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The substantive right to environment and the procedural environmental rights under the Aarhus Convention – Part I

Materialne prawo do środowiska a uprawnienia proceduralne według Konwencji z Aarhus – Cześć I

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Abstract: The current article provides Part I of the study which aims at examining the mutual relations between substantive and procedural environmental rights against the background of the typology of the substantive rights to the environment and challenges encountered when designing the right to a healthy environment. Part I provides the background analysis in this respect. It presents the origins of the term "right to environment" and various approaches to its meaning, in particular differences between the "right to have access to natural environment" and the "right to a healthy environment". This is followed by presenting two possible approaches to the meaning of the term "right to a healthy environment" and their consequences. On this basis the article shows the three main methods of addressing concerns regarding environmental quality within human rights system and the relation between anthropocentric and ecocentric approach. Following this, the article presents the main challenges encountered when creating "right to a healthy environment", in particular the issue of fitting this right into the existing system of protecting human rights and limitations related to "greening" of other human rights. Finally the current article provides a short overview of the the development of the respective legal provisions regarding environmental rights, including both human rights and Rights of Nature. Part I is concluded with some comments regarding the trend towards developing procedural environmental rights and expectations towards the UNECE Aarhus Convention and its role in protecting

substantive environmental rights and participatory democracy – which is the link to Part II which addresses these issues in detail and concludes that access to justice provisions under the Aarhus Convention neither provide sufficient means to protect environmental rights nor – in light of the various conceptual roots of the Convention – should be treated as having only such a role.

Keywords: right to environment, "greening" of human rights, protection of subjective rights, Aarhus Convention, procedural environmental rights

Abstrakt: Niniejszy artykuł stanowi część I studium, którego celem jest zbadanie relacji między materialnymi i proceduralnymi uprawnieniami do środowiska na tle typologii materialnego prawa do środowiska i wyzwań napotykanych przy projektowaniu prawa do zdrowego środowiska. Część I zawiera analizę kontekstu w tym zakresie. Przedstawiono w niej pochodzenie terminu „prawo do środowiska" oraz różne podejścia do jego znaczenia, w szczególności różnice pomiędzy „prawem do dostępu do środowiska naturalnego" a „prawem do zdrowego środowiska". Następnie przedstawiono dwa możliwe podejścia do znaczenia terminu „prawo do zdrowego środowiska" i ich konsekwencje. Na tej podstawie artykuł przedstawia trzy główne metody rozwiązywania problemów dotyczących jakości środowiska w ramach systemu praw człowieka oraz relację między podejściem antropocentrycznym i ekocentrycznym. Następnie w artykule przedstawiono główne wyzwania napotykane przy tworzeniu „prawa do zdrowego środowiska", w szczególności kwestię dopasowania tego prawa do istniejącego systemu ochrony praw człowieka, oraz ograniczenia związane z „zazielenianiem" innych praw człowieka. Artykuł zawiera też krótki przegląd rozwoju odpowiednich przepisów prawnych dotyczących praw środowiskowych, w tym zarówno praw człowieka, jak i praw przyrody. Część I kończy się kilkoma uwagami na temat tendencji do rozwijania proceduralnych praw środowiskowych i oczekiwań wobec Konwencji EKG ONZ z Aarhus oraz jej roli w ochronie materialnych praw środowiskowych i demokracji uczestniczącej – co jest łącznikiem z częścią II, w której szczegółowo omówiono te kwestie i stwierdzono, że przepisy dotyczące dostępu do wymiaru sprawiedliwości w ramach Konwencji z Aarhus ani nie zapewniają wystarczających środków ochrony praw środowiskowych, ani – w świetle koncepcji leżących u podstaw Konwencji – nie powinny być traktowane jako pełniące jedynie taką rolę.

Słowa kluczowe: prawo do środowiska, „zazielenianie" praw człowieka, ochrona praw podmiotowych, Konwencja z Aarhus, uprawnienia proceduralne

1. Introduction

The links between a substantive right to environment and procedural environmental rights of the public have prominently featured in the academic literature, jurisprudence, and various law-drafting activities for years – yet the nature of the links have not been fully recognised. The current study presents some observations regarding these links under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark in 1998

("Aarhus Convention") which is not only commonly considered as the leading international benchmark for the procedural environmental rights[1], but also as an important milestone in addressing the issue of a substantive right to environment in the international law (Boyle 2006: 477).

The current article provides Part I of the above study which aims at examining the mutual relations between substantive and procedural environmental rights against the background of the typology of the substantive rights to the environment and challenges encountered when designing the right to a healthy environment. Part I provides the background analysis in this respect. It briefly presents in Section 2 the origins of the term "right to environment, which is followed in Section 3 by presenting the approaches to understanding and designing a substantive right to environment. In this context it presents differences between the "right to have access to natural environment" and "right to a healthy environment", and two possible approaches to designing the latter with the consequences resulting therefrom. On this basis the article shows the three main methods of addressing concerns regarding environmental quality within human rights system and the relation between anthropocentric and ecocentric approach. Following this, the article presents the main challenges encountered when creating "right to a healthy environment", in particular the issue of fitting this right into the existing system of protecting human rights and limitations related to "greening" of other human rights. Finally the current article provides in Section 5 a short overview of the the development of the legal provisions regarding environmental rights, and in Section 6 some information regarding Rights of Nature. Part I is concluded with some comments regarding the trend towards developing procedural environmental rights and expectations towards the UNECE Aarhus Convention and its role in protecting substantive environmental rights and participatory democracy – which is the link to Part II which addresses these issues in detail, and which concludes that access to justice provisions under the Aarhus Convention neither provide sufficient means to protect environmental rights nor – in light of the various conceptual roots of the Convention – should be treated as having only such a role.

2. Right to environment – origins

The issue of formulation and legal meaning of the concept commonly coined as the "right to environment" has been for many years a subject of discussion

[1] The role of the Aarhus Convention is best reflected in the words of (the then) UN Secretary-General Kofi Annan who described it as "the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations" (Aarhus Implementation Guide 2000: Foreword)

and deliberations both at the international and national level and has received considerable attention in the literature. There have been numerous attempts, both in the past and more currently, to summarise different approaches to tackle this issue[2], but neither seems to have managed to capture all such approaches[3]. The current attempt does not purport to be exhaustive and is focused on the issues considered to be important for the purpose of proper interpretation of the intent and meaning of the respective provisions of the Aarhus Convention.

The scientific and political discussion on the "right to environment" as one of the human rights (existing next to such fundamental rights as the right to life or liberty) accompanied the birth of modern environmental law. However, the beginnings of modern legal regulation of environmental protection are commonly considered to date back to the 1970s, while the key international legal instruments related to human rights in Europe and at the global level were adopted much earlier. In 1950, when the European Convention on Human Rights (ECHR) was adopted[4], environmental protection was not yet an important social problem being the subject of a separate legal regulation (de Sadeleer 2012: 61), and therefore ECHR does not include neither the right to environment nor even a mention of the environment and its protection (Pedersen 2008: 84). The two key international treaties at the global level related to human rights were adopted by the United Nations General Assembly in 1966[5], therefore – as it was rightly pointed out in the literature– still too early for the "right to environment" to be included in the International Bill of Rights (Knox 2020: 83 or Kobol-Benda 2022: 121-122).

Despite the above constraints, the scientific and political discussion on the "right to environment" remained extremely vivid and – following the development of the modern environmental legislation – already in the 1970s it was subject to extensive coverage in the legal literature in the countries with the most developed environmental legislation at that time[6]. There were also consecutive attempts to introduce "right to environment" into the various legal documents at both national and international level (see below). The common opinion is that the "right to environment" was first started to be introduced

[2] Some of the most recent ones are being referred to in the current article

[3] Furthermore, most of the opinions regarding the "right to environment" tend to address the issue without a clear distinction between consequences of handling this issue at the international and national levels, and the diversity of various systems of protection of human rights.

[4] Formally the Convention for the Protection of Human Rights and Fundamental Freedoms

[5] International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

[6] For a comprehensive overview of the literature on this topic at that time see Steiger 1980: passim

into the national legislation (often Constitutions[7]) and then only into the documents at the international level[8], which was a different trend than in case of other rights, where after the adoption of the Universal declaration of the Human Rights in 1948 the influence came rather downward, from international agreements to national legislations (Knox 2020: 81). Whether this common opinion is accurate might be debatable because the very notion of "right to environment" is far from being crystal clear and might be understood to cover quite different things. Furthermore this opinion seems to somehow neglect the impact of respective international processes, which often result in the soft-law political documents or judgments of international tribunals and not necessarily in the binding provisions of international agreements.

3. The term "right to environment" and approaches to its meaning

3.1. Right to environment: "right to a healthy environment" or "right to have access to natural environment"?

The term "right to environment" is quite often equated with the term "right to a healthy environment" (differently called as "right to clean/decent/sound… environment" – see below) and the discussion regarding the former is focused on the issues specific to the latter without clearly indicating it. This is rather misleading and not in line with the academic rigour because it does not take into account the fact that in some legislations there is a right to have access to natural environment, which is also referred to as "right to environment" but has a totally different legal nature[9]. For example, Art. 141(3) of the constitution of Bavaria of 1946, allows everyone to enjoy the beauty of nature and recreation in the countryside, in particular to enter forests and forest meadows, to use the fields and to take possession of wild-growing forest fruits in the customary manner. The state and municipalities are obliged to facilitate access to hills, lakes, rivers and scenic features and are entitled to impose property rights restrictions for this purpose[10].

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[7] According to L. Lawrysen „the constitutions of over a hundred countries presently contain such a provision in some form or other" (Lawrysen 2012: 24)

[8] See for example Bandi 2014: 79 or Knox 2017: 15

[9] Outside the scope of this discussion is yet another interpretation, which assumes a „right to use the environment" understood as a right to use natural resources and thus tending to oppose environmental protection see Ladeur 1996: 26

[10] The full text of the Constitution of Bavaria is available at https: //www.bayern.landtag.de/en/dokumente/rechtsgrundlagen/constitution-of-the-free-state-of-bavaria/

Two things are important and worth emphasizing here. Firstly – the right formulated in this way relates only the use of certain environmental resources (in the state they are in) and not to their quality. It is not, therefore, meant to be a defensive law against any changes deteriorating the quality of the environment – as the case law of the Bavarian Constitutional Court have expressly stated (Hernekamp 1979: 194). Secondly, this approach to the right to environment allows it to be treated as a subjective right of an individual – thus similar as in the case of other liberal, so-called classical, rights and liberties based on the opposition of the private interest of an individual against the private interests of other individual or a public interest.

3.2. Right to a healthy environment: two possible approaches to its meaning and their consequences

While the wording of Art. 141(3) of the constitution of Bavaria seems to be quite clear as to the legal meaning of the right to environment covered by it, there are also examples where this is not so clear. In 1976 an amendment to the Constitution of the People's Republic of Poland introduced in art. 71 a new constitutional right commonly referred to as a right to environment. It was very short as it read: " Citizens of the Polish People's Republic shall have the right to benefit from the values of natural environment and it shall be their duty to protect it."[11]

It should be noted that the introduction of this right into the Constitution in 1976 was not preceded by any wider theoretical discussion regarding the content and legal character of the proposed right to environment, which was quite understandable given the fact that in 1970s Poland was still under the communist rule and Constitution was treated as a merely a political document not entailing significant role in the legal position of individuals (Jendrośka 1990: 93-101). When later some attempts to interpret this new right started to appear, they were all focused on understanding this right to environment as a "right to a healthy environment" thus neglecting its other meaning ie. those focused on merely having access to natural environment (ibid: 95-96).

After the collapse of the communism and reorientation of the legal system in Poland towards democracy and rule of law – the issue has started to gain practical importance. In this context already in 1990 some conclusions were made regarding the meaning of the term "right to a healthy environment" which

[11] In the official translation of this provision the word „values" was missing, which did not capture well the essence of the provisions (official translation available at: http: //libr.sejm.gov.pl/tek01/txt/kpol/e1976.html)

despite the passage of time seem to have still some value as reflecting some developments regarding the approaches towards interpretation of this term.

The starting point for these conclusions was the question what was the subject matter of the "right to a healthy environment" and identifying two possible alternative approaches in this respect. In the first approach the subject matter of the right is the quality of the environment as an intrinsic value for itself while in the second approach it is only the quality of the "private" environment of a person. Thus in the former case the infringement of the right to environment would be either any deterioration of the state of the environment or – in less ambitious approach – violation of the requirements of environmental law (for example regarding pollution of the sea or destroying state owned forests) regardless of where it would occur. In the latter case, the infringement of the right to environment would be limited only to such deteriorations or violations which would affect other legally guaranteed rights of the individual (ibid: 97).

The conclusion regarding the latter approach to the "right to a healthy environment" (i.e. the one limited to "private" environment) was that while theoretically it could be also treated as a subjective right of an individual similar to other liberal, so-called classical, rights and liberties – accepting such interpretation would in fact mean that introduction of such right would not bring anything new beyond what is already guaranteed under the existing rights and its implementation would be dependent on the implementation of the other rights. Thus such interpretation could not be accepted as it would render a separate right to environment in fact redundant and would not address the needs related to environmental protection (ibid: 97).

Regarding the approach in which the subject matter of the right would be the quality of the environment as an intrinsic value for itself – the conclusion was different. It held that that while on merit it would be needed but conceptually and practically it would be rather difficult because it would not be possible to treat such a "right to a healthy environment" as a substantive subjective right of individuals regarding quality of the environment, resulting in granting anyone the right to challenge any violation anywhere of the requirements of environmental law (ibid: 98).

Following this, the final conclusion of this research done in 1990 was that the only feasible interpretation of the "right to a healthy environment" would be to consider it as not a substantive subjective right but rather as a procedural right focused on co-operating with the public administration in environmental protection (Jendrośka 1990: 99).

In this context the need to treat environmental protection in terms of "public interest" was emphasised and – as opposed to the situation in many other countries (see below) – the already existing in Poland legal possibilities granted

to ecological NGOs to participate in the decision-making and to file genuine public interest law suit were considered almost sufficient while the lack of similar rights granted to individuals was criticized (ibid: 99-100).

3.3. Three main methods of addressing concerns regarding environmental quality within human rights system aspects and relation between anthropocentric and ecocentric approach

The above conclusions, while done mostly for the purpose of interpreting the term "right to environment" in Poland in 1990, not only rightly predicted future development regarding constitutional guarantees of the "right to environment" in Poland[12], but first of all seem to correspond well with the prevailing approach used in the most recent accounts summarising the state of play regarding the relations between human rights and environmental protection globally. According to this approach three basic methods can be differentiated in this respect: 1) development of a separate substantive right to a healthy environment, 2) the "greening" of the other human rights; and 3) development of procedural environmental rights[13].

It must be emphasized however that the conclusions made in Poland in 1990 did not address the difference between anthropocentric and ecocentric approach and totally neglected the issue of " rights of nature", which already at that time started to be addressed worldwide both in the academic literature and in various legal and policy documents. As for the anthropocentric vs ecocentric approaches it must be noted that while most of the recent accounts refer often to anthropocentric or ecocentric approaches but usually this fundamental dichotomy in the approach is not the basis for the respective analysis. Certain explanation for focusing only on "human-centred environmental rights" is given by Knox who claims that "ecocentric rather than anthropocentric rights – that is, rights *of* , rather than *to*, the environment – are much less common in national law, and absent entirely from international law" (Knox 2020: footnote 4).

The above statement of Knox was given as a mere obiter dictum in a footnote and requires some commentary. First of all, while his statement is true regarding national law, because rights of nature are indeed granted only in a couple of

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[12] A good overview of the recent state of play in this respect in Poland is provided by Habuda, who generally concludes that a „right to environment" should be „less perceived as a right to environmental protection…but as a right to use the environment" and thus „right to environment is the right to regulate access to various goods" (Habuda 2019: 119)

[13] See for example Knox: 82 or V. Kobol-Benda 2022: passim. The same in fact approach, although using slightly different terminology is used by Sands when summarizing developments regarding human rights and environment (Sands 2013: 291-307)

countries (see below), in case of international law the above statement is true only insofar as the binding international agreements are concerned, because the rights of nature are mentioned in some soft-law international documents (see below).

Furthermore, a growing interest in promoting ecocentric rather than anthropocentric approach towards interpretation of the right to a healthy environment not necessarily should be equated with proposals for making the nature itself subject of rights. There are proposals for linking ecocentrism with anthropocentrism within the right to a healthy environment[14], and here the most popular seems to be the tendency to interpret certain formulations within the genuinely anthropocentric right in a way to give it an ecocentric element[15]. In this tendency the key point is not so much the subject of the right but rather the object of the right, thus if the right refers to the quality of the environment in itself and not in relation to humans – it may be considered as following ecocentric approach. Following this logic: "the right to a healthy environment" would be considered as "anthropocentric" while as ecocentric would be considered such formulations as "the right to decent/ good quality environment" (Lambert2020: 16), or "the right to ecologically sound environment"[16]. Furthermore, there are views calling for combining anthropocentric and ecocentric approaches with the intergenerational approach (Lambert 2020: 18). Following this, there are also visions of a "biocentric" or "immersive anthropocentric" approaches towards human rights that would "entail a recognition that the well-being or the lives of individuals in current and future generations greatly depend on ecosystem services" (Kobylarz 2020: 20).

Finally, worth mentioning in the context of this study (which is focused on linkages between a substantive right to a healthy environment and procedural environmental rights under the Aarhus Convention) is the approach proposed by Boyle who shows consequences of various ways of constructing the substantive right to a healthy environment (Boyle 2006: 471-511). He considers that the "greening" of the other human rights is "anthropocentric" by definition and proposes to keep ecocentric approach within the domain of human rights (without any special reference to rights of nature) by creating a separate substantive right to have the environment itself protected (ibid: 473). When

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[14] See for example Giunta 2017: passim

[15] See for example the analysis of the Draft Pact for the Environment made by Kotze, who – in the context of his claims to acknowledge the rights of nature – praised the reference to "ecologically sound environment" in draft Article 1 as a right step in this direction and useful addition to otherwise anthropocentric right (Kotze2019: 229). As another example may serve mentioned above interpretations of the wording of the right to environment in the old Constitution of People's Republic of Poland whereby reference to „values" was the hook to interpret it as a right to a healthy environment.

[16] See for example the already mentioned analysis of the article 110b of the Constitution of Norway, which Giunta considers as „having an anthropocentric-ecocentric approach" (Giunta 2017: 68)

suggesting the approach to constructing such a right he is focused on the differences in designing the subject of such right and the issue of enforceability, which indeed are the key challenges to be addressed when constructing the right to a healthy environment (see below).

4. Legal basis for the "right to a healthy environment": challenges

4.1. Key challenge: fitting the right to a healthy environment into the system of protecting human rights

Ever since Gormley proclaimed in 1976 existence of an internationally recognised human right to (a healthy) environment (Gormley 1976: 110), there have been an ongoing debate regarding the legal character of such a right. In 1977 Vasak proposed to treat the right to a healthy environment as belonging to a "third generation" of human rights (focused on "solidarity"), as opposed to so called negative" political rights and personal freedoms considered as the "first generation" of rights, and economic, social and cultural rights (requiring "positive action by the state") as the "second generation" of rights (Vasak 1977: 29). In his view the rights belonging to the "third generation" (which, in addition to the right to a healthy environment and other rights, includes also the "right to ownership of the common heritage of the mankind") can only be implemented by the combined efforts of everyone, including individuals, states and other bodies (ibid: 32).

While the distinction of human rights into three categories is sometimes considered as "misleading" (Knox 2020: 84), and environmental rights are considered as not fitting "neatly into any single category or "generation" of human rights" (Boyle 2006: 471) any attempt to design the right to a healthy environment must – as it is the case of all human rights – properly capture the nature of the protected value/values and assure its effective protection. And here – as rightly pointed out by Lawrysen – the key issue for human rights, including for the right to a healthy environment, is the question how it would be enforced in practice (Lawrysen2012: 24). This, in turn, depends pretty much on what is considered to be the subject matter of the right. And in this respect – as already has been pointed out above – there are different approaches.

The starting point is an obvious constatation that the existing system of the protection of rights was designed (both at the international level and in most legislations in Europe) for the purpose of protecting subjective rights belonging to traditional civil and political rights and liberties ("first generation" of rights) based on the opposition of the private interest of an individual against the private interests of other individuals or a public interest.

Bearing the above in mind, and assuming that effectiveness of the "right to a healthy environment" (whatever is its scope) depends on the possibility to enforce it through the litigation at courts – it is clear that the major challenge is to design it in such a way that it allows for an effective protection of the environment and yet fits somehow into the existing system of the protection of rights which offer practical possibilities for the enforcement. It could be fitted to the existing systems either by using the instruments already used for the purpose of protecting human rights or by designing some new ones – but both still would need to conceptually fit to the system and be practically feasible.

4.2. Limitations of protecting „private" environment by „greening" of other human rights

In case of the right to protect a healthy „private" environment, fitting it into the existing system of the protection of rights has turned out to be relatively easy and required merely a proper interpretation of other subjective rights – although, as pointed by Lawrysen – „attempts to *derive* a right to a healthy environment *from other constitutional rights* have been more successful in certain countries than in others" (Lawrysen 2012-2: 2). It required some time to appreciate the causal link between „polluting" activities and impact on human health or property but otherwise there were no major conceptual obstacles to find ways to allow individuals to protect their "private" environment by using the traditional instruments created for the protection of other subjective rights to challenge decisions of authorities or filing law suits against acts/omissions of polluters. This process, often referred to as "greening" of the human rights, was well researched both at the national and international level in the academic literature[17], worth mentioning are also the most recent internal account of the respective jurisprudence under the European Convention of Human Rights (ECHR)[18] and rights under the American Convention on Human Rights (Pact of San Jose)[19].

The point however is that the system of the protection of human rights, whether at national or at international level, was traditionally designed to protect individual legal interests. But in case of environmental issues there are certain values that need to be protected and which escape inclusion into these traditional categories. Paraphrasing the title of a famous essay of Christopher Stone which 50 years ago inspired a debate on this subject in the world's legal

[17] Apart from the already cited studies on human rights mentioning „greening of rights" see for example Pedersen 2008 and Pedersen 2010.

[18] See for example Kobylarz 2020: 18-29 or Manual on Human Rights 2022

[19] See for example Calderon Gamboa 2020: 29-37

literature, the whole issue can be reduced to a question: "do trees have a right to judicial protection?" (Stone 1972). In numerous accounts attempting to address the issue a number of limitations of "greening" of the human rights have been pointed out in this context.

For the European context the most often researched and illustrative is the jurisprudence under the European Convention of Human Rights (ECHR) . As it is commonly known, neither ECHR nor any of its Protocols include a substantive right to a healthy environment, and that has been the legal basis for rejecting applications seeking a general protection of the environment or nature (see below). On the other hand there is an "impressive record of rulings concerning situations where various environmental harms or risks have directly affected human rights that are guaranteed by the Convention and its Protocols" (Kobylarz 2020: 19).

The respective case law makes it however crystal clear that the prerequisite for the possibility of environmental claims under the ECHR is the existence of personal harm, not a harm to the environment objectively understood. As early as in the 1970s the European Commission of Human Rights (a now defunct body of the ECHR) concluded in Case X v Federal Republic of Germany that the ECHR, and in particular Articles 2, 3 and 5 of the ECHR invoked by the applicants, did not cover the right to preserve the environment, and dismissed the complaint for actions endangering marshlands[20]. Similarly, a little later, the European Court of Human Rights (ECtHR) in the Hatton Case pointed out that while there is „ no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8". In this context the ECtHR quoted the earlier judgment in Case López Ostra v. Spain by saying that „a problem might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".

The ECtHR has consistently maintained the view (clearly expressed in Case Kyrtatos v. Greece) that the ECHR does not confer a right to a healthy environment, stressing that neither Article 8 of the ECHR nor any other article of the ECHR has the task of protecting the environment as such, as this is the task of other instruments of international or domestic law (Boyle 2006: 31).

A consequence of the condition of the existence of personal injury is the rather limited standing to bring a complaint, which is related to the narrow understanding of the concept of "victim of violation" (injured person), as referred to in Article 34 of the ECHR. The „direct victim requirement" apply to both individuals and to non-governmental organizations (NGOs) who need to

[20] For more on this case see for example Sands 2012: 299

prove any negative and serious impacts on their well-being, life or patrimony (Kobylarz 2020: 22). Although non-governmental organizations are explicitly listed there as "victims of violations" in addition to individuals, nevertheless, in the interpretation of the ECtHR, the condition for filing a complaint is a violation directly affecting a person or organization. This means trouble for environmental organizations to file complaints in the public interest or the interest of the environment, i.e. citing only statutory purposes, but without proving their own legal interest in the case. This type of limitation occurs both under Article 8 of the ECHR, where the ECtHR held that an organization can only act as a representative of its members or employees, on the same basis as a lawyer represents a client, but cannot itself be treated as a "victim of a violation" related to Article 8 of the ECHR (Sunkin, Ong and Wight 2002: 853-856), as well as under Article 11 of the ECHR (Sands 2012: 306).

While according to Kobylarz some new tendencies have been shown recently in the case law of ECtHR regarding recognition of the nature protection, or approach to standing or causality[21], there is a widely shared view in the literature that – from the point of view of environmental protection – the system of protection of rights under ECHR has some fundamental limitations „created by an anthropocentric outlook" which „are out of keeping with social realities today" (Lambert 2020: 13). Similar conclusions of her analysis of the environment-based human rights claims under ECHR has led Morrow to conclude that this approach (i.e. „greening of human rights under ECHR) „has progressed as far as it it is likely be able to" and „may have reached the limit of its potential" (Morrow 2017: 36 and 41).

As underlined by Grant, the situation under American Convention on Human Rights (ACHR) is generally very similar to the situation under ACHR insofar as the Convention itself also does not include the right to a healthy environment (Grant 2017: 200). Although the "right to live in a healthy environment" was included in 1988 to the San Salvador Protocol to the Convention – it is not enforceable at the regional level and therefore environmental related claims are litigated under various other rights guaranteed by ACHR (Rivero Godoy 2017: 190-191 and 194-196). While some commentators see perhaps a little bit more ecocentric tendency in the jurisprudence under ACHR than under ECHR (Calderon Gamboa2020: 35), the other commentators point to unknown under ECHR impediments against effective protection of environmental interests – like for example the fact that the Inter-American Court of Human Rights jurisdiction is limited to cases referred to it by the Inter-American Commission of Human

[21] For example „sufficiently close link" instead of „direct and immediate link" – see Kobylarz 2020: 21-25

Rights which „in turn is dependent on the acquiescence of the States" (Rivero Godoy 2020: 196-197).

Worth mentioning is the view of Grant, who indicates that while most of the commentators "argue that human rights frameworks and adjudication are ill-equipped to deal with environmental claims" (Grant2017: 199) there are some verdicts of human rights courts giving raise to opinion that "there is nothing inherent in the nature of human rights law preventing human rights courts from providing an avenue for consideration of claims of environmental damage affecting human rights brought on behalf of the wider community" (ibid: 208). Without attempting to enter into this debate, for the purpose of this study it is sufficient to note the opinion that generally the approach of human rights courts "appears to rule out public interest litigation by individual or NGOs in environmental cases under all of the relevant human rights treaties"(Boyle2006: 506) and – in relation to ECHR – that "it is completely inadequate for the Council of Europe to rely on the indirect contributions of existing convention rights to address the scope and severity of the global environmental crisis faced by society today" (Boyd 2020: 18). Furthermore, it is difficult not to agree with the conclusion that "a Healthy Environment is not secondary to other principles or duties of the State, but a RIGHT in itself to be respected, protected and fulfilled by law" (Calderon Gamboa 2020: 36).

In light of the above opinions it is clear that "greening" of other human rights has some limitations which justify attempts to create a separate self-standing right to a healthy environment. And this, while it is capable of addressing some of the challenges related to the "greening" of other human rights, will pose some other challenges.

4.3. Approaches to understanding the right to a healthy environment and related challenges

The right to a healthy environment as a right going beyond just protecting the "private" environment (i.e. covering also such issues as climate change, biodiversity or quality of high seas etc.) can be designed in a number of ways depending on what would be considered a subject matter of such right and what would be the nature of such right.

The most commonly discussed approach assumes that the subject matter of the right to a healthy environment would be the quality of the environment (differently determined as "satisfactory" or "decent", or "ecologically sound" etc.) as a value for itself. In this respect, apart from terminological nuances, the key issue is what is the level of the quality of the environment which can be qualified as "satisfactory" or "decent", or "ecologically sound" etc.? And – as rightly pointed

out by Boyle – what constitutes satisfactory, decent, or ecologically sound environment is bound to suffer from uncertainty" (Boyle 2006: 507). The first issue here is the question: according to which standard it could be measured? There is no commonly accepted set of definitions in this respect and the approaches by various people or organizations may vary even in the same circumstances or locality, in particular in case of new projects to be undertaken: what some may consider as detrimental to "satisfactory" quality of the environment, for others may be considered as not making any harm or even beneficial for the quality of the environment. The difference in approaches may involve even a clear conflict between various legitimate environmental concerns, like for example the conflict between the need for enhancing renewable energy projects (as means for achieving climate neutrality goals) and protection of biodiversity[22].

Bearing in mind the above, the second fundamental question is who and how should solve the above dilemmas and decide what constitutes satisfactory, decent, or ecologically sound environment, in particular whether it should be a judge setting the respective standard as a result of individual litigation? Some authors suggested to accept the impossibility of defining an ideal environment in abstract terms and let the courts develop their own interpretations (Kiss and Shelton 2000: 174-178) – but prevailing seems to be the view "that judges are not the right people to decide on what constitutes a decent or satisfactory environment" (Boyle 2006: 508). Already in the 1970s there were fears of "paralyzing" economic life resulted from assuming by the judiciary the tasks normally performed by the legislators and public authorities[23]. Therefore the obvious alternative was "to revert to….economic, social and cultural rights" (Boyle 2006: 508), which are usually meant as "guidelines" for the legislators and public authorities, who are supposed to set the appropriate standards taking into account other competing public interests (Lawrysen 2012-2: 4 and 6). Following this approach, the right to a healthy environment was included into the economic, social and cultural rights in some national jurisdictions[24], but also into some international treaties[25].

Including the right to a healthy environment into the economic, social and cultural rights does not seem to solve the problem. First of all, it could not be accepted in legal systems where proclamation of a human right means a pos-

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[22] See for example Jendrośka and Anapianova 2022: passim

[23] See the statements of the participants at the International Colloquium on the Human Right to the Environment organized in Bonn by the European Environment Council in 1975 – collected in the post-conference publication Individualrecht oder Verpflichtung des Staates? *Internationales Beitrage zum Umweltgestaltung,* Heft A-41, E. Schmidt Verlag Berlin 1976

[24] See some examples in L. Lawrysen 2012-2: 1-13

[25] See for example San Salvador Protocol (Rivero Godoy 2017: 190-191)

sibility of protecting such a right by individual claims at the court because introduction of the right to a healthy environment would mean raising hopes that could not be fulfilled[26]. Furthermore, it has resulted in the same problems with the enforcement as in case of other such rights belonging to the "second generation" of human rights. The attempts to solve somehow these problems by applying the concept of the *standstill* effect[27], applied in case of the right to a healthy environment in some countries[28], did not remove fully the "fear of an excessive control of the judiciary over (environmental) policy" (Lawrysen 2012-1: 26), as the concept itself is open to different interpretations influencing its practical application by courts (ibid: 25).

In light of the above comments concerning the challenges related to the right to a healthy environment understood as a right to the proper ("satisfactory" or "decent" , or "ecologically sound") quality of the environment, it is not surprising that despite some specificities in various legislations meant to facilitate its practical application at courts, such a right is generally considered as difficult to be handled "through the litigation in courts" (Boyle 2006: 506-510). This statement applies regardless of whether the right to a healthy environment would be considered as a right belonging to the "first" or "second" generation of human rights. Therefore there are numerous attempts to create the right to a healthy environment as a totally new type of right.

5. Developments in creating legal basis for the "right to a healthy environment"

5.1. Stockholm Declaration – human rights and environmental protection in 1970s

The key role in the legal framework for the protection of the environment was for a long time assigned to the obligations imposed on the users of the environment, especially polluters, and respective competences of public authorities who were responsible for monitoring compliance and enforcement. The role

[26] This was one of the main reasons why the mentioned above right to environment introduced in Poland into the old „socialist" Constitution in 1976 was not included again into the new democratic Constitution in 1997 (Jendrośka and Longi 1998: 10-13)

[27] Which is supposed to be produced by the constitutional social rights – see Lawrysen and Theunis 2007: 17-19

[28] For example in Belgium (Lawrysen and Theunis 2007: 17) or in Greece (Pediaditaki 2007: 63).

of the public was limited mainly to the use of traditional private law measures for the protection of individual interests, which in the field of environmental protection have limited scope and effectiveness. In the 1970s, in view of the significant increase in the importance of the environmental issues in the hierarchy of social objectives and the emergence of detailed regulations in this field, ways to increase the effectiveness of environmental protection were sought. They were seen in the development of legal measures serving the civic activity of the public. The issue was widely considered during the 1972 United Nations Conference in Stockholm, whose objective was to discuss the key problems related to environmental degradation and to develop mechanisms for effective environmental protection, which "could serve as an effective instrument for education and stimulate public awareness and community participation in action for the protection of the environment"[29].

Under the influence of the intense political debate on human rights that was taking place at that time[30], it was recognised there that a good way to raise the status of environmental protection and to increase its effectiveness would be to recognise it as one of the fundamental human rights, which could result in the use for environmental protection of instruments specific to the protection of human rights. Such hopes led to the inclusion of the human right to the environment in the Stockholm Declaration.

The human right to the environment, understood as the right to live in and enjoy a healthy environment, was formulated in the Stockholm Declaration adopted at the conclusion of the Stockholm Conference of 1972. The formulation of the right to a healthy environment in Principle 1 of the Stockholm Declaration has been subject of many analyses and considerations. It should be borne in mind, however, that the entire Stockholm Declaration is merely a declaration of political intentions, and not a set of binding legal obligations[31]. Moreover, the formulation of Principle 1, including in particular the linking of the right to environment with the issue of racial segregation etc., reflects more the political conditions of the time than it is an expression of a real political will to recognise the right to a healthy environment as a subjective right. Nevertheless it initiated an extensive debate about introducing such a right into the binding legal framework.

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[29] See seminal overview of the preparations for- and the results of the Stockholm Conference in Sohn 1973: 424-427

[30] During the 1970s human rights started to play an important role in international relations and heavily influenced various political debates – some authors even consider the 1970s as a „Turning Point in Human Rights History" see Eckel and Moyn 2014: 1-14

[31] For an overview of the respective debate see Sohn 1973: 426-427

5.2. Human rights and environmental protection in 1980s and 1990s: Rio Declaration and trend towards procedural environmental rights

Following the Stockholm Declaration the reference to some kind of the right to a healthy environment started to appear in many different international documents, including in various acts of international law (e.g. labour law conventions, conventions governing the law of armed conflict). It was also included into two regional binding international human rights agreements: the 1981 African Charter on Human and Peoples' Rights and in the Additional Protocol of San Salvador signed in 1988 to the American Convention on Human Rights (see comments above). The right to environment guaranteed in Article 24 of the African Charter on Human and Peoples' Rights deserves special attention, as it is not only recognized as the first case of explicit recognition of the human right to a healthy environment in a binding human rights instrument (du Plessis 2011: 36-37), but also because this right is granted there not so much to human beings but to "peoples", which gives it a dimension different from traditional human rights focused on the protection of individual interests (Pedersen 2008: 79). Moreover, this right seen in the context of other provisions of the African Charter implies the existence of positive obligations on the part of states (du Plessis 2011: 39) It should be added, however, that the interpretation of this right by the African Commission on Human and Peoples' Rights in specific cases tends to give it a more procedural character by, for example, reducing this right to powers concerning public participation in decision-making or obligations to carry out and make available to the public the documentation of environmental impact assessments (Pedersen 2008: 80).

The right to a healthy environment increasingly started to appear also in the national constitutions, their legal meaning varied however depending on the approaches to constitutional rights generally[32]. As a result of the lively political and legal debate that had started already in the 1970s on the recognition of the human right to a healthy environment, many problems were identified that made it difficult to frame this right in such a way as to provide effective judicial protection of individual claims (Krämer 2011: 134). As the above discussion about the respective challenges show, one of the solutions was to include right to a healthy environment into the category of social rights unsuitable for direct application before the courts.

[32] See Sands 2012: 296 or Knox 2020: 84-87

Instead of constructing a substantive right to a healthy environment (or in addition thereto[33]), it turned out to be more popular to grant certain procedural rights providing the public with possibilities to undertake some activities for the benefit of environmental protection, for example by access to environmental information or by participation in decision-making processes in the field of the environment (Ladeur 1996: 24). Such rights could be enforced before the courts because claims based on the violation of individual legal interests can be constructed there. Furthermore, in some legislations it was supplemented with providing some possibilities (most frequently to environmental organisations, but sometimes also to individual citizens) to challenge decisions or lodge claims against polluters in the public interest related to environmental protection.

The first comprehensive approach to procedural environmental rights at the international level was undertaken when access to information, public participation in decision making and access to justice in environmental matters were codified in Principle X of the Rio Declaration. Although Rio Declaration belongs to the instruments of so called "soft law" (i.e. having not binding legal nature but only a form of recommendations or political declarations) Principle X is commonly considered to be significant as a clear global expression of the developing concepts of the role of the public in relation to the environment. It was soon after its adoption acknowledged as an international benchmark against which the compatibility of national standards could be compared and as a forecast of the creation of new procedural rights which could be granted to individuals through international law and exercised at the national and possibly international level (Sands 1995: 95).

It is characteristic that the Rio Declaration of 1992 – as compared with the Stockholm Declaration – no longer includes a reference to the substantive right to a healthy environment in the catalogue of fundamental environmental principles it codified. Instead, in Principle 10 of the Rio de Janeiro Declaration, there is a reflection of these new trends by clearly referring to the so-called "triad" of procedural environmental rights: access to information, participation in decision-making, and access to justice in environmental matters. Worth noting is the fact that they are clearly indicated in the context of effectiveness of environmental protection ("Environmental issues are best handled…") thus making a link to the mentioned above objectives of the 1972 Stockholm Conference. There is no evidence for this, but one can speculate that drafters of

[33] See for example the Constitution of Portugal which already in 1976 in addition to granting in article 66 the substantive „right to a healthy and ecologically balanced human living environment" required also public participation and in Article 52 granted the right of actio popularis in relation inter alia to the „preservation of the environment'

the Rio Declaration might have realised that mere establishment of the right to a clean environment would not so easily result in using the instruments specific for human rights for the purpose of environmental protection, and therefore decided to replace a reference to the substantive right to a healthy environment with procedural environmental rights.

5.3. Right to environment at the global level

Attempts to institutionalise the links between human rights and environmental protection at the global level within the framework of the United Nation have been made many times, the best known example being the so-called Ksentini Report (Human Rights and the Environment, E/CN.4/Sub.2/1994/9) prepared for the United Nations Commission on Human Rights in 1994. The longstanding efforts culminated in some success in March 2012, when the Human Rights Council, which replaced the former United Nations Commission on Human Rights, decided to establish a special body, called the Independent Expert on Human Rights and the Environment (United Nations A/HRC/19/L.8/Rev.1) to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, and appointed John H. Knox to the mandate. In 2015, the Council renewed the mandate for another three-year term and changed the title of the mandate-holder to special rapporteur. He issued a number of reports mapping how human rights bodies have applied human rights norms to environmental issues and prepared a document called Framework Principles on Human Rights and the Environment, which summarize the existing human rights obligations relating to the environment as defined by human rights tribunals and other international bodies (Knox 2020: 88). In 2018, the Council renewed the mandate for another three years, appointing David R. Boyd as the special rapporteur.

Following this, the Human Rights Council issued a number of resolutions on human rights and the environment, which somehow were concluded with the resolution 48/13 of 8 October 2021 in which it „*Recognizes* the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights" and „*Invites* the General Assembly to consider the matter" (A/HRC/48/L.23/Rev.1).

Finally, the General Assembly in its resolution 76/300 recognized "the right to a clean, healthy and sustainable environment as a human right", noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law" and affirmed that „the promotion of the human right to a clean, healthy and sustainable environment requires the full

implementation of the multilateral environmental agreements under the principles of international environmental law" (A/76/L.75).

5.4. Right to environment in EU

There is no explicitly proclaimed substantive right to a healthy environment in EU law. Although in the course of the preparations for the negotiations leading to the Maastricht Treaty, as early as 1990, the Commission proposed the introduction of such a right in the Treaty (Krämer 2011: 133-134), and the European Council in a way supported this in its Declaration on the Environment adopted in the same year (ibid: 2), the right to a healthy environment ultimately found no place in the Treaties. In the doctrine, the need to introduce this right into the Treaties has been suggested many times for years, the demands in this respect intensified especially during the debate preceding the enactment of the Constitutional Treaty providing sometimes quite elaborated proposals[34]. This has however never gained sufficient political support (de Sadeleer 2012: 41). Instead of a substantive right to the environment in EU law, a number of legal instruments regulating various aspects of environmental procedural rights of the public have emerged in the Community/EU law in some kind of interplay with the Aarhus Convention: with those adopted before the Convention clearly influencing respective provisions of the Convention, while those adopted after the Convention aiming at implementing its provisions (Jendrośka 2005: 12-21).

6. Rights of Nature (RoN)

6.1. Concept of RoN and its development

The discussion regarding the relationship between human rights and environmental protection has been significantly enriched with the concept of Rights of Nature (RoN) proposing to retreat from the traditional anthropocentric approach (rights *to* the environment) towards a new ecocentric approach (rights *of* the environment) in which the Nature (or its elements) would have the rights on its own. The rationale for a new approach is based on the drawbacks of the traditional approach which is seen by advocates for RON as legitimising claims to nature and assuming that nature exist only for the benefit of humans. This

[34] See for example Ermacora 2003: 29-42

in turn, according to them, results in numerous negative consequences for both the society and the environment[35].

The origins of the legal concept of RoN are often traced back to 1972, when the already quoted Christopher Stone's famous essay "Should trees have standing?" was published (Darpo 2021: 11 or Vallejo Galárraga 2018: 344-345). According to Darpo, the resulting therefrom idea „that environmental objects should be granted legal personhood and thus be able to defend themselves in court through representation by the public" did not win much attention until it was resurrected at the beginning of the 2000s which resulted in the introduction of rights for nature in the Constitution of Ecuador in 2008 (Darpo 2021: 11-12).

The above view of Darpo is partially true, as indeed until the 2000s there were no serious attempts to provide legal personhood to natural objects but it somehow overlooks the impact this essay had on the approach to the environment and nature, and in particular to the issue of standing for claims related to environmental protection generally.

As far as the approach to the environment and nature is concerned worth noting is the fact that already in 1982 the UN General Assembly adopted the resolution on the World Charter for Nature which, inter alia, stated that „[E] very form of life is unique, warranting respect regardless of its worth to man". Furthermore, the Stone's essay heavily influenced the discussions regarding limitations of the traditional approach to standing and attempts undertaken already in 1990s to increase the role of access to justice and judiciary in environmental protection, including the approaches to designing access to justice pillar of the Aarhus Convention (Jendrośka 2020: 375-398).

As already indicated, the debate on RoN was accelerated in the 2000s with a number of legal studies addressing various aspects of the concept of RoN, instances of accepting legal personality of certain natural objects in some national and local legislations, and with the respective court verdicts[36].

6.2. Pros and cons of RoN

The literature about RoN is impressive[37], but the views regarding RoN are very different. There are strong believers of the benefits of using the concept of RoN

[35] For a good account of the respective arguments see for example Villavicencio Calzadilla and Kotze 2017: 176

[36] For an overview of the various aspects of RoN and developments of respective legal acts and jurisprudence see for example Darpo 2021: 11-22

[37] There are about 150 academic accounts devoted to the RoN debate listed in M. Carducci et al 2019: 132-142

as an instrument to solve failures of the existing environmental law, whether at the EU level [38], or at the global level[39]. There are however also authors skeptical about the very concept of RoN, who claim it would not solve such problems[40].

Worth noting in this context are views of scholars having a closer look at the implementation of the existing legal acts explicitly recognizing some forms of RoN in Latin America, who claim either that such implementation is not effective enough (Villavicencio Calzadilla and Kotze 2017: 175-189), or that granting such rights is counterproductive as it leads to favoring one forms of nature at the expense of other forms, for example fauna at the expense of flora (Lozano 2023: 345-380). This seems to be confirming the view of Krämer who, after examining experience with implementation of the legal acts recognizing RoN in various countries, considers important not so much a formal recognition in EU of the rights of natural objects but rather enforcement of the respective legal obligations and underlines in this respect the importance of access to justice (Krämer 2020: 71). As far however as the EU is concerned, some authors claim that „strong protection amounts – in effect – to an award of rights" and, despite the fact that RoN have not been explicitly recognized, argue that already „nature does have legal rights in the EU legal order by virtue of the legal obligations owed to it under existing environmental laws" (Epstein and Schoukens 2021: 206).

Quite interesting is the fact that many authors, after examining the key features of RoN, come to a totally different conclusions. Some conclude that while indeed the nature requires better protection, nevertheless „there are a number of practical and theoretical difficulties in granting standing to trees" because the very concept of rights is designed for humans and thus not suitable for the purpose of protecting the nature (Burdon and Williams 2022: 175). The others conclude that there is nothing intrinsic in the concept of rights that could not be attributed to nature and „see no real difference between granting certain rights to ecosystems and corporations" (Schoukens 2020: 213).

Without assessing whether indeed a formal recognition of granting personhood to natural objects is possible and needed, for the purpose of this account it is sufficient to note that most authors participating in the debate underline that the key issue is to assure the effective protection of the nature. And here of utmost importance is the possibility to represent the interests of natural objects at courts, which could be granted „without claiming that the natural entity itself would have become a legal person" (Kurki 2022: 525). In this point there is an obvious link between RoN and the right to a healthy environment considered as

[38] for example authors of the above cited collective study (M. Carducci et al 2019)

[39] For example Vallejo Galárraga 2018: 341-360

[40] For example J. Betaille (Betaille 2019: 64) or J. Darpo (Darpo 2021: 60)

a standard human rights, because both require appropriate procedural guarantees regarding access to justice in relation to standing and scope of the review. And this is exactly the issue which the Aarhus Convention is meant to address.

7. Conclusions (interim)

As it was already indicated the challenges related to constructing a substantive right to a healthy environment have resulted in the move towards granting procedural environmental rights to the publics One of the reasons for this was the assumption that such rights could be enforced before the courts because claims based on the violation of individual legal interests can be constructed there. Bearing in mind the role of the UNECE Aarhus Convention, which was meant to codify procedural environmental rights, there is nothing strange that the commonly shared assumption is that legal framework provided by the Convention, in particular its access to justice provisions, would provide a solid basis as legal guarantees for the protection the rights of the public in environmental matters. The more careful examination conducted in this respect in Part II of the study shows that while this is not necessarily the case in relation to strictly environmental rights, the interpretations of the Convention should pay more attention also to its role as an instrument to foster democracy and better governance.

Abbreviations

ACCC – Aarhus Convention Compliance Committee
EU – European Union
CJEU – Court of Justice of the European Union
RoN – Rights of Nature
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights

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