

ON THE CONCEPT OF FUNDAMENTAL HUMAN RIGHT TO FAVOURABLE ENVIRONMENT

I. THE HUMAN RIGHTS IDEA AND THE RIGHT TO ENVIRONMENT

The right to environment is extremely close to the natural right to life. The author considers it necessary to emphasize that for him the natural right concept of fundamental human and civil right is not merely a venerated symbol easily replaced by a mere phrase hovering above positive constitutional and legal codification, possibly the international law codification of fundamental human and civil rights. This codification is considered by positivist jurists the only right viable for the jurist.¹⁾

The well – known theoretician from the field of democracy and human rights Katherine Fierlbeck states: „In early modern political theory rights can be broadly classified as „natural“, or „civil“, or both. Civil rights are legal constructions created and espoused by society; natural rights are said to exist (due to the precepts of natural law) regardless of whether they are recognized legally or not. But while the existence of legal rights was easily discernable, justifying the existence of „natural“ rights not (yet) codified in law was more difficult. In practice the acceptance of rights as „inherent“ has generally depended upon the willingness of a majority of individuals to acknowledge this fact; but the irony is that the very point of having a „right“ is to protect the rights – holders from the whims of a fickle majority. Thus, to a large extent, rights are the symbolic articulation of the legitimacy of beliefs that already exist rather than declarations of what ought to exist“.²⁾

The concept of natural human and civil rights, naturally, differs significantly with reference to the comprehension and concept of the origin. Most widespread in legal and social sciences is the antropocentric concept of human and

¹⁾ „... Positivism entails a logical difficulty which cannot be overcome. According to this line of thought, positive rights are the only true and proper rights. Now, in order for man to have real rights it is necessary that he possesses the ontological capacity for being the subject of right... No cultural fact can exist no be invented unless it is based upon a natural fact ... Culture rests upon Nature. It would be impossible for the positive Law to grant a right if juridicity – right as such – were not a natural fact. The legislator could not grant anything juridical if that act of giving were not resting upon nucleus of juridicity granted by Nature: the ontological fact would be missing“. HERVADA, J., *Natural Right and Natural Law: A critical Introduction*, Pamplona 1987, pp. 94, 95.

²⁾ FIERLBECK, K., *Globalizing democracy, Power, legitimacy and the interpretation of democratic ideas*, Manchester and New York, 2008, pp. 42-43.

civil rights. The primary fundamental human and civil rights are the right to life and the right to human dignity. The right to human dignity emphasizes the antropocentric concept of human and civil rights. In the present stage of theoretical development the antropocentric natural right concept of human and civil rights has the most varied forms. It is not our task to analyze these forms, or trends – often called „schools“ with certain exaggeration (a „school“ involving often only a small group of authors or even a single author).

Human and civil rights as natural rights are the fundamental set of values of democratic society in Euro – American area forming the basis of the democratic constitutional system enshrined in constitutions. Such is the situation in the absolute majority of models of constitutional systems when considered comparatively.³⁾ However, with reference to the function far fewer models of democratic constitutional systems can be so qualified.⁴⁾

II.THE CONCEPT OF THE RIGHT TO ENVIRONMENT

The constitutions of the democratic states of the Euro-American area which had originated in the 19th and at the beginning of the 20th centuries, as a rule, did not impose on the state the obligation to take care of favourable environment and protection of nature, as the then state of the environment did not make it possible yet to identify fully its originating degradation. The constitution adopted after the second World War took this issue into account, but only by imposing the obligation of protecting and taking care of the environment⁵⁾ on the state or by combining the obligations of the state to protect natural and cultural environment⁶⁾ and imposing on the state the obligation of special preventative or subsequent measures for their conservation. However, the constitutions of numerous democratic states of this type do not contain the fundamental constitutional right to environment.

In the theory of both constitutional and international law we can find opponents and advocates of the fundamental human right to environment.⁷⁾

The advocates of the fundamental human right to environment are generally the advocates of natural right concept of human and civil rights, although their number often includes also the opponents of this right. The reason is the objective that the right to environment cannot be individualized, it is boundless,

³⁾ HENKIN, L., NEUMAN, G., L., ORENTLICHER, D., F., LEEBRON, D. W., Human Rights, New York 1999, pp. 89-94; MACHAN, T., R., Individual Rights Reconsidered, Stanford 2001, pp. 19, 22, 25-27, 37, 87-89. RUSCIO, K., P., The Leadership Dilemma in Modern Democracy, Northampton 2008, pp. IX-XV.

⁴⁾ BOGDANOR, V., ed., Constitutions in Democracies Politics, Aldershot 1988, pp. 3-13.

⁵⁾ Cf e. g. Art. 21 of the Constitution of the Kingdom of the Netherlands.

⁶⁾ Cf. Art. 24, para. 1 of the Constitution of the Greek Republic.

⁷⁾ HOOG, G., STEINMETZ, A., International Conventions on Protection of Humanity and Environment, Berlin, New York 1993, p. XV ff. ; GRIFFITH, J. A. G., The Politics of the Judiciary, London 1997, p. 120.

too declarative in character, the damage to the individual or a group of people in the application of this right is too difficult to prove, etc. To a certain extent these objections are justified. However, it is possible to object: is it necessary to wait with the application of this right for the loss of human lives or heavily damaged health, or is it sufficient to prove the relation of direct threat to the individual or a group of people by an ecological danger which has not caused a catastrophe yet? The contemporary postmodern society is slowly beginning to realize this reality and we can see that the right to environment no longer forms merely the subject matter of theoretical discussions, but has become a real constitutional institution in modern European constitutions as well as in the constitutions of Latin American, Asian and African states. In the same way it has become an institution of international law in the field of human rights – although it still cannot be considered a stabilized institution, as it follows from the case-law of international as well as national courts.

The right to favourable environment and its protection as a fundamental human and civil right (the „civil right“ being added because of the global dimensions of environment and nature protection) originates, in our opinion, principally

1. at the time of origin of such serious devastation of environment as begins to threaten directly the existence of mankind and the whole mutually linked chain of all forms of life with which the life of man as individual, species as well as human community is integrally connected, as well as everything generating natural conditions for the life of living organisms incl. Man and creating the prerequisites necessary for their further development (in particular air, water, rocks, soils, organisms, ecosystems and energy) and simultaneously

2. if there are social, cultural, constitutional, international law and primarily international relations conditions for the implementation of this right. Like in the case other fundamental human and civil rights it is sufficient, if the above mentioned qualitative possibilities to assert this right exist. Those are, so to say, the substantive law conditions for the origin of the right to environment as the fundamental human and civil right.⁸⁾

If we break up the right to environment as the right of the individual and that of human collectives or civic organizations according to the individual environment components, we obtain a mutually linked (and sometimes difficult to understand by those examining the environment within narrow scientific disciplines) chain of relations sometimes called special connected or related rights, implementing the fundamental human right to environment. With reference to comparative law it is necessary to differentiate the way in which the individual environment components are defined in individual states and to identify accordingly what can form the content of the fundamental human and civil right to

⁸⁾ HOOG, G., STEINMETZ, A., *International Conventions on Protection of Humanity and Environment*, Berlin, New York 1993, pp. 453, 698.

environment in every individual state: that can be applied and/or enforced in every individual state by accurately defined procedural legal means.⁹⁾

III. CONSTITUTIONAL ENSHRINEMENT OF THE RIGHT TO ENVIRONMENT AS FUNDAMENTAL HUMAN RIGHT

We are witnessing that, due to ever more profound recognition of its global character, the codification of the environment is approximating not only in the Euro-American legal area, but also in other regions of the world; consequently, it can be assumed that also the definition of the right to environment will be – if not identical, at least very close in the states of the Euro-American area forming the object of our interest.¹⁰⁾

A considerable difference still prevails, however, in the status of the right to environment, i.e. whether it is considered in the respective state a fundamental human and civil right and, consequently, represents the institution of constitutional law, or whether it is in some countries still the right defined by an Act (or, in federations, by constitutional laws of individual federative countries). However, approximation can be observed also in this respect, as it is primarily international law that guarantees the right to environment, though indirectly, as a rule. In particular there are the decisions of international courts that apply the right to environment and broaden and detail its content. In this way the right to environment is becoming a fundamental human and civil right generally recognized as such in Europe, although it is not codified in the constitutions of individual European state, as the constitutions of European countries acknowledge, in one from or another, the superiority of international law to national law incl. the decisions of the European Court of Human Rights.¹¹⁾

Those, however, are the problems we shall deal with after an analysis of some constitutions enshrining the right to favourable environment as a fundamental human right.

We shall deal first with the national definition of the right to environment as the fundamental human and civil right primarily in three European states recognizing it as such. Naturally we are interested primarily in the concept of the

⁹⁾ BIANCHI, A., Harmonizing Liability Rules for Environmental Damage in Europe (in Gambaro, A., Rabelo, A., M. eds., Towards a New European ius Commune), Jerusalem 1999, p. 261 ff.; POZZO, B., Challenges to the Tort System in the Environmental Field: The European Perspectives (in Gambaro, A., Rabelo, A., M., eds., Towards a New European ius Commune), Jerusalem 1999, p. 299 ff.

¹⁰⁾ DEJEANT-PONS, M., L'insertion du droit de l'environnement dans les systemes régionaux de protection des droits de l'homme, *Revue universelle des droits de l'homme*, Paris 1991, p. 461.

¹¹⁾ REPÍK, B., Chrání Evropská úmluva o lidských právech právo na životní prostředí? (první část), *Bulletin advokacie* 7-8/2005, pp. 20-23; (druhá část) *Bulletin advokacie*, 9/2005, pp. 65-68; MÜLLEROVÁ, H., Právo na příznivé životní prostředí jako základní lidské právo, *Doktorská disertační práce*, Právnická fakulta, Univerzita Karlova Praha 2009, pp. 17-39.

right to environment as the fundamental human and civil right in the Czech Republic.

In Chapter Four, headed Economic, Social and Cultural Rights, Art. 35 para. 1 of the Charter of Fundamental Rights and Freedoms provides: „Everyone has the right to live in a favourable environment“, and in para. 2 of the same Article „Everyone is entitled to timely and complete information about the state of environment and natural resources“. ¹²⁾ The Constitution of the Czech Republic in Art. 7 provides: „The state take heed of prudent exploitation of natural resources and natural wealth“. This provision must be understood in conjunction with art. 35 para 3 of the Charter under the provisions of which „in the exercising of his/her rights nobody may endanger or cause damage to the living environment, natural resources, the wealth of natural species and cultural monuments beyond limits provided by law“. ¹³⁾

By these constitutional norms the Czech Republic has ranked among the states enshrining in their constitutions the right to favourable environment as the fundamental human and civil right. Of extraordinary significance is the fact that the Charter includes the right to favourable environment among economic, social and cultural rights. If the Charter defines the entitled subject by the term of „everyone“, it means not only with reference to the law-maker, but also with reference to the global character of the concept of environment in general, that the right to favourable environment ranks in the category of personal rights; its subject, consequently, is every man staying in the territory of the Czech Republic.

With reference to the content of the right to environment and the possibility of its individual application the provisions of Art. 41, para. 1 of the Charter apply preferentially, though not exclusively, viz. that the content of the concept of environment as well as the way in which this right may be claimed either collectively or individually is provided by a law. However these provisions do not exhaust the right to environment in the Czech Republic. It is necessary to emphasize the right to information on environment (Act No. 123/1998 Coll.) as a decisive component of the right to environment. As the Act makes use of the term of „applicant“, it is obvious that any man staying in the territory of the Czech Republic, not only its citizens, may act as applicant. The constitutional codification of this right to information on environment can be found in Art. 17 of the Charter, although the Division in which this article forms part has a somewhat inaccurate heading of „Political Rights“. It is difficult to explain why it

¹²⁾ PAVLÍČEK, V. a kol., Ústava a ústavní řád České republiky, Komentář, 2. díl, Práva a svobody, Praha 2002, pp. 281-283; DAMOHORSKÝ, M., Právo na příznivé životní prostředí jako základní lidské právo (in Jirásková, V., Vondráček, J., eds., Právní stát, současnost a budoucnost, Praha 2004, pp. 65-75); DAMOHORSKÝ, M. a kolektiv, Právo životního prostředí, Praha 2010, pp. 46-48; KLÍMA, K., Komentář k Ústavě a Listině, 2. rozšířené vydání, 2. díl, Plzeň 2009, pp. 1283-1287.

¹³⁾ PAVLÍČEK, V. a kol., op.cit., note 12, pp. 283-287.

is so; in any case however, it is an erroneous heading; the right to information on environment in itself proves that the concept of the right to information goes far beyond the concept of information of political character.¹⁴⁾

It is necessary to return to the above statement that both the content of the right to environment and the possibility of its individual application are governed preferentially, though not exclusively by Art. 41, para. 1 of the Charter of Fundamental Rights and Freedoms, i.e. by the reference to an Act. It is the Act No. 17/1992 Coll. on Environments as amended, which defines the environment as „everything forming natural conditions of existence of organisms incl. man and representing the prerequisites for their further development. Its components include in particular air, wather, rocks, soil, organisms, ecosystems and energy.“¹⁵⁾ It is a brief definition which, however, is particularly apt from our viewpoint, as it expresses the connection of man with all forms of life and corresponds in general form with the definition of environment used in international treaties and other, though legally unbinding international documents the prestige of which, with reference to the definition of the concepts contained therein, however is so high that they are beginning to generate unwritten principles of the fundamental right to environment. At the same time it should be emphasized that the provisions of Sec. 2 of the Act No. 17/1992 coll. on environment as amended do not exhaust the content of the concept of environment; however, they are of principal, general, possibly umbrella significance for the definition of the fundamental human right to environment. In the interpretation of these provisions it is necessary to proceed by examining the general provision reading „everything forming natural conditions of existence of organisms incl. man and representing the prerequisites for their further development“ first on the basis of accurate legal formulations defining the individual environment components. They are contained primarily in the above mentioned Act and in the Act No. 114/1992 Coll., on nature and landscape protection as amended, but not only therein.

The legal definition of the application of the right to environment is given in Sec. 15 of the Act No. 17/1992 Coll. which provides that „everyone may seek in the defined way before the respective authority his rights arising from this Act and further legislation concerned with the matters of environment“. This relatively broad provision¹⁶⁾ gives rise to the follow procedure: if anyone has suffered damage/injury by the impairment of the environment in which he/she lives or if such damage/injury is imminent, he/she may use all generally availa-

¹⁴⁾ For some problems of the Structure of the Charter of Fundamental Human Rights and Freedoms compare BLAHOŽ, J., Human Rights, their Guarantees and the Constitutional Judiciary in the CSFR, Austrian Journal of Public and International Law 43/1992, pp. 35-38.

¹⁵⁾ DAMOHORSKÝ, M. a kolektiv, Právo životního prostředí, 3. vydání, Praha 2010, pp. 28-29.

¹⁶⁾ DAMOHORSKÝ, M., Právo na příznivé životní prostředí jako základní lidské právo (in Jirásková, V., Vondráček, J., eds., Právní stát, současnost a budoucnost, Praha 2004, pp. 65-75); MÜLLEROVÁ, H., op.cit pp. 68-93.

ble legal means, petitions, complaints to administrative authorities, actions in court incl. the constitutional complaint to the Constitutional Court under appropriate circumstances (Art. 87, para 1, letter d' of the Constituion of the Czech Republic).

When considering the legislation concerning the right to environment in the European Union member states, we can find analogous codification in the constitution of Portugal. Art. 6, para. 1 of the Constitution of the Republic of Portugal provides inter alia that „everyone has the right to humanly dignified, healthy and ecologically adequate environment“. A substantial difference from the Czech Republic exists in that this right (qualified as a social right also in Portugal) arises directly from the constitution and does not state – like Art. 41 para. 1 of the Charter in Czech law – that the right can be sought only within the laws implementing it.

Also Spain (Art. 45, para. 1 of the Constitution of the Kingdom of Spain) codifies the right to environment in its constitution except that it excludes expressis verbis the use of the constitutional complaint (Art. 53, para. 2 of the Constitution of the Kingdom of Spain) submitted to the Constitutional Court in case of the violation of the right to environment and other social and economic rights.

IV. INDIRECT GENERATION OF FUNDAMENTAL HUMAN RIGHT TO ENVIRONMENT

The knowledge of the threat to people by people – the devastation of environment and the destruction of nature – has contributed to the generation of legal means of application of the right to environment against the state, legal entities and natural persons which can be divided accurately between the means of substantive and adjective law. The means of substantive law include the right to the compensation of damages, the right to seek the prohibition of activities devastating the environment, the right to be informed on the decisions of state authorities preventing the devastation of environment. The procedural means include e. g. the right of individuals and civic organizations to enter administrative proceedings concerning the right to environment, the right of individuals civic associations – legal entities to submit remedies in the proceedings which they had entered due to their legal capacity to do so („standing“ in Anglo-American states). Analogous state can be observed also on international level in the framework of EU member states. It is possible to say that both fields, i. e. both the case-law of international courts and the jurisdiction of national courts, enrich one another in the guarantees of the right to environment.

The prevailing majority of EU member states provides the state with the obligation to take care of the environment. According to national legislations this provision enables also the individual as well as collectives or civil organizations to request the state by legal means to fulfil its obligations and to seek restitution by the state, should it have caused or permitted the impairment of environment.

At the same time it must be emphasized that this fact in itself does not rank the right to environment and the right to information on environment in these states among fundamental human and civil rights. Actually, however, even in these states, in which the right to environment and the right to information on environment are not enshrined in the constitution as fundamental human rights, it has acquired this status, whether directly or indirectly, by the case-law of the courts, especially the constitutional courts¹⁷⁾ or the authorities providing judicial review of constitutionality,¹⁸⁾ incl. the case-law of the European Court of Human Rights.¹⁹⁾

Indirect protection by the European Court of Human Rights, guaranteeing by their decisions the provisions of the European Convention on the Protection of Human Rights – has enhanced significantly the formation of the right to environment as a fundamental human right on European level. The European Convention does not include that right, but if the European Court of Human Rights, when examining a specific case, find that this right occurs in conjunction with the rights protected by European Convention, the ECHR guarantee the right to environment, although in its decision-making activities the right to environment is of procedural character – it is a procedural right aiming unambiguously at the right expressly protected by the European Convention. The decision-making activities of the European Court of Human Rights in this field are considerably extensive. For instance, the European Court of Human Rights granted, under Art. 6 of the European Convention on Human rights on the right to a fair hearing, the application by Powel and Rayner²⁰⁾ requesting the compensation of damages caused by excessive noise of the nearby airfield in Great Britain, although the British law had not permitted any compensation under given circumstances.

Analogous was also the case of Lopez-Ostra in which excessive noise had been qualified as interference with private life under Art. 8 of the Convention, as it can disturb the individuals physical state.²¹⁾ Art. 56 of the Convention on the right to a fair hearing was used by the European Court of Human Rights to accept the application concerning the right to environment, concerning the

¹⁷⁾ KAVAS, J. J., *Supranational and Constitutional Courts in Europe: Functions and Sources*, New York 1992, p. 129 ff.

¹⁸⁾ BLAHOŽ, J., *Soudní kontrola ústavnosti: srovnávací pohled*, Praha 2001, p. 245 ff., 403 ff.

¹⁹⁾ KAVAS, J. J., *op.cit.*, p. 117 ff.

²⁰⁾ Powel and Rayner v. United Kingdom, Series A-172, 1990 (compare with the theoretical analysis in JANIS, M., KAY, R., BRADLEY, A., *European Human Rights Law*, Oxford 1995, pp. 247 ff.).

²¹⁾ Lopez-Ostra v. Spain, Series A-303 C 1994; compare with the theoretical analysis in CHURCHILL, R.R., *Environmental Rights in Existing Human Rights Treaties* (in Boyle, A., E., Anderson, M.R., *Human Rights Approaches to Environmental Protection*, Oxford, 1998, pp. 94, 95); ŠTURMA, P., a kol., *Mezinárodní právo životního prostředí*, I. část, Beroun 2004, pp. 52-53; REPÍK, B., *Chrání úmluva o lidských právech právo na životní prostředí?* (první část), *Bulletin advokacie*, 8/2005, pp. 22-23.

pollution of potable water by a public refuse dump. The right to use potable water from the well situated on the owner's land, according to the decision of the European Court of Human Rights, forms an enforceable part of property rights. Permanent fear of potable water pollution was qualified by the European Court of Human Rights as moral injury.²²⁾

Of significant importance for the right to environments is also the European Court for Human Rights interpretation of the provision (considerably frequented in European states, note by J. B.) on the „necessity in democratic society“. The European Court of Human Rights has explained that the concept of „necessity in democratic society“ assumes that the interference corresponds with „urgent social need“.²³⁾ In another case the European Court of Human Rights explained the legal formulation of „the necessity in democratic society“ analogously as the existence of urgent social need. According to this interpretation the contracting states have a certain leeway for assessment whether such need exists; this leeway, however, is subjected to European supervision concerning both the legislation and the generally binding implementation normative acts comprising instruction for the implementation of statutes; at the same time this European supervision applies also to the decisions adopted by independent courts.²⁴⁾ The decisions of international authorities analyzed above resulted in the fact that in the second half of the 90s the right to environment began to be guaranteed indirectly as a fundamental human right by the courts in the Federal Republic of Germany, Italy, the Netherlands, Belgium, France and the Scandinavian countries. Also the decisions of constitutional courts or of the bodies of judicial review of constitutionality in these states in this field are known, although not very frequented.

Therefore, it is possible to conclude that the case-law of the European Court of Human Rights – and by far not only in the field of the right to environment has been developing in many European countries substantially the concept of fundamental human and civil rights both enshrined and not enshrined in the constitutions of these states.

V. CONCLUSION

We believe that leaving the care of the environment only to the state and the supra-state and international organizations contradicts the concept of democratic liberal state. Man and citizen, naturally endowed with the most significant values of democratic society – the fundamental human and civil rights, should also be the guardian of environment and should be provided with constitutional and legal means for this purpose to be able to implement this right. Why, the right to environment is extremely close to the fundamental human right or – to

²²⁾ Zander v. Sweden, Series A 279-B (1993); compare with the theoretical analysis in CHURCHILL, R.R., *op.cit.*, p. 96.

²³⁾ Sunday Times v. United Kingdom, Series A, 217 (1991).

²⁴⁾ Niemietz v. Germany, Series A, 251-B (1992).

be exact – the superfundamental human right – the right to life. If we have proved that the fundamental human and civil rights actually are nothing but the requirements imposed on the quality of human life which are threatened and which can be articulated in the given political and social environment, in the case of the fundamental human and civil right to environment we must realize it enters – and will enter with ever increasing urgency in the future – various fields of human life.

The well – known scientist Alan Boyle states: „The most far – reaching case for environmental rights comes in the form of claims to a decent, healthy, or viable environment, that is, to a substantive environmental right which involves the promotion of a certain level of environmental quality. Such a right... includes:

- freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well – being or sustainable development;
- protection and preservation of the air, soil, water, sea – ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems;
- the highest attainable standard of health;
- safe and healthy food, water and working environment;
- adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment;
- ecologically sound access to nature and the conservation and sustainable use of nature and natural resources;
- preservation of unique sites;
- enjoyment of traditional life and subsistence for indigenous peoples²⁵⁾.

Apart from its decisive significance for human health and the healthy evolution of future generations the fundamental human right to environment is extremely significant for all activities of man and society incl. the economic field in which material values are created. And it is in this very field that the issue of environment incl. the fundamental human right to environment is not sufficiently appreciated.

We often encounter the approach which can be characterized as momentary economic interest. It is beyond doubt that the environment, its respecting and protection, is something which may limit the momentary economic interest in the achievement of the highest profit possible. With reference to long-term perspective, which is the only correct viewpoint even in the fields of economy and business enterprise, however, the situation is entirely different.

Favourable environment, respect to it, prudent exploitation of natural resources, represent one of the essential guarantees of long-term successful business

²⁵⁾ BOYLE, A., The Role of International Human Rights Law in the Protection of the Environment, (in Boyle, A., Anderson, M. edited, op.cit.), p. 48.

enterprise and economic development in general. Business enterprise and successful economic development cannot be imagined without individual activities - the initiative of individuals. That is also why the care of the environment and its protection should not be merely the interest and affair of the state, but should be also made the centre of interest of every individual (in the near future this need will come forward with ever increasing urgency).