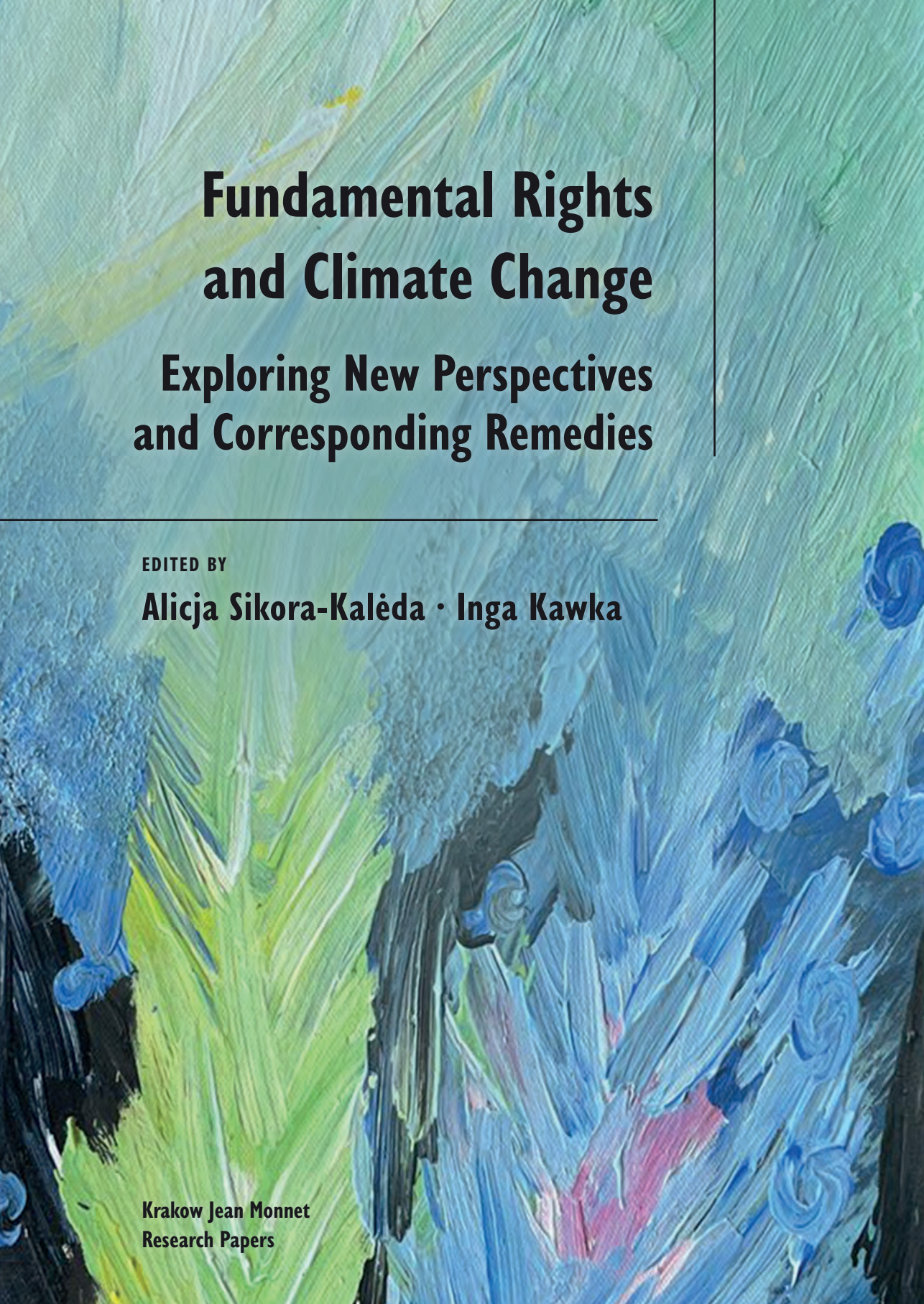

Fundamental Rights and Climate Change

Exploring New Perspectives and Corresponding Remedies

EDITED BY

Alicja Sikora-Kalėda · Inga Kawka

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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

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Ilona Przybojewska[1]

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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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.

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