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PROTECTION OF THE RIGHT TO CLEAN AIR UNDER THE POLISH CIVIL CODE¹

1. INTRODUCTION

The 2030 Agenda for Sustainable Development, as a resolution of the UN General Assembly, was adopted on 25 September 2015. The aim of the 2030 Agenda is to act together for the benefit of the people, the planet and prosperity². Based on the goals of the 2030 Agenda, it can be concluded that clean air is an important element of the sustainable development of our planet. Although this is not clearly stated, the aspects of this plan can be derived from the following goals numbered: 3 (good health and well-being), 7 (affordable and clean energy), 11 (cities and communities), 12 (sustainable consumption and protection), 13 (activities in the field of climate) and 17 (partnership for the goals)³. Presently, it is widely observed that the world is ever more aware of how serious the problem of air quality has become. The media regularly provide information about the air pollution levels and how much they exceed acceptable limits⁴. One can therefore learn more about the consequences of such a state of affairs. Pollution can have a profound irreversible impact on human

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¹ This contribution is an extended and updated version of the presentation given during the “Sustainable Development and Human Rights” international conference organised by the Coordination Centre for Foreign Law Schools of the Jagiellonian University, in Krakow, on 25th of April 2018.

² Resolution adopted by the General Assembly on 25 September 2015, pp. 1–2, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed: 30/06/2019).

³ The right to breathe the clean air, <https://www.unenvironment.org/news-and-stories/story/right-breathe-clean-air> (accessed: 12/12/2018).

⁴ For example, on the website <http://airindex.eea.europa.eu>, it is possible to check the interactive map for the current air pollution in Europe.

health. In accordance with Marilena Kampa and Elias Castanas' article⁵, air pollutants may have a negative effect on the respiratory, cardiovascular, nervous, urinary, and digestive systems. Air pollution can also increase the risk of cancer⁶. In other words, pollution evidently does affect health. According to the data provided on the WHO website, 91% of the human population lives in places where the level of air pollution exceeds the WHO-recommended limits. Furthermore, an estimated 4,2 million people die worldwide as a result of exposure to such pollution⁷. This information is therefore a warning and calling for real changes that should be made. Although this is basically a problem for the entire world, the situation in Poland is among the worst in Europe⁸. This article has been prepared to answer the question of how people could protect their right to clean air. The basis for my discussion will be the provisions of the Polish Civil Code.

2. RIGHT TO A CLEAN ENVIRONMENT IN LIGHT OF LAW

The most important issue to be resolved is the problem of protecting the right to clean air. It should be considered both from the international and national perspective. However, the answer to the question about the grounds of protecting this right is certainly not so clear cut.

The classification of the right to clean air into human rights seems evident. It would be a complex task and beyond the scope of this study to define human rights. However, one should note that these are the fundamental rights resulting from humanity⁹.

In the context of human rights, it is worth paying attention to the theory developed by Karel Vasak¹⁰. According to his theory, human rights can be classified into three categories. The first-generation human rights embrace civil and political rights. These rights are fundamental, like: the right to life, equality before the law, freedom of speech, the right to a fair trial, freedom of religion. The second-generation human rights are economic, social and cultural rights and cover: the right to education, the right to housing, the right to adequate standard of living, the right to health, victims'

⁵ M. Kampa, E. Castanas: *Human Health Effects of Air Pollution*, *Environmental Pollution* 151:2 (2008), pp. 362–367, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.465.5144&rep=rep1&type=pdf> (accessed: 30/11/2018).

⁶ Cancer research UK, <https://www.cancerresearchuk.org/about-cancer/causes-of-cancer/air-pollution-radon-gas-and-cancer/how-air-pollution-can-cause-cancer> (accessed: 2/12/2018).

⁷ World Health Organisation website: <https://www.who.int/airpollution/en> (accessed: 2/12/2018).

⁸ A. Chapman: *Poland among Europe's Worst for Smog*, <https://www.euronews.com/2017/11/30/poland-among-europe-s-worst-for-smog> (accessed: 30/12/2018).

⁹ M. Piechowiak: *Pojęcie praw człowieka* (in:) L. Wiśniewski (ed.): *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa (1997), p. 7.

¹⁰ K. Vasak: *A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights* (in:) *The UNESCO Courier* 30 (11), (1977), p. 29, <https://unesdoc.unesco.org/ark:/48223/pf0000048063> (accessed: 1/08/2019).

rights, and the right to science and culture. The *third-generation* rights are collective and developmental. They include the right to peace, the right to development, the right to a safe environment, and the right to enjoy the common heritage of humanity.

So far, the United Nations have received no document on human rights regarding a clean and ecologically sustainable environment. Nonetheless, in 1972 the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) was adopted and became the first international document which recognised the right to a healthy environment¹¹. The current 2030 Agenda (and earlier Millennium Development Goals) is also the evidence of the UN's continued interest in the subject. There are discussions in the international arena aimed at finding a global solution to the problem with pollution. One of such conferences, the 24th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP24), took place in Poland in 2019. The COP24 ended with the adoption of the Katowice Rulebook. The main conclusion of this meeting was the decision to make further efforts to reduce carbon emission¹². The recent United Nations Climate Change Conference (COP26) was held in 2021, in the United Kingdom. The concluded agreement (Glasgow Climate Pact) provides for measures to be taken to reduce coal consumption¹³.

The European Union also draws attention to the problem of pollution. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe is the basic act, the objective of which is to protect the air in countries of the European Community¹⁴.

The foundations of environmental protection in Polish law can also be found in the Constitution of the Republic of Poland. Article 5 provides that the Republic of Poland shall ensure the protection of the natural environment pursuant to the principles of sustainable development¹⁵. Environmental protection is one of the system-founding principles. The authorities' task is to improve the quality of the environment and care for the development of the state for future generations. According to this, when evaluating activities that affect the environment, one should always pay attention not only to the harmfulness of interference, but also to the benefits thereof. It is therefore necessary to maintain the appropriate balance¹⁶. In addition,

¹¹ Declaration of the United Nations Conference on the Human Environment, https://en.wikisource.org/wiki/Declaration_of_the_United_Nations_Conference_on_the_Human_Environment (accessed: 15/02/2019).

¹² The Katowice Rulebook — main principles of the document, <https://cop24.gov.pl/news/news-details/news/the-katowice-rulebook-main-principles-of-the-document/> (accessed: 1/08/2019).

¹³ Glasgow Climate Pact, 13 November 2021, https://unfccc.int/sites/default/files/resource/cma2021_L16_adv.pdf (accessed: 21/11/2021).

¹⁴ OJ L 152, 11.6.2008, pp. 1–44; A. Drzeniecka-Osiadacz: *Ochrona powietrza — przepisy UE — dyrektywa CAFE*, <https://powietrze.uni.wroc.pl/base/t/przepisy-ue> (accessed: 12/02/2019).

¹⁵ Art. 5 of the Constitution of the Republic of Poland of 2 April 1997: *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* (Dz. U. Nr 78, poz. 483).

¹⁶ P. Sarnecki: *Komentarz do art. 5 Konstytucji Rzeczypospolitej Polskiej* (in:) L. Garlicki, M. Zubik (eds.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. I, (2016), LEX, u. 11.

some of legal commentators recognise sustainable development as a separate system-founding principle. The consequence of such a claim is the necessity to apply the principle of sustainable development also during the performance of state tasks other than those involving environmental protection¹⁷. I agree with the opinion that the indicated principle should be associated only with environmental protection, because this interpretation results directly from the wording of the provision of law¹⁸. Referring the above to the issue of protecting the right to clean air, it should be stated that the development of the country should be planned in a way that would allow air quality in Poland to improve. Although it is not possible to stop abruptly the operations of industries emitting pollutants to the atmosphere, one of the state tasks is to protect the environment, including clean air. Under Article 5 of the Polish Constitution the authorities are required to consider whether the potential advantages of a particular industry's operation outweigh the environmental losses it can cause. At the same time, a continuous review is necessary of new, improved solutions that can ensure the industry's effective operations and reduce the pollution levels.

There are more other articles in the Polish Constitution that refer to environmental protection (Articles 31, 68, 74, 86, 233). This only proves that, in accordance with the Constitution, environmental protection is an important and protected value, and the resulting obligations are assumed by both the state authorities and the citizens¹⁹.

These assumptions are further elaborated on in the Environmental Protection Act²⁰. For example, this Act specifies the rules of air protection by imposing a number of tasks on the administrative and legislative authorities²¹.

3. PROTECTION OF THE RIGHT TO CLEAN AIR UNDER THE PROVISIONS OF POLISH CIVIL LAW

Civil law regulates relations between natural and legal persons²². Legal relations are characterised by the equal status of the parties²³. Civil law is not a typical basis for claiming the state liability in case of human rights violations. Nevertheless, for an individual, this option could be the simplest and most accessible, compared to administrative or criminal proceedings. The foregoing sections provide

¹⁷ M. Florczak-Wątor: *Komentarz do art. 5 Konstytucji Rzeczypospolitej Polskiej* (in:) M. Safjan, L. Bosek (eds.): *Konstytucja Rzeczypospolitej Polskiej*, t. I, *Komentarz do art. 1–86*, (2016), Legalis, u. 41.

¹⁸ *Ibidem*.

¹⁹ M. Górski: *Komentarz do art. 74 Konstytucji Rzeczypospolitej Polskiej* (in:) M. Safjan, L. Bosek (eds.): *Konstytucja Rzeczypospolitej Polskiej*, t. I, *Komentarz do art. 1–86*, Legalis, u. 1–2.

²⁰ The Act of 27 April 2001: *Prawo ochrony środowiska z dnia 27 kwietnia 2001 r.* (Dz. U. 2018, poz. 799).

²¹ Art. 85–96a, *Prawo ochrony środowiska z dnia 27 kwietnia 2001 r.*

²² Art. 1 of the Civil Code of 23 April 1964: *Kodeks cywilny z dnia 23 kwietnia 1964 r.* (Dz. U. 2019, poz. 1145).

²³ P. Sobolewski: *Komentarz do art. 1 KC* (in:) K. Osajda (ed.): *Kodeks cywilny. Komentarz*, (2019), Legalis, u. 6.

examples of proceedings in which the Civil Code provisions were used for such protection. In addition, proposals for applying other provisions of Polish law are also presented.

3.1. PERSONAL RIGHTS

A viable option is to treat the right to clean air as a personal right in accordance with the Polish Civil Code²⁴. There is no single definition of the concept of personal rights. Article 23 of the Civil Code lists examples of personal rights²⁵. These are certain values, such as health or freedom. Recognition of a given value as a personal right determines the place of this value in the system of values for a particular society. This system undergoes constant development and changes²⁶. Recognition of the right to clean air as a personal right would allow its protection under Article 24 of the Civil Code. Still, so far, the right to clean air has been fully recognised as a personal right neither in jurisprudence nor in literature. At this point, it is worth paying attention to positions expressing support for the claim that the environment, and thus clean air, can be protected based on regulations on personal rights.

Izabela Wereśniak-Masri drew attention to the possibility of such classification of the right to clean air. She pointed to the open catalogue of personal rights and the possibility of recognising new categories thereof. In her opinion, the changes in the attitude to a clean environment, the scale of threat posed by air pollution and the increasing involvement of society in seeking to improve their situation result in the need to grant the right to a clean environment and the right to clean air the status of separate personal rights within the meaning of Article 23 of the Civil Code²⁷. This opinion is based on the rulings of the European Court of Human Rights and the Polish Constitutional Tribunal indicated by Wereśniak-Masri²⁸, as well as the obligations of public authorities arising from the Polish Constitution²⁹.

However, it should be emphasised that the courts do not establish new categories of personal rights, and they can only confirm the existence of certain personal rights in society. This is why, the catalogue of personal rights may change along with the societal development³⁰. Caution and restraint while defining new personal

²⁴ Art. 23–24, Kodeks cywilny z dnia 23 kwietnia 1964 r.

²⁵ ‘Personal rights of an individual shall be in particular health, freedom, honour, freedom of conscience, name or pseudonym, image, secret of correspondence [...]’.

²⁶ P. Machnikowski: *Komentarz do art. 23 KC* (in:) E. Gniewek (ed.): *Kodeks cywilny. Komentarz*, (2017), Legalis, u. 2.

²⁷ I. Wereśniak-Masri: *Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste*, *Monitor Prawniczy* 17 (2018), Legalis, pp. 937, 944.

²⁸ *Ibidem*, p. 940 and judgments of the ECtHR and the CT cited therein.

²⁹ *Ibidem*, p. 944; Art. 74, Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.

³⁰ P. Machnikowski: *Komentarz do art. 23 KC* (in:) E. Gniewek (ed.): *Kodeks cywilny...*, *op. cit.*, Legalis, u. 2.

rights, as mentioned by the Supreme Court in its resolution³¹, should be understood as caution when examining the nature of a given value in society and not as an action of developing such a right from scratch.

Pursuant to Article 71 of the Constitution of the Polish People's Republic of 22 July 1952, citizens of the Polish People's Republic shall have the right to take advantage of the natural environment and it shall be their duty to protect it³². Based on that Constitution, the interpretation of the individual's subjective right to an unpolluted environment was possible. In accordance with the judgment of 1975, the Supreme Court concluded that the human right to an unpolluted environment could be protected under Article 24 of the Civil Code³³. However, Stefan Grzybowski did not agree with that approach, criticising the ruling³⁴. Thus, even despite the clear constitutional grounds, granting citizens (people) the personal right to a clean environment (and therefore also to clean air) was not universally considered a positive phenomenon. The 1997 Constitution did not replicate the above-mentioned provision. Therefore, it is no longer possible to derive the right to a clean environment solely from the Constitution³⁵. Nevertheless, it is justified to discuss whether the right to a clean environment (including air) can be recognised as a separate personal right protected under Article 24 of the Civil Code. At present, we can find attempts at such classification of the right to clean air in cases brought to courts. In this context, three judgments are worth mentioning: V ACa 649/13 (Court of Appeal in Katowice), II C 1259/15 (District Court in Rybnik) and VI C 1043/18 (District Court for Warszawa-Śródmieście in Warsaw).

In the first case, the plaintiff's claim was to oblige the defendant (the State Treasury) to take appropriate legislative measures, the aim of which would be to combat air pollution, as well as to pay a PLN 10,000 compensation for violation of his personal rights. The plaintiff accused the government of failing to take appropriate action, among others, to implement the Directive 2008/50/EC in time. The action was dismissed both before the district court and the appellate court. In the justification of the judgment, the court pointed out that it was not a personal right to live in a clean and uncontaminated environment. The court explained that the personal right that might be subject to protection in the case in question was health, however, according to the court, the plaintiff did not prove that violation sufficiently. The court also pointed out that citizens did not have measures that could force the state to imple-

³¹ Resolution of the Supreme Court of 19 November 2010: uchwała Sądu Najwyższego z dnia 19 listopada 2010 r., III CZP 79/10, Legalis 260723.

³² Art. 71, Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 r. (Dz. U. 1976, Nr 7, poz. 36).

³³ The Supreme Court judgment of 10 July 1975: wyrok Sądu Najwyższego z dnia 10 lipca 1975 r., I CR 356/75, LEX nr 344145.

³⁴ S. Grzybowski: *Glosa do wyroku Sądu Najwyższego z dnia 10 sierpnia 1975 r., I CR 356/75*, OSPiKA 12 (1976), pp. 540–542.

³⁵ See the Constitutional Tribunal judgment of 13 May 2009: wyrok Trybunału Konstytucyjnego z dnia 13 maja 2009 r., Kp 2/09, LEX nr 493281.

ment the directive. According to the court, it was not possible to award compensation for legislative omission, either, if the non-implementation of the directive did not infringe the personal rights of citizens and could involve, at best, liability for damages. In that case, the plaintiff did not claim ‘liability for damages’. The grounds for that liability could be, according to the court, Article 417 of the Civil Code³⁶.

In the second case, the plaintiff made a claim against the defendant (State Treasury), represented by the Minister of Environment, to be awarded PLN 50,000 as compensation for violation of personal rights. The plaintiff indicated violation of Article 13 of the Directive 2008/50/EC, Articles 5, 74 of the Polish Constitution and Article 85 of the Environmental Protection Act. The plaintiff pointed to the significantly exceeded air pollution limits in the area inhabited by him, and presented the dangers that arise from this, emphasising the related stress.

Just as in the prior case, the first instance court did not recognise the claim. The court pointed out that it was impossible to demand compensation for undefined harm if there was no injury or health disorder (physical or mental) and the plaintiff did not sufficiently demonstrate that he suffered from any diseases caused by the contaminated air. Like the court in Katowice, the opinion of the District Court in Rybnik was that the plaintiff did not raise violation of his personal right to health, and it did not consider the right to live in a clean environment to be a personal right subject to protection based on Article 24 of the Civil Code. The court also argued that residing in Rybnik was the plaintiff’s free choice, and that at any moment he could change his place of residence. An appeal was then lodged³⁷. The Ombudsman joined the case and requested that the judgment under appeal should be amended and that the action should be upheld. According to the Ombudsman, there was evidence of interference in the plaintiff’s personal rights, consisting of the right to use the environment³⁸.

He drew attention to the continuous development of concepts related to personal rights and examples of recognising the right to use the environment as a personal right (Court of Appeal in Warsaw judgment of 10 June 2014, VI ACa 1446/13). The Ombudsman argued that already in the 1970s and 1980s, based on the Constitution of the Polish People’s Republic, the right to the environment was considered a personal right. The present Constitution, although it does not replicate the provisions of the 1952 Constitution relating to the right to the environment, makes environmental protection one of the basic principles of the political sys-

³⁶ Judgment of the Court of Appeal in Katowice of 23 January 2014: wyrok Sądu Apelacyjnego w Katowicach, V Wydział Cywilny, z dnia 23 stycznia 2014 r., V ACa 649/13, Legalis nr 797344.

³⁷ Judgment of the District Court in Rybnik of 30 May 2018: wyrok Sądu Rejonowego w Rybniku z dnia 30 maja 2018 r., II C 1259/15, [http://orzeczenia.ms.gov.pl/details/\\$N/151515250001003_II_C_001259_2015_Uz_2018-05-30_001](http://orzeczenia.ms.gov.pl/details/$N/151515250001003_II_C_001259_2015_Uz_2018-05-30_001) (accessed: 30/06/2019).

³⁸ Pleadings of the Ombudsman of 30 November 2018: Pismo procesowe RPO z dnia 30 listopada 2018 r., p. 14, <https://www.rpo.gov.pl/sites/default/files/pismo%20procesowe%20RPO%20ws%20smogu%20w%20Rybniku%2C%2030.11.2018.pdf> (accessed: 5/08/2019).

tem³⁹. The Ombudsman, Adam Bodnar, supported the idea of recognising the right to use the environment as a personal right⁴⁰.

The Polish Supreme Court, based on the above-mentioned case, indicated that the right to live in a clean environment is not a personal right. Nevertheless, the air quality standards defined in relevant regulations are intended to provide people with appropriate living and health conditions. Violation of air quality standards may lead to infringement of personal rights such as health or privacy⁴¹.

The District Court changed the judgment of the first instance court and awarded the plaintiff PLN 30,000. In the opinion of the court, the right to live in a clean environment is not a personal right but air pollution led to the infringement of other personal rights of the plaintiff, including health and inviolability of the apartment. The plaintiff proved that the claim for compensation was justified⁴².

In the third of the above-mentioned cases (Warszawa-Śródmieście District Court, VI C 1043/18), the plaintiff claimed that she should be awarded PLN 5,000 as compensation from the defendant (State Treasury) for the violation of her personal rights. It is worth mentioning that the case aroused media interest, the plaintiff being a well-known actress. The court admitted the plaintiff's claim. In contrast to the above-discussed cases, the court presented a different justification. The court found that the catalogue of personal rights includes the right to use the value of an unpolluted natural environment. However, it is not about using the environment free of any contamination. It is about the right to live in the environment and breathe air which quality corresponds to the standards laid out in legislation, for instance, a directive of the European Union⁴³. What follows, there is a chance to base the protection of the right to clean air on the construct of protection of personal rights. The judgment is final⁴⁴.

3.2. NUISANCE

Another legal measure to pursue the rights to clean air under civil law could be Article 144 of the Civil Code⁴⁵. Nuisance involves negative effects on neighbour-

³⁹ *Ibidem*, pp. 5–11.

⁴⁰ *Ibidem*, p. 9, u. 10–11.

⁴¹ Resolution of the Supreme Court of 28 May 2021: uchwała Sądu Najwyższego z dnia 28 maja 2021 r., III CZP 27/20, OSNC 2021/11/72.

⁴² Judgment of the Regional Court in Gliwice of 9 December 2021: wyrok Sądu Okręgowego w Gliwicach z dnia 9 grudnia 2021 r., III Ca 1548/18, LEX nr 3307532.

⁴³ Judgment of the Warszawa-Śródmieście District Court of 24 January 2019: wyrok Sądu Rejonowego dla Warszawy-Śródmieścia w Warszawie z dnia 24 stycznia 2019 r., VI C 1043/18, [http://orzeczenia.ms.gov.pl/details/\\$N/154505300003003_VI_C_001043_2018_Uz_2019-01-24_002](http://orzeczenia.ms.gov.pl/details/$N/154505300003003_VI_C_001043_2018_Uz_2019-01-24_002) (accessed: 30/06/2019).

⁴⁴ Smoglab website, <https://smoglab.pl/wyrok-za-smog-prawomocny> (accessed: 21/11/2021).

⁴⁵ Art. 144: The owner of real property should, while exercising his right, refrain from actions that would excessively disrupt the normal use of the neighbouring property resulting from the social and economic purpose of the real property and local relations.

ing real property. Article 144 concerns indirect nuisance. These are situations in which the adverse effects of actions in real property can be naturally felt in the neighbouring property, such as noise, vibration, the production of odours or heat⁴⁶. Land should be used in a way that does not disrupt the normal use of the neighbouring land. However, examples of cases in which the parties would try to claim their right to clean air using Article 144 of the Civil Code are rare.

At this point, Roman law could be mentioned. It can be said that air pollution was already of interest during the rule of Roman law. In the Digest, also known as the Pandects, one can find a described conflict regarding the smoke discharged from a cheese factory upon the buildings above it.

It is possible, therefore, to draw an analogy with the modern issue of air pollution caused, for example, by irresponsible neighbours. A problem is with the scope of using the right of ownership. In the above-mentioned case, the rights to protect the neighbour of the factory were quite obvious, but the rights of the remaining residents, who were disturbed by the smoke, were problematic. An opinion expressed was that people exposed to the smoke could bring an action to recognise that the discharge of the smoke should be banned, but at the same time, the owner of the cheese factory could bring an action to prove that he had his right. It is noted that the protective measure is then also justified if a 'party is prevented from making use of his own property in any way that he pleases'⁴⁷.

With reference to contemporary Polish law, it is worth paying attention to, for example, the case III Ca 1730/14 of the Regional Court in Łódź. This case did not directly concern the problem of air pollution. The plaintiff demanded, among other things, that the defendant should stop the heating the plaintiff's real property using inappropriate fuel. The plaintiff suspected that the defendant used rubbish as fuel. Because this thesis could not be proven, the court dismissed the plaintiff's claims. The court acknowledged that there was no evidence that the defendant was responsible for pollution on the property. The plaintiff, whose real property is situated in a densely built-up residential area, cannot reasonably expect that his property will be free from any nuisance. The plaintiff could only demand protection if the disturbance exceeded the average level, which he did not prove⁴⁸. If it was assumed that Article 144 of the Civil Code could be used as the basis for the protection of the right to clean air, the question arises with whom to seek the cessation of affecting property. Air cleanliness is the result of many factors as pollution particles can

⁴⁶ W. Szydło: *Komentarz do art. 144 KC* (in:) E. Gniewek (ed.): *Kodeks cywilny. Komentarz*, (2017), Legalis, u. 2.

⁴⁷ Digest 8.5.8.5, https://droitromain.univ-grenoble-alpes.fr/Anglica/D8_Scott.htm#V (accessed: 25/06/2019).

⁴⁸ Judgment of the Regional Court in Łódź of 22 April 2015: wyrok Sądu Okręgowego w Łodzi, III Ca 1730/14, [http://orzeczenia.ms.gov.pl/content/\\$N/152510000001503_III_Ca_001730_2014_Uz_2015-04-22_001](http://orzeczenia.ms.gov.pl/content/$N/152510000001503_III_Ca_001730_2014_Uz_2015-04-22_001) (accessed: 30/06/2019).

travel many kilometres. Therefore, it would be problematic to indicate the specific person(s) responsible for the contaminated air.

3.3. LIABILITY OF THE TREASURY PURSUANT TO ARTICLE 417 OF THE CIVIL CODE

A question that remains to be considered concerns liability for tort (*ex delicto*) and Article 415 of the Civil Code⁴⁹ to serve as a potential basis for pursuing claims regarding infringements that breach the right to clean air. One can imagine a situation when a person's act causes air pollution, which consequently causes damage to another person. If such behaviour is culpable, the person responsible could bear the consequences under Article 415. However, it would be necessary to prove both damage and guilt of the perpetrator. Damage may be defined as loss, both of material and non-material nature, to the aggrieved party⁵⁰. Therefore, there is a certain act resulting in the responsibility for damage, if it can be concluded that the damage is its usual consequence, and therefore if there is an adequate causal link between the act and the damage⁵¹.

Ex delicto liability is regulated quite broadly in the Civil Code. Not only Article 415, but also other provisions (e.g. Article 435 of the Civil Code) could under certain circumstances be the basis for pursuing claims related to damage caused by air pollution. An interesting issue is the possible liability of the State Treasury. According to Article 417 of the Civil Code, the State Treasury is liable for damage sustained as a result of an unlawful act or omission related to the exercise of public authority⁵². In order to allow for this possibility, it would have to be shown that there has been an unlawful act or omission in the exercise of public authority. This condition is met in the event of a conflict between the behaviour of public authority and the legal norm derived from the applicable legal provision, regardless of what rank the provision has⁵³. The application of Article 417 of the Civil Code would require recognising the violation of international law by the Polish State.

For instance, in the case C-336/16 the Court of Justice of the European Union ruled that:

[T]he Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive

⁴⁹ Art. 415: Whoever has caused damage to another person shall be obliged to repair it.

⁵⁰ I. Długoszewska-Kruk: *Komentarz do art. 415 KC* (in:) M. Załucki (ed.): *Kodeks cywilny. Komentarz*, (2019), Legalis, u. 2.

⁵¹ Art. 361, Kodeks cywilny z dnia 23 kwietnia 1964 r.

⁵² Art. 417, Kodeks cywilny z dnia 23 kwietnia 1964 r.

⁵³ P. Sobolewski: *Komentarz do art. 417 KC* (in:) K. Osajda (ed.): *Kodeks cywilny...*, *op. cit.*, Legalis, u. 30.

2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [...]⁵⁴.

Failure to take appropriate and effective measures to reduce pollution, despite such an obligation, is unlawful. Therefore, if damage were proven, the Treasury could be held liable under Article 417.

The possibility to claim compensation under Article 417 in the event of damage caused by environmental pollution (for example, deterioration of health) was confirmed by the above-mentioned judgment of the Warszawa-Śródmieście District Court in the case VI C 1043/18.

4. CONCLUSION

As it follows from the above observations, currently there is no ideal basis in Polish law for seeking the protection of the right to clean air. It is an interesting solution to recognise the right to clean air as a personal right and thus to seek appropriate protection. It is possible to argue that air pollution violates the already recognised personal rights to health or inviolability of the home. One of the Supreme Court rulings (II CKN 394/00) acknowledged that personal rights such as health could be affected by noise⁵⁵. Similarly, it would be possible to assume protection against air pollution, proving that it has violated a personal right to health, which was raised by the courts in the above-mentioned judgments (e.g. V ACa 649/13). Protection of environmental components by means of the right to the environment of adequate quality would be (if recognised) broader than protection by means of the personal right such as health⁵⁶. The dominating position adopted in legal writings denies the right to the environment, and the right to clean air, protection under the provisions on personal rights⁵⁷. However, there are voices in favour of such classification⁵⁸.

The provisions on personal rights seem to be more favourable than the provisions on negative claims or tort liability. This liability is not connected with guilt or damage. Therefore, gathering evidence is simpler and the range of persons who

⁵⁴ CJEU judgment of 22 February 2018, *European Commission v. Republic of Poland*, C-336/16, ECLI:EU:C:2018:94.

⁵⁵ The Supreme Court judgment of 23 February 2001: wyrok Sądu Najwyższego z dnia 23 lutego 2001 r., II CKN 394/00, *Legalis* 277377; M. Woźniak: *Naruszenie dóbr osobistych hałasem*, *Przegląd Sądowy* 6 (2015), pp. 33–41.

⁵⁶ P. Mazur: *Prawo osobiste do korzystania z wartości środowiska naturalnego*, *Państwo i Prawo* 11 (1999), p. 54.

⁵⁷ The Supreme Court judgment of 10 July 1975: wyrok Sądu Najwyższego z dnia 10 lipca 1975 r., I CR 356/74, *LEX* nr 344145; P. Sobolewski: *Komentarz do art. 23 KC* (in:) K. Osajda (ed.): *Kodeks cywilny...*, *op. cit.*, *Legalis*, u. 107–110; P. Machnikowski: *Komentarz do art. 23 KC* (in:) E. Gniewek (ed.): *Kodeks cywilny...*, *op. cit.*, *Legalis*, u. 2.

⁵⁸ See 3.1 above.

could benefit from such protection is greater⁵⁹. Provisions regarding nuisance may be difficult to apply, especially when proving who has actually contaminated the air. In relation to tort liability (*ex delicto*), it is necessary to raise not only the exposure to living in a contaminated environment, but also an actual disease caused by this state of affairs.

However, one may predict that people will increasingly seek protection against air pollution in courts. It should be emphasised that a growing number of judgments recognising citizens' actions against the State Treasury may have negative consequences for its financial stability. It is debatable whether this will or will not stop judges from taking such decisions.

Theoretically, Article 157 of the Polish Criminal Code⁶⁰ could be also considered the basis for protecting the right to clean air. The aim of this article is to protect the quality of human health⁶¹. In the event of damage to health as a result of contaminated air, this would be a crime committed by omission, for which the State would have to assume liability. The application of administrative law could also be taken into consideration, for example, based on the Environmental Protection Act. However, the subject of this article is to discuss protection of the right to clean air under the Civil Code, which is why, the above basis and the question of who could be held liable is not elaborated further.

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⁵⁹ P. Mazur: *Prawo osobiste...*, *op. cit.*, pp. 60–62.

⁶⁰ Art. 157 § 1. Whoever causes a bodily injury or health disorder, other than specified in Art. 156 § 1, shall be subject to the penalty of deprivation of liberty from 3 months to 5 years. § 2. Whoever causes a bodily injury or health disorder lasting no longer than 7 days, shall be subject to a fine, restriction of liberty or deprivation of liberty for up to 2 years. § 3. If the perpetrator of the act specified in § 1 or 2 acts unintentionally, they shall be subject to a fine, restriction of liberty or deprivation of liberty for up to one year. § 4. A private prosecution shall be brought for the offense referred to in § 2 or 3, if the bodily injury or health disorder has not lasted longer than 7 days, unless the injured is the closest person living together with the perpetrator. § 5. If the injured is the closest person, the prosecution specified in § 3 shall be initiated on a motion from the injured.

⁶¹ K. Wiak: *Komentarz do art. 157 Kodeksu karnego* (in:) A. Grześkowiak (ed.): *Kodeks karny. Komentarz*, (2019), Legalis, u. 1

- Górski M.: *Komentarz do art. 74 Konstytucji Rzeczypospolitej Polskiej* (in:) M. Sajfjan, L. Bosek (eds.): *Konstytucja Rzeczypospolitej Polskiej*, t. I, *Komentarz do art. 1–86*, (2016), Legalis.
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Tytuł w języku polskim: Ochrona prawa do czystego powietrza na podstawie polskiego kodeksu cywilnego

Słowa kluczowe: prawo do czystego powietrza, dobra osobiste, prawa człowieka, zanieczyszczenie powietrza.

MONIKA BAGIER

PROTECTION OF THE RIGHT TO CLEAN AIR UNDER
THE POLISH CIVIL CODE

S u m m a r y

Many societies are becoming ever more aware of the problem of air pollution. The purpose of this study is to indicate the possibility of protection of the right to clean air on the basis of applicable provisions. The paper refers to the most significant international acts calling for the protection of clean air and presents the possibilities of and attempts at protecting the right to clean air in Polish law on the basis of the Civil Code (e.g. provisions on protection of personal rights, and on nuisance). The discussed issues are already the subject of interest in the Polish society. The poor quality of air in Poland was confirmed by the CJEU judgment of 22 February 2018, C-336/16. At the same time, air pollution has become the subject of proceedings before Polish courts, where the uniform case law in this matter has not yet been

developed. There have been judgments refusing to treat the right to clean air as a personal right (e.g. judgment of the District Court in Rybnik of 30 May 2018, II C 1259/15) and those that recognise it as such (e.g. judgment of the District Court for Warszawa-Śródmieście in Warsaw of 24 January 2019, VI C 1043/18). Meanwhile, people will increasingly seek protection of their right to clean air in courts. Undoubtedly, it is necessary to plan actions and adopt procedures that would allow citizens to influence the government's efforts to improve air quality. The question is whether litigation and the Civil Code provisions should be used for this purpose.

Keywords: right to clean air, personal rights, human rights, air pollution.