" (climate change, biodiversity loss, toxic pollution) consists in challenging existing legal frameworks, principles and remedies. The aim of this chapter is first, to contemplate, against the background of normative, judicial and ethical developments, both the impact of climate litigation on human rights' architecture and also possible ways forward in the process of development of rights as instruments of pressure in a global attitude to tackle climate change. Secondly, current developments in the environmental and climate field of the EU legal order from a constitutional perspective are addressed, including the impact of the ECtHR *Klimaseniorinnen* judgement on the EU legal framework. Whilst the EU Courts are under pressure of an irrefutable link between human rights and the climate, the limits of judicial creativity should trigger a new debate about the feasibility of environmental rights in the EU legal order at large.

Keywords: fundamental rights, environmental human rights, climate change litigation, EU legal order, environmental law, climate change, climate rights

1. Environmental rights – contemplating a change

1.1. Introduction

One of the ways to address a "triple planetary crisis" (climate change, biodiversity loss, toxic pollution)[2] consists in challenging existing legal frameworks, principles

[1] Dr hab. A. Sikora-Kalėda, Chair of European Law, Jagiellonian University, https://orcid.org/0009-0001-1204-7020.

[2] E. Morgera, *International Environmental Law: A Case for Transformative Change through the Lens of Children's Human Rights*, "Environmental Policy and Law" 2024, vol. 53, no. 5-6. For the concept

and remedies. Indeed, the temporal outline of environmental governance 'is not just to value the future but also to respond and manage a changing future.'[3] In the context of a broadly understood environmental constitutionalism,[4] advocating the link between human rights and climate change[5] and the overall concept of environmental human rights[6] can be understood as a universal expression of a need for groundbreaking change given the magnitude of the climate change as a "polycentric issue."[7] Challenging existing legal and philosophical *status quo* equally implies reinventing foundational reasoning underpinning rights in a broad sense including understanding their purpose, scope and feasibility. Indeed, the impact of climate change litigation on the architecture of human rights is undeniable. Human rights have been in recent years operationalised through the judicial debate and have gradually become an instrument of pressure on state actors echoing a need for change of the legal and economic framework in many jurisdictions around the globe. Indeed, the substantial focus on rights has shifted recently from the normative area to the judicial creativity sphere in a context of a climate change ligation in order to put pressure on govern-

of a triple planetary crisis in the UN context, see Universal Rights Group, *Realising Human Rights as a Critical Contribution to Confronting the Triple Planetary Crisis*, 2024, https://www.universal-rights.org/urg-policy-reports/human-rights-triple-planetary-crisis/.

3 B.J. Richardson, *Time and Environmental Law: Telling Nature's Time*, Cambridge 2017, p. 124.

4 J.R. May, E. Daly, *Global Climate Constitutionalism and Justice in the Courts* [in:] *Research Handbook on Global Climate Constitutionalism*, J. Jaria-Manzano, S. Borrás (eds), Cheltenham–Northampton 2019, pp. 42-57; E. Daly, J.R. May, *Introduction: Implementing Environmental Constitutionalism* [in:] *Implementing Environmental Constitutionalism: Current Global Challenges*, E. Daly, J.R. May (eds), Cambridge 2018, pp. 1-12; J.R. May, *Constituting Fundamental Environmental Rights Worldwide*, "Pace Environmental Law Review" 2006, vol. 23, no. 1, pp. 113-182; J.R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, "Cardozo Law Review" 2020, vol. 42, no. 3, p. 983; S.J. Turner et al. (eds), *Environmental Rights: The Development of Standards*, Cambridge 2019, pp. 383-400; J.C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, London 2017; S. Bookman, *Demystifying Environmental Constitutionalism*, "Environmental Law" 2024, vol. 54, no. 1, pp. 1-77; A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Zutphen 2020; E. Daly, M.A. Tigre, N. Urzola, *Common but Differentiated Constitutionalisms: Does 'Environmental Constitutionalism' Offer Realistic Policy Options for Improving UN Environmental Law and Governance? US and Latin American Perspectives* [in:] *Constitutionalism and Transnational Governance Failures*, E.-U. Petersmann, A. Steinbach (eds), Leiden–Boston 2024, pp. 172-205.

5 C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, "European Journal of International Law" 2022, vol. 33, no. 3, pp. 925-951.

6 For the purpose of this chapter the "environmental human rights" notion is used to denote the human rights jurisprudence on the application of human rights norms to environmental harm and climate change. See Environmental human rights (EHRs) (see J.R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge 2014).

7 European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECLI:CE:ECHR:2024:0409JUD005360020, para. 419.

ments and industrial players to reduce greenhouse gas emissions and to raise the level of ambition in the field of climate neutrality and thus amend the current legal framework.[8] Strategic litigation embodied in the climate change rationale is a new form of legal practice.[9] The aim of this chapter is thus to contemplate, in the first part, against the background of normative, judicial and ethical developments, possible ways forward in the process of construing environmental rights in tackling climate change. In the second part, current developments in the environmental and climate field of the EU legal order from a constitutional perspective are addressed, including a potential impact of the European Court of Human Rights (ECtHR) *Klimaseniorinnen* judgement on the attitude of the European Court of Justice (CJEU) in the field of environmental, climate rights. The centre of gravity in the modern debate about rights and environment should be precisely about "their underlying rationale, their necessity, feasibility, and use in international and national law and policy."[10] It seems that existing normative and judicial expressions of greening human rights by deriving environmental rights from expressly recognised human rights are about to reach their limits. Thus, contemplating their philosophical foundations and possible legal avenues of construing a new generation of environmental rights adapted to the climate change reality, societal and technological challenges is worthwhile.

1.2. Normative and judicial expressions of environmental human rights

Constitutional entrenchment of environmental human rights has been viewed in the global context of a "growing global consciousness of environmentalism in tandem with increasing threats to social and environmental sustainability [which] have

[8] M. Bönnemann, M.A. Tigre (eds), *The Transformation of European Climate Litigation*, Berlin 2024; J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, London 2024, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf; I. Alogna et al. (eds), *Climate Change Litigation in Europe: Regional, Comparative and Sectoral Perspectives*, Cambridge–Antwerp–Chicago 2023; C. Beauregard et al., *Climate Justice and Rights-Based Litigation in a Post-Paris World*, "Climate Policy" 2021, vol. 21, no. 5, pp. 652-665.

[9] J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, London 2021, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf; J. Peel, R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the* Sharma*,* Neubauer*, and* Shell *Cases*, "German Law Journal" 2021, vol. 22, no. 8, pp. 1484-1498; Ch. Eckes, *Strategic Climate Litigation before National Courts: Can European Union Law Be Used as a Shield?*, "German Law Journal" 2024, vol. 25, no. 6, pp. 1022-1042.

[10] M. Scobie, *Framing Environmental Human Rights in the Anthropocene* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 9-30.

contributed to the greening of constitutions"[11] and considering "environmental quality as fundamentally related to human rights."[12] As noted in the classical "*Environmental Constitutional Rights*" monograph by Hayward, constitutional recognition of environmental human rights, "entrenches a recognition of the importance of environmental protection; it offers a possibility of unifying principles for legislation and regulation; it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes."[13] An initial question about the relationship between human rights law and global climate change has already been addressed by arguing that a "mutually exclusive relationship" between human rights law and general international law would counter the evolution of international environmental law as a whole and international human rights law.[14] A human rights-based approach to climate change remains a complex trend in national and international legal orders,[15] enhanced notably through the climate change litigation and judicial response of national and international courts,[16] both through the prism of a general link between climate and human rights[17] and intergenerational perspective of rights and responsibilities.[18] However, this effort, as noted by scholars, is paved with many hurdles, including primarily the absence of an explicit right to a healthy environment in the

11 E. Daly, J.R. May, *Learning from Constitutional Environmental Rights* [in:] *The Human Right to a Healthy Environment*, J.H. Knox, R. Pejan (eds), Cambridge 2018, pp. 42-57.

12 J.C. Gellers, *The Global…*, p. 2.

13 T. Hayward, *Constitutional Environmental Rights*, New York 2005, p. 8.

14 A. Boyle, *Human Rights and the Environment: Where Next?*, "European Journal of International Law" 2012, vol. 23, no. 3, pp. 613-642.

15 Ex multis, B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Brisbane 2018, p. 153ff.

16 Ch. Eckes, *Constitutionalising Climate Mitigation Norms in Europe* [in:] *Constitutionalism and Transnational Governance Failures*, E.-U. Petersmann, A. Steinbach (eds), Leiden–Boston 2024, pp. 107-144.

17 C. Heri, *Climate Change…*

18 United Nations General Assembly, *The Pact for the Future (A/RES/79/1)* that includes a *Global Digital Compact* and a *Declaration on Future Generations*. Pact, Action 35, point e "Address the adverse impact of climate change and other environmental challenges that constitute threats to the ability of young persons to enjoy their human rights and a clean, healthy and sustainable environment." See also, Bundesverfassungsgericht, *Neubauer et al. versus Germany*, order of 24 March 2021 – 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, ECLI:DE:BVerfG:2021:rs 20210324.1bvr265618, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html, operative part, para. 2 "If there is scientific uncertainty regarding causal relationships of environmental relevance, a special duty of care imposed upon the legislator by Art. 20a of the Basic Law – also for the benefit of future generations – entails an obligation to take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments."

European Convention on Human Rights (ECHR).[19] More broadly, environmental human rights are anchored in various trends of environmental justice,[20] planetary justice and Earth system justice in the era of the Anthropocene.[21] Whilst climate change is "increasingly viewed as a human rights issue", scholars equally emphasise that this is a relatively novel issue in the international fora which started globally to arise in the context of the claims of indigenous communities.[22] Since the 1900s, approximately one hundred States have adopted the right to a healthy environment "by writing anew or amending their constitutions to include substantive environmental human rights provisions."[23] Scholars note that approximately half of the constitutions around the globe explicitly or implicitly provide for a substantive right to a clean or quality or healthy environment, and "about half of those also guarantee procedural rights to information, participation, or access to justice in environmental matters."[24] However, global human rights treaties do not include such a substantive right to healthy environment. In 2008, the U.N. Human Rights Council adopted Council Resolution 7/23, which affirmed that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights."[25] The concept of environmental human rights has been further categorised among "new human rights" and prominently highlighted by the 2022 UN endorsement of "a right to a clean, healthy, and sustainable environment" in the UNGA Resolution 76/300.[26]

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19 C. Heri, *Climate Change…*

20 L. Pellegrini et al., *International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case from the Ecuadorian Amazon*, "Journal of International Economic Law" 2020, vol. 23, no. 2, pp. 455-468; M. Scobie, *Framing Environmental Human Rights…*

21 J. Gupta et al., *Earth System Boundaries and Earth System Justice: Sharing the Ecospace*, "Environmental Politics" 2024, vol. 33, no. 7, pp. 1-20.

22 B. Lewis, *Environmental Human…*, p. 153.

23 Cf. https://iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment, see also Ch. Jeffords, *On the Relationship between Constitutional Environmental Human Rights and Sustainable Development Outcomes*, "Ecological Economics" 2021, vol. 186. For the US perspective, see J.H. Knox, N. Tronolone, *Environmental Justice as Environmental Human Rights*, "Vanderbilt Journal of Transnational Law" 2023.

24 E. Daly, J.R. May, *Learning from…*

25 A/HRC/RES/7/23 Human Rights and Climate Change. For an outline of political and historical context of the UN debates, see M. Limon, *For People; For Planet: The Long and Winding Road to United Nations Recognition of the Universal Right to a Clean, Healthy, and Sustainable Environment*, https://www.universal-rights.org/urg-policy-reports/for-people-for-planet-the-long-and-winding-road-to-united-nations-recognition-of-the-universal-right-to-a-clean-healthy-and-sustainable-environment/.

26 Cf. https://documents.un.org/doc/undoc/gen/n22/442/77/pdf/n2244277.pdf.

Furthermore, many environmental constitutional rights are related to either sustainable development or preserving the environment for future generations. As emphasised in the scholarship, the *The Environmental Rights Revolution* was facilitated in the 20th century by three, converging trends: "a wave of new and amended constitutions in both emerging and established democracies, the human rights revolution, and growth in the magnitude and awareness of the global environmental crisis."[27] In order for "uniform restatement of general principles that have emerged in international human rights law in the context of the environment,[28] in 2020 the so-called "Strasbourg Principles of International Environmental Human Rights Law" were enacted by a group of human rights and environmental law experts.[29] Global concerns and the reality of a climate change and environmental degradation is nevertheless universally recognised and reflected even in the most controversial jurisdictions such as the US.[30] In this respect scholars argue that "environmental rights should be recognised as *natural rights* that need not be granted by a constitution or a statute but rather understood to be inherent in what it means to be human."[31] Consequently, this approach would imply that "(t)he near-universal acceptance of environmental rights provides a starting point for the argument that the right to a healthy environment should be recognized as an element of natural law."[32]

Whilst "environmental rights revolution" has not led to a recognition of a normative, enforceable, substantive human, environmental right worldwide, climate change litigation, for its part, represents a unique, universal phenomenon in the legal history anchored in the 'court-centric approach'[33] having led to the "climate constitutionalisation" which indeed arises to a global legal reality.[34] Notwithstanding conceptual tensions, human rights continue to be at the heart of both judicial and constitutional

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[27] D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Toronto 2012, p. 3.

[28] *The Strasbourg Principles of International Environmental Human Rights Law – 2022*, "Journal of Human Rights and the Environment" 2022, vol. 13, pp. 195-202.

[29] *Ibidem.*

[30] J.A. Basseches et al., *Climate Policy Conflict in the U.S. States: A Critical Review and Way Forward*, "Climatic Change" 2022, vol. 170, p. 32; M.G. Burgess et al., *Supply, Demand and Polarization Challenges Facing US Climate Policies*, "Nature Climate Change" 2024, vol. 14, pp. 134-142.

[31] D.C. Esty, *Should Humanity Have Standing? Securing Environmental Rights in the United States*, "Southern California Law Review" 2024, vol. 95, no. 6, pp. 1345-1392.

[32] *Ibidem.*

[33] C. Rodríguez- Garavito, *Human Rights: The Global South's Route to Climate Litigation*, "American Journal of International Law" 2020, vol. 114, p. 40; J.R. May, E. Daly, *Global Climate Constitutionalism…*; Ch. Eckes, *Constitutionalising Climate…*

[34] Ch. Eckes, *Constitutionalising Climate…*

conversations about climate change[35] and through this debate one can denote that environmental (human) rights are evolving. The concept of greening human rights by deriving environmental rights from the human right to life and family life under the ECHR and under the open clause of American Convention on Human Rights (ACHR), is a prominent trend.[36] As echoed in the judicial conversations around the globe[37], before both international, constitutional and supreme courts such as the European Court of Human Rights (ECtHR)[38], International Court of Justice (ICJ),[39] International Tribunal for the Law of the Sea (ITLoS),[40] the Inter American Court of Human Rights (IACHR), Irish Supreme Court,[41] the German Federal Constitutional Court (BVfG),[42] Dutch jurisdictions,[43] French Conseil d'État,[44] Belgian courts,[45]

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35 See, ex multis, S.J. Turner et al. (eds), *Environmental Rights…*; J.H. Knox, R. Pejan (eds), *The Human Right to a Healthy Environment*, Cambridge 2018; J. Jaria-Manzano, S. Borrás (eds), *Research Handbook on Global Climate Constitutionalism*, Cheltenham–Northampton 2019; J.R. May, E. Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Cheltenham 2019.

36 A. Rocha, R. Sampaio, *Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Human Rights Bodies*, "Review of European, Comparative & International Environmental Law" 2023, vol. 32, no. 2, pp. 279-289.

37 Cf. https://climatecasechart.com/non-us-jurisdiction/.

38 On derived environmental rights, see https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG. Among the key recent cases in relation to climate change, see https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG and in particular European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz…*

39 International Court of Justice, *Obligations of States in Respect of Climate Change*, https://www.icj-cij.org/case/187.

40 International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law: Advisory Opinion*, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

41 Irish Supreme Court, *Friends of the Irish Environment -v- The Government of Ireland & Ors*, https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf.

42 Bundesverfassungsgericht, *Neubauer…*

43 Supreme Court of the Netherlands, *Climate Case Urgenda*, 20 December 2019, ECLI:NL:HR:2019:2006 (English translation ECLI:NL:HR:2019:2007, https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf).

44 Conseil d'État, n° 42730, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, ECLI:FR:CECHR:2020:427301.20201119; Conseil d'État, n° 427301, 5 et 6e chambres réunies, 1 July 2021, ECLI:FR:CECHR:2021:427301.20210701; Conseil d'État, n° 467982, Commune de Grande-Synthe et autres, 10 May 2023, ECLI:FR:CECHR:2023:467982.20230510.

45 Brussels Court of Appeal, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, 30 November 2023, see E. Slautsky, *Climate Litigation, Separation of Powers and Federalism* à la Belge*: A Commentary of the Belgian Climate Case*, "European Constitutional Law Review" 2024, vol. 20, no. 3, pp. 506-526.

Pakistani courts,[46] Czech courts,[47] EFTA Court,[48] and recently the South Korean Supreme Court,[49] human rights are being operationalised as instruments of pressure on executive, legislative and judicial branches.[50] Arguing an insufficient level of ambition mostly in relation to the emission of States before the judiciary triggered discussions of an unprecedented dynamism and scope about the constitutional dimension of both anthropocentric and ecocentric approaches, human rights, intergenerational rights, common responsibilities and States' positive obligations in the context of climate change as well as the limits of judicial power in separation of powers.[51] In France, inspiring developments following the constitutionalisation of environmental human rights embodied in the *Charte de l'Environment*, are illustrated by the case law of the national courts.[52] The Inter-American Court of Human Rights is currently debating a climate case filed on January 9, 2023 by Chile and Colombia, who signed a joint advisory opinion aiming to clarify the scope of the state obligations for responding to the climate emergency under the frame of international human rights law.[53] The recently closed hearing before the International Court of Justice has sparked considerable attention and gathered ninety-eight States and twelve international organisations.[54] At the level of the EU, the first attempt of the climate litigation before the EU

[46] Lahore High Court, *Leghari v Federation of Pakistan*, 4 April 2015, WP N0 25501/2015.

[47] Czech Supreme Administrative Court, *Klimatická žaloba ČR v. Czech Republic*, 9 As 116/2022-166, 20 February 2023 (English translation: https://www.law.muni.cz/dokumenty/62964).

[48] EFTA Court, *E-11/23: Låssenteret AS v Assa Abloy Opening Solutions Norway AS*, https://eftacourt.int/cases/e-11-23/.

[49] South Korea Constitutional Court, *Do-Hyun Kim et al. v. South Korea*, 29 August 2024 (2020 Hun-Ma389, 2021Hun-Ma1264, 2022Hun-Ma854, 2023Hun-Ma846 (consolidated)), https://english.ccourt.go.kr/site/eng/ex/bbs/List.do?cbIdx=1143.

[50] An overview of cases from France, Germany, Ireland, Netherlands, Norway, Spain, United Kingdom and Belgium makes part of the legal background of the ECtHR judgment in case European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz…*, paras 235-272.

[51] See, ex multis, S.J. Turner et al. (eds), *Environmental Rights…*; J.H. Knox, R. Pejan (eds), *The Human Right…*; J.R. May, *Constituting Fundamental Environmental Rights Worldwide*, "Pace Environmental Law Review" 2006 vol. 23, no. 1, p. 113; J.R. May, *The Case for Environmental Human Rights: Recognition, Implementation and Outcomes*, "Cardozo Law Review" 2020, vol. 42, no. 3, p. 983; J.R. May, E. Daly, *Global Environmental…*; J.R. May, E. Daly, *Environmental Constitutionalism*, Cheltenham 2016; J.R. May, E. Daly (eds), *Human Rights and the Environment…*; Ch. Eckes, *Constitutionalising Climate…*

[52] D. Marrani, *Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts*, "Sustainable Development Law & Policy" 2009, vol. 10, no. 1, pp. 52-57.

[53] Cf. https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

[54] Cf. https://www.icj-cij.org/sites/default/files/case-related/187/187-20241108-pre-01-00-en.pdf.

Courts failed at the stage of admissibility,[55] but other sectoral remedies under Aarhus Regulation[56] continue to trigger judicial debates.[57]

However, climate change litigation as we know it today, in particular in the case of "winning", should be carefully assessed. First, this phenomenon has a price in terms of human rights evolution. As indicated in the scholarship, climate litigation risks 'betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives.'[58] Derived environmental human rights are undoubtedly affecting the core of human rights' architecture. Secondly, judicial trends are subject to fluctuation as courts do not operate in a social and political vacuum. Once the State's responsibilities have been concretised in a given case, notably in the light of international human rights obligations, the judiciary has exhausted its role. Even if the constitutional precedent continues to thrive in a legal system, it is subject to further interpretations in various legal contexts including balancing. Thirdly, and most importantly, the multilevel implementation of judicial decisions in climate related cases in a given national order is key. Thus, the biggest challenge nowadays consists of translating judicial decisions into the normative language. A recent critical response of the Swiss government to the ECtHR judgement in the *Klimaseniorinen* case[59] both demonstrates the relevance of implementation phase and illustrates potential risks of compromising the impact of ECtHR judgement. In particular, the Swiss government argued that the legislation approved immediately before and after the ruling has already adjusted Swiss Net Zero trajectory,[60] but this interpretation was not unanimously shared among experts.[61]

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55 Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2022:297. See G. Winter, Armando Carvalho and Others v. EU: *Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, "Transnational Environmental Law" 2020, vol. 9, no. 1, pp. 137-164.

56 *Council Regulation 1367/2006 of Sept. 6, 2006, On the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies*, "Official Journal of European Union" 2006, L 264, pp. 13-19.

57 Case C-212/21, *EIB v. ClientEarth*, ECLI:EU:C:2023:546 and pending case T-579/22, *ClientEarth v Commission.*

58 B. Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, "American Journal of International Law" 2021, vol. 115, no. 3, pp. 409-451.

59 Cf. https://rm.coe.int/0900001680b1ddd9.

60 Cf. https://chambers.com/topics/climate-seniors-echr-case-global-impact.

61 Cf. https://cms.law/en/che/publication/bill-on-a-secure-electricity-supply-from-renewable-energy-what-are-the-changes.

In parallel, the nature and substance of climate litigation is shifting from States to big industrial market players. As demonstrated by the judgement of 11 November 2024 in the Dutch case *Shell*,[62] companies might be held responsible and considered as having an obligation towards citizens to limit its CO2 emissions. After having relied on groundbreaking cases such as *Urgenda* and *Klimaseniorrinen*, the Dutch Court of Appeal has nevertheless dismissed the appeal of environmental organisations since it was not able to establish that the social standard of care entails an obligation for Shell to reduce its CO2 emissions by a given percentage.[63] Commentators refer therefore to the "corporate climate (un)accountability."[64] Whilst the EU regulatory framework has recently advanced considerably in the field of the corporate accountability,[65] it remains a universal legal and ethical challenge which will inevitably come back before various courts.

More globally, notwithstanding impressive progress in operationalising human rights such as the right to life, health protection, and respect for family life for the purpose of the climate cause, a normative architecture of environmental (human) rights continues to represent a very arduous enterprise. From a conceptual perspective, establishing a link between climate change and fundamental rights requires a new legal structure including identification of the "right holders" and "duty-bearers."[66] More and more, the environmental (human) rights notion is decomposed as far as right holders are concerned and thus the lacuna of legal protection of specific groups such as indigenous communities, children, woman, climate induced immigrants forms part of a global discussion on a climate and human rights.[67] Novel attempts encapsulated in

[62] Court of Appeal The Hague, 200.302.332/01, *Shell Plc v. Environmental Defense Association e.a.*, ECLI:NL:GHDHA:2024:2100.

[63] Cf. https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100.

[64] Cf. https://climatehughes.org/blog-corporate-climate-unaccountability-landmark-shell-ruling/.

[65] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending; Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760; Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, pp. 15-80.

[66] B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Brisbane 2018, pp. 209-211.

[67] Ex multis, M. Hurlbert, *Advancing Environmental Rights through Indigenous Rights* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 132-148; E. Morgera, *International Environmental Law…*, pp. 307-319; M.C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge 2012; D. Andreolla Serraglio, F. de Salles Cavedon-Capdeville, F. Thornton, *The Multi-Dimensional Emergence of Climate-Induced Migrants in Rights-Based Litigation in the Global South*, "Journal of Human Rights Practice" 2024, vol. 16, no. 1, pp. 227-247.

"*a right to All or None*" has been argued in relation to the carbon emissions.[68] Given the definitional challenges, it has been argued that the scope of a right to healthy, decent or sustainable environment could be recalibrated and focus on one medium such as water and air, which would enhance its enforceability.[69] Although there is no doubt climate change affects enjoying a variety of human rights such as the rights to life, to health, access to food and water, to one's home and family life or to a healthy environment,[70] determining the substance and boundaries of environmental, human rights *sensu stricto* remains one of the greatest challenges of most of the legal systems, including in the EU legal order which does not recognise a substantive right to a healthy environment.

Surprisingly, as demonstrated by the recent developments, one of the most successful concepts which has gone from a purely theoretical, ethical idea expanded through the international public law scholarship,[71] reaching the legally substantive constitutional level[72] and strong political dimension[73] is the concept of environmental rights of future generations including "do no harm" and the obligations and responsibilities of States. In this regard, first the German Constitutional Court judgement offered in the *Neuberbauer* case a fascinating legal construction by holding that "The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations."[74] Likewise, the BvfG judged that in its objective dimension, Art. 20a of the Basic Law "encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence."[75] Whilst the German Climate Change Act (KSA) was judged unconstitutional insofar

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[68] O. Quirico, *The Obligation to Curb Carbon Emissions: A Right for All or None* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 149-226.

[69] A. Sikora, *Constitutionalisation…*, pp. 255-276.

[70] A. Rocha, R. Sampaio, *Climate Change…*

[71] E.B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Tokyo–New York 1989; R.P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, Cambridge 2008, pp. 5-25.

[72] Bundesverfassungsgericht, *Neubauer…*; European Court of Human Rights, *Verein Klima-Seniorinnen Schweiz…*

[73] Cf. https://fitforfuturegenerations.eu/#whoweare and European Commission, *Mission Letter: Commissioner-designate for Intergenerational Fairness, Youth, Culture and Sport*, https://commission.europa.eu/document/download/c8b8682b-ca47-461b-bc95-c98195919eb0_en?filename=Mission%20letter%20-%20MICALLEF.pdf.

[74] Bundesverfassungsgericht, *Neubauer…*, para. 1 of the operative part.

[75] *Ibidem*, paras 2-4.

as it deferred major emissions reductions to 2030, therefore impacting the freedoms of future generations, the added value of this judicial decision resides in framing obligations of a State towards future generations since "those who will be most affected – naturally have no voice of their own in shaping the current political agenda"[76] through the prism of the constitutional constraints on the legislator's decisions – especially those with irreversible consequences for the environment – and a special duty of care, including a responsibility for future generations.[77] Other jurisdictions in Europe and beyond have equally been faced with claims of a duty of protection.[78] In particular, in light of available scientific reports, in the Finnish climate case[79] whilst having considered the appeal inadmissible, the Supreme Administrative Court of Finland admitted that 'climate change is a matter of life and death for humankind that threatens the conditions of living of the current and future generations on Earth, unless rapid and effective measures are taken with regard to maintaining and increasing emission restrictions and carbon sinks."[80] The Finnish Adsministative Court recalled in 2025 that "climate change poses a serious threat to the living conditions of present and future generations on Earth and thus constitutes a threat to the realisation of human rights."[81] Likewise, although the *Duarte Agostino* application before the ECtHR was dismissed as inadmissible,[82] there is no doubt new youth-related cases will be submitted both before the international and national courts.[83]

To conclude, by focusing on climate mitigation and adaptation, normative and judicial expressions of environmental (human) rights have been operationalised as instruments of pressure, a bottom-up process of a global scope. It has equally been judicially recognized that climate change constitutes a threat for both the present

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[76] *Ibidem*, para. 206.

[77] *Ibidem*, para. 229.

[78] Federal Court of Australia, *Sharma & Others v Minister for the Environment*, 2021, FCA 560 and Federal Court of Australia, *Sharma & Others v Minister for the Environment* (No 2), 2021, FCA 774, see J. Peel, R. Markey-Towler, *Recipe for Success?…*

[79] Korkein Hallinto-oikeus, *Suomen luonnonsuojeluliitto et al.*, ECLI:FI:KHO:2023:62, https://www.kho.fi/en/index/decisions/summariesofselectedprecedentsinenglish_0/eclifikho202362.html.

[80] *Ibidem*, para. 66. See K. Kulovesi et al., *Finland's First Climate Judgment: Putting the Government On Notice*, https://sites.uef.fi/cceel/finlands-first-climate-judgment-putting-the-government-on-notice/.

[81] Korkein Hallinto-oikeus, *Suomen luonnonsuojeluliitto et al.*, ECLI:FI:KHO:2025:2.

[82] European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others*, 39371/20.

[83] A. Brucher, A. De Spiegeleir, *The European Court of Human Rights' April 9 Climate Rulings and the Future (Thereof)* [in:] *The Transformation of European Climate Litigation*, "Verfassungsblog" 2024; C. Heri, *On the* Duarte Agostinho *Decision* [in:] *The Transformation of European Climate Litigation*, "Verfassungsblog" 2024.

and future generations. In this context traditional actors involved shift, new types of rights and responsibilities are being recognised and new legal tools and frameworks are needed, notably at the corporate responsibility level. Consequently, the question is to be asked how to make the most potential out of the climate and rights *momentum* and whether focusing on human dimension of rights is adequate or enough.

2. Contemplating theoretical dimension of environmental rights

2.1. Contemplating new environmental rights and climate claims

Among various critiques of environmental (human) rights, scholars argue that environmental rights are too nebulous, redundant, not easily enforceable and suffer from an anthropocentric bias.[84] In parallel, a critical aspect of advocacy in favour of substantive human rights, both within the environmental sphere and beyond, should be noted. Notably, the "multiplication of right-defining rules has not reduced, but in fact augmented the risk of violations"[85] which triggers a more universal question discussed in the legal theory notably of "what is the point of having a right? More specifically, what is the point of having an abstract right, unless you also have a way of securing whatever it is that you have a right to."[86] Finally, in a broader context of the concept of abuse of rights, A. Sajo noted that "an underlying affinity towards the absoluteness of fundamental rights is translated into the false but self-assuring belief that parliaments and courts know for sure what is the clear meaning and resulting 'extent' or scope of a right. This assumption is clearly betrayed when constitutions and courts talk about a 'core' or essential meaning of a fundamental right". In parallel, human (fundamental) rights and the rule of law are potentially considered "in ways that violate the fundamental rights of other people."[87]

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84 M. Scobie, *Framing Environmental Human Rights…*, pp. 15-16.

85 G. Palombella, *The Abuse of Rights and the Rule of Law* [in:] *Abuse: The Dark Side of Fundamental Rights*, A. Sajó (ed.), Utrecht 2006, pp. 5-27, referring to L. Pannarale, *"Quod alii nocet, et sibi non prosit, non licet"*, "Sociologia del diritto" 2001, vol. 2, p. 167.

86 O. O'Neill, *The Dark Side of Human Rights International Affairs*, "Sub-Saharan Africa" 2005, vol. 81, no. 2, pp. 427-439, referring to the famous question of E. Burke "What is the use of discussing a man's abstract right to food or medicine? Th is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics" (E. Burke, *Reflections on the Revolution in France*, London 1984, p. 1).

87 A. Sajó, *Abuse of Fundamental Rights or the Difficulties of Purposiveness* [in:] *Abuse: The Dark Side of Fundamental Rights*, A. Sajó (ed.), Utrecht 2006, pp. 29-98.

By the same token, one has to admit that the technological evolution of the modern societies, strong ecocentric and novel trends such as advocating rights of non-human entities[88] including artificial intelligence, resonate more and more.[89] Scholars indicate a globally growing role of narrative and emotional resonance in environmental and climate law which only illustrates the depth and justification of this primary legal, social and philosophical challenge.[90] Voices refer to the "constraints on the utilitarian calculus for the maximisation of human welfare" and argue for a respect for the intrinsic value of non-humans and legal rights for non-humans.[91]

Advocating human rights in relation to the climate change is indeed not free from certain paradoxes since it is precisely the human-induced climate change which is both triggering the recognition and challenging the enjoyment of human rights.[92] It is also recognised that environmental human rights build upon a "transformational shift" given that "a new and destructive human–nature relationship, is that for the first time in humanity's history, the access to a clean and healthy environment is uncertain for large groups of persons and ecosystems."[93] Whilst this paper does not fully rely on the Critical Environmental Law (CEL), it is understood as a meaningful approach to environmental law that 'exerts a radical critique of traditional legal and ecological foundations, while proposing in their stead a new, mobile, material and acentric environmental legal approach,"[94] it does refer to various analytical stances in order to critically anchor environmental rights from a climate change perspective. As argued by J. Gellers, "On the one hand, humans acknowledge the unique impact they have had on the environment and that any effort to meaningfully revise the status quo will require the demotion of human interests. On the other hand, this situation reifies the

88 M.C. Nussbaum; *Justice for Animals: Our Collective Responsibility*, New York 2023; M. Rowlands, *Animal Rights*, Cambridge 2025; W. Kymlicka, *Rethinking Human Rights for a More-Than-Human World* [in:] *More Than Human Rights: An Ecology of Law, Thought and Narrative for Earthly Flourishing*, C. Rodríguez-Garavito (ed.), New York 2024, pp. 51-110.

89 S. Vogel, *Thinking Like a Mall: Environmental Philosophy after the End of Nature*, Cambridge 2015; J.C. Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law*, London 2021.

90 Ch. Hilson, *The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature*, "Journal of Environmental Law" 2022, vol. 34, no. 1, pp. 1-24.

91 Y. Epstein, E. Bernet Kempers, *Animals and Nature as Rights Holders in the European Union*, "Modern Law Review" 2023, vol. 86, no. 6, pp. 1336-1357.

92 A. Rocha, R. Sampaio, *Climate Change…*

93 M. Scobie, *Framing Environmental Human Rights…*

94 J.C. Gellers, *Rights for Robots…*, p. 117; A. Philippopoulos-Mihalopoulos, *Actors or Spectators? Vulnerability and Critical Environmental Law*, "Oñati Socio-Legal Series" 2013, vol. 3, no. 5, pp. 854-887.

centrality of humans among members of the living order as the only beings capable of coming to this realization."[95]

Consequently, a crucial question is whether remedying environmental and climate damage by relying on environmental (human) rights is an accurate approach and whether constitutional entrenchment of intrinsic value, worthiness and dignity of Nature coupled with the meaningful obligations of States, notably anchored through the general, efficient, enforceable principles tackling climate change, would be a more appropriate approach. In other terms, is addressing a planetary crisis, in particular climate change, through human "rights" only a pattern which lends itself to accomplishment through those forms both philosophically and legally, including efficiency? Given the underlying complexity, it is important to outline the reasoning behind it, especially against the background of the novel theoretical trends which will be addressed in the next section.

2.2. Philosophical foundations

A philosophical debate about rights is of unfathomable depths and its complexity goes beyond the scope of this chapter. The key concepts are nevertheless relevant in the context of exploring a link between climate and human rights and the potential justification of the construction of "climate human/non-human rights". Advocating rights implies various theoretical sketches referring, inter alia, to interests, values and principles. Globally, "(r)ights are most often thought of either as claims to something or as protected options to act, though these categories are not exhaustive. (…) That someone has a right can provide a unique reason for action on the part of others or, less likely, the rightholder himself."[96] Whilst "(h)uman rights are the distinctive legal, moral, and political concept of the last sixty years,"[97] as famously stated by J. Raz, "(t)he nature of rights is one of the perennial topics of practical philosophy."[98] Constituting the central element of the contemporary moral and political discourse, "considerable theoretical disagreement remains regarding the nature of rights."[99] As recalled in *The Last Utopia*, human rights only emerged as a relevant practice in the 1970s and remain equally challenging today.[100]

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95 J.C. Gellers, *Rights for Robots*…, p. 117.

96 F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, Oxford 2007, p. 238.

97 R. Cruft, S.M. Liao, M. Renzo (eds), *Philosophical Foundations of Human Rights*, Oxford 2015, p. 1.

98 J. Raz, *On the Nature of Rights*, "Mind" 1984, vol. 93, no. 370, pp. 194-214.

99 J. Pallikkathayil, *Revisiting the Interest Theory of Rights: Discussion of* The Morality of Freedom, "Jerusalem Review of Legal Studies" 2016, vol. 14, no. 1, pp. 147-157.

100 S. Moyn, *The Last Utopia: Human Rights in History*, Cambridge 2010, pp. 1-10.

Although environmental ethics tries to distance itself from the anthropocentrism embedded in traditional ethical views, discussing rights in a context of a climate change would not be complete without reaching to the justification of rights through the prism of their philosophical foundations. Indeed, notwithstanding potential answers and viability of legal and theoretical preferences, there is a pure value in exploring human rights and retrieving their theoretical foundations given that "(e)ven if our foundational inquiries do not promise to yield any sort of litmus test for assessing rights claims, still the questions we face in pursuing these inquiries help to deepen and enrich our understanding of human rights."[101] It is on this premise that this chapter builds. It is equally on the "understanding premise" in particular that the link between rights and climate change that will be further contemplated.

The key trends in human rights philosophical analysis regarding the *nature of human rights*, encompass human rights as an expression of natural rights where "these are rights that all human beings possess simply in virtue of their humanity,"[102] later contested by the so-called 'political' conception of human rights where "human rights are not based on certain features of humanity; rather, the distinctive nature of human rights is to be understood in light of their role or function in modern international political practice."[103] Whilst the naturalistic and political conceptions of human rights do not seem incompatible, inevitable, primary duties and responsibilities are to be borne by the states in the context of human rights potentially "due to the primacy and justiciability of state duties in human rights law."[104] The question of the *human rights justifications* oscillates around the distinction between instrumental and non-instrumental justifications where the former amounts to view human rights "useful or essential means to realize or further valued features of human lives" notably through the prism of a good life, basic needs and agency, whilst the latter dissociates rights and interests. In the second trend, in his chapter "*Rights beyond Interests*", F. M. Kamm argues that rights "are not concerned with protecting a person's interests, but with expressing his nature as a being of a certain sort, one whose interests are worth protecting. They express the worth of the person rather than the worth of what is in the interests of that person."[105] This non-instrumental approach stands in

[101] J. Waldron, *Is Dignity the Foundation of Human Rights?*, "NYU School of Law, Public Law Research Paper" 2013, no. 12-73.

[102] R. Cruft, S.M. Liao, M. Renzo (eds), *Philosophical Foundations…*, p. 4.

[103] *Ibidem*, p. 6.

[104] *Ibidem.*

[105] F. M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, Oxford 2007, p. 271.

contract with other theories, such as the famous theory of *J. Raz* who considered that "individual interests are ground for rights and rights are grounds for duties, duties being peremptory reasons for action."[106] J. Raz also construed values as underlying rights, thus prior to rights, and dictating the scope and strength of rights.[107] Among a plethora of theories, a useful summary of conceptualising human rights reflects two approaches which rely, on the one hand, on the "the superiority of fundamental rights as moral principles over the law" (so called Moralism), and on the other a claim where "fundamental rights should be treated as any other rule, only encapsulating very important interests by way of stipulation (globally referred to as Positivism)."[108]

In parallel, scholars emphasise that "theories of what rights are have reached an impasse", in particular where "rights are construed in relation to the interests versus rights as expression of will."[109] The contestable impact of rights as peripherising other forms of social and economic justice has been equally advocated by S. Moyn in his critically fêted book entitled *Not Enough*.[110] In the EU law doctrine, new concepts are continuously advancing, such as the notable theory of M. Kumm who claims that "there are good grounds for recognizing a general right to liberty and a general right to equality. A conception of rights that shares these two features defines the 'Rationalist Human Rights Paradigm' (RHRP)."[111]

Regarding the environmental and climate dimension of the human rights debate,[112] faced with environmental crises in the 1960s and the 1970s, it was precisely a substantive change of values in connection with environment that triggered the development of environmental ethics viewed as a sub-discipline of philosophy studies which focuses on "normative and evaluative propositions about the world of nature and, perhaps more generally, the moral fabric of relations between human beings and the world we occupy"[113]. It has been argued convincingly that human rights and

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106 A. Zanghellini, *Raz on Rights: Human Rights, Fundamental Rights, and Balancing*, "Ratio Juris" 2017, vol. 30, no. 1, pp. 25-40.

107 J. Raz, *The Morality of Freedom*, Oxford 1986, p. 181.

108 L. Zucca, *Monism and Fundamental Rights in Europe* [in:] *Philosophical Foundations of European Union Law*, J. Dickson, P. Eleutheriadēs (eds), Oxford 2012, pp. 331-353.

109 J. Thomas, *Thinking in Three Dimensions: Theorizing Rights as a Normative Concept*, "Jurisprudence" 2020, vol. 11, no. 4, pp. 552-573.

110 S. Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge 2018.

111 M. Kumm, *Alexy's Theory of Constitutional Rights and the Problem of Judicial Review* [in:] *Institutionalized Reason: The Jurisprudence of Robert Alexy*, M. Klatt (ed.), Oxford 2012, pp. 201-217.

112 For an overview, see A. Savaresi, *Environment and Human Rights* [in:] *Max Planck Encyclopedias of International Law*, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1948.

113 S.M. Gardiner, A. Thompson (eds), *The Oxford Handbook of Environmental Ethics*, Oxford 2015.

environmental protection each represent "different, but overlapping, societal values" and this approach frames an opinion whereby "clearly and narrowly defined international human right to a safe and healthy environment" could accommodate objectives both in human rights law and environmental law[114]. Among various trends, environmental ethics triggered new global concepts of an "ecological footprint" on the earth[115] and by the exploration of planetary boundaries, the concept of a "safe operating space for humanity."[116] It is worth noting that human and environmental rights constitute merely a fraction of environmental ethics which discuss ecological ethos, value and meaning of nature, planetary justice, indigenous and feminist philosophies and much more.[117] Regarding human rights: "advantages of a rights-based ethical framework include the linking of ethical norms of environmental protection or stewardship with international law and commitments to promoting humanitarian objectives, which provide those norms with an institutional foundation and help narrow the gap between environmental imperatives and those with global justice imperatives and development objectives."[118] Focusing on the climate change, a three-fold concept has been advanced in negative terms noting that human rights to life, health, and subsistence are all threatened by human-induced climate change. Without pretending that human rights optics responds to "all the morally relevant aspects of climate change", "any account of the impacts of climate change which ignores its implications for people's enjoyment of human rights" is considered to be incomplete.[119] The prospects and limits of human rights as ethical constructs to address climate change and environmental threats continue to be discussed. A critical account of this approach focuses mostly on the individualistic nature of human rights (and thus the impossibility to violate rights of a collectivity) as well as the fact that "the human rights approach does not appear to add clarity or scope to standard climate ethics analyses of wrongful climate-

114 D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, "Stanford Journal of International Law" 1991, vol. 28, pp. 103-105.

115 A. Brennan, N.Y.S. Lo, *Environmental Ethics* [in:] *Stanford Encyclopedia of Philosophy Archive*, https://plato.stanford.edu/archives/sum2024/entries/ethics-environmental/, referring to Rees 1992, Wackernagel et al. 2018.

116 A. Brennan, N.Y.S. Lo, *Environmental…*, referring to Rokström et al. 2009, Biermann and Kim 2020.

117 S.M. Gardiner, A. Thompson (eds), *The Oxford Handbook of Environmental Ethics*, Oxford 2015.

118 S. Vanderheiden, *Human Rights and the Environment* [in:] *The Oxford Handbook of Environmental Ethics*, S.M. Gardiner, A. Thompson (eds), Oxford 2015, pp. 301-310.

119 S. Caney, *Climate Change, Human Rights, and Moral Thresholds* [in:] *Human Rights and Climate Change*, S. Humphreys (ed.), New York 2009, pp. 69-90.

related harm."[120] All in all, linking human rights and climate change anchored in an anthropocentric approach nevertheless offers "several potentially valuable conceptual and political tools for environmental ethics."[121]

2.3. New trends, dignity, responsibility, converging interests. Towards climate rights and climate claims.

Conceptualising environmental rights used to relate mostly to environmental ethics and dichotomy between intrinsic and instrumental value of nature,[122] which would imply situating human rights in one or another ethical dimension. However, recent studies refer to a new trend which suggests a third value category such as "relational value" where "objects of relational value should be protected as a matter of respect for human well-being and human right."[123] Relational value triggers "appreciation, concern, and responsibility toward the valuable object."[124] Among the new trends, viewing dignity and responsibility as a landing zone for both an anthropocentric and non-anthropocentric perspective of climate related rights seems worth being explored. Construing such a *landing zone* at this stage implies skipping a definitional challenge and relying on "amorphous character of dignity". As pointed out by J. Waldron, "dignity is the foundation of rights does not point us to a determinate premise. Rather, it instructs us to pay attention to questions about dignity in trying to address questions about rights; it implicates the one line of inquiry in the other."[125] Relying on dignity as a foundational value for both human and non-human rights builds thus upon "responsibility characterizations of dignity" which are "works-in-progress, just like the idea of responsibility rights that they appear to underpin."[126] As noted by M. Rosen, historically, there are three different meanings of dignity which encompass "dignity as a valuable characteristic not restricted to human beings, dignity as a high social status, and signity as behavior with a certain respect-worthy character (or indignity as behavior lacking it)."[127] Although in the Kantian approach dignity was always human dignity, M. Rosen emphasizes the link between dignity and sublimity (Erhabenheit) echoed in Kant's *Observations on the Feeling of the Beautiful and*

120 S. Vanderheiden, *Human Rights…*, p. 305.
121 *Ibidem*, p. 302.
122 A. Brennan, N.Y.S. Lo, *Environmental…*
123 A. Deplazes-Zemp, *Beyond Intrinsic and Instrumental: Third-Category Value in Environmental Ethics and Environmental Policy*, "Ethics, Policy & Environment" 2024, vol. 27, no. 2, pp. 166-188.
124 *Ibidem.*
125 J. Waldron, *Is Dignity…*, p. 122.
126 *Ibidem.*
127 M. Rosen, *Dignity: Its History and Meaning*, Cambridge 2012, p. 16.

the Sublime. Thus, "this transcendent quality Kant asserts, should inspire awe and reverence in us in a way that is analogous to the awe-inspiring power of nature when it presents us with phenomena that go beyond our powers of perception."[128] In particular, dignity of nature has been understood as "putting human aims and ambitions under moral constraint- for nature's having some worth apart from the worth that is merely attributed by human valuers-is what is meant by nature's having dignity: i.e. worthiness, some rank in the scale of things."[129] Dignity beyond humans and thus reaching to the nature and non-humans is indeed being explored in many ways.[130]

The underlying leitmotiv in this context is inspired by various attempts to redefine the relationship between Nature and humans characterising the Anthropocene which highlights the boundaries between human and nonhuman.[131] Dignity understood as ontological property is the concept deserving special attention when advancing environmental rights precisely "as it relates to personhood, status, and rights" which characterize consciousness related trait relevant in the area of AI ethics.[132] Construing dignity as a common ground echoes, without formally applying them, recent trends in the postnaturalist environmental philosophy which asserts that "[t]he distinction between humans and nature … depends on a philosophically and biologically untenable dualism that forgets that human beings themselves are part of nature and instead treats them as exceptional creatures who somehow transcend the natural."[133] In particular, S. Vogel suggests dropping the concept of "nature" and relying instead on the "environment" meant as the world that actually surrounds us, and thus replacing "nature" with "reality."[134] Yet, if such a new understanding of environment was universally accepted, it would probably blur a determination of the entity meant to be vested with environmental rights as we understand it in many legal systems. However, this paper does refer to the idea of responsibility for climate change and what S. Vogel persuasively considers restoring a "*discursive connection to others* (…). Restoring that connection, (…) might require first of all recognizing that although *I* as an individual have no way of overcoming the tragedy of the commons, *we*—the

128 *Ibidem*, p. 29.

129 F. Ferre, *Personalism and the Dignity of Nature*, "The Personalist Forum" 1986, vol. 2, no. 1, p. 109.

130 P. de Araujo Ayala, J. Sousa Correia Schwendler, *Life without Dignity? The Search for an Integrative Sense of Dignity for Nature, the Human Condition and the Non-Human Condition*, "Veredas do Direito" 2021, vol. 18, no. 42.

131 J.C. Gellers, *Rights for Robots…*

132 *Ibidem*, p. 144.

133 S. Vogel, *Thinking Like a Mall…*, p. 24.

134 *Ibidem*, p. 105.

community as a whole—might together be able to do so. And this in turn requires understanding that in a certain sense the community is, or can be, something like a collective agent, capable of a kind of moral responsibility, and that such responsibility is not merely a matter of summing the responsibilities of the individual members of the community."[135] In this regard, exercising environmental rights is a way of enforcing this "community, coordinated responsibility", where, paraphrasing B. Johnson in his essay on inconsequentialism with respect to global warming, "it's to change that social structure to make the kind of real coordination possible that will lead to actual protection of the climate."[136] Interestingly, in the *Klimaseniorinnen* judgement, whilst empahsising that climate change is a polycentric issue, ECtHR noted that "(i)ndividuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations."[137]

Against this background, dignity coupled with responsibility might arise as a "common" justification for new climate right, joint human and Nature's right construed through the prism of substantive dignity, a good life where dignity "stands for what is valuable for individuals and society at large,"[138] where rights are viewed expression of the common responsibility for tackling climate change. If a "rights based" approach is to be a viable catalyst in addressing climate change and enforcing climate related duties it could be further expounded in at least two ways.

First, a creation of new, horizontal legal instrument of *climate claims* construed as a horizontal tool of legality control can be a way forward. The *ratio* of climate claims would be to act as "emergency break" instrument allowing to either halt the legislative process for the purpose of *ex ante* control, to suspend administrative procedures such as permitting process or to raise it *ex post* in the context of judicial control, including through interim measures (judicial injunctions). Some examples in the EU legal order such as internal review under the Aarhus Regulation[139] and green claims

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135 *Ibidem*, p. 213.

136 *Ibidem*, p. 215 referring to B.L. Johnson, *Ethical Obligations in a Tragedy of the Commons*, "Environmental Values" 2003, vol. 12, no. 3, p. 284.

137 European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz…*, para. 419.

138 N. Rao, *Three Concepts of Dignity in Constitutional Law*, "Notre Dame Law Review" 2013, vol. 86, no. 1, p. 221.

139 Council Regulation 1367/2006 of Sept. 6, 2006, On the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264), pp. 13-19.

in the Commission's proposal in the field of consumer protection[140] punctually reflect the idea of reviewing the legality from a point of view of their compatibility with environmental and climate objectives. Whilst this instrument would however remain subject to various national or EU law related legal constraints, it would have an advantage of being an autonomous climate change legal tool, detached from the classical human rights law.

Secondly, a discussion about a new *climate right* as a concept applicable to human and non-human entities is to be addressed. Climate rights can be regarded from a pragmatic point of view as a *path forward*, *one of many* legal tools balancing social, economic and environmental objectives of modern societies, encapsulating active, responsible approaches to climate change dignifying both humans and Nature. As noted above, human rights are already performing a role an *instrument of pressure*, a tool relied upon before the judge, an argument voiced in the legislative process and before the stakeholders at the executive level having as an ultimate objective counteracting the triple planetary crisis. In this context, human rights are about to reach their limits precisely owing to an excessive instrumentalization. A pragmatic and broad understanding of new climate right encompassing both human and non-human entities such as Nature and artificial intelligence (AI), all unified by a supreme objective to counteract climate change, could be another avenue alleviating instrumental pressure from the human rights area and enabling sharing responsibility. The concept of *converging interests* could be a starting point for this debate. It is true that in order for the construction of climate rights to counteract climate-driven anomalies and enforce State duties in the field of environmental protection, they would potentially have to reach a certain level of uniformity and coherence at the global level in order to address the planetary dimension of a climate change. In the context of this exercise, the concept of climate rights meets responsibilities. As noted by the scholars "with great responsibility sometimes comes great opportunity. If every *environmental* challenge is now also a *human* challenge, it may be that human interests and the interests of the non- human (or, more-than-human) environment are gradually converging (…). If so, then the protection of human rights may afford new opportunities to protect the environment (and vice versa). It remains to be seen whether we are astute enough to recognise those opportunities and take advantage of them."[141]

Against this background, at the level of classical, environmental human rights, various studies show already that "protecting environmental rights has increased the

[140] Cf. https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en.

[141] W.F. Baber, J.R. May, *Introduction* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, p. 1.

support for protecting nature."[142] Also, recognition of a human right to a healthy environment is viewed as "a powerful interpretative lens to clarify the minimum content of States' international environmental obligations, the scope and extent of business due diligence, and the need for effective remedies in environmental law."[143] All in all, anthropocentric approach is already considered as "valuable conceptual and political tools for environmental ethics and politics by linking environmental imperatives with those of international humanitarian law and politics, mobilizing legal and political mechanisms that are associated with human rights objectives, and empowering a broader constituency on behalf environmental protection than might otherwise be available through rival normative approaches."[144] The modern understanding of Anthropocene reflects the intertwined relationship between human and non-human and thus "international community is in need of a new, constitution-type agreement that will redefine the relationship between humans and the rest of the community of life."[145]

3. Is the EU legal order immune to environmental rights?

3.1. The EU's green agenda and the environmental rights status quo

In recent years, one can denote an intriguing trend in the evolution of EU law, in particular in the field environmental protection and sustainability law. On the one hand, a transformation of environmental protection in the EU legal order in recent decades justifies the assertion of its constitutional status, whereby it permeates the whole of the EU legal order.[146] In parallel, the focus of the European Union translated into the massive efforts of the EU legislator was directed at the concept of the green and fair transition, net zero economy and climate neutrality objectives in the context of the EU Green Deal.[147] In this context, punctual references to access to justice

142 M. Scobie, *Framing Environmental Human Rights*…, p. 16.
143 E. Morgera, *International Environmental Law*…
144 S. Vanderheiden, *Human Rights*…, p. 302.
145 O.R. Young et al., *Goal Setting in the Anthropocene: The Ultimate Challenge of Planetary Stewardship* [in:] *Governing through Goals: Sustainable Development Goals as Governance Innovation*, N. Kanie, F. Biermann (eds), Cambridge 2017, pp. 53-74.
146 A. Sikora, *Constitutionalisation*…
147 For a recent overview, see E. Chiti, *Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process*, "Common Market Law Review" 2022, vol. 59, no. 1, pp. 19-48; N. de Sadeleer, *Environmental Law in the EU: A Pathway toward the Green Transition* [in:] *Blue Planet Law*, M.G. Garcia, A. Cortês (eds), Cham 2023, pp. 21-33.

and the right to compensation both in the field of classical environmental areas,[148] corporate sustainability,[149] green claims consumer protection,[150] and soil monitoring law[151] have been enhanced in EU legislation. More broadly, the Court of Justice of the European Union (CJEU) has contributed and consolidated the "pro-ecological" interpretation of the protective environmental standards established by various EU secondary law measures, thus making scholars refer to the "positivist approach" to rights of Nature in EU law.[152] The *Bialowieza case* and the dramatic environmental harm made the Court adopt interim measures which highlight the relevance of compliance with its decisions and the rule of law and protection of nature by stating in its order of 20 November 2017: "The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the *effective application of EU law*, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded."[153]

On the other hand, in its current state of development and notwithstanding an impressive interpretative environmental edifice of the EU Courts, the EU legal order does not recognise environmental or climate related fundamental rights, notably in view of the limits enshrined in the Charter of Fundamental Rights, in particular its Articles 37[154] and 51, the principle of conferral, as well as the rationale of direct effect of the EU directives. It is however not an isolated *status quo* since, as noted in the scholarship, the doctrine of positive obligations under the Charter is globally limited

148 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, pp. 206-247; cf. https://www.consilium.europa.eu/en/press/press-releases/2024/10/14/air-quality-council-gives-final-green-light-to-strengthen-standards-in-the-eu/.

149 Article 29 of a directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760.

150 Cf. https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-substantiating-green-claims.

151 Cf. https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-healthy-soils.

152 Y. Epstein, H. Schoukens, *A Positivist Approach to Rights of Nature in the European Union*, "Journal of Human Rights and the Environment" 2021, vol. 12, no. 2, pp. 205-227.

153 Case C-441/17 R, *Commission v Poland (Białowieża Forest)*, CLI:EU:C:2017:877, para. 102.

154 In accordance with Article 37 of the Charter, a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the European Union and ensured in accordance with the principle of sustainable development.

in the CJEU jurisprudence.[155] Consequently, in order to compensate the lack of substantive environmental rights, some novel ideas such as "compartmentalised environmental rights" (right to air or water)[156] and the non-contractual liability of the Member States to justify the legal architecture of a quasi – right to a healthy environment beyond the Charter have been explored.[157] Rare attempts of climate litigation before the EU Courts and potential breach of the Charter by the EU legislator failed owing to the admissibility criteria of access to justice.[158] It is worth recalling that the line of case law in *Janecek, Clientarth and Deutsche Umwelthilfe* where the Court confirmed the right of an individual to enforce EU environmental legislation in case of failure to transpose EU directives, does not amount to recognition of the right to clean air in EU law. In light of the case law, the individuals concerned must be able to require the national authorities, if necessary, by bringing an action before the courts having jurisdiction, to adopt the measures required under those directives.[159] The case law relies on both the direct effect and effectiveness of EU law. The doctrine of direct effect is however a horizontal EU law principle which characterises a relationship between the EU and national law without conferring a specific status to its environmental legislation. As recalled by the Court "The right recognised by the Court, stemming in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation, *does not mean* that the obligations resulting from *EU directives were intended to confer individual rights on interested persons*, and that the breach of those obligations is, in consequence, capable of altering a legal situation which those provisions sought to establish for those persons". The Court has therefore judged in the famous *JP* case that "EU clean air legislation is "not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member

155 J. Krommendijk, D. Sanderink, *The Role of Fundamental Rights in the Environmental Case Law of the CJEU*, "European Law Open" 2023, vol. 2, no. 3, pp. 616-635.

156 D. Misonne, *The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science*, "RECIEL" 2021, vol. 30, no. 1, pp. 34-45; I. Benöhr, *The Right to Water and Sustainable Consumption in EU Law*, "Journal of Consumer Policy" 2023, vol. 46, pp. 53-77. For an overview, see A. Sikora, *Constitutionalisation*…, pp. 255-276.

157 Case C-61/21, *Ministre de la Transition écologique and Premier ministre (Responsabilité de l'État pour la pollution de l'air)*, ECLI:EU:C:2022:1015. See also in this volume chapter by M. Baran.

158 Case C-565/19 P…

159 Case C-404/13, *ClientEarth*, EU:C:2014:2382, para. 56; Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para. 56 is not capable of altering that finding.

State". Yet, nothing prevents the EU legislator from adopting new acts which "*are intended to confer individual rights on interested persons*".

The Charter continues to perform a telling role in the context of environmental litigation before the EU Courts.[160]

First, concepts of sustainable development and high level of protection of the environment is expounded in the case law by relying jointly on the provisions of Article 3 TEU, Article 37 of the Charter, the first subparagraph of Article 191(2) TFEU.[161] Driven by a general ambition of addressing and preventing water pollution, in particular in the area of water pollution by nitrates from agricultural sources, in the case *Wasserleitungsverband*, the Court highlighted that under Article 37 of the Charter, Article 3(3) TEU and Article 191(2) TFEU, the EU policy on the environment aims at a high level of protection.[162] In the case *CEZ* the Court interpreted Directive 2010/75, in the light of Article 191 TFEU and Articles 35 and 37 of the Charter, as meaning that "the Member States are required to provide that the prior assessment of the effects of the activity of the installation concerned on the environment and on human health must be an integral part of the procedures for granting or reconsidering a permit to operate such an installation under that directive."[163] This joint interpretation has already been denoted in the scholarship as a potential sign of a new, horizontal principle of high level of protection of the environment in EU law, thus going even beyond the EU environmental policy.[164]

Secondly, the CJEU explores various links between Articles 35, 37 and 38 of the Charter, which seek to ensure a high level of human health, environmental and consumer protection, respectively and are regularly relied upon, equally jointly with Article 13 TFEU, regarding the protection of animal welfare recognised by the Union as an objective of general interest.[165] Article 37 of the Charter is mostly relied upon in the process of interpretation[166] and sometimes validity control of EU law.[167] Well known examples of such "ecological interpretation" encompass nature conservation, legislation, environmental impact assessment, water pollution, ambient air standards

[160] J. Krommendijk, D. Sanderink, *The Role of Fundamental Rights…*, pp. 616-635.

[161] Opinion of A. G. Kokott in case C-444/15, *Associazione Italia Nostra Onlus*, ECLI:EU:C:2016:665.

[162] Case C-197/18, *Wasserleitungsverband Nördliches Burgenland*, EU:C:2019:824, para. 49.

[163] Case C-626/22, *CZ and others*, EU:C:2024:542, para. 66.

[164] A. Sikora, *Constitutionalisation…*, pp. 158-161.

[165] Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031, para. 63; Case C-13/23, *cdVet Naturprodukte GmbH*, EU:C:2024:175, para. 49.

[166] Ex multis, Case C-197/18…

[167] Case C-444/15…; Case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742.

etc. where the Court often establishes a link between the objectives of environmental EU legislation and Article 37 of the Charter to ground the rationale of its decision-making in the EU constitutional framework, which led commentators to discuss the concept of "ecological rule of law."[168] In its recent case law, in judgement *One Voice, Ligue pour la protection des oiseaux*, the Court recalled that the Birds Directive "comes within the framework provided for both in Article 3 TEU and in Article 37 of the Charter,"[169] and judged that "that directive must be understood as meaning that it can be satisfied, in the case of a non-lethal method of capture leading to by-catch, only if that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally, for a limited period, and only if those specimens can be released without sustaining harm other than negligible harm."[170] In the field of environmental impact assessment, in the case *A and Others*, after having recalled that that Directive 2001/42 includes not only the preparation and adoption of 'plans and programmes', but also their modifications,[171] the Court emphasised that Directive 2001/42 comes within the framework established by Article 37 of the Charter.[172] Likewise, the Court relies jointly on Articles 37 and 35 of the Charter having regard to the link between the protection of the environment and that of well-being and human health. In a recent Grand Chamber judgement in case *CZ and others* concerning the EU legislation in area of industrial emissions the Court highlighted that directive 2010/75 "contributes to protecting the right to live in an environment which is adequate for personal health and well-being."[173] The Court interpreted thus directive 2010/75 "as meaning that the Member States are required to provide that the prior assessment of the effects of the activity of the installation concerned on the environment and on human health must be an integral part of the procedures for granting or reconsidering a permit to operate such an installation under that directive."[174]

Regarding Article 47 of the Charter, it is true it was relied upon in a groundbreaking judgement *Deutche Umwelthilfe* consolidating the pro-ecological interpretation of the EU secondary law measures from the point of view of enforcement and efficiency of the EU law protective environmental standards.[175] However, this

168 F. Lecomte, *The Contours of Ecological Justice before EU Courts in the Light of Recent Case-Law*, "ERA Forum" 2021, vol. 21, pp. 737-751, referring to K. Bosselmann, *Ökologische Grundrechte*, Baden-Baden 1998, pp. 47-53.

169 Case C-900/19, *One Voice, Ligue pour la protection des oiseaux*, EU:C:2021:211, paras 60-65.

170 *Ibidem*, para. 65.

171 Case C-24/19, *A and Others*, EU:C:2020:503, paras 43-44.

172 *Ibidem*, para. 44.

173 C-626/22…, para. 72.

174 *Ibidem*, para. 105.

175 Case C-752/18…

"*Arm Wrestling around Air Quality*"[176] judgement must be viewed through the lenses of the principle of effective judicial protection and the right to an effective remedy enshrined in Article 9(4) of the Aarhus Convention, notably in the case of the environmental organisations, and did not contemplate substantive environmental rights. Finally, new challenges before the EU Courts regarding the control of validity of the Union's green agenda measures continue to rise. Recent cases concern notably sustainable finance and the European Commission decision to add aviation and shipping criteria to the EU Taxonomy[177] as well as greenhouse gas emissions allocations under the Effort Sharing Regulation.[178]

3.2. The EU Court of Justice under pressure? Lessons learnt from the ECtHR Klimaseniorinnen?

The CJEU has not yet directly engaged in environmental rights and classical climate change litigation, including through the derived environmental rights doctrine shaped in the case law of the ECtHR. This judicial attitude is however exposed to the new, legal reality following the recent judgement of the ECHR judgment in case *Klimaseniorinnen*.[179] Indeed, in this groundbreaking case, the ECtHR for the first time established a link between climate change and human rights by stating that "Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life." *Klimaseniorinnen* forms part of the constitutional, environmental judicial conversations throughout the world regarding both greening human rights and determining positive obligations of States in the era of climate change.[180] In particular, according to its Preamble, the Charter reaffirms the rights as they result in particular from the constitutional traditions and international obligations which are common to the Member States, the European Convention on Human Rights and the case-law of the Court and of the European Court of Human Rights. Thus, claiming relevance of fundamental rights in environmental context is a *way* to make

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176 D. Misonne, *Arm Wrestling around Air Quality and Effective Judicial Protection: Can Arrogant Resistance to EU Law-related Orders Put You in Jail? Judgment of the Court (Grand Chamber) of 19 December 2019 in Case C-752/18 – Deutsche Umwelthilfe eVvFreistaat Bayern*, "Journal for European Environmental & Planning Law" 2020, vol.17, no. 4, pp. 409-425.

177 See pending Case T- T-449/24, *Dryade and Others v Commission*.

178 See pending Case T-120/24, *Global Legal Action Network and CAN-Europe v Commission*.

179 European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz…*

180 N. de Arriba-Sellier, *Symposium: Climate Protection as a European Fundamental Right under the ECHR and beyond*, 2024, https://eulawlive.com/symposia/climate-protection-as-a-european-fundamental-right-under-the-echr-and-beyond-demo/.

environmental protection become a new constitutional paradigm of the Union or, at least, a way to demonstrate a constitutional dimension of environmental protection in EU law. In particular, whilst Article 37 of the Charter does not enshrine a substantive right to healthy environment, paradoxically, the Charter contains this environmental provision which is absent in the European Convention of Human Rights. The CJEU could therefore draw an inspiration from the ECHR case law of derived environmental rights by relying on an added value on Article 37 in conjunction with other provisions of the Charter such as right to life and respect for private and family life. Against this background, Article 37 of the Charter should be seen beyond the Charter based dichotomy between rights and principles. Article 37 of the Charter can equally contribute to the consolidation of the principles and duties in EU law going beyond fundamental rights area and going beyond the EU environmental policy measures.

This *Klimaseniorinnen* judgement is crucial for the Union since by virtue of Article 52(3) of the Charter, rights in the Charter which correspond to rights guaranteed by the European Convention on Human Rights should be given the same meaning and scope as those laid down in the Convention. Also, the Union's accession to the Convention seems to progress.[181] In this context it is worth recalling the jurisprudential *Bosphorus principle* relying on a presumption that the EU Member States' actions that comply with EU law cannot be considered as breach of the Convention. Protecting environmental fundamental rights in the Union is therefore of outmost importance to consider that an equivalent level of protection is established in the Union's law. What matters most, however, is the *constitutional entrenchment* of *environmental* considerations at the level of the Union, both in its autonomous dimension and based on the common constitutional traditions of the Member States. A preliminary ruling asking for the consequences of the *Klimaseniorinnen* for the EU legal order is to come. Leveraging Article 37 of the Charter of Fundamental Rights, in conjunction with derived environmental rights established under the European Convention on Human Rights, offers a promising pathway to align EU jurisprudence with emerging global standards. *Klimaseniorinnen* could however also trigger novel EU secondary law measures or ultimately an amendment of the EU primary law. Indeed, it boils down to the question of whether the CJEU should, one more time, bear the responsibility of judicial creativity, this time in the field of greening the EU fundamental rights? Counting on the EU Courts to fill a tangible gap in relation to the substantive right to the healthy environment may trigger serious consequences

[181] F.R. Agerbeek, *EU Accession to the European Convention on Human Rights: A New Hope*, "European Papers" 2024, vol. 9, no. 2, pp. 695-713.

and critics against its role in the EU legal order, including from the principle of conferral angle. Also, this creation is not formally required by the future Union's accession to the ECHR. As noted in the introductory part of this chapter, challenging existing legal and philosophical *status quo* in the era of climate change implies reinventing foundational reasoning underpinning rights in a broad sense including understanding their purpose, scope and feasibility. The *Klimaseniorinnen* judgement could be perfectly relied upon in a constitutional context leading to the novel legal instruments addressing climate change in EU law.

4. Conclusions

In the changing reality of the modern politics and economy, one should not disregard conflicting trends in order to situate both environmental rights and climate change discourse. The green agenda is constantly under stress in many respects and the same fluctuation concerns reliance on existing human rights in a climate change debate. The discourse on environmental (human) rights in the context of climate change reveals a dynamic interplay between evolving legal principles and the pressing demands of a global ecological crisis. This chapter has explored the conceptual, judicial, and normative dimensions of environmental (human) rights, emphasising their current evolution into instruments of pressure against states and corporate actors. Human rights have emerged as pivotal tools for driving climate action. The progressive operationalisation of these rights underscores their dual nature: they are rooted in ethical and philosophical principles while simultaneously serving pragmatic objectives in climate litigation. Judicial interpretations, particularly those linking environmental degradation to fundamental rights such as life and health, highlight the growing importance of these rights in reshaping legal and policy frameworks. Yet, climate driven legal instruments are at a critical juncture, including the core of their theoretical and legal architecture. While significant strides have been made in their normative and judicial expressions, their potential should be further explored in fully addressing the challenges of the Anthropocene. At the theoretical level, addressing the planetary crisis requires a holistic approach that transcends traditional anthropocentric paradigms. Concepts such as dignity and responsibility offer a normative foundation for integrating human and non-human rights into the new area of new legal instruments. By framing climate rights as expressions of collective responsibility, legal systems can better address the interconnectedness of ecological and social justice.

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The Bad Condition of the Environment as the Grounds for Liability of the State Treasury

Reflections on the Background of the Resolution by Polish Supreme Court of 28 May 2021 in the Case III CZP 27/20

Abstract: A recent trend in environmental protection, noticeable in particular in relation to the climate, consists in asserting claims through the channel of fundamental rights. A side path of that bumpy road has also appeared before Polish courts, resolving cases of smog disputes where claimants alleged that the level of air pollution, obviously infringing respective provisions (notably CAFE directive), contravenes their right to a clean environment which should be perceived as belonging to a wide array of personal rights granted legal protection by civil law. After a few judgments in favor of celebrities invoking such a right, the Polish Supreme Court issued the resolution that expressly denied the possibility to recognize the environment as a personal interest and, apparently, put an end to a possible avalanche of similar claims. It said that the right to live in a clean environment is not a personal right – however, at the same time, shared the view that health, freedom, privacy are protected as personal rights, and infringement of air quality standards set out in the law may result in violation of these rights. Although smog cases are related to air protection, consequences of the resolution of the Supreme Court obviously exceed far beyond the scope of problems with air quality, and may be extrapolated to the environment as a whole. The present article constitutes an attempt to ponder the concepts of perceiving the environment as a subject of rights, in particular of a personal right, and to draw conclusions related to obstacles and incentives accompanying such trends, as well as their advantages and drawbacks.

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Keywords: right to the environment, right to clean environment, personal rights, personal interests, smog, liability of State Treasury

1. Introduction

A traditional depiction of environmental law as the sphere of legal regulation encompassing all the legal norms having environmental protection as its object, is focused on emphasizing the specificity of the object of protection, founded on the distinction of protected goods (the environment, its particular resources, protection of human life and health) and identification of certain threats (for instance waste, noise, electromagnetic fields or chemicals). At the same time, it should be noticed that usually the protection of particular elements of the environment, or of the environment as a whole, is justified in particular by anthropocentric considerations, invoking, sometimes even expressly, economic criteria and stating that the environment may be ascribed an economic value.[2] The relationship between a man and the environment is embodied in the possibility of satisfying his life needs, including personal necessities and the use of the environment for economic purposes. Use of environmental resources is not only beneficial, but also indispensable, as far as the functioning of a man, whose life is determined by environmental conditions, is concerned. The natural environment 'delivers' many factors of production that are used for the purpose of leading economic activity; at the same time, it creates conditions for functioning and leading commercial activity and, last but not least, is the recipient of pollution resulting from such activity of a man.[3] From that point of view, the environment is perceived as performing functions of a 'supplier' of production factors, a service and a condition.[4]

The notion of the environment itself is attributed a very broad scope: it is said that the environment encompasses both the natural environment, as well as the environment being the product of an activity of a man, whereas elements of that notion comprise a man, fauna, flora, soil, water, air, climate, landscape, material resources and cultural heritage, natural surroundings and natural resources, water resources, parts of social surroundings of a man, pertaining to social conditions of life of an individual

[2] A. Gillespie, *International Environmental Law, Policy and Ethics*, Oxford 2014, p. 25.
[3] H. Manteuffel Szoege, *Problems of Environmental and Natural Resources Economics*, Warsaw 2013, p. 8.
[4] A. Graczyk, *Instrumenty rynkowe polityki ekologicznej. Teoria i praktyka*, Wrocław 2013, p. 75.

and of the society. The law of the environment construed in such a manner also regulates problems of waste and energy supplies.[5] Thus, the scope of environmental law is deemed to be 'all-embracing.'[6] When taking actions aimed at environmental protection, a man actually acts in his best interests, having some expectations with regard to the environment; the expectations that correspond with numerous functions of the environment. More and more frequently, these expectations cannot be fully satisfied, due to the worsening state of the environment. The Anthropocene is commonly said to be a new epoch in the history of the Earth, whereby the overwhelming and, alas, destructive influence of man on the natural environment is particularly noticeable. That condition generates deepening problems in the functioning and activity of men, related in particular to pollution and the resulting devastation of ecosystems.

At the same time, there is currently the dynamic development of environmental law; the number of regulations of that domain seems to rise by a geometric progression. Modern environmental law features multiple structure of provisions and legal acts. However, it should be pointed out that the aforementioned increase in terms of quantity has not been accompanied with similarly significant changes in terms of quality, of the environment itself. The manner of implementation and ramifications of legal norms of environmental law are often called into question as inadequate, when juxtaposed with the intended objectives.[7]

There may be perceived recently invoked, both in courts' rulings, as well as in literature, postulates for adoption of a different look at the environmental law. Namely, they refer to the approach focused on the problem of adequate protection of rights of individuals in environmental protection. In the age of growing threats for the natural environment, stronger and stronger voices are raised, pointing out the need to take into consideration not only already deeply rooted rights of individuals in various proceedings related to environmental protection, but also the substantive right of an individual in environmental protection (the right to environment), formulated for instance as the right to a clean environment or the right to live in the environment

[5] M.M. Kenig-Witkowska, *Prawo środowiska Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2011, p. 13.

[6] L. Krämer, *EU Environmental Law*, London 2012, pp. 1-4.

[7] See for instance: N. Gunningham, *Enforcing Environmental Regulation*, "Journal of Environmental Law" 2011, vol. 23, no. 2, pp. 200-201, as well as L.J. Kotzé, *Arguing Global Environmental Constitutionalism*, "Transnational Environmental Law" 2012, vol. 1, no. 1, p. 201; about the law of the European Union in such a manner S. Kingston *Surveying the State of EU Environmental Law: Much Bark with Little Bite?*, "International & Comparative Law Quarterly" 2013, vol. 62, no. 4, p. 982.

ensuring the physical and mental health of an individual.[8] Some say that such a reversal of the point of view – from the environment as the object of protection to an individual (and his right to environment) – may, paradoxically, contribute to an intensification of efforts within the scope of preservation, protection and improvement of quality of the natural environment, because that newly adopted point of view focuses on mutual relations between a man and the environment. Others take the opposite position, saying that such a point of view reinforces anthropocentric dimensions of environmental protection with no positive ramifications for the environment.

The trend in question is reflected in a growing number of cases initiated to assert claims through the channel of fundamental rights. A side path of that bumpy road has also appeared before Polish courts, resolving cases of smog disputes where claimants alleged that the level of air pollution, obviously infringing respective provisions (notably CAFE directive),[9] contravenes their right to a clean environment which should be perceived as belonging to a wide array of personal rights[10] granted legal protection by civil law. After a few judgments in favor of celebrities invoking such right, Polish Supreme Court issued the resolution[11] that expressly denied the possibility to recognize the environment as a personal right and, apparently, put an end to a possible avalanche of similar claims. It said that the right to live in a clean environment is not a personal right – however, at the same time, shared the view that health, freedom, privacy are protected as personal rights, and infringement of air quality standards set out in the law may result in violation of these rights. Although smog cases are related to air protection, consequences of the resolution of the Supreme Court obviously exceed far beyond the scope of problems with air quality, and may be extrapolated to the environment in general. The present article constitutes an attempt to ponder the concepts of perceiving the environment as a subject of rights, in particular of a personal right, and to draw conclusions related to obstacles and incentives accompanying such trends, as well as their advantages and drawbacks. Considerations are led according to the following structure: 1) the first part of the article is devoted to an endeavor to discover the essence of the right to clean environment from a theoretical point of view; 2) the second part analyzes the current state of the law with special

[8] In further considerations I am going to use the phrase 'the right to clean environment' for simplification purposes and because it seems the most widespread construction.

[9] *Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on Ambient Air Quality and Cleaner Air for Europe*, "Official Journal of the European Union" 2008, L 152/1, pp. 1-44, as amended.

[10] In Polish 'dobra osobiste'. In English they are usually referred to as 'personal interests' or 'personal rights'.

[11] Resolution of the Supreme Court of 28 May 2021, case reference number III CZP 27/20.

emphasis on the Polish legal order as regards existence and perception of the right to a clean environment; 3) the third part examines the notion of personal rights and the possibility of qualifying the right to a clean environment as one of the personal rights (and the environment as a subject of a personal right), starting from a theoretical analysis and then passing to discussion about the aforementioned resolution of the Supreme Court issued in smog litigation; 4) the fourth part presents current possibilities of asserting liability in damages of the State Treasury in the Polish legal order after the resolution in question, denying the right to a clean environment the status of a personal right; this part attempts to assess their viability bearing in mind the premises required for pursuing each available path. The article ends with conclusions concerning the impact of rejecting the possibility of recognizing the right to a clean environment as a personal right on the quality of the environment.

2. Right to a clean environment from a theoretical perspective – an attempt to grasp the essence

The right of an individual to environment has been placed within the third generation of human rights, encompassing solidarity rights, called in such a manner due to the fact that their effective exercise requires common and solidary efforts.[12] In the classic concept of human rights that right was not included at all, because in the past, due to the lack of obstacles in use of unpolluted environmental elements, no value was attributed thereto.[13] It is significant that the issue of distinction of the right to environment appeared in connection with the worsening condition of the natural environment. It was raised by K. Vasak who invoked the right to environment consisting of specific rights, such as the right to a decent environment (fr. *le droit à en environnement décent*), the right to clean water (fr. *le droit à l'eau pure*) or the right to clean air (fr. *le droit à l'air pur*).[14] From time to time, also currently in the literature there are distinguished substantive specific rights, referring to individual elements of the natural environment – such as the right to natural resources, the right to water, the right

[12] Ł. Baratyński, *Problem prawa do środowiska w międzynarodowym systemie ochrony praw człowieka*, Kielce 2015, p. 77.

[13] W. Radecki, *Prawa i obowiązki obywatela w dziedzinie ochrony środowiska*, Katowice 1991, p. 14; K. Urbańska, *Prawo podmiotowe do dobrego środowiska w prawie międzynarodowym i polskim*, Poznań 2015, p. 23.

[14] See: K. Urbańska, *Prawo podmiotowe…*, p. 23; L. Karski, *Prawa człowieka i środowisko*, „Studia Ecologiae et Bioethicae" 2006, vol. 4, p. 312.

to food or the right to land belonging to indigenous people.[15] However, proponents of recognition of a substantive right to environment confine themselves far more often to indication of the only one general right.[16] In my opinion, both standpoints are reasonable, so that we may perceive the right to environment as a bundle of rights related to particular environmental components.

What is more contentious is that the right in question is denominated in many different ways; as 'the right to environment', 'the right to a good environment', 'the right to a clean environment' or 'the right to a healthy environment' and the actual meaning of such notions is definitely not obvious. Each such formulation remains open for interpretation with regard to its scope and content.[17] As pointed out by the doctrine,[18] such right *would give courts much leeway and flexibility in defining the right and applying it to the facts of each case*.

As far as the Polish legal order is concerned (as opposed to the European Union law) there is a uniform legal definition of the environment – namely, article 3.39 of the Environmental Law[19] defines the environment as *all natural elements, including those transformed by human activity, in particular the earth's surface, minerals, water, air, landscape, climate and other elements of biological diversity, as well as the interactions between these elements*. However, we do not have any legal definitions of good, clean or healthy environments.[20] I would say creation of such definitions without reliance on some quality standards would be bound to fail. A literal interpretation would lead us astray, suggesting that an environment with even a slight contamination is no longer clean or healthy. On the other hand, confining oneself not to use any adjective to determine the state of the environment we expect would deprive the notion in question of any actual meaning. An environment without any requirements as to its quality is always available. Therefore, I deem it reasonable to construe the right to clean, good

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15 See, for instance, L. Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, Leiden–Boston 2011, pp. 137-153.

16 On the theoretical concept of the uniform right to environment vested with an individual see: J. Trzewik, *Publiczne prawa podmiotowe jednostki w systemie prawa ochrony środowisk*a, Lublin 2016, pp. 193-249.

17 B. Lewis, *Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection*, "Macquarie Journal of International and Comparative Environmental Law" 2012, vol. 8, no. 1, p. 37.

18 S. Atapattu, *The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment under International Law*, "Tulane Environmental Law Journal" 2002, vol. 16, no. 1, p. 112.

19 Act of 27 April 2001 – the Environmental Law, uniform text OJ 2024, item 54, as amended.

20 See also E. Radecka, *Is the Right to Live in an Environment with Clean Air a Personal Interest? Selected Issues*, "Acta Universitatis Carolinae. Iuridica" 2022, vol. 68, no. 1, p. 110.

or healthy environment as the right to environment (according to the legal definition quoted hereinabove), the components of which fulfil quality standards prescribed by the law.

But the theoretical right to a clean environment is like a ghost without flesh; to embody it, we have to search for its actual expression in the domain of the law.

3. The right to a clean environment – the current state of the law with special emphasis on the Polish legal order

Emerging of the right to a clean environment is visible on various levels, although the actual existing right may be perceived in acts of soft law. For instance, in the Stockholm Declaration of 1972[21] it was indicated that a man *has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (the first principle). Some authors say that it was the first international document recognizing the right to clean environment[22]. However I would rather be inclined to agree with the assessment of S. Atapattu who wrote that the provision *recognizes that an environment of a particular quality is necessary for man to enjoy his fundamental rights to freedom, equality, and adequate conditions of life. This is different from recognizing an independent right to a clean environment. This formulation falls within the second distinction made above, namely, a healthy environment being necessary to enjoy other basic human rights. Therefore, the Stockholm Declaration falls short of recognizing an independent fundamental right to a clean environment*.[23]

Binding acts of international law dealing with human rights do not include at all any right to environment in any wording whatsoever; nevertheless, individuals are indirectly protected by competent bodies in the context of other rights, such as the right to life or the right to respect for private and family life. As indicated in the literature, there should be emphasized a special role of the environment in the sphere of shaping conditions for observance of human rights, in particular the right to life and health protection, since the relationship of a man with the environment

[21] United Nations, *Report of the United Nations Conference on the Human Environment*, Stockholm 1972, https://documents.un.org/doc/undoc/gen/nl7/300/05/pdf/nl730005.pdf (20.09.2024).

[22] See, among others, M. Bagier, *Protection of the Right to Clean Air under the Polish Civil Code*, "Transformacje Prawa Prywatnego" 2022, vol. 2, p. 7, and L. Karski, *Prawa człowieka*…, p. 317.

[23] S. Atapattu, *The Right*…, p. 74.

consists in satisfying life necessities.[24] In such a context, there should be invoked rulings of the European Court of Human Rights which has repeatedly assessed the impact of environmental pollution on the right of an individual to private and family life and accommodation. In particular, the Court in Strasbourg claimed that significant pollution of the environment may negatively affect the well-being of an individual (even despite the lack of determining a serious risk for health, created by such pollution) and hinder use of a dwelling,[25] pollution of the environment and the noise influence the right of an individual to private and family life,[26] whereas a state bears liability also when pollution is caused by private entities, if the state regulates their activity improperly or if regulations are adequate, but the state has not enforced them.[27] From time to time, the Court referred to the right to life, enshrined by article 2 of the Convention, an environmental context. However, not every situation of negative environmental impact is construed by the European Court of Human Rights as amounting to state liability for infringement of basic rights resulting from the European Convention on Human Rights.[28] For instance, as the court considering the situation of noise due to functioning of an airport and reproach against local authorities which did not establish a system limiting the noise indicated in the case *Hatton*,[29] there is a margin of discretion vested with public authorities to achieve the objectives set forth by the Convention. Interferences with the environment should be based on balancing economic interest and human rights, which the Court deemed to be done properly when the airport in question was extended. Moreover, the Court expressly stated in *Kyrtatis*[30] that neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such. Still, the development of judicial decisions of the Court in Strasbourg

[24] K. Urbańska, *Prawo podmiotowe…*, p. 60.

[25] See for instance the ruling of the European Court of Human Rights, *Case of Lopez Ostra v. Spain (Application no. 16798/90)*, Strasbourg 1994, as well as the ruling of the European Court of Human Rights, *Case of Guerra and Others v. Italy (116/1996/735/932)*, Strasbourg 1998.

[26] See for instance the ruling of the European Court of Human Rights, *Case of Apanasewicz v. Poland (Application no. 6854/07)*, Strasbourg 2011.

[27] See for instance the ruling of the European Court of Human Rights, *Case of Giacomelli v. Italy (Application no. 59909/00)*, Strasbourg 2006.

[28] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome 1950, pp. 5-32, https://www.echr.coe.int/Documents/Convention_ENG.pdf (20.09.2024).

[29] The ruling of the European Court of Human Rights, *Case of Hatton and Others v. The United Kingdom (Application no. 36022/97)*, Strasbourg 2003.

[30] The ruling of the European Court of Human Rights, *Case of Kyrtatos v. Greece (Application no. 41666/98)*, Strasbourg 2003.

is symptomatic in particular bearing in mind the fact of the lack of an expressly conveyed right to the environment in the European Convention on Human Rights – which, however, is considered a living instrument, construed taking into account currently existing circumstances. As pointed out by researchers, *without doubt, the Court's case law represents a significant contribution to the development of environmental rights in international law*.[31] Although definitely looking at the environment through the lenses of human rights reinforces the perceived position of the environmental law, it was noticed by the doctrine that *we may be sure that the protection of the environment will be granted by the human rights law to the extent in which the environment will be found useful for assuring the protection of human well-being. This surely limits the scope of the protection of the environment by the human rights law*.[32] It is hard not to agree with such a conclusion. Also, as noticed in literature, no case examined by the European Court of Human Rights concerned such widespread occurrence as the air pollution in Poland. Such a case is significantly different from situations where states issued wrong administrative decisions allowing for too high of an emission or did not exercise proper supervision over the given business undertaking, which are the typical environmental cases resolved by the ECHR.[33]

At present, the only act of binding legal force at the international level applicable in Europe where the right to environment has been expressed is the Aarhus Convention.[34] The preamble says that *every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations*. The right to a clean environment is also proclaimed in the operative part of the Aarhus Convention. In light of its article 1: *In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.* However,

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[31] O.W. Pedersen, *The European Court of Human Rights and International Environmental Law* [in:] *The Human Right to a Healthy Environment*, J.H. Knox, R. Pejan (eds), Cambridge 2018, p. 96.

[32] J. Ciechanowicz-McLean, M. Nyka, *Prawa człowieka i środowisko*, "Przegląd Prawa Ochrony Środowiska" 2012, vol. 3, p. 87.

[33] R. Szczepaniak, *Odpowiedzialność odszkodowawcza władz publicznych za skutki zanieczyszczonego powietrza. Glosa do uchwały Sądu Najwyższego – Izba Cywilna z dnia 28 maja 2021 r., III CZP 27/20*, "Orzecznictwo Sądów Polskich" 2022, no. 6, pp. 13-14.

[34] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus 1998, https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (20.09.2024).

that provision refers to the aforementioned subjective somehow right on the margin, not specifying its essence or basic elements. Neither at the level of the European Union is there a formulation in a clear and unambiguous manner of the right of an individual to environment; the lack of such right is especially noticeable in the Charter of Fundamental Rights of the European Union.[35]

Bearing in mind the current state of affairs as regards the presence of the right to environment in international law, it is said that the right in question is on the stage of soft law.[36] The current tendency is favorable to the reinforcement of such a right. Some researchers invoke that *just as there is a strong moral case for the existence of a right to a healthy environment, the development of international law and doctrine supports the claim that the right is already part of customary international law*.[37] More and more numerous threats for the environment lead to development of new initiatives, underlining the significance of already existing regulations concerning rights of individuals, but also advocating introduction (extension) of a catalogue of devices intended for protection of subjective rights. An example of such an initiative is the draft of the Global Pact for the Environment[38] where, apart from principles of environmental law stated in the law of the European Union or Polish law (the principle of integration, the principle of sustainable development, prevention, precaution, 'polluter pays' principle), procedural rights within the scope of access to information, taking decisions and access to justice in environmental matters or the duty to care for the environment, *the right to live in an ecologically sound environment adequate for* (…) *health, well-being, dignity, culture and fulfilment* is formulated (article 1 of the draft of the Pact).

A fairly optimistic picture as far as the proclamation of the right to a clean environment is concerned results from the juxtaposition of constitutions of various states. According to D.R. Boyd, such a right enjoys direct constitutional protection in one hundred countries.[39] Although Poland is not one of them, the Polish Constitution[40]

[35] Charter of Fundamental Rights of the European Union, OJ EU C.2007.303.1. of 14 December 2007.

[36] J. Ciechanowicz-McLean, *Aktualne problemy nauki prawa ochrony środowiska*, "Studia Prawnoustrojowe" 2019, vol. 43, p. 47.

[37] C. Rodríguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations* [in:] *The Human Right to a Healthy Environment*, J.H. Knox, R. Pejan (eds), Cambridge 2018, p. 160.

[38] The draft is available at the website: https://globalpactenvironment.org/uploads/EN.pdf (20.09.2024).

[39] D.R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment* [in:] *The Human Right to a Healthy Environment*, J.H. Knox, R. Pejan (eds), Cambridge 2018, p. 18.

[40] The Constitution of the Republic of Poland of 2 April 1997, "Journals of Laws" 1997, no. 78, item 483, as amended.

in a wide array of its provisions refers to the environment. The very fact that environmental protection is made one of systemic bases of the Republic of Poland (article 5 of Polish Constitution) clearly demonstrates how great significance is associated therewith by the legislator. Environmental protection is also one of reasons justifying the limitation of rights and freedoms of a man (article 31(3) of the Constitution). The Constitution imposes some duties on public authorities, having the programmatic character, i.e. leading policy ensuring ecological security of present and future generations and a general obligation to protect the environment (article 74(1) and 74(2) of the Constitution). Apart from the aforementioned, the Constitution sets forth two more concrete duties that are conjugated with a right of an individual, i.e. the duty to make information about the condition and protection of the environment available to individuals – the subjective right to information (article 74(3) of the Constitution), as well as the duty to support the actions of citizens aimed at protection and improvement of the condition of the environment – the right to gain support within that scope by citizens (article 74(4) of the Constitution). As the Polish Constitutional Tribunal stated, constitutional provisions related to the environment allow for establishing that a healthy environment is one of constitutional values, and interpretation of the Constitution should be performed bearing in mind such a value – nevertheless, the Constitution does not guarantee the subjective right to live in healthy environment.[41] In literature, however, there appear attempts to derive the subjective right to environment, vested with an individual, from the constitutional stipulations quoted above.[42] Among principal arguments for 'continuity' of the right to environment as the subjective constitutional right, it is invoked particularly often that it would be hard to assume that as a result of the entry into force of the Polish Constitution the regression in protection of rights and freedoms of an individual could take place. Article 71 of the Constitution of 1952, in the wording binding as at 31 December 1989,[43] stated that citizens of the Republic of Poland were vested with **the right to use the values of the natural environment**, and encumbered with a duty of its protection. Such an argument is definitely one of the most forceful ones. However, in my opinion it cannot outweigh the lack of any referral to such right in the currently binding Constitution.

However, although the subjective right to environment is not expressly mentioned among constitutional rights and freedoms of an individual, it is unambiguously

41 Ruling of the Constitutional Tribunal of 13 May 2009, case reference number Kp 2/09.

42 See, on a broader extent, L. Karski, *Prawa człowieka…*, pp. 320-324.

43 The Constitution of the Republic of Poland enacted by the Seym on 25 July 1952, "Journals of Laws" 1976, no 7, item 36, as amended; see, on a broader extent, J. Trzewik, *Publiczne prawa…*, p. 189.

declared in ordinary legislation, in particular in article 4(1) of the Environmental Law. Moreover, in a current shape, resulting from the ordinary legislation, the right to use the environment is broader in its scope than the one guaranteed by the aforementioned article 71 of the Constitution of 1952. Its structure further acts in favor of recognition of that right as the subjective one. According to article 4(1) of the Environmental Law, common use of the environment is vested, *ex proprio vigore*, with everyone, and comprises the use of the environment, without utilization of installations, in order to satisfy personal needs and necessities of a household, including rest and sport, within the scope of: 1) introduction of substances and energies to the environment; 2) other than the ones mentioned in point 1, kinds of common use of waters as construed by provisions of the Water Law.[44] Nonetheless, the right to use the environment is obviously not the same as the right to clean environment. These might be perceived as two different forms of the subjective right of an individual to environment.[45] Therefore, if we discuss the right to environment, it may take two divergent shapes: the right to clean environment (which is the subject of this contribution) and the right to use the environment (which is outside of the scope of the present article).

4. Could the environment be the subject of a personal right? So-called smog litigations in Poland and the resolution by Polish Supreme Court

Lack of the right to a clean environment expressed in the Polish legal order obviously reduces the possibilities of initiating so-called strategic litigations aimed not so much on a specific claim than on drawing the attention of the society and public authorities to environmental problems that should be solved.[46]

However, due to smog litigations, a few years ago we could notice the revival of the old discussion, whether the environment could be perceived as the subject of a personal right and enjoy protection attributed to personal rights by provisions of Polish Civil Code.[47]

Speaking more precisely, the question was about clean air. As indicated in literature, air is the most important component of a clean environment as an element

[44] Act of 20 July 2017 – The Water Law, "Journals of Laws" 2024, item 1087, as amended.
[45] See J. Ciechanowicz-McLean, *Aktualne problemy…*, pp. 47-48.
[46] About the role of strategic litigations see A. Bielska-Brodziak, M. Drapalska-Grochowicz, M. Suska, *On Why the Court Did Not Want to Fight Smog, or Several Comments on the Resolution of the Polish Supreme Court on the Right to Live in a Clean Environment*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2023, vol. 85, no. 3, p. 29.
[47] Act of 23 April 1964 – The Civil Code, "Journals of Laws" 2024, item 1061, as amended.

necessary for life; at the same time, risks for human health and life resulting from air pollution are greater than risks associated with pollution of other elements of the environment, due to the inability to avoid them and the ease of spreading and simultaneous exposure of very large groups of people.[48]

Smog has been a very serious issue in Poland ; although the situation seems to improve gradually, there are still places where the problem of air quality is very acute. Smog cases in Poland were initiated by private persons, claiming, *inter alia*, that by not taking appropriate actions to rectify the problem of smog (delict by omission) public authorities violated personal rights of the claimants. Such cases were due to very significant exceedances of air quality standards in Poland, visible in the occurrence of harmful smog in the autumn and winter period in many towns. Due to the fact that these exceedances have become a certain standard in the autumn and winter period in Poland, without effective actions of public authorities, in 2018 the Court of Justice of the European Union considered a complaint by the European Commission against Poland and issued a ruling[49] confirming, in particular, that by not taking appropriate measures *in ambient air quality programmes to ensure that the exceedance period of particulate matter PM^{10} concentrations limit values is kept as short as possible*, Poland *failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe*.[50] Therefore, the infringement of the European Union law regarding air quality was confirmed, which gave rise to a bundle of claims brought to civil courts by private persons (first celebrities, attracting the attention of the media and public opinion, followed then by others) who argued that their personal rights, in particular in the form of the right to live in clean environment (or the ability to use the advantages of an unpolluted environment) are therefore being violated. Usually they demanded adjudication of appropriate pecuniary amounts for social purposes. The claims were based on article 24 § 1 and 2 of the Civil Code, laying foundations for protection of personal rights in Polish civil law system. The provisions in question have the following wording:[51]

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[48] I. Wereśniak-Masri, *Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste*, "Monitor Prawniczy" 2018, vol. 26, no. 17.

[49] The ruling of the European Court of Justice of 22 February 2018 in case C-336/16, *European Commission v Republic of Poland*, ECLI:EU:C:2018:94.

[50] *Directive 2008/50/EC of the European Parliament…*, as amended.

[51] In all cases where provisions of Polish law are quoted, their English version is taken from LEX/el.

§ 1. A person whose personal interests are jeopardized by another person's action ***may demand that the action be abandoned, unless it is not illegal*** [author's emphasis]. *In the case of actual violation, he may also demand that the person who committed the violation perform acts necessary to remove its consequences, in particular that the latter make a statement of a relevant content and in a relevant form.* ***On the basis of the principles provided for by the Code he may also demand pecuniary compensation or a payment of an adequate amount of money for a specified community purpose*** [author's emphasis].

§ 2. If, as a result of a of personal interests damage to the property was inflicted, the injured party may demand it to be redressed on the basis of general principles.

§ 3. The above provisions shall not prejudice the entitlements provided for by other provisions, in particular by copyright law and by patent law.

These provisions are complemented in particular by article 448 § 3 of the Civil Code, stating as follows:

In the cases specified in Article 445 § 1 [bodily harm or health disorder] (…), *the person whose personal interest has been violated may, in addition to pecuniary compensation, demand the award of an appropriate pecuniary amount for the community purpose indicated by them.*

Thus, we can see that there is a wide array of possible claims related to violation of personal rights, while the premises for asserting those claims seem relatively modest, being limited to an actual violation of a personal right, illegality of infringement (usually construed as contradiction to legal provisions or principles of community life) and – but only if a plaintiff wants compensation instead of or in addition to ordering acts of the perpetrator necessary to remove consequences of the violation in question to be taken and/or payment of an adequate amount of money for a specified community purpose to be made by the perpetrator – the amount of the damage (obviously, very subjective if we mean personal injury) and the adequate causal link between the infringement and the damage sustained by the claimant. What has to be underlined is that fault is not the premise of liability for infringement of personal rights.[52]

However, as in smog cases we dealt with claims brought against the State Treasury, it is important to remember that there are special rules resulting from article 417 § 1 of the Civil Code, reading as follows:

The State Treasury or an entity of local government or some other legal person who by virtue of law exercises public authority ***shall be liable for the damage inflicted by an illegal act or omission committed while exercising the public authority*** [author's emphasis].

[52] Resolution of the Supreme Court of 18 October 2011, case reference number III CZP 25/11.

Also within the framework of that provision determination of fault is not required.[53]

Leaving aside the analysis of conditions of asserting claims related to infringement of personal rights for a while, we should now clarify the very notion of personal rights in the Polish legal order. It should be noted that without a doubt the catalogue of personal rights in the Polish legal system is open. This conclusion stems from the content of article 23 of the Civil Code, which has the following wording:

Personal interests of a human being, such as in particular [author's emphasis] *health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive and reasoning activities* ***shall be protected by the civil law regardless of the protection provided for by other provisions*** [author's emphasis].

Therefore, there is neither a legal definition of personal rights nor an exhaustive catalogue of them, and in fact, over time, under the influence of a dynamically changing reality, more and more new personal rights have been distinguished and recognized in jurisprudence. From the manner article 23 of the Civil Code is formulated and from the very term 'personal rights' or 'personal interests' itself, it is possible to deduce certain features that such interests should have, as opposed to, for example, common interests. The courts emphasize that a personal interest comprises two elements: protected value and the right to demand from the others the respect for that value.[54] Of course, there have been many definitions of personal rights proposed by the jurisprudence and legal researchers. According to the established line of jurisprudence, personal interests should be understood as values intrinsically connected with the essence of humanity and the nature of man, independent of his will, permanent, able to be specificized and objectified, or being a manifestation of his creative activity, encompassing the unique individuality of man allowing for self-realization, his dignity and position among other people.[55] This definition is pretty vague and ambiguous, however it includes a clear indication that interests to be deemed personal rights should be immanently connected with a man and his nature. Such conclusion of jurisprudence should not evoke doubts, bearing in mind the adjective 'personal' included in the concept of personal interests. This seems to be a crucial obstacle preventing the right to a clean environment from being granted the status of a personal right. All examples of personal rights mentioned

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[53] *Ibidem.*

[54] See the resolution of the Supreme Court of 19 October 2010, case reference number III CZP 79/10.

[55] As defined, among others, by the resolution of the Supreme Court of 22 October 2010, case reference number III CZP 76/10.

in article 23 of the Civil Code, i.e. *health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive and reasoning activities*, are indeed interests that are personal, whereby we mean inherent relation to a human. This is obviously not the case of the environment, not to mention a clean environment: it is more a common or public good than anything else. It is definitely not private, and the meaning of the term 'personal' in the notion of personal rights seems to be close to the sense of the term 'private'. And it should be underlined here than from the point of view of economic analysis elements of the environment (such as air) are public goods, with all the associated negative consequences, which can be colloquially summarized in the familiar identification of public things with nobody's things. Such public goods are characterized by indivisible consumption (which means that the use of a given good by a given entity does not limit other entities in using this good), the inability to exclude use (no one can be deprived of use, except in cases of crowd effect), insufficiently defined property rights (due to the above features of public goods) and unsellability (no one will buy them if they are available for free). In the case of some environmental goods, we are dealing rather with common goods, which are distinguished from public goods mainly by the feature of divisibility of use (use by a given entity eliminates or reduces the possibility of using this good by other entities) and within which there are economic mechanisms that, apart from ill-defined property rights, lead to difficulties in achieving an adequate level of use of these goods by individual entities. These mechanisms include the so-called tragedy of the commons (also referred to as the problem of collective action),[56] the free rider problem or a specific prisoner's dilemma[57] in which an entity that cannot be excluded from the benefits resulting from actions undertaken by other entities (so-called free rider) will not have proper incentives to take action for the joint effort.[58] Of course air as such is indivisible, but when we think about air pollution, we may see clearly the negative dependence, resulting in many individuals

[56] This is about the problem of overexploitation of commonly available resources, which are depleted as they are used, so each user strives to maximize a share in their exploitation. Such notion was developed by G. Hardin, referring to tragedy in the ancient sense (the inevitability of the course of events). See G. Hardin, *Tragedia dostępności dóbr wspólnych* [in:] *Środowisko – społeczeństwo – gospodarka. Wybór przekładów z literatury anglosaskiej*, G. Peszko, T. Żylicz (eds), Kraków 1992.

[57] Classification and characteristic features of public goods and environmental goods are presented by H. Manteuffel Szoege in: *Problems of Environmental…*, pp. 10-11.

[58] E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, New York 1990, p. 6; M. Pietraś, *Bezpieczeństwo ekologiczne w Europie. Studium politologiczne*, Lublin 2000, p. 175.

suffering from serious harmful effects not caused by their actions or omissions (or caused by themselves only to a slight extent), which is tantamount to lack of internalization of negative economic effects. Therefore, in my opinion there are no convincing arguments for claiming that environment could be the subject of a personal right.[59] I agree with the opinion that bearing in mind the settled requirements related to the objectification, individualization and durability of personal rights and their connection with human dignity, the unambiguous qualification of the right to live in clean environment as an autonomous personal right is difficult to accept.[60]

Apart from the values expressly mentioned by article 23 of the Civil Code, the jurisprudence has differentiated a wide array of other values, such as life, bodily integrity, sexual integrity, voice, marital status, privacy, cult of memory of a deceased loved one and various other values. As indicated by the Supreme Court, determination whether a specific interest is a personal interest as mentioned by the already invoked provisions of the Civil Code depends on many factors, since this concept should refer to a concrete level of technological and civilizational development, moral and legal principles adopted in society and the current development of social, economic and even political relations; also whether a given act or omission is tantamount to the violation of a personal right is subject to dynamic interpretation, changing in time and related to specific surroundings.[61] Therefore, challenges of the altering reality, full of changes in the legal environment, civilization changes and new technologies, act as incentives for the creation of new personal rights.[62] However, the dynamic approach cannot justify abandoning the requirement that personal rights have to be – as the name suggests and in the meaning presented above – personal.

Actually, the environment is a typical example of an interest external with regard to a human, and it has to be emphasized that within the framework of underlining the special relation between a personal interest and the nature of human, the courts expressly rejected the possibility of recognizing as personal rights interests influencing

[59] However, some researchers claim otherwise – see, in particular, I. Wereśniak-Masri, *Prawo do czystego środowiska…* and J. Trzewik, *Prawo do życia w czystym środowisku umożliwiającym oddychanie powietrzem atmosferycznym spełniającym standardy jakości jako dobro osobiste – glosa do zagadnienia prawnego zarejestrowanego w Sądzie Najwyższym, III CZP 27/20*, "Przegląd Ustawodawstwa Gospodarczego" 2021, vol. 4. The majority opinion is that right to clean environment does not fit in the perception of personal rights.

[60] K. Garnowski, *Prawo do czystego środowiska jako dobro osobiste* [in:] *Współczesne wyzwania prawa ochrony klimatu*, M.M. Kenig-Witkowska, A. Barczak, M. Stoczkiewicz (eds), Warszawa 2024.

[61] Resolution of the Supreme Court of 16 July 1993, case reference number I PZP 28/93.

[62] M. Hejbudzki, *Normatywne podstawy wprowadzenia do polskiego porządku prawnego koncepcji prawa podmiotowego do życia w czystym środowisku*, "Studia Prawnoustrojowe" 2019, vol. 43, p. 121.

the quality of human life, but coming from outside and not originating from the essence of humanity.[63]

What is also worth invoking in this context is that the Supreme Court underlined that not every human right may be considered a personal right because the legal nature of personal rights distinguishes them from other legal values, also those that are indicated in the Constitution and international conventions regulating human rights.[64] Therefore, even if – as already mentioned – the right to a clean environment or similar rights are sometimes a part of international law, customary law or soft law, such circumstances should not have any impact on answering the question whether such right is a personal right in the meaning of article 23 of the Civil Code. From my point of view, the Supreme Court is right in making such a differentiation. Although many personal rights are human rights as well, there is no legal basis for identification of those two notions as the same single one.

What was the standpoint of the courts delivering judgments in smog litigations before the resolution adopted by Polish Supreme Court on the background of the smog case in May 2021? Well, until the legal question about the possibility of qualifying the right to live in clean environment as a personal right was referred to the Supreme Court, smog trials brought various decisions, i.e. some courts found (in accordance with the traditional jurisprudence of the Supreme Court, in particular the judgment of 1975)[65] that the right to live in a clean environment is not a personal interest, however, there were also decisions in which the courts recognized the right to live in a clean environment as a personal right and ruled in favor of the plaintiffs.[66]

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[63] See, in particular, the ruling of the Supreme Court of 7 December 2011, case reference number II CSK 160/11, where the court stated that the right to uninterrupted use of electricity is not a personal right. See also B. Szyprowski, *Glosa do uchwały Sądu Najwyższego z dnia 28 maja 2021 r., sygn. III CZP 27/20*, "Prokuratura i Prawo" 2023, no. 7-8, p. 287, who writes that the environment, being a sphere outside of a man, cannot constitute itself a personal interest, because it constitutes surroundings of humans.

[64] Ruling of the Supreme Court of 24 September 2015, case reference number V CSK 741/14.

[65] The Supreme Court in its judgment of 17 July 1975, case reference number I CR 356/75 stated that the human right to an unpolluted biological environment and to satisfy aesthetic feelings with the beauty of the landscape may be protected by the measures provided for by article 24 of the Civil Code only if the violation of this right constitutes at the same time an infringement or threat to personal rights within the meaning of Art. 23 of the Civil Code. Therefore, the Court considered the aforementioned interests as a human right, but not a personal right. Once in a later ruling (of 20 July 1984, case reference number II CR 5/84) the Supreme Court presented the opposite standpoint, although with no verifiable argumentation. Courts of lower rank generally followed the judgment of 1975.

[66] See for instance the ruling of the District Court for Warszawa-Śródmieście in Warsaw of 24 January 2019, case reference number VI C 1043/18. However, justification of the ruling is pret-

Discrepancies in jurisprudence and doubts as to whether the right to live in clean environment can actually be deemed a personal right prompted the Regional Court in Gliwice, hearing another smog trial in the second instance, to submit a legal question to the Supreme Court.[67] A resident of the city of Rybnik, in the case considered by the Regional Court in Gliwice, requested an award of PLN 50,000.00 as compensation for the harm caused to him in connection with the serious violations of air quality standards that have been systematically occurring in his place of residence for many years, which allegedly infringed his personal rights. The plaintiff saw his harm mainly in limitations in everyday functioning; he followed recommendations of local authorities not to leave the house, he felt the stench of the air, he was aware of the impact of pollution on his and his children's health, he felt ailments related to the air quality – but he did not seek treatment and rarely got sick. In the autumn and winter, the plaintiff could not fully use the apartment, open the windows, or spend time actively with his children outside.

The legal question presented to the Supreme Court for consideration read as follows: *Is the right to live in a clean environment enabling breathing of atmospheric air that meets the quality standards specified in the provisions of generally applicable law, in places where a person stays for a long time, in particular in the place of residence, a personal right subject to protection pursuant to article 23 of the Civil Code in connection with article 24 of the Civil Code and article 448 of the Civil Code?* The answer of the Supreme Court was negative;[68] it indicated that the right to live in clean environment is not a personal interest, but health, freedom and privacy are protected as personal rights, and the violation of or threat to them may result from violation of air quality standards set forth by the law. The indirect path using protection of personal rights as a weapon against negative environmental effects, left open by the Supreme Court, demonstrates similarity when compared to the logic used by the ECHR, considering negative effects to the environment as infringing human rights guaranteed by the convention. The Supreme Court invoked the already presented jurisprudential definition of personal rights and stated that the environment obviously does not have the characteristics of a personal interest in such sense. It is a common good for humanity, having a material

ty strange, as the court seems to overlook the matter of personal character of personal right when claiming that the right to use the advantages of unpolluted natural environment is a personal right, while at the same time the court declares acceptance for the widely accepted definition of personal rights present in the jurisprudence of the Supreme Court, which clearly underlines intrinsic link of a personal interest with a man and its nature.

[67] Ruling of the Regional Court in Gliwice of 24 January 2020, case reference number III Ca 1548/18.

[68] Resolution of the Supreme Court of 28 May 2021…

substrate in the form of air, water, soil, plants and animals. The environment and its condition determine the physical survival of man and the extent to which his basic living needs are satisfied. These categories include access to air, water, food and the expectation that these goods will not be contaminated, otherwise, in the short or long term, it will affect the health of the population and its individual members. Therefore, by not taking actions to prevent deterioration of the quality of the environment, personal interests such as health, freedom and privacy could be infringed by such omissions. Given the special position of the Supreme Court's resolutions in jurisprudence, the path of pursuing claims related to the bad condition of the environment by invoking the violation of the right to live in a clean environment as a personal right should be considered closed, at least until the Supreme Court issues a different resolution. Nevertheless, the second part of the Supreme Court's answer, in which the Court indicates that health, freedom and privacy are protected as personal rights, and their infringement or threat to them may result from the violation of air quality standards specified in legal provisions, seems to leave some scope for using the path of protection of personal interests in environmental matters. This is demonstrated by the judgment of the District Court in Gliwice, passed after the discussed resolution of the Supreme Court, in which the District Court awarded the plaintiff the amount of PLN 30,000.00 as compensation, finding that there had been a violation of the plaintiff's personal rights such as health, freedom, inviolability of the apartment, as a result of which the plaintiff suffered significant harm.[69] However, the Prosecutor General filed an extraordinary complaint, invoking the plaintiff's failure to prove the threat or health impairment (failure to submit any evidence in this respect). The extraordinary complaint has not been considered yet by the Supreme Court.[70] However, reproaches raised by the Prosecutor General signify that the aforementioned path of protection of personal interests in environmental matters may actually be very narrow. As indicated in literature,[71] there will often occur situations where proving all premises necessary to assert the claim will be extremely difficult. If we exclude the right to clean environment from the category of personal rights, it will be hard for the claimant to prove the harmful influence of a given negative environmental effect on his health or other traditional personal rights, the more that such harmful influence will often be based only on the probability of getting sick in an unspecified future.

Prima facie, if the right to live in a clean environment is recognized as a personal right, nothing would prevent such proceedings from being commonly and effectively

[69] Ruling of the Regional Court in Gliwice of 9 December 2021…
[70] As at 20 September 2024.
[71] M. Hejbudzki, *Normatywne podstawy…*, p. 134.

initiated by residents of numerous agglomerations where the levels of particulate matter were exceeded, because for a number of claims related to the infringement of personal rights the mere finding of a violation is sufficient (which allegedly would not pose any problems in the context of the exceedances of air quality standards in Poland, undoubted and established by the CJEU judgment), and in the context of a claim for compensation for harm resulting from the violation of personal rights, the finding of harm does not necessarily have to involve the determination of damage to health, if we do not consider violating the right to health, but the right to a clean environment. However, numerous doubts appear as regards the veracity of such a picture.

The resolution of the Supreme Court is criticized not so much as regards the merits (the majority of authors share the view that the right to clean environment cannot be deemed to be a personal interest), but as regards *the low quality of the argumentation presented*.[72] Indeed, the reasoning is very laconic and does nothing more than repeat the old line of argumentation from the already mentioned resolution of the Supreme Court of 1975, just as if the Supreme Court overlook the weight of the case.

R. Szczepaniak has expressed the view that the Supreme Court should have taken over the entire case for its own consideration, because the question posed by the Regional Court in Gliwice did not allow for analysis of premises of the State Treasury's liability, which is not obvious in the case of the smog problem. According to that author, the Supreme Court should have at least signified expressly that even acknowledging the infringement of personal rights as a result of living in an environment with high levels of air pollution exceeding the permissible standards does not yet prejudice liability in damages of the State Treasury due to existence of other premises of such liability which, bearing in mind the specificity of the case, might not be fulfilled.[73] The author underlines that answering the question actually posed by the Regional Court in Gliwice could not fully resolve the case and draws the attention of a reader in particular to doubts related to the question whether the fact of excessive level of air pollution, deviating from applicable standards, in particular resulting from the CAFE directive, prejudices illegality required by provisions concerning liability in damages of the State Treasury.[74]

The premise of illegality is indeed not obvious here, despite the fact that the infringement of some provisions of the CAFE directive, notably article 13(1) and

[72] A. Bielska-Brodziak, M. Drapalska-Grochowicz, M. Suska, *On Why the Court Did Not Want…*, p. 30.
[73] R. Szczepaniak, *Uchwała…*, p. 12.
[74] *Ibidem*, *passim*.

13(2), was confirmed by the aforementioned judgment in the case *European Commission v. Republic of Poland* resolved by the ECJ. The judgment was final and legally binding, so the existence of such breach cannot be called into question.

The CAFE directive in particular *lays down measures aimed at* (…) *defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole* (article 1 point 1 of the CAFE directive). Article 13(1) imposes on Member States **the duty to ensure that levels of certain pollutants, including PM_{10}, do not exceed the thresholds determined by Annex XI of the directive in question**. Article 23(1) states in particular that if *in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV. In the event of exceedances of those limit values for which the attainment deadline is already expired,* ***the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible*** [author's emphasis].

Clearly, these are provisions of the EU law which were breached. That seems to determine illegality. However, there are still a few problems.

Surprisingly, the first of them is created by another judgment of the ECJ. Namely, in the case *JP v Ministre de la Transition écologique and Premier ministre*[75] the Court has expressly stated that the aforementioned provisions of the CAFE directive *must be interpreted as meaning that they are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State* (point 65 of the judgment). The Court repeated indices from its previous jurisprudence as regards three premises of the liability of the state for an infringement of the EU law. Namely, *individuals who have been harmed have a right to compensation where three conditions are met:* ***the rule of EU law infringed must be intended to confer rights on them*** [author's emphasis]*; the infringement of that rule must be sufficiently serious; and there must be a direct causal link between that infringement and the loss or damage sustained by those individuals* (point 44 of the judgment). According to the European Court of Justice, articles 13(1) and 23(1) of the CAFE directive do not confer individual rights on interested persons. In my opinion such narrow interpretation is erroneous and actually implies the necessity of direct effect of respective provisions of

[75] Ruling of the European Court of Justice of 22 December 2022 in case C-61/21, *JP v Ministre de la Transition écologique and Premier ministre*, ECLI:EU:C:2022:1015.

a directive in order for an individual to be able to assert liability of the State for breach of the EU law, even if the ECJ expressly denied such necessity in this judgment.

In the judgment in question the Court made a reservation that this conclusion *does not mean that a Member State cannot incur liability under less strict conditions on the basis of national law* (…) *nor does it prevent, where appropriate, a failure to fulfil the obligations resulting from Article 13(1) and Article 23(1) of Directive 2008/50* (…) *from being taken into account in that regard as a factor which may be relevant for the purposes of establishing the liability of public authorities on a basis other than EU law* (point 63 of the judgment). The possibility to use that exception is not unambiguous. As aptly pointed out in literature, general norms such as constitutional provisions related to environmental protection cannot be used in this regard.[76] And Polish law does not contain any specific provisions that could be infringed by omission of the State to take effective actions preventing smog, as long as air quality programs are adopted (no matter whether they are effective or not). The judgment of the ECJ may be considered surprising, bearing in mind that the Court invoked its former rulings as regards the second subparagraph of article 23(1) of the CAFE directive where it has confirmed *that the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to draw up an air quality plan which complies with that provision, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of that directive and has not applied for a postponement of the deadline as provided for by Article 22 thereof* (point 60 of the judgment in question). Nevertheless, the Court differentiated such right *stemming in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation* from approving that the aforementioned provisions were intended to confer individual rights on interested persons (point 62 of the judgment in question). Therefore, the Court has excluded the possibility to assert liability in damages based merely on these stipulations. In my opinion there are no convincing arguments to differentiate solutions to these issues. The ECJ has not elaborated on that matter further, despite the fact that this question is crucial and certainly, not obvious. Article 13(1) and 23(1) of the CAFE directive expressly encumber Member States with the duty to ensure that levels of certain pollutants, including PM_{10}, do not exceed prescribed thresholds, and if they do exceed, to introduce appropriate measures in air quality plans, *so that the exceedance period can be kept as short*

[76] B. Szyprowski, *Glosa*…

as possible. It is logical to assume that such obligations correspond to rights to demand their fulfilment. Also, if the ECJ confirmed that an individual have a standing in asserting drawing up an air quality plan fulfilling legal requirements resulting from article 23(1) of the CAFE directive, then it actually means that the ECJ acknowledges direct effect of that provision. And this is an exception, not a rule, because directives generally do not entail direct effect. Moreover, the exceptional direct effect of a directive is obviously a more far-reaching demand than the requirement for State liability for infringement of the EU law that a given provision confers rights on individuals. In fact, the construction of State liability towards an individual for breaching EU law was developed by the ECJ as a measure for alleviating negative consequences that may be incurred by private entities due to lack of direct effect of directives.[77]

It should not come as a surprise that the opinion of the Advocate General issued in the case[78] was divergent from the standpoint presented by the ECJ. The Advocate General expressed a view that thresholds for pollutants in ambient air and obligations to improve ambient air quality, resulting, in particular, from article 13 and 23 of the CAFE directive, are intended to confer rights on individuals. As regards asserting compensation for adverse effects to health stemming from exceedance of such a threshold after the lapse of the deadline to implement the aforementioned obligations of Member States, the Advocate General acknowledged such a possibility, however, with the important reservation that *it requires that the injured party proves a direct link between that adverse effect and his or her stay at a place where the respective applicable limit values were exceeded without there having been an air quality improvement plan which satisfied the requirements of Annex IV to Directive 96/62 or Section A of Annex XV to Directive 2008/50 and which also did not contain any manifest defects in other respects* (point 143 of the opinion). Of course, the burden of proof laying on a claimant according to statements of the Advocate General is heavy, but no wonder that an adequate causal link between the infringement and the damage has to be established to assert liability – that results even from the aforementioned judgment in *Francovich*.

However, before the ECJ changes its standpoint, it is more or less like *Roma locuta – causa finita*. Although from the formal point of view judgments of the ECJ are not a source of law, the influence of the principle *acte éclairé* leads to their special position and *de facto* application *erga omnes*. Even if we consider the ruling of the ECJ wrong, at present it effectively bars the path of claiming State liability for bad quality

[77] Ruling of the European Court of Justice of 19 November 1991 in joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, ECLI:EU:C:1991:428.

[78] Opinion of the Advocate General Kokott delivered on 5 May 2022 in case C-61/21, *JP v Ministre de la Transition écologique and Premier minister*, ECLI:EU:C:2022:359.

of air if asserting such liability is to be based solely on the aforementioned provisions of the CAFE directive. In the following part of this contribution I will examine the remaining possibilities to assert the liability of Polish State Treasury for not taking appropriate actions to prevent the smog problem (and more generally, to prevent bad quality of the environment having negative ramifications on individuals).

Apart from that problem (which in its current state actually excludes asserting liability of the State on the basis of the CAFE directive), of course we should ask the question about the required character of illegality. In literature it was invoked that establishing illegality for the purposes of the system of liability in damages of the State requires interpretation of the legal provisions, and such interpretation should be performed in a moderate way, which results in the recognition of existence the obligation to take actions that are within the capabilities of public authorities.[79] However, in my opinion it would be hard to allow the State escape liability for smog with the argument that it is not able to rectify the problem. Maybe if we discuss exceedances of thresholds imposed by the EU law by a few percent, but not a few hundreds or even thousands.

Another issue is the question of individualization. As indicated by researchers, *smog is a 'doubly non-individualized' phenomenon – both on the part of 'perpetrators' and 'victims'*.[80] Such a circumstance is often perceived as an obstacle for asserting the liability of the State relating to air pollution both as regards article 417 of the Civil Code (even without a reference to provisions granting protection of personal rights), as well as regards claims resulting from infringement of personal interests. As regards the first aspect, it is argued that state or public authorities could incur liability in damages for air pollution only if a disproportionally heavy injury to health and an adequate causal link between improper behavior of the State or that public authority and the injury occur.[81] As regards the latter, individualization of infringement of personal rights is invoked as a condition of asserting related claims.[82] I must say these arguments seem legitimate. A lack of individualization just does not match tort liability.

Another issue is the problem of so-called cumulative causation. As pointed out in the doctrine,[83] it is not only the omission of the State Treasury which leads to bad

[79] R. Szczepaniak, *Uchwała…*, p. 19.

[80] A. Bielska-Brodziak, M. Drapalska-Grochowicz, M. Suska, *On Why the Court Did Not Want…*, p. 33.

[81] R. Szczepaniak, *Uchwała…*, p. 21.

[82] T. Grzeszak, *Dobro osobiste jako dobro zindywidualizowane* [in:] *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, T. Targosz, P. Podrecki, P. Kostański (eds), Warszawa 2017.

[83] T. Nowakowski, *Kilka uwag w przedmiocie odpowiedzialności odszkodowawczej Skarbu Państwa za zły stan powietrza w kontekście ochrony dóbr osobistych*, "Studia Prawa Prywatnego" 2021, vol. 3.

quality of air, but also (or rather first and foremost) the activity of emitters of pollutants (business undertakings and possessors of motor vehicles). Therefore, in the case of redressment of the damage by the State Treasury, it would have a recourse claim against the polluters. Also, there would be the question of possible reduction of the liability of the State due to contribution to the damage.[84] By virtue of article 362 of the Civil Code, *if the injured party has contributed to the infliction of damage or to the aggravation of damage, the duty to redress it shall be reduced accordingly to the circumstances, and particularly to the extent of both parties' fault*. Definitely, if there are no sources of emission of substances constituting smog components, no omission of the State Treasury could inflict the smog problem. Therefore, joint and several liability of the State Treasury and polluters would be a reasonable idea, unfortunately, bearing in mind the highly dispersing nature of air pollution, it would be hard to indicate specific entities as liable for the smog problem.

The above doubts certainly do not exhaust possible legal obstacles that could prevent an individual from effectively asserting the liability of the State Treasury in connection with smog, even if the right to clean environment was considered a personal interest. However, rejection of the possibility to consider the right to clean environment as a personal interest by the Supreme Court definitely creates additional hurdles in the form of the necessity to demonstrate specific damage to health, life or privacy when using the path of protection of personal rights. Demonstrating the damage and the adequate causal link by a claimant could be hardly possible. From a practical point of view, certainly the resolution of the Supreme Court examined in this contribution creates an escape from a possible deluge of claims for general damages due to inadequate environmental protection. At first glance the remaining possibilities in this regard seem limited.

5. The landscape after the battle: civil law possibilities of asserting redressment of personal injuries related to the bad condition of the environment in the Polish legal system

The deepening problem of environmental pollution and its negative impact on human health, juxtaposed with limited effectiveness of public authorities in rectifying or at least alleviating the acuteness of such occurrences, are likely to increase the frequency of bringing civil claims against the State related to bad quality of the environment. It pertains to cases of dispersed pollution where it is not possible to attribute

[84] *Ibidem*.

the problem to a single polluter. However, in view of the negative answer given by the Supreme Court to the legal question about the possibility of qualifying the right to live in clean environment as a personal right, it seems that in this respect as an actual option on the battlefield there would stay the tort liability regime or indirect path using the protection of personal rights highlighted by the resolution of the Supreme Court. However, both of the above paths are not free from hurdles.

In the context of tort liability regime of the State, we should take into account the already quoted article 417 of the Civil Law. In my opinion it is not possible to assert such liability through special provisions of article 323 of the Environmental Law. By virtue of that article:

1. Whoever is directly threatened with or has suffered damage from ***unlawful impact on the environment*** *may demand* ***the entity responsible for said threat or violation*** *to restore the lawful conditions and take preventive measures, in particular through the employment of installations or equipment protecting from the threat or violation; where it is impracticable or excessively difficult, he may demand the activity causing said threat or violation be ceased.*

2. Where the threat or violation refers to the environment as the common good, the claim referred to in paragraph 1 may be made by the State Treasury, local government unit and an environmental organisation.

I claim that the wording of article 323(1) of the Environmental Law actually excludes addressing claims mentioned there towards the State. From my point of view, the underlined pieces refer to a polluter breaching environmental law, not to the State which is not a polluter, it is just not so effective in preventing and rectifying the problem of pollution as we would wish it to be.[85] I think that article 323(2) of the Environmental Law is not formulated properly, because indeed it may lead to an opinion that both provisions of this article cannot be logically interpreted in the case of one-way perception of the environment by referring to the category of the common good, suggested by the Supreme Court in the resolution from May 2021.[86] The second paragraph of article 323 mentions threat or violation referring to the environment as a common good, which might be considered as implying that the first paragraph, in contrast to the second one, pertains to the environment which is not a common good – then what is it? The wording of the second paragraph is misfortunate in this respect, however in my view the legislator did not intend to allow

[85] However, in literature article 323.1 of the Environmental Law is indicated as a possible legal basis for claims against the State, see in particular K. Garnowski, *Prawo do czystego środowiska…*

[86] Such opinion is expressed by J. Trzewik in: *Glosa do uchwały Sądu Najwyższego z 28 maja 2021 r., sygn. akt III CZP 27/20*, "Przegląd Prawa Konstytucyjnego" 2022, vol. 66, no. 2, pp. 394-395.

the application of any of the provisions included in article 323 of the Environmental Law against the State. The first paragraph is directed against a polluter causing harm at the side of individual and the second one is also aimed at a polluter – in the case when the range and nature of a harm sustained by the environment justify recognition that it is in the common interest to lodge claims mentioned in the first paragraph against the polluter.

Within the framework of tort liability regime, we should consider the utilization of article 417 § 1 of the Civil Code as an independent legal basis (without reference to protection of personal interest). To apply it, one would have to prove the following premises: 1) illegality of an act or omission of the State; 2) an adequate causal link between such behavior and the damage; 3) the amount of damage suffered. As already mentioned in the previous section, significant difficulties arise here, in particular in demonstrating illegality and an adequate causal link. Although illegality is understood not only by reference to legal provisions, but also to the principles of community life, it is difficult to imagine attributing liability for bad quality of the environment or any of its components to violation of such principles and it is hard to find a norm of Polish law (since according to the ECJ respective provisions of the EU directives, concerning air quality, do not *per se* give rise to liability of the state if they are not properly implemented) imposing concrete duty on the state in this regard. Of course, we have a wide array of constitutional provisions related to environmental protection, in particular article 74(1) and 74(2) of Polish Constitution, encumbering public authorities with the duties to lead policies that ensure ecological security for current and future generations and to protect the environment. However, these are far too general to be used as an independent legal basis for liability in damages of the State related to bad air quality.

Another obstacle may be the issue of establishing the cause and effect relationship, which should be adequate, i.e. include the normal (standard) consequences of the act or omission from which the damage resulted (according to article 361 § 1 of the Civil Code). In some instances it may be very difficult or even impossible to demonstrate such a relationship. This could potentially be the case in the event of failure to ensure fulfilment of environmental standards, which may result in health damage.

In turn, in the context of an attempt to pursue claims related to the protection of personal rights in the form of the right to life or the right to health, it may be problematic to demonstrate the existence of a violation of these personal rights, which essentially involves establishing a connection between the failure of the State to ensure environmental quality standards and health damage.

It was aptly pointed out in the literature that *currently there is no ideal basis in Polish law for seeking the protection of the right to clean air*.[87] What are the effects of such a situation in terms of the level of environmental protection?

6. Conclusions

To answer the question ending the preceding section, we should set aside the point of view of an individual and his desire to gain compensation for harm caused by bad quality of the environment (from this perspective, having a legal basis – or even better, a few alternative legal bases – allowing for suing the State on such ground is advantageous) and focus on the quality of the environment. Theoretically, individual claims related to the state of the environment reinforce the recognition of environmental protection as an important concern. However, their positive effect on improvement of the quality of the environment is not certain. First and foremost, such claims also reinforce anthropocentric attitudes to environmental protection which suggests limiting it to nothing more than measures ensuring the minimum state acceptable for humans. It is tricky and distorts the operation of the principle of sustainable development, tipping the scales in favor of economic development and to the detriment of environmental protection. Moreover, the effects on the environment could be detrimental ; instead of focusing on efforts aimed at improving the quality of the environment, the state would have to concentrate on redressing individual damages related thereto. This would probably be counterproductive in terms of environmental protection. Means that could be spent on it would instead be transferred to individual persons as compensation for damage sustained due to bad quality of the environment. And these could be significant amounts, bearing in mind that there is a risk that a relative ease in asserting claims against the state that could be provided by legislative changes would lead to a deluge of such claims. However, payment of compensations to individuals do not have any positive effect on the condition of the environment, and I do not think it would be an incentive (a stick) for the state authorities to improve the effectiveness of environmental protection, because it is not a question of will. Nowadays the challenges related to the environment result from many divergent factors and are hard to overcome. Therefore, instead of opening a Pandora's box with individual claims related to the environment, I postulate focusing on better enforcement of existing regulations concerning environmental standards.

[87] M. Bagier, *Protection*…, p. 15.

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Damage Action for the Individual – Challenges for the National Courts in the Enforcement of EU Environmental Law

Remarks on the Judgment of the Court of Justice in the Case C-61/21 Ministre de la Transition Écologique (JP)*

Abstract: This chapter aims at discussing the enforcement of EU legislation on the protection of ambient air quality through the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. The full effectiveness of EU rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of EU law for which a Member State can be held responsible. Accordingly, individuals who have suffered damage have a right to compensation if three conditions are met, namely that the rule of EU law infringed is intended to confer rights on them, that the infringement of that rule is sufficiently serious and that there is a direct causal link between that infringement and the damage suffered by those individuals. The analysis demonstrates the first requirement of non-contractual liability of Member States for infringement of EU law, namely the question as to whether the provisions of Directive 2008/50 establish rights for individuals. The purpose of the analysis is clarification of the extent to which an infringement of the limit values for the protection of ambient air quality under EU law can in fact give rise to entitlement to compensation. Finally, State

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liability is discussed further, i.e. conditions under which a possible infringement of Directive 2008/50 is sufficiently serious, and the proof of a direct causal link between the infringement and the damage.

Keywords: damage action, state liability, enforcement of EU environmental law, air quality, individual right in EU environmental law

Introduction

Given the urgent need for significant improvements of air quality in many areas of Europe and concerns about insufficient climate action and ambition around the world, NGOs and individuals are increasingly turning to the courts to trigger states and public authorities to adopt more ambitious measures to protect the environment and hold them accountable through environmental litigation. Environmental litigation has become a strategic tool for pushing for environmental justice.[2]

The purpose of this chapter is to analyse the judgement of the Court of Justice of the European Union (hereinafter "CJEU" or "the Court") in Case C-61/21 *Ministre de la Transition Écologique (JP)*.[3] In this regard, a key question is whether an individual has the legal capacity to trigger effective measures to ensure compliance with the limit values required by Directive 2008/50 on Air Quality and Cleaner Air for Europe?[4] And, if not, may they seek compensation (redress) for the damage suffered as a result of air pollution?

In the case at hand, the CJEU faced the question of the prerequisites for state liability and damages in the case of health and personal injury resulting from a Member State's failure to comply with EU air law. Yet, the Court did not – as will be discussed further below – deliver a landmark judgement, but it did confirm previous case law[5]

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[2] On the concept of in international law, legal philosophy and environmental ethics – see, e.g., S.A. Atapattu, C.G. Gonzalez, S.L. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development*, Cambridge 2021; R.A. Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, "University of Colorado Law Review" 2007, vol. 78, p. 1625; R.R. Kuehn, *A Taxonomy of Environmental Justice*, "Environmental Law Reporter" 2000, vol. 30; C.G. Gonzalez, *Environmental Justice and International Law* [in:] *Routledge Handbook of International Environmental Law*, S. Alam et al. (eds), London 2013, p. 77.

[3] C-61/21, *Ministre de la Transition écologique i Premier ministre (Responsabilité de l'État pour la pollution de l'air)*, ECLI:EU:C:2022:1015.

[4] See for a discussion on Directive 2008/50: M. Baran, *Dyrektywa 2008/50/WE w sprawie jakości powietrza i czystszego powietrza dla Europy oraz jej implementacja w prawie polskim*, "Europejski Przegląd Sądowy" 2017, no. 7, pp. 19-20 and the literature and case law therein.

[5] See: J. Richelle, *C-61/21 Ministre de la Transition Écologique: Putting the Individual-centered CJEU Case Law on Air Quality on Hold*, "Review of European Administrative Law" 2023, vol. 16,

and systematise the role of individuals in enforcing before national courts the obligations imposed on the Member States by the EU environmental legislation.

1. Can an individual take effective action through the courts to comply with the limit values under Directive 2008/50?

Admittedly, the addressees of the norms of directives are, in accordance with Article 288(3) TFEU, the Member States, as a result of the implementation requirement. Notwithstanding, the provisions of directives may also have a protective effect in relation to private parties if Member States are obliged to establish individual rights.[6]

Interpreting the provisions of a directive according to the interpretation method recoin in the case law of the Court, it is to be determined whether a provision of EU law in this context is intended to establish subjective rights.[7] The decisive factors in this regard are the wording, the purpose of the relevant provisions and the motives guiding the Union legislature, which are apparent from the preambles of the EU acts (directive) concerned.[8]

The Court used the concept of "individual rights" in several judgements in environmental cases handed down in the early 1990s, in the context of proceedings for breach of EU obligations in cases under Article 258 TFEU. At first in cases

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no. 2, pp. 109-122 and the literature and case law therein; M. Pagano, *Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in JP v. Ministre de la Transition écologique*, "European Law Blog" 2023; D. Misonne, *The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science*, "RECIEL" 2020, vol. 30, no. 1, p. 1; U. Taddei, *A Right to Clean Air in EU Law? Using Litigation to Progress from Procedural to Substantive Environmental Rights*, "Environmental Law Review" 2016, vol. 18, no. 1, p. 3ff.

[6] According to definition, a directive is addressed only to the Member States in the sense of being binding in purpose. In the *Francovich* case, the disputed claim for compensation in the event of the employer's bankruptcy was to accrue to the employee only as a result of the transposition and enactment of the relevant national legislation. However, the Court confirmed the individual's claim for compensation.

[7] See generally on the principles of interpretation recognised by the case law – e.g. judgments: C-1/96, *Compassion in World Forming*, ECLI:EU:C:1998:113, para. 49; C-102/96, *Commission v Germany*, ECLI:EU:C:1998:529, para. 24. When interpreting a provision of EU law, it is necessary to take into account not only the wording, but also the context in which the provision is used and the objectives of the legislation in which it appears.

[8] The CJEU analyses the wording and the purpose of the provisions of the directive in the light of their protective purpose and takes into account, in particular, the recitals of the preamble (see the judgments: C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer and Others*, ECLI:EU:C:1996:375, paras 30ff.; C-127/95, *Norbrook Laboratories*, ECLI:EU:C:1998:151, para. 108).

in procedure under 258 TFUE against Germany, linking this concept to the content of the obligations imposed on the Member States by various directives in the field of environmental law, which were aimed at increasing the level of protection of environmental components.[9] "Therefore that whenever non-compliance with the measures required by the directives in question might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights."[10] However, firstly, this finding does not precisely determine the nature of the concept of "rights of individuals" as used in this context (the content and rights' holder) and it is highly vague and imprecise. Secondly, it is not clear by what legal means such unspecified rights are to be enforced before the national courts.[11] The concept of rights referred to by the Court in implementation cases may refer to "rights" that are not protected under the liability regime according to *Francovich* principle.[12] With respect to the role of individuals in the enforcement of EU environmental law, the Court had occasion to express itself on several occasions using the formula (construc-

[9] See, for example, case C-361/88, *Commission v Germany*, ECLI:EU:C:1991:224, para. 16: "The obligation on Member States to prescribe limit values not to be exceeded within specified periods and under specified conditions, laid down in Article 2 of Directive 80/799 on air quality limit values and guide values for sulphur dioxide and suspended particulates, is imposed «in order to protect human health in particular». It implies, therefore, that in all cases where the exceeding of the limit values could endanger human health, individuals must be in a position to rely on mandatory rules in order to be able to assert their rights. Furthermore, the fixing of limit values in a provision whose binding nature is undeniable is also necessary in order that all those whose activities can give rise to nuisances can ascertain precisely the obligations to which they are subject"; or in case C-186/91, *Commission v Kingdom of Belgium*, ECLI:EU:C:1993:93; see also the opinions of Advocate General F. Jacobs in C-237/90, *Commission v Germany*, ECLI:EU:C:1992:65, para. 15; or the opinions of Advocate General W. Van Gerven in C-131/88, *Commission v Germany*, ECLI:EU:C:1990:332, para. 7: "clear and precise implementing provisions, it was added, are particularly important where a directive is intended to create rights for individuals; imprecise legislation which leaves those individuals uncertain as to their rights (in the case of directives concerning the protection of the environment it may well be a question of obligations) under Community law and their right to rely on Community law before the national courts is not sufficient to satisfy the duty imposed by Article 189 of the EEC Treaty"; see also: C-59/89, *Commission v Germany*, EU:C:1991:225, para. 19; C-58/89, *Commission v Germany*, ECLI:EU:C:1991:391, para. 14; C-298/95, *Commission v Germany*, ECLI:EU:C:1996:501, para. 16.

[10] Cases: C-361/88…, para. 16; C-58/89…, para. 14.

[11] See M. Dougan, *Addressing Issues of Protective Scope within the* Francovich *Right to Reparation*, "European Constitutional Law Review" 2017, vol. 13, no. 1, pp. 152-153 and the literature and case law therein; J.H. Jans, H.H.B. Vedder point out that the CJEU does not always apply the concept of individual rights consistently and that the concept may have one meaning in the context of direct effect, another in the context of liability for damages and yet another in the context of correct transposition of the directive (J.H. Jans, H.H.B. Vedder, *European Environmental Law*, Groningen 2008, pp. 205-206).

[12] B. Thorson, *Individual Rights in EU Law*, Cham 2016, pp. 353-354.

tion) of a "person affected or likely to be affected" by the content of certain EU rules as justification for the right of an individual to rely on EU legislation in proceedings before a national court.[13]

The concept of "person affected or likely to be affected" describes the relationship (impact) of the content of EU law provisions/obligations imposed on the Member States on the factual situation of the individual concerned.

Indeed, the protection of health against adverse environmental effects has been repeatedly identified by the CJEU as an (additional)[14] basis for allowing an individual to rely on the direct effect[15] of EU environmental law provisions.[16]

In the *Gruber* case,[17] in the context of the interpretation of Article 11 of Directive 2011/92,[18] the problem has occurred as to whether an EU law precludes national legislation under which an administrative decision finding that there is no obligation to carry out an environmental impact assessment for a project has binding force vis-à-vis neighbours, who are deprived of the right to challenge that administrative decision. The CJEU recalled that, according to the definition in Article 1(2) of Directive 2011/92, the "public concerned" means the public affected or likely to be affected by, or having a legal interest in, environmental impact assessment decision-making procedures. That is, not all natural or legal persons or organisations falling within the concept of "public concerned" should have access to the review procedure within the meaning of the aforementioned Article 11, but only those who have a sufficient legal interest or possibly allege an infringement of the national law. Since K. Gruber was a "neighbour"

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13 A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Zutphen 2020, pp. 268-277; A. Sikora, Konstytucjonalizacja ochrony środowiska w prawie Unii Europejskiej, "Europejski Przegląd Sądowy" 2021, vol. 2, p. 14.

14 See *echtsschutz im Umweltrecht – Weichenstellung in der Rechtsprechung des Gerichtshofs der Europäischen Union*, "Deutsches Verwaltungsblatt" 2014, vol. 129, p. 132.

15 According to the concept of direct effect of EU law norms, an individual may invoke before a national court an EU norm that is clear, precise and unconditional. In the case of directives, as they require implementation, the direct effect of their provisions is generally excluded. Unless it is a matter of vertical disputes and the assertion by individuals of the protection of their rights under the provisions of a non-implemented or incorrectly implemented directive. See e.g. C-435/97, *World Wildlife Fund*, ECLI:EU:C:1999:418, para. 69; C-404/13, *ClientEarth*, ECLI:EU:C:2014:2382, para. 55 and case law therein; see futher N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, p. 202; M. Lenz, D. Sif Tynes, L. Young, *Horizontal What? Back to Basics*, "European Law Review" 2000, vol. 25, vol. 3, p. 509.

16 See for example cases: C-237/07, *Janecek*, EU:C:2008:447, para. 37; C-165/09 to C-167/09, *Stichting Natuur en Milieu and Others*, EU:C:2011:348, para. 94.

17 C-570/13, *Gruber*, ECLI:EU:C:2015:231.

18 *Directive 2011/92/EU of the European Parliament and of the Council on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, "Official Journal of the European Union" 2011, L 26/1, pp. 1-21.

of the planned project and this concept covers persons for whom the construction, existence or operation of an economic activity facility may create a danger or nuisance or endanger their property or other rights in rem, this means that persons covered by the concept of "neighbour" may belong to the "public concerned" within the meaning of Article 1(2) of Directive 2011/92.[19] And by limiting the right to challenge decisions determining the need to carry out an environmental impact assessment of a project only to the applicants for approval of the project, the authorities involved, the environmental ombudsman (Umweltanwalt) and the municipality of the site of the project, the national legislation deprives, according to the CJEU, a large number of individuals of that right, including in particular the category of "neighbours."[20]

In the *Folk* case,[21] the formula "affected or likely to be affected" (by environmental damage) was applied in the context of interpretation of Article 12 of Directive 2004/35[22] on environmental liability with regard to the prevention and remedying of environmental damage in relation to the request for preventive or remedial action and the granting of standing to bring actions for access to court. Article 12 of Directive 2004/35 provides for three distinct categories of persons who may initiate the procedures referred to in Articles 12 and 13 of that Directive.[23] "Although the Member States have discretion to determine what constitutes a 'sufficient interest', a concept provided for in Article 12(1)(b) of Directive 2004/35, or 'impairment of a right', a concept laid down in Article 12(1)(c) of that directive, they do not have such discretion as regards the right to a review procedure for those persons affected or likely to be affected by environmental damage, as follows from Article 12(1)(a) of that directive."[24] It follows that "An interpretation of national law which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage resulting in an increase in the mortality of fish, although those persons are directly affected by that damage, does not respect the scope of Articles 12 and 13 and is thus incompatible with that directive."[25]

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19 C-570/13…, para. 42.

20 *Ibidem.*

21 C-529/15, *Folk*, ECLI:EU:C:2017:419.

22 *Directive 2004/35/CE on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage*, "Official Journal of the European Union" 2004, L 143, pp. 56-75.

23 C-529/15…, para. 44: "those three categories are persons affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision-making relating to the damage, or alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition".

24 C-529/15…, para. 47.

25 *Ibidem*, para. 49.

With regard to the air quality, the CJEU has on several occasions confirmed[26] referring to the right of a "the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded" that such persons should be in a position to require the competent authorities to draw up an action plan to improve air quality, if necessary by bringing an action before the competent courts.[27] "It would be contrary to the binding nature conferred on the Directive by Article 249 EC [288 TFUE] to exclude in principle that the obligation established by it could be invoked by the persons concerned. That observation remains valid in particular in relation to a directive which aims to control and reduce atmospheric pollution and which therefore seeks to protect public health."[28]

In this context, the Court also referred to the formula of a "directly affected person,"[29] and thus a person actually interested in the Member States' compliance (fulfilment) with the obligations imposed by the Directive's provisions.[30] Such a person, being in such a factual situation ("whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health")[31] must "be able to rely on the mandatory rules included in those directives."[32] The Court has concluded that "the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts."[33]

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[26] E.g. in cases: C-237/07…, paras 34-42 and C-404/13…, paras 54-56.

[27] See for an analysis of the C-237/07… case e.g.: J. H. Jans, *Harmonization of National Procedural Law Via the Back Door? Preliminary Comments on the ECJ's Judgment in Janecek in a Comparative Context* [in:] *Views of European Law from the Mountain*: *Liber Amicorum Piet Jan Slot*, M. Bulterman, L. Hancher, H.G. Sevenster (eds), Alphen aan den Rijn 2009, p. 267; H. Doerig, *The German Courts and European Air Quality Plans*, "Journal of Environmental Law" 2014, vol. 26, no. 1, p. 139; A. Ryall, *Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law*, "European Journal of Risk Regulation" 2015, vol. 6, no. 2, p. 305.

[28] C-237/07…, para. 37; C-404/13…, para. 56; C-723/17, *Lies Craeynest and Others*, ECLI:EU:C:2019:168, para. 67.

[29] See e.g.: C-237/07…, para. 39; C-570/13…, paras 48-49; C-404/13…, para. 58; C-61/21…, paras 58-61.

[30] See e.g.: A. Sikora, *Constitutionalisation…*, pp. 268-277; A. Sikora, *Rola sądów krajowych w egzekwowaniu unijnych norm prawa ochrony środowiska*, "Rocznik Administracji Publicznej" 2021, vol. 7, p. 153.

[31] C-237/07…, para. 38.

[32] *Ibidem*. See also cases: C-361/88… and C-59/89…, as well as C-58/89…

[33] C-237/07…, para. 39.

Thus, an individual finding himself in such a factual situation (i.e. a breach of environmental quality standards which is likely to endanger the health of the individual concerned) has a right to invoke the mandatory provisions of EU directives. It is clear from this formulation of the CJEU that the provisions of the directives on the quality of the components of the environment which were intended to protect public health set standards for water or air quality do not confer a substantive right to air or water of a particular quality, but the only right is to invoke the mandatory (directly effective) provisions contained in those directives in order to seek judicial enforcement or assessment of the manner in which the Member States (competent national authorities) have complied with the obligations imposed by the Directive's provisions.

The jurisprudence of the Court, not always in a consistent and precise manner, distinguishes between, on the one hand, the assertion of rights (entitlements) arising from EU rules (more on this below) and, on the other hand, the right to invoke EU rules before a national court as a feature of the EU rule independent of whether it confers subjective rights on the individual concerned (as regards the effects of such invocation, this will depend on the type of proceedings and the nature of the EU rule).[34] EU law has still not developed a coherent framework on the possible interaction between individual rights and collective (rights) interests in the context of the protection of the proper state of environmental quality (of its various components).[35]

Invoking a norm of EU law may cover a range of situations, as is apparent, for example, from the nature of individual EU norms, but also gives rise to a variety of effects, as is apparent from the specific framework of the proceedings before the national court in which the EU norm is invoked.[36]

It is worth pointing out that, with regard to environmental legislation, one does not have to do with regulatory framework that formulates rights 'for the benefit of specific persons', the content and enforcement of which are both for the 'direct benefit and interest of the holders of those rights.[37] On the contrary, obligations imposed on the Member States in environmental legislation concerning the state of environmental quality are clearly intended to benefit society as a whole, since they are aimed at improving and guaranteeing the proper state of the elements of the environment, and not any specific person(s).[38]

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[34] M. Dougan, *Addressing Issues…*, pp. 162-165 and the literature and case law cited therein.

[35] *Ibidem*, pp. 144, 154-155.

[36] *Ibidem*, pp. 145-149.

[37] *Ibidem*, pp. 152-155 and the literature and case law cited therein.

[38] *Ibidem*; see H. Somsen, *The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?* [in:] *Yearbook of European Environmental Law*, H. Somsen (ed.), Oxford 2000, p. 311.

In this context, it is possible to point to the different nature of EU norms. Indeed, one can distinguish between, on the one hand, norms formulating rights of a substantive nature, which introduce a certain level of protection within a given dispute or relationship, and, on the other hand, procedural rights/obligations, which formulate rights to participate in decision-making processes (e.g. the right to participate in an environmental impact assessment procedure), but without prejudging its final outcome.[39]

For the possibility of claiming compensation from a Member State for breach of UE law, a distinction should be made between, on the one hand, rules aimed at conferring subjective rights on individuals, the breach of which enables the right holder to claim compensation from the Member State for breach of EU law; and, on the other hand, the right to invoke UE provisions, usually in defence of some collective interest, the breach of which does not give rise to a claim for damages against a Member State.[40]

It is for these reasons, inter alia, that environmental legislation implies the need for a broad access to the courts (standing) to ensure its effective enforcement, not necessarily by individuals themselves (unless they fall within the category of 'directly affected person'), but by environmental organisations, as well as appropriate, though not necessarily individual, remedies.[41]

With these two factors in mind, it should be pointed out that EU law has created a wide spectrum of possible legal constructions in the application of environmental standards by national courts. First, the applicant may rely on an individual right under EU law (which is a rare situation and generally concerns a right of a procedural nature). Second, the applicant may only be entitled to enforce, before the national courts, procedural obligations (imposed in the general interest) incumbent on the competent national authorities.

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[39] M. Dougan, *Addressing Issues…*, pp. 145-146. H.C.H. Hofmann, C. Warin, *The Concept of an Individual Right under Union Law* [in:] *Contemporary Concepts of Administrative Procedure between Legalism and Pragmatism*, Z. Kmieciak (ed.), Warsaw 2023, pp. 49-63.

[40] *Ibidem.*

[41] J. Darpö, *Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law* [in:] *Environmental Rights in Europe and beyond: Swedish Studies in European Law*, S. Bogojevic, R. Rayfuse (eds), pp. 274-275; M. Dougan, *Addressing Issues…*, pp. 151-155.

2. Do the air quality provisions of Directive 2008/50 (and the preceding directives) confer rights on individuals?

With regard to the possibility of enforcing legislation in the field of air quality protection by means of a State's liability for damages caused to individuals as a result of infringements of EU law,[42] the answer is to what extent the infringement of limit values laid down by Union law for the protection of air quality can actually justify a claim for damages. In other terms, are the conditions for claiming liability for damages under EU law fulfilled?

In general terms, the full effectiveness of EU law, as confirmed by the case law of the CJEU, would be limited and the protection of rights conferred thereunder weakened if an individual were not able to obtain compensation for the infringement of his rights as a result of a breach of EU law attributable to a Member State.[43]

The institution of the Member States' liability for damages (as formulated in *Francovich case*) identifies three conditions for the right to compensation:

- the purpose of the infringed provision of EU law is to confer a right on individuals,
- the breach is sufficiently serious, and
- there is a direct causal link between that infringement and the harm suffered by those individuals.[44]

As a general rule, specific provisions that the CJEU interpreted as conferring individual rights were characterised either by the fact that they conferred civil law

[42] See: C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, paras 54-55; D. Misonne, *Arm Wrestling around Air Quality and Effective Judicial Protection: Can Arrogant Resistance to EU Law-related Orders Put You in Jail? Judgment of the Court (Grand Chamber) of 19 December 2019 in Case C-752/18 – Deutsche Umwelthilfe eVvFreistaat Bayern*, "Journal for European Environmental & Planning Law" 2020, vol. 17, no. 4, p. 409. Indeed, the 'intention to confer rights' criterion has attracted considerably less scholarly analysis than either the 'sufficiently serious breach' or the 'direct causal link' requirement – though there are some notable exceptions, e.g. J.H. Jans, A.P.W. Duijkersloot, *State Liability* [in:] *Europeanisation of Public Law*, J.H. Jans, S. Prechal, R.J. Widdershoven (eds), Zutphen 2015, pp. 445-485.

[43] See e.g. C-6/90 and C-9/90, *Francovich*, EU:C:1991:428, para. 33; C-420/11, *Leth*, EU:C:2013:166, para. 40; C-573/17, *Popławski*, EU:C:2019:530, para. 56; C-752/18…, para. 54; M.L. Ogren, *Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives*, "Transnational Lawyer" 1994, vol. 7, no. 2, p. 583; J.T. Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations under European Community Law: The Francovich Judgment*, "Fordham International Law Journal" 1992, vol. 16, p. 1.

[44] See. e.g.: C-46/93 and C-48/93, *Brasserie du pêcheur*, EU:C:1996:79, para. 51; C-445/06, *Danske Slagterier*, EU:C:2009:178, para. 20; C-735/19, *Euromin Holdings (Cypr)*, EU:C:2020:1014, para. 79.

claims for damages on a specific group of individuals (employees or consumers) or by the claims of individuals against national authorities (administrations) for a specific benefit as defined in the directive.[45] These were cases where, on the basis of the wording and purpose of the provision in question, both the right holder and the content of the right (claim) could be determined with sufficient clarity.[46]

As far as the provisions of Directive 2008/50 are concerned – as discussed in more detail below – the wording of its provisions does not make it possible, in the sense indicated above, to establish both the right holder and the content of the right (claim).

The doctrine of subjective law confirms the existence of a right when a mandatory provision serves not only the public interest, but – at least also – the interest of individuals.[47] In order to assert a claim of state liability, the question is whether the infringed provision confers a right on the affected person in the sense of a legally protected position.[48]

The criteria to be applied to the question of personal entitlement in the case of transposition of a directive and direct effect of directives can be applied. According to these criteria, a subjective right exists if a provision of EU law, in accordance with its objective purpose, protects an individual's interests, which, however, must be real and distinct.[49]

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[45] See e.g. Opinion of Advocate General V. Trstenjak in C-445/06, *Danske Slagterier*, paras 60-64.

[46] T.A. Downes, Ch. Hilson, *Making Sense of Rights: Community Rights in EC Law*, "ELRev" 1999, vol. 24, no. 2, p. 121; W. Van Gerven, *Of Rights, Remedies and Procedures*, "CMLR" 2000, vol. 37, p. 501; T. Eilmansberger, *The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link*, "CMLR" 2004, vol. 41, p. 1199; S. Beljin, *Rights in EU Law* [in:] *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, S. Prechal, B. van Roermund (eds), Oxford 2008; M. Dougan, *Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law*, "Cambridge Yearbook of European Legal Studies" 2010, vol. 12, p. 73.

[47] Opinion of Advocate General V. Trstenjak in C-445/06…, para. 72; see also, e.g. C-453/99, *Courage*, paras 19 and 23; see further, e.g. W. Van Gerven, *Harmonization of Private Law: Do We Need It?*, "CMLR" 2004, vol. 41, p. 505; S. Drake, *Scope of Courage and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice*, "ELRev" 2006, vol. 31, p. 841; N. Reich, *Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights*, "CMLR" 2007, vol. 44, p.705; M. Dougan, *Addressing…*, pp. 147-149; C. Warin, *Individual Rights and Collective Interests in EU law: Three Approaches to a Still Volatile Relationship*, "CMLR" 2019, vol. 56, pp. 463-488.

[48] The CJEU generally uses the term 'individual right', however, in doing so it obviously has 'subjective right' in mind; see e.g. Opinion of Advocate General V. Trstenjak in C-445/06…

[49] See C. Calliess, M. Ruffert (eds), *Kommentar zu EUV/EGV*, München 2007, p. 2358 – I invoke for Opinion of Advocate General V. Trstenjak in C-445/06…, footnote 18; N. Półtorak, *Ochrona uprawnień…*, pp.172-180 and case law and literature therein.

The Court has found in a number of infringement proceedings that Member States have failed to meet the air quality standards required by Directive 2008/50 (including even a systematic and persistent failure to do so).[50] Does this mean, however, that the purpose of the provisions of Directive 2008/50 (or its predecessor directives) was to confer a right to a certain ambient air quality, the violation of which could justify a claim for damages?

That would mean, if the answer to that question is in the affirmative, that Member States would be exposed to claims for damages on account of breaches of air quality standards if it is assumed that the content of the legal standards setting those standards confers rights on individuals.[51]

2.1. Case law before the judgement in Case C-61/21 *Ministre de la Transition Écologique (JP)* and the liability of the Member States for damages for breach of EU environmental law

In the *Deutsche Umwelthilfe* case,[52] in response to a question from a national court whether EU law, and in particular the first paragraph of Article 47(1) of the EU Charter of Fundamental Rights (hereinafter "the Charter"), in circumstances characterised by a national authority's persistent refusal to comply with a judicial decision ordering it to enforce a clear, precise and unconditional obligation under that law, and in the context of Directive 2008/50, whether EU law empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority, the CJEU, *orbiter dicta* of the main line of argument, pointed out (recalled) the importance of the institution of the Member States' liability for damages. The Court recalled that "[t]he full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a re-

[50] See: Opinion of Advocate General J. Kokott in C-61/21…, para. 96; see: cases: C-479/10, *Commission v Sweden (PM10)*, EU:C:2011:287; C-34/11, *Commission v Portugal (PM10)*, EU:C:2012:712; C-68/11, *Commission v Italy (PM10)*, EU:C:2012:815; C-488/15, *Commission v Bulgaria (PM10)*, EU:C:2017:267; C-336/16, *Commission v Poland (PM10)*, EU:C:2018:94; C-636/18, *Commission v France (Exceedance of Nitrogen Dioxide Limit Values)*, EU:C:2019:900; C-638/18, *Commission v Romania (Exceedance of PM10 Limit Values)*, EU:C:2020:334; C-644/18, *Commission v Italy (Limit Values – PM10)*, EU:C:2020:895; C-637/18, *Commission v Hungary (Limit Values – PM10)*, EU:C:2021:92; C-664/18, *Commission v UK (Limit Values – Nitrogen Dioxide)*, EU:C:2021:171; C-635/18, *Commission v Germany (Limit Values – NO2)*, EU:C:2021:437; C-286/2, *Commission v France (Limit Values – PM10)*, EU:C:2022:319.

[51] This fact is also noted by Advocate General J. Kokott – see Opinion of Advocate General J. Kokott in C-61/21…, paras 97-100.

[52] C-752/18…

sult of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based."[53]

In the context of liability for damages, the CJEU has already had occasion, in its earlier case law on environmental matters,[54] notably in the *Wells* case[55] to clarify the concept of 'a provision conferring a right(s) on an individual' (nature of such rights) and the corresponding entitlement to judicial protection (instruments of such protection), appeared in the *Wells* case.[56] In that case, the Court, for the first time in relation to legislation in the field of environmental law, indicated, on the margins of the fundamental problem (i.e. the question of the existence of an obligation to carry out an environmental impact assessment procedure for a project and the legal remedies to be taken in the event of a failure to comply with that obligation)[57] that "the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment"[58] (…) "it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."[59] An individual seeking to enforce the provisions of Directive 85/337,[60] i.e. the obligation to carry out the necessary environmental impact assessment, should also be able to claim damages for a breach by a Member State of its obligations under EU law.

The Court did not expressly rule that Directive 85/337 was intended to confer rights on individual "members of the public" (individuals or environmental organisations) in the context of being able to claim compensation. It appears that the possibility of 'redress for the harm suffered', as indicated in the *Wells* judgment, must be read in the context that it is for national law, in accordance with the principle of procedural autonomy and the requirements of the principle of equivalence and

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53 *Ibidem*, para. 54; see similarly cases: C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, EU:C:1996:79, paras 20, 39, 52; C-168/15, *Tomášová*, EU:C:2016:602, para. 18 and the case law cited therein.

54 This is *Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, "Official Journal of the European Union" 1985, L 175; subsequently replaced by *Directive 2011/92/EU…*

55 C-201/02, *Wells*.

56 *Ibidem*, paras 62-70.

57 *Ibidem*, paras 33-70.

58 *Ibidem*, para. 68.

59 *Ibidem*, para. 69.

60 *Directive 85/337/EEC…*, pp. 40-48.

effectiveness, to provide a mechanism for redressing any harm caused to an individual as a result of a failure to carry out an environmental impact assessment as required by EU law (as required by the Directive).[61] As the literature rightly argues, the problematic nature of the *Wells* judgment arises first and foremost from the fact that, so far as the carrying out of an environmental impact assessment in accordance with Directive 85/337 is concerned, the purpose of the applicable legislation is not to confer a subjective right on an individual which should be subject to redress in the form of compensation in the event of its infringement, but it is a legislation of a public nature, i.e. it protects a general interest and not an individual interest.[62]

However, in the later *Leth* case,[63] the Court explicitly confirmed that EU law also requires that a Member State, irrespective of any grounds of liability arising under national law, must also be liable on the basis of the *Francovich* principle (EU law). The Court's conclusion in the *Leth* case was preceded by a finding that the purpose of Directive 85/337[64] is to protect the environment and the quality of life; exposure to noise from a qualifying project can have a significant impact on the quality of life and potentially also on the health of individuals.[65] The issue was whether provisions of Directive 85/337 confers certain rights on the individual, i.e. determining the scope of the protective purpose of the directive. An analysis of the normative nature of Directive 85/337 provisions led to the conclusion that it only contains procedural norms,[66] and not provisions of a substantive nature specifying requirements/conditions for the implementation of certain projects subject to an impact assessment procedure. However, a negative result of the assessment does not automatically prohibit the implementation of the project, nor does the assessment directive itself contain provisions on offsetting negative environmental effects by other factors.[67]

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[61] See: M. Dougan, *Addressing Issues…*, pp. 153-154; M. Baran, *Odpowiedzialność odszkodowawcza państwa członkowskiego (doktryna Francovich) za szkody wyrządzone naruszeniem unijnego prawa ochrony środowiska (wybrane problemy)* [in:] *Prawo zarządzania środowiskiem. Aspekty sprawiedliwości ekologicznej*, M. Nyka, T. Bojar-Fijałkowski (eds), Gdańsk 2017, pp. 163-178.

[62] See further, for critical discussion, e.g.: S.L. Prechal, L. Hancher, *Individual Environmental Rights: Conceptual Pollution in EU Environmental Law* [in:] *Yearbook of European Environmental Law*, H. Somsen et al. (eds), Oxford 2001, p. 89; P. Wennerås, *State Liability for Decisions of Courts of Last Instance in Environmental Cases*, "Journal of Environmental Law" 2004, vol. 16, p. 329.

[63] C-420/11…; H. Vedder, *Leth: Court Rules Out Francovich Claim on the Basis of the Environmental Impact Assessment Directive*, "European Law Blog" 2013.

[64] *Directive 85/337/EEC…*, pp. 40-48. *Directive 85/337/EEC…* was repealed by *Directive 2011/92/EU…* on the assessment of the effects of certain public and private projects on the environment (pp. 1-21).

[65] C-420/11…, paras 34-35.

[66] See on EU environmental law legislation of a procedural nature e.g. M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making*, Oxford 2005, pp. 151-152, 163.

[67] C-420/11…

The CJEU then analysed whether the provisions of Directive 85/337 are intended to confer a subjective right to an assessment of the environmental effects of a project and to protection against property damage in the form of loss of value as a direct result of the failure to carry out such an assessment, despite the fact that "the environmental impact assessment as provided for in Article 3 of Directive 85/337 does not include an assessment of the effects of which the project under examination has on the value of material assets."[68] But this does not mean "that an environmental impact assessment has not been carried out, contrary to the requirements of that directive" (in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material asset), "does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets."[69] This conclusion is justified by the fact that "the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337."[70] What is important is that, in terms of defining the full scope of protection under Directive 85/337, the reasoning of the Court in *Leth* case concerning the material scope of the individual interests protected by the directive refers only to its economic dimension (diminution in the value of property), but no longer covers the intangible interests of individuals, or more generally the interests of the environment as a whole (the state of the quality of the various components of the environment).[71]

As rightly pointed out in the scholarship, the Court's approach in *Leth* case to understand the protective scope of the Directive for the purpose of establishing a 'grant of rights to the individual' is debatable.[72]

First, the Court has been quite creative in extracting the subjective rights of the individual from the provisions of Directive 85/337: on the one hand, the procedural rights relating to the carrying out of the assessment and the right to participate in the assessment in the environmental impact assessment procedure,[73] and, on the other

[68] *Ibidem*, pkt 30.
[69] *Ibidem*, pkt 31.
[70] *Ibidem*, pkt 36.
[71] M. Dougan, *Addressing Issues…*, pp. 135-136.
[72] *Ibidem*, pp. 153-155.
[73] Indeed, the EIA Directive confers certain rights on the persons concerned when a project is made subject to an environmental impact assessment. In particular, they are entitled, in the context of the procedure created by the Directive, to be informed of the environmental impact of the project in question (in particular Articles 5 and 6) and to express their views on the matter during that procedure (Articles 6 and 7). The results of public participation should also be taken into account

hand, the substantive right, granting protection against the direct economic consequences (reduction in the value of the property).[74]

Second, although the *Leth* case took a very expansive approach to interpreting the scope and protective purpose of the Directive 85/337, the Court's approach was then narrow in its subsequent analysis of the conditions for liability, i.e. verifying the direct causal link between the Member State's breach of the Directive 85/337 and the property damage for which the individual seeks compensation.[75] This, in turn, significantly limits the potential scope of claims for damages in view of this understanding of the concept of a 'right' falling within the scope of the protection of the Directive 85/337.[76] To satisfy the condition of a causal link, it must be determined whether the correct implementation/application of the directive (in the *Leth* case the correct application of the directive would have been to carry out an environmental impact assessment of the project) could have prevented the damage.[77]

In the *Leth* case, in view of the procedural nature of the Member State's obligations under Directive 85/337, which did not prejudge the substantive decision as to whether the proposed project should be authorised, the mere fact that an assessment was not carried out does not in itself, in principle, affect the value of the property, even if the decrease in that value is directly attributable to the environmental effects of authorising the project.

2.2. Do the limit values and the obligation to comply with air quality standards under Directive 2008/50 aim to confer (substantive) rights on the individual?

For liability to be claimed for damages on the grounds that EU law has been infringed by the Member States, it must first be established that the purpose of the provision of EU law infringed is to confer rights on the individual claiming damages.[78] In the context of air quality standards, this requires a positive finding that the purpose of the limit values and the obligation to improve air quality under Directive 2008/50 (or its predecessor: Directives 96/62 and 1999/30) is to confer rights on individuals who have suffered damage to their health as a result of air pollution.

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when deciding on the project (Article 8) and the essential information concerning the decision on the project should be made available to the public (Article 9).

74 M. Baran, *Odpowiedzialność odszkodowawcza…*, pp. 170-178; M. Dougan, *Addressing Issues…*, pp. 153-155.

75 C-420/11…, paras 45 and 47.

76 M. Dougan, *Addressing Issues…*, pp. 154-155.

77 N. Półtorak, *Ochrona uprawnień…*, p. 473.

78 See, for example, C-6/90 and C 9/90…, para. 40; C-46/93 and C-48/93…, para. 51; C-420/11…, para. 41; C-129/19, *Presidenza del Consiglio dei Ministri*, EU:C:2020:566, para. 34.

For an assessment of whether EU law provision confers a right on an individual for the purpose of a claim for damages, it is not decisive whether the provision in question is of direct effect.[79] Determining the content of the right conferred by the EU law measure is crucial for the assertion of a claim for damages against a Member State.[80] Although the direct effect of a rule does not necessarily mean that it acquaints a particular group of individuals with rights, it may be, as Advocate General J. Kokott points out, "an important indication in favour of the granting of rights."[81]

In her opinion on the *JP* case, Advocate General J. Kokott, in analysing whether the provisions of Directives 96/62 and 1999/30 as well as Directive 2008/50 (which replaced Directives 96/62 and 1999/30 in 2008 with effect from 11 June 2010) confer rights on individuals, focused her consideration on whether the provisions are clear (definite) and unconditional and what the purpose of the provision is.[82]

- ***The clarity and precision of the provision***

The feature of an EU law provision that it is "sufficiently determinate"; is linked to the fact that it has the capacity of conferring a right on an individual.[83] In the case of provisions which leave the Member States a scope of discretion, the fact that an individual may seek redress before national courts in respect of the limits of that discretion[84] may also confirm the conferral of a right by Union legislation.[85] The question of the limits of the discretion which the EU legislation confers on the Member States may, in the view of the Advocate General, be relevant to the question whether the infringement is material,[86] but not to the fact that it confers rights on individuals.[87]

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79 See e.g. judgments: C-46/93 and C 48/93…, paras 21-22; C-735/19…, para. 81.

80 Cases: C-6/90 and C-9/90…, para. 40; C-212/04, *Adeneler et al.*, EU:C:2006:443, para. 112; C-616/16 and C-617/16, *Pantuso et al.*, EU:C:2018:32, para. 49.

81 Opinion of Advocate General J. Kokott in C-61/21…, para. 34; see also judgments: C-445/06…, paras 22-26; C-429/09, *Fuß*, EU:C:2010:717, paras 49-50; C-501/18, *Balgarska Narodna Banka*, EU:C:2021:249, paras 63, 86.

82 See Opinion of Advocate General J. Kokott in C-61/21…, paras 35 and 72; see e.g. cases: C-178/94, C-179/94 C-188/94…, paras 33ff.; C-571/16, *Kantarev*, EU:C:2018:807, para. 102; C-735/19…, paras 88-89.

83 See Opinion of Advocate General J. Kokott in C-61/21…, para. 71.

84 Cases: C-237/07…, para. 46; C-488/15…, para. 105; see also cases: C-72/95, *Kraaijeveld et al.*, EU:C:1996:404, para. 59: C-723/17…, paras 34, 45; C-197/18, *Wasserleitungsverband Nördliches Burgenland et al.*, EU:C:2019:824, paras 31, 72.

85 See Opinion of Advocate General J. Kokott in C-61/21…, paras 35 and 71.

86 Cases: C-278/05, *Robins et al.*, EU:C:2007:56, para. 72; C-398/11, *Hogan et al.*, EU:C:2013:272, paras 50-52 and in particular to Directive 2008/50 – Opinion of Advocate General J. Kokott in C-174/21, *Commission v Bulgaria (PM10)* (C-488/15…, para. 76).

87 See the opinion of Advocate General J. Kokott in C-61/21, para. 71.

Advocate J. Kokott concludes in her opinion that both Articles 7 and 8 of Directive 96/62, in conjunction with the limit values for nitrogen dioxide and PM10 pursuant to Directive 1999/30, justify a clear and unconditional obligation to comply with those limit values, which for PM10 existed from 1 January 2005 and for nitrogen dioxide from 1 January 2010, and Article 13(1) of Directive 2008/50, as well as Article 23(1) of Directive 2008/50, impose a clear and independent obligation on the Member States to prevent the limit values for air pollutants from being exceeded and to draw up, respectively, air quality plans for the protection of air quality arising from failure to comply with the limit values requirements established.[88]

The obligation of Member States to balance the conflicting interests and to take action to reduce the period of exceedance as far as possible (derived from Article 7(3) of Directive 96/62[89] and Article 23(1) of Directive 2008/50) does not set a specific time limit for ending the exceedance, but merely requires that the period of non-compliance be as short as possible. But that does not prevent it from being regarded as sufficiently clear for the assessment of a breach of the limits of the existing freedom in that regard.[90]

Referring in turn to the objective of Regulation 2008/50 and Directive 96/62, the Advocate General points out that that objective is (in accordance with the second recital in each case and Article 1 of Directive 2008/50) to reduce, prevent or limit harmful effects on human health.[91]

Building on the legal arguments based on the protection of human health as an objective of Directives 96/62 and 2008/50, the Advocate General concludes that the establishment of limit values for pollutants in ambient air and the imposition of an obligation to improve air quality in Articles 7 and 8 of Directive 96/62, read in conjunction with Directive 1999/30, and in Articles 13 and 23 of Directive 2008/50 confer rights on individuals.[92]

- ***Who is entitled?***

The provisions of Directive 2008/50 and its predecessor directives on air quality undoubtedly give concrete expression to the Union's obligations to protect the environment and public health arising, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU. According to these treaty provisions, Union policy on the en-

88 Cases: C-237/07…, para. 35; C-404/13…, para. 53.
89 Opinion of Advocate General J. Kokott in C-61/21…, para. 54.
90 *Ibidem*, para. 71.
91 C-723/17…, para. 67.
92 Opinion of Advocate General J. Kokott in C-61/21…, para. 103.

vironment aims at a high level of protection, taking into account the diversity of situations in the various regions of the Union, and is based, inter alia, on the principles of precaution and preventive action.[93]

But the mere fact that, in particular, limit values (limit values for the protection of human health in Annexes II and III to Directive 1999/30 and in Article 13 of Directive 2008/50 and Annex XI thereto) are set in order to avoid, prevent or reduce harmful effects on human health or the environment as a whole does not determine what group of persons is entitled to derive a substantive right to air of a certain quality is, unless we assume that it is every person.[94]

The mere fact that the Member States' obligations under those directives as regards improvement of air quality arise as a result of the exceedance of those limit values and – as the Court accepted – the possibility for an individual to rely on Directives 2008/50 and 96/62[95] and, in that context, to point to the judicial protection of the rights of individuals, does not yet mean that Directive 2008/50 (and its predecessors) was intended to confer (substantive) rights on an individual as regards air quality.[96]

Analysing the content of the provisions of Directive 2008/50 and the directives which preceded it, the Court – in contrast to Advocate General Kokott – pointed out that they do not contain any express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals."[97]

The CJEU rejected such an interpretation of the provisions[98] of Directive 2008/50 and its predecessor directives that were considered, as aiming to grant on individuals individual rights which would enable them to bring a claim for damages against the Member State in accordance with the principle of State liability for damage caused to individuals as a result of infringements of EU law attributable to it.

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93 See, for example, C-723/17…, para. 33.

94 Thus the definition of the term 'limit value' in Article 2(5) of Directives 96/62 and 2008/50.

95 Cases: C-237/07…, paras 37-38; C-404/13…, para. 54; C-723/17, *Craeynest et al.*, EU:C:2019: 533, paras 53-54; C 752/18…, para. 38.

96 C-61/21…, paras 47-56 and case law cited therein.

97 *Ibidem*, para. 56.

98 These were: Articles 3 and 7 of Directive 80/779, Articles 3 and 7 of Directive 85/203, Articles 7 and 8 of Directive 96/62, Articles 4(1) and 5(1) of Directive 1999/30, as well as Articles 13(1) and 23(1) of Directive 2008/50.

The CJEU reaffirmed the conclusion already drawn from its earlier case law that it is a different matter whether the Union provision in question has direct effect, since that characteristic is neither necessary[99] nor sufficient in itself,[100] in order for a provision to be considered to confer a right on individuals.[101] The way in which a Union provision is worded may or may not be decisive for concluding, through its interpretation, that it confers a right on individuals.

While it is true that rights of individuals may arise not only from the express conferral of a right by Union legislation, but also from the obligations, positive or negative, which it imposes in a well-defined manner on individuals as well as on Member States and the Union institutions.[102] But the mere fact that the provisions of Articles 13(1) and 23(1) of Directive 2008/50 establish, like the analogous provisions of Directives 96/62, 1999/30, 80/779 and 85/203, clear and precise obligations as to the result which Member States are required to ensure, does not yet mean that they confer rights on individuals.

The rejection of the possibility for individuals to derive rights (individual rights) from those provisions is precluded, according to the Court, because "those obligations pursue, as is apparent from Article 1 of the directives mentioned in the previous paragraph, as well as, in particular, recital 2 of Directive 2008/50, a general objective of protecting human health and the environment as a whole."[103]

The general nature of the objective of Directive 2008/50 in the context of the protection of human health appears to be the argument which determined the exclusion that the provisions of that directive, which formulate certain obligations on the Member States in relation to the state of air quality, confer rights on a particular group of persons potentially concerned (affected) by the failure to comply with the levels of the permitted air quality standards.

Indeed, the primary objective of the air quality provisions of Directive 2008/50 is to improve air quality and thus the general interests of all individuals, as air is such an environmental component which is not subject to individual appropriation. Moreover, due to the physical characteristics of the air, the pollutants present in it are subject to displacement. Another important argument confirming the general objective

99 C-61/21…, para. 47; see similarly C-46/93 and C-48/93…, paras 18-22.

100 C-61/21…, para. 47; see also C-98/14, *Berlington Hungary and Others*, EU:C:2015:386, paras 108-109.

101 C-61/21…, para. 44.

102 C-61/21…, para. 46; see similarly the judgments: 26/62, *van Gend & Loos*, EU:C:1963:1, para. 23; C-6/90 and C-9/90…, para. 31; C-453/99, *Courage and Crehan*, EU:C:2001:465, para. 19; C-819/19, EU:C:2021:904, para. 47.

103 C-61/21 *Stichting Cartel Compensation and Equilib Netherlands* JP, para. 55.

(protection of the entire population) of Directive 2008/50 as regards the protection of human health is the fact that, in view both of the mobility of pollutants in the air (in the environment in general) and of the mobility of individuals themselves, there are no criteria in the text of the directive which would make it possible to single out from among all the individuals to whom it confers rights.[104]

Articles 13(1) and 23(1) of Directive 2008/50 (as well as the analogous provisions of Directives 96/62, 1999/30, 80/779 and 85/20) impose fairly clear and precise obligations as to the result that the Member States are required to ensure, namely the adoption of measures capable of minimising the risk of a breach and its duration, regarding all the circumstances of the moment and the interests at stake.[105] At the same time, those provisions set limits on the exercise of the national authorities' discretion which individuals may rely on before the national courts in order to assess whether the national authorities have acted in conformity with the obligations arising under the Directive 2008/50 (concerning, inter alia, the adequacy of the measures which the action plan must contain for reducing the risk of a breach and its duration, having regard to the balance to be struck between that objective and the various public and private interests at stake).[106] In particular, individuals relying on the obligations of Member States under Directive 2008/50 should be able to require the competent authorities, if necessary through judicial channels, to adopt the measures required under those Directives.[107]

As regards the second subparagraph of Article 23(1) of Directive 2008/50, natural or legal persons directly concerned by the risk of those limit values being exceeded after 1 January 2010 must be able to require the competent authorities to draw up, if necessary by judicial review, an air quality plan in accordance with the second subparagraph of Article 23(1) of Directive 2008/50, where the Member State has failed to ensure compliance with the requirements of the second subparagraph of Article 13(1) of that directive and has also failed to seek a deferral of the deadline under the conditions laid down in Article 22.[108] Furthermore, the Member States are in any

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104 Indirectly also Advocate General J. Kokott in C-61/21…, paras 130-134.

105 C-61/21…, para. 51; see similarly C-237/07…, paras 44-46.

106 C-61/21…, paras 51 and 58; see similarly C-237/07…, paras 44-46; C-404/13…, para. 56 and case law cited therein; and from C-752/18…, para, 56.

107 C-61/21…, para. 60; see similarly the cases: C-404/13…, para. 56 and the case law cited therein; and from C-752/18…, para. 56. Similarly, the CoJ ruled with regard to Article 7(3) of Directive 96/62: 'natural or legal persons directly affected by a risk of the limit values or alert thresholds being exceeded should be able to require the competent authorities, if necessary through the courts, to draw up an action plan as soon as such a risk arises (C-237/07…, para. 39; C-61/21…, para. 59).

108 C-61/21…, para. 60; C-404/13…, para. 56.

event to ensure that the period of exceedance of the limit values set for a given pollutant is as short as possible.[109]

Again, in the context of the entitlement of individuals to rely on the obligations of the Member States under Directive 2008/50 and its predecessors[110] in order to bring administrative or judicial proceedings, depending on their particular situation, to require the adoption of the measures required by those directives, the Court refers to the concept of affected individuals,[111] that is to say, of individuals "directly concerned".

The reasoning of the CJEU confirms that it is a different matter for individuals to be able to rely on the obligations laid down by the provisions of Directive 2008/50 and its predecessor directives in order to assess the action or omission of the national authorities. It is a separate question whether the provisions of Directive 2008/50 confer, implicitly, on individuals or categories of individuals, by reason of those obligations, individual rights the breach of which may give rise to liability on the part of the Member State for damage caused to individuals. This latter possibility was ruled out by the Court in view of the general objective of protecting human health and the environment as a whole (Article 1 of each directive and, in particular, recital 2 in the preamble to Directive 2008/50) and the directives which preceded it.

The fact that Directive 2008/50 does not confer on individuals individual rights which would enable them to bring a claim for damages against a Member State under the principle of State liability for damage caused to individuals as a result of infringements of EU law attributable to it does not preclude the State from being held liable on a less restrictive basis under national law[112] for breach of the obligations under Articles 13(1) and 23(1) of Directive 2008/50, as an element which may be relevant for the purposes of attributing liability to public authorities on a basis other than EU law.[113]

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109 C-61/21…, para. 50; C-644/18…, para. 136.

110 Cases: C-237/07…, paras 37-38; C-404/13…, para. 54; C-723/17…, paras 53-54; C-752/18…, para. 38.

111 C-61/21…, para. 62; see cases: C-404/13…, para. 52; C-723/17…, paras 31, 54; C-752/18…, paras 33, 39, 54.

112 See C-278/20, *Commission v Spain (Infringement of Union Law by the Legislature)*, EU:C:2022:503, para. 32 and case law cited therein.

113 C-61/21…, para. 63.

3. Is there a direct causal link between the infringement and the Member State?

To successfully claim damages,[114] there must be a causal link between the breach of the Union provision conferring the right on the individual and the damage.[115] There is no harmonised standard developed at EU level for the condition of a causal link because in each country it would fall under national law.[116] The Court of Justice emphasises that the existence of a direct causal link is a condition for the Member State's liability for damages, and it is for the national court to determine whether such a causal link exists in a particular case (it is for the national courts to determine the precise degree of proof).[117] This makes it necessary to assess the existence of a causal link in accordance with the principle of procedural autonomy as it is perceived in national law,[118] taking into account the requirements of the principles of equivalence and effectiveness.[119]

In the context of air quality, it is a question of demonstrating a direct causal link between a substantial failure to comply with air quality legislation and specific health impairments.[120] The Advocate General J. Kokkot in her opinion on the *JP* case considers that the first condition for liability is met, since the purpose of setting limit values for pollutants in ambient air and establishing an obligation to improve air quality is to confer rights on individuals, but as regards the condition of a causal link (i.e. as regards the condition of a causal link, that is, the deterioration in health resulting from the persistence, from the expiry of the relevant time-limit, of the limit values for PM10 and nitrogen dioxide in ambient air) but it is necessary "that the injured party proves a direct link between that adverse effect and his or her stay at a place where the respective applicable limit values were exceeded without there having been an air quality improvement plan which satisfied the requirements of Annex IV to

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114 *Ibidem*, p. 224.

115 C-501/18…, para. 122.

116 See: A. Biondi, M. Farley, *The Right to Damages in European Law*, Hague 2009, pp. 160-162; P. Wennerås, *The Enforcement of EC Environmental Law*, Oxford 2007, pp. 160-161 and the case law and views in the literature indicated there.

117 See C-420/11…, pkt 48 *in fine*: „it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied".

118 Cases: C-46/93 and C-48/93…, para. 65; C-94/10, *Danfoss and Sauer-Danfoss*, EU:C:2011:674, para. 34; C-501/12 to C-506/12, C-540/12 and C-541/12, *Specht et al.*, EU:C:2014:2005, para. 106.

119 C-94/10…, para. 36 and similarly judgments: C-295/04 to C-298/04, *Manfredi et al.*, EU:C:2006:461, para. 64; C-557/12, *Kone et al.*, EU:C:2014:1317, para. 24.

120 So Advocate General J. Kokott in her opinion in C-61/21, para. 126.

Directive 96/62 or Section A of Annex XV to Directive 2008/50 and which also did not contain any manifest defects in other respects."[121]

In determining the extent of compensation, the national court may examine whether the injured party has shown reasonable diligence in order to avoid the damage or to limit its extent (the issue of whether he has contributed to the extent of the damage caused and whether he has made use in good time of all the legal remedies available to him.[122] As pointed out in the literature when assessing the causal link, it should be determined whether the proper implementation/application of the directive (in the *Wells* or *Leth* case – the proper application of the directive would have consisted in conducting an assessment of the project's impact on the environment) could have prevented the damage.[123] An action or – as in the case of ineffective measures to improve air quality – an omission is only a cause of harm if the harm caused is directly attributable to the conduct in question. The necessary causal link does not exist if the damage would have occurred without the act or omission in question.[124]

The link that exists between the protective objectives pursued by the EU legislation and the harm to private property.[125] The scope of protection provided by the EU rules breached by a Member State has a direct bearing on the plane of causation as that element of liability for damages which delimits (and links) the types of damage caused by the nature of the breached EU norms falling within the normative construction of adequate causation (as a premise of liability).

It is theoretically possible that a party directly affected by the incorrect implementation of an environmental directive could claim damages.[126] If an individual had incurred certain expenses while acting in reliance on the compliance of national law with EU environmental legislation then these could be regarded as damages.[127] *Francovich's principle* suggests that an action for damages is also possible under envi-

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121 *Ibidem*, para. 142.

122 C-46/93 and C-48/93…, para. 84; P. Wennerås, *The Enforcement*…, pp. 161-162.

123 N. Półtorak, *Ochrona uprawnień*…, p. 473.

124 See similarly C-164/01 P, *van den Berg/Council and Commission*, EU:C:2004:665, para. 57.

125 If certain types of damage are not covered by the objective of protection pursued by directive, it is therefore impossible to link such damage as being in an adequate causal relationship with an infringement of the standards of such a directive.

126 For example, if the national authorities had granted an authorisation on the basis of national provisions that had not been brought into line with the requirements of the directive and subsequently, because of the need to bring the law into line, it was repealed or amended.

127 A separate issue remains the problem of compensation for environmental damage caused by non-compliance of national law with the requirements of EU environmental law; J.H. Jans, H.H.B. Vedder, *European*…, p. 228.

ronmental law,[128] although case law has not yet clarified to what extent this liability extends to environmental damage and is not limited to property damage arising in the sphere of a private party whose rights under EU law have been infringed.[129]

Conclusions

Contemporary challenges linked to the state of the environment and climate change, as well as the growing environmental awareness of modern societies, are also accompanied by the initiation of legal remedies in various for a for the enforcement of environmental liability in order to force Member States to take optimum action to improve the state of the environment.[130] In many cases, legal action taken by private parties through the courts is an example par excellence of complaints in the general interest.[131] This illustrates vividly the contrast between the global dimension of the issue of the state of the environment and the climate change taking place and the individual nature of judicial protection in the traditional sense of liability for damages.

The legal institution of state liability under EU law has been shaped in the Court's jurisprudence (starting with the *Francovich* case)[132] by the CJEU stating that a Member

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128 See examples from practice and an assessment of the effectiveness of the application of the Francovich rule in the recovery of damages in environmental cases discussed by A.-M. Moreno Molina, *Direct Effect and State Liability* [in:] *National Courts and EU Environmental Law*, J.H. Jans, R. Macrory, A.-M. Moreno Molina (eds), Zutphen 2013, pp. 100-102.

129 See also P. Wennerås, *The Enforcement*…, p. 156; cf. also C-420/11…: „(…) the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied" (para. 47).

130 Examples include the judgment of the Grand Chamber of the European Court of Human Rights in Starsburg in the case of *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECLI:CE:ECHR:2024:0409JUD005360020 and the decisions in *Carême v France*, ECLI:CE:ECHR:2024:0409DEC000718921 and *Duarte Agostinho and Others v Portugal and 32 Others*, ECLI:CE:ECHR:2024:0409DEC003937120. The applicants in these cases alleged that the respondent States had failed to act sufficiently on their part to prevent global warming and that this failure entailed a violation of the right to life and the right to respect for private and family life; and the impact of the consequences of the respondent States' omissions on the applicants' living conditions and health.

131 *Ibidem*.

132 In any event, the Court has already held in previous judgments that the Member States are, in principle, obliged to incur liability towards an injured person under the provisions of their national

State is obliged, on the basis of EU law, which confers rights on individuals, to compensate individuals for those damages caused to them by the State's breach of EU law.

The central issue of this analysis was the first condition for the non-contractual liability of Member States for breaches of Union law, namely whether the provisions of Directive 2008/50 give rise to rights for individuals. The CoJ in *JP* held that the provisions of Directive 2008/50, as well as those of its predecessor directives, do not purport to confer individual rights on individuals which would enable them to bring a claim for damages against a Member State under the principle of State liability for damage caused to individuals as a result of infringements of Union law attributable to it.

In relation to the problem of the ability to claim damages from a Member State for a breach of Union law, a distinction must be made between (on the one hand) rules aimed at conferring subjective rights on individuals, the breach of which enables the right holder to claim damages from the Member State for a breach of Union law; and (on the other hand) the right to invoke Union rules, generally in defence of some collective interest, the breach of which does not give rise to a claim for damages against the Member State.

In short, EU law has not yet developed a coherent framework for the interaction between individual rights and collective interests.[133] It is for these reasons, among others, that environmental legislation implies the need for broad judicial access (standing) to ensure its effective enforcement, not necessarily by individuals themselves (unless they fall within the category of 'directly affected person'), but by environmental organisations, as well as adequate, though not necessarily individual, remedies.[134]

Taking into account these two factors, it should be pointed out that EU law has created a wide spectrum of possible legal constructions in the application of environmental standards by national courts. First, the complainant may rely on a subjective individual right under EU law. Second, the complainant may only be entitled to enforce before national courts procedural obligations (imposed in the general interest) incumbent on the competent national authorities.

It is worth noting in this context that, at the legal level in the EU, changes are being made to existing legislation with a view to explicitly granting individuals the right to compensation in selected areas of EU environmental law. For example, in the Industrial Emissions Directive 2010/75 (IED), it is proposed that individuals will be granted the right to claim and obtain compensation (Article 79a of the IED) when

law on the liability of the State for the consequences of damage caused to an individual by an infringement of Community law (see judgment in C-60/75, *Russo*, paras 7-9).

133 M. Dougan, *Addressing Issues…*, pp. 154-155.

134 *Ibidem*, pp. 145-146, 151-152; J. Darpö, *Pulling the Trigger…*, pp. 274-275.

they suffer damage to their health due to a breach of national law transposing the IED.[135] The right to compensation in the IED is the first of its kind in EU environmental law and is certainly the start of a new trend: amendments to the Air Quality Directive[136] and the Urban Waste Water Treatment Directive also include a right to compensation for individuals whose health has been affected by pollution.

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Fundamental Rights and Climate Change – Exploring New Perspectives and Corresponding Remedies
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Between the Legal Qualification of Climate Claims and the Law Applicable to Their Resolution from the Perspective of Polish Law

Abstract: The legal community is increasingly seeking legal frameworks to support successful climate claims. However, the results are mixed, as the law often lacks adequate tools for effective climate action. Consequently, this chapter aims to explore whether it is legally feasible to file successful climate claims against private actors under Polish law, and if so, how to determine the applicable law for resolving such claims. Consequently, the analysis is focused on the relationship between climate change on one hand, and legal solutions, including personality rights, and tortious liability, on the other. Concurrently the multitude of legal bases for eventual claims triggers the difficulties in choosing the applicable law for the settlement of transnational climate disputes, i.e. whether their resolution should be based on the rules developed within national law or the relevant EU regulations, especially Rome II.

Keywords: personality rights, climate change, tortious liability, private sector accountability

Introduction

Saying that climate change is one of the biggest crises of 21st century is like saying nothing at all. The mentioned statement is in fact just a truism, one of the buzzwords of the public debate. However, the problem of an anthropogenic climate change still has a legal meaning and significance.

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Law shall be responsive and as such shall provide adequate tools to adapt, mitigate and fight the adverse effects of climate change. Both international and domestic law regimes – if well-functioning and well-established – shall provide certain scope of stability on the one hand and mechanisms to safeguard the rights of individuals and society as a whole on the other, especially in times of uncertainty and rapid changes, including the completely new social, legal and economic conditions caused by climate change.[2] These dependencies have been recognized by the public, whose environmental and legal awareness is consistently growing. The manifestation of said thesis is simple fact, that the legal community is increasingly looking for legal reasoning allowing the filing of successful climate claims. The results are mixed though, for the law does not provide adequate tools for effective climate action.

As for that, the main objective of this chapter is to examine the relationship between climate change and legal solutions, including human rights, personality rights,[3] and tortious liability. In other words the main concern of following deliberations is to analyze whether there exist legal remedies to hold private entities reliable for their adverse actions towards environment and climate.

In light of the above, the starting point for further considerations will be to answer the question of what climate change, including in particular legally relevant climate change, actually is. This will allow further analysis regarding the relationship between the Polish legal system and the phenomenon of a climate change. The above will mainly consist of verifying whether the legal system is reactive, i.e. whether it guarantees appropriate legal tools for making climate-oriented claims. The whole

[2] J. McDonald, *The Role of Law in Adapting to Climate Change*, "WIREs Climate Change" 2011, vol. 2, no. 2, p. 283.

[3] Personality rights are the legal construct known in Polish civil law. Although its elaboration will take place within the framework of further considerations, so already at this stage it should be pointed out that according to Art. 23 of Polish Civil Code: "The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, and scientific, artistic, inventor's and rationalizing activity, shall be protected by civil law independent of protection envisaged in other provisions". Art. 24 of Polish Civil Code statutes the protection of these values, indicating that: "§ 1. The person whose personal interests are threatened by another person's activity may demand the omission of that action unless it is not illegal. In case of an infringement he may demand that the person who committed the infringement perform acts necessary to remove its effects and in particular to make a statement of an appropriate contents and in an appropriate form. On the terms provided for in this Code he may also demand pecuniary compensation or an appropriate sum of money paid to a specified community purpose. § 2. If, as a result of an infringement of a personal interest, a damage to property has occurred, the injured person may demand that it be redressed in accordance with general principles. § 3. The above provisions shall not prevail over the rights envisaged by other provisions, in particular by the copyright law and the law on inventions".

of the deliberations outlined will allow to discuss the issues of the law applicable to the recognition of transboundary climate claims, what will be done with special attention to the institution of personality rights, assuming that it is possible to grant protection to one's right to a safe climate using this legal institution.

1. Defining anthropogenic climate change and climate change that is legally relevant

The subsequent analysis should be grounded in the well-structured conceptual grid. Therefore, the process of climate change can be described as: "*a change in the state of the climate that can be identified (…) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer.*"[4] Importantly, understanding the legal implications of climate change requires acknowledging that not every form of climate change will be a legally relevant phenomenon.[5] This highlights the complexity of the issue, encompassing both natural and anthropogenic (human-induced) climate change.

Climate change may be anthropogenic when it is caused by human activity, as opposed to changes in climate that may have resulted as part of Earth's natural processes. "Anthropogenic" shall be therefore understood as: "*resulting from or produced by human activities*."[6] Said distinction found its expression in the wording of the United Nations Framework Convention on Climate Change,[7] which in Article 2.2. clearly states that climate change means: "*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*".

Given the legal focus of this paper, it seems relevant to state that only human interference in natural climate variability may hold potential legal implications. Those may vary between the measures of adaptive, mitigative and preventative means of reaction to the adverse effects of climate change. As indicated in the introductory phase, this article focuses primarily on those legal consequences of climate change

[4] The Core Writing Team, H. Lee, J. Romero (eds), *Climate Change 2023: Synthesis Report*, Geneva 2023, pp. 121-122, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf (12.03.2024).

[5] J. Ciechanowicz-McLean, *Kompensacja szkód wyrządzonych w środowisku na przykładzie zmian klimatu*, "Gdańskie Studia Prawnicze" 2011, vol. 26, p. 96.

[6] The Core Writing Team, H. Lee, J. Romero (eds), *Climate Change 2023*…, p. 121.

[7] United Nations Framework Convention on Climate Change, New York 9 May 1992 (Dz.U. 1996, nr 53, poz. 238).

that manifest in the derivation of legal liability of private sector actors for their harmful climate acts and omissions. But is in fact any climate change really legally relevant?

To answer said questions effectively, it is crucial to focus on a specific legal system and the solutions already established within it. Therefore, further analysis will concentrate on the Polish legislation and its potential tools for formulating climate claims.

2. Climate change and the Polish legislation

2.1. A subjective right to a climate – the perspective of public law regime and personality rights

Within the Polish legal framework, pursuing climate change lawsuits against private entities presents a certain set of challenges, whereby the central hurdle lies in identifying a suitable legal basis for such claims.

Firstly, it is important to note that Polish legislators have not yet enacted any binding legislation specifically addressing the issue of climate change and its harmful effects. The first attempt to address climate change through legislation came last year with a draft climate protection bill prepared by lawyers from the ClientEarth foundation.[8] The mentioned document straightforwardly states that every human being has a right to live in a safe climate.[9] While currently existing only as a draft proposal, this measure, if enacted in the future, could trigger research conducted by legal scholars into whether it establishes a subjective right to a safe climate and if so, whether it is a subjective right in the public or private law sense, and finally whether this right is enforceable.

The potential legal inquiries surrounding this proposed legislation seamlessly connect to the central axis of legal debates on climate and the environment as legally protected values, which revolve around the question of whether these values constitute universal or individual rights. It is worth noting that under Polish law it is rather commonly agreed that the environment – and consequently the climate, are com-

[8] ClientEarth, *Projekt ustawy o ochronie klimatu*, 13 April 2023, https://www.clientearth.pl/media/g3wp0hau/2023-04-17-projekt-ustawy-o-ochronie-klimatu-1.pdf (06.03.2024).

[9] Article 3 of the draft proposition: "Everyone has the right to live in an environment free from acts or omissions unlawfully causing or contributing to the negative effects of climate change or threatening to causing or contributing to the negative effects of climate change, and to live in an environment free from the effects of such acts or omissions (the right to live in a safe climate climate)"; *ibidem*, p. 3.

munity rights,[10] and more importantly – rights which execution is almost impossible for the individual.

The logical starting point for further analysis should be the provisions of the Constitution of the Republic of Poland,[11] given its status as the fundamental legal document. According to Article 74.1 of the Constitution: "*public authorities are pursuing policies that ensure environmental security for today's and future generations*". Consequently, the Polish Constitution does not guarantee the general, subjective right of an individual to live in a healthy or clean environment as well as a safe climate.[12] The Polish Constitution's omission reflects the drafters' intent to avoid providing in its provisions an unenforceable clause with ambiguous legal consequences,[13] and at the same time stems from the Polish legislature's decision to conceptualize the Constitution as primarily a normative, rather than programmatic.[14]

A previously binding act from 1952 in its Article 71 straightforwardly stated that: "*citizens of the Republic of Poland have the right to enjoy the value of the environment and the obligation to protect it*". The above indicates that, in contrast to the current document, the 1952 Polish Constitution recognized a public subjective right to the environment for individuals. The absence of one's explicit right to the environment shall be viewed as a significant gap in the constitutional framework for environmental protection.[15] However, it is crucial to indicate that there are also different views among

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[10] See: M. Górski, *Commentary to the Article 74 of the Constitution of the Republic of Poland* [in:] *Konstytucja RP*, vol. 1: *Komentarz. Art. 1-86*, M. Safjan, L. Bosek (eds), Warszawa 2016; J. Trzewik, *Publiczne prawa podmiotowe jednostki w systemie prawa ochrony środowiska*, Warszawa 2016; B. Rakoczy, *Ciężar dowodu w polskim prawie ochrony środowiska*, Warszawa 2010; J. Marszałek, *Prawo do czystego środowiska jako wartość konstytucyjna. Wyrok irlandzkiego Sądu Najwyższego z dnia 31 lipca 2020 r., w sprawie Friends of the Irish Environment v. The Government Ireland (Appeal No. 205/19)*, "Gdańskie Studia Prawnicze" 2021, vol. 3, p. 156; M. Bartoszewicz, *Commentary to the Article 74 of the Constitution of the Republic of Poland* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, M. Haczkowska (ed.), Warszawa 2014; Judgment of the Supreme Administrative Court of 26.05.2015, II OSK 2595/13, LEX No. 1780503.

[11] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. 1997, nr 78, poz. 483 z późn. zm.).

[12] K. Doktór-Bindas, *Prawo do czystego powietrza*, "Przegląd Konstytucyjny" 2020, vol. 4, p. 122; D. Kuźniar, *Prawo do zdrowego środowiska jako konstytucyjnie gwarantowane prawo podmiotowe*, "Przegląd Prawa Konstytucyjnego" 2021, vol. 3, no. 61, p. 207; Judgment of the Constitutional Court of 13.05.2009, Kp 2/09, OTK-A 2009/5, item 66.

[13] L. Garlicki, M. Derlatka, *Commentary to the Article 74 of the Constitution of the Republic of Poland* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, M. Zubik (ed.), Warszawa 2016.

[14] W. Radecki, *Koncepcja publicznych praw podmiotowych do korzystania z walorów turystycznych* [in:] *Ochrona walorów turystycznych w prawie polskim*, Warszawa 2011.

[15] See: A. Habuda, *The Right to the Environment in the Republic of Poland*, "Studia Prawnoustrojowe" 2019, vol. 44, pp. 108-109; R. Paczuski, *Zagadnienie prawa człowieka i obywatela do korzystania*

which M. Hejbudzki states, that it is possible to derive said right from Article 74.2 of Constitution, Article 4 of Polish Environmental Protection Law,[16] and norms of public international law.[17] An analogous position is taken by A. Haładyj, indicating that the Constitution of the Republic of Poland establishes: "*a civil right to the environment, the content of which can be derived from Articles 5, 68(4), 74 and 86. And the subjective right expressed in Article 74(4) is a guarantee of its realization*."[18]

The Polish Supreme Court Resolution of 28th May 2021 (hereinafter the "Resolution") further strengthens this perspective,[19] as while rejecting the characterization of a clean environment as a personality right, the judicial panel recognized it as a public subjective right. Therefore, the Resolution naturally becomes the starting point for further considerations centered around the possibility of qualifying an individual's right to a safe climate as a personality right.

The concept of personality rights is one that is not sufficiently sharp and, in the opinion of the representatives of the doctrine, cannot be precisely defined.[20] Consequently, the concept of personality rights has not been accorded a uniform definition by either civil law scholarship or judicial pronouncements. *A fortiori*, this term lacks a statutory definition promulgated by the legislature. Having due regard to the primary theme of this chapter and the exigency of preserving intellectual rigor within the presented argumentation, it is deemed expedient to confine to the proposition that personality rights constitute: "*the values recognized by the legal system (…) including the physical and psychological integrity of the human being, his individuality and dignity and position in society, which is the premise of the self-realization of the human person*."[21] The civil law protection accorded to personality rights finds its foundation

z walorów środowiska oraz obowiązku jego ochrony w Konstytucji Rzeczypospolitej Polskiej z 1997 r. [in:] *Księga jubileuszowa Profesora Stanisława Jędrzejewskiego*, H. Nowicki, W. Szwajdler (eds), Toruń 2009, pp. 374-375 and 381; R. Paczuski, *Ochrona środowiska. Zarys wykładu*, Bydgoszcz 2008, pp. 119-120.

16 Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Dz.U. 2024, poz. 54).

17 M. Hejbudzki, *Normatywne podstawy wprowadzenia do polskiego porządku prawnego koncepcji prawa podmiotowego do życia w czystym środowisku*, "Studia Prawnoustrojowe" 2019, vol. 43, p. 131.

18 A. Haładyj, *Konstytucyjne prawo do korzystania z wartości środowiska*, "Prawo i Środowisko" 2002, vol. 2, pp. 42-43.

19 Resolution of the Supreme Court of 28.05.2021, III CZP 27/20, OSNC 2021, no. 11.

20 W. Czachórski, *Dobra osobiste i ich ochrona* [in:] *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, S. Sołtysiński (ed.), Poznań 1990, p. 13.

21 Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2019, p. 162. See: S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego*, Warszawa 1957, p. 19; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*, Warszawa 1975, p. 29; A. Szpunar, *Ochrona dóbr osobistych*, Warszawa 1979, p. 106; A. Cisek, *Dobra osobiste i ich niemajątkowa ochrona w Kodeksie*

in the private law construct of subjective rights,[22] which should be understood as a "*certain legal situation determined for subjects by the applicable norms and protecting the legally recognized interests of these subjects. This situation consists of free – in normative terms – psychophysical or conventional behavior of the entitled subject, with which are always coupled the obligations of another subject or other subjects, whereby the as a rule (…) the right holder is also entitled to demand that the state body having coercion to bring about the realization of the obligations coupled with the subjective right obligations.*"[23] By extension, these rights are presumed to be classified as non-material and absolute subjective rights.[24] Furthermore, given their intimate association with the person, they are additionally considered to be non-transferable and non-hereditary.[25]

Knowing the nature of personality rights in the Polish legal system allows to pursue with the analysis of the above mentioned Resolution and – as a consequence – the possibility to grant the individual's right to climate and environment the qualification of a personality right. In order to maintain terminological uniformity, the following will refer to the "right to a safe climate"[26] and the "right to a clean environment."[27]

As already mentioned the Polish Supreme Court rejected the characterization of a clean environment as a personality right by indicating that the right to live in a clean environment, enabling one to breathe atmospheric air that meets the air quality standards: "*is not a personality right (…) personality rights are health, freedom, privacy, the violation of which may be caused by the violation of air quality standards set forth in generally applicable laws. Violation of these standards can therefore lead to interference with personality rights, which are primarily health, freedom, privacy, and the emergence of related civil law claims in favor of the individual. At the same time, it cannot be ruled out that failure to comply with the indicated standards may also constitute interference with other personality rights, protected by individual subjective rights.*"[28]

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cywilnym, Wrocław 1989, p. 39; Judgment of the Supreme Court of June 10, 1977, ref. no. II CR 187/77, LEX no. 7947; Resolution of the Supreme Court of October 22, 2010, ref. no. III CZP 76/10, LEX no. 604152; Judgment of the Supreme Court of May 6, 2010, ref. no. II CSK 640/09, LEX no. 598758.

22 M. Pazdan, *Dobra osobiste i ich ochrona* [in:] *System Prawa Prywatnego*, vol. 1: *Prawo cywilne – część ogólna*, M. Safjan (ed.), Warszawa 2012. Nb. 86; Z. Radwański, A. Olejniczak, *Prawo cywilne…*, p. 176; A. Szpunar, *Ochrona…*, p. 96.

23 Z. Radwański, A. Olejniczak, *Prawo cywilne…*, p. 89.

24 M. Pazdan, *Dobra osobiste…*, Nb. 86; A. Szpunar, *Ochrona…*, pp. 96-97.

25 *Ibidem.*

26 Further see: M. Stoczkiewicz, *Prawo ochrony klimatu w kontekście praw człowieka*, Warszawa 2021, p. 381ff.

27 However the adjectives may differ starting from "clean", through "healthy", "sustainable" past "proper".

28 Resolution of the Supreme Court of 28.05.2021…, item 72.

Without delving into detailed considerations[29] although recognizing one's right to safe climate or environment might pose theoretical and practical difficulties, it is not entirely implausible to conceptualize such a right and subject it to a definition along the lines of values that are proclaimed as personality rights. The indicated view is evident in both legal scholarship and case law, with divergent views appearing in the latter.[30] The legal doctrine proposes that the individual's right to the environment should be interpreted as a subjective right to the value of the environment,[31] or a subjective right to live in an unpolluted environment of adequate quality.[32] Building on those findings regarding the right to a clean environment, it is possible to define one's right to safe climate, understood as a personality right, as a right to live in a unpolluted climate in which variability does not exceed human's adaptive capacity, thereby translating into his dignity, health and comfort. However it is worth stipulating, that the difficulties in this area are significant, and among those are the potentially unlimited circle of individuals entitled to bring up a protective claim and the inability to individualize[33] or objectify[34] said right, not to mention the hurdles with causation.

2.2. Tortious liability

Although the assumption that there is a possibility to distinguish a separate and fully independent personality right to a safe climate is a central concept of further

[29] See: M. Krystman, *Prawo do oddychania czystym powietrzem jako dobro osobiste. Glosa do uchwały Sądu Najwyższego – Izba Cywilna z dnia 28 maja 2021 r., III CZP 27/20*, "Orzecznictwo Sądów Polskich" 2022, vol. 9, p. 73; J. Trzewik, *Prawo do życia w czystym środowisku umożliwiającym oddychanie powietrzem atmosferycznym spełniającym standardy jakości jako dobro osobiste – glosa do zagadnienia prawnego zarejestrowanego w Sądzie Najwyższym, III CZP 27/20*, "Przegląd Ustawodawstwa Gospodarczego" 2021, vol. 74, no. 4, pp. 57-62; R. Szczepaniak, *Odpowiedzialność odszkodowawcza władz publicznych za skutki zanieczyszczonego powietrza. Glosa do uchwały SN z dnia 28 maja 2021 r., III CZP 27/20*, "Orzecznictwo Sądów Polskich" 2022, vol. 6, p. 49; A. Skorupka, *Prawo do życia w czystym środowisku. Glosa do uchwały SN z dnia 28 maja 2021 r., III CZP 27/20*, "Przegląd Sądowy" 2022, vol. 5, pp. 112-120; B. Szyprowski, *Glosa do uchwały Sądu Najwyższego z dnia 28 maja 2021 r., sygn. III CZP 27/20*, "Prokuratura i Prawo" 2023, vols 7-8, pp. 284-295.

[30] J. Turek, *Środki ochrony prawa do osobistego korzystania z wartości środowiska naturalnego – ujęcie cywilnoprawne*, "Iustitia" 2012, vol. 2, p. 68ff.; Judgment of the Court of Appeals in Warsaw of 10.06.2014, VI ACa 1446/13, LEX No. 1540954.

[31] S. Włodyka, *Cywilnoprawna ochrona środowiska człowieka w Polsce. Tendencje i perspektywy rozwoju*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze" 1982, vol. 108, p. 152. See: W. Radecki, *Pozycja organizacji społecznych w postępowaniu o ochronę środowiska*, "Palestra" 1985, vol. 29, no. 5, p. 26.

[32] I. Wereśniak-Masri, *Prawo do czystego środowiska i prawo do czystego powietrza jako dobro osobiste*, "Monitor Prawniczy" 2018, vol. 17, p. 943.

[33] T. Grzeszak, *Dobro osobiste jako dobro zindywidualizowane*, "Przegląd Sądowy" 2018, vol. 4, p. 26.

[34] T. Nowakowski, *Przekroczenie norm jakości powietrza a ochrona dóbr osobistych. Glosa do uchwały SN z dnia 28 maja 2021 r., III CZP 27/20*, "Orzecznictwo Sądów Polskich" 2022, vol. 5, p. 15.

deliberations, it's vital to at least superficially examine additional legal frameworks for addressing the harmful impacts of climate change.

In the Resolution of the Supreme Court, the adjudication panel also stated, that: "*the environment will retain the character of a common good (…) even if living in an environment with air, soil and water that conforms to the standards established by science, conducive to the preservation of health and man's realization of his freedom (…) is explicitly recognized as a human right*."[35] The growing body of climate litigation cases employing human rights arguments necessitates a thorough evaluation of their efficacy within the confines of national legal frameworks. In particular, this evaluation should focus on the applicability of these arguments to establish private sector liability under tort law.

While analyzing the right to a safe climate through the lens of human rights law, it's important to note that as a rule *no* existing human rights treaties, including the European Convention on Human Rights (hereinafter the "ECHR"),[36] explicitly guarantee a right to a safe climate or a clean environment. However, in climate change cases before the European Court of Human Rights (hereinafter the "ECtHR"), especially those seeking compensation, judicial bodies often reference the right to life and the right to respect for life[37] as well as private and family life.[38] In this context, it is worth mentioning the only successful case to date, initiated by the association Verein Klimaseniorinne,[39] which accused Switzerland of specific negligence in the area of mitigating the negative effects of climate change. By admitting the complaint, the ECtHR indicated that while the ECHR does not recognize an

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[35] Resolution of the Supreme Court of 28.05.2021…

[36] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, as subsequently amended by Protocols Nos. 3, 5, and 8, and supplemented by Protocol No. 2. (Dz.U. 1993, nr 61, poz. 284 z późn. zm.); further also as: ECHR.

[37] According to Article 2 of ECHR: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection".

[38] According to Article 8 of ECHR: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[39] European Court of Human Rights, *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland (Application no. 53600/20)*, https://hudoc.echr.coe.int/eng?i=001-233206 (29.09.2024).

individual's right to an environment or climate, climate change is currently one of the most significant threats to the environment and human life. Consequently, the Court ruled that the insufficient measures taken by the Swiss government in relation to the climate crisis have led to a violation of the applicants' right to respect for private and family life. This ruling may potentially lead not only to the explicit and institutionalized introduction of human rights into the climate change debate but also to the shaping of normative foundations for effectively deriving state responsibility for harmful climate actions and omissions.

The tendency to invoke human rights agenda to the climate change litigation extends to domestic lawsuits against private actors concerning their liability for contributing to harmful climate change. This reasoning is exemplified in the landmark Shell case,[40] where plaintiffs demanded the Dutch court oblige Shell to cut down its greenhouse gases emissions to the atmosphere. The Dutch Supreme Court stated that whilst Articles 2 and 8 of the ECHR are applicable only in the relations between the individuals and the state, they can still be viewed as a model for interpreting the concept of an unwritten duty of care. The court also held that it cannot be assumed sufficient for private parties to monitor developments and actions taken by states in this regard, given that they bear individual responsibility. What is more, on the basis of the Book 6 of Section 162 of the Dutch Civil Code,[41] the Court ruled that Shell is obliged: "*to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (…) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels*".

In light of the Shell case, a crucial question arises: can the legal approach adopted by the Dutch Supreme Court be successfully applied in other domestic legal systems? In the Polish legal framework, the legal provision most similar to the solution used by the Dutch Supreme Court appears to be Article 415 of the Polish Civil Code,[42] which states that: "*whoever by his fault caused a damage to another person shall be obliged to redress it*".

The doctrine has not yet determined whether the cited provision of the Polish Civil Code establishes a legally binding norm prohibiting harm to others (*neminem laedere*).

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[40] Judgment of the Hague Distcit Court from 26th May 2021, case number C/09/571932 / HA ZA 19-379, *Milieudefensie et al. v. Royal Dutch Shell plc.*, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf (12.03.2024).

[41] Dutch Civil Code (Burgerlijk Wetboek), 1992, Book 6: The Law of Obligations, http://www.dutchcivillaw.com/civilcodebook066.htm (12.05.2024).

[42] Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U. 2023, poz. 1610 z późn. zm.).

The rule contained in Article 415 of the Civil Code can be presented as a principle according to which the goods of civil law subjects are protected against their violation under the tort regime.[43] Although the predominant view is questioning its operation in terms in which it follows from it a general normative prohibition of harming others,[44] different positions can be found. According to S. Sołtysinski, on the basis of Article 415 of the Civil Code, which has the character of a sanctioned and sanctioning norm,[45] there is an opportunity to determine both the obliged and entitled parties. According to this author, consequently, it should be considered that this provision shapes a civil law relationship similar to the construction of personality rights.[46]

Thus, does Article 415 of the Polish Civil Code provide a legal basis for successful climate-oriented claims? Despite the lack of definitive conclusions, relying on the said provision for climate lawsuits presents significant challenges. As a rule, an action in Polish tort law may be brought by a person who has suffered direct damage as a result of the unlawful and culpable action of a specific entity. Importantly, there must be an adequate causal link between the violator's behavior and the damage. Transferring the above to the reality of climate change, it remains crucial to indicate that establishing a causal link between a specific action and the resulting climate damage is a major hurdle, especially when considering the adequate level of causation required. Additionally, complexities arise regarding liability for indirect damage, liability for omissions, and defining "unlawfulness" solely as a violation of social norms. Taking into consideration the character of climate change as a global phenomenon which adverse effects affect individuals functioning under varied jurisdictions it remains unclear whether it is possible to address certain implications of anthropogenic climate change to specific countries, not to mention the specific private law companies. In relation to this issue it crucial to mention the issue of establishing legal liability of multinational companies operating in many different countries, which applies additional obstacles, i.e. the question of standing.

The legal implications of characterizing harmful climate interference as a form of environmental damage warrant further exploration. Similar to the challenges discussed regarding Article 415, uncertainties remain concerning the Polish Environ-

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43 Z. Banaszczyk, *Commentary on Article 415 of the Civil Code* [in:] *Kodeks cywilny*, vol. 1: *Komentarz. Art. 1-449[10]*, K. Pietrzykowski (ed.), Warszawa 2020, Nb. 25.

44 *Ibidem.*

45 Z. Ziembiński, *O metodzie analizowania stosunku prawnego*, "Państwo i Prawo" 1968, vol. 2, p. 206.

46 S. Sołtysiński, *Licencje na korzystanie z cudzych rozwiązań technicznych*, Warszawa 1970, pp. 170-175.

mental Protection Law, which establishes liability for environmental damage,[47] but its applicability to "climate damage" – a concept inherently less tangible and dispersed – also raises significant, similar to the abovementioned, questions.

According to Article 3 p. 39 of Polish Environmental Protection Law term "environment" means: "*all natural elements, including those transformed by human activity, particularly land, minerals, water, air, landscape, climate and other elements of biological diversity, as well as the interaction between these elements*". The wording chosen by the Polish lawmaker enables making an assumption that "climate" is a part of the environment of a broader sense.[48] As a consequence it enables the attempt to conceptualize the difficulties of applying the provisions of Polish Environmental Protection Law establishing liability for environmental damage to so-called "climate damage".

Along with the Article 322 of Polish Environmental Protection Law: "*The provisions of the Civil Code will apply to liability for damage caused by environmental impacts unless the Law provides otherwise*". With respect to that, as a principle, the general rules of the liability for environmental damage will remain the same as indicated while analyzing the Polish tort regime. Article 323 of Polish Environmental Protection Law establishes more specific criteria concerning construing claims regarding environmental damage. As a rule: "*anyone who is directly threatened or harmed by an unlawful environmental impact may demand that the person responsible for the threat or breach restore the situation to a lawful state and take preventive measures, particularly by installing installations or equipment to safeguard against the threat or breach; where this is impossible or extremely difficult, he/she may also demand the cessation of the activity causing the threat or breach*" (Article 323 (1) of Polish Environmental Protection Law). If, on the other hand, the threat or breach concerns the environment as a common good, a claim referred above may be brought by the State Treasury, a local government unit or an environmental organization (Article 323 (2) of Polish Environmental Law).

Mindful of the above provisions and the fact that climate damage is less tangible and dispersed, it remains crucial to indicate the potential hurdles in addressing the climate change through Polish Environmental Protection Act. Among those the most important is statutory impediment arising from the wording of Article 323 (1) of said bill, which states that an individual may make a claim regarding environmental damage if he is "*directly threatened or harmed by an unlawful environmental impact*". The legal doctrine commonly states that the direct threat of damage shall be seen

[47] Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Dz. U. z 2024 r. poz. 54). See articles 322-328.

[48] M. Bar et al., *Commentary to the Article 3 of Polish Environmental Law* [in:] *Prawo ochrony środowiska. Komentarz*, M. Górski, M. Pchałek, W. Radecki (eds), Warszawa 2019, Nb. 152.

as a highly probable occurrence of damage in a given case, which does not require it to happen in a short period of time.[49] Applying said criteria to anthropogenic climate change may be at least a challenging, if not impossible legal task. Firstly, climate change is characterized by significant scientific uncertainty, making it challenging to precisely predict the specific and tangible manifestations of its adverse effects, such as heat waves, floods, or prolonged droughts in particular regions. Secondly, the harmful effects of climate change may become noticeable in the perspective of years i.e. in the distant future. As a consequence it may not be seen as a "direct threat" to the interests of individuals. Finally, it is hard to determine the contribution of certain private actors to the intensified anthropogenic climate change, as it remains the global phenomenon triggered by not only private but also public entities. As a consequence construing a legally successful claim against private actors basing on said provision becomes challenging, as it faces not only the hurdles indicated within the tortious liability analysis, but also specific for Polish Environmental Protection Act.

Having said that, it is justified to state that protection of individual's widely understood environmental interests is not sufficient. Those inadequacies cannot be addressed by the wording of Article 323 (2) of Polish Environmental Law granting the possibility to make a lawsuit concerning the "environment as a common good" as the provision does not provide the standing for the individual. However said provision is being successfully used by environmental organizations like ClientEarth Prawnicy dla Ziemi,[50] the activism of said organizations will not properly protect the environmental interests of the individual.

3. The legal basis of the claim and the law applicable to the transboundary climate lawsuits resolution

Having established the potential legal bases for private sector liability in connection with harms induced by the climate change, the following analysis focuses on the interplay between these legal bases i.e. personality rights regime, tortious liability, liability for environmental damage, and private international law. A subsequent, detailed examination will elucidate how private international law principles govern specific legal issues,

[49] M. Bar, *Commentary to the Article 323 of Polish Environmental Law* [in:] *Prawo ochrony środowiska. Komentarz*, M. Górski, M. Pchałek, W. Radecki (eds), Warszawa 2019, Nb. 5.

[50] See for example: ClientEarth, *ClientEarth pozywa Elektrownię Bełchatów za przyczynianie się do kryzysu klimatycznego*, 26 September 2019, https://www.clientearth.pl/najnowsze-dzialania/artykuly/clientearth-pozywa-elektrownie-belchatow-za-przyczynianie-sie-do-kryzysu-klimatycznego/ (25.09.2024).

such as claims related to personality rights. However, a comprehensive discussion regarding the interaction of private international law with the broader range of legal bases outlined earlier is necessary. Ultimately, the above discussion will demonstrate that the selection of the applicable legal framework hinges on the preliminary determination of the most fitting legal basis for a particular transboundary climate change lawsuit.

While leaning to the concept of tortious liability *in genere*, Article 4 of Rome II Regulation[51] applies, according to which the applicable law is, as a rule, the law of the country in which the damage occurs. However, if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than those mentioned above the law of that other country shall apply. It is visible that said provision contains of three different conflict norms, where the first one expresses the general rule, and the other two introduce exceptions to said rule.[52] Minding the above it is possible to state that Rome II assumes that the location of damage, understood as the place of direct infringement of the injured party's legal good, is decisive while considering the applicable law, since it is there that the event determining the emergence of liability is realized, while the place where the injured party suffered consequential damage resulting from the original damage, which arose in another country remains irrelevant.[53] In other words: "*in order to identify the law applicable to a non-contractual obligation arising from a tort or delict, Article 4(1) of that regulation adopts the law of the country in which the 'damage' occurs, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the 'indirect consequences' of that event occur. The damage which must be taken into account in order to determine the place where the damage occurred is the direct damage*."[54] In its jurisprudence, the European Court of Justice (hereinafter the "CJEU") indicates that: "*where it is possible to identify the*

[51] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations ("Rome II") (Dz.U. UE. L. 2007, nr 199, p. 40).

[52] P. Fik, *Commentary to the Article 4 of Rome II* [in:] *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007 (Rzym II). Komentarz*, P. Fik, P. Staszczyk (eds), Warszawa 2014.

[53] M. Świerczyński, *Commentary to the Article 4 of Rome II* [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, Nb. 6.

[54] Judgment of CJEU from 10 December 2015, case no. C-350/14, *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA*, ECLI:EU:C:2015:802, t. 23; https://curia.europa.eu/juris/document/document.jsf?text=&docid=172887&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=3126508 (29.09.2024).

occurrence of direct damage, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of the harmful event."[55]

If climate damage were to be given the qualification of an environmental damage, the provision for determining the law applicable would become Article 7 of Rome II, according to which it: "*shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*".

Referring to the issue raised in both Article 4 and 7 of the Rome II Regulation, the concept of "the place where the harmful event occurred" should be pointed out that, based on CJEU case law, in principle it includes that: "*where the place of the happening of the event which may give rise to liablity in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' (…) must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it*."[56] Thus, the construction of the cited provision indicates that the idea behind the law applicable for environmental liability is to give the injured party the opportunity to decide whether the law of the place where the damage occurred (*lex loci damni*) or the law of the country where the event causing the damage occurred (*lex loci delicti commissi*) will be applicable.[57] As a consequence, contrary to Article 4 (1) of Rome II Regulation which

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[55] Judgment of CJEU from 10 March 2022, case no. C498/20, *ZK as successor to JM, liquidator in the bankruptcy of BMA Nederland BV v. BMA Braunschweigische Maschinenbauanstalt AG & Stichting Belangbehartiging Crediteuren BMA Nederland*, ECLI:EU:C:2022:173, t. 58, https://curia.europa.eu/juris/document/document.jsf?text=&docid=255424&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1 (29.09.2024).

[56] Judgment of CJEU from 30 November 1976, case no. 21-76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA.*, Document 61976CJ002, t. 24, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:61976CJ0021 (29.09.2024); See: Judgment of CJEU from 16 July 2009, case no. C189/08, *Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA.*, ECLI:EU:C:2009:475, t. 23, https://curia.europa.eu/juris/document/document.jsf;jsessionid=B33B521677B9F8F2001393B035BD7C1D?text=&docid=72472&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2284215 (29.09.2024); Judgment of CJEU from 29 July 2019, case no. C451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV*, ECLI:EU:C:2019:635, t. 25, https://curia.europa.eu/juris/document/document.jsf?text=&docid=216540&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2285790 (29.09.2024); Judgment of CJEU from 5 February 2004, case no. C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*, ECLI:EU:C:2004:74, t. 40-41, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:62002CJ0018 (29.09.2024).

[57] P. Fik, *Commentary to the Article 7 of Rome II* [in:] *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007 (Rzym II). Komentarz*, P. Fik, P. Staszczyk (eds),

clearly states that "*the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred*", Article 7 of this regulation gives the injured party the option to choose between two equal bases for determining the applicable law. It remains crucial to stipulate that said term: "*cannot be construed so extensively as to encompass every place where the adverse consequences of an event, which has already caused damage actually occurring elsewhere, can be felt. Consequently, that concept cannot be construed as including the place where the victim claims to have suffered financial damage following initial damage arising and suffered by him in another State*,"[58] as it demands the: "*existence of a particularly close connecting factor*."[59]

Finally, if one would like to bring up a protective claim using the institution of personality rights, pursuant to Article 1.2. g of Rome II national law would be applicable, that is law indicated by Article 16 of the Polish Private International Law,[60] which unfortunately poses further interpretational difficulties, that will become the subject of further considerations.

4. Transboundary protection of personality rights and the individual's right to a safe climate

The territorial dimension of the protection of personality rights extends beyond national borders, which makes it possible to indicate a category of situations containing a foreign element, in which there is a factual or legal connection with other states or even areas not subject to any state authority.[61] It then becomes necessary to determine the law, which is the basis for the substantive decision, which takes place on the basis of the conflict rules of private international law.[62]

Warszawa 2014. See: A. Wowerka, *Prawo właściwe dla odpowiedzialności za szkody w środowisku naturalnym w świetle rozporządzenia Rzym II*, "Gdańskie Studia Prawnicze" 2023, vol. 4, no. 61, pp. 308-322.

[58] Judgment of CJEU from 9 July 2020, case no C343/19, *Verein für Konsumenteninformation v. Volkswagen AG*, ECLI:EU:C:2020:534, t. 26, https://curia.europa.eu/juris/document/document.jsf?text=&docid=228372&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2288587 (29.09.2024).

[59] Judgment of CJEU from 1 October 2002, case no C-167/00, *Verein für Konsumenteninformation and Karl Heinz Henkel*, ECLI:EU:C:2002:555, t. 46, https://curia.europa.eu/juris/document/document.jsf?text=&docid=47727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2294808 (29.09.2024).

[60] Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe (Dz.U. 2023, poz. 503).

[61] N. Rycko, *Prawo właściwe dla zobowiązań wynikających z naruszenia dóbr osobistych. Uwagi* de lege ferenda, "Forum Prawnicze" 2017, vol. 3, p. 26.

[62] *Ibidem.*

Given the potential classification of the right to a safe climate as a personality right, and building on the previous deliberations, it is crucial to reiterate that the Rome II Regulation in its Article 1 (2g) explicitly excludes the domain of personality rights from its purview. The above arose as it became clear that the opposing views on this subject were too strongly held to allow a reasonable compromise.[63] The said exclusion has raised concerns among legal scholars, particularly regarding the principle of a comprehensive codification,[64] as it remains rather well established that: "*the main purpose of uniform choice-of-law rules is to reduce uncertainty as to the law governing international legal relationships*."[65] While the absence of said rules referring to personality rights does not preclude national legislators from extending the convention rules to non-convention situations,[66] the Polish legal system has opted for a different approach, explicitly addressing the protection of personality rights in Article 16 of the Private International Law.

According to the wording of Article 16 (1) of the Private International Law: "*an individual's personality rights are governed by his native law*". The law so indicated determines whether there is a given personality rights, the catalogue of those, their content and characteristics.[67]

In turn, Article 16 (2) of cited regulation states that: "*an individual whose personality rights is threatened with infringement or has been infringed may claim protection under the law of the state on whose territory the event causing the threatened infringement or infringement occurred, or the law of the state on whose territory the consequences of the infringement occurred*". The provision simultaneously uses two conjunctions – the place of the event and the place of the effect. The concept of the place of the event means the country in whose territory the violator of the personality right acted or omitted to act.[68] The link of "the state in whose territory the consequences of this violation occurred", due to the essence of personality rights, can be associated primarily with the place of habitual residence of the person whose personal rights were threatened or violated.[69]

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63 S.C. Symeonides, *Choice of Law in Torts Arising from Infringement of Personality Rights*, "International Business Law Journal" 2022, vol. 6, p. 8.

64 M. Pilich, *Prawo właściwe dla dóbr osobistych i ich ochrony*, "Kwartalnik Prawa Prywatnego" 2012, vol. 21, no. 3, pp. 603-604.

65 T.M. de Boer, *The Purpose of Uniform Choice-of Law Rules: The Rome II Regulation*, "Netherlands International Law Review" 2009, vol. 56, no. 3, p. 330.

66 P. Mostowik, E. Figura-Góralczyk, *Commentary to Article 16 of the Private International Law* [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, Nb. 23.

67 M. Wałachowska, *Kolizyjnoprawne aspekty naruszenia dóbr osobistych* [in:] *Dobra osobiste w XXI wieku. Nowe wartości, zasady, technologie*, J. Balcarczyk (ed.), Warszawa 2012, pp. 255-256.

68 P. Mostowik, E. Figura-Góralczyk, *Commentary…*, Nb. 59.

69 M. Pilich, *Commentary to Article 16 of the Private International Law* [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017.

It is noteworthy that the legal interpretation of the phrase "an individual (…) may demand protection" remains a subject of ongoing debate within legal scholarship.[70] According to some representatives of the Polish legal doctrine, Article 16 (2) of said regulation is a manifestation of conflict-legal autonomy of the will, allowing the injured party to choose one of two alternative connecting factors for the protection of personality rights.[71] A different position was taken however according to which this formulation is not an example of a conflict-of-law choice of law, since the freedom to decide on the legal basis of the claim does not have to take the form of a separate behavior in the nature of a choice of applicable law.[72] Likewise, other authors claim that this provision is an example of an alternative designation of several laws.[73]

Having discussed the nature of both sections of Article 16 of the Private International Law, it is possible to verify their relation and mutual links. Indeed, the scope of Article 16 (1) of the Private International Law includes the determination of what legal values constitute the constitutive element of subjectivity, identity and status of a person in society,[74] while paragraph 2 of the provision in question indicates the statute for the protection of personality rights.[75] On the other hand, scholars point out that according to the native law of an individual, the circle of his personality rights and the corresponding subjective rights should be determined, while Article 16 (2) of the Private International Law determines the law applicable to the protection of aid values.[76] Likewise, authors claim that the content and nature of personality right is determined by the personal statute,[77] while tortious status includes all the elements of an obligatory relationship, the source of which is the violation of personality rights.[78]

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70 P. Mostowik, E. Figura-Góralczyk, *Commentary…*, Nb. 66.

71 M. Pilich, *Commentary…*

72 M. Pazdan, *Kolizyjnoprawny wybór prawa a inne przejawy autonomii woli w prawie prywatnym międzynarodowym* [in:] *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi*, A. Matlak, S. Stanisławska-Kloc (eds), Warszawa 2013, p. 787; quoted in: J. Balcarczyk, *Uwagi ogólne na tle normy art. 16 ust. 2 ustawy z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe* [in:] *Prawo właściwe dla dobrego imienia osoby fizycznej i jego ochrony*, Warszawa 2014.

73 A. Mączyński, *Jednoczesne wskazanie kilku praw w polskiej kodyfikacji prawa prywatnego międzynarodowego* [in:] *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, P. Kostański, P. Podrecki, T. Targosz (eds), Warszawa 2017.

74 M. Pilich, *Commentary…*

75 *Ibidem.*

76 M. Pazdan, *Kolizyjnoprawny wybór prawa…*, p. 786; quoted in: P. Mostowik, E. Figura-Góralczyk, *Commentary…*, Nb. 35.

77 M. Wałachowska, *Kolizyjnoprawne aspekty…*, p. 256.

78 *Ibidem*, p. 270.

The above interpretation needs to be agreed with, and consequently it should be assumed that the Polish legislator has singled out a conflict of laws norm that subjects personality rights to *legi patriae*, along with a separate provision for their protection, based on a separate link.[79] The legitimacy of the application of this procedure can be evaluated differently whereby the separation of these concepts is particularly justified, especially when analyzing a specific factual situation under Polish law.[80] A different position is taken, according to whom this solution raises certain doubts, manifested, inter alia, in the circumstance that in order to establish the violation of personality rights, it is necessary to first determine its content, and the type and intensity of protection measures against the background of the applicable law may depend on the extent of the violation.[81] Hence, in the opinion of the authors, from a conflict of laws perspective, an approach would seem appropriate, according to which, in principle, one statute covers the issue of the existence and catalog of personality rights and the subject of the means of their protection.[82]

Consequently, it is apparent that the current wording of Article 16 of the Private International Law raises a multitude of practical problems in its proper application. Independent of the doubts about the grounds for singling out the personality rights in the form of the right to a safe climate, or the relatively small number of cross-border claims concerning personality rights as such, it seems reasonable to point out *de lege ferenda* postulates, especially those concerning Article 16.1 of the Private International Law. In particular, the need to refer to the native law of a person injured by a violation of his personality rights should be considered questionable, as certain fundamental goods are guaranteed to everyone not because of the individuals' status as a citizen of a state that declares these values to be legally significant, but solely because the individual in question is a human being.[83] In view of the above, one must agree that the better solution is the one found in German law, where, on the occasion of the reform of private international law in 1999, it was decided to adopt the principle of uniformity of the tort statute, which resolves not only the scope and means of protection of the right of personality, but also the granting of certain rights to the individual and their content.[84]

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79 J. Balcarczyk, *Uwagi ogólne…*; N. Rycko, *Prawo właściwe dla ochrony dóbr osobistych w wiążących Polskę dwustronnych umowach międzynarodowych*, "Zeszyty Prawnicze" 2018, vol. 18, no. 4, p. 70.

80 J. Balcarczyk, *Uwagi ogólne…*

81 P. Mostowik, E. Figura-Góralczyk, *Commentary…*, Nb. 75.

82 *Ibidem.*

83 M. Pilich, *Prawo właściwe…*, p. 617.

84 *Ibidem*, p. 619.

Conclusion

Summarizing, it still remains unclear whether climate change can be qualified as a fact with a real legal significance, a fact which allows the individual to bring a protective claim broadly understood as a climate action claim. There are many, maybe even too many, problems and difficulties regarding this matter. The nature of the individual's right to climate remains a core issue. This is because the issue significantly resonates with the possibility of recognizing the value in question as a personality right. In the context of tort liability, on the other hand, the issue of adequate causation or adequate definition of the category of climate damage *per se* remains a fundamental problem. What remains crucial is the fact that the above determines not only the basis for, but more importantly, the possibility of pursuing cross-border climate lawsuits against private sector entities.

Current analysis within the thematic scope of this chapter (domestic law, Rome II Regulation, or non-binding instruments) indicates a prevalent reliance on soft law. However, a discernible trend towards a potential shift in this paradigm is emerging, potentially necessitating legislative interventions at both the Polish and European Union levels.

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Judgment of the Supreme Court of June 10, 1977, ref. no. II CR 187/77, LEX no. 7947. Resolution of the Supreme Court of October 22, 2010, ref. no. III CZP 76/10, LEX no. 604152.

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Resolution of the Supreme Court of 28.05.2021, III CZP 27/20, OSNC 2021, no. 11.
The Convention for the Protection of Human Rights and Fundamental Freedoms (Dz.U. 1993, nr 61, poz. 284 z późn. zm.).
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Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Dz.U. 2024, poz. 54).
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Reframing Human Rights

Addressing Food Insecurity in a Global Context

Abstract: The purpose of this chapter is to draw attention to the flawed perception of the right to food solely from the perspective of a social right, whereas it is inextricably linked to other human rights. The right to food is very often cited as exemplifying the weakness of human rights. It illustrates a situation in which there is a perceptible inconsistency between the rights on one side and the obligations on the other. The right to food is not unattainable, but it is unfortunately unrealised. Food is the most basic human need, the lack of food security has negative effects on all other levels: economic, social and political. In the past, problems related to food provision were local in nature, nowadays, in a globalising world, the food problem has become a global problem. Global problems are interlinked. Human rights, in their universality, contain prerogatives that are vested in everyone. The addressee of these rights is the state and, increasingly as of late, the international community.

Keywords: human rights, food security, right to food

1. Introduction

Humanity has struggled with food access for almost all of recorded history. Malnutrition is still a major problem notwithstanding the unquestionable advancement of technology and overall improvement in living standards. The right to food was included in the list of human rights during the time of their codification, mainly

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as a social right.[3] On the one hand, this emphasises the importance of food for human beings and, in line with the idea of human rights, creates new responsibilities for governments. On the other hand, conceiving of it a social right undermines its realisation.[4] Framing the human right as a social right means that the obligation of the state changes from "must" to "should".

The purpose of this chapter is to draw attention to the flawed perception of the right to food solely from the perspective of a social right, whereas it is inextricably linked to other human rights. Given the difficulties in establishing claims based on social rights, this approach makes it possible to assert the responsibility of states for malnutrition. Such an argument can be drawn from the jurisprudence of international bodies: UN committees, the European Court of Human Rights (hereinafter the "ECHtR"), the Inter-American Court of Human Rights (hereinafter the "IACHR"), the African Court of Human and Peoples' Rights (hereinafter the "ACHP"), and the Court of Justice of the European Union (hereinafter the "CJEU"). However, it is important to be aware that, for the time being, we are at the beginning of the journey of strengthening the right to food in international courts. In this context, however, it is necessary to consider not only the formal control of the implementation of international obligations by states, but rather the possibility of actually realising the right to food. Such a question is particularly pertinent in the context of the long-standing debate on the food insecurity. While climate change has been the primary cause of the decline in food security, other unexpected factors that have shaken food security in recent years are a pandemic and the war in Ukraine. Furthermore, it will be debated how the right to food is realised in the face of these ongoing crises and the fact that there is still a significant proportion of consumers in the world who do not have sufficient income to buy food. The realisation of the right to food rests on two pillars: legislating the right to food and implementing the right through jurisprudence and policy.

2. Food insecurity

At the World Food Conference of 1974 the first definition of food security was given: 'availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and

[3] E.g.: United Nations, *International Covenant on Economic, Social and Cultural Rights*, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (28.09.2024).

[4] The term "realisation" is used in the text to refer to the real (not just theoretical) provision of the right to food.

price.[5] The Food and Agriculture Organization of the United Nations (hereinafter "FAO") broadened the definition of food security in 1983 by suggesting that "ensuring food security means that all people at all times have both physical and economic access to the basic food they need.[6] Probably the most well-known definition of food security was put forth later at the World Food Summit (1996): "Food security, at the individual, household, national, regional and global levels is achieved when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."[7] The four pillars of food security are availability, access, utilisation, and stability. In 2020, the High-Level Panel of Experts for the Committee on World Food Security[8] recommended adding agency and sustainability to these pillars.

By 2050, the world's population is predicted to reach 9.8 billion people.[9] Therefore, in order to maintain the current levels of consumption, agriculture must produce 60% more food globally. Urbanisation will lead to an increase in food demand. Due to the fact that the global food system is currently responsible for at least 30% of the greenhouse emissions that contribute to climate change, existing assessments are concerned about how the growing demand for meat and milk will affect crop productivity and the intensification of agricultural production. It means that agriculture contributes to climate change and is also impacted by negative effects of climate change.[10] The effects of recent climate-related extremes, like heat waves, droughts, floods, and hurricanes, highlight how vulnerable certain ecosystems and numerous human systems are to the current variability in the climate. Global warming is expected to increase the risks associated with climate change to human security, livelihoods, food security, water supply, and economic growth. It is predicted that yield reductions for maize, rice, wheat, and possibly other cereal crops will be less significant if global warming

5 United Nations, *Report of the World Food Conference*, Rome 1974.

6 Food and Agriculture Organization of the United Nations, *World Food Security: A Reappraisal of the Concepts and Approaches*, Rome 1983.

7 United Nations, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, Rome 1996.

8 High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, *Food Security and Nutrition: Building a Global Narrative towards 2030*, Rome 2020.

9 United Nations, *World Population Projected to Reach 9.8 Billion in 2050, and 11.2 Billion in 2100*, https://www.un.org/en/desa/world-population-projected-reach-98-billion-2050-and-112-billion-2100 (24.09.2024). Estimates vary slightly depending on the source, e.g. see: United Nations, *Population*, https://www.un.org/en/global-issues/population (24.09.2024).

10 M. Adamczak-Retecka, O. Śniadach, *Climate Change and Food Security: The Legal Aspects with Special Focus on the European Union*, Gdańsk 2018, p. 21.

is kept to 1.5°C.[11] Depending on the degree of changes in feed quality, the spread of diseases, and the availability of water resources, it is predicted that livestock will suffer from rising temperatures.[12]

There are approximately 900 m. people who suffer from hunger in the world, with the majority of them living in Asia and Africa. The overwhelming figures and statistics in this respect may be viewed from a variety of perspectives, with human rights being one, if not the central, perspective. Hunger is a global problem and it should be treated as such. It has also become an interdisciplinary issue with a common platform of hot discussion driven towards the creation of a food security concept that does not only embrace human existence, but it also corresponds to and correlates with economic, energy or ecological security categories.

Food, despite its elemental importance for humanity, is treated as a product in free market relations. Expenditure on food consumes more than 6.7 to 56% of global expenses, depending on the region. It is worth pointing out that the spread of the share of consumption in household budgets given above presents a characteristic trend – in countries where obesity is a problem (USA, UK), less than 10% of all costs are spent on food. In African countries (the situation is worst in Nigeria and Kenya), which are mainly affected by hunger, it is more than 50%.[13] Although we are theoretically able to feed 12 billion people, access to it (the growth of overweight people is much faster than that of undernourished people) and the structure of food (too many carbohydrates and fats) do not provide security now or in the future. More than 900 million individuals were severely food insecure in 2022.[14] Nearly one-third of the global population lacks access to adequate food, and approximately 3 billion individuals cannot afford a healthy diet.

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[11] See more: Ch. Zhao et al. *Temperature Increase Reduces Global Yields of Major Crops in Four Independent Estimates*, "Proceedings of the National Academy of Sciences" 2017, vol. 114, no. 35. Intergovernmental Panel on Climate Change, *Summary for Policymakers* [in:] *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, Cambridge 2018.

[12] *Ibidem*, p. 32.

[13] *Jaką część dochodów wydajemy na jedzenie?*, "Forsal" 2016, https://forsal.pl/artykuly/1003797, jaka-czesc-dochodow-wydajemy-na-jedzenie-infografiki.html (28.01.2024).

[14] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World Report 2023: Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural-Urban Continuum*, Rome 2023, https://reliefweb.int/report/world/state-food-security-and-nutrition-world-report-2023-urbanization-agrifood-systems-transformation-and-healthy-diets-across-rural-urban-continuum (29.01.2024).

Food is to be considered as any substance or product of plant or animal origin that is intended to be consumed. Food is a specific subject of regulation, due to its characteristics which have no equivalent in any other product, above all because it is the only product necessary for human existence. As Philip Alston underlined, food is first and foremost a commodity which is traded annually for billions of dollars and its status as human right is very much secondary to this fact.[15] The idea of looking at hunger through the prism of human rights was initiated and crystallised upon the publication by Amartaya Sen of "Poverty and Famines."[16] He has noted that markets are interconnected with human rights in terms of economy, social and cultural rights.

3. The right to food

The inaugural World Climate Conference took place in Geneva in 1979, and since then it has been evident that climate change-related phenomena, such as droughts, elevated temperatures, heightened soil salinity, more frequent storms, and other extreme weather events, are significantly impacting agriculture and ultimately food security. In 2015 Hilal Elver, the UN Special Rapporteur on the Right to Food has stated that climate change 'poses severe and distinct threats to food security.'[17] A. Saab points out that many researchers believe that climate change will become the main cause of food insecurity in the future.[18] However, recent events, most notably the conflict in Ukraine, have served as a reminder that warfare is also a very significant threat. Access to food is a dangerous tool of political pressure. It is dangerous because it is possible to exterminate populations (not only from countries directly affected by the conflict), without much cost or risk to military forces. European Commission pointed out major problems that started with global food security – as the Russian invasion in Ukraine has serious consequences for global food security mainly in Africa, the Middle East, and Western Balkans. Those regions are already affected by pre-existing food insecurity. "We are witnessing how Russia is weaponizing its energy supplies.

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15 P. Alston, *International Law and the Right to Food* [in:] *Food as a Human Right*, A. Eide et al. (eds), Tokyo 1986, p. 163.

16 A. Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford 1981.

17 United Nations, *Climate Change Poses Major Threat to Food Security, Warns UN Expert: Climate Change and Food Security*, 2015, https://www.ohchr.org/en/press-releases/2015/11/climate-change-poses-major-threat-food-security-warns-un-expert (23.09.2024).

18 A. Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change*, Cambridge 2019, p. 3.

And this is having global repercussions. Unfortunately, we are seeing the same pattern emerging in food security," said Ursula Von der Lyen in May 2022.[19]

The idea of the right to sufficient food is closely related to the idea of food security. The right to food was proclaimed in the acts of international law as well as in the constitutions of a number of countries. Discussion should thus open up with the Universal Declaration of Human Rights,[20] which under Art. 25 provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food (…)". From the normative perspective, the Covenant on Economic, Social and Cultural Rights,[21] which under Art. 11 defines the right to food, carries a fundamental significance. It is also worth noting that a closer study shows that the same provision does apparently determine two rights. On the one hand, it stipulates the right to an adequate standard of living, including food, while on the other hand, paragraph 2 of this Article recognises the right of everyone to be free from hunger. In fact, this Covenant creates a connection among the right to life, the right to physical integrity, the right to be protected against genocide and the right of any person to be protected against hunger. In its General Comment No. 12,[22] the CESCR indicated that the "core content" of the right to food implied "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" and "[t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights". A variety of reports and publications have been produced by the Food and Agriculture Organization of the United Nations (FAO), the Committee of Economic, Social, and Cultural Rights (CESCR), and the Office of the High Commissioner for Human Rights (OHCHR) to provide an explanation of the right to food. A few of important documents that should be mentioned at the regional level are the African System of Human Rights[23] and the Charter of the Organization of American States,[24] namely Article 34.

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19 *EU's von der Leyen Says Russia Is Using Food Supplies as a Weapon*, "Reuters" 2022, https://www.reuters.com/world/europe/eus-von-der-leyen-says-russia-is-using-food-supplies-weapon-2022-05-24 (28.09.2024).

20 United Nations, *Universal Declaration of Human Right*s, Paris 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights (20.09.2024).

21 United Nations, *International Covenant…*

22 United Nations High Commissioner for Refugees, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 1999.

23 United Nations, *International Norms and Standards Relating to Disability*, https://www.un.org/esa/socdev/enable/comp303.htm (24.09.2024).

24 Cf. https://www.iachr.org/Basicos/English/Basic22.Charter%20OAS.htm (23.09.2024).

There are a number of national constitutions that take into account the right to food or some of its aspects. The constitutional recognition of the right to food can be broken down into four categories: direct recognition as a human right, the right to food implicit in broader human rights, explicit recognition of the right to food as a goal, and indirect recognition through the interpretation of other human rights.[25] In accordance with the report by FAO on the implementation of the right to food in the world, 23 states recognise the right to food as a human right, including nine states that recognise it as an autonomous right (e.g. Art. 27 of the Constitution of the Republic of South Africa), ten states guarantee in their constitutions the right to food solely to certain categories of people, such as children (Art. 44 of Colombia's Constitution), with five states in this group pointing at this right as a component of another human right (e.g. Art. 21 of the Constitution of the Republic of Belarus).[26] Notwithstanding the fact that constitutional standards do not correspond directly to the right to food in a number of states, the right in question derives from other human right, *inter alia*, the right to life. Thus it seems rather indisputable that the absence of a direct reference to the right to food in the domestic law does not amount to the absence of safety and security in this range.

The right to food has been classified among social, economic, and cultural rights, the so-called second generation of human rights. While in traditional understanding, first-generation rights are subject to unconditional realisation by the state, which is primarily to refrain from acting; the so-called second-generation rights are realised through the active action of the state, which gradually, according to its capacities, ensures their realisation. Such norms are considered programmatic norms, which do not create hard obligations but rather define an obligation to pursue general social goals, are open-ended, and leave their addressees free to choose their path. In fact, the meaning of programmatic norms is a description of goals and not of rights. However, as with other human rights, the right to food requires the state to act in a way that respects, protects, and realises this right. Respect is to be understood in this case as state behaviour that does not prevent access to food. Protection on the part of the state is to ensure that it takes appropriate measures to ensure that subjects are not deprived of access to food. States have two categories of duties relating to right to food. They have domestic duties and external duties to fulfil. The other duty-holders are individuals

[25] L. Knuth, M. Vidar, *Constitutional and Legal Protection of the Right to Food around the World*, Rome 2011, p. 14.

[26] Food and Agriculture Organization Legal Office, *Implementation of the Right to Food in National Legislation* [in:] *The Right to Food: Extracts from International Instruments*, https://www.fao.org/4/w9990e/w9990e11.htm (24.09.2024).

and the international community.[27] This division is of great importance in the context of the ongoing crises, which are global in nature and have a definite impact on the perception of food security. Pointing out that the responsibility rests with different categories of actors should provide a platform for finding solutions in a spirit of solidarity. The Right to Food Resolution encourages all the States to "take steps with a view to achieving progressively the full realization of the right to food."[28]

4. Recognition of a right to food as a civil or social right?

The real problem with the right to food lies in its enforcement. While dignity, which encompasses the right to food, is a right that must be absolutely respected, access to food itself is treated as a social right. This applies not only from the doctrinal division of rights into personal rights, political rights and social, economic and cultural rights, but also to the positioning of the right to food in acts dedicated to precisely this third group of rights. Moreover, this has legal consequences. The language used to instrumentalise these rights is also characteristic, e.g.: "will take appropriate steps", "recognise the right", "shall take (…) the measures."[29] In practice, this means fewer responsibilities for the state and a more difficult way for individuals to assert the implementation of the right. States are held accountable for their ability and efforts to ensure an appropriate standard. Absolute implementation is not expected, but states shall do what is possible in a given social or economic situation.

The primary form of legal redress for the realisation of human rights and, in practice, also for the redress of violations taking place, are complaint procedures to international bodies. Of course, it should be noted that international bodies act in a subsidiary manner when previous steps taken directly against a state are ineffective. States must also agree to the jurisdiction of the international body. International agreements guaranteeing social rights are not as widely ratified as documents containing personal or political rights and complaints procedures are mostly contained in optional protocols to the agreement.

The Committee on Social, Economic and Cultural Rights ensures the monitoring of compliance with the International Covenant on Economic, Social and Cultural

[27] P. Alston, *International Law…*, p. 169.

[28] United Nations General Assembly, *The Right to food: Resolution Adopted by the General Assembly*, 2023, https://www.refworld.org/legal/resolution/unga/2003/en/12600 (24.09.2024).

[29] United Nations, *International Covenant…*, Art. 11.

Rights in individual cases acts on the basis of the Optional Protocol.[30] Although this was the first international agreement that explicitly referred to the right to food as a human right, so far the Committee has not dealt with the implementation of this right.[31]

The complexity of the right to food and its interrelationships with other rights means that cases concerning this matter will also arise in the adjudication of actors other than those dedicated to economic, social and cultural rights.

The Human Rights Committee, which upholds compliance with the International Covenant on Political and Civil Rights, has spoken out on the extensive soybean cultivation and the indiscriminate use of toxic agrochemicals causing contamination of the water supply and food insecurity (in the mainly right to life context).[32] In the case considered by the Committee on the Rights of the Child, on the other hand, the right to food was invoked in the context of adequate housing.[33] In none of the cases has the right to food been the basis of the complaint, it has only been referred to in the grounds, illustrating the difficult situation of the complainants. Also, no other specialised Committee has so far dealt with a complaint of neglect of the right to food.[34]

The right to food, or more broadly, the matter of access to food appears much more frequently in the jurisprudence of the European Court of Human Rights primarily, however, in relation to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR").[35] Another

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[30] United Nations, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, New York 2008, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4 (29.09.2024).

[31] In one case, the Committee, in deciding on an adequate alternative housing, examined state social support consisting, inter alia, of the provision of food by national authorities, see: United Nations, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Concerning Communication No. 134/2019*, 2 May 2023.

[32] Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2751/2016*, 20 September 2019; Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*, 24 October 2019.

[33] United Nations Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 134/2020*, 7 March 2023.

[34] Nevertheless, there is no doupt that the UN system recognises the problem of hunger. It has established the Special Rapporteur on the right to food. The activity of the Special Rapporteur on the right to food is based on the drafting of reports and recommendations, while it is not equipped with the power to deal with individual complaints, see: United Nations, Special Rapporteur on the Right to Food, https://www.ohchr.org/en/special-procedures/sr-food (28.01.2024).

[35] European Court of Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome 1950. E.g.: European Court of Human Rights, *Case of Ciorap V. The Republic*

grounds to which the Court has referred is the right to life or the right to privacy.[36] Clare James notes that the cases in which food access was considered can be divided into three categories.[37] In the first place, and these are the most frequent cases, these are the rights of the detainees – the lack of adequate food (which may also refer to individual dietary requirements, both on the grounds of health and religion), was an element justifying the finding of a violation of the prohibition of torture.[38] It should be pointed out, however, that the right to food was one element, but not the only or main one. In such cases, it was also linked to other violations, such as inadequate sanitary conditions.[39] The second group of cases involves people isolated in psychiatric hospitals. The third type of situation involves migrants.[40] The common feature is the detention and the degree of dependence of the applicants on the State. The Court classifies them as 'vulnerable persons'.

Although there have not yet been any judgements that explicitly recognise the lack of access to food as a violation of the ECHR, it is likely that if there are any, they will relate to "extreme poverty" and inadequate social protection.[41] A lack of access to adequate food is thus treated, as in the jurisprudence of UN Committees or the European Committee of Social Rights, as a situation strongly related to poverty, which also confirms the thesis of A. Sen.[42]

Based on the ECtHR's case law, the following conclusions can be drawn:

(a) The State is only responsible for access to food when a person is dependent on a State institution (situations of detention or cases of highly vulnerable

of Moldova (No. 3) (Application no. 32896/07), Strasbourg 2012, European Court of Human Rights, *Case of Rotaru v. Moldova (Application no. 51216/06)*, Strasbourg 2011.

[36] It should be noted that a Council of Europe has established the European Social Charter with the European Committee of Social Rights as its guardian. The Committee only deals with group complaints and so far food issues have secondary to health care, social support, including the family, the fight against poverty and social exclusion.

[37] C. James, *Food, Dignity, and the European Court of Human Rights*, "Legal Studies" 2023, vol. 44, no. 3.

[38] Recently e.g.: European Court of Human Rights, *Ukraine v. Russia (re Crimea) [GC] – 20958/14 and 38334/18*, 2024; European Court of Human Rights, *Case of Zarema Musayeva and Others v. Russia (Application no. 4573/22)*, Strasbourg 2024; European Court of Human Rights, *Case of K.J. and Others v. Russia (Applications nos. 27584/20 and 39768/20)*, Strasbourg 2024.

[39] European Court of Human Rights, *Case of Necula v. Romania (Application no. 33003/11)*, Strasbourg 2014.

[40] E.g. European Court of Human Rights, *Case V.I. v. The Republic of Moldavia (Application no. 38963/18)*, Strasbourg 2024.

[41] European Court of Human Rights, *Budina against Russia (Application no. 45603/05)*, Strasbourg 2009.

[42] A. Sen, *Rozwój i wolność*, tłum. J. Łoziński, Poznań 2002.

persons). Complaints in this regard will be based mainly on Article 2 or 3 of the ECHR.

(b) The right to food is treated in the broader perspective of extreme poverty, which implies that in the absence of detention, social security 'absorbs' the right to food as a separate[43] guarantee. This is understandable insofar as malnutrition (quantitative, but mostly also qualitative) results from poverty.

Considering the Verein KlimaSeniorinnen Schweiz and Others v. Switzerland ruling, it is very possible that issues of right to food will be decided in the context of climate change.[44]

The ECHR is a living instrument, which means that the way it is interpreted and the rights derived from it should be adapted to social changes.[45] Therefore, it is not necessary to create additional regulations to protect people from hunger on the basis of such rudimentary rights as the right to life or dignity.

The right to food emerges even more rarely in CJEU rulings, despite the Union's active involvement in the sphere of ensuring food security. This is, of course, due to the fact that the CJEU is not a classic court of human rights and the access of individuals to the CJEU is very limited. So far, there has been no opportunity to give a straightforward answer on how the right to food is to be understood under EU law, and what obligations this imposes on the Union and the Member States.[46]

The signal for European courts to approach poverty in a more sensitive way was expressed by the Inter-American Court of Human Rights: "(…) unlike the European and African human rights systems, the inter-American and the universal systems reveal a tendency to consider that individuals who are in a situation of poverty con-

[43] A. Mowbray, *The Creativity of the European Court of Human Rights*, "Human Rights Law Review" 2005, vol. 5, no. 1.

[44] European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] – 53600/20*, Strasbourg 2024. Although in the referenced case the right to food was not explicitly used in the reasoning of the decision, it did appear in the ruling. More about this case, see: M. Zemel, *The Rise of Rights-Based Climate Litigation and Germany's Susceptibility to Suit*, "Fordham Environmental Law Review" 2018, vol. 29, no. 3, pp. 484-527; R. Harvey, *What's Paris Got to Do with It? Community Lawyering for Climate Justice at Europe's Highest Court*, "Socialist Lawyer" 2023, no. 93, pp. 32-37; R. M. Lange, *The Right to Adequate Housing for IDPs in the Context of Slow-Onset Climate-Induced Disasters within the European Union*, "Renewable Energy Law and Policy Review" 2022, vol. 11, no. 1, pp. 11-22.

[45] A. Mowbray, *The Creativity…*

[46] In the case Vadim Nikolaevich Moshkovich v. Council, the General Court had the opportunity to consider EU regulation in the context of ensuring global food security, see: *Judgment of the General Court (First Chamber) of 20 December 2023. Vadim Nikolaevich Moshkovich v Council of the European Union*, Case T-283/22, ECLI:EU:T:2023:849.

stitute a group in a situation of vulnerability that differs from the groups traditionally identified as such; this situation is recognized as grounds for special protection and part of the prohibition of discrimination based on "economic status" expressly included in Article 1(1) of the American Convention."[47] Despite this, the right to food is invoked extremely rarely before the Inter-American Court of Human Rights, with only a few cases. As at the ECtHR, these cases mostly concern the rights of detainees.[48] An interesting group of cases are those involving indigenous communities.[49] In the Case of the Indigenous Communities of the Lhaka Honhat Association, for the first time a property right was combined with the right to food. According to the claimants, the deprivation of land from the indigenous people resulted in them being barred from obtaining food in the traditional way for them. At the same time, the lack of state assistance and care led to starvation or the gathering of food in violation of their dignity and even their lives. It was considered a violation of Article 26 of American Convention on Human Rights, according to which: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

The problem of hunger is a major concern in Africa, however, the jurisprudence of the African Court on Human and Peoples' Rights has so far not developed a significant jurisprudence in this area.[50] One of the few cases in which the Court referred to the right to food had to do with the right of indigenous people to land and to

[47] Inter-American Court of Human Rights, *Case of Hacienda Brasil Verde Workers V. Brazil: Judgment of October 20, 2016 (Preliminary Objections, Merits, Reparations and Costs)*. In this case, malnutrition was one of the elements arguing for the recognition of working conditions as slavery.

[48] Inter-American Court of Human Rights, *Case of Rodríguez Revolorio et al. VS. Guatemala: Judgment of October 14, 2019 (Preliminary Objection, Merits, Reparations and Costs)*; Inter-American Court of Human Rights, *Case of Amrhein et al. v. Costa Rica: Judgment of April 25, 2018 (Preliminary Objections, Merits, Reparations and Costs)*.

[49] Inter-American Court of Human Rights, *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina: Judgment of February 6, 2020 (Merits, Reparations and Costs)*; Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay: Judgment of March 29, 2006 (Merits, Reparations and Costs)*; Inter-American Court of Human Rights, *Case of Yakye Axa Indigenous Community v. Paraguay: Judgment of June 17, 2005 (Merits, Reparations and Costs)*.

[50] Whereas the progressive jurisprudence in South Africa is noteworthy, see: T. M. Makunya, M. Bwanaisa, *Right to Food Security*, https://www.pulp.up.ac.za/edocman/pulp_commentaries/protocol_to_ACHPR/Article_15.pdf (29.01.2024).

cultivate their own traditions, including those of obtaining food.[51] The Commission also ruled on the violation of the right to food caused by environmental pollution.[52] Access to food issues were also raised in the case concerning the displacement of the Endorois community.[53]

5. Conclusions

The right to food is considered in international instruments as a separate human right. The rather poor jurisprudence of the controlling bodies of these instruments emphasises a close interconnection between the right to food, human dignity and other human rights, with the right to food itself forming more of a mere background consideration. This is precisely due to the framing of the right to food as a social right.[54] Another option may be to ground the complaint on a basis other than the right to food. Invoking the right to life or the prohibition of torture puts more responsibility on states, which cannot be reduced by economic arguments. This seems to be the reason that determines the social character of the right to food, rather than the very nature of the human need that is expressed in the right to food.

Pursuing liability for failure to provide food on the basis of the right to life, the prohibition of torture or the right to property is not an ideal solution, as it forces the complainant to prove the specific conditions linking to the right in question, while the issue of malnutrition constitutes (a) a reason (in the case of a violation of the right to life), (b) a consequence (e.g. deprivation of property) or (c) a circumstance 'building up' the violation (in the case of the prohibition of torture). It is necessary to

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[51] AfCLR, *African Commission on Human and Peoples' Rights v. Republic of Kenya (Application No. 006/2012*), 23 June 2022.

[52] African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action and the Center for Economic and Social Rights v. Nigeria, 13-27 October 2001*, paras 65-66.

[53] African Commission on Human and Peoples' Rights, *276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*.

[54] A different perspective on the realisation of social rights is offered by the Inter-American Court of Human Rights: "Notwithstanding the justiciability of a right – civil or social – its absolute protection cannot be assumed in all litigation. Every case, whether civil or social law, must always be resolved through an imputation analysis and by verifying how the obligations of respect and guarantee operate with respect to each situation that is alleged to violate a given right." The different approach is that the limitation of the exercise of social rights is not based on their nature, but depends on the circumstances of the case. Inter-American Court of Human Rights, *Case of Canales Huapaya et al. v. Peru: Judgment of June 24, 2015 (Preliminary Objections, Merits, Reparations and Costs)*.

make a logical connection between malnutrition and the violation of another right. Another limitation that arises from the case law is the dependence of the complainant on the state, which refers primarily to detention or the vulnerable group.

In the light of such complex causes and consequences of malnutrition, as well as the shape of human rights protection mechanisms, the question also arises as to whether access to food can in practice be treated as an enforceable per se human right, or whether the issue of access to food and related food security should be placed only on the political agenda.

It is to be expected that the position of the tribunals will evolve in the future. Perhaps it is a matter of the number of cases in which citizens assert their right to food still being too small. If one were to look at its implementation from the perspective of the judiciary, one might conclude that it is not a global problem. This may be related to a low awareness of the entitlement or a public perception only for the course of action and not the basis of the claim. The provision of food is mainly regarded as an individual's responsibility.[55] This is presumably to some extent influenced by the fact that people who struggle every day to provide the basic needs of existence direct their energies precisely towards survival rather than institutional disputes. The activism of citizens and NGOs is therefore so important, especially since the problem of malnutrition paradoxically does not disappear, despite constant economic growth and adequate resources. On the other hand, new factors causing the problem and new faces of malnutrition are emerging, which may influence the progressive attitude of judicial bodies.

Ensuring food security for all and eradicating hunger are imperative objectives that are consistent with the human right to adequate food. Not only are these responsibilities the responsibility of national governments, but the global community as a whole should share them. There is an obligation to take the necessary steps in order to achieve the goal if we already know them; we must select a path that can be reasonably anticipated to lead us to the objective. If the assumption were made that the actors responsible for the realisation of these rights are only states, one could point to politics. However, there is increasing talk of the responsibility of the international community as a whole, which is obliged to realise this right.[56]

We should more broadly consider the question of responsibility for the realisation of this right. If the narrative of the universality of human rights has become a permanent part of the language of lawyers, but also of politicians, one has to wonder who

[55] It is difficult to be precise about the number of complaints about violations of the right to food, as the procedures for dealing with complaints foresee various forms of preliminary examination of cases brought and rejection at this stage results in the decision not being published.

[56] A. Eide, *The International…*, p. 165.

and how should one guarantee the realisation of such a basic need as the right to food. What is certainly needed is action at different levels and in different areas, including science, policy and society. It is also important to shift in consciousness. Holden Karnofsky points out that we have become accustomed to a "Business as usual" headspace – somehow everything will regulate itself. Instead, the author suggests a change to a "This cannot go on" headspace.[57] Changes on a mental level are also needed at the starting level, thinking about people and their future.

On 25 September 2015, the 193 Member States of the United Nations adopted the 2030 Agenda for Sustainable Development, including 17 Sustainable Development Goals (SDGs) with 169 targets and 230 indicators. Agenda 2030 is a global vision for all people living on the planet and for a long-time perspective. The aims are very comprehensive, as they cover all challenges facing the planet today: poverty, hunger and climate change, while achieving inclusive growth. The 2030 Agenda for Sustainable Development commits the international community to act together to overcome them and transform our world for present and future generations. Meeting commitments to sustainable development can be a guide to developing new solutions. It is now argued that the concept of food security should be based on the additional pillar of sustainability. Living in a more interconnected world globally, it is necessary to change the approach towards issues like food, climate and agricultural policy, and to understand that actions taken by one state – or its negligence – have transboundary effects and an impact on the wellbeing of peoples living in distant parts of the world. As Hilal Elver, the UN Special Rapporteur on Right to Food has underlined: 'At the same time, hunger and malnutrition in Africa, Asia or Middle East can have a severe security impact on places that have no immediate food problem by generating the migration of desperate people. It is becoming painfully obvious that it is important for the international community to address the root causes of hunger and food insecurity as an urgent matter of shared global interest, reinforced by commitments to uphold and fulfill human rights obligations.'[58]

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[57] H. Karnofsky, *This Can't Go On*, https://www.cold-takes.com/this-cant-go-on/ (29.01.2024).

[58] H. Elver, *The Lasting Legacy from Milan Expo 2015*, Milan 2015, p. 1.

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Food Security and the Right to Food in the European Union

Abstract: In recent years the discussion on food security in the European Union (hereinafter the "EU" or "Union") seems to have intensified and has begun to be one of the leading issues in the EU-agenda. The reason for it might be especially, i.a., the climate crisis. The EU food safety policy is based on the following pillars: food hygiene, animal and plant health, and contaminants and residues. Despite the urgent need to undertake actions towards the aforementioned directions, the new approach linking food security with access to food for each individual is needed. Moreover, this approach, based on the paradigm of food as a fundamental need, is not new in law. Already the 1948 Universal Declaration of Human Rights as well as the ICESCR relate to nutrition as a perquisite to enjoyment of other human rights. The same tendency was confirmed by the European Court of Human Rights (hereinafter the "ECtHR"), which stated that a lack of access to food can constitute a serious breach of Art. 3 of the ECHR. Meanwhile in the European Union law there is no legislation which classifies food as "public/common good" or "human right". Therefore, the aim of this chapter is to verify how the process of recognition and implementation of the "right to food" in the EU progresses against the international standards.

Keywords: right to food, food law, food security, freedom from hunger, The F2F Strategy

1. Introduction

In recent years the discussion on food security in the European Union (hereinafter the "EU" or "Union") seems to have intensified and has begun to be one of the leading issues in the EU-agenda. The reason for it might be especially, i.a., the climate

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crisis. The concerns on its long-term negative consequences were expressed in the Union particularly in the European Parliament resolution of 28 November 2019 on the climate and environment emergency.[2] The agriculture sector and the food industry intensively experience changes caused by climate degradation. Current EU legislation on food safety mainly addresses this issue in terms of ensuring a hygienic and "healthy" chain from the production of food to getting it directly into the hands of the consumer. The definition of food security enclosed in the Rome Declaration on World Food Security and Plan of Action stipulates that "food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."[3] It emphasizes not only its biological safety, but its physical and economic accessibility, as well.

The EU food safety policy is based on four pillars: food hygiene, animal health, plant health and contaminants and residues.[4] Despite the urgent need to undertake actions towards the aforementioned directions, the new approach linking the food security with access to food for each individual is required. Moreover, this approach, based on the paradigm of food as fundamental need and good, is not new in law. Already the 1948 Universal Declaration of Human Rights as well as The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) relate to nutrition as a perquisite to an enjoyment of other human rights. The same tendency was confirmed by the ECtHR, which stated that lack of access to food can constitute a serious breach of Article 3 of ECHR.[5] Meanwhile in the European Union law there is no legislation, which classifies food as a social good or "human right". Therefore, the aim of this chapter is to verify how the process of recognition and implementation of "right to food" in the European Union progresses against the international standards.

[2] European Parliament, *European Parliament Resolution of 28 November 2019 on the Climate and Environment Emergency (2019/2930(RSP)*, https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2019/2930(RSP) (11.01.2024).

[3] Cf. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0021:FIN:PL:PDF (11.01.2024). Compare: S. Motala, *Giving Realisation to the 'Right to Food'*, "Agenda: Empowering Women for Gender Equity" 2010, vol. 24, pp. 3-7.

[4] Cf. https://european-union.europa.eu/priorities-and-actions/actions-topic/food-safety_en (11.01.2024).

[5] C. James, *Food, Dignity, and the European Court of Human Rights*, "Legal Studies" 2023, vol. 44, no. 3, pp. 1-18.

2. Urgent need for the "right to food" for each individual

The discussion on the right to food could, at first glance, appear to be strictly theoretical, a manifestation of the problem that is the inflation of human rights and thus the devaluation and "blurring" of already existing and evolutionarily emerging new rights. Meanwhile, it is difficult to imagine a more basic good, without which the existence of human being could be possible. Along with water, shelter, or sanitation, access to food is a fundamental need, without the provision of which it is difficult to speak of securing other goods inherent in the civilization of 21st century, such as privacy, freedom of economic activity, voting rights, or freedom of speech. Thus, the obvious conclusion is that the provision of both quantitatively and qualitatively adequate food conditions the ability to realize other freedoms and rights.[6]

In international law, this right is explicitly stated in the Universal Declaration of Human Rights,[7] which, in Article 25, treats nutrition as an element of the right to a standard of living that ensures health and well-being, listing it alongside such goods as clothing, housing, medical care, basic social benefits and the right to insurance against extraordinarily adverse circumstances.[8] The same provides Article 11 of the ICESCR, which is the source of the right of everyone to an adequate standard of living. In addition, protection limited only to selected groups is ensured *expressis verbis* by the Convention on the Rights of the Child (Article 24(2)(c) and (e), and Article 27(3))[9] and the Convention on the Elimination of All Forms of Discrimination against Women (Article 12(2)),[10] the Convention on the Rights of Persons with Disabilities (Article 28),[11] and the Geneva Conventions.[12]

In the aforementioned legal acts, the approach to treat food as an element that ensures the realization of the "right to adequate living conditions" is noticeable. The failure to give the right to food an autonomous character in the key sources of

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[6] Also worth mentioning is the problem of the so-called interdependence of the right to food with other individual rights: M.A. Szkarłat, *Prawo do właściwego wyżywienia jako przykład współzależności praw człowieka*, "Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia" 2014, vol. 21, no. 2, pp. 65-83.

[7] United Nations, *The Universal Declaration of Human Rights*, Paris 1948.

[8] See more: K. Mechlem, *Right to Food* [in:] *Max Planck Encyclopedia of Public International Law*, A. Peters, R. Wolfrum (eds), 2008.

[9] United Nations, *Convention on the Rights of the Child*, 1989.

[10] United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, New York 1979; O. Śniadach, *Czy potrzebujemy prawa do żywności?*, "Gdańskie Studia Prawnicze" 2017, vol. 38, p. 283.

[11] United Nations, *Convention on the Rights of Persons with Disabilities*, 2006.

[12] The Geneva Conventions are referred to in detail by M.A. Szkarłat, *Prawo do właściwego wyżywienia*…, p. 66.

international law on human rights may lead to the conclusion of the negligible interest of the international community in this problem, which may be surprising given its scale. The same tendency is visible at the constitutional level, because among the EU Member States none of them provides a self-standing right to food in the constitution.[13] According to the projections of the UN, by 2030, approximately 670 million people will still be facing hunger – representing 8% of the world's population.[14] Moreover, the report of five organizations: the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the United Nations Children's Fund (UNICEF), the UN World Food Programme (WFP) and the World Health Organization (WHO) detected that access to food in 2021 was increasingly more difficult than in previous years.[15] According to the estimates, this means that almost 10% of the world population had faced hunger.[16] Despite these sobering figures, the right to food is still not universally recognized and is not a self-standing right.

The lack of inclusion of food in the category of an autonomous human right may also constitute a confirmation of the position expressed in legal studies that not every social need must (should) be equated with the need to ensure the right to it. This problem was pointed out by W. Osiatyński, exposing the fundamental differences between the construction of rights and needs, and claiming that "rights serve the realization of human needs."[17] Consequently, the needs often "force" legislators to undertake some legislative action. W. Osiatyński pointed out that "we should have recourse to rights when – and only when – a given need of a paramount character cannot be satisfied in any other way."[18] In doing so, the author refers to a list of solely "basic needs" at the top of which are nutritious meals and clean water.[19] It is obvious that apart from the fundamental needs, the term "need" can be understood in a broader scope and be subjective in nature. It can result from an individual's preferences (such as the need to live at a certain social and financial level that far exceeds the satisfaction of basic needs).

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13 Cf. https://www.fao.org/right-to-food-around-the-globe/countries/en/ (11.01.2024).

14 Cf. https://sdgreport2023.gsma.com/sdgs/sdg-2-zero-hunger-2/ (11.01.2024).

15 According to the authors "as many as 828 million people were affected by hunger in 2021 – 46 million people more from a year earlier and 150 million more from 2019", cf. https://www.fao.org/newsroom/detail/un-report-global-hunger-sofi-2022-fao/en (11.01.2024).

16 Cf. https://www.fao.org/newsroom/detail/un-report-global-hunger-sofi-2022-fao/en (11.01.2024).

17 W. Osiatyński, *Human Rights and Their Limits*, Cambridge 2009, p. 106.

18 *Ibidem*, p. 150.

19 *Ibidem*, p. 131.

In light of alarming data on the problem of unequal access to food, child malnutrition, weather phenomena causing prolonged periods of drought or flooding in many areas of the world resulting in restrictions on food production, it is necessary to recognize the urgency of acknowledging the right to food as a fundamental right in international law. In accordance with international solidarity and the principle of sustainable development, the emphasis on helping less developed countries and areas should be appropriately distributed to ensure that all people on the planet have access to the basic goods necessary for survival and protection of human dignity. In the age of space conquest and the development of artificial intelligence, the problem of hunger that exists on such a large scale should be a constant reproach to the international community of the 21st century.

2.1. The CESCR General Comment No. 12

A key document from the point of view of the development of the universal right to food is General Comment No. 12, enacted by the *Committee on Economic, Social and Cultural Rights* (CESCR) in 1999, devoted exclusively to "the right to adequate food."[20] With the enactment of this Comment, one can observe the process of "unbundling" the right to food from Article 11 of the ICESCR, stating that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Moreover the wording of Article 11 sec. 2 leaves no doubt that it links issues of the right to food with appropriate agricultural programs.[21] What is more, it also introduces a new concept of "freedom from hunger", which even more fully emphasizes

[20] The CESCR decided to adopt the Commentary as a result of call from states parties, expressed in 1996 at the World Food Summit, to determine the entitlements stemming from the "right to food".

[21] According to art. 11 sec. 2 of the ICESCR: "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

the need to take measures to ensure adequate access to food. The particular importance of the CESCR General Commentary is manifested in decoding the normative content of the "right to food" and, consequently, in defining the obligations of public authorities in its implementation. The Committee stated that "The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[22] Moreover, the Committee formulated the definition, according to which this right means "the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. The accessibility of such food in ways that are sustainable and that don't interfere with the enjoyment of other human rights."[23]

The analysis of the General Commentary makes it possible to distinguish the following features of the right to food:

- a broad subjective scope;
- a physical availability;
- an economic availability;
- an adequate quality and quantity of food;
- sustainable access.

Due to the nature of the ICESCR, the implementation of the states' obligations under the right to food should be progressive, i.e., taking into account the capabilities of the state in question.[24] As it is clear from the General Comment, the fundamental obligation of the authorities is to take the necessary measures to minimize (mitigate) the incidence of hunger. According to the CESCR the obligations stemming from right to adequate food are as follows:[25]

- obligation to respect meaning that State authorities should respect the mechanisms already in place to ensure access to food and refrain from any action to restrict it;

[22] United Nations, *CESCR General Comment No. 12: The Right to Adequate Food (Art. 11)*, 1999, https://www.refworld.org/pdfid/4538838c11.pdf (11.01.2024).

[23] *Ibidem.*

[24] According to Art. 2 sec. 1 of ICESCR: „Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[25] See sec. 15 of the United Nations, *CESCR General Comment No. 12…*

- obligation to protect meaning that State authorities should protect the individual from actions by third parties against deprivation of the right of access to food;
- obligation to fulfil meaning a two-pronged nature action, i.e.: on the one hand, through measures aimed at enabling and facilitating access to and use of means of subsistence (including funding for food). On the other hand, this duty is also realized in situations where an individual does not have the means to feed himself, in which case assistance must be provided in a direct sense (e.g., groups particularly vulnerable to discrimination, or victims of natural disasters).

Because of the progressive nature of the right to food, states party to the ICESCR should enact national food and food security programs that take into account the national economic and social context, first addressing the needs of vulnerable groups with limited access to food. This was followed by a call on states parties to enact a framework regulation as a key document for implementing national programs and as a legal basis for judicial enforcement at the national level. In this regard, the Committee did not define any specific guidelines on deadlines, protection mechanisms or institutions responsible for implementing the right to food, leaving states with a wide margin of discretion. Instead, the Committee has explicitly formulated a clear prohibition on food embargoes where this would result in a threat to food production or access in another country (sec. 37). Moreover, access to food should never be an instrument of political or economic pressure (sec. 37).

3. Right to food in the EU

EU legislation devotes considerable space to the EU agricultural policy,[26] which has been an area of integration since the early years of the European Communities' development.[27] Meanwhile, the concept of a "right to food" is not mentioned in either the Treaties or Charter of Fundamental Rights of the European Union. The situation is no different under the secondary legislation. None of the legal acts guarantees it *expressis verbis*. In contrast, a lot of space is devoted to food security. The key legal reference in this field is Regulation no. 178/2002 laying down the general principles

[26] See: Article 38 of TfUE.

[27] J. Sozański, *Reformy wspólnej polityki rolnej i prawa rolnego Unii Europejskiej po 1990 roku*, "Ius Novum" 2011, vol. 1, pp. 130-161.

and requirements of food law[28] (hereinafter "The Regulation no. 178/2002"), which can be perceived as a framework regulation. The purpose of this legislation was to ensure the free movement of safe and healthy food in order to protect the lives and health of consumers in the Union. The Regulation no. 178/2002 remains to this day a key piece of legislation for the development of EU food law[29] by introducing unified rules for the marketing and circulation of food and feed to raise consumer health protection standards. EU food law is based on a meticulous risk analysis and information about their occurrence, the precautionary principle in the event of knowledge of the possible danger of harmful effects on health in the case of food intake, and consumer protection. The last element means taking preventive measures (Article 8), by protecting people from fraudulent or deceptive practices, the adulteration of food, and any other practices which may mislead the consumer (Art. 8 sec. 1). The Regulation no. 178/2002 also stipulates obligations in the food trade and food safety requirements for products placed on the market. It also led to the establishment of the European Food Safety Authority.

Undoubtedly, the Regulation no. 178/2002 is a gamechanger in the development of new standards for consumer health protection[30] and the product information rights. It is also one of the key (and necessary) pieces of legislation for the development of EU agricultural policy. However, it is difficult to see in it any tendency to facilitate access to food for those suffering from its deprivation. Within its framework, food constitutes a commodity (product), subject to market logic. Thus, while the undoubted contribution of this regulation to enhancing food safety should be appreciated, it does not in any way strengthen the human rights-based approach to food. One would have expected from a framework regulation that it has a broad sub-

[28] *Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety*, "Official Journal of the European Communities" 2002, L 31, pp. *1-24.*

[29] Currently, there is no uniform understanding of the term "food law." See more: Ch. Parker, H. Johnson, *From Food Chains to Food Webs: Regulating Capitalist Production and Consumption in the Food System*, "Annual Review of Law and Social Science" 2019, vol. 15, pp. 205-225. On the ground of legal science in Poland, as recently as 2017, it was described as a "new field of law." See: M. Korzycka, P. Wojciechowski, *System prawa żywnościowego*, Warszawa 2017. It should be noted, however, that *Regulation (EC) No 178/2002…* already used it in 2002, establishing its legal definition, according to which food law means the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level; it covers any stage of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals" (Article 3 (1)).

[30] Compare: M.Z. Wiśniewska, *Terroryzm żywnościowy oraz obrona żywności w ujęciu formalnoprawnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2022, vol. 84, no. 4, pp. 101-120.

ject matter, at the very least, to signal an obligation of public authorities to provide access to food, and thus move beyond a market-based approach, for marginalized or malnourished groups. This would support the anthropocentric nature of EU policies and give impetus to putting the "right to food" on the EU agenda.

Following the enactment of the Regulation no. 178/2002, the following years saw a significant expansion of the EU food law with acts dedicated to the "segments" of food law[31] like: hygiene of foodstuffs,[32] food information,[33] genetically modified food, animal and plant health in food production,[34] water policy.[35] Despite the EU's legislative heritage in the area of food security, no secondary legislation proclaims the concept of "right to food" in the sense adopted by the CESCR. However, it is important to emphasize the momentous role of these regulations in the expansion of consumer rights. It should also be pointed out that the European Court of Justice (hereinafter the "CJEU"), in one of its rulings, indicated that "efforts to achieve objectives of the common agricultural policy, in particular under common organizations of the markets, cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the community institutions must take into account in exercising their powers."[36] The development of perceiving food as a social good is

[31] More detailed information: *Fact Sheets on the European Union: Food Security*, https://www.europarl.europa.eu/factsheets/pl/sheet/51/bezpieczenstwo-zywnosci (08.01.2024).

[32] *Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the Hygiene of Foodstuffs*, "Official Journal of the European Union" 2004, L 139, pp. 1-54.

[33] *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the Provision of Food Information to Consumers, Amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and Repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004*, "Official Journal of the European Union" 2011, L 304, pp. 18-63.

[34] *Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on Transmissible Animal Diseases and Amending and Repealing Certain Acts in the Area of Animal Health ('Animal Health Law')*, "Official Journal of the European Union" 2016, L 84, pp. 1-208; *Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations (EU) No 228/2013, (EU) No 652/2014 and (EU) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC*, "Official Journal of the European Union" 2016, L 317, pp. 4-104.

[35] *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy*, "Official Journal of the European Union" 2000, L 327, pp. 1-73.

[36] European Court of Justice, *Judgment of the Court of 23 February 1988 in Case 68/86*, sec. 12. See also: A. Kubicz, *Europeizacja prawa żywnościowego – zagrożenia i korzyści*, "Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM" 2015, vol. 5, p. 152.

observed in the European Union in the grassroots plans for European Citizens' Initiative on the right to food,[37] which is currently under discussion.

3.1. The F2F Strategy

From the point of view of food security in the European Union, a significant role is played by the European Commission's document "A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system"[38] (hereinafter "The F2F Strategy"). It was adopted in 2020 as a key element of the European Green Deal[39] and doesn't have the binding force. The aim of the F2F Strategy was to develop a sustainable food system in the first place, and to introduce mechanisms in the food chain that would be friendly and environmentally friendly to consumers, food producers, the climate and the environment alike. In the Strategy, the European Commission pledged to take steps to develop sustainable agriculture, ecological biodiversity and decarbonize the food chain, among other things. Moreover a lot of attention has been paid to food security. In the document, the Commission repeatedly declared its readiness to undertake changes to transform the food industry, as well as to review legislation on, among other things, pesticides, or to adopt new guidelines and formulate new legislative proposals on, for example, food waste. Unfortunately, the document lacked any reference to the right to food. The Strategy treats food as a special kind of commodity that is subject to all the laws of the market, just like any other product. Thus, food in it does not have the character of a good that should be guaranteed to everyone, especially the most vulnerable groups. Such a situation may come as a disappointment given that, according to the Commission's declarations, the Strategy was defined as a major component of the program to achieve the UN Sustainable Development Goals, while it should be mentioned the end of hunger is one of the top priorities of the UN included in this list. According to Goal no. 2, all possible actions should be undertaken "by 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round" (target 2.1.) and to end "by 2030 all forms of malnutrition including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address

[37] In May 2024 the second Demopratica Forum of Geneva took place and was exclusively dedicated to the European Citizens' Initiative on the right to food: https://www.opdemge.org/ (08.01.2024).

[38] European Commission, *Communication on A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System*, 2020.

[39] Cf. https://www.eea.europa.eu/policy-documents/com-2019-640-final (08.01.2024).

the nutritional needs of adolescent girls, pregnant and lactating women and older persons" (target 2.2).[40] The "F2F Strategy" also fails to guarantee any preferential access to food for the deprived persons. However, it should be considered important from the point of view of the right to food that in the Strategy it was concluded that ensuring food security, nutrition and public health should be achieved by "making sure that everyone has access to sufficient, nutritious, sustainable food that upholds high standards of safety and quality, plant health, and animal health and welfare, while meeting dietary needs and food preferences; and by preserving the affordability of food, while generating fairer economic returns in the supply chain, so that ultimately the most sustainable food also becomes the most affordable (…)". Thus, it can be considered that the Strategy refers (but not explicitly) to some of the aforementioned elements of the right to food like broad personal scope, quantity and quality requirements, and affordability. However, it uses these categories to describe the features of food ensured, and not to constitute the elements of a new right in the European Union. From the point of view of a human rights-based approach, further steps by the EU should be observed, in particular, those serving the declared affordability of food, which is of fundamental importance for vulnerable people experiencing poverty. This issue (the affordability of food) can provide some bridge between the realization of agricultural policy goals and human rights. This is made possible by Article 39(1)(e) of the TFEU, which states that one of the objectives of the common agricultural policy is "to ensure that supplies reach consumers at reasonable prices". Thus, the EU legislator could pay special attention to the needs of consumers in poor financial (living) situations. This approach would correspond to the fundamental rights enshrined in the Charter, like the protection of dignity (Article 1), life (Article 2), but also the prohibition of discrimination (Article 21). Moreover, the Charter, in order to combat social exclusion and poverty, recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources (Article 34 sec. 3). Therefore, among the mechanisms supporting vulnerable and disadvantaged groups, the access to adequate food could be treated as a form of manifestation of distributive justice.

The strategy promotes sustainable food consumption and a shift to a healthy and balanced diet. Symptomatically, a lot of space in this document is devoted to the problem of overweight, obesity and food waste, however, the document does not

[40] Cf. https://sdgs.un.org/goals (10.01.2024). See also: E. Askin, *SDG 2 'End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture ("Zero Hunger")* [in:] *The UN Sustainable Development Goals: A Commentary*, I. Bantekas, F. Seatzu (eds), Oxford 2023.

address the problem of hunger and malnutrition in the European Union anywhere. Meanwhile, these challenges are also acute in the Union, where it is estimated that 33 million people cannot afford a full meal every day, but every second day.[41] According to the report "The State of Food Security and Nutrition in the World" the situation in Europe in terms of access to food is the best among all continents (next to North America), however, about 8% of the population still experiences various forms of food insecurity.[42] Moreover, new standards introduced in the EU, whose food industry is the world's largest food importer and exporter,[43] would set an example and be a gamechanger in the fight against hunger and malnutrition worldwide.

A positive sign that the right-to-food issue may be on the EU agenda is the European Parliament Resolution of 20 October 2021 on a farm to fork strategy for a fair, healthy and environmentally-friendly food system.[44] The EP called on the Commission to translate the Strategy as soon as possible into concrete legislative and non-legislative actions to achieve the transformation goals. Most importantly, reference was made to the right to food, pointing out that an environmentally, socially (including health) and economically sustainable agricultural sector must take into account the "UN right to food."[45] Moreover, the EP pointed out that the EU shall "champion human rights and the right to food as a central principle and priority of food systems and as a fundamental tool to transform food systems and ensure the rights of the most marginalized to access nutritious foods (…)."[46] This formulation can be considered a breakthrough from the point of view of seeing the right to food, which is not only a "UN-right", but also should become an "EU-right" and remains in direct connection with respect for human dignity, valid in the broader European legal order, as the European Court of Human Rights has already confirmed on several occasions.[47]

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41 European Commission, *Communication on a Farm…*

42 FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2023: Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural-Urban Continuum*, Rome 2023, p. 19.

43 Cf. https://www.europarl.europa.eu/news/pl/headlines/society/20200519STO79425/stworzenie-zrownowazonego-systemu-zywnosciowego-strategia-ue (17.01.2024).

44 European Parliament, *European Parliament Resolution of 20 October 2021 on A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System (2020/2260(INI))*, Strasbourg 2021.

45 *Ibidem.*

46 *Ibidem.*

47 C. James, *Food, Dignity…* See cases i.a: European Court of Human Rights, *Case of Necula v. Romania (Application no. 33003/11)*; European Court of Human Rights, *Case of Nencheva and Others v. Bulgaria (Application no. 48609/06)*.

4. Conclusions

The problem of ensuring food security and the right to food in the European Union is complex. Although it is not due to a lack of agricultural resources or the inability to produce food, it strongly correlates with climate change, the general problem of poverty and the lack of resources to ensure the provision of basic needs,[48] the lack of national food programs to support groups particularly vulnerable to suffering from hunger. First of all, it should be noted that the EU's food security priorities and goals oscillate around energy transition and environmental protection. Therefore, the expansion of a human rights-based approach within the EU's strategy framework on food security is a challenging issue, especially when we take into account the limited scope of competence of the European Union in the area of social policy and the lack of a self-standing right to food in the constitutions of the EU Member States. The European Union is more focused on achieving the goals of agricultural policy and unifying the rules of the European food industry. Meanwhile, in the author's opinion, food security should be understood as not only safety in terms of hygiene, freedom from hazardous substances and knowledge of the food consumed, but also ensuring access to food for the vulnerable groups that may suffer from food shortages. In the proposed shape the concept of "food security" might support the development of the human rights-based approach to food in the Union. The problem of preventing hunger and malnutrition should remain at the center of the attention of Member States and the European Union, at least in the secondary legislation. It corresponds directly to the protection of values guaranteed in the Charter: the inherent dignity of every human being regardless of their status, but also life, equality and non-discrimination. Moreover the Charter declares that housing rights should be respected in order to prevent social exclusion and poverty. Therefore, in the author's opinion access to adequate food could be treated as a tool of distributive justice. Additionally, the fundamental nature of access to food determines the realization of other human rights, already acknowledged at the EU level.

Of all the international organizations, the UN has made the greatest contribution to the development of the right to food. In a special way, it is important to point out here the role of Article 11 of ICESCR and the CESCR General Comment No. 12, which made it possible to define the elements of the right to food: a broad subjectivity, a physical accessibility, an economic accessibility, an adequate quality and quantity of food, and sustainable access. In addition, General Comment defined

[48] See: United Nations, *CESCR General Comment No. 12*…, sec. 5.

the obligations of public authorities under the right to food, which should be implemented in a progressive manner. It should be concluded that the UN acquis has not translated into action in the European Union for the proclamation and promotion of the right to food, which is fulfilled "when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[49] However, the idea of elaborating the European Citizens' Initiative on the right to food will certainly initiate the broader discussion on this matter at the EU level. Currently, food products, covered by broad and retail EU regulation, are still treated as a product/commodity in the EU. While this approach still does not preclude a human rights-based approach, there is no provision in EU legislation for access to food for disadvantaged groups. For this reason, the need for an amendment of the Framework Regulation on food law, which was enacted 3 years after General Comment No. 12, in a way that ensures access to food for the vulnerable groups should be considered justified and can be a first step towards implementation of the right to food in the EU agenda. Given the scale and potential of the food industry in the European Union, it does not seem that solutions that satisfy the basic fundamental needs related to access to adequate food are beyond the financial capacity of the EU.

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FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2023: Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural-Urban Continuum*, Rome 2023, https://doi.org/10.4060/cc3017en.
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Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the Hygiene of Foodstuffs, "Official Journal of the European Union" 2004, L 139.
Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the Provision of Food Information to Consumers, Amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and Repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, "Official Journal of the European Union" 2011, L 304.
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Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Directive) of 5 July 2023 in the Context of the Right to Health, Food and Information Concerning the Environment

Abstract: The objectives of this chapter are: firstly, to determine whether the regulatory framework contained in the draft Soil Monitoring Directive of 5 July 2023, in particular, with regard to healthy soils, can contribute to human health, food and soil information (also of global relevance under the Charter of Fundamental Rights); and secondly, to identify selected legal instruments under the CAP 2023-2027 and other soil health regulations. Reference will also be made to case law. At the same time, soils, which are important for human health and life, need to be taken into account in other EU policies, e.g. agriculture, energy, regional policy. First, comments on the importance of healthy soils, FAO studies, and EU initiatives on soils are presented. The section that follows presents selected elements from the draft Directive such as Soil Health Monitoring, Soil Health Assessment, Soil Health Certification, Sustainable Soil Management, Identification of potentially contaminated sites, and EU funding. It is pointed out that the draft Directive provides for access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of soil health assessments, of measures

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taken under this Directive and of any failure of competent authorities to act. In the conclusion, the author provides a positive assessment of the draft (Soil Monitoring Directive) of 5 July 2023. At the same time, some elements may cause problems, for example, in relation to land ownership and data sharing on private land. An important step will therefore be to transpose the principles of the Soil Monitoring Directive into national legislation and to take into account other EU and national legislation.

Keywords: soil, draft Soil Monitoring Directive, right to health, food, agricultural land

1. Introduction

Soil, which is the natural formation of the outer layer of the earth's crust, is used for a variety of purposes, such as agriculture, forestry, renewable energy, housing or economic activities. Healthy soils are an indispensable basis for our economy, society and environment.[2] They are a necessary means for agricultural activities, food safety and security,[3] and soil pollution can harm human health.[4] For example, airborne dust produced by wind erosion of the land causes or exacerbates respiratory and cardiovascular diseases and can contribute to the development of cancer. Exemplifying soil contaminants are elements, e.g. cadmium, chromium, mercury, lead, manganese, zinc (Zn) and radionuclides (23), oil-derived substances, organochlorine compounds (OCPs), and pesticides covering various groups of substances (88,23).[5] The Stockholm Convention on Persistent Organic Pollutants, passed in Stockholm on 22 May 2001,[6] emphasises that "...persistent organic pollutants have toxic properties, resist degradation, bioaccumulate and are transported via air, water and migratory species

[2] P. Panagos et al., *How the EU Soil Observatory Is Providing Solid Science for Healthy Soils*, "European Journal of Soil Science", vol. 75, no. 3.

[3] P.M. Kopittke et al., *Healthy Soil for Healthy Humans and a Healthy Planet*, "Critical Reviews in Environmental Science and Technology" 2023, vol. 54, no. 3, pp. 210-221.

[4] Draft of Directive on Soil Monitoring and Resilience (Soil Monitoring Law), Prambula point no 21, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0416 (17.10.2024); Food and Agriculture Organization, *Overview of Land Degradation Neutrality (LDN) in Europe and Central Asia*, Rome 2022, https://www.fao.org/documents/card/en/c/cb7986en (17.10.2024); A. Klimkowicz-Pawlas, *Środowiskowe i zdrowotne skutki zanieczyszczenia gleb oraz metody przeciwdziałania*, "Studia i Raporty IUNG-PIB" 2021, vol. 66, no. 20, pp. 91-116; E.C. Brevik, L. Pereg, J.J. Steffan, L.C. Burgess, *Soil Ecosystem Services and Human Health*, "Current Opinion in Environmental Science & Health" 2018, vol. 5, pp. 87-92; E.C. Brevik et al., *Soil and Human Health: Current Status and Future Needs*, "Air, Soil and Water Research" 2020, vol. 13, pp. 1-23.

[5] A. Klimkowicz-Pawlas, *Środowiskowe i zdrowotne skutki…*

[6] OJ 2009, item 14.76.

across international boundaries and are deposited far from their release sites, where they then accumulate in terrestrial and aquatic ecosystems."

Degradation of agricultural land affects its fertility, yields, and pest resistance, and also the nutritional quality of food. With 95 per cent of our food produced to ensure food security and the world's population continuing to grow, it is crucial to maintain the health of natural resources.[7] It is correct to say that *food security starts with the soil*,[8] *which was the keynote of* the Global Forum for Food and Agriculture 2022 (GFFA 2022), held from 24-28 January in Berlin.[9]

The right to health, the right to food is linked to the right to life.[10] A person without water and food combined can survive between 8 and 21 days, and the length of time depends on various factors, such as the age and health of the person.[11] According to the United Nations Food and Agriculture Organisation (FAO), more than 828 million people suffer from hunger and 3.1 billion cannot afford a healthy diet.[12] In 2020 this was 720 and 811 million people in the world[13] in 2022. This is 122 million more people than before the COVID-19 pandemic.[14] The right to food is recognised in the 1948 Universal Declaration of Human Rights (Article 25) as part of the right to an adequate standard of living. Issues related to the right to food are included, for

[7] P.M. Kopittke et al., *Healthy Soil…*

[8] M. Rutkowski, *Bezpieczeństwo żywnościowe zaczyna się od gleby*, https://ksow.pl/aktualnosc/bezpieczenstwo-zywnosciowe-zaczyna-sie-od-gleby (08.04.2024); I. Łuczyk, *Land Grabbing and Food Security in Developing Countries*, "Zagadnienia Ekonomiki Rolnej" 2022, vol. 373, no. 4, pp. 22-45.

[9] European Commission, *Global Forum for Food and Agriculture 2022 – Communiqué – Sustainable Land Use: Food Security Starts with the Soil*, https://knowledge4policy.ec.europa.eu/news/global-forum-food-agriculture-2022-%E2%80%93-communiqu%C3%A9-sustainable-land-use-food-security-starts-soil_en (19.09.2024).

[10] A. Mokrzycka, *Prawo do ochrony zdrowia. Konstytucyjny priorytet czy źródło dylematów w ochronie zdrowia?*, Kraków 2014.

[11] N. Silver, *How Long Can You Live without Food?*, "Healthline" 2024, https://www.healthline.com/health/food-nutrition/how-long-can-you-live-without-food (02.03.2024).

[12] Food and Agriculture Organization, *Right to Food*, https://www.fao.org/policy-support/policy-themes/right-to-food/en/ (02.03.2024); Polska Akcja Humanitarna, *Prawo do żywności*, https://www.pah.org.pl/app/uploads/2017/06/2017_dlaszkol_prawo_do_zywnosci.pdf (02.03.2024); *FAO: 870 milionów ludzi głoduje, 2 miliardy niedożywionych*, "Money.pl", 2013, https://www.money.pl/archiwum/wiadomosci_agencyjne/pap/artykul/fao;870;million;people;are;starving;2;billion;undernourished,109,0,1319277.html (09.03.2024); FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2023: Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural-Urban Continuum*, Rome 2023; Food and Agriculture Organization, *The State of Food and Agriculture 2021: Making Agrifood Systems More Resilient to Shocks and Stresses*, Rome 2021.

[13] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2021: Transforming Food Systems for Food Security, Improved Nutrition and Affordable Healthy Diets for All*, Rome 2021.

[14] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2023…*

example, in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 19 December 1966,[15] and in the Convention for the Protection of Human Rights and Fundamental Values.[16] According to Article 2 of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter"), everyone has the right to life.[17] The right to life is also emphasised, for example, in Article 3 of the Universal Declaration of Human Rights, which indicates that: "Everyone has the right to life, liberty and security of person". According to Article 6 of the International Covenant on Civil and Political Rights, "Every human being has the inherent right to life. This right shall be protected by law."[18] In turn, the *2030 Agenda for Sustainable Development* indicates that the Right to Food protects the right of all people to be free from hunger and food insecurity. It is also worth pointing out that some constitutions, for example that of Switzerland, refer to agricultural land. Article 104a states that in order to ensure the adequate supply of food to the population, the Swiss Federal Government shall create the conditions for safeguarding the basis of agricultural production, especially arable land.[19]

Climate change is also affecting the state of agricultural land, with this being subject to such effects as desertification due to drought, erosion, compaction, decline in organic matter, pollution, loss of biodiversity.[20] Its capacity to store and cycle carbon, nutrients and water is also diminishing. Growing concerns about the state of the world's soils led the UN General Assembly to declare 2015 as the International Year of Soils.[21] The FAO also adopted a revision of the World Soil Charter, and World Soil Day is celebrated on 5 December each year.[22] Soil degradation adversely affects other elements of the environment. Article 37 of the Charter states that: "A high level of environmental protection and the improvement of the quality of the environ-

[15] Journal of Laws 1977, No. 38, item 169.

[16] See also M.Z. Wiśniewska, A. Kowalska, *Kultura bezpieczeństwa żywności w prawie Unii Europejskiej. Czy polski system kontroli żywności sprosta wyzwaniu?*, " Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2022, vol. 84, no. 2.

[17] *Charter of Fundamental Rights of the European Union (2012/C 326/02)*, "Official Journal of the European Union" 2012, C 326/391.

[18] United Nations, *International Covenant on Civil and Political Rights*, 1967, https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (19.09.2024).

[19] Schweizerische Eidgenossenschaft, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, https://www.fedlex.admin.ch/eli/cc/1999/404/de (17.09.2024).

[20] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*: *EU Soil Strategy 2030: Reaping the Benefits of Healthy Soils for People, Food, Nature and Climate*, Brussels 2021, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021DC0699 (17.10.2024).

[21] World Soil Day (WSD) – a holiday on 5 December.

[22] Food and Agriculture Organization, *Soils, Where Food Begins: Outcome Document of the Global Symposium on Soils for Nutrition 26–29 July 2022*, Rome 2023.

ment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."[23]

The European Union's Soil Strategy 2030 announced that the Commission will present a legislative proposal on soil health to meet the objectives of the Soil Strategy and to achieve healthy soils across the European Union (hereinafter the "EU" or "Union") by 2050. Realising the importance of soils and the functions they perform, the European Commission has prepared a proposal in the form of the Directive of the European Parliament and of the Council on soil monitoring and resilience (Soil Monitoring Directive) of 5 July 2023.[24] The proposed legislation aims to regulate soil health at EU level, while providing Member States with a wide range of flexibility on how to achieve the objectives. Currently, there is no specific EU legislation on soils and the proposed directive contains new concepts and obligations. Such obligations regarding the monitoring of soils will be addressed mainly to public authorities (register, certificates) and those on the quality of land to owners and possessors. Maintaining or increasing soil fertility in the long term contributes to stable or even higher yields from crops, feed and biomass, contributing to our economy's shift away from fossil fuels and the soil's ability to retain water helps to both prevent and respond to risks from natural disasters. The Draft Soil Monitoring Directive was approved by the Environment Council at its 4032nd meeting on 17 June 2024.[25]

The aims of this chapter are as follows: firstly, to determine whether the regulatory framework contained in the draft *Soil Monitoring Directive 2023*, in particular regarding healthy soils, can contribute to the protecting and fulfilling of the right to health,[26] food and information on soil counteracting or adapting to climate change; secondly, to identify selected legal instruments under the CAP on soil health. Court judgments are also referred to.

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[23] In its resolution of 28 April 2021 on soil protection, the European Parliament stressed the importance of protecting soils and promoting healthy soils in the Union, not forgetting that degradation continues despite limited and uneven action in some Member States. The European Parliament called on the Commission, in full respect of the principle of subsidiarity, to develop an EU-wide common framework for the protection and sustainable use of soil, taking into account all major threats to soil. The negative impact of climate change on soil health should also be pointed out.

[24] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law)*, Brussels 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0416 (17.10.2024). Proposal on Soil Monitoring and Resilience (Soil Monitoring Law)

[25] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law)*, Brussels 2024, https://data.consilium.europa.eu/doc/document/ST-11299-2024-INIT/en/pdf (19.09.2024).

[26] Z. Nampewo, J.H. Mike, J. Wolff, *Respecting, Protecting and Fulfilling the Human Right to Health*, "International Journal for Equity in Health" 2022, vol. 21, https://doi.org/10.1186/s12939-022-01634-3 (19.09.2024).

The Draft Soil Monitoring Directive 2023 was prepared by DG Environment (DG ENVI). However, the protection of soils, which are essential for human health and life, must also be integrated into other EU policies, such as agriculture, energy, and regional development.

The European Parliament adopted the Commission's proposal for a Soil Monitoring Directive on 10 April 2023 by 336 votes to 242, with 33 abstentions. Following the vote, rapporteur Martin HOJSÍK (Renew, SK) said: "We are finally close to having a common European framework to protect our soils from degradation. There is no life on this planet without healthy soils. Farmers' livelihoods and the food on our tables depend on this non-renewable resource. It is therefore our responsibility to adopt the first EU-wide legislation to monitor and improve soil health". The Parliament has already adopted its position, doing so at the first reading.[27]

The matter will be taken forward by the new Parliament after the European elections on 6-9 June 2024. The Council adopted its position on 17 June 2024. It clarifies the administrative structure relevant to the soil monitoring framework, adds flexibility for soil measurements and sets minimum quality requirements for laboratories analysing soil samples.[28]

2. Comments on the importance of healthy soils, EU initiatives for soils and the draft directive's objectives

As mentioned previously, according to the FAO publication, soils have eleven key functions, including: purifying water and reducing pollution levels, participating in the cycling of elements, providing a habitat for living organisms, reducing the risk of flooding, being a source of medicinal substances and genetic resources, being a priority element of the natural environment, and being a determinant of the survival and well-being of humankind.[29]

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[27] *Healthy Soils*, https://www.europarl.europa.eu/legislative-train/spotlight-JD%2023-24/file-healthy-soils (19.09.2024); European Parliament, *European Parliament Legislative Resolution of 10 April 2024 on the Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law) (COM(2023)0416 – C9-0234/2023 – 2023/0232(COD))*, https://www.europarl.europa.eu/doceo/document/TA-9-2024-0204_EN.html (19.09.2024).

[28] *Healthy…*

[29] Food and Agriculture Organization for the United Nations, *Soil Functions*, http://www.fao.org/resources/infographics/infographics-details/en/c/284478/ (17.10.2024); N. Harari et al., *Promoting Sustainable Land Management through Evidence-Based Decision Support: A Guide with Country Insights*, Rome 2023 (17.10.2024).

The United Nations Convention to Combat Desertification in Countries Affected by Severe Drought and/or Desertification, especially in Africa, drawn up in Paris on 17 June 1994 provides for an international framework to address desertification and mitigate the effects of drought. It emphasises the need to improve land productivity and the restoration, conservation and stable management of land and water resources, which will lead to improved living conditions.[30]

The EU has taken action in the context of international conventions to address soils affected by desertification[31] (UN Convention to Combat Desertification),[32] to contribute to climate change mitigation (UN Framework Convention on Climate Change) and to make soils an important habitat for biodiversity (Convention on Biological Diversity).[33] Restoring, maintaining and improving soil health is the goal of the new global biodiversity framework. Issues concerning soils or, more broadly, the land surface, are addressed in the European Green Deal.[34] For example, in its Resolution of 20 October 2021 on a farm-to-table strategy for a fair, healthy and environmentally friendly food system,[35] the European Parliament emphasised that "healthy soil is a prerequisite for safe food, feed and fibre production; calls on the Commission and the Member States, therefore, to prevent further soil degradation in the EU; stresses that agricultural land is an essential natural resource, the good condition of which is of key importance for the implementation of the farm-to-table strategy; (…) recognises the vital importance of soil organic matter and biodiversity and the services and goods it provides."[36]

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30 United nations, *Convention*, https://www.unccd.int/convention/overview# (09.09.2024).

31 "Desertification" refers to land degradation in arid, semi-arid and intermittently dry areas resulting from various factors, including climate variability and human activities.

32 United Nations Convention to Combat Desertification in Countries Affected by Severe Drought and/or Desertification, especially in Africa, OJ. EU 1998 There are 197 Parties to the Convention, of which 196 are country Parties and the European Union see more *Healthy land is central to the wellbeing of the planet's ecosystems and biodiversity; it feeds us, shelters us, and provides the backbone to a thriving global economy, https://www.unccd.int/convention/overview* (9.09.2024)

33 United Nations, *Convention on Biological Diversity and Its Protocols*, https://www.un.org/ldc-portal/content/convention-biological-diversity-and-its-protocols# (09.09.2024).

34 European Commission, *Communication from the Commission: The European Green Deal*, Brussels 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640 (17.10.2024).

35 European Commission, *A Farm to Fork Strategy for a Fair, Healthy and Environmentally Friendly Food System*, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2260(INI) (09.09.2024).

36 *European Parliament Legislative Resolution of 7 June 2021 on the Proposal for a Regulation of the European Parliament and of the Council on Sustainable Use of Plant Protection Products*, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021IP0425 (15.03.2024).

This differentiated importance of soils is also indicated in various Resolutions and Communications of the European Union. Moreover, the importance of soil health has also been recognised at the global level.

On 12 May 2021, the European Commission adopted the EU Action Plan: "Towards zero pollution of air, water and soil" – an important outcome of the European Green Deal.[37] According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *An EU Biodiversity Strategy 2030 Bringing nature back into our lives*.[38] "Soil is an extremely important non-renewable resource that is vital for human health and the health of the economy, as well as for the production of food and new medicines. In the EU, soil degradation has serious environmental and economic consequences (…)."[39]

In its Communication *EU Soil Strategy 2030 Benefits of Healthy Soils for People, Food, Nature and Climate*[40] the European Commission points out that soil is probably the most undervalued element in nature. Soil and the range of organisms that live in it provide (…) biomass, fibre and raw materials, regulate cycles of water, carbon and nutrients and make life on land possible. It has rightly been pointed out that "the EU has so far not been able to develop an appropriate legal framework that provides soil with the same level of protection as water, the marine environment and air."[41]

The aims of the draft of the *Soil Monitoring Directive* are firstly, to put in place a robust and coherent soil monitoring framework for all soils across the EU; secondly, to continuously improve soil health in the European Union with a view to achieving and maintaining healthy soils by 2050, to reduce soil pollution to levels that are no longer considered harmful to human health and the environment; and thirdly, to enhance disaster resilience and food security. These could provide a range of ecosystem services at a scale sufficient to meet environmental, social and economic needs, and prevent the impacts of climate change and biodiversity loss.

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37 COM (2021) 400 final.

38 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030: Bringing Nature Back into Our Lives*, Brussels 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020DC0380 (02.08.2024).

39 *Ibidem*, p. 8

40 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee: EU Soil Strategy 2030: The benefits of healthy soils for people, food, nature and climate*, 17 November 2021, SWD(2021) 323 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0323 (02.08.2024).

41 *Ibidem.*

The draft of the *Soil Monitoring Directive* provides for the establishment of measures on soil health monitoring and assessment, sustainable soil management, and contaminated land (Art. 1.2. of the draft). Each of these issues is relevant to human health and the right to food. The draft indicates that 'soil health' means the physical, chemical and biological state of the soil that determines its ability to function as an essential living system and to provide ecosystem services. In addition, 'sustainable soil management' refers to soil management practices that maintain or improve the ecosystem services provided by the soil without compromising the functions that make these services possible or harming other environmental properties. Finally, 'soil remediation' means a remediation activity that reduces, isolates or immobilises the concentration of contaminants in soils. It should be pointed out that, according to Article 14 of Draft, potentially contaminated sites located in areas used for the abstraction of water intended for human consumption shall be prioritised for soil investigations.

Taking into account the remarks submitted on the draft, an extended version of the draft Soil *Monitoring Directive* has been prepared. At the time of printing this article, the final version had not yet been agreed.

3. Soil health monitoring

According to Art. 6 of the Draft Soil Monitoring Directive, Member States establish a monitoring framework based on the soil districts, to ensure that regular and accurate monitoring of soil health is carried out in accordance with this Article and Annexes. The soil districts are based on such elements as soil indicators and soil health criteria, and soil sampling points. The monitoring framework shall be based on the following e.g. the soil descriptors and soil health criteria, the soil sampling points ***and sampling depth*** to be determined in accordance with Article 8(2); the land take and soil sealing indicators referred to in Article 7(1).

The Commission and the European Environment Agency (EEA) are to use existing data and satellite products provided under the Copernicus component of the EU space programme established by Regulation (EU) 2021/696 to explore and develop soil remote sensing products with a view to supporting Member States in monitoring relevant soil indicators. On the basis of existing data and within two years of the draft Soil Monitoring Directive entering into force, the Commission and the EEA shall establish a digital soil health data portal. It shall provide access in a georeferenced spatial format at least to data on soil health. Member States may adapt the soil indicators and soil health criteria in accordance with the specifications. (Art. 6 draft of

the Soil Monitoring Directive). The draft of the Soil Monitoring Directive stipulates that Member States shall ensure that the first soil measurements are taken and new soil measurements are performed at least every five years (propose change six year). In addition, they shall ensure that the value of soil take-up and soil sealing rates are updated at least once a year.

4. Soil health assessment

According to the draft of the Soil Monitoring Directive and resilience, the data collected from the monitoring will then be used to assess the health of the soils for each soil indicator. Member States shall ensure that soil health assessments are carried out at least every five years (proposed change six years) *For the assessment of the soil ecological status,* Member States shall also take into account the data collected in the context of soil investigations referred to in Article 14.

On the basis of the assessment of the health of the soil carried out in accordance with this article, the competent authority, where appropriate in cooperation with local, regional and national authorities, shall identify in each soil district those areas with unhealthy soils, and inform the public thereof in accordance with Article 19. A positive assessment should be made of public access to information, the condition of the soil and possible adverse effects on human health and the environment. This should be in line with the activities not only at the European Union level but also the world level in terms of access and public participation in decision-making The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998, states that "Recognising that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations".

5. Certification of soil health

The draft of the Soil Monitoring Directive also provides for Member States to establish a voluntary soil health certification mechanism for landowners and land managers. The Commission may adopt implementing acts to harmonise the format for soil health certification. Countries in the EU shall provide soil health and assessment data to relevant landowners and land managers upon request, in particular, to sup-

port the development of advisory services. The European Commission is to prepare implementing acts to establish formats or methods for making the data available or collecting the data, or for including the data in the digital soil health data portal. These implementing acts shall be adopted in accordance with the examination procedure referred to in Article 20 of the draft of the Soil Monitoring Directive.

6. Sustainable soil management

According to the draft of the Soil Monitoring Directive, Member States shall introduce at least several measures, taking into account the type, use and condition of the soil: firstly, the definition of sustainable soil management practices consistent with the principles of sustainable soil management as listed in Annex III. These practices are to be progressively implemented on all managed soils; secondly, the implementation of regeneration practices on unhealthy soils in the Member States. These are to be prepared on the basis of the results of soil assessments carried out in accordance with Article 9 on regeneration practices; thirdly, the identification of soil management practices and other practices that adversely affect soil health, which soil managers should avoid. In identifying practices and measures, Member States shall take into account the programmes, plans, objectives and measures listed in Annex IV, as well as the latest existing scientific knowledge, including the results of the Horizon Europe Healthy Soils Pact mission.

Member States shall ensure that the process of developing the identified practices is open, inclusive and effective and that the members of the public concerned, in particular, landowners and land managers, are involved in developing these practices and have the opportunity to participate at an early stage and in an effective manner.

Another important provision of the draft directive specifies that Member States shall ensure that soil managers, landowners and competent authorities have easy access to impartial and independent advice on sustainable soil management, training activities and capacity building (Art. 10). Member States shall also introduce the following measures: a) promoting awareness of the multiple medium- and long-term benefits of sustainable soil management and of the need for sustainable soil management; b) promoting research into and implementing holistic soil management approaches; c) making available regularly updated maps of available funding instruments and measures to support the implementation of sustainable soil management. Member States shall regularly evaluate the effectiveness of the measures introduced pursuant to Article 9 and, where appropriate, review and revise such measures, taking into account soil health monitoring and assessment.

European Union countries shall ensure that the following principles are respected when land is taken over, e.g. avoiding or limiting, as far as is technically and economically feasible, the loss of the soil's capacity to provide multiple ecosystem services, including food production, by limiting the area affected by the land takeover as far as possible, selecting areas where the loss of ecosystem services would be minimised and carrying out the land takeover in a way that reduces negative impacts on the soil; compensating, as far as possible, for the loss of the soil's capacity to provide multiple ecosystem services.

7. Contaminated sites and risks to human health and the environment; Identification of potentially contaminated sites

According to Article 12 of the draft Soil Monitoring Directive,[42] countries in the EU shall manage the risks to human health and the environment posed by potentially contaminated sites and maintain such sites at an acceptable level, taking into account the environmental, social and economic effects of soil contamination. The draft[43] provides that four years after the date of entry into force of the Directive, Member States shall establish a risk-based approach for identifying potentially contaminated sites, investigating potentially contaminated sites, and managing contaminated sites. The public shall be given early and effective opportunities to participate in the establishment and concrete application of the risk-based approach set out in this Article. On the basis of the soil health assessment carried out in accordance with this Article, the competent authority, where appropriate in cooperation with local, regional and national authorities, shall identify areas with unhealthy soils in each soil district. Member States shall establish a voluntary soil health certification mechanism for landowners and land managers.

Member States shall systematically and proactively identify all sites where, on the basis of evidence gathered by any available means, soil contamination is suspected ('potentially contaminated sites'). In identifying potentially contaminated sites, countries shall take into account the following criteria, e.g. the existence of active or inactive activities giving rise to a risk of potential contamination; the occurrence of a potentially contaminating accident, disaster, accident or spill; any other event likely to cause soil contamination; Member States shall establish an inventory of the activities posing a risk of potential contamination. These activities may be further

[42] *Ibidem.*
[43] *Ibidem.*

classified according to the risk they pose as regards causing soil contamination based on scientific evidence. They shall ensure that all potentially contaminated sites are identified and duly entered in a register. In turn, potentially contaminated sites shall be soil tested. States shall establish rules on the timing, content, form and priority of the soil investigation. Four years after the entry into force of the Directive, Member States shall establish a register of contaminated and potentially contaminated sites, which is to be regularly reviewed and updated, and shall be made available in an online georeferenced spatial database.

8. EU funding

Given the priority of establishing soil monitoring and sustainable soil management and regeneration, the implementation of the draft Soil Monitoring Directive is to be supported by existing Union financial programmes in accordance with their rules and conditions. The Commission shall ensure that soil health data made available through the digital soil health data portal referred to in Article 6 is made accessible to the public in accordance with Regulation (EU) 2018/172580 of the European Parliament and of the Council and Regulation (EC) No 1367/2006 of the European Parliament and of the Council 81. Member States shall ensure that the information is made available to the public in accordance with Directive 2003/4/EC, Directive 2007/2/EC and Directive (EU) 2019/102482 of the European Parliament and of the Council.

9. Access to justice

In order to properly implement the provisions of the draft Soil Monitoring Directive, it is necessary for Member States to introduce it into their national legal systems. It is also of vital importance to ensure the right to an effective remedy before a court in respect of any failure to act on the part of the competent authorities. It is worth referring to Article 47 of the Charter, which states that all persons whose rights and freedoms guaranteed by the law of the Union have been violated has the right to an effective remedy and to a fair trial. All persons are also entitled to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. They shall also be permitted to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. By contrast, according to Article 22, draft Soil Monitoring Directive Member States shall ensure

that, in accordance with national law, members of the public who have a sufficient interest or who claim that there has been an infringement of the law have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of the soil health assessment of measures introduced pursuant to this Directive and of any failure to act on the part of the competent authorities.

The question is whether a claim can be brought against the person who caused the soil contamination, for example, by affecting the health of a third party? Another example is unhealthy food resulting from contaminated soil. Currently, regulations exist in the national legislation of the Member States. It should also be pointed out that, as a rule, land is owned by a private person, although it may also be owned by the State or by municipalities. In Poland, there are three laws that apply to land. These are the provisions of the Act of 27 April 2001 on Environmental Protection Law,[44] the Act of 3 February 1995 on the Protection of Agricultural and Forestry Land[45] and the Act of 13 April 2007 on Prevention and Remedy of Environmental Damage.[46]

According to Article 322 of the Polish Environmental Protection Law, the provisions of the Civil Code apply to liability for damage caused by an environmental impact, unless the law provides otherwise. Art. 323 of the same act states that anyone who, by a wrongful impact on the environment, directly endangers the environment or has caused damage to it may demand that the entity responsible for such endangerment or infringement restore the lawful state and take preventive measures, in particular, by constructing installations or equipment to prevent such endangerment or infringement; when this is impossible or excessively difficult, it may demand that the activity causing the endangerment or infringement be discontinued.[47] It is also worth mentioning the general rules of the Civil Code. Under Article 415 of the Civil Code, anyone whose fault causes damage to another person is obliged to make good the damage.

Reference should also be made to the case law on the right to clean air and the environment. As mentioned above, contaminated soil can also have a negative impact

[44] Journal of Laws 2024, item 54, 834, 1089, 1222.
[45] Journal of Laws 2024, item 82.
[46] Journal of Laws 2020, item 187.
[47] Judgement of the Constitutional Court of 13 May 2009, Kp 2/09, in which the Court, analysing the provisions contained in Articles 68(4), 74, 86, as well as 31(3), ruled that "The first of the provisions in question obliges state authorities to prevent the negative effects of environmental degradation. The second stipulates that the protection of the environment is a duty of the state authorities, whose policy is to ensure the environmental security of present and future generations (as well as to support citizens in their efforts to protect the environment).

on air quality. The Supreme Court – Civil Chamber, in its ruling of 28 May 2021, III CZP 27/20, stated that "the right to live in a clean environment is not a personal good. Protected as personal goods (Article 23 of the Civil Code in conjunction with Article 24 of the Civil Code and Article 448 of the Civil Code) are health, freedom, privacy, the violation (threat) of which may be caused by the violation of air quality standards established by law."[48]As an aside worth noting, the German Federal Constitutional Court, in its Order of 24 March 2021. – 1 BvR 2656/18, ruled that "The protection of life and physical integrity under the first sentence of Article 2, paragraph 2, sentence 2 of the Basic Law encompasses protection against the infringement of constitutionally guaranteed interests caused by environmental pollution, irrespective of who or what circumstances cause this. The duty of protection under the first sentence of Article 2, paragraph 2, sentence 2 of the Basic Law also includes the duty to protect life and health from the dangers of climate change. Furthermore, it can form the basis for an objective obligation to protect future generations. Article 20a of the Basic Law obliges the state to take climate action. This includes the objective of achieving climate neutrality."

In the explanatory memorandum, the Constitutional Court emphasised, for example, that a particular challenge for Germany is soil drainage, which has a significant impact on agriculture. Soil moisture is of key importance for the level of water supply to plants. The increasing incidence of dryness and drought observed in Germany is considered particularly challenging. The related soil drainage is particularly important for agriculture. If the soil moisture level falls below 30% to 40% of the 'useful field capacity' (*nutzbare Feldkapazität* – nFK), there is a sharp decline in photosynthesis and plant growth. In addition, soils play an important role in flood prevention, especially when adapting to the expected increase in heavy rainfall.[49]

10. Draft Soil Monitoring Directive and LULUCF

It should be emphasised that land also affects other elements of the environment and that land can be used for different purposes. Therefore, the draft *Soil Monitoring Directive* under discussion is important for achieving the objectives of other pieces

[48] Uchwała SN z 28.05.2021 r., III CZP 27/20, OSNC 2021, nr 11, poz. 72.

[49] Federal Constitutional Court of Germany, *Decision of March 24, 2021, 1 BvR 2656/18*, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.htm (02.08.2024).

of legislation. For example, Regulation no. 2018/841[50] (hereinafter the "LULUCF Regulation") contains provisions on such aspects as Member States' commitments in the area of land use, land use change and forestry that contribute to the achievement of the Paris Agreement objectives, and the EU's greenhouse gas emission reduction target for 2021-2025.[51] The LULUCF Regulation sets an overall EU net removal target for land use, land use change and forestry of 310 million tonnes of CO2 equivalent by 2030. The appropriate use of land, in particular, but also of trees will lead to a progressive increase in removals and a reduction in emissions. The explanatory memorandum to the draft Soil Monitoring Directive emphasises, inter alia, that the proposal is fully complementary and synergistic with the LULUCF Regulation.[52] Between 2026 and 2029, each Member State will have a binding national target to gradually increase GHG removals. The LULUCF Regulation also requires Member States to set up monitoring systems for soil carbon stocks in order to better implement nature-based mitigation measures in soils. The proposed Soil Health Directive and the revised LULUCF Regulation are key to ensuring that soils have the capacity to absorb and store carbon. The explanatory memorandum indicates that appropriate certification of healthy soils will increase the value of carbon removal certificates and provide greater social and market recognition for sustainable management of soils and associated food and non-food products.

11. Selected legal instruments under Common Agricultural Policy, particularly 2023-2027 concerning agricultural land

Agricultural land is an essential component of farms, necessary for food production. As a rule, therefore, the national laws of the Member States contain regulations for their protection. However, these are not sufficient. There is less and less agricultural land and the agricultural land itself is of poor quality, having become degraded and devastated. There is a change in the increasing importance attached to sustainable use of agricultural land and improving its quality.[53] It should also be noted that ag-

[50] *Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the Inclusion of Greenhouse Gas Emissions and Removals from Land Use, Land Use Change and Forestry in the 2030 climate and Energy Framework, and Amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU*, "Official Journal of the European Union" 2018, L 156/1, pp. 1-25.

[51] R. Bujalski, *Redukcja emisji CO2 w sektorze użytkowania gruntów i leśnictwie*, LEX/el, 2023.

[52] *Regulation (EU) 2018/841*…, p. 1.

[53] J. Augier et al., *Evaluation Support Study on the Impact of the CAP on the Sustainable Management of Soil: Final Report*, Brussels 2020, https://www.ecologic.eu/sites/default/files/publica-

ricultural activities are recognised in the context of a Public Good contributing to the satisfaction of human needs. The EU Regulation of 2 December 2021[54] indicates that 'agricultural activity' is defined as an activity that makes it possible to contribute to the provision of private and public goods through one or more of the following activities: the production of agricultural products including activities such as animal husbandry or cultivation, or maintaining agricultural land in a state which makes it suitable for grazing or cultivation, without undertaking preparatory actions going beyond the use of normal agricultural methods and normal agricultural equipment.

When using EU funds, agricultural producers are obliged to fulfil obligations related to environmental protection, which, as a rule, has a positive impact on the condition of agricultural land.[55] For example, the previously valid Act of 5 February 2015 on payments under direct support schemes[56] in Article 9 indicated that the farmer is obliged under Article 43(1) of Regulation no. 1307/2013 to respect practices, agricultural practices beneficial for the climate and the environment, or equivalent practices. These farmers' obligations were also important for improving agricultural land. Agricultural practices beneficial for land, the climate and the environment include: a) crop diversification; b) maintenance of existing permanent grassland; and c) maintenance of an ecological focus area on agricultural land. In turn, in the Regulation of the Minister and Rural Development of 18 March 2015 on the detailed conditions and procedure for granting financial aid under the measure 'Agri-environmental and climatic action' covered by the Rural Development Programme 2014-2020, one of the packages included Protection of soils and waters. Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) pays even greater attention to the issue of soils. Article 6 indicates that the general objectives shall be achieved,

tion/2022/3591-Evaluation-Support-Study-on-The-Impact-of-The-CAP-on-Sustainable-Management-of-The-Soil-web.pdf (15.03.2024); *Halt and Reverse Soil Degradation in Europe: A Priority for the European Green Deal*, Bruxelles 2021, https://mcusercontent.com/d128a627b717db2380ccf7e90/files/bed006bc-2d8d-407e-a07b-fe47ad148fb2/Soil_position_paper_21_04_21.pdf (19.03.2024).

[54] *Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 Establishing Rules on Support for Strategic Plans to Be Drawn Up by Member States under the Common Agricultural Policy (CAP Strategic Plans) and Financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and Repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013*, "Official Journal of the European Union" 2021, L 435/1, pp. 1-186.

[55] A. Suchoń, *Different Land Uses and Regulations on the Territory – Case of Poland*, "CEDR Journal of Rural Law" 2021, no. 2.

[56] Journal of Laws 2022, item 1775, 2727.

for example, by pursuing such specific objectives as promoting the sustainable development and efficient management of natural resources like water, soil and air, including by reducing dependence on chemicals; contributing to halting and reversing the loss of biodiversity; enhancing ecosystem services; and protecting habitats and landscapes. In the preamble to this legislation, Paragraph 51 highlights that information on nutrient management with a particular focus on nitrogen and phosphate (nutrients can present particular environmental challenges and therefore deserve special attention) should be provided to individual farmers through a specific Electronic Nutrient Management Sustainability Tool provided by Member States.

Regulation (EU) 2021/2115 of the European Parliament in question, e.g. Article 13 et seq. emphasizes: firstly, that Member States shall ensure that all agricultural land, including land which is no longer used for production purposes, is maintained in good agricultural and environmental condition; secondly, that Member States shall, at national or regional level, set minimum standards for farmers and other beneficiaries for each GAEC standard; thirdly, when setting their standards, Member States shall take into account, where appropriate, the specific characteristics of the areas concerned (e.g. soil and climatic conditions, existing farming systems such as agricultural practices, farm size and structure, land use and the specificity of outermost regions). The framework of GAEC standards is intended to contribute to climate change mitigation and adaptation.

The EU legislators' increased concern about climate and environmental action is also evident through the introduction of climate, environment and animal welfare schemes. These schemes include: the protection or improvement of water quality and reduction of pressure on water resources; prevention of soil degradation, soil restoration, improvement of soil fertility and nutrient management [and soil biota]; protection of biodiversity, preservation or restoration of habitats or species, including the conservation and creation of landscape elements or non-productive areas; measures for the sustainable and reduced use of pesticides, in particular, pesticides that pose a risk to human health or the environment. In Regulation (EU) 2021/2115 of the European Parliament Article 70 on environmental, climate-related and other management commitments, Member States shall include agri-environmental and climate commitments among the interventions provided for in their CAP strategic plans and may include other management commitments in those plans. Payments for these commitments shall be granted under the conditions set out in this Article and further specified in the CAP strategic plans. Member States shall only grant payments to farmers or other beneficiaries who undertake, on a voluntary basis, management commitments which are considered beneficial to achieve one or more of the specific objectives set out in Article 6(1) and (2).

According to the law of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy 2023-2027,[57] payments for carbon-intensive crops and nutrient management are granted if the farmer implements practices to increase soil carbon sequestration and improve nutrient management. The development of afforestation of agricultural land with EU funds is also important. The amount of this land is increasing every year. The latest Regulation of the Minister of Agriculture and Rural Development of 17 April 2023 on the detailed conditions and modalities for granting and paying financial support for investments in forestry or afforestation and in the form of an afforestation premium. Afforestation[58] or agroforestry systems under the Strategic Plan for the Common Agricultural Policy 2023-2027 expand the possibilities for financial intervention. This includes not only afforestation of agricultural land, but also the creation of mid-field afforestation, the creation of agroforestry systems, and enhancement of biodiversity in private forests. The paper will also discuss the processing of agricultural products, the circular economy and short supply chains. In addition, the paper highlights the importance of agricultural producer association in achieving neutrality.

12. Conclusion

In conclusion, the EU proposal for a Soil Monitoring Directive is to be assessed positively. The need for a single European soil protection regime has long been the subject of discussion and debate. Soil protection cannot only be local, regional or national.[59] The draft of the Soil Monitoring Directive focuses not only on agricultural land, but also on other land used, for example, for forestry or housing. Soil contamination can

[57] Journal of Laws 2023 item. 412.

[58] Afforestation is the conversion of long-term non-forested land into forests and refers to the establishment of forests where there were none before, or where forests have been lost for a long time (50 years according to the UNFCCC). Reforestation refers to the replanting of trees on recently deforested land (i.e. the conversion of recently non-forested land into forests). See more Afforestation and reforestation as adaptation opportunity, Climate ADAPT, *Afforestation and Reforestation as Adaptation Opportunity*, https://climate-adapt.eea.europa.eu/en/metadata/adaptation-options/afforestation-and-reforestation-as-adaptation-opportunity?set_language=en (02.08.2024); Ch. Reyer, M. Guericke, P.L. Ibisch, *Climate Change Mitigation via Afforestation, Reforestation and Deforestation Avoidance: And What about Adaptation to Environmental Change?*, "New Forests" 2009, vol. 38, pp. 15-34.

[59] European Commission, *Healthy Soils – Soil Protection, Sustainable Soil Management in the EU and Their Restoration*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13350-Zdrowie-gleby-ochrona-gleb-zrownowazone-gospodarowanie-glebami-w-UE-i-ich-odbudowa/feedback_pl?p_id=28624022 (19.03.2024).

adversely affect human health and life, for example, by aggravating respiratory and cardiovascular diseases and contributing to the development of cancer. The provisions of the Directive can contribute to the realisation of the right to information on elements of the environment, health, food safety and food security (values also relevant under the Charter of Fundamental Rights). On a positive note, there is a growing interest on the part of the European Commission in developing a comprehensive legal framework for soil protection that provides the same level of protection for soil as for other key elements of the natural ecosystem, such as water or air.[60] The links between soil and climate are complex. Climate change affects soil, and changing soil conditions affect climate. Above all, it is important to monitor the conservation of biodiversity. The proposal for the Draft Soil Monitoring Directive is in line with the 2030 Agenda for Sustainable Development, the Charter of Fundamental Rights of the European Union, the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. Every human being has the right to life, and life requires food, health and adequately protected elements of the environment (including land).

There is no doubt that the largest number of national regulations in the EU today concern the protection of agricultural soils. Such regulations are not only important for agriculture, which has a basic function of food production that guarantees the sustainability of food security in the EU, but also contribute to better environmental conditions, which are essential for the health and life of humans and animals. For many years, agricultural producers have had numerous obligations in relation to agricultural land under the Pillar I and Pillar II financial schemes of the Common Agricultural Policy. It is important to highlight the obligations arising from the basic payment. The trend towards imposing more obligations on owners of agricultural land benefiting from EU programmes should also be noted. Particular attention should be paid to agri-environmental and climate change programmes or organic farming. More and more duties are linked to environmental protection. However, it is rightly pointed out that the introduction of new instruments should not impose many additional obligations on farmers, especially an increased bureaucratic burden.[61]

In conclusion, the new soil regulations contained in the Directive of the European Parliament and of the Council on Soil Monitoring and Resilience Draft Soil

[60] European Commission, *Carbon Farming Coalition*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13350-Zdrowie-gleby-ochrona-gleb-zrownowazone-gospodarowanie-glebami-w-UE-i-ich-odbudowa/F2928259_pl (19.03.2024).

[61] European Commission, *CIA – Agricoltori Italiani*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13350-Zdrowie-gleby-ochrona-gleb-zrownowazone-gospodarowanie-glebami-w-UE-i-ich-odbudowa/F2927833_pl (19.03.2024).

Monitoring Directive will contribute to improving soil health and it is to be hoped that they will be adopted by the EU legislator. At the same time, some elements may raise problems connected with land ownership and data sharing on private land, for example. An important step will therefore be to implement the principles of the Draft Soil Monitoring Directive in national legislation and to take into account other EU and national legislation.

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Enhancing the EU Green Transition through the Protection of Fundamental Rights in the Digital Environment

Abstract: The European Union faces the dual challenge of advancing digital transformation while ensuring environmental protection and safeguarding fundamental rights. The article explores how EU legislation protecting fundamental rights including the GDPR, DSA, and AI Act, contribute to a human-centric digital transformation aligned with environment protection goal. It underscores the critical role of digital technologies in achieving ecological objectives, as outlined in EU policies like the Green Deal and Circular Economy Action Plan. By analyzing the application of environmental principles in the digital context, the article highlights the emergence of concepts like digital pollution and the potential need for a new right to a clean digital environment.

Keywords: fundamental rights, EU digital transition, EU legislation, EU green transition

1. Introduction

The European Union's proactive approach to safeguarding fundamental rights in the digital era is commendable, but significant challenges remain, particularly in harmonizing digital transformation with environmental protection. Frameworks such as the GDPR, DSA, and the Declaration on Digital Rights and Principles establish robust strategies for ensuring fundamental rights such as privacy, data protection,

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and user safety, yet the environmental impact of digitalization poses a complex issue. Recognizing these challenges, the EU emphasizes sustainability and the right to clean environment as a core principle of its digital policy agenda. This article explores how the EU addresses these issues by examining the legal measures implemented to ensure a clean online and offline environment while demonstrating how a human-centric digital transformation supports and accelerates the green transition. The article also points out that the right to a clean offline environment may affect the right to a clean online environment.

2. Offline and online protection of fundamental rights

Digital transformation in the EU generates the need to emphasize that fundamental rights protected in reality must also be protected online. An example is the right to information and freedom of expression. According to Article 11 of the Charter of Fundamental Rights of the EU (hereinafter – CFR),[2] 'everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' Additionally, 'the freedom and pluralism of the media shall be respected.' This article applies to EU institutions and its Member States when they implement EU law (Article 52(5) CFR). These provisions correspond to Article 10 of the European Convention on Human Rights (hereinafter – ECHR) titled 'Freedom of Expression,' which states: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[3] According to the case law of the Court of Justice of the European Union (CJEU),[4]

[2] *Charter of Fundamental Rights of the European Union*, "Official Journal of the European Union" 2012, C 326/39.

[3] Official Journal, 1993, no 61, poz. 284. Currently, all EU Member States are parties to the ECHR. The right to freedom of expression also stems from national constitutions, such as Article 54 of the Constitution of the Republic of Poland. Its observance is thus guaranteed in Europe at both the international level and within individual Member States. Although the CFR and the ECHR are legal acts functioning within different legal systems (the CFR is part of EU law, while the ECHR is part of the Council of Europe's law), according to Article 52(3) CFR, the meaning and scope of the right expressed in Article 11 CFR are the same as those guaranteed by Article 10 ECHR. Therefore, it has a broad scope of application. This right applies to everyone—it is not limited only to natural persons but also includes legal entities. Furthermore, it protects expressions regardless of the type of content. These may include words, images, photographs, and actions expressing ideas.

[4] CJEU judgments: C-274/99 P, *Connolly v Commission*, EU:C:2001:127, para. 39; C-203/15 and C-698/15, *Tele2*, EU:C:2016:970, para. 93; C-163/10, *Patriciello*, EU:C:2011:543, para. 31.

the right to freedom of expression is one of the essential foundations of a pluralistic and democratic society and forms part of the values on which the Union is based, as stated in Article 2 of the Treaty on European Union (TEU).[5] The CJEU holds that guaranteeing freedom of expression is particularly significant in the digital environment, especially on the Internet.[6] The Council of the EU also highlighted this in its guidelines on human rights regarding freedom of expression online and offline dated May 12, 2014.[7] According to this document, technological innovations in information and communication technologies have provided people with new means to disseminate information to large audiences, significantly impacting citizens' participation in decision-making processes.

Digitalization often involves the collection, storage, and processing of vast amounts of information, raising concerns about privacy and the protection of personal data from unauthorized access or misuse by corporations and governments. The latter are collecting increasingly large amounts of data, which has sparked growing criticism over their use of data-driven digital technologies at the potential cost of privacy. These are also sensitive data, e.g. in the field of health.[8] Although the concept of open data and digitalization on public services is generally viewed positively and is aimed at modernizing public administration at different levels and for various stakeholders,[9] the public release of government datasets can pose risks to personal privacy, such as enabling open profiling or data mining for private purposes.[10] The digitization of public administration can also enable extensive surveillance activities by governments, raising concerns about individuals' right to privacy and freedom from arbitrary interference in

[5] According to Article 2 of the TEU 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[6] CJEU judgments: C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, ECLI:EU:C:2021:181, para. 18; C-160/15, *S Media BV v Sanoma Media Netherlands BV and others*, EU:C:2016:644, para. 45.

[7] Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Brussels 2014, pkt 6, https://eeas.europa.eu/sites/default/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf (12.02.2022).

[8] M. Blanquet, N. de Grove-Valdeyron (2023), *Les interférences entre la politique de la santé et la politique du numérique* [in:] *La politique européenne du numérique*, B. Bertrand (ed.), Bruxelles 2023, pp. 491-514.

[9] A. Bouhend et al., *State-of-Play Report on Digital Public Administration and Interoperability 2020*, Luxembourg 2020, https://interoperable-europe.ec.europa.eu/sites/default/files/news/2020-10/SC263_D04.02_State-of-play%20report_vFINAL.pdf (19.11.2024), p. 7.

[10] P. Acosta Gallo, *E-Administration: Is There a Fundamental Right to the Protection of Personal Data?*, "Revista General de Derecho Administrativo" 2007, no. 15.

their private lives (cyber surveillance and mass surveillance).[11] Furthermore, as public service infrastructure becomes more dependent on digital systems, the risk of data breaches and cyberattacks increases. Such incidents can threaten confidential information and undermine individuals' right to data security (data security risks). Very large internet platforms also pose a range of risks to personal data and privacy. These platforms often collect vast amounts of user data, including preferences, habits, and online activity, to create detailed user profiles. The EU has introduced several regulations to address these risks and protect the privacy and personal data of its citizens. The General Data Protection Regulation (GDPR)[12] requires organizations to obtain explicit consent for data processing, provide clear information on data usage, and uphold individuals' rights to access, correct, transfer, and delete their data. Non-compliance with GDPR can result in significant fines.[13] The GDPR is complemented by the ePrivacy Directive,[14] which focuses on specific aspects of digital communication (the confidentiality, the use of cookies and similar technologies, and unsolicited marketing communications), and it is set to be replaced by the forthcoming ePrivacy Regulation,[15] which aims to modernize and strengthen these rules in light of technological advancements. The Digital Services Act (DSA)[16] mandates transparency and accountability from online platforms, especially large ones, in removing illegal content and protecting user data. The Digital Markets Act (DMA)[17] targets major platforms, known as 'gatekeepers', ensuring fair competition and user

[11] S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, London 2019.

[12] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)*, "Official Journal of the European Union" 2016, L 119/1, pp. 1-88.

[13] Ch. Kuner, L.A. Bygrave, Ch. Docksey (eds), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford 2020.

[14] *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications)*, "Official Journal of the European Union" 2002, L 201, pp. 37-47.

[15] Proposal for a regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), Brussels, 10.1.2017, COM/2017/010 final.

[16] *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act)*, "Official Journal of the European Union" 2022, L 277/1, pp. 1-102.

[17] *Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)*, "Official Journal of the European Union" 2022, L 265, pp. 1-66.

protection. The Cybersecurity Act establishes an EU-wide framework for certifying the cybersecurity of digital products and services and enhances the role of the EU Agency for Cybersecurity (ENISA)[18] in tackling cyber threats. Lastly, the NIS Directive, updated to NIS2,[19] addresses the cybersecurity of essential service operators and digital providers, strengthening the resilience of critical infrastructure and digital systems across the EU.[20] These regulations collectively aim to safeguard user privacy and personal data, enhance transparency, and bolster cybersecurity to mitigate the risks posed by large online platforms. These examples demonstrate that the EU emphasizes the protection of fundamental rights both online and offline, including the right to information, personal data protection, and privacy. These rights are firmly grounded in primary law, notably the Charter of Fundamental Rights of the EU, which enshrines the right to private life, protection of personal data, and freedom of expression. Complementing this, secondary law, such as the GDPR and the ePrivacy Directive, provides detailed rules to ensure these rights are respected in the digital realm, demonstrating the EU's commitment to safeguarding fundamental rights in a rapidly evolving technological landscape.

Additionally, the human-centric direction of the digital transformation is guided by a politically significant document that shapes the actions of the EU and Member States in this area: the Declaration on Digital Rights and Principles for the Digital Decade[21] (Declaration) proclaimed by the European Parliament, the Council and the Commission in January 2023. The Declaration highlights the importance of a human-centric transformation of Europe. This act contains the principles governing Europe's digital transformation, which are to guarantee the use of new technologies and the resulting digital facilities for man's well-being. According to the Declaration, the goal of digitizing the EU is, among others: to support solidarity and social inclusion, to ensure easy access to online digital public services, to support the participation of citizens in the digital public space, to increase the security, protection and empowerment

[18] *Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on Information and Communications Technology Cybersecurity Certification and Repealing Regulation (EU) No 526/2013 (Cybersecurity Act)*, "Official Journal of the European Union" 2019, L 151, pp. 15-69.

[19] *Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on Measures for a High Common Level of Cybersecurity Across the Union, Amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and Repealing Directive (EU) 2016/1148 (NIS 2 Directive)*, "Official Journal of the European Union" 2022, L 333.

[20] D.P.F. Möller, *Guide to Cybersecurity in Digital Transformation: Trends, Methods, Technologies, Applications and Best Practices*, Cham 2023, pp. 1-70.

[21] *European Declaration on Digital Rights and Principles for the Digital Decade*, "Official Journal of the European Union" 2023, C 23, pp. 1-7.

of EU citizens in the digital environment and to promote sustainable development. This document outlines the principles and rights of EU citizens, emphasizing the protection of new digital rights and reinforcing those already established in EU law.[22] An example of the first category is the right to disconnect, ensuring safeguards for work-life balance in a digital environment.[23] An example of the second category, reflected in secondary legislation but elevated to the status of a principle, is network neutrality – the commitment to a neutral and open Internet where content, services, and applications are not unjustifiably blocked or degraded. The importance of certain principles, such as sustainable development, is also highlighted in the Declaration in the context of digital transformation.

3. The impact of Protection of Fundamental Rights online on environmental protection

3.1. The digital transformation of Europe closely related to the ecological one

The link between digital transformation and ecological transformation is emphasized in the EU soft law acts.[24] In 2020, the Council adopted conclusions "Digitalisation for the benefit of the environment,"[25] as a result of a process steered by the German presidency. In 2021, on the occasion of the Digital Days, organized by the Portu-

[22] C. Cocito, P. de Hert, *The Transformative Nature of the EU Declaration on Digital Rights and Principles: Replacing the Old Paradigm (Normative Equivalency of Rights)*, "Computer Law & Security Review" 2023, vol. 50.

[23] Currently, there is no specific European legal framework that directly defines or regulates the right to disconnect. However, the Working Time Directive (*Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time*, "Official Journal of the European Union" 2003, L 299) indirectly addresses related issues, particularly by establishing minimum daily and weekly rest periods designed to protect workers' health and safety. The right to disconnect also aligns closely with the broader goal of achieving a better work-life balance, which is central to recent European initiatives. These include Principle 9 ("Work–life balance") and Principle 10 ("Healthy, safe and well-adapted work environment and data protection") of the European Pillar of Social Rights, as well as the Work–Life Balance Directive.

[24] I. Kawka, *E-governance and Environmental Protection towards Greater Sustainability* [in:] *The European Green Deal and the Impact of Climate Change on the Eu Regulatory Framework: Searching for Coherence*, A. Sikora, I. Kawka (eds), Bruxelles 2024, pp. 60-61.

[25] Council of the European Union, *Draft Council Conclusions on Digitalisation for the Benefit of the Environment*, Brussels 2020, https://data.consilium.europa.eu/doc/document/ST-13957-2020-INIT/en/pdf (19.11.2024)

guese Presidency of the Council, 26 EU Member States signed a ministerial declaration "A Green and Digital Transformation of the EU."[26] Both documents stress that digital technologies can be used as a key enabler to reach the EU's environmental and climate targets.[27] In its 2022 Strategic Foresight Report entitled Twinning the Green and digital transitions in the new geopolitical context,[28] the European Commission concluded that digital technologies can play a key role in achieving climate neutrality, reducing pollution and restoring biodiversity. In the Berlin Declaration, the Council stressed the need to ensure synergies between the digitalization of Europe and the sustainability of the Union. According to this document, digital transformation in Europe should, inter alia, contribute to the UN Sustainable Development Goals,[29] and provide a common data space for the European Green Deal to extend and deepen EU cooperation, data reuse and exchange, good practices and solutions of digital governance. In the Green Deal itself, we can find the statement that 'digital technologies are a critical enabler for attaining the sustainability goals of the Green Deal in many different sectors.'[30] In particular, Information and Communication Technologies (ICT) such as artificial intelligence, 5G network, cloud computing, the architecture of distributed information resources (edge computing) and the Internet of Things can serve to accelerate and maximize the impact of policies on climate change and environmental protection.[31] Digitalization has an impact on individual EU policies and should be used within them to protect the environment. An example is the common agricultural policy (using AI to minimize the use of pesticides), energy policy (smart energy networks), or consumer protection policy (product passports). New technological solutions are also used directly to achieve environmental goals, e.g. biodiversity (creating digital twins of the earth or oceans).[32]

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[26] *A Green and Digital Transformation of the EU: Ministerial Declaration*, 2021, https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3D%3DBQAAAB%2BLCAAAAAAABAAzNDQxMwMAT7AwdwUAAAA%3D (20.11.2024).

[27] *Toulouse Call for a Green and Digital Transition in the EU*, 2022, https://www.economie.gouv.fr/files/files/2022/Call_for_Green_Digital_Transition_EU.PDF (20.11.2024).

[28] European Commission, *Communication from the Commission to the European Parliament and the Council: 2022 Strategic Foresight Report: Twinning the Green and Digital Transitions in the New Geopolitical Context*, Brussels 2022.

[29] Cf. https://sdgs.un.org/goals (12.11.2024).

[30] European Commission, *Communication from the Commission: The European Green Deal*, Brussels 2019.

[31] B. Bertrand, *The Twin Digital and Green Transition*, "Revue trimestrielle de droit européen" 2022, no. 4, pp. 619-653.

[32] A. Trantas et al., *Digital Twin Challenges in Biodiversity Modelling*, "Ecological Informatics" 2023, vol. 78.

3.2. The right to a clean environment and digital transformation of the EU

The cornerstone of sustainable development within the EU is the commitment to achieving a 'high level of protection and enhancement of environmental quality.' The Court of Justice of the European Union (CJEU)[33] regards this goal as a fundamental aim of the Union, pursued through the implementation of the EU's environmental policy, as outlined in Title XX of the TFEU (Articles 191–193).[34] Article 191(2) TFEU articulates the guiding principles of this policy: it aims for a high standard of environmental protection, considering the diverse circumstances across various regions of the Union. The policy is grounded in the precautionary principle, the principle of preventive action, the prioritization of rectifying environmental harm at its source, and the 'polluter pays' principle. Furthermore, Article 37 of the Charter of Fundamental Rights of the European Union emphasizes that a high level of environmental protection and the enhancement of environmental quality must be integrated into EU policies, adhering to the principle of sustainable development.[35]

The EU digital transformation is directly related to the right to a clean (offline) environment. The EU institutions focus on the environmental impact of ICT. Under the 'Sustainability' principle expressed in the European Declaration on Digital Rights and Principles for the Digital Decade (Declaration)[36] digital products and services should be designed, produced, used, disposed of and recycled in a way that minimizes their negative environmental and social impact to avoid significant harm to the environment,[37] and to promote a circular economy. In addition, according to the Declaration 'everyone should have access to accurate, easy-to-understand information on the environmental impact and energy consumption of digital products and services, allowing them to make responsible choices'. Thus, in the European Declaration institutions commit to: 'supporting the development and use of sustainable digital technologies that have minimal environmental and social impact and

[33] Case 240/83, *ADBHU*, ECLI:EU:C:1985:59, para. 13; C-28/09, *Commission v Austria*, ECLI:EU:C:2011:854 para. 120.

[34] See especially: A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Zutphen 2020, pp. 75-78.

[35] I. Kawka, *E-governance*…, p. 58.

[36] *European Declaration on Digital Rights and Principles for the Digital Decade*, "Official Journal of the European Union" 2003, C 23/1.

[37] For a definition of 'significant harm to the environment', see Art 17 of the *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088*, "Official Journal of the European Union" 2020, L 198/13.

developing and deploying digital solutions with a positive impact on the environment and climate'. Human-centred transformation therefore inherently involves safeguarding the right to a clean environment, reflecting the EU's commitment to balancing technological progress with sustainability. This approach recognizes that environmental protection is not just about natural resources but also about fostering healthy, sustainable living conditions for individuals, ensuring their well-being in both the physical and digital realms. The Declaration highlights the intrinsic connection between human rights and environmental protection, emphasizing the need for policies that prioritize public health, reduce environmental harm, and promote sustainable development. By integrating environmental protection into digital policies, the EU aims to create a transformation that benefits both individuals and the planet. For this purpose, EU law provides legal solutions that, on the one hand, have a positive impact on environmental protection and, on the other hand, are intended to prevent digitalization from harming the environment.

3.3. Digital solutions with a positive impact on the environment and climate

In order to contribute to sustainable production and consumption, according to 'A New Circular Economy Action Plan,'[38] 'digital technologies can track the journeys of products, components and materials and make the resulting data securely accessible. The European data space for smart circular applications will provide the architecture and governance system to drive applications and services such as product passports, resource mapping and consumer information'. An interesting example of a new technological solution to empower consumers for the green transition is the "Digital Product Passport."[39] It is a key regulatory element enhancing the traceability of products and their components (origin and composition including substances of concern, their reuse, repair, dismantling and recycling possibilities, and end-of-life handling, as well as their environmental footprint). Digital product passports will store and share information about a product's life cycle and could help consumers make better-informed choices and encourage producers to increase the sustainability of their products.

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[38] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A New Circular Economy Action Plan for a Cleaner and More Competitive Europe*, Brussels 2020.

[39] *Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 Establishing a Framework for the Setting of Ecodesign Requirements for Sustainable Products, Amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and Repealing Directive 2009/125/EC*, "Official Journal of the European Union" 2024/1781.

Information and data play a pivotal role in addressing environmental challenges. Citizens' access to information about environmental policies, air quality, pollution levels, and sustainability practices can be enhanced through digital applications and platforms.[40] When theirs rights are protected online, individuals can better engage in environmental decision-making and advocate for stronger environmental protections. Access to data and information is essential for gaining a deeper understanding of issues, shaping and influencing policies, assessing risks, setting policy priorities, and enabling informed decision-making.[41] The role of environmental data is exemplified by the use of environmental electronic databases. One notable example is Copernicus, the European Union's Earth observation program. It provides comprehensive information services based on data collected from Earth observation satellites and in-situ (ground-based) sources.[42]

Another example of data management in the environmental field is the work of the European Environment Agency (EEA), which plays a central role in providing reliable and comparable environmental data. The agency collects and disseminates information on various environmental issues, using data shared by Member States through initiatives like INSPIRE. This cooperation ensures that the environmental data available to policymakers and the public is accurate, up-to-date, and consistent across the EU. The INSPIRE directive[43] aims to create a European Union spatial data infrastructure for EU environmental policies and policies or activities that may have an impact on the environment.

An important role in access to environmental information is also played by the database – European Green Deal Dataspace.[44] This is a tool created under the Digital Europe Programme, as an element of a common European Data Space.[45] The common European Green Deal Dataspace interconnects currently fragmented data from various ecosystems, both for/from the public and private sectors. These data, combined with digital infrastructure (e.g. supercomputers, cloud, ultra-fast networks) and

[40] S. Kravchenko, *Is Access to Environmental Information a Fundamental Human Right?*, "Oregon Review of International Law" 2009, vol. 11, no. 2, pp. 227-265.

[41] A.P.J. Mol, *Environmental Governance in the Information Age: The Emergence of Informational Governance*, "Environment and Planning C: Politics and Space" 2006, vol. 24, no. 4, pp. 497-514.

[42] Cf. https://www.copernicus.eu/en.

[43] *Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 Establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)*, "Official Journal of the European Union" 2007, L 108/1.

[44] Cf. https://green-deal-dataspace.eu/ (12.11.2024).

[45] *Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on Harmonised Rules on Fair Access to and Use of Data and Amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act)*, "Official Journal of the European Union" 2023/2854.

artificial intelligence solutions, facilitate evidence-based decisions and expand the capacity to understand and tackle environmental challenges. They also play a crucial role in predicting natural disasters such as droughts, floods, hurricanes and help to reduce the damages.[46] The Commission's vision is to use the major potential of data in support of the Green Deal priority actions on climate change, circular economy, zero-pollution, biodiversity, deforestation and compliance assurance.[47]

3.4. EU legal solutions preventing negative impact of ICT on environment and climate

The digitalization of the EU economy, society and administration also has a negative impact on the environment. The manufacturing and use of ICT devices can become a major source of emissions. Also, many ICT devices contain non-renewable and non-recyclable components that can cause significant environmental damage. In addition, blockchain, Machine Learning in Artificial Intelligence, or metaverses, require high levels of electricity consumption for their operations and cooling. EU law provides many solutions to address environmental threats caused by the rapid technological development. One of the examples is regulation (EU) 2024/1781 establishes a comprehensive framework for setting ecodesign requirements for sustainable products in the EU. It replaces Directive 2009/125/EC and expands the scope of ecodesign rules to include almost all product categories, not just energy-related products. The primary goal is to promote sustainability across the entire product lifecycle, reduce environmental impacts, and support the transition to a circular economy.

According to Eurostat data, the amount of electrical and electronic equipment waste in the EU is increasing.[48] Therefore, European Union has introduced several legal acts related to the recycling of electronic products, aimed at reducing the environmental impact of waste electronics.[49] The key legislative act is WEEE Directive

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[46] T. Ibrahim, A. Mishra, A. Bostan, *Role of E-government in Reducing Disasters*, "TEM Journal" 2019, vol. 8, no. 4, p. 1157.

[47] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data*, Brussels 2020.

[48] The amount of electrical and electronic equipment put on the market in the EU evolved from 7.6 million tonnes in 2012 to a peak of 14.4 million tonnes in 2022, cf. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Waste_statistics_-_electrical_and_electronic_equipment (12.11.2024).

[49] M. Hedemann-Robinson, *The EU Directives on Waste Electrical and Electronic Equipment and on the Restriction of Use of Certain Hazardous Substances in Electrical and Electronic Equipment: Adoption Achieved*, "European Energy and Environmental Law Review" 2003, vol. 12, no. 2, pp. 52-60.

(Waste Electrical and Electronic Equipment).[50] The WEEE Directive regulates the collection, processing, recovery, and recycling of waste electrical and electronic equipment. It requires producers to take responsibility for their products after they have reached the end of their life, ensuring that used electronic devices are collected and recycled in an environmentally friendly way.

Another example of EU secondary law protecting the environment from the negative impact of digitalization is RoHS (Restriction of the Use of Certain Hazardous Substances) Directive.[51] The RoHS Directive is designed to minimize the risks to human health and the environment associated with the disposal of electronic and electrical waste. It currently prohibits the use of ten substances: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), polybrominated diphenyl ethers (PBDE), bis(2-ethylhexyl) phthalate (DEHP), butyl benzyl phthalate (BBP), dibutyl phthalate (DBP), diisobutyl phthalate.[52] All products containing electrical and electronic components, unless specifically exempted, must adhere to these restrictions.

Environmental issues are also taken into account when investing in new technologies. To include sustainability criteria in investments, a Taxonomy regulation[53] was adopted, which also takes into account the environmental impact of ICT. For example, the EU Taxonomy Climate Delegated Act[54] establishes the technical screen-

[50] *Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on Waste Electrical and Electronic Equipment (WEEE)*, "Official Journal of the European Union" 2012, L 197, pp. 38-71; *Directive (EU) 2024/884 of the European Parliament and of the Council of 13 March 2024 Amending Directive 2012/19/EU on Waste Electrical and Electronic Equipment (WEEE)*, "Official Journal of the European Union" 2024/884.

[51] *Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment*, "Official Journal of the European Union" 2011, L 174, pp. 88-110; *Directive (EU) 2017/2102 of the European Parliament and of the Council of 15 November 2017 Amending Directive 2011/65/EU on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment*, "Official Journal of the European Union" 2017, L 305, pp. 8-11.

[52] Annex II RoHS Directive.

[53] *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector*, "Official Journal of the European Union" 2019, L 317/1 *Amended by Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088*, "Official Journal of the European Union" 2020, L 198/13.

[54] *Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 Amending Delegated Regulation (EU) 2021/2139, as Regards Economic Activities in Certain Energy Sectors and Delegated Regulation (EU) 2021/2178, as Regards Specific Public Disclosures for Those Economic Activities*, "Official Journal of the European Union" 2022, L 188/1.

ing criteria for data centers and digital solutions contributing substantially to EU Taxonomy objectives, and should be expanded to include more activities for developing sustainable digital solutions and using sustainable crypto-assets.

The principle of sustainability is also integrated into EU funding. Instruments such as the Recovery and Resilience Facility, Horizon Europe, and cohesion policy funds support, inter alia, technological investments, and promote innovation. However, they must also take into account environmental protection issues. Thus, three types of investments can be co-financed from the multi-annual EU budget: 1) in digital technologies that contribute to achieving environmental objectives, 2) in environmentally-friendly ICT digital technologies, 3) in digital technologies that contribute to achieving economic or social objectives, which have no negative impact on the environment. This results both from strategic planning and programming documents, as well as from the obligation to adopt appropriate criteria for selecting projects for co-financing. Effective and credible environmental policy mainstreaming requires also a robust system to measure the contributions made by different EU spending programmes to a given overarching policy priority: this is known as tracking.[55] The Commission has implemented tracking methodologies for climate and biodiversity under the 2014-2020 Multiannual Financial Framework (MFF). These methodologies were based mainly on the intent of the financed action – i.e. whether the actions were designed to help achieve the overarching objective or were only expected to make a significantly positive contribution. The Commission is now further developing its tracking methodologies to take into account not just intent but also expected effects of the actions. Moreover, the funding instruments of the 2021-2027 MFF and Next Generation EU, particularly the Recovery and Resilience Facility, include specific requirements to ensure that EU co-financing takes environmental considerations into account. These requirements include compliance with EU environmental legislation, adherence to the 'do no significant harm' principle, and the application of sustainability proofing.

4. Right to a clean environment and new fundamental digital rights

Digital transformation may also lead to the emergence of new fundamental rights or their new understanding. Technology often seems to develop faster than the legal framework. Most of the fundamental rights were drafted in an era in which the

[55] Tracking requires a detailed understanding of how specific actions contribute to a given policy priority; these actions need to be identified in a way that allows the related financial resources to be counted, or tracked, and then aggregated at the level of the entire EU budget to monitor progress.

world looked completely different. For instance, the European Convention on Human Rights was ratified in 1950, before any computers, databases or the internet existed. Admittedly, most fundamental rights are drafted in general phrases, aligned with core ethical and societal values, rather than tailored to specific situations and circumstances. The advantage of these broad phrasings is that these rights provide room for interpretation and can easily be applied to very different situations in very different contexts. This aspect most certainly has helped most fundamental rights to stand the test of time and to remain fundamental. However, this does not mean that the values underlying these fundamental rights have not changed over time. For instance, perceptions of the right to privacy have changed over the decades. With the rise of social media, people increasingly disclose information about themselves. This may be an indication that people attach less value to their privacy. Or perhaps they now have to make different types of decisions than a few decades ago, balancing privacy risks with fostering their online reputation. So, there may be situations in which additional fundamental rights may be needed.[56]

One of the new fundamental rights that could be introduced into EU law is the right to a clean digital environment. The right to a clean offline environment could serve as a model for the development of this new right. Building on this idea, it could be argued that data acts as the pollution of the information age. Every action we take in the digital space leaves a trace. Similar to environmental pollution, this 'digital waste' can have significant negative effects on the online ecosystem.[57] It can contribute to noise and bias in aggregated data or analyses, and it can obstruct access to more relevant information – akin to how smog reduces visibility in the physical world. In environmental law, several instruments have been developed to address pollution and resource management, such as energy efficiency labels, emissions quotas, and tradable emissions rights. It would be valuable to explore whether similar mechanisms could be adapted to support a clean digital environment. Such an exploration would need to assess the extent to which digital pollution harms individuals, both in the short term and long term, and evaluate whether a right to a clean digital environment should primarily be a governmental duty of care, an individual right, or both.[58] Given the inherently international nature of the digital world, enforcing rights to a clean digital environment may face challenges similar to those encountered in global environmental law.

[56] B. Custers, *New Digital Rights: Imagining Additional Fundamental Rights for the Digital Era*, "Computer Law & Security Review" 2022, vol. 44, pp. 4-5.
[57] *Ibidem*, p. 11.
[58] *Ibidem*, pp. 11-12.

In addition, legal measures used to ensure the right to a clean environment and to combat climate change (which are the response to the adverse environmental effects of industrialization may be a guideline for solutions related to protection against the threats of digitization and datafication for individuals and society. An example of an instrument used in environmental protection is risk management. Environmental risk management (ERM) helps to ensure that environmental risk is contained to acceptable levels.[59] This instrument was also used in the case of DSA. Under the DSA very large online platforms and search engines are obliged to assess and mitigate systemic risks. These risks are linked to the dissemination of illegal content; negative effects for the exercise of fundamental rights and negative effects on civic discourse caused for ex. by disinformation and electoral processes, and public security. The Artificial Intelligence Act (AI Act) also is a risk-based regulation designed to ensure the safe and ethical use of AI technologies within the European Union. It classifies AI systems into different risk categories – unacceptable, high, limited, and minimal – based on their potential impact on fundamental rights and safety. High-risk AI systems, such as those used in critical infrastructure or hiring processes, are subject to stringent requirements for transparency, accountability, and oversight. This risk-based approach aims to balance innovation with the protection of individuals and society, ensuring that AI technologies are developed and deployed responsibly.

5. Conclusion

The European Union's efforts to harmonize the digital transformation with environmental protection underscore the interconnectedness of technological innovation, sustainability, and fundamental rights. Instruments such as the GDPR, DSA, and AI Act, alongside the Declaration on Digital Rights and Principles, demonstrate the EU's commitment to creating a human-centric and sustainable digital transition. As the EU integrates digital solutions into policies like the Green Deal and Circular Economy Action Plan, it exemplifies how technological advancements can drive ecological goals.

Moreover, the conceptualization of new rights, like the right to a clean digital environment, reflects the evolving needs of the digital age. Drawing parallels with the right to a clean offline environment, this right emphasizes the importance of

[59] M. Rhoen, *Rear View Mirror, Crystal Ball: Predictions for the Future of Data Protection Law Based on the History of Environmental Protection Law*, "Computer Law & Security Review" 2017, vol. 33, no. 5, pp. 603-617.

mitigating digital pollution and ensuring that digital ecosystems promote individual well-being and collective sustainability.

However, challenges remain, particularly in defining and enforcing environmental protection in the digital decade on an international scale, ensuring robust governance frameworks, and minimizing the environmental footprint of digital technologies themselves. The EU's proactive stance offers a blueprint for balancing innovation, fundamental rights protection, and environmental sustainability, setting an example for global digital and ecological transformation.

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Environmental Public Interest Litigation in Romania

Recent Developments in Domestic Courts and the Implications of the CJEU Judgment in Case C-252/22

Abstract: Access to justice in environmental cases is an essential guarantee of the substantive right to a healthy environment. Nevertheless, the legal rules and their interpretation differ greatly. The Romanian legal framework on judicial review in environmental cases is focused on the private interest requirement. However, using the purposive method of statutory interpretation aimed at protecting the constitutional right to a healthy environment, the Cluj Court of Appeal, a court of appeal in the Western part of Romania, acknowledged that every person has the right to initiate public interest litigation in environmental cases. This judicial transition from the doctrine of the individual private interest to the objective criteria of protecting the law and collective rights specific to the environmental public interest was, however, blocked by the decision of another court of appeal and the CJEU judgment in case C-252/22. In this judgment, ruling on a preliminary reference submitted in a case first decided by the Cluj Court of Appeal, the CJEU decided that, as a rule, private interest is a legitimate requirement under Article 9 (3) of the Aarhus Convention. In this perspective, environmental non-governmental organizations are the only claimants who have the power to represent the public interest. Even if the CJEU promoted a restrictive interpretation of public interest under Article 9 (3), the Opinion of AG Laila Medina opened the way to a new perspective: the thesis that public interest litigation can be initiated not only by NGOs but also by individuals or other associations that genuinely want to protect the environment.

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Keywords: access to justice, environmental cases, public interest litigation, Article 9 (3) of the Aarhus Convention, CJEU

1. Introduction

A court judgment is 'a traditional tool for protecting the environment. However, to obtain such judgment, someone must go to court. From this perspective, the question of of 'who' – who has the capacity and standing to go to court? – becomes essential. The concept of 'legal standing' (i.e., locus standi) may be interpreted in two ways. First, it refers to a person's competence to appear in court as a claimant or a defendant. In this understanding, elements such as age and legal capacity must be considered. Secondly, it refers to an individual's ability to bring a case to court as a claimant due to a particular interest in the subject matter of the case. It is with this latter understanding that this contribution relates most.

Traditionally, the general rules on standing in judicial review rely on a subjective model in which individuals assert their rights or legitimate interests. This is legal standing based on a legitimate private interest and also applies to environmental litigation.

Over time, legal standing in environmental litigation was also recognized for non-governmental organizations (NGOs). In this evolution, the Aarhus Convention, as interpreted by the Court of Justice of the European Union (CJEU), had an essential contribution. Under Article 9(2) of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention), NGOs' standing relies also on a subjective model; however, unlike individuals, their private interest is legally presumed. Furthermore, in its case law under Articles 9 (2)[2] and (3),[3] CJEU ruled that the objective of NGOs is to defend the public interest. The question that motivated this contribution was whether, apart from NGOs, individual citizens might possess the power to initiate environmental judicial reviews solely in the interest of the general public rather than for their private interest.

This contribution explores the tension between the rights-based approach to environmental litigation and the protection of the environment as a public interest issue.

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[2] Court of Justice of the European Union, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, Judgment of the Court 12 May 2011, para. 46.

[3] Court of Justice of the European Union, C-664/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, Judgment of the Court 20 December 2017, para. 47.

It argues that Environmental Public Interest Litigation (EPIL)[4] can act as a transformative mechanism for communities in post-communist countries such as Romania, particularly against the backdrop of recent trends aimed at restricting the role of NGOs in administrative litigation.

The structure of the article is as follows: Section 2 outlines the Romanian legal framework governing environmental judicial review; Section 3 analyzes domestic case law recognizing the right of any individual to initiate EPIL, employing a purposive method of statutory interpretation that emphasizes the objective of safeguarding the substantive right to a healthy environment, as enshrined in Article 35 of the Romanian Constitution; Section 4 examines the judgment of the Court of Justice of the European Union (CJEU) in case C-252/22, which arose from a domestic case concerning public interest litigation; Section 5 discusses the broader implications of the CJEU judgment in case C-252/22; Section 6 concludes by summarizing the key findings and their significance.

2. The legal framework of environmental judicial review in Romania

Administrative litigation (i.e., judicial review) is part of public law in Romania. The statute regulating it represents the *ius commune* for any administrative litigation, including environmental cases. Specific rules are applicable only when they are provided in statutes regulating particular domains such as environmental protection, urban planning, and building permits. Therefore, this section outlines firstly the general rules on administrative litigation, followed by the specific regulations on environmental litigation.

2.1. Judicial review

In Romania, judicial review was regulated as a transplant from the French system in the middle of the 19th century. However, after the transplant was realized, the judicial review in Romania did not keep pace with the evolution of the France one. Thus, even if, at the beginning of the 20th century, France evolved towards the legal standing of associations,[5] Romania has long upheld the exclusive legal standing of individuals and the principle of subjective litigation.

[4] The concept of 'public interest litigation' is decsribed in A. Maglica, *Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe*, "Erasmus Law Review" 2023, no. 2, pp. 71-75.

[5] Conseil d'Etat, Decision No. 19167/1906 of 21 Decembre 1906, *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli*, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/1906-12-21/19167 (10.11.2024).

Furthermore, 'popular actions' that focus on public interest were constantly rejected in Romania. In 1930, the domestic literature stated: 'Judicial review is sought by harmed individuals. This is because judicial action in administrative cases, no matter its relationship to the social order, does not have the characteristics of a popular action. The individual acts as a control agent for the legality of administrative acts only to the extent they affect him.'[6] This literature is still referenced today in the judgments of the Constitutional Court and High Court of Cassation and Justice (HCCJ) when rejecting the idea of public interest litigation.

The communist regime eliminated judicial review in 1948 and reinstated it in a restrictive legal framework in 1967. Following the fall of the communist regime, Law No. 29/1990 was the first statute regulating administrative litigation. Under this law, legal standing was granted only to individuals who could demonstrate a violation of their rights. The second law on judicial review in post-communist times was Law No. 554/2004 regarding administrative litigation.[7] With further amendments, this is the law currently in force.

Adopted during the EU accession process, Law No. 554/2004 intended to protect individuals' rights and the public interest more. Thus, in its original form, public interest litigation was recognized in Romania, along with subjective litigation. Both NGOs and individuals could exercise it. This rule was also applicable in environmental cases. Public prosecutors could also initiate public interest litigation and were obliged to participate in any administrative case brought by individuals or NGOs.

Legitimate public interest, as defined in the original form of Law No. 554/2004, meant the fulfilment of fundamental rights exercised collectively or the fulfilment of public interest. The 'public interest' concept was defined as interests that uphold the legal order and constitutional democracy, safeguard citizens' rights, freedoms, and fundamental duties, address the community's needs, and enforce public authorities' duties.

After Romania joined the EU, the concept of public interest as a basis for legal standing under Law No. 554/2004 was gradually limited. The main argument justifying this process was that the public interest is defined and protected exclusively by the State and its agencies. Therefore, the involvement of individuals or NGOs in safeguarding public interest is not welcomed and must be restricted to a minimal

[6] C. Hamangiu, R. Hutschneker, G. Iuliu, *Recursul în casaţie şi contenciosul administrativ. Comentariul legilor Curţii de Casaţie şi a Contenciosului administrativ, după doctrină şi jurisprudenţă*, Bucureşti 1930, p. 467.

[7] Law no 554/2004 regarding administrative litigation, published in Romanian Official Journal (ROJ), No. 1154 of 7 December 2004.

framework. Following this line of argumentation, Law No. 262/2007[8] significantly amended Law No. 554/2004, particularly regarding litigation in the public interest.

First, the concept of 'legitimate public interest' as defined in the original Law No. 554/2004 has been repealed. The 2007 amendments erased the reference to rights exercised collectively, a fundamental concept in environmental cases. Secondly, the protection of 'public interest' was subordinated to the proof of existence of a private interest.

Under the new Article 8 (1^1), public interest may be used by individuals and NGOs as an alternative basis for legal standing; it can be a basis for legal standing only when a subjective right or a legitimate interest is primarily violated. This is the law in force today.

In 2009, the Constitutional Court ruled that the amended Article 8 (1^1) was in conformity with the Constitution.[9] The Court held that this subordination of the public interest to the proof of a subjective one was provided by the legislator 'in order to «stop» the so-called «popular actions» filed by some individuals or legal entities who, lacking arguments to demonstrate harm to their own rights or legitimate interest, initiate actions based exclusively on public interest.' The court also held that the protection of public interest is the responsibility of public authorities rather than individuals or private associations. In 2021, the court reaffirmed this position.[10]

The Constitutional Court's case law regarding public interest litigation demonstrates a key doctrine that significantly impacts the Romanian understanding of judicial review and the overall concepts of democracy and the rule of law.

First, citizens cannot defend the public interest through judicial litigation. They can protect the public interest only if a private interest is demonstrated, which is necessary for standing. As a rule, the responsibility for public interest lies with the State. This poses a significant vulnerability for Romania as a constitutional democracy, reinforcing the government's tendency towards illiberalism due to its exclusive power to define and protect the public interest.

Secondly, in the Constitutional Court's argumentation, the 'popular actions' are initiated because the private parties (i.e., individuals or private legal entities) cannot prove harm to a subjective right or a legitimate private interest. Consequently, these actions are considered wrong and must be 'stopped'. Although the Constitution provides the fundamental right to a healthy environment, the Court did not elaborate

[8] Law No. 262/2007 amending Law No. 554/2004, published in ROJ No. 510 of 30 July 2007.
[9] Constitutional Court, Decision No. 66/2009, published in ROJ No. 135 of 4 March 2009.
[10] Constitutional Court, Decision No. 461/2021, published in ROJ No. 1221 of 23 December 2021.

on collective rights or diffuse interests. It held only that actions motivated by public interest are often misguided, arguing that those who engage in such actions do so primarily because they cannot demonstrate a private interest.

This approach was also followed by the HCCJ. In a mandatory interpretation of the law regarding NGOs' legal standing in administrative litigation, the HCCJ ruled that the private interest requirement applies to both individuals and NGOs.[11]

From the HCCJ perspective, NGOs and other associations, like labor unions, have subjective interests and do not have the power to represent the public interest directly. However, for NGOs, private interests should be defined by their founding documents rather than the impact of contested administrative acts on individual rights. The HCCJ also referred to the need to stop 'popular action', using the same argumentation as the Constitutional Court.

The HCCJ argumentation also had an indirect effect. Considering NGOs as parties with private interests led to skepticism about their credibility as advocates for the public interest. This created distrust toward NGOs, fueling political discussions that finally supported legislation which brought limitations to their power to take legal action in environmental cases.

In 2023, the deadlines for NGOs to contest building permits have been shortened to 30 days for internal review and 60 days for judicial review.[12] The deadline for individuals, as provided by Law No. 554/2004, remained six months. The Explanatory Memorandum of the draft amending law expressly reflected the distrust towards NGOs: 'Most of the time, such organizations (NGOs) are controlled by individuals who act in bad faith, who pursue completely different goals than those officially declared in the statutes or constitutive documents registered with the court and who take advantage of the ambiguity of the legal provisions to it diverted them from the original goals envisaged by the legislator.'[13]

The role of public prosecutors in exercising public interest litigation has also been limited. Regarding individual administrative acts (e.g., a building permit or an environmental permit based on an environmental impact assessment), the prosecutors must obtain the approval of the holder of the subjective rights before initiating a judicial review. In Romania, therefore, prosecutors cannot initiate judicial review of indi-

[11] HCCJ, Decision No. 8/2020 (appeal in the interest of the law), published in ROJ No. 580 of 2 July 2020.

[12] Law No. 50/1991 on the building permit, Article 12, as amended by Law No. 102/2023, published in ROJ No. 322 of 18 April 2023.

[13] Explanatory memorandum of draft Law No. 102/2013, amending Law No. 50/1991 on the building permit.

vidual administrative acts solely based on public interest. Prosecutors can initiate such litigation only when the contested administrative act is normative (e.g., a Ministry of Health Order regulating the distances between a landfill and residential areas).

2.2. Environmental judicial review

Following the fall of communism in December 1989, a substantive right to a healthy environment was provided by the first statute on environmental protection, Law No. 137/1995.[14] This law lacked specific rules for judicial review in environmental litigation, so the general framework for administrative litigation applied. The 1991 Constitution did not acknowledge a substantive right to a healthy environment.

In 2000, Romania ratified the Aarhus Convention.[15] Romania is a monist state where international treaties automatically integrate into domestic law after ratification. However, the ratification of the Aarhus Convention neither determined legislative amendments nor changed domestic case law.

The most critical changes to environmental litigation stem from EU accession.

In 2003, Article 35 of the amended Constitution[16] provided the substantive right to a healthy environment: '(1) The state acknowledges every person's right to a healthy and ecologically balanced environment. (2) The state provides a legal framework to support the exercise of this right. (3) Individuals and legal entities must protect and enhance the environment'. To date, in its case law, the Constitutional Court interpreted only the State's positive duty to establish a normative framework that effectively supports the right to a healthy environment.[17]

In 2005, a new legal framework for protecting the environment was adopted.

After its approval with amendments by Law No. 265/2006,[18] the Government Emergency Ordinance No. 195/2005 (GEO No. 195/2005)[19] provided that: 'the right to submit claims regarding environmental issues, either directly or through environmental protection organisations, to the appropriate administrative and/or judicial

[14] Law No. 137/1995 on protecting the environment, published in ROJ No. 304 of 30 December 1995.

[15] Law No. 86/2000 on ratifying the Aarhus Convention, published in ROJ No. 224 of 22 May 2000.

[16] Law No. 429/2003 on amending the Constitution, published in ROJ No. 758 of 29 October 2003.

[17] Constitutional Court, Decision No. 295/2022, paras 173-174, published in ROJ No. 568 of 10 June 2022.

[18] Law No. 265/2006 on approving GEO No. 195/2005, published in ROJ No. 586 of 6 July 2006.

[19] Government Emergency Ordinance No. 195/2005 on protecting the environment, published in ROJ No. 1196 of 30 December 2005.

authorities, as the case may be, regardless of whether or not damage has occurred' (Article 5 paragraph 1 letter d). Article 20 (1) referred to the duty of public authorities to enforce the right to information, public participation, and access to justice in conformity with the Aarhus Convention. Article 20 (5) provided that access to justice is governed by the legislation in force, while Article 20 (6) provided that environmental NGOs have the right to access justice and have legal standing as claimants in environmental litigation. This is the law in force today.

GEO No. 195/2005 lacks rules on litigation costs in environmental cases litigation. Therefore, the general rules, as provided in Article 451 of the Code of Civil Procedure,[20] are applicable. The courts may reduce litigation costs related to advocates' fees if they are disproportionate to the value or complexity of the case.

The cost of litigation significantly impacts the enforcement of the right to access justice. Environmental cases are lawsuits brought by individuals or NGOs against public authorities. In Romania, when public authorities cannot provide legal assistance through their in-house counsels, they are entitled to procure legal services from private practice lawyers. In this situation, public funds cover the advocates' fees, and no maximum limit is stipulated by law.[21] Public authorities often justify this decision by citing the complexity of environmental litigation. The law does not require public procurement for legal services.

In the domestic case in which the preliminary reference in C-252/22 was submitted, the Suceava County Council paid about 80,000 euros in public funds for lawyers' fees. In Romania, with a minimum gross salary of around 800 euros, individuals or NGOs cannot afford such costs. The use of public funds to pay lawyers' fees creates, therefore, a significant imbalance in environmental litigation between public authorities and private entities parties.

Public authorities consolidate this imbalance by threatening individuals or NGOs with high litigation costs, deterring them from pursuing environmental lawsuits. Empirical studies have identified this risk.[22] In interviews, Romanian NGO representatives indicated that the Environment Ministry uses the legal services of costly lawyers and the threat of litigation costs as an intimidation tactic to stop environmental litigation initiation.

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[20] Law No. 134/2010 on the Code of Civil Procedure, republished in ROJ No. 247 of 10 April 2015.

[21] GEO No. 26/2012 on measures to reduce public expenses and strengthen financial discipline, published in ROJ No. 392 of 12 June 2012, Article I (2) letter b).

[22] B. Neamțu, D. Dragoș, *Mimicking Environmental Transparency: The Implementation of the Aarhus Convention in Romania* [in:] *The Making of a New European Legal Culture: The Aarhus Convention*, R. Caranta, A. Gerbrandy, B. Müller (eds), Groningen 2018, p. 232.

3. Public interest litigation in the Cluj Court of Appeal's case law

Two cases regarding a landfill have determined the Cluj Court of Appeal's case law regarding EPIL. The landfill was built in Valea Putnei, a village in Suceava County, part of a commune named Pojorâta, northeastern Romania (historically known as Bukovina).

The characteristics of the landfill built in Valea Putnei by Suceava County Council, as presented in Section 3.1, created a specific context that highlighted the tension between rights-based judicial review and the protection of public interest. This tension led the court to acknowledge that every person can initiate a judicial review in environmental cases. To reach this decision, the Cluj Court of Appeal applied the teleologic method of statutory interpretation, as presented in Section 3.2.

3.1. The subject of the environmental cases concluding on EPIL

The landfill is located at 1,000 meters in the Eastern Carpathians, specifically in the mountain pass known as Mestecăniș. This pass connects the historic regions of Transylvania and Bukovina, which is why the landfill is referred to as the 'Mestecăniș landfill'. The landfill has been built on a mountain peak that was blasted sixteen meters deep to create space for the waste landfill.

Near the landfill, at distances of less than 1,000 meters, there are homes for residential living and buildings meant for tourism. Romanian legislation transposing Directive 1999/31 on the landfill of waste[23] requires a minimum distance of 1,000 meters from the landfill to residential areas to protect the health of the individuals living near the landfill.

The landfill was built next to the E58 road, a major European route from Central Europe to the east. The closest distance from the landfill to the E58 road is 40.9 meters, while the farthest is 66.5 meters. The daily traffic on this road, comprising Romanian and other European citizens, is approximately 7,000 vehicles. The area is a popular tourist destination, featuring the painted monasteries of Bukovina, which are recognized as a UNESCO World Heritage site. The environmental impact assessment effectuated for the construction permit indicated that 'The cumulative inhalation risk of 11 chemicals known or suspected to be carcinogenic was found to «at worst» persist up to 100 meters from the boundaries of the landfill'. The landfill and treated leachate discharge are also near a railway line where passenger trains run.

[23] When the building permit for the Valea Putnei landfill was issued, this rule was provided by Government Decision No. 349/2005 on the landfill of waste. Currently, this rule is provided by Government Ordinance No. 2/2021 on the landfill of waste, published in ROJ No. 749 on 18 August 2021.

The landfill's storage capacity is 390,000 tons, and its surface area is 5,45 hectares. The feasibility study revealed that the landfill could negatively impact tourism developments in Bukovina. It also identified a significant risk of flooding due to the site's steep slope and the degradation of the mountain landscape.

Although the landfill is not yet operational, the mountain landscape is significantly impacted, and flooding is already occurring. In 2003, Romania ratified the Carpathian Convention[24] and assumed the obligation to ensure specific protection for these mountain areas.[25]

The Pojorâta Local Council[26] was the public authority that allocated the site for the landfill's construction (Decision No. 64/2010) and decided on urban planning (Decision No. 69/2009). The Suceava County Council, the public authority responsible for governing the county,[27] was the beneficiary of these two administrative acts. The Suceava County Council issued the development consent (i.e., the building permit) for the landfill, even though the beneficiary was the same public authority (Development Consent No. 39/2012). Romanian legal rules allow a public authority to issue development consent and be also its beneficiary.

Another public authority, the Bacău Regional Environmental Agency, issued the environmental authorization after concluding an environmental impact assessment (Authorization No. 9/2009). Nonrefundable European funds ensured the funding of the landfill construction (European Commission Decision No. C (2011) 2035 of 30 March 2011). The Suceava County Council was also the recipient of European funds.

3.2. The judgments of the Cluj Court of Appeal

In 2014, eight citizens living in Valea Putnei and Iacobeni, a nearby village, brought judicial action against the Pojorata Local Council, asking the court to annul the decision allowing Suceava County Council to use the land for the landfill construction (Decision No. 64/2010). The claimants stated that the decision was made without public consultation and contradicted several legal regulations regarding landfills.

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[24] The Carpathian Convention is a regional treaty signed in 2003 by 7 states. Cf. http://www.carpathianconvention.org/ (20.11.2024).

[25] Law No. 389/2006 on the ratification of the Carpathian Convention, published in ROJ No. 879 of 27 October 2006.

[26] The local council is the local authority's deliberative assembly. Every commune and town has such a council.

[27] The county council is the county's deliberative assembly, which is responsible for public funds in the county, the county's economic, social, and environmental development, and the management of county property and certain public services. Every county has such a council.

As the first instance court, the Suceava Tribunal denied the claim as inadmissible because the claimants failed to demonstrate a legitimate interest necessary for legal standing in environmental cases.

The claimants appealed the judgment to the Suceava Court of Appeal and requested a transfer to a different court due to concerns about the impartiality of the local judges. The HCCJ granted this request, referring the case to the Cluj Court of Appeal. Cluj-Napoca is a city in Transylvania, a region in Western Romania formerly part of the Austro-Hungarian Empire.

By Decision no 182/2016, the Cluj Court of Appeal ruled that the claim was admissible and must be granted.[28] The court held that the Pojorâta Local Council decision must be annulled because the citizens were not informed about it, and there was no public debate before its adoption. Regarding the legal standing of claimants, the Cluj Court of Appeal held that they have a private interest in bringing environmental litigation. However, the Court held that this analysis is unnecessary because, in environmental litigation, any individual has the right to bring a case to court.

As a legal basis for recognizing EPIL exercised by every individual, the Cluj Court of Appeal identified Article 5 (1) letter d) of GEO No. 195/2005 and ruled: 'In other words, damage to the environment can be reported by any person without justifying damage other than the legal norms related to the protection of the environment. In this context, the law recognizes the objective protection of the environment independent of the infringement of a specific substantive right and the occurrence of damage. From this perspective, it can be stated that the administrative litigation initiated under Article 5 letter d) of GEO no. 195/2005 is an objective one, even if it is not initiated by a public authority expressly provided by law.'[29]

To reach this decision, the Cluj Court of Appeal used the purposive method of interpretation, with the right to a healthy environment, as provided by Article 35 of the Constitution, as an objective. This line of argumentation emphasizes the importance of legal recognition of the right to a healthy environment as a substantive right, a point further elaborated by Advocate General (AG) Laila Medina in her opinion in case C-252/22.

On the merits, in Decision No. 182/2016, the Cluj Court of Appeal ruled that a public debate was necessary before constructing the landfill. However, despite much of the landfill already being built, the Suceava County Council held a public debate in Valea Putnei only after this decision was pronounced. Citizens at the consultation

[28] Cluj Court of Appeal, Case No. 5737/86/2014, Decision No. 182/2016 of 28 January 2016.
[29] *Ibidem*, p. 19.

expressed disagreement, citing legal arguments about distances from the site to residential and recreation areas, proximity to the European road, flooding risks from the slope, and protection of nature and cultural heritage in Eastern Carpathians. The Suceava County Council argued that stopping the landfill construction posed a significant risk of having to return funds to the EU.

After the public consultation, Pojorâta Local Council adopted a second decision (Decision No. 80/2016) granting Suceava County permission to use the land to construct the landfill again.

Given the local tense atmosphere and Suceava County Council's power to overturn a final judicial decision, three lawyers from Cluj (comprising a law firm) decided to analyze the case and bring all necessary judicial actions. Two of these lawyers had family members in Pojorâta and frequently traveled there.

The decision to bring judicial proceedings was halted due to insufficient open-access information about the permits for landfill authorization. Following several refusals to communicate copies of such permits, under the law on access to public information, the law firm filed three lawsuits: the first one against Suceava County Council regarding the development consent,[30] the second one against Suceava Public Health Agency regarding the public health permit,[31] and the third one against Iași Railway Regional Agency regarding the permit for railway safety.[32] In all three litigations regarding access to environmental information, the Cluj courts decided that the law firm has legal standing (understood as both the capacity to stand justice and the right to bring judicial proceedings).

The documents obtained through these cases supported the judicial action in the administrative court. The judicial review referred to the zoning plan and the development consent. The law firm was the claimant, and the defendants were Pojorâta Local Council and Suceava County Council.[33]

The decision to submit a judicial review with the law firm as claimant was justified by those three final judgments acknowledging its capacity to stand justice as claimant[34] and by Decision No. 182/2016 stating that every person has the right to initiate judicial review in environmental cases. Regarding capacity and interest, the

[30] Cluj Tribunal, Judgment No. 317/2018 of 1 February 2018, final due to rejecting the Suceava County Council appeal by Cluj Court of Appeal, Decision No. 3333/2018 of 11 June 2018.

[31] Cluj Tribunal, Judgment No. 1038/2018 of 10 April 2018, final without appeal.

[32] Cluj Tribunal, Judgment No. 652/2018 of 27 February 2018, final without appeal.

[33] This is case no. 3655/117/2018, in which the preliminary reference in C-252/22 was formulated.

[34] See footnotes no. 30, 31 and 32.

Cluj Court of Appeal case law confirmed a law firm's legal standing in environmental litigation at that moment.

The judicial action was based primarily on protecting the public interest. Secondly, the private interests of the three lawyers comprising the law firm (two had family members living in Pojorata,[35] and the third was a tourist in the area) were presented. Private interests could also be argued because the law firm was an entity without a legal personality. Each lawyer has, therefore, maintained their legal personality, including the right to a healthy environment.

The Cluj Tribunal denied the claim as inadmissible.[36] The court held that public interest could be a basis for legal standing only in a subsidiary manner. Therefore, because the claimants failed to demonstrate a personal interest, their claim has to be denied. The claimant appealed the judgment before the Cluj Court of Appeal.

By Decision No. 1195/2019,[37] the Cluj Court of Appeal granted the appeal, annulled the judgment of the first instance court, and referred the case to the Cluj Tribunal for trial. The Court upheld its established case law regarding EPIL and ruled that the claimant had legal standing based on public interest.

In 2019, the Cluj Court of Appeal's argumentation of EPIL was more elaborate than in 2016. The court analyzed the domestic law on standing in environmental cases and its relation to the Aarhus Convention.

In analyzing domestic law, the court maintained the purposive interpretation of legal rules on standing with the aim of protecting the constitutional right to a healthy environment. In its own words, the Cluj Court of Appeal held: 'It can be concluded, without any doubt, that the legal nature of judicial review concerning administrative acts applying environmental legislation is one of objective litigation. It is so because objective litigation refers to a legal action initiated by a claimant to protect an objective right or a legitimate public interest. This means that the court is requested to verify whether rights of a general and impersonal nature have been violated and whether the law, in general, has been breached. In other words, objective litigation signifies wide openness to uphold legality, characterized by generality and impersonality. (…) From this perspective, it can be concluded that in the judicial review of an administrative act issued by a public authority related to environmental legislation, any individual or legal person can hold legal standing and proof of a violation of a subjective right or a legitimate private interest is not required. From the interpretation of the

35 The author of this contribution is one of those two lawyers.

36 Cluj Tribunal, Case No. 3655/117/2018, Judgment No. 250/2019 of 7 February 2019.

37 Cluj Court of Appeal, Case No. 3655/117/2018, Decision No. 1195/2019 of 26 September 2019.

legal regulation applicable in this area, access to justice in environmental litigation is granted to any individual based on public interest, without the requirement to assert a private interest.'

Through purposive interpretation aiming to protect the constitutional right to a healthy environment, the Cluj Court of Appeal marked the transition from the doctrine of the individual subjective right, traditionally focused on the harm produced directly to a personal interest, to the objective criteria of protecting the law and collective rights, specific to the environmental public interest. The evolution of Romanian case law is another proof that, usually, EPIL is not created by traditional legislative norms but rather by judicial decisions based on practical expedience.[38]

Under Article 20 of the Romanian Constitution, domestic regulations must be interpreted in conformity with international treaties regarding citizens' rights and freedoms. When inconsistencies arise between such treaties and domestic rules, international law takes precedence unless the Constitution or domestic laws have more favorable provisions.

Applying these rules, the Cluj Court of Appeal ruled: 'Even if the provisions of the Aarhus Convention regarding access to justice can be interpreted in a restrictive manner, indicating that proof of a legitimate private interest is necessary, as claimed by the first-instance court and the defendants, it is essential to recognize that domestic law on access to justice takes precedence. According to Article 20(2) of the Constitution, domestic law is more favorable and holds priority.'[39]

The Cluj Court of Appeal indicated that the Aarhus Convention, as ratified by the EU, has to be transposed through secondary legislation, such as Aarhus Regulation No. 1367/2006 or Directive 2011/92 and 2010/75. By referring to the European Commission's Communication on access to justice,[40] the Court noted that no secondary legislation regulates access to justice under Article 9 (3) of the Aarhus Convention. The Court emphasized that Article 9 (3) refers to the criteria established in the domestic law and that Article 3 (5) refers to the state's power to provide wider access to justice in environmental cases than the one required by the Convention.

Considering these arguments, the Court concluded: 'The Court observes while the Aarhus Convention may *in extremis* provide a legal basis restricting access to justice in environmental cases, such limitations cannot be imposed on the Romanian

[38] Ch. Schall, *Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?*, "Journal of Environmental Law" 2008, vol. 8, no. 3, p. 434.

[39] *Ibidem*, p. 12.

[40] Commission Notice on Access to Justice in Environmental Matters, published in OJ No. C275 of 18 August 2017.

courts. In this situation, Article 20 (2) of the Constitution applies, requiring the prevalence of domestic law as interpreted by court precedents. Even one could argue that the court's interpretation leads to the idea that the judicial action exercised by an individual or a legal entity in the application of GEO No. 195/2005 could qualify as *actio popularis*, the Constitution does not prohibit this type of action, and, therefore, *actio popularis* does not contradict the supremacy of fundamental law.'[41]

As for the capacity of the law firm to stand justice, the court ruled that an entity without legal personality, such as the claimant, has the capacity to stand justice according to civil procedural law (the general law applicable to judicial review). The Court argued that such an entity could be appreciated as a group of individuals, a category expressly recognized by the rules on administrative litigation.

At the final stage of the appeal hearing, the Suceava County Court submitted a claim asking the HCCJ to refer the case to another court of appeal. The defendant argued that the Cluj Court of Appeal had already decided on legal issues regarding the Valea Putnei landfill (in the case finalized with Decision No. 182/2016) and lacked impartiality to judge another case on the same project. Under Article 144 of the Code of Civil Procedure, in Romania, the HCCJ can decide on such claim even after the judgment becomes final.

The HCCJ granted the claim, annulled Cluj Court of Appeal's final Decision No. 1195/2019, and referred the case to the Târgu Mureș Court of Appeal. This court will refer the case to the CJEU in C-252/22. The High Court issued its ruling without reasoning, even though it annulled the final judgment of the Cluj Court of Appeal. Under Article 6 of ECHR (*res iudicata* principle and the requirement to motivate judgments), the claimant submitted a claim to the ECtHR. The application has been communicated to the parties and is at the stage of writing observations.[42]

4. Case C-252/22

4. 1. The preliminary reference

At the Târgu Mureș Court of Appeal, the claimant and the defendant, Suceava County Council, requested a reference to the CJEU on the issue of legal standing in environmental cases. The claimant also asked for a preliminary reference on the issue of

[41] Cluj Court of Appeal, Case No. 3655/117/2018, Decision No. 1195/2019 of 26 September 2019, p. 12.

[42] European Court of Human Rights, Application No. 39517/20.

litigation costs. This question was determined by the fact that, at that moment, Suceava County Council had already paid a lawyer fee of around 70,000 euros (another 15,000 euros will augment this as a lawyer fee for CJEU proceedings).

Concerning the legal standing, the referring court revised the claimant's proposal and requested the CJEU to rule on two issues: (a) the definition of the 'public' under Article 2(4) of the Aarhus Convention; (b) the conformity of the domestic legislation requiring the private interest as the legal basis for standing with Article 9 (3) of the Aarhus Convention, read in the light of the right to effective judicial protection under Article 47 of the Charter of the Fundamental Rights of the EU. Regarding litigation cost, the referring court maintained the claimant's proposal and asked the CJEU to interpret the rule that the judicial proceedings should not be prohibitively expensive, according to Article 9 (4) of the Aarhus Convention.

In the preliminary reference, the Târgu Mureș Court of Appeal presented the domestic legislation as having only one interpretation (i.e., subjective litigation based on private interest) without referring to the Cluj Court of Appeal case law. The law was presented assertively, suggesting that its interpretation was the only possible one.

When the preliminary reference in case C-252/22 was submitted to CJEU for ruling, the EU still did not have dedicated secondary legislation transposing Article 9 (3) of the Aarhus Convention concerning access to justice at the domestic level. As the literature indicates,[43] currently, a sectorial approach seems more plausible for such a transposition. Until then, however, it is for the CJEU to fill the gaps by interpreting Article 9 (3) of the Aarhus Convention as part of EU law.[44]

After consolidating the position of NGOs under Article 9 (2) of the Aarhus Convention,[45] CJEU decided to give them the same role under Article 9 (3).[46] CJUE ruled, therefore, that Article 9 (3) must be interpreted in such a way as to recognize the legal standing of NGOs.[47] In *Protect Nature*, the NGOs position as claimants in

[43] M. Eliantonio, J. Richelle, *Access to Justice in Environmental Matters in the EU Legal Order: The "Sectorial" Turn in Legislation and Its Pitfalls*, "European Papers" 2024, vol. 9, no. 1, p. 267.

[44] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie VLK*, Judgment of 8 March 2011, para. 43.

[45] Court of Justice of the European Union, C-263/08, *Djurgården*, Judgment of 15 October 2009; Court of Justice of the European Union, C- 115/09, *Bund*, Judgment of 12 May 2011.

[46] For detailed research on the role of NGOs in environmental judicial review, see B. Iwańska, M. Baran, *Access of an Environmental Organisation to Court in Light of the EU Standard Set by the Principle of Effective Legal (Judicial) Protection*, "European Energy and Environmental Law Review" 2019, pp. 47-66; C. Warin, *Individual Rights and Collective Interests in EU Law: Three Approaches to a Still Volatile Relationship*, "Common Market Law Review" 2019, vol. 56, no. 2, pp. 466-469.

[47] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie…*, paras 51-52.

environmental litigation has been clarified. According to CJEU judgment, 'the public concerned', such as environmental organizations that satisfy the requirements of Article 2 (5) of the Aarhus Convention, must have the right to bring proceedings set out in Article 9 (3).[48] This is due to the fact that the objective of NGOs is to defend the public interest.[49]

In C-252/22, CJUE continued, therefore, the interpretation of Article 9 (3) by answering the questions of private interest requirement and the role of protection of public interest. Briefly, it answered that other organizations, besides NGOs, may be submitted to such a requirement. Therefore, protecting the public interest remains solely within the scope of environmental organizations. Still, the intention to protect the public interest must be considered when deciding on litigation costs, including when the judicial review is denied because of the lack of private interest.

4.2. Opinion of AG Laila Medina

In her opinion, AG Laila Medina argued that: (1) a law firm can be considered a member of 'the public' within the meaning of Articles 2(4) and 9 (3) of the Aarhus Convention; (2) Article 9 (3) of the Aarhus Convention and Article 47 of the Charter, do not preclude domestic law which imposes to a law firm partnership to prove private interest to initiate judicial review; (3) Article 9 (3), (4) and (5) of the Aarhus Convention and Article 47 of the Charter, does not presuppose specific rules or criteria to limit litigation costs.[50]

AG Medina's conclusions have been accompanied by a reference to the Aarhus Convention's objective of ensuring wide access to justice and to the duty of courts to interpret domestic law to ensure this objective, also considering the predominance of public interest in environmental litigation. The duty of domestic courts to apply a purposive interpretation to ensure wide access to justice and the predominance of public interest are arguments that run through AG Medina's entire opinion. However, the CJEU followed this approach only concerning the third question.

In her reasoning, AG Medina highlighted additional arguments that supported a purposive interpretation of Article 9 (3) of the Aarhus Convention.

Firstly, AG Medina referred to Article 3 (4) of the Aarhus Convention and argued that effective judicial protection in environmental matters also applies to other categories of members of the public, including, in particular, associations, organizations,

48 Court of Justice of the European Union, C-664/15…, para. 46.
49 *Ibidem*, para. 47.
50 Court of Justice of the European Union, C-252/22, Opinion of A.G. Medina, para. 79.

or groups genuinely promoting environmental protection even if they do not (yet) formally qualify as environmental organizations within the meaning of Article 2(5).

Furthermore, she held that Article 9 (3) does not indicate that NGOs should be privileged over individuals.[51] From this perspective, other organizations (not only NGOs) could be recognized as claimants in EPIL.

Secondly, AG Medina emphasized that the Court has already recognized that citizens should play an active role in protecting the environment.[52] From this perspective, she referred to the opinion presented by AG Kokott in *Edwards*: 'The recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally'. In such cases, 'as the environment cannot defend itself before a court [it] needs to be represented by active citizens or non-governmental organizations.'[53]

Thirdly, AG Medina emphasized the fact that, in the process of interpreting the national law, taking into account the predominance of public interest in environmental litigation and in conformity with the objective of wide access to justice (by including, in particular, organizations, associations or groups genuinely promoting environmental protection), the domestic court has to consider the relevance, for the interpretation of the rules on standing, of the recognition, in national law, of the right to every person to a 'safe and ecologically balanced environment.'[54]

Considering the objective of ensuring wide access to justice, AG Medina also addressed the need to impose limitations: 'However, this does not imply an unqualified standing to anyone. The Compliance Committee has held, indeed, that «the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment». Member States retain the discretion to apply criteria in order to determine the conditions under which members of the public can act to defend the environment. As pointed out, essentially, by the Commission and Ireland, streamlining environmental litigation is a legitimate objective to avoid a situation that could prove difficult to manage for the courts.'[55] AG Medina's reasoning on limitations allows for two counterarguments.

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51 *Ibidem*, para. 55.
52 *Ibidem*, para. 58.
53 Court of Justice of the European Union, C-260/11, Opinion of A. G. Kokott, para. 42.
54 Court of Justice of the European Union, C-252/22…, para. 63.
55 *Ibidem*, para. 61.

Concern about *actio popularis* leading to numerous cases is a common argument in discussions regarding legal standing in environmental litigation. However, it is worth noting that no empirical data sustains this assertion. It remains a doctrinal argument.

The risk of burdening the courts can be empirically assessed in countries where *actio popularis* is regulated. When arguing about this risk, the Portuguese *actio popularis*, for instance, cannot be ignored. Therefore, the concern of overloading courts (as a doctrinal argument) can be researched (using empirical quantitative data) in a concrete reality, namely the judicial system of Portugal.

In 1976, after the revolution that ended the fascist regime in Portugal, Article 66 (1) of the Constitution stated: 'Everyone has the right to a healthy and ecologically balanced human living environment and the duty to defend it.'[56] In 1989, the Constitution acknowledged *actio popularis* in environmental cases, and in 1995, Parliament enacted the law regulating its legal regime.[57] Under Article 2 of this statute, legal standing is granted to anyone, 'regardless of whether they do or do not have a direct interest in the claim'.

Even if the rules on legal standing are so generous, in practice, the Portuguese courts did not experience many environmental cases based on *actio popularis*. On the contrary, their numbers were low, as presented by Alexandra Aragão: 'The cases that have been heard using the *actio popularis* provision have been mainly instigated by non-governmental organisations and less frequently by citizens and companies. Even though litigants are not subjected to court fees, *actio popularis* cases still occur infrequently.'[58]

Secondly, even if the Aarhus Compliance Committee has held that the state parties are not obliged to regulate *actio popularis*, it also did not forbid the adoption of such action either through specific regulation or by purposive interpretation of existing regulations. States can accept such action if they appreciate that EPIL is an appropriate instrument due to historical, social, and political circumstances. States that have already regulated such action, like Portugal, cannot be obliged to renounce it.

During the pleadings in C-252/22, the claimant also argued that the amended Aarhus Regulation should be considered when interpreting Article 9 (3) of the Aarhus Convention. However, neither AG Medina nor the Court addressed this issue.

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[56] The Portuguese regulations on *action popularis* in environmental cases are presented in A. Aragão, *Environmental Standards in the Portuguese Constitution* [in:] *Environmental Rights: The Development of Standards*, S.J. Turner, D.L. Shelton, J. Razzaque, O. McIntyre, J.R. May (eds), Cambridge 2019, pp. 247-264.

[57] Law No. 83/95 of 13 August 1995, last amended 2015, presented in A. Aragão, *Environmental Standards…*, p. 261.

[58] *Ibidem*, p. 262.

Article 11 of the Aarhus Regulation,[59] as amended in 2021,[60] came into force on 29 April 2023. Considering the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, the EU acknowledged that the right to request an internal review of administrative acts adopted at the EU level belongs to: (a) members of the public having a legitimate interest under the rights-based model; (b) NGOs and (c) individuals acting in the public interest. In the latter case, the individuals must demonstrate sufficient public interest and that the request is supported by at least 4,000 individuals residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States. The members of the public who requested an internal review may institute proceedings before CJEU if the EU institution does not respond within the specified timeframe.

This may raise questions about the applicability of the uniformity principle, as indicated by the CJEU in the *Slovak Brown Bears* case.[61] The amended Aarhus Regulation now accepts, under several requirements, the public interest litigation exercised by NGOs and individuals. At the same time, at the domestic level, Article 9 (3), as interpreted by the CJEU, admits only the public interest litigation exercised by NGOs. Where a provision can apply both to situations failing into the scope of national law and within the scope of national law, such as Article 9 (3), it is in the interest of EU law that that provision should be interpreted uniformly.

As for the interpretation of Article 9 (4) on the issue of litigation costs, AG Medina referred to the existing CJEU case law.[62] She argued that: (a) Article 9 (4), which regulates the not prohibitively expensive rule, applies to the procedures referred to in Article 9 (3); (b) the private interest, but also the general interest to defend the environment, are criteria for the assessment of the costs; (c) the possible lack of standing of the claimant does not preclude the application of Article 9 (4); (d) courts must interpret domestic procedural law in a way that is consistent with the objectives laid down in Article 9(3) and (4) to the fullest extent possible so that judicial procedures as a whole are not prohibitively expensive.

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[59] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ No. L264 of 25 September 2006, p. 13.

[60] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021, OJ No. L 356 of 8 October 2021, p. 1.

[61] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie…*, para. 42.

[62] Court of Justice of the European Union, C-470/16, *North East Pylon Pressure Campaign Limited and Maura Sheehy*, Judgment of 15 March 2018.

4.3. The CJEU judgment

In case C-252/22, CJEU delivered its judgment on 11 January 2024. The Court held: (1) Article 9 (3) of the Aarhus Convention must be interpreted as not precluding national legislation under which a legal entity, other than a non-governmental organization for the protection of the environment, is recognized as having standing to bring proceedings against an administrative measure of which it is not the addressee only where it claims that there has been a failure to observe a legitimate private interest or an interest connected to a legal situation which is directly related to the object of that entity; (2) Article 9 (4) and (5) of the Aarhus Convention, read in the light of Article 47 of the Charter, must be interpreted as meaning that, in order to ensure compliance with the requirement that judicial proceedings not be prohibitively expensive, a court called upon to make an order for costs against an unsuccessful party in an environmental dispute must take into account all the circumstances of the case, including that party's interest and the public interest in the protection of the environment.[63]

Regarding Article 9 (3), the CJEU judgment presented several differences from AG Medina's opinion. First, the Court united the first two questions and ruled on the interpretation of Article 9 (3) on legal standing. Secondly, the Court did not refer to the duty of the national court to interpret the domestic law to ensure wide access to justice and protection of public interest, as to include in the category of members of the public, in particular the organizations who genuinely intended to protect the environment.

In justifying its decision on the interpretation of Article 9 (3), the Court did not refer to AG Medina's arguments, such as the eighteenth recital of the Convention or Article 3 (4). AG Medina presented all these arguments to justify the domestic court's duty to apply the purposive method of interpretation and to include entities that genuinely wanted to protect the environment in the category of claimants in the public interest.

As indicated, the Court decided not to follow this path of reason. Instead, it connected Article 9 (3) to Article 9 (2) to justify limiting Article 9 (3) to NGOs and individuals with legitimate private interests.

The Court observed that 'Article 9 (3) is broader in scope because it covers a wider category of measures and decisions and is addressed to members of the «public» in general. On the other hand, that provision confers a greater discretion on the Member

[63] Court of Justice of the European Union, C-252/22, *Societatea Civilă de Avocați AB&CD*, Judgment of 11 January 2024.

States when they lay down the criteria for determining, among all members of the public, who has the right to bring the action provided for in that provision.'[64]

This idea is further elaborated by linking the scope *ratione personae* of Article 9 (2) to Article 9 (3). The Court observed that in the context of Article 11 of Directive 2011/92/EU, which implements Article 9(2), it is open to the national legislature to restrict the rights that, when they are not observed, may be relied on by an individual to be able to bring judicial proceedings under Article 11 solely to individual rights.[65]

Under an argumentation *a fortiori*, the Court ruled that the limitation to subjective litigation also applies to Article 9 (3).[66] Under this interpretation, 'the need to establish a legitimate private interest means only that actions brought by persons who have no specific connection to the administrative measure that they wish to challenge are inadmissible. Thus, the Romanian legislature avoided giving rise to a popular action without unduly restricting access to justice.'[67]

However, Article 9 (3) permits also an argumentation *e contrario*. Unlike Article 9 (2), Article 9 (3) refers to members of the public rather than the concerned public. If legitimate private interest is a limitation in conformity with Article 9 (3), we must conclude that there is no distinction between Article 9 (2) and Article 9 (3) regarding the criteria of *ratione personae*. Both of them include only the concerned public and NGOs.

As the Court stated, Article 9 (3) has a broader scope as it encompasses members of the 'public' without further qualifications. There must be 'something' to distinguish *ratione personae* in the category of claimants under Articles 9 (2) and (3). Otherwise, the distinction between the public and the concerned public makes no sense.

The solution proposed by AG Medina involves including those who genuinely intend to protect the environment in Article 9 (3). This approach could be a key factor distinguishing Article 9 (2) from Article 9 (3). Even if the Court did not accept this argument, the Opinion of AG Medina in case C-252/22 opened a pathway that may be followed in future cases.

Similar to AG Medina, the Court referenced the concept in the Implementation Guide to the Aarhus Convention, which states that parties to the convention are not required to create a system of *actio popularis* in their national laws.[68] The counterarguments presented in the AG opinion section are also relevant here.

64 *Ibidem*, para. 53.
65 *Ibidem*, para. 59.
66 *Ibidem*, para. 60.
67 *Ibidem*, para. 58.
68 *Ibidem*, para. 55.

As for the question relating to reasonable costs in judicial proceedings, the CJEU maintained its previous case law[69] and agreed with AG Medina. The Court referred to the duty of the courts to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objective laid down in Article 9 (4) of the Aarhus Convention so that judicial procedures are not prohibitively expensive.[70] The non-prohibitive costs rule also applies when the judicial action is dismissed as inadmissible due to a lack of standing.[71]

It is worth noting that the Court made reference to 'the public interest in the protection of the environment' and to the fact that 'members of the public and associations are naturally required to play an active role in defending the environment'.

5. Implications of the CJEU judgment in C-252/22

The CJUE judgment in case C-252/22 has implications for the domestic case that referred the preliminary reference and other cases from Romania or any other Member State. Additionally, it may shape national policies on environmental litigation and legal standing.

5.1. Consequences on legal standing

Applying the CJEU judgment in C-252/22, the Târgu Mureș Court of Appeal denied the judicial review due to the lack of legal standing in both components, lack of capacity, and lack of interest.[72] The court did not have to decide on the issue of costs because the Suceava County Council, the main defendant in the trial, opted for a distinct civil litigation based on tort law.

As for legal capacity to initiate judicial proceedings, the Târgu Mureș Court of Appeal applied Article 196 (3) of the Statute of the profession of lawyer ('For disputes arising from the performance of a professional activity, the partnership may take legal action as an applicant or defendant, even if it does not have legal personality'). It did not discuss the relation between this rule and Article 56 of the Code of Civil Procedure (the legal rule that gives entities without legal personality the capacity to be claimants or defendants without limitations). The Court held that its

[69] Court of Justice of the European Union, C-470/16, *North East Pylon Pressure Campaign and Sheehy*; Court of Justice of the European Union, C-470/16, Judgment of 15 March 2018; Court of Justice of the European Union, C-260/11, *Edwards and Pallikaropoulos*, Judgment of 11 April 2013.

[70] Court of Justice of the European Union, C-252/22…, para. 82.

[71] *Ibidem*, para. 71.

[72] Târgu Mureș Court of Appeal, Case No. 3655/117/2018, Decision No. 191/2024 of 4 April 2024.

decision would have been different only if the Aarhus Convention expressly regulated the *actio popularis* as a mandatory duty on the state parties.[73]

As for the interest to initiate judicial proceedings (the issue that this contribution treated as legal standing), the court applied the CJEU judgment, which it cited extensively. The Târgu-Mureș Court of Appeal held that the Romanian legislation, which requires a legitimate private interest, is in conformity with EU law. Therefore, the claim has to be denied because the claimant did not prove a legitimate private interest.

Using a textual interpretation method, the Târgu-Mureș Court of Appeal held that Article 35 of the Constitution does not regulate legal standing. Therefore, it rejected the claimant's argument concerning the purposive interpretation of the law based on the constitutional right to a healthy environment.

Secondly, it relied only on Article 20 (5) and (6) of GEO No. 195/2005 (' Public access to justice shall be based on the legislation in force; NGOs promoting the protection of the environment shall have the right to take legal action in environmental matters and have standing in disputes concerning the protection of the environment'). Contrary to the Cluj Court of Appeal, the Court of Appeal of Târgu Mureș did not assess Article 5 (1) letter d) of GEO No. 195/2005 ('the right to apply, directly or through environmental protection organizations, to the administrative and/or judicial authorities, as the case may be, in environmental matters, irrespective of whether or not damage has occurred') in the process of interpretation and application of legal norms on standing.

The Târgu Mureș Court of Appeal applied the CJEU judgment based on EU law priority. It held: 'Considering the priority of EU law, as stated in Article 148 (2) of the Constitution, and noting that the case law of the CJEU is part of the binding EU regulations, the Târgu Mureș Court of Appeal dismisses the claimant's motion regarding the application in the present case of the reasoning presented in a judgment issued by the Cluj Court of Appeal, namely Decision no. 182/28 January 2016, which asserted the objective character of environmental litigation, in consideration of the CJEU judgment of 11 January 2024, delivered in case C-252/22'.

In Romania, a post-communist Civil law jurisdiction, case law has only a persuasive force; court judgments are not a primary source of law. Only two exceptions are recognized: the judgments of Constitutional Courts and the judgments of the HCCJ in interpreting the law. However, the principle of legal certainty requires consistency in the case law of a civil law jurisdiction. Even if this doctrine does not carry the same authority as the doctrine of precedents in common law jurisdictions, it has practical effects, especially in the same court of appeal jurisdiction.

[73] *Ibidem*, p. 38.

In this context, Decision No. 182/2016 of the Cluj Court of Appeal, which recognized the existence of EPIL in Romania, held only persuasive authority. However, the Târgu Mureș Court of Appeal limited its argumentation to directly applying the CJUE judgment in C-252/22 and did not provide arguments against it.

This line of argumentation reveals a question about the limits of the CJEU judgment and its binding force. As discussed earlier, the CJEU concluded that the Romanian legislation, which mandates proof of a legitimate interest for organizations other than NGOs, complies with EU law. The CJEU also emphasized the referring court's responsibility to provide the domestic law, noting that its findings are subject to further checks by that court on the domestic law and facts.

The CJEU's ruling determines the limits on its binding force. Thus, the CJEU decided that the domestic law, as provided by the referring court, is in line with EU law. The CJEU did not hold that EPIL exercised by every person is contrary to EU law. Lacking a directive transposing Article 9 (3) of the Aarhus Convention, the Court has no competence to reach such a conclusion. There is no legal basis for it.

Within these limits, the other Romanian courts retain the power to answer the question, 'What is the domestic law?' Using alternative interpretation methods, such as the purposive method, domestic courts other than the Târgu Mureș Court of Appeal can reach different conclusions. This does not breach the binding force of the CJEU judgment, which has to be conferred to its limits.

This conclusion also applies to domestic courts from other EU Member States. Lacking a directive transposing Article 9 (3) of the Aarhus Convention, Member States still have their margin of appreciation in its implementation. Domestic courts still have their own space for the interpretation of domestic law. Furthermore, Article 3 (5) expressly provides that the Aarhus Convention is only a minimum standard in the area of access to justice.

Regarding public policies for access to justice in environmental litigation, the CJEU judgment in case C-252/22 undoubtedly holds persuasive authority. The Court ruled that the litigation model based on subjective disputes conforms with EU law, providing a strong argument for this type of litigation and limiting the public interest as legal basis for standing.

5.2. Consequences on litigation costs

As previously noted, the Suceava County Council, the main defendant in the trial, opted for a distinct civil litigation based on tort law. At the time of writing, this litigation has started, but it is in first stages of written observations.

In this litigation the domestic court will need to take into account the CJEU judgment in case C-252/22. The Court has established a mandatory duty for judges to use a purposive method of interpretation aimed at protecting claimants from excessive costs. In this regard, the CJEU judgment is legally binding on the domestic court handling the separate civil litigation, as well as on other Romanian courts and courts in other Member States when addressing the issue of litigation costs in environmental cases.

Therefore, the impact of the CJEU judgment depends on the courts applying the duty to interpret domestic law purposively and protect the claimant from excessive costs. In another case, the Cluj Court of Appeal has already decided to apply the CJEU judgment regarding litigation costs. In a recent case, it reduced litigation costs from around 80,000 euros claimed by a private company, beneficiary of a mining license whose prolonging has been challenged in judicial review and the action has been denied, to 4,000 euros.[74] It remains to be seen whether courts from other regions of Romania will follow the same direction.

6. Conclusion

This contribution outlined recent Romanian judicial developments in environmental litigation case law and the implications of the CJEU judgment in case C-252/22. Within this framework, three solutions regarding access to justice have been presented.

First, the Cluj Court of Appeal ruled that domestic laws, interpreted to protect the substantive right to a healthy environment, support the right of any individual to initiate judicial reviews in environmental cases. The court moved away from the individualistic doctrine of legal standing in favor of a new public interest doctrine through purposive interpretation.

Secondly, AG Medina elaborated on the thesis that NGOs but also other organizations and individuals who genuinely want to protect the environment can have legal standing in environmental cases by invoking the public interest. She also decided to move away from the individualistic doctrine of legal standing and to present a new middle way between a rights-based approach and *action popularis*. Until case C-252/22, the middle way the Advocates General presented to the CJEU was the NGOs as the only representatives of the public interest.[75]

[74] Cluj Court of Appeal, Case No. 432/33/2024, Judgment No. 321/2024 of 17 September 2024 (not final).

[75] Court of Justice of the European Union, C-664/15..., Opinion of AG Eleonor Sharpston, par. 81.

Finally, the CJEU held that domestic legislation requiring other organizations besides environmental NGOs to meet the private interest requirement conforms with Article 9 (3) of the Aarhus Convention. The referring court, the Târgu Mureș Court of Appeal, strictly applied the CJEU judgment and returned to the individualistic doctrine of legal standing.

The same facts determined three solutions on legal standing. In the end, however, the CJEU judgment prevailed, and the judicial action against the zonal planning and building permit of the landfill was denied.

The landfill from Valea Putnei is currently waiting for the final environmental authorization to become operational. It determined litigation that reached two supranational European courts. A lot of time and arguments have been dedicated to the legal cases. In the meantime, the landscape of the Eastern Carpathians has been destroyed, the once-green mountain peak is now a 5-hectare landfill, and the flooding of the area is ongoing. At the end of the day, what did we humans accomplish through these cases? If Nature could speak, she would probably say that we accomplished nothing.

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Development of Green Skills as an Educational Platform

Abstract

Background: A perception of the possible impact of green skills development on society is presented. How have legislative and political processes of the EU been established in recent years to increase the importance and consciousness of individual participation in pro-ecological behaviours and given rise to the establishment of green skills to foster the care of the natural environment?

Aim: The presentation will focus on the development of green skills as an educational platform to explore possible efforts to complement policy and/or regulatory adjustments.

Method: The contributory character of the chapter is based on the three-fold axis of the analysis, encompassing political, legal perspective, and researching green skills as an effective platform to develop the cognitive perceptions of the solutions being recognised. The analysis is embedded in the review of the legal and political endeavours of the European Commission to grab the benefits of green transformation in the economic and political interest of all EU citizens, as well as on the perspective of the green skills development as an educational platform toward green transition.

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Research summary: The mix of legal, political or organisational as well as individual actions has the potential to stimulate activities that empower whole communities towards sustainable individual, public and corporate behaviour.

Keywords: green transformation, green skills, EU policy in green skills development

Introduction

Social sensitivity, the mobilisation of ideas on sustainable practices, cost management, resource allocation and capacity adaptation, integration of a wide range of stakeholders, empowerment of individuals and communities, operating in a long-term sustainable perspective are the main objectives of the EU-driven interpretation of the priorities of resilience and stability of an economy and societies.

The area of skills formation and use is of particular value in the process of capacity building, transformation of management operations, empowerment, activation of sustainable alternatives and innovative solutions to act more circularly, climate neutral, resource efficient, etc. Adaptability to local contexts, small-scale experimentation and low-cost solutions that stimulate innovation while meeting societal expectations are the hallmarks of stimulating educational and business models, often geared towards self-sustainability, collective efforts of teams faced with the limitations of existing solutions to mitigate economic and social slowdowns, reduce distortions in income distribution, increase the use of business strategies to address social and environmental problems while generating revenue.

The imperative to strive for an accurate transition to a greener world imposes obligations to stimulate politically, enforce legally (if necessary) and harvest economically to make societies sustainably better off. The key issue that emerges is the need for people to develop new skills and update existing ones to support the green transition. The green skills are crucial to sustain the politically driven movement of stimulating pro-ecological behaviours and choices, to push (if necessary) for the rules to be legally enforced, and essentially to adapt the skills within occupations to strengthen the economic sustainability of societies.

Many processes and phenomena that are considered to be socially or ecologically neutral and represent everyday attitudes have a long-term and significant impact. As well as reducing the burden on the natural environment, everyday attitudes have many economic benefits (cost savings, positive corporate image). Raising the environmental awareness of the entire community is essential to eliminating environmental threats. It is also extremely important to mobilise resources and use them

in an effective and planned manner to prevent further environmental degradation. It remains an open question who will be the leader, whether it will be a more centralised or decentralised formula, whether it will be more top-down or bottom-up stimulation, and what the priority will be for the time being. If we assume that the most important thing at the moment is to work on the awareness of the population, then the educational perspective of the problem should be the issue. Going further in this direction, the stimulation of educational initiatives aimed at developing educational platforms is of fundamental importance.

The structure of the chapter follows the sequence of presentation of green skills, EU involvement in the green skills development process and individual project outlines dealing with green skills development in higher education.

1. Green skills as an educational platform to adjust toward green transformation

In the EU Council Recommendation of 22 May 2018 on key competences for lifelong learning, it is pointed out that to maintain current levels of well-being and to secure future high levels of employment and cohesion, people need to acquire a mix of skills and competences.[5]

The impetus of lifelong learning is to serve the processes of adaptation, to upgrade qualifications, to orient competences and skills to the real needs of the labour market, to take advantage of today's and tomorrow's market opportunities.

The information society is creating new professions. The growing information and audiovisual sector is absorbing new workers whose professions and skills must be adapted to meet changing needs. A large-scale service sector, including information services, is being developed in information societies. The development of information networks, including the Internet, is creating ever new areas of services for an increasing number of users.

The above-mentioned implications of globalisation processes impose new tasks on governments. The ever-increasing saturation of the economy with capital and the increase in its productivity, based on technological progress, inevitably lead to a decrease in the demand for labour. On the other hand, environmental challenges – climate change, rising and uncertain energy prices and the prospect of depleting resources – are increasing.

[5] Council of the European Union, *Council Recommendation of 22 May 2018 on Key Competences for Lifelong Learning*, "Official Journal of the European Union" 2018, C 189/01.

The above realities and the forecasted future changes, pose new challenges and impose requirements on market actors, and thus on the broader education system, which has the task of „equipping" the managers of organisations and the people working in them with the necessary competences and skills, which are in practice a key success factor in the process of competition and development.

Recognising this, all developed countries, in their programmes and strategies to counter social and environmental problems, are trying to respond to these processes by investing in the formation in formal and informal processes – technological skills and green skills – related to the concept of sustainable development.

Education, especially today, should have an important function in preparing people to function in organisations subjected to new dynamic changes and competitive perspectives. These conditions are largely related to technological progress and concern, above all, the risks associated with the limitations and degradation of the natural environment. In order to cope with these realities, the education system has to respond to challenges not only in economic but also in social and ecological terms. This is because the issue of the impact of businesses and households on the state and quality of the environment and related social issues (e.g. the state of health of the local community associated with smog) is becoming increasingly important. There is also an increasingly broader interpretation of the concept of risk in the operation of market actors, pointing to the need to mitigate it in environmental, social and thus reputational terms.

From the point of view of the labour market, the green transformation, implemented within the framework of the implemented circular economy (which is a response to environmental problems), affects both the overall number of jobs in the economy and changes in demand for green professions. According to the experts of the Lewiatan Confederation, by 2030, the energy transition is expected to lead to the creation of approximately 300,000 new jobs in Poland in sectors such as renewable energy, nuclear energy or electromobility.[6]

The changes resulting from the implementation of the energy transition are associated, among other things, with changes in the demand for workers, including:[7]

- the energy sector based on traditional energy sources,
- the offshore/onshore/wind farm sector,
- the photovoltaic industry,

[6] Konfederacja Lewiatan, *Raport Lewiatana. Zielone miejsca pracy zwiększą konkurencyjność gospodarki*, 2022, https://lewiatan.org/raport-lewiatana-zielone-miejsca-pracy-zwieksza-konkurencyjnosc-gospodarki/ (20.09.2024).

[7] Instytut Analiz Rynku Pracy, *Zmiany na rynku pracy wynikające z wdrażania koncepcji zrównoważonego rozwoju. Raport tematyczny*, Warszawa 2022.

– the coal mining sector,
– production, servicing and repair of personal transport vehicles.

Meanwhile, there is a shortage of green skills on the Polish labour market, which poses a serious challenge for both the lifelong learning system and businesses.[8] With insufficient training in the school education system in the area of green professions and skills, it is necessary to develop these competences within formal education, but also to support it through targeted courses and training.

Eliminating the skills deficit in this area should be considered a key aspect of systemic preparedness for the calls related to adaptation to the labour market and climate change.

Experts point out that education is faced with the requirement to take a more holistic view of the causes and effects of the processes taking place, as well as the need to develop the skills to design and implement innovative solutions where ecological issues are the point of reference. Environmental education should be an important platform relating to different areas of human activity. Environmental problems and risks should occupy a special place in education at every stage, from pre-school education to university and post-graduate education.

Innovation of an economic nature should be seen as a fundamental solution to environmental problems, but also as a potential for making profits and improving wider social well-being.

Experts and practitioners emphasise that in the process of green skills education, both soft skills are important, e.g. understanding the greening of supply chains, the importance of environmental awareness and activities to raise awareness, as well as hard skills, e.g. the ability to assemble green solutions and circular facility design skills. Important for these skills are concrete design decisions, for example choosing a specific design or material for a product to counteract environmental degradation and increase efficiency. Awareness of the consequences of decisions and the ability to assess its wider benefits and costs in the short and long term is crucial.

Formal education in green skills should be complemented not only by training and courses, but also by internships and apprenticeships that students can profile for green skills acquisition.

The International Labour Organisation has developed a set of key skills, not linked to a specific job, but pointing to green skills as being increasingly universal and necessary in the labour market, these include:[9]

[8] *Ibidem*.
[9] *Ibidem*, pp. 36-38.

- awareness and respect for the environment; willingness to learn about sustainable development;
- adaptability to enable employees to acquire the theoretical and practical knowledge of new technologies and processes needed to green their workplace;
- ability to work as a team towards solutions that reduce the environmental footprint of the organisation;
- entrepreneurship, for exploiting the opportunities of low-carbon technologies to adapt and reduce environmental impact;
- skills to innovate, identify opportunities and create new strategies to respond to green challenges;
- marketing skills to promote greener products and services;
- strategic and leadership skills, to create an enabling organisational culture for green production and transport.

Education is therefore key to solving different types of problems, including environmental problems. Properly shaped green skills in the process of formal education (implemented in various profiles and faculties), is the possibility of shaping social attitudes adequate to the needs of the current and future labour market and socio-economic processes, and thus preparing for the proper identification of market opportunities (including green challenges) and their exploitation through the search for and application of, for example, the right business concept.

Green skills education should be based on a strong theoretical basis (knowledge of concepts and processes), but also on a strongly example-oriented education that teaches how to evaluate different innovation projects, how to look for environmentally and economically friendly solutions and how to shape students' inclination to think and act in a green project perspective.

Skills development is very important for socio-economic development and therefore the involvement of the EU in the support processes for the implementation of financial support programmes for green skills is of utmost importance. These issues are addressed in the following sections, both at EU level and from the perspective of an individual project.

2. Existing EU policy in green skills development

According to Articles 165 and 166 of the Treaty on the Functioning of the European Union, education remains the exclusive competence of the Member States. The Treaty grants the EU only soft competences in these areas, focusing mainly on coor-

dinating, complementing and supporting the actions of the Member States. The European Parliament and the Council of the European Union (Education Ministers) adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, in order to achieve the main objective, i.e. the development of quality education.[10]

The basis for the issue of green skills development in the European Union should be sought primarily in the document entitled: "A European Economic Recovery Plan", in which the strategic objectives were identified, among them included: "Speed up the shift towards a low carbon economy. This will leave Europe well placed to apply its strategy for limiting climate change and promoting energy security: a strategy which will encourage new technologies, create new 'green-collar' jobs and open up new opportunities in fast growing world markets, will keep energy bills for citizens and businesses in check, and will reduce Europe's dependence on foreign energy."[11] Therefore, as has been emphasised, the issue of developing green jobs should be identified with the transition to a low-carbon economy and what it entails, i.e. changes in the operational processes of production and service provision to reduce emissions of heat-trapping gases, increase energy efficiency and increase the use of renewable energy. The colloquial term "green collar" should be clarified. The name is metaphoric to other terms that refer to jobs involving office work (white-collar jobs) and manual labour (blue-collar jobs), which originated in writing in the United States of America.[12] The correct term is "green jobs", defined by the International Labour Organisation[13] as follows: "Green jobs are decent jobs that contribute to preserve or restore the environment, be they in traditional sectors such as manufacturing and construction, or in new, emerging green sectors such as renewable energy and energy efficiency. Green jobs help:

- Improve energy and raw materials efficiency
- Limit greenhouse gas emissions
- Minimize waste and pollution
- Protect and restore ecosystems
- Support adaptation to the effects of climate change".

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[10] Consolidated version of the T*reaty on the Functioning of the European Union – Part three: Union Policies and Internal Actions – Title XII: Education, Vocational Training, Youth and Sport – Article 165* (ex Article 149 TEC), Official Journal 115, 09/05/2008 P. 0120 – 0121.

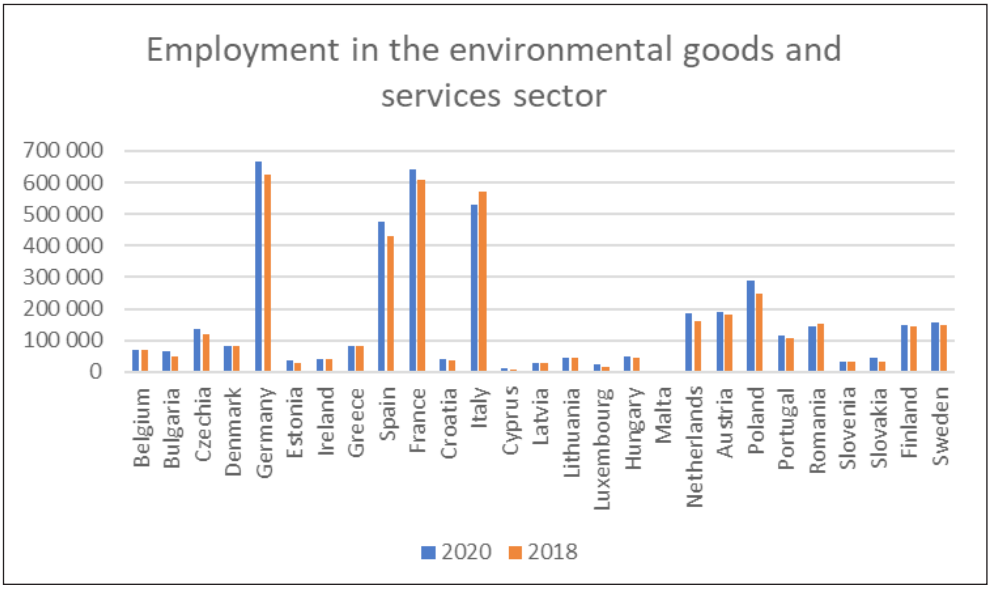
[11] European Commission, *A European Economic Recovery Plan*, Brussels 2008, p. 4, https://ec.europa.eu/economy_finance/publications/pages/publication13504_en.pdf (18.01.2024).

[12] R. Howells, *Why Do We Classify Jobs by Collar Color? Is Your Collar Blue, White, or Pink?*, "Medium" 2008, https://icemaverick88.medium.com/why-do-we-classify-jobs-by-collar-color-895dfab122d1 (18.01.2024).

[13] International Labour Organization, *What Is a Green Job?*, https://www.ilo.org/global/topics/green-jobs/news/WCMS220248/lang--en/index.htm (19.01.2024).

Considering the European Union, it should be noted that there is no single, binding definition of green jobs. In this regard, reference was made to definitions of others, inter alia ILO. And in the study "Public Employment Services and Green Jobs. Analytical paper", prepared by the Commission's Directorate-General for Employment, Social Affairs and Inclusion,[14] where highlighted: "green jobs associated with environmentally friendly industries, including renewable energy, eco-construction and waste management."[15] Simultaneously, the Eurostat identified green jobs with jobs in environmental economy, which is statistically defined as the environmental goods and services sector (EGSS),[16] including sixteen categories and various subcategories, inter alia: protection of ambient air and climate; waste management; wastewater management; management of energy resources.[17] The figure 1 presents data of employment in the environmental sector goods and services in European Union Member States in two years – 2018 and 2020.

Figure 1. Employment in the environmental sector goods and services in European Union Member States in two years – 2018 and 2020



Source: based on Eurostat, *Employment in the Environmental Goods and Services Sector*, https://ec.europa.eu/eurostat/databrowser/view/envacegss1/default/table?lang=en (19.01.2024).

[14] A. Cox, B. Foley, *Public Employment Services and Green Jobs*, Brussels 2013.

[15] *Ibidem*, p. 2.

[16] Eurostat, *Environmental Economy – Statistics by Member State*, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Environmental_economy_%E2%80%93_statistics_by_Member_State (19.01.2024).

[17] Eurostat, *Environmental Goods and Services Sector*, https://ec.europa.eu/eurostat/cache/metadata/en/envegsesms.htm (19.01.2024).

The number of full-time equivalent employees in the environmental goods and services sector in the European Union in 2018 was 4 608 000 and in 2020, was 5 065 000. The highest employment rate in this sector was recorded in Germany, France, Italy and Spain.

According to Barbara Kryk: "Regardless of the nature of the definitions, their analysis shows that there are 3 categories of green jobs:

- directly related to environmental protection;
- indirectly related to environmental protection;
- determined by changes in consumer income and expenditure.

Within each of these categories, it is possible to list economic sectors that have long been "'green' and those that are just 'greening' or emerging (modern). A distinctive feature of green jobs is that they encompass a wide range of workers needed, as green collar workers are also workers in green sectors."[18]

Follow EU documents in historical perspective, the issue of green jobs was also highlighted in the "Europe 2020. A European strategy for smart, sustainable and inclusive growth" in the context of achieving "sustainable future", as José Manuel Barroso emphasized.[19] This document presented, among the flagship initiatives, the one entitled "An Agenda for New Skills and Jobs", aimed at maintaining existing jobs and creating new ones. In the former respect, they can be related inter alia with "re-skilling of blue collar workers with a view to a transition towards green-collar jobs", and in the second "significant investments in "green" skills need to be made to ensure Europe lives up to its ambition of having 3 million green collar workers by 2020."[20] On the need to develop the job of a new sustainable economy stated also the European Parliament in resolution[21] and the Employment Committee in the dedicated report.[22]

In "the European Green Deal" it was highlighted that: "The transition is an opportunity to expand sustainable and job-intensive economic activity. There is significant

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18 B. Kryk, *Czas na zielone kołnierzyki*, "Ekonomia i Środowisko" 2014, vol. 3, no. 50, p. 13.

19 European Commission, *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*, Brussels 2010, https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf (19.01.2024).

20 European Commission, *An Agenda for New Skills and Jobs: A European Contribution towards Full Employment*, Strasbourg 2010, p. 9.

21 European Parliament, *European Parliament Resolution of 7 September 2010 on Developing the Job Potential of a New Sustainable Economy*, https://www.europarl.europa.eu/doceo/document/TA-7-2010-0299_EN.pdf (19.01.2024).

22 Council of the European Union, *Towards a Greener Labour Market – The Employment Dimension Of Tackling Environmental Challenges – EMCO Final Report*, Brussels 2010, https://data.consilium.europa.eu/doc/document/ST-16514-2010-ADD-1/en/pdf (19.01.2024).

potential in global markets for low-emission technologies, sustainable products and services. Likewise, the circular economy offers great potential for new activities and jobs."[23] In 2020 the European Commission presented "European Skills Agenda for sustainable competitiveness, social fairness and resilience", among the 12 actions listed were: Skills to support the green and digital transitions.[24] Regarding the green transition was stated: "The Commission will support the acquisition of skills for the green transition by:

- Defining a taxonomy of skills for the green transition, which will allow the statistical monitoring of the greening of our professions.
- Agreeing with Member States a set of indicators to allow monitoring and statistical analysis of developments in green skills.
- Developing a European competence framework on education for climate change, environmental issues, clean energy transition and sustainable development, which will spell out the different levels of green competence.
- Supporting the development of a core green skills set for the labour market to guide training across the economy with a view to creating a generation of climate, environment and health conscious professionals and green economic operators.
- Helping to integrate environmental and climate considerations into school, higher education, vocational education and training, as well as professional training."[25]

On 10 November 2020 The Pact for Skills was launched: "aims to support public and private organisations with maximising the impact of their investment in upskilling and reskilling, so they can thrive through the green and digital transitions."[26]

The Pact for Skills aims to use the European Social Fund+ to help train five million people for green jobs and a green recovery. It encourages stakeholders, local authorities and communities to use the Fair Transition Fund to support the retraining and employment of job seekers in regions affected by the transition to a low carbon economy.

From the overview of the documents, it is reasonable to conclude that there is a strong interest and commitment on the part of the EU institutions to promote and

[23] European Commission, *The European Green Deal*, Brussels 2019, p.7.

[24] European Commission, *Commission Presents European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, 1 July 2020, https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9723&furtherNews=yes#navItem-1 19.01.2024).

[25] *Ibidem*.

[26] European Commission, *About the Pact for Skills*, https://pact-for-skills.ec.europa.eu/about (19.01.2024).

develop green skills in the context of maintaining and creating new jobs, not only to recover from the crisis but also to meet the challenges of the green transition.

In addition, the development of green skills is supported by the EU through the Erasmus+ programme, which provides opportunities to develop forward-looking skills and partnership projects.

3. Developing green skills

As part of the SDGLabs project,[27] research was carried out into the ownership and green skills development opportunities for potential and existing employees and co-operators of social economy actors. This research was carried out among the three target groups of the project: representatives of social economy organisations, university teachers and social economy students.

The survey was conducted in the first half of 2022 among the listed target groups from the four project partner countries: Belgium, Czech Republic, Greece and Poland. In total, the survey covered: 81 social economy organisations, 33 academics teaching social economy related courses and 141 students on these courses. A diagnostic survey method was applied, using two research tools: a survey questionnaire and an in-depth interview questionnaire. The latter tool was used in the study of social economy organisations. The main aim of the research was a comprehensive and transnational research to verify what green skills social economy actors possess and develop in order to realise an inclusive green transformation.

Common to all three questionnaires were questions about knowledge and understanding of green skills, where to get information about them and the extent to which they are acquired through different activities. Of particular note was the question about the specific areas of such skills that could be acquired.

Familiarity with the term 'green skills' itself varied between respondents (Table 1).

[27] SDG LABS – *Harnessing the Potential of the Social Economy towards a Green Transformation through the Establishment of Socially Driven Green Labs within Universities*; Project number: 2021-1-PL01-KA220-HED-000032077; Budget: 361 221 EUR; Duration: 01.11.2021-01.05.2024; Info: https://sdglabs.uom.edu.gr/; consortium: University of the National Education Commission, Krakow (Poland, Kraków), Stimmuli For Social Change (Greece, Thessaloniki), Prague University of Economics and Business (Czech Republic, Praha), University of Macedonia (Greece, Thessaloniki), The Square Dot team (Belgium, Leuven), Association for Social Cooperatives (Poland, Poznań); the project components: IO 1. Green skills in the field of Social Economy – Research Study, IO 2. Socially Driven Green Labs Digital Gallery, IO 3. Socially Driven Green Labs capacity building programme, IO 4. Socially Driven Green business simulation model, IO 5. Socially Driven Green labs students' upskilling programme.

Table 1. Distribution of responses to the question on knowledge of the term "green skills" (in %)

Answer	SEE	HE Teachers	Students
Yes	65.4	48.5	34.1
No	23.5	39.4	40.4
Don't know	11.1	12.1	25.5

Source: own elaboration based on the research.

Analysis of the results using the Chi2 test showed a statistically significant difference (p=0.00019) between the reported level of knowledge of this concept.

The highest level of familiarity with the term "green skills" was reported by employees and people working in social economy organisations, which may indicate the practical dimension of the skills themselves acquired through practice.

The declaration of familiarity involved indicating what is specifically understood as a set of 'green skills'. In this question, respondents were given 6 categories to choose from: *1 – transition to low-carbon economy; 2 – transition to circular economy (closed loop economy); 3 – tackling climate change; 4 – new environmentally friendly economic sectors; 5 – green products/services; 6 – knowledge, capacities, values and attitudes needed to develop and support a society that reduces the environmental impact of human activities*.

The highest number of responses from social economy actors was in the last category, as well as from academics and students. They indicated "knowledge, capacities, values and attitudes needed to develop and support a society that reduces the environmental impact of human activities" as the definition of green skills to the highest degree (Table 2).

Table 2. Defining "green skills" by groups of respondents (in %)

Green skills	SEE	HE Teachers	Students
transition to low-carbon economy	29.6	27.3	27.0
transition to circular economy	32.1	33.3	17.0
tackling climate change	34.6	33.3	36.2
new environmentally friendly economic sectors	29.6	18.2	31.2
green products/services	29.6	18.2	31.2
knowledge, capacities, values and attitudes	65.4	81.8	69.5

Source: own elaboration based on the research.

However, an interesting relationship was observed when the level of knowledge reported by respondents was taken into account. Those who reported knowledge of the term "green skills" were the most likely to say that these were elements of transformation (to low-carbon economy and to circular economy). Both were chosen by more than 60% of those familiar with the term. Those who explicitly stated that they were not familiar with the term 'green skills' were most likely to say that it was "tackling climate change" and "knowledge, capacities, values and attitudes" (more than 33% each, respectively). In this case, a cautious approach to providing definitions can be observed, as well as a rather low degree of variation in the answers. In the case of respondents declaring a lack of orientation in terms of their knowledge of "green skills", the response "green products/services" as a synonym for "green skills" was given the highest degree of indication (24.3%).

Table 3. Defining "green skills" by declaration of knowledge of the concept (in %)

Green skills	Yes	No	Don't know
transition to low-carbon economy	62.0%	25.4%	12.7%
transition to circular economy	63.9%	26.2%	9.8%
tackling climate change	47.8%	33.3%	18.9%
new environmentally friendly economic sectors	51.4%	29.7%	18.9%
green products/services	47.3%	28.4%	24.3%
knowledge, capacities, values and attitudes	47.2%	33.1%	19.7%

Source: own elaboration based on the research.

Surveyed Students and HE Teachers responded that green skills are most needed in the production area of companies. To a slightly lesser extent, in transport and storage. The responses of the two groups were consistent and no significant differences were found between them (Table 4).

Table 4. Areas in which green skills are useful in organisations (responses from academic staff and students; scale: *1 – not at all, 5 – to the greatest extent*)

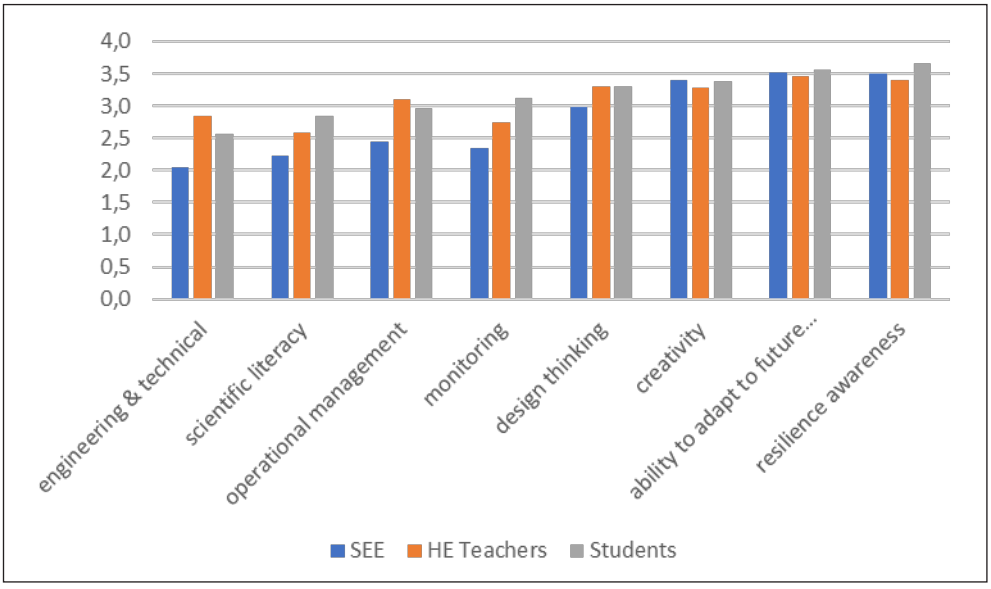
Area	HE Teachers	Students
production	4.48	4.34
transport & storage	4.12	4.09

Area	HE Teachers	Students
sales	3.64	3.46
finances	3.55	3.19
advertising	3.45	3.53

Source: own elaboration based on the research.

The most important part of the green skills survey was the question "To what extent do employees and students in social economy enterprises acquire green skills?" Respondents (from all groups) were most likely to mention typically "soft" aspects: creativity, ability to adapt to future challenges and awareness of resilience (Figure 2).

Figure 2. Indication of opportunities to acquire specific skills in social economy organisations (scale: *1 – not at all, 5 – to the greatest extent*)



Source: own elaboration based on the research.

As before, a rather interesting result was obtained by correlating the different areas of green skills acquisition in social economy entities according to the declaration of knowledge of this concept (Table 5).

Table 5. Areas of acquisition of "green skills" in social economy enterprises according to the declaration of knowledge of the concept

Specific Area	Yes	No	Don't know
engineering & technical	49.4	30.3	20.4
scientific literacy	49.8	28.7	21.4
operational management	49.1	30.3	20.7
monitoring	50.1	29.8	20.1
design thinking	51.7	28.2	20.1
creativity	50.2	28.2	21.6
ability to adapt to future challenges	50.9	29.1	20.1
resilience awareness	50.4	30.4	19.3

Source: own elaboration based on the research.

The area most frequently cited by respondents who said they were familiar with the term green skills was "design thinking". More than half of the indications also related to "monitoring", "creativity", "ability to adapt to future challenges" as well as "resilience awareness". For respondents who explicitly stated that they were unfamiliar with the concept, the references were evenly spread across all the propositions, although almost 1/3 of the references were in the area of "resilience awareness", as well as in areas not typically associated with the social economy: "engineering and technology", "operational management". For respondents who were not confident in their knowledge of green skills, "scientific literacy" and "creativity" were identified as specific areas where these could be acquired in social economy enterprises.

The above results indicate the important role of expertise, which underpins the possibility of developing green skills in specific areas (e.g. social economy actors). Not only rules imposed from above, but also personal responsibility expressed in knowledge and shaped skills can lead to good results in participating in the green transformation. The broad perspective that emerges from the research and the emphasis on knowledge gives room for a variety of actions. By combining different areas: legal, political or organisational, as well as individual actions, a positive, synergistic effect can be achieved that benefits the whole community and sustainable development.

Conclusion

Emphasising the importance of green transformation through political action and (if necessary) legal operationalisation can be of inestimable value in the process of shaping behaviour to better protect the natural environment. It is the European Union that is unfolding a series of powerful political efforts to stimulate and coordinate the integration of environmental and climate considerations into all levels of education and training, as well as to support public and private organisations in their skill-building investment projects. The EU, as the political leader of the green transformation, is committed to pushing forward the priority of making people aware/more conscious, urging them to adapt and educate, developing new skills not only to develop but also to make EU countries more resilient to crisis.

Where the law does not meet the economic challenges/keep pace with reality, or where it is not certain whether there is a need to cover a problem with a legal prescription, there is ample space to develop patterns or good practices to be used. The fundamental economic changes, which include new practices in a wide range of sectors, trigger a legal adaptation that is consistent with the standards that emerge on a daily basis, as economic actors follow the rules of economic calculation and social respect.

By endorsing the Pact for Skills, as part of the European Skills Agenda and based on the European Pillar of Social Rights, the EU has recognised the commitment of a wide range of stakeholders: enterprises, public authorities at national, regional and local level, workers, industrial organisations, social partners, education and training providers, chambers of commerce and employment services. This message confirms the bottom-up approach in the process of supporting the delivery of incentives (through networking, knowledge updates, guidance and resource facility) to upskill and reskill workers in the European Union countries and beyond. By shaping social attitudes that are open to identifying (green) market opportunities and ready to apply them in business projects, the stable foundation for environmentally and economically friendly solutions is designed and operated.

In the process of political and legal adaptation in the sense of green competence development, the expertise forged in social economy entities is of key importance. The sense of agency, responsibility and flexibility that characterise these organisational structures is a fertile ground for the growth/stimulation of cognitive, affective and even psychomotor dimensions of green skills in particular.

In order to transform the workforce in all sectors and at all levels in the adaptation of production processes to the changes brought about by environmental requirements, technical and soft skills and an understanding of sustainable development are

indispensable. Values and attitudes are also the basis for effective communication, negotiation, conflict resolution and leadership.

No less important is the ability to respond to incentives for cleaner production, more circular production and consumption, more low-carbon technologies, networking and dissemination of good practices (lean production management, life-cycle management).

The creation of social value, while protecting the natural environment, neutralising environmentally harmful practices and promoting environmentally friendly activities, supports the processes of seeking to diversify sources of income and business models open to the socialisation of profits. The catalytic role of local resources in recognising the complementarity of green technologies and organisational practices, as well as norms and expectations, could be of particular added value through sectoral and/or regional initiatives.

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YOUNG SCHOLARS SECTION

Fundamental Rights and Climate Change – Exploring New Perspectives and Corresponding Remedies
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Climate-Induced Migration, a Dangerous Legal Gap in European Asylum Law

Abstract: Climate-induced migration is a contemporary phenomenon that is likely to become massive in the years to come, with up to a billion migrants by 2050 according to some specialists. Nowadays, international displacement is excluded from any refugee definition due to the general and indiscriminate nature of the impacts resulting from climate change. Recent developments in Human rights may suggest an application of the principle of *non-refoulement* on the basis of the right to life. However, it is argued that such a development would trap climate migrants between the impossibility of obtaining an adequate international protection and their protection against any kind of *refoulement*.

This chapter will therefore introduce the decisions of the United Nations Human Rights Committee in relation to climate change-induced and propose an analysis of the reception of the method set out by the UN Committee, using selected examples of cases from European national courts. Indeed, a new extensive interpretation of Article 19 of the EU Charter of Fundamental Rights (*non-refoulement*) in order to avoid the violation of the fundamental rights of non-EU citizens – namely the right to life (Art. 2), the right to the integrity of the person (Art. 3) or the respect of private and family life (Art. 7) – would allow the recognition of a principle of non-removal to such displaced persons in the European framework.

Scholars studying the subject focus mainly on the adoption of a new international convention, which appears not only necessary but urgent. However, in the meantime, an extensive interpretation of Article 19 of the Charter might

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fill the gap. Therefore, this paper will propose the development of an ambitious and modern reading of the Charter of Fundamental Rights while launching the elaboration and adoption of proper European legislation.

Keywords: climate change, climate change-induced migration, European Union, human rights, migration

1. Climate change and migration

At a time when the reports of the Intergovernmental Panel on Climate Change (IPCC) are forcing us to prepare for a world +4°C, it seems essential to target legal studies at the phenomenon of climate migration. Indeed, one clear consequence of the climate crisis will be human mobility, referred to as climate change-induced migration (hereinafter the 'CCIM') or, more simply, climate migration. Despite the numerous forms of migration triggered by climate change, they all have in common the fact that people are forced to leave their place of origin, and in some instances their country, because the land becomes uninhabitable.

What may appear to be an essentially academic topic is in fact a very tangible and major issue. Indeed, according to the most accurate estimates, around 200 million people could be on the streets by 2050.[2]

In reality, predictions are very disparate because of the multitude of triggers of the phenomenon. According to the famous *Kälin* typology,[3] five types of migration can be identified. The first category is the one most often evoked. It concerns people displaced by slow-onset phenomena (desertification, sea level rise). These slow phenomena are particularly representative of the slow and inexorable nature of climate change. The second is displacement because of sudden and extreme events (hurricanes, floods, *etc.*). This typically includes displacements linked to disasters. The increase in the unpredictability, frequency and power of these phenomena fully inscribes them within the framework of climate change. Next is the separate issue of the citizens of small island states, who are confronted to the first two categories, and to whom another problem is added: the fear of the disappearance of their state. In addition, we have persons displaced by government-imposed resettlement, a category that has received little study in the literature because it has little international character. Finally, we have the last category which overlaps with our traditional vision

[2] N. Stern, *The Economics of Climate Change: The Stern Review*, Cambridge 2007; K.K. Rigaud et al., *Groundswell: Preparing for Internal Climate Migration*, Washington, D.C. 2018.

[3] W. Kälin, N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Geneva 2012.

of asylum. These are people displaced by persecution, violence caused by the visible effects of climate change. All these effects can trigger or reinforce migration, through a cumulative push or pull effect.

The problem is often referred to by the general public as 'climate refugees', and even some academics defend the use of this term.[4] However, the concept has been considered for long as a misnomer by legal scholars[5] as there is currently no legal definition of these *climate refugees* and no asylum law takes account of climate change-induced migration. The traditional definition provided by the Geneva Convention[6] cannot be applied as it was modelled in the immediate post-war period on the situation of people fleeing their persecuting state.[7] In the case of climate migration there is no identifiable persecution, therefore, no State that can be held responsible for migration.

This is reflected in the European Union (hereinafter 'EU') law. While Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter')[8] reaffirms the right to asylum as defined by international law, this right is set out in detail in the Qualification Directive. However, neither the definition of refugee,[9] which is based on the definition given in international law, nor subsidiary protection as defined by the EU,[10] nor temporary protection[11] provide a legal framework for the protection of climate migrants.

In these conditions, it appears that the adoption of a proper legislation would be necessary someday. However, it is to be noted that on a global scale, the adoption of

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4 F. Gemenne, *The Refugees of the Anthropocene* [in:] *Research Handbook on Climate Change, Migration and the Law*, B. Mayer, F. Crépeau (eds), Cheltenham 2017.

5 C. Cournil, *The Inadequacy of International Refugee Law in Response to Environmental Migration* [in:] *Research Handbook on Climate Change, Migration and the Law*, B. Mayer, F. Crépeau (eds), Cheltenham 2017.

6 United Nations, *Convention Relating to the Status of Refugees*, 1951, art. 1(A)2.

7 D. Alland, C. Teitgen-Colly, *Traité du droit de l'asile*, Paris 2002, p. 75; A. Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, Geneva 1997.

8 *Charter of Fundamental Rights of the European Union*, "Official Journal of the European Union" 2000, C 364/01.

9 *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, "Official Journal of the European Union" 2011, L 337/9, art. 9.

10 *Ibidem*, art. 15.

11 *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, "Official Journal of the European Union" 2001, L 212.

a new convention appears not only difficult but also jeopardizing the current protection refugees can enjoy under the Geneva Convention instrument.[12] The adoption of a legislation at the European Union level, through an *ad hoc* instrument or by an amendment to the subsidiary protection appears to be a good compromise. Indeed, several academic studies[13] have suggested amending subsidiary protection to cover climatic migration. For example, it has been proposed to develop a fourth subsidiary protection for "serious group threats" or more directly for situations of natural or man-made disaster. This was attempted by several MEPs during the revision of the Qualification Directive (2017-2024),[14] but these proposals never got beyond the stage of trialogue negotiations. Therefore, the final text, voted on in spring 2024, contains no progress on the issue.

Nevertheless, the absence of new instruments does not prevent the problem from arising in practice. It is therefore a question of seeing how the law in force enables the national courts of the Member States of the European Union to respond, even if only partially, to the challenge.

2. The global rise of a dispute within the UN Human Rights Committee

In response to the major challenge posed by climate change, the courts with jurisdiction over human rights have witnessed the emergence of litigation based on human rights and climate change.

This is particularly the case in international law, where the States' actions – or inaction – have been challenged on several occasions before the UN Human Rights Committee (UN HRC). The latter has, through a few decisions, developed an integrated human rights-based approach to climate change issues. This has been achieved

12 C. Vlassopoulou, *Les migrations environnementales entre secteurs d'action publique*, "Revue. Asylon(s)" 2008, no. 6.

13 E. Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, "Columbia Journal of European Law" 2017, https://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/ (8.07.2023); E. Delval, *From the U.N. Human Rights Committee to European Courts: Which Protection for Climate-Induced Displaced Persons under European Law?*, 8 April 2020, https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/ (8.07.2023).

14 N. Keckhut, *Climate Change and Migration: The Development of a European Legal Approach between International Protection and Human Rights*, Master's thesis, Strasbourg 2024 [thesis for the master degree], pp. 119-145.

through decisions relating to pollution issues such as *Portillo Cáceres v. Paraguay*[15] and *Benito Oliveira Pereira v. Paraguay*.[16]

In this context of emerging litigation, the UN Human Rights Committee was quickly confronted with the issue of climate migration. In the *Ioane Teitiota v. New Zealand* decision,[17] a Kiribati citizen who was denied asylum in New Zealand brought his case before the UN Committee on the grounds of an alleged violation of his right to life. Ioane Teitiota and his legal counselor argued that his deportation, and the one of his family, is threatening his right to life because of the lack of resources, especially drinkable water, and of the progressive sinking of his island. First of all, the Committee recalled the obligation of States parties not to extradite, deport, expel or otherwise transfer a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).[18] The Committee very clearly linked the right to life to the issue of dignity.[19] Although the Committee did not recognize a violation of the right to life in this case, it did admit that this could be the case in situations of climate migration where the danger appeared to be more real and more personal.

The *Billy* decision[20] was handed down on 22 September 2022, just one day before a wave of climate protests around the world. It does not directly concern international climate displacement. However, it is often seen as a logical continuation of the approach described by *Teitiota*. Firstly, it should be noted that the Committee declared admissible the complaints of the applicants, indigenous Australian citizens of the Ocean Islands, under Articles 6 (right to life), 17 (right to respect for private life, family and home), 24 (1) (necessary measures of protection for children) and 27 (right to enjoy one's own culture) of the International Covenant on Civil and Political Rights. Concerning the right to life (Article 6), the Committee reiterated much of its previous case law, already summarized in the *Teitiota* judgment. It quotes directly from the judgment, stressing the need to interpret the right to life broadly and stating that this

15 United Nations Human Rights Committee, *Portillo Cáceres et al. v. Paraguay*, 20 September 2019, CCPR/C/126/D/2751/2016.

16 United Nations Human Rights Committee, *Benito Oliveira Pereira et al. v. Paraguay*, 12 October 2021, CCPR/C/132/D/2552/2015.

17 United Nations Human Rights Committee, *Ioane Teitiota v. New Zealand*, 7 January 2020, CCPR/C/127/D/2728/2016.

18 *Ibidem*, para. 9.3.

19 *Ibidem*, para. 9.4.

20 United Nations Human Rights Committee, *Daniel Billy v. Australia*, 22 September 2022, CCPR/C/135/D/3624/2019.

right 'requires States parties to adopt positive measures to protect the right to life'.[21] With regard to the right to privacy, family, home or correspondence (Article 17), the Committee is more innovative. In the Committee's view, the applicants' traditional way of life and their connection with the land and sea bring these elements within the scope of protection of Article 17 of the Covenant.[22] Strikingly, in the *Billy* case, delays in building infrastructure to prevent environmental damage led the Committee to consider that Article 17 of the International Covenant on Civil and Political Rights had been violated.

The combined reading of *Billy* and *Teitiota* suggests that a *non-refoulement* obligation for environmental displaced persons would exist in theory for the right to life, but also in a much more tangible way for the right to private and family life.

3. The europeanization of the litigation: developing a human rights-based approach

In Europe, the main instruments concerning human rights are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union. Interestingly, the rights referred to by the UN HRC Committee in the *Teitiota* and *Billy* cases are rights that have equivalents in European human rights law. Indeed, the right to life, provided for in Article 6 of the ICCPR, is also provided for in Article 2 of the ECHR and Article 3 of the Charter. Similarly, the prohibition of torture and inhuman treatment is laid down in Article 7 of the ICCPR, Article 3 of the ECHR and Article 4 of the Charter. Finally, the right to private and family life, provided for in Article 17 of the ICCPR is set out in Article 8 of the ECHR and Article 7 of the Charter.

Furthermore, just as the Committee recognized in the *Teitiota* case that there is indirect protection from removal[23] if that removal constitutes a serious violation of a human right guaranteed by the Covenant,[24] the European Court of Human Rights (ECtHR) has acknowledged this since the 1980s with the *Soering* case.[25]

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21 *Ibidem*, para. 8.3.

22 *Ibidem*, para. 8.10.

23 Removal is defined as the "act of a state in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain".

24 United Nations Human Rights Committee, *Ioane Teitiota*…; United Nations Human Rights Committee, *Benito Oliveira*…, para. 9.3.

25 European Court of Human Rights; *Case of Soering v. The United Kingdom*, Strasbourg 1989, no. 14038/88, no. 8319/07 and no. 11449/07.

While the ECtHR has not yet had to deal with situations of climate migration, national courts have been obliged to take a stance on this emerging legal issue. The Italian Supreme Court of Cassation, for example, has fully acknowledged the Committee's reasoning. Indeed, in 2021, a foreigner from Niger was seeking to overturn an Italian tribunal's rejection of his request for international and humanitarian protection. The *Corte suprema di cassazione* recognized that humanitarian protection should have been granted when the situation in the country of origin did not allow a 'minimum essential limit of guarantee' for the individual's right to life. What is particularly key in this ruling is that the Court specifically referred to the *Teitiota* finding, reproducing part of its interpretation.[26] The general atmosphere in which Italian law is evolving on this issue has paved the way for the Court of Cassation's decision. Indeed, interpretation has already gone in this direction, without going as far. In a ruling handed down by the *Tribunale di L'Aquila* on 18 February 2018,[27] the Italian court had already granted the humanitarian protection to a Bangladeshi citizen who had declared himself hopelessly in debt after losing his farmland to flooding.

An even older practice exists in Austria concerning migration in the context of natural disasters related to the right to life and dignity. Indeed, since 2005, the Asylum Act has made direct reference to Articles 2 and 3 of the European Convention on Human Rights.[28] In cases where the removal of the foreign national to his or her country of origin constitute a real risk of violation of Article 2 or Article 3 of the ECHR, subsidiary protection shall be granted. This led to the development of consistent Austrian case law, which has fully integrated natural disasters into the assessment of the 'real risk' of inhuman or degrading treatment. This was even the subject of a constitutional judgment, in which the Constitutional Court held that failure to take sufficient account of country-of-origin information leads to a violation of Article 3 of the ECHR.[29]

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[26] The Supreme Court of Cassation of Italy, Second Civil Section, *I.L. v. Italian Ministry of the Interior and Attorney General*, 24 February 2021, no. 5022/21, no. 19/00135, para. 8.

[27] Court of L'Aquila, Italy, *X v. Ministry of the Interior*, 18 February 2018, no. 1522/17, no. 19/00135.

[28] 100/2005 Federal Asylum Act (Austria), no. 2005:716, part 2, section 4, article 8.

[29] See Constitutional Court (VfGH) (Austria), 19 September 2011, U256/11; Constitutional Court (VfGH) (Austria), 12 December 2019, E1170/2019.

4. The human rights-based approach applied to the case of sick foreign nationals

The case law established by the Strasbourg Court on the possible violation of the right to life or the prohibition of inhuman or degrading treatment in cases of certain *refoulement* has made its way into EU law. The Charter of Fundamental Rights of the EU, adopted in 2000, ten years after the *Soering* case, incorporates the case law in its Article 19(2). While the contours of this article remain unclear, as do the cases in which it would lead to a violation, there is one area where it is very well embodied, and that is in the case of seriously ill foreign nationals. In EU law, it is incarnated in Article 5 of the so-called 'Return Directive,'[30] which states that 'when implementing this Directive, Member States shall take due account of: c) the state of health of the third-country national concerned'.

Transposed, not without difficulty, into the law of the Member States, the situation was ruled by the CJEU in 2022 in *X v State Secretary for Justice and Security*[31] in the context of a Russian national who developed a rare form of blood cancer is currently receiving treatment in the Netherlands and was refused asylum. The Court prevented any return decision if there is a real risk of a significant, irreversible and rapid increase in the applicant's pain, should he return. This decision fully incorporates the case law well established by the ECtHR between 1997 and 2016.[32]

What is particularly interesting is that this article, inherited from the case law of the ECtHR, was used by a French court to recognize what some have called the 'first French climate refugee.'[33]

This case challenged on the grounds of *ultra vires* an order requiring a Bangladeshi national, named *Sheel* in the French press, to leave French territory. The applicant suf-

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30 *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, "Official Journal of the European Union" 2008, L 348/98, art. 5.

31 Judgment of the Court (Grand Chamber) of 22 November 2022, *X v. Staatssecretaris van Justitie en Veiligheid*, Case C-69/21, no. C-285/12.

32 European Court of Human Rights; *Case of Soering…*, note 21; European Court of Human Rights, *D. v. The United Kingdom*, 2 May 1997, no. 30240/96; European Court of Human Rights, *Case of N. v. The United Kingdom*, Strasbourg 2008, no. 26565/05; European Court of Human Rights, *Case of Paposhvili v. Belgium*, Strasbourg 2016, no. 41738/10, no. 30696/09.

33 E. Dourel, *Toulouse : Pourquoi « Sheel », un Bengali asthmatique, est-il sans doute le premier réfugié climatique en France ?*, 7 January 2021, https://www.20minutes.fr/planete/2946631-20210107-toulouse-pourquoi-sheel-bengali-asthmatique-doute-premier-refugie-climatique-france (8.07.2023); L. Lenoir, *La France a-t-elle accueilli son premier «réfugié climatique» ?*, 8 January 2021, https://www.lefigaro.fr/faits-divers/la-france-a-t-elle-accueilli-son-premier-refugie-climatique-20210108 (8.07.2023).

fered from a chronic respiratory pathology combining severe allergic asthma treated daily, and severe sleep apnea syndrome requiring the use of an electric ventilation device every night, which requires biennial maintenance and monthly replacement of his mask, filters and tubes. The Bordeaux Administrative Court of Appeal confirmed the ruling of the Toulouse Administrative Court, ruling at first instance, by adopting an innovative and detailed reasoning based on data relating to air quality in Bangladesh, as the applicant 'would find himself confronted in his country of origin with both an aggravation of his respiratory pathology due to atmospheric pollution.'[34] It would appear that the Court was directly inspired by the approach developed by the United Nations Human Rights Committee as seems to have adopted the Committee's General Comment 36 on the right to life.[35] Paragraph 26 of the latter states that 'the duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.'[36]

This approach was too innovative for the *Conseil d'État* that quashed the decision. According to France's highest administrative court, the administrative court of appeal made an error of law as it had to confine itself to 'ascertaining, having regard to the pathology of the person concerned, the existence of appropriate treatment and its availability under conditions allowing access to it.'[37] It remains to be seen whether a reversal of the case law is possible, and whether the administrative jurisdictions of other Member States will go along with the Bordeaux judges.

Conclusion

While national courts navigate the complex field of environmental migration litigation, with mixed results, EU legislation is needed. As a report from the European Parliament explains: 'EU support for a legal framework for "climate refugees" could make a difference.'[38] While the Charter was a step in the right direction, it needs precise legislative instruments to be implemented. Yet, the current European political

[34] Cour administrative d'appel de Bordeaux, 2ème chambre, *M.A (Sheel) v. Préfet de Haute Garonne*, 18 December 2020, no. 20BX02193, *Lebon*.

[35] United Nations Human Rights Committee, *General Comment No. 36 – Article 6: Right to Life*, 3 September 2019, CCPR/C/GC/36.

[36] *Ibidem*, para. 26.

[37] *Ibidem.*

[38] E. Noonan, A. Rusu, *The Future of Climate Migration*, Strasburg 2022.

climate offers little prospect and the recent failure during the revision of the Qualification Directive is a case in point.

In the absence of legislation, anticipation mounts for the reactions of the ECtHR and the CJEU. With climate litigation gaining momentum across Europe, invoking Article 3 of the Convention or Article 4 of the Charter to contest refusals of residence permits or deportation orders due to environmental concerns seems inevitable. Indeed, as the public rapporteur on what has been called 'France's first climate migration' case explains, if a removal order must be annulled in a climate context, it should be done based on 'article 3 of the ECHR, which must be established with sufficient certainty and personal character to be taken into account.'[39] Amidst the prevailing confusion exacerbated by UN Human Rights Committee ruling, a European jurisprudence that would unify the matter would be most welcome. This would allow European litigation to develop along clear lines and avoid differences in treatment that would jeopardize the coherence of the Common European Asylum System.

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Name Index

For many years legal thought and practice focused on the general concept of environmental rights as a legal tool meant to enforce the human right to a healthy and sustainable environment. Whilst there is an undeniable link between human rights and climate change, as illustrated notably by the global phenomenon of the climate change litigation, this monograph focuses on the growing role of potential, sectoral fundamental rights and tailored remedies available in the EU legal order in absence of a substantive fundamental right to a healthy environment in EU law. Against the background of the European Green Deal and its ambitious climate-neutrality goal by 2050, the book echoes the sustainability-based approach and its limits.

Contributors analyse two interrelated perspectives. On the one hand, authors explore the procedural dimension by discussing the climate litigation and the limits of the concept of human environmental rights, state liability for loss and damage caused to individuals as a result of breaches of EU law, national remedies available in case of bad condition of the environment as well as the limits of the public interest litigation and challenges related to climate claims against private actors in national law. On the other hand, contributors discuss substantive aspects from a global perspective of food insecurity, soil monitoring and resilience as well as digitalisation, green skills and climate-induced migration. With insights from leading experts, this work highlights the evolving tensions and expectations within the EU legal framework.

Essential for legal practitioners, policymakers, academics, and students of law and administration, this book offers a comprehensive exploration of the intersection between sustainability, climate action, and the protection of fundamental rights in EU law.

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