PWPM 2020, Vol. XVIII
REVIEW OF INTERNATIONAL, EUROPEAN AND COMPARATIVE LAW
PROBLEMY WSPÓŁCZESNEGO PRAWA MIĘDZYNARODOWEGO, EUROPEJSKIEGO I PORÓWNAWCZEGO
ISSN 1730-4504

ARTICLES / ARTYKUŁY

DOI: 10.26106/enad-q007

The still emerging universal human right to adequate air quality

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I. Introduction

In 1986 the UN General Assembly in its Resolution 41/120 set forth guidance related to developing new instruments in the field of human rights nothing that such instruments should:

a) Be consistent with the existing body of international human rights law;
b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
e) Attract broad international support.[1]

In fact, the enumerated points have formed a framework which has been utilized by international lawyers to scrutinize the rationale underlying the existence of particular human rights. For instance, the epistemological battle concerning the existence (or building up a case for recognition) of the right to a healthy environment

[1] UNGA Res 41/120 (4 December 1986) UN Doc. A/RES/41/120.

in international law revolved around a) the issue of support lent to the right (at international and domestic levels); b) the question of (un)certainty and ambiguity of the right (its content); c) the matter whether the right can be inferred from the human dignity; d) the problem of whether the right is really needed in view of the existence of other rights and methods which can contribute to the same outcome; and finally e) the point of the practical working of the right in view of its enforceability both in front of national and international bodies.[2] This article will chiefly avail of this structure while examining the human right to adequate air quality. To determine the position of the right to adequate air quality in international law two crucial parameters will be looked at, that is, its existence in binding international legal acts and its enforceability. Against this backdrop, the article will situate the human right to adequate air within the tentative scheme proposed by Decken, that is, between 1) the idea; 2) the emergence; and 3) full recognition.[3] To explore whether the right meets criteria for its international acknowledgement, in principle, all the mentioned indicia are relevant and will be taken in account, alongside some additional ones found in the literature, like strengthening the rule of law.

II. The human right to adequate air quality in contemporary international law

Every human being assumes to have the right to breathe clean air.[4] As fittingly remarked by Swanson and Hughes, 'clean air is believed to be ours by'.[5] This assumption can be classified as a moral claim.[6] Yet, it is hard to square this moral claim with positive international law.[7] States, in fact, are obliged to protect the air and

2 Luis Rodriguez-Rivera, The Human Right to Environment in the 21st Century: A Case for its Recognition and Comments on the Systemic Barrier it Encounters, 34 *Am Univ Intl L Rev* (2018) 146–148. Cf. G Handl, Human Rights and Protection of the Environment: A Mildly Revisionist View, in Antonio Cancado Trindade (ed) *Human Rights, Sustainable Development and Environment* (IIDH, 1992) 125–126.

3 Kerstin von der Decken & Nikolaus Koch, Recognition of New Human Rights, in Andreas von Arnauld, Kerstin von der Decken & Mart Susi (eds) *The Cambridge Handbook of New Human Rights Recognition, Novelty, Rhetoric* (Cambridge University Press, 2020) 7–20.

4 In this article words "clean", "adequate", "decent" and "good" are used interchangeably.

5 E Swanson & EL Hughes, *The Price of Air Pollution* (Edmonton, Environmental Law Centre, 1990) 205.

6 See Marko Trajković, Moral Values as the Binding Force of the Human Rights, 63 *Annals FLB – Belgrade L Rev* (2015) 127–140.

7 Cf. Higgins 'A human right is a right held vis-à-vis the state, by virtue of being a human being. But what are those rights? The answer to that question depends…on the approach you take to the nature and sources of international law. Some will answer that the source of human-rights

introduce many mechanisms which are conducive to the improvement of air quality but have not still decided to incorporate the right to adequate air into the human rights structure. Below, the article will discuss this problem in detail referring to the well-established doctrine of sources of international law laid down in Article 38 of the Statute of the International Court of Justice.[8]

2.1. International legal documents

International written documents (treaties, conventions) appear in Article 38(1)(a) of the ICJ Statute and have been traditionally considered as the most significant source of obligations (*pacta sunt servanda*).[9] The substantive right to air of adequate quality regrettably has not found a place in any binding instrument at the international level. It does not appear in the 1948 Universal Declaration on Human Rights (UDHR),[10] nor any international treaty, most notably, the 1966 International Covenants on Human Rights (ICCPR, ICESCR)[11] as well as the United Nations General Assembly has not recognized it, as compared to the right to clean water and sanitation.[12] Article 24 of the Convention on the Rights of the Child is the only international human rights convention of universal application which comes close to addressing the matter of adequate air. Namely, Article 24 deals with the right

obligation is to be found in the various international instruments; and that whatever rights they contain and designate as human rights are thereby human rights, at least for the ratifying parties…Others will say that the international instruments are just the vehicle for expressing the obligations and providing the detail about the way in which the right is to be guaranteed'. Rosalyn Higgins, *Responding to Individual Needs: Human Rights* 230 RCADI (1991-V) 139.

8 Statute of the International Court of Justice, TS No 993, 3.

9 Christopher Greenwood, Sources of International Law, *Audiovisual Library of International Law* <https://legal.un.org/avl/ls/Greenwood_IL.html>

10 Very many of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states. This development has been confirmed by states in intergovernmental and diplomatic settings, in arguments submitted to judicial tribunals, by the actions of intergovernmental organizations, and in the writings of legal scholars. Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 *Ga J Intl & Comp L* (1996) 289.

11 Consult the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 UNTS 3 (entered into force 3 Jan 1976).

12 UNGA Res 64/292 (28 July 2010) UN Doc. A/RES/64/292. UNGA Resolutions are generally not binding, but as in the case of the right to water and sanitation, the UN Human Rights Council passed a follow-up resolution stating "that the right to water and sanitation is derived from the right to an adequate standard of living", and hence it exists in treaties and is legally binding. See UN Doc. A/HRC/RES/15/9.

of the child to the highest attainable standard of health and sets forth that 'States Parties shall pursue full implementation of this right and, in particular,' take appropriate measures with regard, *inter alia*, the dangers and risks of environmental pollution.[13] Given that treaties are the classic sources of public international law, offer the strongest form of consensual basis, usually provide for supervisory mechanisms and are regarded as those sources with the highest dose of legal certainty, many commentators have rejected the existence of the human right to adequate air quality in international law precisely on that basis.[14]

The right to adequate air quality (in a form of the right to a healthy environment) has been mentioned in plenty international soft law documents: the Stockholm[15], Rio[16] and Bizkaia Declarations,[17] UN General Assembly Resolutions,[18] the International Group of Experts Draft Principles on Human Rights and the Environment,[19] the ICJ Advisory Opinion,[20] and the Institute of International Law's Resolution,[21] among others. Riviera-Rodriguez is of the opinion that soft law instruments are equally important as hard law sources and that modern international law attaches even greater importance to them, and states generally comply with the obligations

[13] Convention on the Rights of the Child. UNGA Res 44/25 (20 November 1989) UN Doc. A/RES/44/25 (1989).

[14] Consult DK Anton & DL Shelton *Environmental Protection and Human Rights* (Cambridge University Press 2011) 139–145.

[15] Principle 1 of the 1972 Stockholm Declaration on the Human Environment states that "Man [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being". Declaration of the United Nations on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1.

[16] Principle 1 of the Rio Conference on Environment and Development provides that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." UN Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1

[17] Article 1 of the Bizkaia Declaration recognizes that "everyone has the right, individually or in association with others, to enjoy a healthy, ecologically balanced environment". Declaration of Bizkaia on the Right to the Environment, UN Educational, Scientific and Cultural Organization, 24 Sept 1999, UN Doc. 30C/INF.11.

[18] See, *inter alia,* UNGA Res 2398 (1968) UN Doc. A/7291, which recognized the link between the degradation of the human environment and the enjoyment of basic human rights or the UNGA Res 37/7 (1982) UN Doc. A/37/51 (World Charter for Nature), which proclaimed the protection of ecosystems.

[19] Draft Declaration was incorporated in the Final Report of Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/9 ('the Ksentini Report').

[20] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep 241.

[21] Inst of Intl Law, Resolution on the Environment, Art 2 (1997).

stemming from soft law.[22] However, it needs to be noted that soft law instruments, not questioning their significance, are still "soft law" and it is difficult to use them as conclusive evidence of the existence of a human right.[23] They certainly can be availed of to classify the right to adequate air quality as emerging within the Decken's scheme, yet still short of full formal recognition.[24]

With reference to the regional level, the right is represented on three continents, alas, apart from on the African Continent, it remains principally non-justiciable.[25] Both the ASEAN Human Rights Declaration and the Arab Charter on Human Rights contain the right to a "safe, clean and sustainable" (ASEAN Declaration) or "healthy" (Arab Charter) environment as an element of the right to an adequate standard of living, but neither instrument envisages oversight mechanisms able to receive complaints in case of the infringement of the right.[26] The San Salvador Protocol to the American Convention on Human Rights sets forth that 'everyone shall have the right to live in a healthy environment', but does not include the right in the shortlist of social, economic, and cultural rights whose violation may be the subject of a claim to the Inter-American Commission on Human Rights.[27] The right is, however,not provided in the European Convention on Human Rights (ECHR) and any protocol thereto, what positions it outwith jurisdiction *ratione materiae* of the European Court of Human Rights (ECtHR). Accordingly, even though the right to adequate air quality might be found in some regional treaties (in the form of a right to a clean environment), it remains largely nonjusticiable, but what is the most pertinent aspect – it is still a regional, not universal level.

22 See generally Luis Rodriguez-Rivera, Is the Human Right to Environment Recognized Under International Law? It Depends on the Source, 12 *Colo J Intl Envtl L & Pol'y* (2001) 16.

23 Michèle Olivier, The Relevance of 'Soft Law' As a Source of International Human Rights, 35(3) *Comp & Intl L J of Southern Africa* (2002) 289–307.

24 See also Collins, 'The numerous soft law provisions addressing the human right to environment (...) have more than mere rhetorical force. Rather, they are the likely precursors to binding international legal obligations in this area.' Lynda Collins, Are We There Yet? The Right to Environment in International and European Law, 3 *Mcgill Intl J Sustainable Development L & Pol'y* (2007) 126.

25 In the *Ogoniland case*, the African Human Rights Commission determined the violation of Article 24 of the African Charter stipulating that "All peoples shall have the right to a general satisfactory environment favourable to their development." This case will be elaborated further in next parts of the article.

26 Article 38 of the Arab Charter on Human Rights 12 IHRR 893 (2005); Article 28(f) of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, <https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf>.

27 Articles 11(1) and 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, 28 ILM 161 (1989). Consult Varun K Aery, The Human Right to Clean Air: A Case Study of the Inter-American System, 6 Seattle J Envtl L (2016) 15–38.

2.2. Customary international law

The practice of states and *opinio juris* (the conviction that custom is mandatory) are two elements forming customary international law. Regarding the practice of states and *opinio juris*, it is fitting to examine both domestic law and international practice of states and analyse their beliefs regarding incumbent obligations, as customary international law is principally based on the inductive method.[28] In that regard, not only the presence of the human right to adequate air quality (direct or indirect) in national legislation, in particular national constitutions, should be taken into consideration but also the justiciability of the right and all sorts of other relevant domestic and international activities.

To start with domestic practice, the vast majority of constitutions promulgated since 1970 do recognize some sort of the right to adequate air quality (mainly within the scope of the right to a healthy environment), and/or correlative state duties to protect the environment.[29] For instance, Article 23 of Montenegro's Constitution stipulates that 'everyone shall have the right to a *sound* environment', the Argentine Constitution in Article 41 provides that residents 'enjoy the right to a *healthy, balanced* environment', whereas Article 30 of Nepal's Constitution sets forth that 'every citizen shall have the right to live in a *clean and healthy* environment'.[30] According to the latest report of the UN Special Rapporteur, 'in total, at least 155 States are legally obligated, through treaties, constitutions, and legislation, to respect, protect, and fulfil the right to a healthy environment', embracing the right to adequate air quality.[31] Yet, as the same report remarks, '80 states have no air quality standards or guidelines at all', while only in 12 countries 'the courts have ruled that the right to a healthy environment is an essential element of the right to life (...) and therefore is an enforceable, constitutionally protected right'.[32] Thus, still in very many countries, the human right to air of adequate quality (interpreted either as the right to

[28] Stefan Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, 26 *Eur J Intl L* (2015) 417ff.

[29] Only two US State Constitutions (Pennsylvania and Massachusetts) treat about the right to clean air. Article 1, Section 27 of the Pennsylvania Constitution provides: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Article XLIX of the Massachusetts Constitution sets forth: "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."

[30] James May & Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (UNEP 2019) 19.

[31] Report of the UN Special Rapporteur, *The Issue of Human Rights Obligations Relating to The Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (8 January 2019) UN Doc. A/HRC/40/55 [16].

[32] Ibid [14] and [70].

a healthy environment or in conjunction with another recognized human right) remains unenforced. A similar conclusion is provided in the UN Environment Report, which found that in spite of 38-fold surge in environmental laws since 1972, there is evident 'failure to fully implement and enforce these laws'.[33] It is exactly this substantial disharmony between the existence of the right to adequate air quality in domestic legislation and the enforcement of this right, which illustrates the discord between state practice and ostensible conviction of the legal obligation.[34] Hence, in reality (irrespective of reasons) customary international law cannot be inferred from domestic legal systems and can be at best overall characterized as ambiguous.

The acts of states in the international arena likewise fall short of corroborating their *opinio juris* of the need for the existence of the international human right to adequate air quality. States are quite restrained in taking up such a new obligation and prefer to consider the right within the framework of non-binding declarations or under domestic, often non-justiciable, legal framework.[35] Therefore, the assertions of certain authors that adequate air is becoming a *jus cogens* norm, binding upon the whole international community,[36] or postulates endeavouring to attribute to it a customary law character (by perusing the implantation of the environmental impact assessment – EIA – in the world)[37] are somewhat exaggerated and perhaps even misleading. It is probably best to contend that the right to adequate air in the positivist sense is yet to emerge at the international level. Notwithstanding, the right to adequate air quality indubitably exists globally as natural law, as observed in the preceding section.[38]

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33 UN Environment, *Environmental Rule of Law: First Global Report* (January 2019) 33, available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y>.

34 *North Sea Continental Shelf*, Judgment of 20 February 1969, [1969] ICJ Rep 3, 45, [77].

35 Cf. Rhuks Ako, Ngozi Stewart & Eghosa Ekhator, Overcoming the (Non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria, in Alice Diver & Jacinta Miller (eds) *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer, 2015) 123–141.

36 Loius Kotzé, In Search of a Right to a Healthy Environment in International Law, in John H Knox & Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 136–154. Consult Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00, DVBl 175–183 (2005), which considered, among others, the environmental protection as a peremptory norm.

37 Rebecca M Bratspies, Reasoning Up to Human Rights: Environmental Rights as Customary International Law, in John H Knox & Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 122–135.

38 "The sources of international legal human rights (ILHR) should not be conflated with their moral grounds." Samantha Besson, Justifications of Human Rights, in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law*, 2nd edn (Oxford: Oxford University Press, 2013) 34–52.

2.3. General principles of law recognized by civilized nations

General principles of law are principles that are foundational to domestic legal orders and that may be transposed to the international legal order. It is highly debatable to what extent general principles of law can be used as a source of human rights law, *ergo*, the right to adequate air quality, and how to clearly distinguish them from state practice and *opinio juris*.[39] Besson suggests that general principles are closely related with moral law and in many cases precede formal recognition of a right in an international treaty. For her, the mere presence of provisions in many domestic legislations of the human right to adequate air quality would testify that the human right is a general principle, regardless if it is respected.[40] She adds though, that if the human right acquires recognition in a domestic institution, in particular, a court, to which an international court later refers, then there is strong evidence of the existence of the general principle. The second argument seems to be at odds with the first pronouncement and encroaches upon other sources (state practice and judicial decisions). For that reason, it is apt to concur with Decken and abstain from searching the source of the human right to adequate air quality in "uncertain" principles of law.[41]

2.4. Judicial decisions and scholarly opinions

Article 38(1)(d) of the ICJ Statute enumerates 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. In reference to judicial decisions, it is not entirely clear whether domestic courts or international courts' verdicts are at stake. Thus, it is apposite to refer to both.

Domestic courts very reluctantly give effect to regulations protecting air. Vindication of the right to clean air is particularly compounded by such matters as the costs to be borne by a state, the need for technical expertise or the quantum of evidence. Litigation barriers also relate to striking the balance between other human rights, such as the right to social security and work.[42] Moreover, national courts hardly ever identify the human right to clean air and the respective violation appertains to another already recognized human right. For example, in India, the High

[39] See Christian Tomuschat, *Human Rights: Between Idealism and Realism,* 3rd edn (Oxford, Oxford University Press, 2016) 43.

[40] Samantha Besson, The Sources of International Human Rights Law: How General is General International Law?, in Samantha Besson & Jean d'Aspremont (eds) *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 854.

[41] Decken, *supra note* 3, at 17.

[42] *See Clean Air Foundation Ltd v The Government of the HKSAR*, 2007 HKEC 1356.

Court of Andhra Pradesh ruled that 'slow poisoning caused by environmental pollution and spoliation should be treated as amounting to a violation of Article 21 of the Constitution',[43] while in 1991, the Supreme Court highlighted that, 'the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life'.[44] In Poland, a string of cases have of late been brought by actors and celebrities against a state for not securing the adequate air quality. The courts have in the majority of cases rewarded financial compensation to claimants, but the violation was constated only in reference to other human rights, in particular those restricting personal liberties, such as the freedom of movement and the right to privacy.[45]

At the regional level, as mentioned in section 2.1, the right to adequate air quality has only been enforced on the African continent. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v Nigeria,* the African Commission established that the Nigerian State was in violation of the right to a satisfactory environment guaranteed by Article 24 of the African Charter on Human and Peoples' Rights.[46] The Commission stated that the Niger Delta environment suffered from degradation resulting from oil pollution which is contrary to satisfactory living conditions as it undermines the ecological equilibrium.[47]

At the international level, the human right is not enforced as there still does not exist such right articulated on the international level, which could be liable to the scrutiny of specially mandated supervisory bodies. Human Rights Committee has, in truth, established the duty of states to protect individuals from air pollution, but has done it so under Article 6 (right to life) and Article 17 (protection of the family) of the International Covenant on Civil and Political Rights (ICCPR). In

43 *T. Damodar Rao v Municipal Corp. of Hyderabad*, AIR 1987 AP 171.

44 *Subhash Kumar v State of Bihar*, AIR 1991 SC 420.

45 District Court in Warsaw ordered the State Treasury to pay 5000 PLN in compensation to famous actress Grażyna Wolszczak. Case VI C 1043/18 (Jan. 24, 2018). Subsequent cases brought by publicities Mariusz Szczygiel, Jerzy Stuhr and Tomasz Sadlik have also been successful. Earlier, citizens and NGOs sought a writ of mandamus in Nepal's Supreme Court against a marble factory which emitted smoke, dust, sands and minerals polluting air, land and water putting in this way at risk both the life and property of the local population. The court in its ruling relied on Nepal's Constitution provisions guaranteeing the right to life, noting however that it in large measure depends on healthy air. *Surya Prasad Sharma Dhungel v Godavari Marble Indus* 4 I*ntl L Envtl L Rep* (2004) 321. See also David R Boyd, The Implicit Constitutional Right to Live in a Healthy Environment, 20 *Rev Eur Comp & Intl Envtl L* (2011) 171–179; Adriana F Aguilar, Enforcing the Right to a Healthy Environment in Latin America, 3 *Rev Eur Comp & Intl Envtl L* (1994) 215–222.

46 *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (27 May 2020, Communication No. 155/96).

47 Ibid. [51].

a recent case *Portillo Cáceres v Paraguay*, the Committee called on Paraguay to provide reparations to the complainants, who, as a result of the mass use of agrotoxins by nearby large agrobusinesses, and negligence of Paraguay, had been poisoned and suffered a death of their relative.[48]

Given all the above, the judicial practice, with very rare exceptions, have not been able to identify the independent human right to adequate air quality.

In reference to scholarly opinions, they are highly divided. Suffice it to mention the long-lasting 'epistemic battle' between Professors Handl and Rodríguez-Rivera, which was patently rehashed in the recently published book *The Cambridge Handbook of New Human Rights Recognition, Novelty, Rhetoric* (Cambridge University Press, 2020). Professor Rodríguez-Rivera maintains that there exists a human right to a healthy environment, embracing the right to adequate air quality and calls it an "internationally recognized right", whereas Professor Handl asserts that at this stage we cannot talk about the new generic human right to clean air.[49] The substantial disagreement among prominent scholars cannot furnish good evidence on the existence of the human right in contemporary international law, but arguments of the debate can certainly be used for building a case for the recognition of the right, which will be described in section 3 of this article.

2.5. The inferred universal human right to adequate air quality from other human rights, procedural guarantees and international responsibility of states

Although the aspects broached in this section do not formally testify to the existence of the human right to adequate air quality at the universal level, it is apt to pose a question whether the said human right could be inferred from the existing legal framework, which often leads to the same effect, *ergo,* guarantees the enjoyment of decent air quality by humans.

One can certainly look at the jurisprudence of the European Court of Human Rights, which referred to clean air in its judgements while constating the violation of Article 2 (right to life) and Article 8 (right to private and family life) of the Convention. For instance, in *Lopez Ostra v Spain*, the Court held that a waste-treatment plant emitting polluting fumes caused nuisance and Spanish authorities failed to respect the right to private and family life.[50] In doing so, the Court in fact impliedly confirmed the human right to clean air and compelled the states to respect it.

48 *Portillo Cáceres v Paraguay* UN Doc. CCPR/C/126/D/2751/2016.

49 See Günther Handl, The Human Right to a Clean Environment and Rights of Nature Between Advocacy And Reality 137–153; Luis Rodríguez-Rivera, The Right to Environment: A New Internationally Recognised Human Right 154–162.

50 1994 ECHR 46.

Likewise, the EU primary law does not *expressis verbis* provide for the human right to decent air, albeit such a right could be deduced from secondary law, most notably, the Air Quality Directive, which imposes the obligation upon the Member States to secure adequate air quality. In the landmark *Janecek* case, the European Court of Justice declared:

> [...] natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.[51]

The *ClientEarth2* substantiated the *Janecek* judgement and the Court upheld the individuals and NGOs' standing before a national court to enforce the Air Quality Directive. The Court underlined that claimants must have the right to a legal remedy, presupposing the adoption of a plan and the right to request judicial scrutiny of that plan.[52] Not long ago, the Court of Justice of the European Union (CJEU) set a good precedent for the rest of Europe ruling that the Air Quality Directive requires air pollution limits be assessed where people's exposure to pollution is the biggest, not with an average across an area.[53]

The European Commission oversees the EU Member States with regard to air pollution and may refer them to the European Court of Justice (ECJ) or impose very high financial fines. For example, the ECJ in 2018 ruled that Poland between 2007 and 2015 had regularly crossed the daily limit values for PM_{10} concentrations in 35 out of 46 zones, whilst the annual limit values for such concentrations were exceeded in nine zones.[54] In March 2019, the EU Commission took Italy to the ECJ for failure to respect the NO_2 limit values in the ambient air demanded in the Directive 2008/50/EC.[55]

Consequently, it is possible to argue that at the European level, elaborated here, the legal framework guaranteeing the enjoyment of adequate air quality exists and to that end realizes the human right to clean air.

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51 Case C-237/07, *Janecek v Freistaat Bayern*, 2008 ECR I-6221, [39].

52 Case C-404/13, *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs,* 2015 UKSC 28.

53 Case C-723/17, *Lies Craeynest et al v Brussels Hoofdstedelijk Gewest et al* (26 June 2019).

54 Case C-336/16, *European Commission v the Republic of Poland*, ECLI:EU:C:2018:94.

55 EC Press Release of March 7, 2019. In total, there are 14 infringement cases pending against Member States for exceeding NO2 limits (Austria, Belgium, the Czech Republic, Germany, Greece, Denmark, France, Spain, Hungary, Italy, Luxembourg, Poland, Portugal, and the United Kingdom).

Procedural guarantees, including three fundamental access rights: access to information, access to justice and public participation, alluded to above, also in great measure impact on the realization of the substantive human right to adequate air quality.

In the international context, the human right to adequate air quality might be deduced from state responsibility for causing environmental harm. The *Trail Smelter* case between the United States and Canada (then a Dominion of the United Kingdom) is illustrious in that regard.[56] The Arbitral Tribunal's award established pecuniary responsibility of the Consolidated Mining and Smelting Company (COMINCO) whose smoke had damaged the forests and crops in the area surrounding Washington. The arbitration affirmed the customary principle of "good neighbourliness" in bilateral arrangements between neighbouring states and coined the polluter pays principle (PPP) in international law.[57] With time, state obligations associated with the maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another) changed the focus from monetary compensation to prevention (due diligence, environmental impact assessment, equitable and reasonable utilization of the atmosphere, and international cooperation).[58] It is predominantly so because compensation in case of harm often 'cannot restore the situation prevailing prior to the event or accident.'[59]

Furthermore, as some authors put forward, the standard court enforcement procedure should not be considered mandatory for the evidence and realization of the right.[60] Other strategies, involving the proliferation of information, engagements of

[56] *Trail smelter case (United States v Canada)* 3 UNRIAA (1941) 1905.

[57] The Smelter case relied heavily on two domestic cases in the US initiated by the State of Georgia against the Tennessee Copper Company (1907) and the Ducktown Sulphur, Copper and Iron Company, Ltd 32 (1915). Both companies were located in the State of Tennessee and conducted copper mining and smelting operations near the border of the State of Georgia. The companies emitted large quantities of sulphur dioxide, which produced sulphuric acid in the atmosphere. The US Supreme Court found that it was a reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale and imposed the obligation of compensation (only in the first case), record keeping, inspection and limiting emission levels.

[58] Third report on the protection of the atmosphere prepared by the ILC Special Rapporteur Shinya Murase UN Doc. A/CN.4/692, at 7–18 (Feb. 25, 2016).

[59] In *Gabčikovo-Nagymaros project* case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment". Judgment of 25 September 1997, [1997] ICJ Rep 78, [140].

[60] César Rodríguez-Garavito, A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations, in John H Knox & Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 158. See also A. Sen, Elements of a Theory of Human Rights, 32 *Philosophy and Public Affairs* (2004) 319–320.

social movements, ethical tribunals and local collaborations have likewise proved advantageous. That being said, almost all undertakings by states and private parties contributing to better air quality could be seen as those realizing the presumptive human right.[61] Yet, it needs to be underlined that even though the human right to adequate air quality might be inferred from other existing human rights, procedural laws and state responsibility, it is still an implicit conjecture, not the independently existing human right.

2.6. Intermediate remarks (1)

Based on the sources enumerated in Article 38(1) of the ICJ Statute, it is very troublesome to confirm the existence of the independent human right to adequate air quality on the universal level. Neither binding international treaties nor customary international law (taking in view comprehensive state practice and *opinio juris*) cannot corroborate the existence. Other sources seem to be equivocal in that regard too. Only if somebody represents the so-called unitary approach and accepts the substantial interconnectivity of other recognized human rights and the prospective human right to adequate air quality, together with all procedural aspects, then it might be argued that such right hypothetically exists.[62] However, such a shortcut in determining new human rights is not yet accepted, and as noted in the introduction, a new human right has to correspond to certain requirements, which will be articulated in the next section.

III. The human right to adequate air quality in contemporary international law: Reasons for and against recognition

This part of the article will commence with the illustration of the main reasons behind the recognition of the human right to adequate air quality at the universal level, continuing with aspects which can shed some negative light on the process of recognition. Equivocal issues will also be considered.

3.1. Better protection of the environment

Arguably, among the greatest benefits of the existence of a separate human right to adequate air quality would be the better protection of the environment as a whole

[61] The undertakings are better desribed as those leading to the emergence of the human right to adequate air quality. They will be illustrated in section 4.

[62] Collins, *supra note* 24, at 147–148.

and a human being as part of it. Clearly, decent air influences a better development of nature. That is why, the advantage is not solely anthropocentric but also ecocentric.[63] Areas uninhabited currently by humans, if polluted, may have indirect adverse effects on humans (illnesses or disappearance of other living species) or may prove inutile in the future. Additionally, adequate air is closely related with other pertinent global problems, such as climate change, global warming, ozone hole or the greenhouse effect.[64] All of those could be substantially diminished if additional, more stringent care of air (through the enforceable human right) would exist.

3.2. Bolstering concomitant human rights

Human rights and the environment are interdependent.[65] Having no access to adequate air impacts on the full enjoyment of many other human rights, including the rights to life, health, food, water and development.[66] For instance, the World Health Organization (WHO) cautions that 9 out of 10 people breathe air containing high levels of pollutants, while around 4.2 million premature deaths globally are linked to ambient air pollution and 3.8 to household pollution.[67] In 2017, the National Human Rights Commission in India issued notices to the Centre and the governments of Delhi, Punjab and Haryana in light of "life-threatening" pollution levels in the National Capital Region.[68] In Europe, Mirjana Anđelković-Lukić, technology

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63 Sumudu Atapattu, The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law, 16 *Tulane Envtl L J* (2002) 65–126.

64 See UN Environment, *Air Pollution And Climate Change: Two Sides of the Same Coin* (23 April 2019).

65 Draft Principles on Human Rights and the Environment, Part I, UN Doc. E/CN.4/Sub.2/1994/9, Annex I.

66 Report of the UN Special Rapporteur, *The Issue of Human Rights Obligations Relating to The Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (24 December 2012) A/HRC/22/43, [10]. See also Council of Europe, Human Rights Comment of the Commissioner for Human Rights, *Living in a Clean Environment: A Neglected Human Rights Concern for All of Us*. <https://www.coe.int/en/web/commissioner/-/living-in-a-clean-environment-a-neglected-human-rights-concern-for-all-of-us>.

67 European Court of Auditors, *Air Pollution: Our Health Still Insufficiently Protected* (2018) 8, <https://www.eca.europa.eu/Lists/ECADocuments/SR18_23/SR_AIR_QUALITY_EN.pdf>. See also worrying statistics of the World Health Organization (WHO) stating that 9 out of 10 people worldwide breathe polluted air, what results in around 7 million premature deaths every year (4.2 million deaths are attributed to ambient pollution and 3.8 to household pollution), <https://www.who.int/airpollution/en/>.

68 <https://nhrc.nic.in/press-release/nhrc-alarmed-over-life-threatening-high-level-pollution-delhi-ncr-issues-notices>.

engineer, in her analysis revealed the detrimental influence of the Knauf factory in Surdulica, Serbia on human health and life.[69] The rock mineral wool factory emits hazardous acids – hydrochloric acid (HCl), hydrofluoric acid (HF) as well as sulphur dioxide (SO2), phenol and formaldehyde, which contribute to cardiovascular and respiratory diseases, such as asthma as well as increase the probability of cancer, which, *nota bene*, is around 8 times higher in Surdulica than in Vranje – a neighbouring town.[70] Yet, the rights to health and life are not the only human rights jeopardized by contaminated air. As noted by Saša Milošević, an alderman in Surdulica and yet another proponent of the relocation of the Knauf factory, the people of Surdulica are deprived of any possibility of ecological production and their chances of opening and leading touristic activities are limited. Furthermore, the property prices around the factory are much lower than in other regions.[71] That being said, polluted air is likely to impact on the economic rights of the population.

3.3. Strengthening the environmental rule of law

The articulation of the right to adequate air quality in international law (and in domestic legislation) would strengthen the environmental rule of law by encouraging stronger environmental statutes, providing procedural protections, filling the gaps in existing law and heightening the significance of environmental law in society.[72] Accordingly, the presence of the right to adequate air quality would oblige companies to act sustainably, provide agencies with the authority to act, but over and above establish a direct corresponding obligation on states and furnish people with the capacity to seek justice.[73]

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69 Mirjana Anđelković-Lukić, Empoisonnement des Citoyens 'Goutte à Goutte' *Stop Knauf Illange*, October 8, 2018, available at https://stopknauf.fr/wp-content/uploads/2018/10/Empoisonnement-des-citoyens-2.pdf.

70 According to the Health Centre in Surdulica, between 2007 and 2016 the number of people affected by cancer in Surdulica was 2315, while according to the Health Centre in Vranje the number in Vranje was 2779. Taking into account that Surdulica has around 11.000 inhabitants and Vranje 83.000 the number is particularly high. See Mirjana Anđelković-Lukić, Ubijanje čistog Vazduha, 1198 *Svedok* (2019) 13–14.

71 <https://jugmedia.rs/surdulicani-ne-odustaju-seobe-knaufa/>.

72 'the recognition of such rights can lead to the enactment of stronger environmental laws, provide a safety net to protect against gaps in statutory environmental laws, raise the profile and importance of environmental protection as compared to competing interests such as economic development, and create opportunities for better access to justice and accountability'. Report of the UN Special Rapporteur, *supra note* 66, [15].

73 See UN Environment, *supra note* 33, 155–165. See also IUCN World Declaration on the Environmental Rule of Law (April 2016).

3.4. The slippery question of dignity

Tellingly, the decisive criterion for the cognizance of a human right is dignity. In fact, on multiple occasions, the international community has referred to 'inherent dignity of the human person' as the ultimate source of human rights.[74] It might be suggested that it is the dignity that allows us to differentiate between human rights and other "simple rights"[75] Dignity, as outlined in UNGA Resolution 41/120, is also a prerequisite for the recognition of a new human right.[76] But, is the link between dignity and the right to adequate air quality firm enough?

Critics could oppose it (and thus the recognition of the right to adequate air quality as a universal human right) based on the historical account of the servitude of nature to humans (expressly because of their dignity) and a (still) unformed awareness of how environmental harms threaten human dignity. For some critics, the precise nature of the connection between human rights and the environment warrants more critical analysis since such a connection raises many theoretical and practical challenges.[77] Lewis, for instance, posited at length that the right to a healthy environment (but a parallel can be extended to its components, *ergo,* air) is not compatible with the theoretical foundations of human rights.[78] Namely, it is not possible to square it with the natural law theory which propounds that inherent human dignity is the source of fundamental claims of an individual (rights derive from human nature and are essential to the protection and realisation of human nature and dignity). For Lewis, adequate air is not a requisite which advances human dignity and a life worthy of a human being.[79] Lewis also rejected alternative theories

[74] Preambles of the UDHR, ICCPR, ICESCR, Vienna Declaration and Programme of Action. An interesting proposition of abstaining from the attachment to a metaphysical 'intrinsic' dignity and replacing it with a 'status dignity' could be found in Laura Valentini, Dignity and Human Rights: A Reconceptualisation, 37 *Oxford J Leg Stud* (2017) 862–885.

[75] 'Simple' or 'ordinary' individual rights expose a lesser degree objectivity and purposefulness – are less important, less worthy of protection and unrecognized globally. Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016) 436ff. See also Christian Tomuschat, *Human Rights: Between Idealism and Realism* 3rd edn (Oxford University Press, 2016) 3–4.

[76] See *supra note* 1, [4(b)].

[77] Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff, 2011) 41.

[78] Bridget Lewis, Quality Control for New Rights in International Human Rights Law: A Case Study of the Right to a Good Environment, 33 *Australian Yrbk Intl L* (2015) 65–70.

[79] It is not sufficient, for example, to argue that a good environment is necessary because it provides a means of subsistence, an adequate standard of living, economic prosperity or good health. It would also not be enough to argue that the environment has some inherent value which we are morally obliged to protect. We must be able to identify some independent and

(the will theory and the interest theory) which have been used to explain human rights and which could be able to provide philosophical justifications for the right to adequate air quality.[80]

On the contrary, others have argued that human beings are part of the ecosphere and all activities that destroy nature and the natural environment consequently lead to human degradation. Therefore, the environmental ethics formulates a double postulate: a) all activities for the protection of the environment should be understood as an expression of respect for human dignity; b) activities that harm the natural environment and reduce the quality of human life should be abandoned.[81] Townsend, in a similar way, – relying on Malpas's approach to dignity – contends that 'humanness is emplaced and constituted in the world in which we find ourselves'.[82] The topographical understanding of humanness lets at the same time understand how our emplacement shapes who we are as well as how stripping our relationship to the world (through degradation) threatens our dignity.

The support for the linkage between dignity and the right to adequate air quality might be found in international written and verbal declarations. For example, the first principle of the 1972 Stockholm Declaration announces that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of *dignity* and well-being...'[83] Similarly, the 2002 Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium recognise that 'the people most affected by environmental degradation are poor and, therefore, there is an urgent need to

indispensable contribution that a good environment makes to the pursuit of human dignity. Lewis, *supra note* 79, at 67.

80 She agreed though that 'one possible solution to this problem relies on a reconceptualisation of human nature so as to view human beings as part of the ecosystem, on an equal footing with other nonhuman species, similar to the view of humans which can be found in the discourse of deep ecology. Lewis, *supra note* 79, at 68. See also Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith, 1985) 67.

81 Wojciech Boloz, Zintegrowana Ochrona Ludzkiego i Naturalnego Środowiska, 5 *Studia Redemptorystowskie* (2007) 173. Cf. J. Łukomski, Podstawy Chrześcijańskiej Etyki Środowiska Naturalnego, in Józef M Dołęga & Józef W Czartoszewski (eds) *Ochrona Środowiska w Filozofii i Teologii* (Wydaw. Akademii Teologii Katolickiej, 1999) 185.

82 Dina L Townsend, The Place of Human Dignity in Environmental Adjudication, 3 *Oslo L Rev* (2016) 50. Townsend also argues that human dignity is 'a concept that is undervalued and underexplored, however, in environmental governance and decision making, holds significant potential to enhance judicial reasoning to achieve better outcomes in human rights cases.' Through dignity 'we come to an understating of our humanness as being constituted in important ways by the environment.' Dina L Townsend, *Human Dignity and the Adjudication of Environmental Rights* (Edward Elgar Publishing, 2020) 2ff.

83 *Supra note* 15.

(...) ensure that the weaker sections of the society (...) are enabled to enjoy their right to live in a social and physical environment that respects and promotes the *dignity*.'[84] Lastly, the UNEP Executive Director stated in 2019 that 'a healthy environment is vital to fulfilling our aspiration to ensure people everywhere live a life of *dignity*.'[85]

Concluding, the correlation between the right to adequate air quality and dignity may evoke mixed feelings (also given the lack of clarity of the term dignity). But the same might be said about other environmental rights (the right to water and sanitation, for example) which have been recognized.[86] Although still not used meaningfully, dignity may play a significant role in future adjudication of the right to clean air, as this is a trend in environmental adjudication, owing to greater awareness of threats stemming from environmental degradation.[87]

3.5. Inherent ambiguities

A much clearer argument against recognizing the human right to adequate air quality is that it is shrouded in multiple conceptual perplexities. Evidently, the biggest issue is the right's imprecise content. Besides, it is not clear to which category (generation of human rights) it belongs, as well as whether is meant to be a present-day or a future human right, yet those issues are not of critical importance.

3.5.1. The undetermined content

Regrettably, the right to adequate air certainly does not make up the category of rights with considerable legal clarity and certainty.[88] As long as the definition of air does not raise questions – it is the gas mixture that forms the Earth's atmosphere, the matter of what adequate quality denotes, and who should ascertain it, remains controversial. Critically, should the adequate quality determination be delegated to the domestic legislator or should it be identified at the international level? What

84 Reprinted in 15 *J Envtl L* (2003) 108.

85 A statement exclaimed during a meeting in Geneva on 16 August 2019 when the UNEP and the UN Human Rights Office signed new agreement, stepping up commitment to protect the human right to a healthy environment. UNEP Press Release of August 16, 2019.

86 '(...) Surely if there is a human right to clean water, there must be a human right to clean air. Both are essential to life, health, dignity and wellbeing (...)'. Report of the UN Special Rapporteur, *supra note* 31, [44].

87 Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 *Eur J Intl L* (2008) 655–724. Generally, James R May, Erin Daly, *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar Publishing, 2019).

88 More on uncertainty surrounding the right to clean air see in Sava Jankovic, Conceptual Problems of the Right to Clean Air, 22(2) *German L J* (2021).

is more, should it be based strictly on scientific data or should socio-political and economic factors be considered as well?

From an anthropocentric perspective, the rudimentary apprehension of adequate air quality would betoken healthful air, meeting human rights standards. Following Bryner, healthy or clean (*ergo* adequate air) presupposes the absence of pollution, threatening irreversible harm and thereby compromising ecological integrity. At a minimum, it must be 'sufficient for human life, food production and to maintain the ecosystem services and biological diversity that are familiar to humans.'[89]

A more technical or otherwise sophisticated definition of decent air quality would be highly challenging. Bearing in mind that international organizations and countries invoke various standards concerning air pollution limits, the question arises whether it is at all feasible to conclusively maintain what decent air means, *a fortiori*, whether the right to decent air is universally applicable? For instance, the new EU Air Quality Directive prescribes 25 μg/m3 as the annual level for particulate matters $PM_{2,5}$ and 40 μg/m3 for PM_{10},[90] whereas the World Health Organization (WHO) guidelines lay down 10 μg/m3 as the annual limits for PM_2 and 20 μg/m3 for PM_{10}.[91] Similar disparities concern the permitted concentration of other air pollutants, such as sulphur dioxide, ozone, mercury, nitric oxide etc. as well as the time allowance for the excess.[92] As striking comes the fact that around 80 states have no air quality guidelines and standards whatsoever, which in their case may effectively obscure the terms "adequate or clean".[93]

What further obfuscates a common content of the right to decent air quality is the creation of groups, which necessitate particular care, and as a result, better air quality. The UN Special Rapporteur in his recent report underlined that children, women, the elderly and indigenous peoples are exceptionally affected by bad quality air.[94] This basically means that for diverse people, diverse levels of air quality are regarded "decent".

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89 Nicholas Bryner, A Constitutional Right to a Healthy Environment, in Douglas Fisher (ed) *Research Handbook on Fundamental Concept of Environmental Law* (Elgar, 2016) 172.

90 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 OJ L 152, Annex XI (PM_{10}) and Annex XIV ($PM_{2,5}$).

91 WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulphur dioxide (Global update 2005) Gov't. Doc. WHO/SDE/PHE/OEH/06.02, 9 (2005).

92 *See* The Law Library of Congress, *Regulation of Air Pollution* (Australia, Brazil, Canada, China, European Union, France, Israel, Japan, South Africa, Switzerland, United Kingdom) (Jun. 2018), https://www.loc.gov/law/help/air-pollution/regulation-of-air-pollution.pdf.

93 Report of the UN Special Rapporteur*, supra note* 31, [70].

94 Ibid. [31].

3.5.2. (Mis)matching human rights categories

In the human rights vocabulary, Vasak's categorisation is still very common: (1) civil and political rights; (2) economic, social and cultural rights; and (3) collective or solidarity rights.[95] Those who subscribe to the idea of such a division of human rights locate the environmental rights within the third category (generation), alongside the right to peace, the right to self-determination and the right to participation in cultural heritage.[96] For them, the third generation rights are collective rights, belonging to nations and social groups, requiring the cooperation of states for their implementation.[97] As such the right to an adequate air quality appears as an inferior right to those which are classified as first and second generation rights, widely acclaimed as individual, inborn and inalienable.[98] However, one may not only disagree with a disparaging characterization of the right to adequate air quality, but also question the whole anachronic division system, which obscures rather than clarifies the relationship between rights.[99] For instance, looking at the right to adequate air quality, why to treat it (conceivably) less important or less individual as the right to vote belonging to the first generation? Relatedly, not only rights allegedly belonging to the third category are meant to be aspirational – what about the right to work falling within the ambit of economic rights, ergo, the second category? Moreover, many rights considered as second generation rights (social – the right to health care, or economic – the right to an adequate standard of living) significantly overlap with the right to adequate air quality. Why then not to treat it as a second-generation

[95] Vasak, a distinguished human rights scholar, wrote in 1977 an article for the UNESCO Courier, introducing the idea of three generations of human rights. See Karel Vašák, Human Rights: A Thirty-Year Struggle: the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, 11 *UNESCO Courier*, (1977) 29–32. See also Karel Vasak, Les Différentes Catégories des Droits de L'homme, in André Lapeyre, François de Tinguy du Pouet & Karel Vasak (eds) *Les Dimensions Universelles des Droits de L'homme* (Bruylant 1990).

[96] Tomasz Lachowski, III generacja praw człowieka, *Liberté!* (24 Feb 2009); Marijana Kolednjak, Martina Šantalab, Ljudska prava treće generacije, 7 *Tehnical Journal* (2013) 322–328.

[97] Ibid.

[98] If one equates the right-holder with the responsivity-bearer (eg. a State, the international community), then such a right may become illusive in terms of accountability and thus easily abused (eg. by repressive regimes).

[99] Steven L. B. Jensen, Putting to Rest the Three Generations Theory of Human Rights, *OpenGlobalRights* (15 Nov 2017); Changrok Soh, Daniel Connolly and Seunghyun Na, Time for a Fourth Generation of Human Rights? *UNRSID* (1 Mar 2018); Spasimir Domaradzki, Margaryta Khvostova, David Pupovac, Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse, 20 *Human Rights Review* (2019) 423–443.

right?[100] Be it as it may, the inability of a precise classification of the right to the adequate air quality within the Vasak's a bit outdated model (it might be better to treat all rights are universal, indivisible and interdependent and interrelated) does not impinge much on its recognition as a human right on the universal level.[101] The right to water or the right to self-determination right (also purportedly third generation rights) have been recognized.

3.5.3. Imprecise timescale

The focal point of this perplexity is whether the right to breathe adequate air should be viewed from the current perspective only or should it be also perceived as the right of future generations? National constitutions regulate this matter differently. For example, while section 24 of the South African Constitution guarantees the everyone's right 'to have the environment protected, for the benefit of present and future generations', many other constitutions do not explicitly mention future generations. Generally, jurisprudence and human rights discourse mainly focus only on the rights of existing humans.

However, nowadays a new trend showing more environmental awareness and vulnerability towards future generations is observable and people are more inclined towards intergenerational equity and sustainable development. This seems to be a correct standpoint since it reflects the preservation idea and the continued use of *res communis omnium.*[102] The US scholars have recently advanced a new novel "atmospheric trust theory" which rests on the ongoing *Juliana, et al. v United States of America, et al* lawsuit asserting that future generations have the right to clean atmosphere.[103]

Nevertheless, the reference to future generations should be rather apprehended as a duty of those alive than as a right of those yet to come, who still have not gained the right. As noted by the Supreme Court of the Philippines, such a duty, *inter alia,* may be exercised in court litigation. Upon recognition of standing of 44 children, who protested against cutting the rainforest (logging permits), the Court noted that their 'assertion of the right to a sound environment constitutes, at the same

[100] Similarly, many social rights could be treated as 'civil' rights: for example, the rights to recreation, health care, privacy and freedom from discrimination.

[101] Vienna Declaration and Programme of Action (1993) Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

[102] Andreja Mihailović, Pravo Na Zdravu Životnu Sredinu Kao Intergeneracijski Fenomen, 66 *Annals FLB – Belgrade L Rev* (2018) 236–255.

[103] This theory connects aspects of the public trust doctrine and state responsibility. See J B Ruhl & Thomas McGinn, The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?, *SSRN* (Sept. 16, 2019).

time, the performance of their obligation to ensure the protection of that right for the generations to come.'[104]

Consequently, the right to breathe good air should be perceived as the right of the present generation, which also implies constant duty towards unborn persons. This argument is not, however critical in recognizing the new right, like the former, classificatory one.

3.6. Debasing human rights currency /redundancy of the right

A penultimate argument that might serve against recognition of a new human right at the universal level is its alleged redundancy. International legal scholarship has been very prolific in that respect. In 1969, Bilder posited that 'to assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy'.[105] The consequential value of having a particular claim earmarked as a "human right" has led to a wide variety of non-governmental organisations and interest groups seeking to have new human rights recognised. Bilder identified ramifications of such an expansion of human rights noting that,

> acceptance of the human rights label for some types of social claims while denying it to others implicitly accomplishes a sort of ordering of social values, prejudging which claims and interests are to prevail and which are to be sacrificed when different values come into conflict.[106]

He observed that if we allow a plethora of claims to be designated as human rights, the 'usefulness of human rights as an ordering concept may be distorted, diminishing their helpfulness in solving those crucial and recurrent conflicts between competing values which every society confronts'. [107]

Likewise Higgins has warned that the "coinage" of human rights will 'undoubtedly become debased' if states agree to the expansion of human rights without proper justification, with the outcome that 'the major operational importance of designating a right a human right – that opprobrium attaches to ignoring it – will be lost'.[108] Gibson underlined the need to ensure that any new right is backed by

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104 *Minors Oposa v Secretary of the Department of Environmental and Natural Resources,* 33 *ILM* (1994) 185.

105 Richard B Bilder, Rethinking International Human Rights: Some Basic Questions, 1 *Wisconsin L Rev* (1969) 171, 174.

106 Ibid.

107 Ibid, 175

108 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 105. See also Philip Alston, Conjuring Up New Rights: A Proposal for Quality Control, 78(3) *Am J Intl L* (1984) 614.

existing human rights theory and architecture noting 'the right to a clean environment is not a frivolous claim; however, declaring it to be a human right without support at the highest level threatens the integrity of the entire process of recognising human rights.'[109] This sort of reasoning clearly stretches to the human right to adequate air quality. Yet, such reasoning may create a trap and fail to acknowledge new international human rights and the principle of dynamism. Thus, as Alston argued, a 'balance must be struck which ensures respect for the integrity of the tradition both in terms of its content and of the process by which it evolves'.[110] Some authors have attempted to set out criteria for admitting new rights, some of which were already elaborated above.[111]

Despite these concerns, generally, there is nothing to prevent states from recognising a human right to adequate air quality, or any other human right, should they choose so. States, and international organisations to which they belong, have used this power to proclaim new rights in the past, with several rights being acknowledged since the initial adoption of the Universal Declaration of Human Rights (1948) and the two International Covenants (1966).[112] This ability to recognise new rights is a crucial quality of contemporary human rights. Human rights law must be adaptable to altering international issues and emerging threats, and therefore some degree of dynamism within the system is mandatory. As Ramcharan says,

> It is fallacious to confine the definition of human rights only to traditional categories or criteria. There are ongoing processes of discovery, recognition, enlargement, enrichment and refining, and adapting and updating...It is open to authoritative organs to recognise new rights and to declare or proclaim their existence, particularly if an international consensus exists over the recognition of such a right.[113]

[109] Noralee Gibson, The Right to a Clean Environment, 54 *Saskatchewan L Rev* (1990) 9.

[110] Philip Alston, Creating New Environmental Rights under International Law: Desirability and Feasibility, in *Human Rights and Environmental Protection: The Vital Link Proceedings* (Sydney, 12 October 1991) 46.

[111] Ramcharan states that human rights are rights which possess certain characteristics, such as universality; essentiality to human live, security, dignity, liberty and equality; essentiality for international order and for the protection of vulnerable groups. Bertrand Ramcharan, The Concept of Human Rights in Contemporary International Law, *Canadian Hum Rts Yrbk* (1983) 267, 280.

[112] For example, the rights of women in the Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) and children in the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[113] Ramcharan, *supra note* 120, at 280–281. See also Makau Mutua,'Standard Setting in Human Rights: Critique and Prognosis, 29 *HRQ* (2007) 547, 619; Stephen P Marks, Emerging Human Rights: A New Generation for the 1980s?, 33 *Rutgers L Rev* (1981) 43.

With reference to the right to a healthy environment, Rodriguez-Rivera has argued that the articulation of the said right 'encompasses a compendium of rights constructed in an effort to protect the environment, as well as human life and dignity'.[114] For him, new environmental human rights are needed as they protect against threats related to environmental degradation triggered by governmental acts or omissions.[115] In addition, in view of the lack of a complex strategy aimed at securing adequate air quality in many places around the world, additional complementary measures, such as the right-based approach should be particularly welcomed.[116] Downs and Symonides have argued that the right to a good environment is justified because of the mutually supportive relationship between human rights and the environment. [117] Human rights law already secures the rights to life, health, water, food, self-determination, and the environmental dimensions of these rights have been progressively recognised. Moreover, a number of procedural rights are recognised in international environmental law which guarantees that persons affected by environmental decision-making are thoroughly informed about the potential impacts, are able to take part in the process, and can seek compensation for environmental harm.[118]

3.7. The anthropocentric character

The final potential hindrance in recognizing the right to adequate air quality is that such a right would be too anthropocentric. Notably, the right to adequate air quality as a human right will inextricably be linked to human interest (people will be empowered to seek redress if the right is breached, air quality is adjusted

[114] Rodriguez-Rivera, *supra note* 22, at 9.

[115] Luis Rodriguez-Rivera, The Human Right to Environment in the 21st Century: A Case for its Recognition and Comments on the Systemic Barrier it Encounters, 34 *Am Univ Intl L Rev* (2018) 147.

[116] Ibid.

[117] Jennifer Downs, A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right, 3 *Duke J Comp & Intl L* (1993) 377–378; Janusz Symonides, The Human Right to a Clean, Balanced and Protected Environment, 20 *Intl J Legal Info* (1992) 29.

[118] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001); The Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961); Protocol on Environmental Protection to the Antarctic Treaty, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998), Annex II; Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

to humans etc.).[119] This alignment has sparked criticism from the fields of deep ecology[120] and earth jurisprudence[121] on the grounds that it effectively denies recognition of plants, animals, species and ecosystems as rights-holders, thus making their protection dependant on establishing some other human interest.[122] Gibson has argued that by labelling the right to adequate air quality a "human" right, the natural world is valued pursuant to human values and needs, with humans holding a superiority position.[123] This would be contrary to the deep ecologists' account that holds that 'all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.'[124] On the other hand, human rights law can enhance environmental protection by augmenting the appreciation of environmental considerations and offering practical mechanisms for attaining better environmental outcomes.[125]

It could be argued that the alleged anthropocentric bias is indeed a bit overstated. The current legal and political architecture seems to favour the expansive interpretation of the right to adequate air quality accepting the multi-recipients approach. If recognized at the international level, it will formally be a human right, but indirectly profit other living species.

Looking at a national level, one can mention Article 35(1) of the Romanian Constitution which, in fact, spells out that 'the right of *every person* to a healthy, well-preserved and balanced environment', yet the very phrase "well-preserved and balanced" may imply the obligation of not causing harm to other living organisms by pollution. This is patently emphasized in Angola's Constitution, which calls on the state to 'adopt measures necessary for the protection of the environment and the species of flora and fauna' and to "maintain ecological equilibrium" (Article 39(2)).

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[119] Human beings entrusted with the right to clean air are sometimes differently identified in national jurisdictions: acts offer environmental protection to residents, women, children and indigenous populations.

[120] Devall and Sessions, *supra note* 81.

[121] Judith Koons, Earth Jurisprudence: The Moral Value of Nature, 25 *Pace Envtl L Rev* (2008) 263; Judith Koons, What is Earth Jurisprudence?: Key Principles to Transform Law for the Health of the Planet, *18 Penn St L Rev* (2009) 47; Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* 2 edn (Chelsea Green, 2011).

[122] Alan Boyle, The Role of International Human Rights Law in The Protection of The Environment, in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) 43, 48–9.

[123] She, in truth, referred to the right to a clean environment, but the parallel could be drawn. Gibson, *supra note* 118*,* at 14.

[124] Ibid. 13; Devall and Sessions, *supra note* 81, at 67.

[125] Karen Macdonald, A Right to A Healthful Environment – Humans and Habitats: Rethinking Rights in An Age of Climate Change, *17 Eur Energy and Envtl L Rev* (2008) 217.

Consequently, it is reasonable to presume that other living species, such as animals, are also addressees of the right to adequate air quality.[126]

With reference to international legal acts, the language is rather all-embracive. For example, the EU Air Quality Directive in Article 1 provides that it aims at 'defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole'. In the same vein, the Rio Declaration on Environment and Development, the 2030 Agenda for Sustainable Development and the Paris Agreement all emphasize that 'social and economic development depends on the sustainable management of planet's natural resources' and that the proper protection of biodiversity, ecosystems and wildlife is required.[127] The Heads of State and Government and High Representatives, meeting at the United Nations Headquarters in New York from 25–27 September 2015 clearly declared that they envisage the world in which 'humanity lives in harmony with nature and in which wildlife and other living species are protected'.[128] The 'ecosystems', 'wildlife' and 'livelihoods' thus become subjects of international concern and enjoy the protection from contaminated air. Some countries, like India or New Zealand, have even recognized intrinsic rights of nature, endowing the Ganges River and the Te Urewera National Park with legal personhood, which means that their rights are legally protected and can be vindicated.[129]

Therefore, the prospective universal right to adequate air will be human but its indirect application will, in reality, be much broader.

3.8. Intermediate remarks (2)

With recourse to arguments set above, a case can be built for the recognition of the new human right to adequate air quality. As observed by an expert in the field, 'it is insufficient to treat clean air as a policy objective. It must be regarded as

[126] That animals increasingly become bearers of rights confirms a recent case of a dog Jack who got compensated for a cancelled flight. Consult Wladyslaw Czapliński, Recognition and International Legal Personality of Non-State Actors, *Pecs J Int & Eur L* (2016) 8. See also Catherine Redgwell, Life, the Universe and Everything: A Critique of Anthropocentric Rights, in Alan Boyle and Michael Anderson (eds) *Human Rights and Approaches to Environmental Protection* (Clarendon, 1996) 83–86.

[127] Transforming Our World: The 2030 Agenda for Sustainable Development, UNGA Res 70/1 (25 September 2015) UN Doc. A/RES/70/1, [33].

[128] Ibid. [9]. Similarly, the Paris Agreement in Article 7 urging for the 'long-term global response to climate change to protect people, livelihoods and ecosystems.' UN Doc. FCCC/CP/2015/10/Add.1, at 26 (Jan. 29, 2016).

[129] The Urewera Act 2014, sec 11. The High Court in the northern Indian state of Uttarakhand ruled in March 2017 that Ganges and Yamuna have 'all corresponding rights, duties and liabilities of a living person'.

a fundamental human right'.[130] Indisputably, it will enhance the protection of the environment, with a human being as its centrepiece, will bolster the protection of other human rights and, in general, will strengthen the environmental rule of law.

The strongest argument against recognition is indeed its undetermined content – it is not clear how good the air should be. In fact, one could base in that regard on the 2005 WHO Air quality guidelines, but as argued in section 3.5.1, they are not adhered to in very many places around the globe for various reasons. On the other hand, the national and international judicial or para-judicial practice may be very helpful in determining the appropriate threshold in the future. Apparently, it could happen faster than anticipated given amplified (direct and indirect) activism for the recognition of the new right, which will be explained below in the last section of the article.

IV. The prospects of the human right to adequate air quality in contemporary international law: National and international initiatives

There is a plethora of factors which can contribute to the advancement of the human right to adequate air quality on the international arena:

a) Social pressure – grassroots movements, local initiatives, protests,
b) A growing number of environmental NGOs and green parties,
c) National measures,
d) World leaders' meetings and involvement of international organizations,
e) International treaty regime and the International Law Commission' projects,
f) UN Special Rapporteur's contribution,
g) Heighten academic attention,
h) The proliferation of scientific data on detrimental effects on human health and the environment as well as the costs of air pollution,
i) Availability of information about the air quality,
j) Increased social awareness, education,
k) Activities of courts and tribunals.

Grassroots movements are the most important initiative-holders and their voice should be heard in the first instance in view of the fact that they know most about the problem and are directly affected. At rallies, people usually demand the right to breathe clean air to be respected, irrespective if it has the place in the statutes. In fact, in the majority of cases, it is where the whole process gets impetus and leads

[130] David R Boyd, The Human Right to Breathe Clean Air, 85 *Annals of Global Health* (2019) 146.

either to maintaining of the *status quo* or improvement of the situation, *ergo* the obedience of the right to breathe clean air. Thus, the right can be safeguarded either as a result of abandoning of the plan to open a factory (as was the case with the Sichuan Hongda copper refinery in China, when in 2012 a couple of thousands of inhabitants gathered together to protest) or the closure of the existing one (when in 2018 thousands of residents of Tuticorin city in southern India violently protested against a copper smelter which had operated there for more than 20 years). Regrettably, in poorer places around the globe or those where the industry is essential for the state, the voice of local communities is often disregarded. For instance, the people of Smederevo for a long time now campaign against the Smederevo Steel Plant, which highly pollutes the air,[131] but last year was ranked as the biggest Serbian gross exporter. Recently the people of Smederevo initiated the "red badges" campaign, which mirrors the red zone of air pollution and aims at attracting broader attention. International human rights have been created to resolve national problems and local examples have been particularly valuable in the process of recognition of new rights.

Green parties and environmental NGOs are on the rise throughout the world. For instance, green parties emerged as big winners in the last European Parliament elections. They will definitely try to put forward more environmental proposals, inducing those on clean air.[132] There are many NGOs which concentrate solely on the issue of clean air, such as those participating in the "Clean Air Project".[133] The aim of the project is the demand that the Air Quality Directive be implemented more effectively, promotion of cooperation between NGOs and regional and local administrations on best-practise models to reduce air pollutants as well as using the justice system as an instrument to put administrations under pressure. In India, the Green Party and the Help Delhi Breathe consider the right to clean air as a fundamental human right and exert influence on the government to behave responsibly. As a result of multifactorial activities, the government launched the Clean Air Project at the World Sustainable Development Summit 2020 being held in New Delhi.[134]

National measures, embracing both legislation on air pollution and other projects aiming to curb air pollution, are effective signposts that a country seriously

[131] S Miladinović, S Jaćimovski, Ž Nikač, D Kekić, The Influence of Zelezara Smederevo on the Quality of the Environment and Its Ability to Improve Through the Monitoring System, 20 *Technical Gazette* (2013) 237–247.

[132] See, *inter alia*, European Parliament resolution of 13 March 2019 on a Europe that protects: Clean air for all (2018/2792(RSP)).

[133] <http://www.cleanair-europe.org/en/projects/>.

[134] <https://timesofindia.indiatimes.com/india/clean-air-project-for-four-cities-launched-javadekar-urges-rich-nations-to-act-on-finance-and-tech-transfer-issues/articleshow/73740832.cms>.

treats the matter of adequate air quality. Such measures are conducive to the creation of a new human right at the international level. New York is on a good way to become the third state in the US to have the right to clean air guaranteed in its constitution (apart from Pennsylvania and Massachusetts).[135] Argentina, Colombia, Costa Rica and India belong to a few countries that have enabled standing to individuals and NGOs to bring lawsuits based on the violation of this right or of environmental laws (India even established the National Green Tribunal). China, the United States, Germany, India and Spain compose top five countries in the world in generating electricity from wind (the global total of wind electricity generating capacity grew from 17 gigawatts in 2000 to over 600 gigawatts in 2019). Furthermore, such initiatives as allowing private cars in and around the Indian capital, New Delhi, on the roads on an alternate day or Krakow's solid fuel ban are also praiseworthy.[136]

With reference to initiatives at the international level, suffice it to mention the organization of the First EU Clean Air Forum in Paris in 2017 and the First Global Conference on Air Pollution and Health in Geneva in 2018. At the Forum, it was noted that the EU legal framework for air quality is adequate, however, more action in securing compliance with the EU air quality standards is needed. This can be achieved by moving towards low-emission mobility, boosting the Energy Union and further developing the Common Agricultural Policy.[137] The conference, on the other hand, set an aspirational goal of reducing the number of deaths from air pollution by two-thirds by 2030. To achieve the aim, it underlined the need of avoiding dirty fuels and technologies in transport and energy production; stopping uncontrolled burning of solid waste and agricultural waste; reducing use of fertilizers in agriculture; promoting clean technologies and fuels and green, clean cities.[138] The organization of international conferences under the auspices of international organizations is likely to accelerate the adoption of a future UN General Assembly resolution on the right to clean air.

International treaty regime definitely helps to protect air and may be instrumental in the development of the human right to adequate air quality. Despite its fragmented nature – state obligations are, *inter alia*, reflected in the Geneva

[135] See the Senate Bill S2072.

[136] Poland's Supreme Administrative Court upheld the decision to ban solid coal and wood burning in Krakow on the 3rd of April 2019, which cannot be appealed and sets a standard that other cities and municipalities must follow to combat smog. More good practices can be found in the Report of the UN Special Rapporteur, *Right to a Healthy Environment: Good Practices* (30 December 2019) UN Doc. A/HRC/43/53.

[137] EC, Summary Report (17 November 2017), available at <http://ec.europa.eu/environment/air/pdf/clean-air-forum-report-web-20180110.pdf>.

[138] First WHO Global Conference on Air Pollution and Health – Summary Report, available at <https://www.who.int/phe/news/clean-air-for-health/en/>.

Convention on Long-Range Transboundary Air Pollution (CLRTAP) and protocols thereto, the Association of Southeast Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution, and the International Convention for the Prevention of Pollution from Ships (MARPOL), these agreements managed to produce valuable results. For instance, as the UNECE remarked,

> Governments have been working together for 40 years in the framework of the Convention on Long-range Transboundary Air Pollution. This has led to significant achievements, including reductions of emissions by 40 to 80 per cent, recovery of forest soils and lakes, and the prevention of 600,000 premature death annually.[139]

Currently, the International Law Commission (ILC) is working on codifying the law on the protection of the atmosphere. The ILC is considering, in particular, the following principles: the obligation to protect the atmosphere, sustainable utilization of the atmosphere, environmental impact assessment, equitable and reasonable utilization of the atmosphere, and international cooperation.[140] Some scholars claim that the prospective treaty will produce little coercive enforcement effectiveness, in view of the fact that states decided to exclude from its scope such matters as 'the liability of states and their nationals, the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights.'[141] Nonetheless, the efforts towards achieving certain standards are being made, regardless of how gradual.

Possibly the biggest role at the universal level regarding the right to adequate air quality plays the UN Special Rapporteur. UN human rights body's Special Rapporteur David Boyd identified seven key steps that each state must take to ensure clean air and fulfil the right to a healthy environment: a) Monitor air quality and impacts on human health; b) Assess sources of air pollution; c) Make information publicly available, including public health advisories; d) Establish air quality legislation, regulations, standards and policies; e) Develop air quality action plans at the local, national and, if necessary, regional levels; f) Implement the air quality action plan and enforce the standards; and g) Evaluate progress and, if necessary, strengthen the plan to ensure that the standards are met. The Rapporteur referred to the successful adoption by the UN General Assembly of a resolution recognizing a right to clean water. He remarked

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139 <https://www.unece.org/info/media/news/environment/2019/claim-your-right-to-breathe-clean-air/doc.html>.

140 Yulia Yamineva, Is Law Failing to Address Sir Pollution? Reflections on International and EU Developments, 26 *Rev Eur Comp & Intl Envtl L* (2017) 189–200.

141 Peter H Sand, The Discourse on "Protection of the Atmosphere" in the International Law Commission, 26 *Rev Eur Comp & Intl Envtl L* (2017) 201.

'surely if there is a human right to clean water, there must be a human right to clean air. Both are essential to life, health, dignity and well-being.'[142]

Increased academic attention undoubtedly has a positive impact on the development and respect for the right to clean air. It is because of the expertise and reputation that scholars and scientists enjoy. Their opinion is often employed by legislative drafters, policymakers, and the courts. It deserves a mention that the 1962 publication of Carson's pivotal book *Silent Spring*, analysing the hazards of chemical pesticides and fertilizers, is credited with catalysing the birth of grassroots environmentalism and modern environmental law.[143] The 1972 Stockholm Declaration on the Human Environment was the culmination of the early environmental movement supported by academics.

The next in turn factor that can exert influence on states and relevant stakeholders to improve air quality and undertake concrete steps to recognize the right to adequate air quality is the proliferation of scientific data on detrimental effects of polluted air on human health and the environment. The World Health Organization (WHO) publishes worrying statistics stating that 9 out of 10 people worldwide breathe polluted air, which results in around 7 million premature deaths.[144] The UN Environment, OECD and the Council of Europe, among others, warn about the serious impact of air pollution on human health and the environment, while the World Bank estimates that the global economy loses annually about $225 billion due to the lost labour income, or about $5.11 trillion in welfare costs.[145]

Availability of the information regarding the air quality is probably the hardest evidence and likewise the best motive for legal action against the polluters. There are more and more monitoring stations and the results are often available online with

[142] Report of the UN Special Rapporteur, *supra note* 31, [44].

[143] Patricia Hynes, *The Recurring Silent Spring* (Pergamon Press, 1989) 9.

[144] <https://www.who.int/airpollution/en/>. In the EU, air pollution is considered the biggest environmental risk to public health in Europe, causing more than 1,000 premature deaths every day. See EU Court of Auditors' Special Report, *Air Pollution: Our Health Still Insufficiently Protected* (2018) 6, available at <https://www.eca.europa.eu/Lists/ECADocuments/SR18_23/SR_AIR_QUALITY_EN.pdf>.

[145] World Bank, *The Cost of Air Pollution Strengthening the Economic Case for Action* (2013) 47–77, available at <http://documents.worldbank.org/curated/en/781521473177013155/pdf/108141-REVISED-Cost-of-PollutionWebCORRECTEDfile.pdf>. In 2015, the cost of ambient air pollution in the BRIICS and the OECD Countries was estimated at around USD 5.1 trillion. Working Paper No 124, *Results The Rising Cost of Ambient Air Pollution thus far in the 21st Century*, ENV/WKP(2017)11, 21–27, available at <http://dx.doi.org/10.1787/d1b2b844-en>. In 2013, the EU Commission estimated the total health related external costs of air pollution at between €330 and €940 billion per year. *Executive Summary of the Impact Assessment*, SWD(2013) 532 final, 2, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0532&from=EN>.

real-time or published in the press. The information on air quality also contains the reference to the acceptable levels and indicates how many times they have been crossed. Very recently, the Court of Justice of the European Union (CJEU) ruled that compliance with air pollution limits in Brussels must be assessed at monitoring stations where people's exposure to pollution is the greatest, not with an average across an area, setting thereby a good precedent for the rest of Europe.[146]

Social awareness on the detrimental impact of degraded air and education to the greatest extent trigger actions and change. Luckily, more and more people are now enlightened and interested in environmental issues. As a result, it is more difficult today for entrepreneurs to protect their interests at the expense of the rest of the population. In the same vein, it is more difficult for a state to ignore its obligations stemming from the right to clean air. Social awareness encompasses the moral and legal entitlement to adequate air quality, which is more regularly voiced in the public and which exerts pressure on the international circles to take up corresponding steps of formal recognition.[147]

Finally, the right to adequate air quality can be established or developed through case law. The evolution of the right through precedence or the interpretative practice of courts and tribunals is very welcomed given the complicated nature of the right and its socio-economic ramifications. For instance, in spite of the absence of the right to good air in the European Convention on Human Rights, the European Court of Human Rights has interpreted the Convention as a living instrument and succeeded in carving out an extensive body of case law which, according to Pedersen, 'all but in name provides for a right to a healthy environment'.[148] Countries, such as India, where the human right to a decent atmosphere has been thoroughly examined by the judiciary (including the establishment of the obligation of citizen's protection of the atmosphere – e.g. *Virender Gaur v State of Haryana*),[149] solidly contribute to the establishment of such a right at the universal level.

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146 Case C-723/17 *Lies Craeynest et al v Brussels Hoofdstedelijk Gewest et al* (Judgement of 26 June 2019).

147 On further recommendations for states regarding raising awareness see EUROSAI, *Joint Report on Air Quality* (2019) 22 <https://www.nik.gov.pl/plik/id,19001.pdf>

148 Ole W Pedersen, The European Court of Human Rights and International Environmental Law, in John H Knox & Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 86. See also Council of Europe, *Manual on Human Rights and the Environment* (2012).

149 *Virender Gaur v State of Haryana* (1995) 2 SCC 577. In *Vijay Singh Funiya v State of Rajasthan*, the High Court of Rajasthan it was observed any person who disturbs the ecological balance or degrades, pollutes and tinkers with the gifts of nature such as air, water, river, sea and other elements of the nature, he not only violates the fundamental right guaranteed under Art 21 of the Constitution, but also breaches the fundamental duty to protect the environment under Art 51A (g). (1997) 2SCC 87.

V. Conclusion

The human right to adequate air quality, despite its paramount significance, still does not exist at the international level. The analysis of sources of international law (those enumerated in Article 38(1) of the ICJ Statute) revealed that the right is yet to crystalize as customary international law and to be acknowledged in a human right treaty. Accordingly, following the mentioned Decken's proposition of categorization of human rights, the right should be classified as the still emerging one, yet short of formal recognition.

There exists however hope that the right, preferably independently of the right to a healthy environment, will be recognized at the international level. This is a much simpler method and the UN General Assembly should repeat its move, which it has done in relation to the recognition of the right to water. In this way, possibly the long-lasting debate of the over-embracing right to a healthy environment may terminate, while people will benefit greatly. Admittedly, the right to adequate air quality is shrouded in certain uncertainties too, in particular, its content is not very clear (how clean should the air be to be termed as adequate, should it only belong to humans and whether it is a right of the future generations), but solutions to these perplexities are gradually found. Regarding perhaps the biggest challenge, the common (international) denominator of air adequacy, states may eventually decide to adopt the 2005 WHO guidelines or work together on a new mutually accepted standard. It is also to be hoped that states will be able to strike an appropriate balance between the prospective universal human right to adequate air quality and other potentially colliding human rights, such as the right to development, as well as that the said right will be properly enforced and respected.

Currently, more and more states introduce air-friendly initiatives, rely on renewable energy sources and reconstruct their industries. Such actions represent a huge leap forward and indicate the maturity, responsibility and awareness of the ruling cadres. Nevertheless, governers constantly feel the breath on their back regarding increased protection of air quality and will finally have to recognize adequate air as a global human right, which is now still (publicly) assumed.

Abstract

Until now international legal scholarship has turned its attention to deliberating the status of the right to a healthy environment in international law. However, the complicated nature of this cluster right (embracing the right to healthy soil, water, air, fauna and flora) has usually led to unsatisfactory conceptualization outcomes. It is argued that it is more plausible to scrutinize particular rights separately since they exhibit different dynamics and only once they acquire international legal status (as the human right to water and sanitation), to (re) consider the cluster right.

Consequently, this article will be devoted to the analysis of the human right to adequate air quality. In the first part, the article will debate whether this right can be considered as a universal human right based on the perusal of international law documents (both hard and soft law), customary international law (practice of states and *opinio juris*) as well as international justiciability of the right. Upon providing a negative response, the article will look into the argumentation of legal commentators, civic society and other organizations on whether international law should allow for the right to adequate air quality. Here, apart from arguments supporting the recognition of a new right, the problems of dignity, inherent content ambiguities, the anthropocentric character and the alleged redundancy of the right will be articulated. Finally, the article will lay out the prospects of the human right to the adequate air quality within international law, looking both at national and international developments.

Key words: Human right to adequate air, human rights theory, customary international law, environmental law, enforceability, hard and soft law

Uniwersalne prawo człowieka do powietrza odpowiedniej jakości w procesie kształtowania
Streszczenie

Doktryna prawa międzynarodowego skupiała się dotychczas w zasadzie wyłącznie na rozważaniu statusu prawa do czystego środowiska w prawie międzynarodowym. Jednak skomplikowany charakter tego złożonego prawa (obejmującego prawo do czystej gleby, wody, powietrza, fauny i flory) zazwyczaj powodował, że wyniki analiz pozostawały niezadowalające. Postuluję, że trafniej byłoby badać poszczególne prawa z osobna, ponieważ wykazują one różną dynamikę i dopiero po uzyskaniu międzynarodowego statusu prawnego (jak w przypadku prawa człowieka do wody i urządzeń sanitarnych) można (ponownie) rozważać zbiorowe prawo do czystego środowiska.

W konsekwencji niniejszy artykuł został poświęcony analizie prawa człowieka do powietrza odpowiedniej jakości. W pierwszej części podjęto dyskusję, czy prawo to można uznać za uniwersalne prawo człowieka mimo jego (nie)obecności w dokumentach prawa

międzynarodowego (zarówno tzw. twardego, jak i miękkiego), zwyczajowym prawie międzynarodowym (praktyce państw i opinio iuris) oraz przy braku międzynarodowej egzekwowalności tego prawa. Po udzieleniu negatywnej odpowiedzi, przytaczam argumentację komentatorów prawnych, społeczeństwa obywatelskiego i innych organizacji na temat tego, czy prawo międzynarodowe powinno uwzględniać prawo do powietrza odpowiedniej jakości. Oprócz argumentów przemawiających za uznaniem nowego prawa, wyartykułowane są kwestie podające w wątpliwość zasadność jego uznania, między innymi jego niejasna treść, dyskusyjny związek z godnością, antropocentryczny charakter, jak i przekonanie o ogólnej zbędności nowego prawa. Na koniec przedstawiam perspektywy prawa człowieka do powietrza odpowiedniej jakości w ramach prawa międzynarodowego, biorąc pod uwagę zarówno aspekt krajowy, jak i międzynarodowy.

Słowa kluczowe: Prawo człowieka do odpowiedniego powietrza, teoria praw człowieka, zwyczajowe prawo międzynarodowe, prawo ochrony środowiska, egzekwowalność, twarde i miękkie prawo