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## IS THE RIGHT TO LIVE IN AN ENVIRONMENT WITH CLEAN AIR A PERSONAL INTEREST? SELECTED ISSUES

EWA RADECKA<sup>1</sup>

**Abstract:** This article attempts to synthetically discuss the right to live in a clean environment through the prism of the regulations on personal interests. The aim is to bring this issue closer to the Czech reader, which could be a contribution to the international academic discussion in this field.

First, the author points to the socio-economic background of the current poor air quality in Poland, and then goes on to try to define a personal good and a clean environment. She then presents the relevant case law and the position of the legal scholarship in this respect, with a simultaneous attempt to determine the consequences of any discrepancies.

**Keywords:** environmental law; air; personal interest

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### INTRODUCTION

The importance of air protection, especially in the context of the current, highly scrutinized, climate change<sup>2</sup> from the global perspective, and its impact on health,<sup>3</sup> is indisputable. This issue is all the more important from the research perspective, as there are legal instruments in Poland (more and more extensive every year), which are intended to affect this protection. However, they seem to be by no means effective,<sup>4</sup> which is highlighted by various reports and surveys (e.g., by the World Health

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<sup>2</sup> It is worth reading the latest report by the Inter-Governmental Panel on Climate Change (See Climate Change 2021: the Physical science Basis. In: *IPCC* [online]. 7.8.2021 [cit. 2021-08-09]. Available at: <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>).

<sup>3</sup> A tragic consequence of poor air quality – according to estimates by the European Environment Agency – is the premature death of around 400000 Europeans annually (See Poprawa jakości powietrza przekłada się na lepszy stan zdrowia i lepszą produktywność. In: *Europejska Agencja Środowiska* [online]. [cit. 2021-08-15]. Available at: <https://www.eea.europa.eu/pl/sygna142y/sygna142y-2020/articles/poprawa-jakosci-powietrza-przeklada-sie>).

<sup>4</sup> RADECKA, E. The National Air Pollution Control Programme in Poland: Selected Legal Issues. *Review of European Comparative Law*. 2020, Vol. 40, part 1, pp. 7–23; RADECKA, E. A legal model of air protection in Poland: selected issues. *Bratislava Law Review*. 2021, No. 1, pp. 159–166.

Organization,<sup>5</sup> the Supreme Chamber of Control,<sup>6</sup> the European Commission,<sup>7</sup> and even the judgment of the CJEU of 22 February 2018 in case C-336/16 – *the European Commission v the Republic of Poland* – concerning air protection in Poland). It is difficult to avoid the impression that the Polish lawmaker is confining air protection to creating new legal regulations, which are neither effective nor efficient, while the appropriate direction of change should consist of:

a) the creation of new legal regulations, which are effective rules which function within a particular socio-economic reality, assuming extensive and strong integration and cooperation of activities between authorities (including the mutual permeation of planning in this field) and

b) emphasising the importance of sustainable development,<sup>8</sup> not only in the context of environmental, but also of socio-economic, issues, as a basis for action in the development of a legal model for air protection.<sup>9</sup>

Since the author mentioned the socio-economic situation, at least a short observation is necessary on its strong connection with the poor air quality in Poland. This situation has been the result of several deep-rooted systemic problems: the high dependence of the national economy on fossil fuels, the low use of energy from renewable sources (especially wind power), the so-called low-stack emissions (sometimes strongly connected with energy poverty), and the low use of electromobility.<sup>10</sup> All this points to one, but not sole, important long-term direction, which is also vital in the context of air protection – decarbonisation. The decarbonisation process, especially in Upper Silesia (currently the largest mining centre in Europe) will have to mean a very-profound energy, economic, and social transformation, which must be based on a well-thought-out, comprehensive, and socially agreed “just transition plan”, which in turn implies the need to create effective legal norms.

The issues considered below are now being widely discussed in Poland, due to the Supreme Court’s Resolution of 28 May 2021, Case No. III CZP 27/20<sup>11</sup> (the Resolution).

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<sup>5</sup> MYLLYVIRTA, L. – HOWARD, E. Five things we learned from the world’s biggest air pollution database. In: *UNEARTHED* [online]. 2.5.2018 [cit. 2021-08-09]. Available at: <https://unearthed.greenpeace.org/2018/05/02/air-pollution-cities-worst-global-data-world-health-organisation/>.

<sup>6</sup> Ochrona powietrza przed zanieczyszczeniami. Lata 2014–2017 (I półrocze). Najwyższa Izba Kontroli, Warszawa, wrzesień 2018 r [online]. 11.9.2018 [cit. 2021-08-09]. Available at: <https://www.nik.gov.pl/kontrola/P/17/078/>.

<sup>7</sup> Komisja Europejska. Przegląd wdrażania polityki ochrony środowiska 2019: sprawozdanie krajowe – Polska [online]. 4.4.2019 [cit. 2021-08-09]. Available at: [ec.europa.eu/environment/eir/pdf/report\\_pl\\_pl.pdf](https://ec.europa.eu/environment/eir/pdf/report_pl_pl.pdf).

<sup>8</sup> Pursuant to Article 3(50) of the Act of 27 April 2001 the Environmental Protection Law (*Journal of Law*. 2020, item 1219, as amended, henceforth cited as the EPL), sustainable development is the kind of social and economic development in which political, economic, and social activities are integrated, while maintaining the natural balance and sustainability of basic natural processes in order to guarantee the possibility of satisfying the basic needs of particular communities or citizens of both the present and future generations.

<sup>9</sup> See more on the systemic approach to air protection in: IWAŃSKA, B. Ochrona powietrza w systemie prawa ochrony środowiska. *Europejski Przegląd Sądowy*. 2017, No. 7, pp. 4–14.

<sup>10</sup> This thread was further developed in: RADECKA, A *legal model*... pp. 159–166.

<sup>11</sup> The resolution of the Supreme Court of 28 May 2021, Case No. III CZP 27/20, LEX nr 3180102. In: *Sąd Najwyższy* [online]. 1.6.2021 [cit. 2021-08-09]. Available at: [https://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=446-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty\\_o\\_sprawach&rok=2021](https://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=446-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach&rok=2021).

The author acknowledges that it is impossible to fully explore this topic, especially as this issue is highly debatable, both in case law and in legal scholarship. Therefore, the most-important threads will be presented, which are a potential contribution to the international academic discussion in this field.

## PERSONAL INTERESTS AND A CLEAN ENVIRONMENT – A TERMINOLOGICAL APPROACH

There is no legal definition of the term “personal interests” (in Polish, *dobra osobiste*).<sup>12</sup> In the Polish legal scholarship, the prevailing view is that of the positivistic approach to subjective rights. According to the classic definition, a subjective right is a sphere of a possibility to behave in a certain way, resulting from a given legal relationship, granted by a legal norm in order to protect the interests of the entitled person, and secured by this norm.<sup>13</sup>

In the words of P. Księżak, “*these are values of a non-material nature, connected with human personality, commonly recognised in society*”.<sup>14</sup> These are values “*connected with the essence of humanity, and the nature of human beings, independent of their will, permanent, capable of being made concrete and objective, or being a manifestation of their creative activity, concentrating his or her unique dignity, allowing the self-realisation of the individuality of a human being, and his or her position among other people. Every personal interest combines two elements – the protected value and the right to expect that others respect it.*”<sup>15</sup>

The legal scholarship stresses that the personal interests listed in Article 23 of the Polish Civil Code<sup>16</sup> are only examples, and the practice of everyday life is constantly developing (or should be) new categories of these. This does not mean, however, that the practice of an unlimited extension of the list of personal rights is approved, as it would lead to a depreciation of the meaning of personal interests, and their formal legal protection.<sup>17</sup>

Moving on to the second term in question, in accordance with the Polish Environment Protection Act (Article 3(39)), the environment is the totality of natural elements, including those transformed as a result of human activity, in particular the earth’s

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<sup>12</sup> It is impossible to discuss exhaustively all the issues connected with the conceptions of personal interests, as the issue itself is extensive, and could constitute a of separate monography. In this respect the author recommends e.g. ŁASZEWSKA-HELLRIEGEL, M. – SKIBIŃSKA, M. *Dobra osobiste w prawie cywilnym, prasowym i karnym*. Zielona Góra: Oficyna Wydawnicza Uniwersytetu Zielonogórskiego, 2018; PATRYK, A. *Definicja i istota pojęcia dóbr osobistych*. In: Lex 2014 [online]. [cit. 2021-09-19]. Available at: <https://sip.lex.pl>; WOŹNIAK, M. *Naruszenie dóbr osobistych hałasem*. *Przegląd Sądowy*. 2015, No. 6, pp. 33–41; GRZESZAK, T. *Dobro osobiste jako dobro zindywidualizowane*. *Przegląd Sądowy*. 2018, No. 4, pp. 7–4.

<sup>13</sup> HEJBUDZKI, M. *Normatywne podstawy wprowadzenia do polskiego porządku prawnego koncepcji prawa podmiotowego do życia w czystym środowisku*. *Studia Prawnoustrojowe*. 2019, Vol. 43, p. 121.

<sup>14</sup> KSIĘŻAK, P. *Komentarz do art. 23, pkt 119–120*. In: KSIĘŻAK, P. – PYZIAK-SZAFNICKA, M. (eds.). *Kodeks cywilny: komentarz: część ogólna*. Warszawa: Wolters Kluwer Polska, 2014. In: Lex 2014 [online]. [cit. 2021-09-19]. Available at: <https://sip.lex.pl>.

<sup>15</sup> HEJBUDZKI, c. d., p. 125.

<sup>16</sup> Id., p. 121.

<sup>17</sup> Id., p. 125.

surface, minerals, water, air, landscape, climate, and other elements in the biological diversity, as well as the mutual interaction between these elements. It is also worth mentioning that environmental protection within the meaning of Polish legislation includes undertaking or abandoning activities facilitating the maintaining or restoring of the natural balance; this protection consists particularly of:

- a) the rational shaping of the environment and the management of environmental resources in accordance with the principle of sustainable development,
- b) counteracting pollution,<sup>18</sup> or
- c) restoring natural elements to their proper state (Article 3(13) of the Environment Protection Act).

No Polish legal Act defines what a “clean environment” is, although the Basic Act – the Constitution of the Republic of Poland<sup>19</sup> states the significance of the “environment” in several articles. The very fact that environmental protection has been made one of the constitutional foundations of the Republic of Poland (Article 5 of the Constitution), emphatically shows what importance it has been given by the Legislature. In addition, the Constitution imposes on public authorities a number of obligations of a programmatic nature, e.g., to pursue a policy ensuring ecological security for contemporary and future generations, as well as a general obligation to protect the environment (Article 74(1) and (2) of the Constitution).

There is no legal definition of the term “clean environment” and this can lead to various interpretations. Nevertheless, any analysis should be carried out rationally and with regard to the specific facts.<sup>20</sup> Certainly, however, the assessment of whether or not the environment is clean, in the context of air protection, will take into account the existing EU air-quality standards,<sup>21</sup> or the already-mentioned concept of pollution. For the purposes of this article, in synthetic terms, clean air is that in which it is possible to breathe atmospheric air meeting the quality standards defined by law.

## THE LEGAL SCHOLARSHIP AND CASE LAW ON THE SUBJECTIVE RIGHT TO A CLEAN ENVIRONMENT

The positions expressed in the body of legal knowledge on the subject are not consistent. One can note both

- a) those which, according to the direct approach, consider a clean environment to be a personal interest<sup>22</sup> and

<sup>18</sup> A pollutant is an emission which can be harmful to human health or the environment, can cause damage to material assets, and can impair the aesthetic qualities of the environment, or can interfere with other legitimate uses of the environment (Article 3(49) of the EPL).

<sup>19</sup> The Constitution of the Republic of Poland of 2 April 1997. (*Journal of Laws*. 1997, No. 78, item 483, as amended, elsewhere cited as the Constitution).

<sup>20</sup> HEJBUDZKI, *c. d.*

<sup>21</sup> Directive 2008/50/EC of the European Parliament, and of the Council, 2008/50/WE of 21 May 2008, on ambient air quality and cleaner air for Europe (*Official Journal of the European Union*. L 152. 11.6.2008, p. 1) – commonly referred to as the CAFE Directive.

<sup>22</sup> See e.g. MAZUR, P. Prawo osobiste do korzystania z wartości środowiska naturalnego. *Państwo i Prawo*. 1999, No. 11, pp. 51–62; SKOWROŃSKA-BOCIAN, E. *Prawo cywilne: część ogólna: zarys wykładu*.

b) those which emphasise that there are no grounds for determining an intrinsic personal interest in the form of the possibility of enjoying the benefits of the natural environment.<sup>23</sup>

At present, however, the legal scholarship more often invokes the direct approach, according to which the right to enjoy the value of the natural environment fulfils the prerequisites for a personal interest, and may be recognised as such.<sup>24</sup> Nevertheless, as M. Hejbudzki states, “when assessing whether there has been a violation of such a personal interest, it is necessary to take into account not only the sphere of the individual experiences of a natural person, but the average human reaction must be borne in mind. Basing on objective criteria, it should be determined whether, as a result of the actions of a given perpetrator, the emotional sphere of a given person, connected with his or her specific personal interest, has been infringed.”<sup>25</sup>

Moving now onto court rulings, the starting point should be that the case law of the Supreme Court to date has been diverse, and has indicated

- a) that the human right to an uncontaminated biological environment is not a personal subjective right, and that it may be protected by the means provided for in Article 24 of the Civil Code only if the violation of that right constitutes at the same time an infringement or threat to personal rights, the subject matter of which is personal interests within the meaning of Article 23 of the Civil Code.<sup>26</sup> Importantly, this decision has been subject to critical assessment, and
- b) another, different view, recognising the existence of the right to enjoy the benefits of an uncontaminated environment as a subjective personal right, within the meaning of Article 23 of the Civil Code.<sup>27</sup>

In the Author’s opinion, one of the indirect objectives of the latest Resolution of the Supreme Court was to consider whether the gravity and social significance is important enough to qualify life in a clean environment to be in the list of personal interests. A positive conclusion in this respect would result in the granting of an independent category of the subjective right to live in a clean environment. There is no doubt that attempts

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Warszawa: LexisNexis, 2005, p. 97; GRZYBOWSKI, S. Głos do wyroku SN z dnia 10 lipca 1975 r., I CR 356/75. *Orzecznictwo Sądów Polskich*. 1976, No. 12, item. 232, pp. 540–542; SZPUNAR, A. *Ochrona dóbr osobistych*. Warszawa: Państwowe Wydawnictwo Naukowe, 1979, pp. 153–154; KATNER, W. J. Prawo człowieka do korzystania z wartości środowiska do prawo obywatelskie czy także podmiotowe prawo cywilne? *Studia Prawno Ekonomiczne*. 1990, No. 45, pp. 35–50; RADECKI, W. Cywilna actio popularis w ochronie środowiska naturalnego. *Palestra*. 1979, No. 11–12, p. 14; RADECKI, W. Żądanie wstrzymania działalności szkodliwej dla środowiska w prawie cywilnym. *Palestra*. 1983, No. 10, p. 10. This right is referred to in different ways, such as the right to live in a clean environment, and the right to enjoy a clean, unpolluted, environment.

<sup>23</sup> SMÓLSKA-KORPAŁA, M. Ochrona dóbr osobistych w świetle ustawy o ochronie i kształtowaniu środowiska. *Nauka Polska*. 1981, No. 3, p. 5; KSIĘŻAK, c. d.; KALUS, S. Komentarz do art. 23 Kodeksu cywilnego, pkt 34. In: FRAS, M. – HABDAS, M. (eds.). *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*. Warszawa: Wolters Kluwer Polska, 2018. In: Lex 2018 [online]. [cit. 2021-09-19]. Available at: <https://sip.lex.pl>.

<sup>24</sup> HEJBUDZKI, c. d., p. 130.

<sup>25</sup> Id.

<sup>26</sup> The judgment of the Supreme Court of 10 July 1975 in case No. I CR 356/75, OSP 1976/12/232.

<sup>27</sup> The decision of the Supreme Court of 20 July 1984, case No. II CR 5/84. *Państwo i Prawo*. 1988, No. 2, p. 140.

are currently being made to link the effects of the polluting of one of the components of the environment, e.g., the air, with a personal interest or health, as explicitly articulated in Article 23 of the Civil Code. Importantly, any decision concerning the independence of the subjective right to live in a clean environment with clean air should not be taken in isolation from the situational context, with particular emphasis on the permanent and long-term exceedance of air-quality standards in Poland.<sup>28</sup>

In the latest case pending before the Polish Supreme Court (Case No. III CZP 27/20),<sup>29</sup> the following legal question was formulated. “Does the right to live in a clean environment enabling one to breathe in atmospheric air which meets the quality standards set out in generally binding legislation, in places where a person stays for a sustained period of time, in particular in his or her place of residence, constitute a personal interest subject to protection under Article 23 of the Civil Code,<sup>30</sup> in conjunction with Articles 24 and 448 of the Civil Code?”

It follows from above that the legal issue submitted for the court’s consideration essentially amounts to the question of whether that protection may also be exercised by means of civil-law measures,<sup>31</sup> and, more specifically, those for the protection of personal interests. The answer to this question is of fundamental importance, since the recognition of a value as a personal interest entails the right to require others to respect it, and the exercising of this right is affected by a claim permissible to prevent the violation of personal interests, and to remove its consequences (i.e., claims for injunctive relief provided for in Article 24 of the Civil Code), which may be submitted in both the case of threatening a personal interest and its infringement, and – in the event of an infringement of a personal interest – a claim for monetary compensation for this infringement, or by the donation of an appropriate amount to a public cause (Article 448 of the Civil Code).<sup>32</sup>

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<sup>28</sup> At this point, it is worth mentioning that on Friday 8 October 2021, the UN Human Rights Council adopted a resolution (48/13) recognizing the Human Right to a Healthy Environment.

<sup>29</sup> Only as an aside does the author note that the hearing and decision in this case was postponed at least twice.

<sup>30</sup> Pursuant to Article 23 of the Civil Code, the personal interests of a human being, such as, in particular, health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive, or improvement achievements, are protected by civil law, independently of protection under other regulations.

<sup>31</sup> Personal interests remain under the protection of civil law, regardless of the protection provided by other laws. For many years, the protection of values which have the status of personal interests in law, in particular life or health, has been provided for by criminal law, but also by administrative law, which defines the tasks and responsibilities of public-administration bodies in terms of organising social life and the ongoing satisfaction of various social needs, as well as setting limits on the exercising of a number of individual freedoms in the public interest. See also TRZEWIK, J. *Publiczne prawa podmiotowe w systemie prawa ochrony środowiska*. Lublin: Wydawnictwo KUL, 2016; and more about international legal regulations on air protection: DOKTÓR-BINDAS, K. *Prawo do czystego powietrza. Przegląd Konstytucyjny*. 2020, No. 4, pp. 1–33. As is indicated in the justification to the Supreme Court’s Resolution of 28 May 2021, “public subjective rights, by establishing which the State undertook to create a legal system with certain characteristics, also indirectly aim at securing personal interests, as values covered by legal protection at different levels and in different subjective relationships, but they are not identical to personal interests”.

<sup>32</sup> Podstawowe założenia i cel pozwu. In: *Pozyвам smog* [online]. [cit. 2021-08-09]. Available at: <https://pozywamsmog.eu/podstawowe-zalozenia-i-cel-pozwu/>.

According to the rationale of the Regional Court in Gliwice (the originator of the legal question to the Supreme Court), the right to pollution-free air, which is essential for life, should be classified as being closely related to the natural person, the essence of humanity and human nature, and inalienable and effective in relation to other persons, and thus meeting the indicated prerequisites of a personal interest.

Going back to the Resolution adopted on 28 May 2021, the Court found that:

*“1. The right to live in a clean environment is not a personal interest.*

*2. Subject to protection as a personal interest (Article 23 of the Civil Code in conjunction with Articles 24 and 448 of the Civil Code) are health, freedom, and privacy, the infringement of (or threat to) which can lead to the violation of air-quality standards specified in the legal regulations.”*

In the Court’s assessment, *“the environment is not a personal interest, but a common good, the care of which is the duty of every member of society, just as it is the duty of the State, as an organised community, and its authorities [...] Human and civil rights, which States – parties to the Convention for the Protection of Human Rights and Fundamental Freedoms – have undertaken to respect and to ensure their fulfilment, are not the same as the personal interests regulated in Article 23 of the Civil Code, although many of these rights are secured at the appropriate level of protection of personal interests.”*

The court emphasised that the question of the form of the breach of standards to which air should be subjected to remained outside the scope of the issue submitted to the Supreme Court for its decision. In the Court’s assessment, it was necessary for the author of the legal question (the Regional Court in Gliwice) to determine, in respect of the case in question, whether liability could be proven in the commission of a specific act leading to air pollution (e.g., the burning of a substandard fuel in a boiler room) or also by failure to establish and enforce such standards of conduct. Compliance with which would make it possible to protect the environment against degradation.

## CONCLUSIONS

This article has aimed to familiarise the reader with the issue of clean air, currently being discussed in Poland in the context of the protection of subjective rights.

The decision of the Supreme Court stipulates that the right to live in a clean environment does not have the autonomous character of a subjective right, and, therefore, it is not possible to create, on this basis, rights constituting the content of a subjective right in the form of claims for compensation for the infringement of a personal interest, which would be the *“right to live in a clean environment”*. Nevertheless, this Resolution does not mean that it is not possible to pursue claims related to poor air quality by means of a civil action. Indeed, the infringement of the right to live in a clean environment with clean air should be viewed from the perspective of the infringement of other defined personal interests, and more specifically as a derivative of the *“right to health”*.<sup>33</sup>

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<sup>33</sup> See more KSIĘŻAK, *c. d.*

It will often (if not always) be the case that a violation of the right to live in a clean environment will at the same violate other rights, such as the right to health. In this respect, one could use the rule “*according to which a personal interest which is better characterised and more specific should precede an interest of a more-general dimension*”<sup>34</sup> (i.e. the right to health – the evident infringement of the acceptable standards, harming one’s health beyond any doubt, will, as a rule, render irrelevant any additional reference to the right to live in a clean environment).<sup>35</sup>

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<sup>34</sup> HEJBUDZKI, *c. d.*, p. 130.

<sup>35</sup> However, as M. Hejbudzki rightly states, the application of the conflict of laws rule *lex specialis derogat legi generali* may not lead to automatism detached from the circumstances of individual factual states *in concreto* (HEJBUDZKI, *c. d.*, p. 130).