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## The right to clean air as a special form of the right to environmental protection - international and national regulations

### Prawo do czystego powietrza jako szczególna postać prawa do ochrony środowiska – regulacje międzynarodowe i krajowe

#### Streszczenie

Artykuł jest próbą przedstawienia problematyki prawa do czystego powietrza i jego uregulowania w systemie prawnym na szczeblu międzynarodowym, regionalnym oraz wewnątrz krajowym. Współczesne społeczeństwo posiada coraz większą świadomość ekologiczną, a przez to oczekuje od organów publicznych podjęcia odpowiednich kroków celem unormowania prawnego wspomnianego zagadnienia. Zaznaczyć należy, że szczególnie dużą rolę w tym procesie odegrały ONZ oraz Unia Europejska. Obie organizacje stworzyły szereg aktów dotyczących omawianego zagadnienia w sposób pośredni, jak i bezpośredni. W artykule pochyłono się nad zagadnieniami zarówno prawa do czystego środowiska, jak i prawa do czystego powietrza, podkreślono różnice między tymi pojęciami, a także przedstawiono ich wpływ na rozwój prawodawstwa. Bardzo istotnym z perspektywy omawianej materii jest także orzecznictwo polskich sądów w tym zakresie i stanowisko, jakie przyjęła judykatura, nie uznając prawa do czystego powietrza jako prawa podmiotowego przynależnego każdej jednostce, ale przynależne całemu społeczeństwu, tym samym zamykając drogę obywatelom do uzyskania zaspokojenia roszczeń z tytułu nieudolności państwa w utrzymaniu wyznaczonych standardów powietrza.

**Słowa kluczowe:** prawo do czystego powietrza, prawo do czystego środowiska, dobra osobiste, ekologia, ochrona środowiska, prawa człowieka

#### Abstract

The paper is an attempt to present the issue of the right to clean air and its regulation in the legal system at the international, regional and domestic level. Modern society shows an increasing awareness of the environment, and thus expects public authorities to take appropriate steps to regulate

this issue. It should be noted that the UN and the European Union have played a particularly important role in this process. Both organizations have created a number of acts, affecting the discussed topic in direct as well as indirect ways. What is more, the paper focuses on both the right to a clean environment and the right to clean air, emphasizing the differences between these concepts, as well as discussing their impact on the development of legislation. What is additionally very important from the perspective of the presented issue is also the jurisprudence of Polish courts in this area and the position adopted by the jurisprudence without recognizing the right to clean air as a subjective right belonging to each individual, but belonging to the whole society, ipso facto closing the way for citizens to obtain satisfaction of claims for the state's inability to maintain the set air standards.

**Key words:** right to clean air, right to clean environment, personal rights, ecology, environmental protection, human rights

## I.

Nowadays, more and more people talk about ecology. This trend is not only positive, but above all very needed in view of the deepening climate crisis. Clean air is a prerequisite for the survival of the human species, and should therefore be a priority for both individual governments and ordinary people. However, the leaders of the world's largest countries do not seem to be interested in taking over initiative<sup>1</sup> in this area, which can be explained primarily by possible economic losses. Taking care of the environment, specifically of clean air, is unprofitable at this stage, and without top-down and systemic measures, ordinary people have very little chance of overcoming the ecological crisis alone. In order to start a real fight against air pollution, states – as they are mainly discussed here – should introduce appropriate legal regulations and instruments to enforce them.

Changes in law, which should also be emphasized, are of course taking place, but this process is too slow<sup>2</sup>. Individual countries or international organizations are

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<sup>1</sup> The irrationality of the actions of the leaders can be evidenced by the recent G20 Summit 2021 in Rome, at which the most influential people, who are at the head of global powers responsible for as much as 75% of greenhouse gas emissions, met to deliberate on economic and climate issues. The countries that are members of this group have both the means and real possibilities to change their climate policy, and yet these changes are minimal. Based on the press reports of the meeting of the group, we can read that in the near future significant and effective actions are to be taken to combat the climate crisis. This sounds absurd when one considers that the organization of the summit itself certainly did not serve the climate. At the end of the meeting, the leaders threw coins at the Trevi Fountain according to the local custom “to wish good luck in the fight against the climate crisis”. If people who have the means to really win this fight entrust it to luck, the future of our planet does not look bright. Claude Forthomme, “G20, the Club of Richest Nations, Disappoints On Climate Change” <https://impakter.com/g20-club-richest-nations-disappoints-climate/> (access: 22.02.2022).

<sup>2</sup> According to L. Karski, modern legislature is faced with the challenge of formulating a right or a collection of human rights to the environment. See. L. Karski, *Prawa człowieka i środowisko*, *StudiaEcologia et Bioethicae* 2006, No. 4, p. 310.

trying to introduce adequate changes in legal regulations and it is their analysis that is the subject of consideration in this paper. The aim of it is to present regulations strictly concerning the right to clean air at the global and regional levels, as well as at the national level. In this last case, when analyzing legal acts issued by Polish authorities, it will also be necessary to recall the relevant case-law of the Supreme Court.

At the very beginning of the considerations, the question should be asked about what the right to clean air is. This term is increasingly recurring in the public debate, sometimes put on an equal footing with other human rights. Therefore, it seems reasonable to agree on its correct understanding, genesis and legal basis in the various systems at each of the above-mentioned levels. In the course of the analysis, it is necessary to establish the legitimacy and possible enforcement of the right to clean air in international, EU and Polish law. These findings are made on the basis of research methods typical for legal sciences, i.e. linguistic-dogmatic, historical and comparative.

## II.

Human rights, simply put, are “the special kind of subjective rights to which a person is entitled and which serve him by virtue of natural law”<sup>3</sup>. They do not exist, therefore, due to the fact of mere acknowledging their existence by states and legal systems, but only independently and they belong to every human being by the very fact that people possess an inherent human dignity which is inalienable. Taking into account the definition discussed, the right to clean air should certainly be included in the category of human rights and, more precisely, in the third generation of them<sup>4</sup>. Unfortunately, despite the obviousness of this statement, it does not mean that this right is universally guaranteed and protected by states which still quite skillfully evade responsibility for the state of the environment.

In the media, the term “the right to the environment” is repeatedly used, and it is often confused with the right to clean air. However, they are not identical, although they are very closely related. The right to a clean environment is a much broader concept, including both the right to clean air and, for example, the right to clean water. However, no document has been issued at either international or regional level which would confirm *expressis verbis* the existence of the right to the environment.

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<sup>3</sup> M. Granat, *Prawo konstytucyjne*, Warszawa 2021, pp. 139–140.

<sup>4</sup> K. Drzewicki, *Trzecia Generacja praw człowieka*, Sprawy Międzynarodowe 1983, No. 10.

At this point, the legislative activity of the United Nations should be recalled in the first place<sup>5</sup>. Over the decades of the UN's existence, the problem of the right to the environment has been present quite frequently. And so, it was one of the subjects of the work of the World Conference on the Human Environment in Stockholm in 1972, where it was adopted that "a man has the right, among other things, to freedom, equality and appropriate living conditions, in the environment whose quality allows us to live with dignity and prosperity<sup>6</sup>." The adoption of a resolution by the UN Commission on Human Rights in 1994, which directly addressed people's right to the environment as a human right, should be seen as another breakthrough in the recognition of the right to live in a clean environment<sup>7</sup>. Resolution 48/13, adopted on 8 October 2021, by the Human Rights Council (UNHRC), a subsidiary body of the UN General Assembly, which replaced the above-mentioned Commission, was also a confirmation of the existence of the right to the environment. In this Resolution, the UNHRC recognised access to a safe and clean environment as a fundamental human right<sup>8</sup>. More specifically, according to the text of the Resolution, "a clean, healthy environment in the proper state of equilibrium is a human right<sup>9</sup>." Still, we are only talking about the right to clean environment.

The right to clean air, constituting the subject of consideration in this paper, which is a detailed specification of the right to the environment, is unfortunately not regulated in any of the basic and most important documents in the field of human rights developed by the United Nations. Suffice it to note that the right to clean air was not regulated either in the Universal Declaration of Human Rights of 1948, or in the International Covenants on Human Rights of 1966, or in any official document issued subsequently. However, this does not mean that such a law does not exist at all. In recent years, the existence of the right to clean air has been repeatedly confirmed directly or indirectly in case-law at both regional and national levels.

It seems that also the UN admits, with the requisite degree of certainty, the existence of the right to clean air, as evidenced by the statement of 2018 by the UN High Commissioner for Human Rights at the First Global Conference on Air Pollution and Health, who stated that "there is no doubt that all people have the right to breathe clean

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<sup>5</sup> T. Gadkowski, *Nowe instytucje współpracy w ramach systemu Organizacji Narodów Zjednoczonych na przykładzie międzynarodowego prawa ochrony środowiska* [in:] *System Narodów Zjednoczonych z polskiej perspektywy*, ed. E. Cała-Wacinkiewicz, Warszawa 2017, pp. 59–80.

<sup>6</sup> <http://www.un.org.pl/prawa-czlowieka/trzecia-generacja-praw-czlowieka/3205#> (access: 18.02.2022).

<sup>7</sup> *Ibid.*

<sup>8</sup> M. Andrzejewska, UN Day 2021: *Dostęp do czystego, zdrowego środowiska będącego w stanie właściwej równowagi prawem człowieka*, <https://www.gridw.pl/aktualnosci/unep/2923-un-day-2021-dostep-do-czystego-healthy-environment-being-in-a-state-of-proper-balance-of-human-being> (access: 9.02.2022).

<sup>9</sup> The human right to a clean, healthy and sustainable environment (A/HRC/48/L.23/Rev.1).

air<sup>10</sup>.” Another confirmation can be found in the 2019 report prepared by the UN Special Rapporteur David R. Boyd and presented in Geneva, in which it was stated that “certainly, if there is the human right to clean water, there must be the right to clean air. Both are essential for human life, health and dignity<sup>11</sup>.” The report itself was an attempt to answer the question of what the relationship between human rights and the right to clean air looks like. Particular emphasis is placed on the lack of a unified air quality system in most of the countries belonging to the organization and on the glaring consequences of this negligence, which we are already facing or will encounter in the near future<sup>12</sup>.

In addition, David R. Boyd recommended to the UN General Assembly adopting a resolution on the right to clean air. In his opinion, taking such a step would certainly help to stimulate and direct actions aimed at improving the actual situation of the environment<sup>13</sup>. If the right to clean air had a legal basis, then it would be much easier to enforce its violations by states.

### III.

In the context of the implementation of the right to clean air, it is worth mentioning the regulations introduced by the European Union. Although neither primary nor secondary law provides grounds for deriving an individual's substantive right to the environment, this right is present in EU legislation. This state of affairs results from the EU's obligation to protect the environment and to improve its quality<sup>14</sup>.

Article 37 of the Charter of Fundamental Rights of the European Union states that a high level of environmental protection and the improvement of environmental quality must be integrated into Union policies and ensured compliant with the principle of sustainable development<sup>15</sup>. However, this is not a precise regulation that would unequivocally indicate a specific human right<sup>16</sup>.

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<sup>10</sup> <https://breathelife2030.org/news/countries-legal-obligation-ensure-clean-air-says-un-human-rights-representative/> (access: 22.02.2022).

<sup>11</sup> Report number A/HRC/40/55 of 8 January 2019 <https://publicystyka.ngo.pl/prawo-do-czystego-i-healthy-air-a-right-man> (access: 22.02.2022).

<sup>12</sup> According to the data cited in the report, more than six trillion people (1/3 of whom are children) regularly inhale polluted air, which leads to health and life threatening conditions and, consequently, to the premature death of 7 million people. See <https://breathelife2030.org/news/countries-legal-obligation-ensure-clean-air-says-un-human-rights-representative/> (access: 22.02.2022).

<sup>13</sup> <https://www.ccacoalition.org/ru/node/3007> (access: 23.02.2022).

<sup>14</sup> K. Doktor-Bindas, *Prawo do czystego powietrza*, Przegląd Konstytucyjny 2020, No. 4, p. 104.

<sup>15</sup> More about the principle of sustainable development is written by E. Olejarczyk, *Zasada zrównoważonego rozwoju w systemie prawa polskiego – wybrane zagadnienia*, Przegląd Prawa Ochrony Środowiska 2016, No. 2, *passim*.

<sup>16</sup> J. Uliasz, *Prawa jednostki w zakresie ochrony środowiska [in:] Wolności i prawa ekonomiczne, socjalne i kulturalne w Konstytucji RP z 1997 r.*, ed. H. Zięba-Zalucka, Rzeszów 2018, p. 243.

Article 191 of the Treaty on the Functioning of the European Union states that “Union policy on the environment contributes to the achievement of the following objectives: preservation, protection and improvement of the quality of the environment, protection of human health, prudent and rational use of natural resources, promotion of measures at international level to address regional or global environmental problems, in particular the fight against climate change<sup>17</sup>.” The aforementioned provision is precise and clearly defines the objectives and principles pursued by the Union in the field of environmental protection. Paragraph 2 of the aforementioned article is also important. It states that the Union has as its objective a high level of environmental protection. It is based on the precautionary principle, the principle of preventive action, compensation for damage at source in the first place and the “polluter pays” principle. These elements shall be respected and, if necessary, enforced taking into account the particular circumstances typical of the various regions of the community. Taking into account the above, it can be concluded that the European Union considers the matter of environmental protection, including the provision of clean air standards, as important elements of its policy.

An important piece of legal act addressing the issue of the right to clean air is the Directive of the European Parliament and the Council on air quality and cleaner air for Europe, commonly known as the CAFE (*Clean Air For Europe*)<sup>18</sup>. This Directive sets out methods for assessing air quality, criteria for the assessment system and measuring points. It introduced the division of the Community into danger zones according to population density, as well as standardised methods for measuring pollution levels and collecting data<sup>19</sup>. The directive introduces EU air quality standards and is the basis for determining what clean air is from the Community perspective. Member States had the task of implementing the provisions of the Directive into their legal systems. However, the mere entry into force of the rules does not automatically make air quality better. It is necessary for public administration bodies and representatives of the business sector to act<sup>20</sup>. For their inactivity, the European Commission may hold individual Member States accountable before the Court of Justice of the EU. In 2018, this was the case of six Member States<sup>21</sup>. It should also be mentioned that in the same year, 29 proceedings were

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<sup>17</sup> *Traktat o Funkcjonowaniu Unii Europejskiej* – wersja skonsolidowana/Traktat ustanawiający europejską wspólnotę gospodarczą (Journal of Laws of 2004, No. 90, *item* 864/2, as amended).

<sup>18</sup> EU Journal of Laws. L. of 2008, No. 152, p. 1 as amended.

<sup>19</sup> *Ibid.*

<sup>20</sup> Cf. M. Czuryk, *Zadania organów administracji publicznej w zakresie ochrony środowiska*, Rocznik Naukowy Wydziału Zarządzania w Ciechanowie 2009, No. 3–4 (III), p. 44 et seq.

<sup>21</sup> European Parliament Resolution of 13 March 2019 on Europe that protects: clean air for all (2018/2792(RSP)).

pending in 20 countries for non-compliance with EU air quality limit values. In addition, in two-thirds of the Member States, the air pollution limit values are not respected<sup>22</sup>. This situation has not improved. It is enough to recall, for example, the communication of 12 January 2022 of the Chief Inspectorate for Environmental Protection on the current and forecasted air quality in Poland<sup>23</sup>. According to it, the alert level<sup>24</sup> was exceeded in the cities of the Wielkopolskie and Kujawsko-Pomorskie voivodships, while the information level<sup>25</sup> was exceeded in several voivodships, among others in Łódź and Pomorskie voivodeships. A similar picture emerges from the 2018 Air Quality Report drafted and published in 2020 by the European Environment Agency<sup>26</sup>. It indicates that the greatest threat to health is air pollution with particulate matter, nitrogen dioxide and tropospheric ozone. Areas where exceedances of the standards for the concentration of harmful substances occurred were inhabited by nearly a third of the EU population.

#### IV.

When discussing the right to clean air in the case of national law, it is necessary to point in the first place to the relevant constitutional provisions. The Constitution of the Republic of Poland of 1997 is a relatively young piece of legislation and thus contains many modern regulations that respond to the current needs of the human community<sup>27</sup>. Thus, Article 68(4) of the Polish Basic Law introduces an obligation on the public authority to prevent the negative effects of environmental degradation on health. The aforementioned duty requires the addressees to apply preventive measures, however, it does not define the means to be used to implement them<sup>28</sup>. Further duties of public authorities are defined in Article 74 of the Constitution. Thus,

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<sup>22</sup> *Ibid.*

<sup>23</sup> <https://powietrze.gios.gov.pl/pjp/content/show/1003522> (access 19.02.2022).

<sup>24</sup> Under Article 2 of the CAFE Directive, “alert threshold” means a level of a substance in the air above which there is a risk to health of the whole population resulting from short-term exposure to pollutants, and in the case of which Member States undertake immediate action.

<sup>25</sup> Under Article 2 of the CAFE Directive, “information threshold” means the level of a substance in the air above which there is a risk to human health resulting from short-term exposure to pollutants of particularly sensitive groups of the population, and in the case of which immediate and correct information is necessary.

<sup>26</sup> *Air quality in Europe – 2020 Report*, Luxembourg: Publications Office of the European Union, 2020.

<sup>27</sup> J. Sommer, *Prawo ochrony środowiska w systemie prawa polskiego*, Studia Prawnicze 2001, No. 3–4, pp. 283–307.

<sup>28</sup> M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, ed. P. Tuleja, LEX/el. 2021, Art. 68.

paragraph 1 of this provision introduces an obligation to pursue a policy which ensures ecological safety for present and future generations. Paragraph 2 introduces an obligation to protect the environment, and paragraph 4 introduces an obligation to support the activities of citizens to protect and improve the state of the environment. These tasks should be carried out by public authorities taking into account the principle of sustainable development<sup>29</sup>. Actions taken in this regard should include not only activities leading to the non-deterioration of the state of the environment, but also to its improvement. The provisions in question formulate the principles of conducting a state policy, however, they do not give rise to subjective rights of an individual<sup>30</sup>. What is of importance in this case is the fact that the cited provision is placed in the second chapter of the Constitution of the Republic of Poland which deals with human rights<sup>31</sup>.

As previously presented in this paper, international regulations are beginning to include regulations touching on the matter of the right to a clean environment. The doctrine also signals a development of links between international human rights law and international environmental law, pointing to the desire to transform the right to the environment into a separate independent human right<sup>32</sup>. Hence, the Polish legislator may become inspired by this positive international trend over time and will make appropriate changes to the fundamental law in this area. At the end of this consideration, Article 86 of the Constitution needs to be mentioned as it imposes an obligation to protect the state of the environment. The addressees of this obligation are natural persons (citizens, foreigners, stateless persons) and legal persons as well as organizational units without legal personality, if they remain under the authority of the Republic of Poland<sup>33</sup>. It is worth emphasizing that it is incumbent on the State to create conditions enabling this obligation to be fulfilled<sup>34</sup>. Article 86 of the Constitution has not only a juridical but also an ethical dimension, because the environment has the character of a common good and every member of the human community should feel obliged to take care of it<sup>35</sup>.

The issue of the right to a clean environment and the right to clean air has become the subject of wide interest of the media and public opinion thanks to the Resolution of the Supreme Court of 28 May 2021<sup>36</sup>, which states, among others,

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<sup>29</sup> See K. Doktor-Bindas, *op. cit.*, p. 106.

<sup>30</sup> M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, ed. P. Tu-leja, LEX/el. 2021, Art. 74.

<sup>31</sup> J. Uliasz, *op. cit.*, p. 244.

<sup>32</sup> L. Garlicki, M. Derlatka [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Volume II, ed. II*, ed. M. Zubik, Warszawa 2016, Art. 74.

<sup>33</sup> M. Florczak-Wątor, *op. cit.*, Art. 86.

<sup>34</sup> See. K. Doktor-Bindas, *op. cit.*, p. 109.

<sup>35</sup> W. Radecki, *Konstytucyjny obowiązek dbałości o stan środowiska i odpowiedzialność za jego pogorszenie*, *Ochrona Środowiska. Prawo i Polityka* 2000, No. 1, p. 2.

<sup>36</sup> Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72.



that the right to live in a clean environment is not a personal right. Any consideration of the line of the case-law and any discussion of its validity or lack of it must begin with an explanation of what a personal right is<sup>37</sup>.

In Article 23 of the Civil Code, such rights, as health, freedom, freedom of conscience, name and secrecy of correspondence are mentioned among others. This enumeration is illustrative, not enumerative. This is an open directory. Following Stanisław Dmowski, it should be noted that due to the above catalogue being open, there is a possibility of appearance and disappearance of other rights as a result of a change in social relations<sup>38</sup>. This is understandable, of course, because society is evolving together with its needs and priorities. Over the years, the right of the family to the intimacy and privacy of life have been added to the above-mentioned exemplary personal rights by doctrine and case-law. But what exactly are personal rights? One of the most popular definitions refers to “non-material values associated with the human personality, universally recognized in society<sup>39</sup>.” Moreover, the rights arising from personal rights are absolute and effective *erga omnes*<sup>40</sup>.

In the context of the right to clean air, a reference should also be made to Article 24 of the Civil Code, i.e. to the issue of the protection of personal rights, because both of these Articles function in an inseparable relationship. Only rights recognized as personal in case-law or doctrine are subject to the protection of personal rights. There also has to occur unlawful threat or infringement of such a right. For the real application of the protection of legal rights, the aggrieved person must demonstrate that there has been a violation or threat to a specific and universally recognized personal right, whereby it is indicated that it will be insufficient to invoke the violation of personal rights understood as a kind of discomfort, “some” harm or negative psychological experience. As it can be seen, the issue is quite problematic, especially in the context of legal practice, mainly when trying to answer the question of “what is protected by Article 24 of the Civil Code”, to which, unfortunately, there is no clear answer. The issue of personal rights has been repeatedly raised in the jurisprudence of Polish courts and the Resolution of the Supreme Court of 2021 referred to above is not the first one.

Previously, this issue was the subject of a decision of the Supreme Court on 10 July 1975<sup>41</sup>. The case concerned a potential infringement of personal rights by

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<sup>37</sup> Act of 23 April 1964. Civil Code (i.e. Journal of Laws 2020 *item* 1740 as amended). [https://sip.lex.pl/#/act/16785996?unitId=art\(23\)](https://sip.lex.pl/#/act/16785996?unitId=art(23)) (access: 2022-04-09 23:26).

<sup>38</sup> S. Dmowski [in:] S. Dmowski, S. Rudnicki, *Komentarz do kodeks cywilnego*, 2011, com. to Art. 23, nt 7).

<sup>39</sup> P. Książak [in:] *Kodeks cywilny. Komentarz. Część ogólna*, wyd. II, ed. M. Pyziak-Szafnicka, Warszawa 2014, com. to Art. 23.

<sup>40</sup> See K. Doktor-Bindas, *op. cit.*, pp. 115–116.

<sup>41</sup> Judgment of the Supreme Court of 10.07.1975, I CR 356/75, OSP 1976, No 12, *item* 232. <https://sip.lex.pl/#/jurisprudence/520437841> [access: 2022-02-20 17:22].

contaminating a lake with oily substances harmful to health as a result of the action of state institutions. The state of fact should only seemingly be considered different from the issue of air pollution. The plea in the lawsuit indicated, among others, Article 23 of the Civil Code as the basis for its claims, because the pollution of the reservoir was to lead to the loss of aesthetic values of the adjacent areas and obviously threatened the health and life of residents, including the plaintiff. The case went before the Voivodeship Court in Szczecin which decided to dismiss the action, arguing that “the human right to an uncontaminated biological environment cannot be considered a personal right within the meaning of Article 23 of the Civil Code<sup>42</sup>.” The judgement was appealed and the case went to the Supreme Court which again did not uphold the action due to the lack of proof of damage, however it was indicated at the same time that “the protection for infringement of personal rights could be granted, for example, in the case of littering of the garden under the window or unlawful obstruction of the view of the park – such cases would be the infringement of a specific personal right<sup>43</sup>.” This indication is important from the perspective of the discussed topic. In other words, the court admitted that the human right to environmental protection and satisfying aesthetic sensations with the landscape can be protected under Article 24 of the Civil Code, but only if the infringed right is a personal right within the meaning of Article 23 of the Civil Code<sup>44</sup>. From the perspective of the twenty-first century, such a sentence may seem controversial. The society is more environmentally conscious. At the time of the judgment, environmental issues or the analyzed right to clean air did not seem to be of great importance.

Years later, a case relating to a similar matter was brought before the Supreme Court. This is the already mentioned Resolution of the Supreme Court of 28 May 2021<sup>45</sup>. It is a response to a legal question that was submitted by the court of appeal in connection with the adjudication on the case of a plaintiff who demanded compensation for a harm caused to him by serious violations of air quality standards that infringed his personal rights such as health, freedom and privacy. The presented claim led to the legal issue: “Does the right to live in a clean environment which allows breathing atmospheric air that meets the quality standards set out in the provisions of universally binding law, in places in which the person stays for a long time, in particular at the place of residence, constitute a personal right protected under Article 23 of the Civil Code in conjunction with Article 24 of the Civil Code and Article 448 of the Civil Code?<sup>46</sup>”.

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> See K. Doktor-Bindas, *op. cit.*, pp. 116–117.

<sup>45</sup> Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72. <https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20> (access: 2022-02-19 19:20).

<sup>46</sup> *Ibid.*

The Supreme Court, responding to the presented question, stated that the right to live in a clean environment is not a personal right. On the other hand, health, freedom and privacy are protected as personal rights (within the meaning of the aforementioned Articles), which can be infringed (threatened) by violations of air quality standards set out in the provisions of law<sup>47</sup>. Arguing the adopted position, the Supreme Court stated that personal rights have always accompanied a person and are related to him, and the perception of whether they have not been violated is significantly influenced by circumstances related to the time and place of making an assessment. States and situations which make it impossible to provide a minimum of human social needs are considered to be threats to human dignity. It is pointed out that the mere lack of access to a certain material good, even if it is commonly used and facilitates the satisfaction of living needs, is not tantamount to a violation of a personal right<sup>48</sup>. From the perspective of the discussed issue, it is worth noting that the Supreme Court pointed out that the natural environment of a man obviously does not have the characteristics of a personal right – it is a common good of humanity. It has a material substrate in the form of air, water, soil, or the world of plants and animals. At this point, it should be emphasized that without it, a man is not able to function, and that its most important element is air. This view is shared by the Supreme Court. However, the right to clean air is currently not considered to be a subjective right belonging to each individual. The environment belongs to everyone. Due to the nature of the good, which is the environment, regulations or postulates of its protection are found in many global, regional and national legal acts.

The conclusion is that the provisions cited in the judgment (constitutional and conventional) are not a direct basis for claims aimed at obtaining protection of personal rights in relations between civil law entities. Even if living in the environment in which air, soil and water corresponding to the standard established by science, conducive to the preservation of health and the realization by a man of his freedom in its various forms, is explicitly recognized as a human right, the natural environment will retain the character of a common good within the meaning of Article 23 of the Civil Code. Therefore, such a claim cannot be effective<sup>49</sup>.

However, air quality can indirectly affect the violation of personal rights. As it has already been mentioned, personal rights are primarily health, freedom, and privacy. Developing science allows us to determine what standards air must meet in order to be considered healthy or “clean”. Within the meaning of the Supreme

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<sup>47</sup> See K. Doktor-Bindas, *op. cit.*, pp. 118–120.

<sup>48</sup> See Judgment of the Supreme Court of 7 December 2011, II CSK 160/11, OSNC 2012, No. 6, *item 75*.

<sup>49</sup> Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item 72*. <https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20> (accessed 2022-02-19 19:20).

Court, violation of standards or their one-off infringement, which have been defined by science and regulated by universally binding law, leads to violations of personal rights. However, this is only the case if such an omission or action results in a violation of health, liberty or privacy of a person<sup>50</sup>. In this case, it will be possible to make a claim for cessation or compensation for the infringement of personal rights.

The arguments set out in the legal justification of the above mentioned judgment clearly show that the environment has the character of a common good and in this form is to be protected by the entire human family<sup>51</sup>. However, it is necessary to consider the economic consequences of recognizing the right to clean air as a personal right. In such a case, many citizens of the Republic of Poland could make a similar claim against the Treasury of the State, invoking this form of interpretation of the already mentioned provisions of the Civil Code. Awarding compensation for poor air quality, which would be a violation of personal rights, could be devastating for the state economy and assets. Hence, it cannot be ruled out that the Supreme Court, in the course of work on this issue, could have taken into account the economic consequences of recognizing the right to clean air as a personal right<sup>52</sup>.

## V.

The subjective right of every human being, resulting from the natural law is a right to a clean environment. The natural environment is understood as a common good of all the members of the human family, which has a material substrate in the form of air, water, soil, the plant and animal world<sup>53</sup>. Breathing clean air is a sine qua non condition for a healthy life. It is, therefore, difficult to discuss the need to protect this part of the natural environment. Under the UN, the right to environmental protection was confirmed by the Resolution of 1994 issued by the UN Commission on Human Rights and by the Resolution No. 48/13 of 8 October 2021.

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<sup>50</sup> See e.g. ECtHR judgment of 9 December 1994, *López Ostra v. Spain*, No. 16798/90, ECtHR judgment of 24 July 2014, *Brincat and Others versus Malta*, No. 60908/11, 62110/11, 62129/11, 62129/11.

<sup>51</sup> Z. Łabno, *Dobro wspólne a prawo ochrony środowiska*, Państwo i Społeczeństwo 2004, No. 2, pp. 41–50.

<sup>52</sup> A similar line of argument was applied in the judgments drawn up by the District Court of Warszawa-Śródmieście of 24 January 2019 and the District Court of Miasto Stołeczne Warszawa of 1 October 2019. For more details, see K. Doktor-Bindas, *Prawo do czystego powietrza*, Przegląd Konstytucyjny 2020, No. 4, pp. 120–122.

<sup>53</sup> Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72. <https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20> (access: 2022-02-19 19:20).

However, under the Universal Declaration of Human Rights of 1948 and the International Covenants on Human Rights of 1966, there is no specific right to clean air. Hence, the UN Special Rapporteur, in a 2019 report, analysed the issues related to this authorisation and unequivocally recommended to the UN General Assembly the adoption of a resolution introducing such a regulation. In this respect, however, the European Union is the most active, despite the lack of expression of the right to the environment in the founding documents and in the Charter of Fundamental Rights of the EU. The introduction of the CAFE directive<sup>54</sup> resulted in the standardization of clean air quality standards, a method of testing and a warning system. In many respects, the EU is an initiator of global change and its activities are of wide importance for change, not only on the old continent<sup>55</sup>. In connection with the right to a clean environment, the Constitution of the Republic of Poland of 1997 definitely stands out. It imposes on public authorities both the obligation to protect the environment and the obligation to prevent the negative effects of environmental degradation on health. Although these obligations are in the nature of programmatic norms, some representatives of the doctrine grant them the possibility of direct application<sup>56</sup>. The Constitution of the Republic of Poland is classified as very “pro-ecological” throughout Europe<sup>57</sup>, which results from the fact that it is relatively young and contains modern provisions which were a response to the global and social situation at that time. The issue of the right to clean air has also been raised in the jurisprudence of Polish courts, in particular the Resolution of the Supreme Court of 28 May 2021 is of great importance here. It reflects on the right to live in a clean environment as a personal right protected under the provisions of the Civil Code. In its position, the Supreme Court did not agree with the presented issue, and even pointed out that the environment is a common good of all people, and its protection belongs in particular to the bodies of public authorities. Such a view cannot be denied partial validity, since it contributes to strengthening the principle of legal certainty. Probably the economic issue was also an important argument, and specifically encumbering the State Treasury

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<sup>54</sup> Directive 2008/50/EC of the European Parliament and the Council of 21 May 2008 on air quality and cleaner air for Europe (EU Journal of Laws L of 2008 No. 152, p. 152 as amended).

<sup>55</sup> Recently, the question of the purity of indoor air has become increasingly highlighted. European Parliament Resolution of 13 March 2019 (Journal of Laws C 23, 21 January 2021, pp. 23–32.) concerning Europe, which protects clean air for all, indicates that nearly 90% of a person’s time is spent indoors, and the air quality can be even worse than outside. It also points out the fact that 10% of non-communicable diseases in the world are caused by poor air quality. The European Parliament appealed to the European Commission to make it mandatory to certify indoor air quality in all new and renovated buildings in the European Union.

<sup>56</sup> K. Doktor-Bindas, *op. cit.*, p. 112.

<sup>57</sup> Czekałowska M., *Problem konstytucyjnych norm programowych dotyczących ochrony środowiska na tle wybranych regulacji ustawowych*, Zeszyty Naukowe Uniwersytetu Szczecińskiego 2015, No. 3.

with the obligation to pay compensation for violations of air purity standards. It should be remembered, however, that air quality in Poland and in Europe is not improving, which is confirmed by reports of relevant institutions formulated in this matter.

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