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The Role of Basic Rights in Environmental Protection.

Basic Right to Environment *de lege ferenda* in the Estonian Constitution

1. Introduction

The existing human rights catalogue was drafted in a time when environmental concerns were not yet an issue and hence fail to adequately address all environmental needs. However in a degrading environment no other human right can be secured. Recent decades have witnessed a debate on whether there is a need for an additional human right to a clean environment. As a consequence, environmental rights have been inserted in several international agreements and constitutions of various states.

The first aim of this article is to analyse the nature of the right to the environment and to come to an understanding of whether it is able to guarantee a higher level of environmental protection. The second aim is to analyse how efficiently the sections of the Estonian Constitution can be invoked for the protection of the environment and whether there is a need for amendments.

The development and current status of the right to the environment is analysed on the basis of international documents and the decisions of international tribunals. We face a question of whether there is any need for an additional formulation of environmental right if the existing catalogue of human rights is sufficient to address environmental concerns. Does the success in invoking existing human rights in environmental cases support this position?

The authors of this article are of the view that the environment is an independent value and needs as strict protection as other commonly agreed values such as the right to property or the right to life and health. Enlisting the right to the environment as a basic right in the Constitution would help to protect this value from the detrimental activities of private entities and also states.

The Estonian Constitution addresses environmental concerns explicitly in § 5 and § 53. In the lack of court practice the possible uses of these provisions remain unclear. However a proper interpretation of § 5 and § 53 would allow coherence with the legal system and at the same time maximum environmental protection.

The final question remains — do we have the appropriate legal basis to meet the needs of society in light of emerging environmental degradation or should and could we enact an additional guarantee, the basic right of an individual to a clean environment? The last chapter of this article proposes amendments to the word-

ings of § 5 and § 53 of the Estonian Constitution, taking into account the concepts of sustainable development and environmental space.

2. Environmental protection through human rights *de lege lata*

Except for the two regional human rights instruments¹ there is no express statement of the right to the environment on an international level.² The closest link to the right to a healthy environment is in the Convention on the Rights of the Child³ linking environmental pollution with health risks. However environmental rights can and have been derived from civil and political as well as social and economic rights⁴ — e.g., the right to life, to property, respect for one's private life, right to health, self-determination, right to safe and healthy working conditions.⁵

The European Court of Human Rights (hereinafter: the Court) held in the case *LCB v. United Kingdom*⁶ that article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms obliges states to take appropriate steps to safeguard the lives of those within its jurisdiction. The wide interpretation of the right to life would allow extending it to the right to the environment.⁷ Also article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is often invoked in environmental cases, usually to stop some action of a state that causes interference.⁸

Nevertheless the abovementioned provisions have become futile as soon as there is no actual harm, but only a need for preventive action or where there is no direct link between the state of the environment and the enjoyment of the right in question. In the situation of scientific uncertainty, the Court found no causal link between a person's exposure to radiation during nuclear testing and his daughter's leukaemia.⁹ In *Tauira and others*¹⁰ the Commission rejected the applicants claim based on the risk of exposure to radiation by stating that mere risks cannot be invoked since "many human activities generate risks". The decision was upheld in *L, M & R v. Switzerland*¹¹ by the statement that direct harm must be suffered or the possibility of its occurrence to the applicant should be imminent.¹²

¹ African Charter on Human Rights and Peoples' Rights, Organization of African Unity (OAU) Doc. CAB/LEG/67/3/Rev. 5 (1982) and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1989).

² One of the reasons for this could be the fear of additional numerous claims that would devalue or debase the human rights currency. See D. Shelton. The right to environment. – A. Eide, J. Helgesen (eds.). The future of human rights protection in a changing world. Oslo: Norwegian University Press, 1991. p. 198.

³ United Nations Convention on the Rights of the Child, 20 November 1989, UN General Assembly resolution 44/25 of 20 November 1989, A/RES/44/25

⁴ Norms that indirectly allow environmental protection can be referred to as "derivative environmental rights". R. Churchill. Environmental rights in existing human rights treaties. – A. Boyle, M. R. Anderson (eds.). Human Rights Approaches to Environmental Protection. Oxford: Clarendon, 1997, p. 100.

⁵ P. Sands. Human rights, environment and the Lopez-Ostra case: context and consequences. – European Human Rights Law Review, 1996, No. 6, pp. 597–618.

⁶ The decision of the European Court of Human Rights, 9 June 1998, App. No. 23413/94. – European Human Rights Reports (hereinafter: EHRR) 1998, 27, 212.

⁷ A. A. Cancado Trindade. Human rights and the environment. – J. Symonides (ed.). Human rights: new dimensions and challenges. Aldershot: Ashgate/Dartmouth, 1998, p. 117.

⁸ The court has invoked the proportionality test when deciding over the proper balance between the individual and society interests. Very often such cases concern noise pollution. See the decisions of European Commission of Human Rights (ECommHR) in *Arrondelle v. UK*, 15 July 1980, App. No. 7889/77. – Decisions and Reports of the Commission of Human Rights (DR) 1980, 19, 186; 13 May 1982. – DR 1982, 26, 5; *Baggs v. United Kingdom*, 16 October 1985, App. No. 9310/81. – DR 1985, 44, 13 and ECHR, *Powell and Rayner v. United Kingdom*, 21 February 1990, App. No. 172. – EHRR 1990, 12, 355; most recent judgment is ECHR, *Hatton and others v. United Kingdom*, 2 October 2001, App. No. 36022/97. – EHRR 2002, 34, 1.

⁹ *LCB v. United Kingdom* (Note 6); see also the judgment of UK High Court in *Reay and Hope v British Nuclear Fuels*, Queen's Bench Division, 22 November 1993. – Medical Reports 1994, 5, 1.

¹⁰ *Noel Narvii Tauira and Eighteen others v. France*, 4 December 1995, App. No. 28204/95. – DR 1995, 83, 112. The applicants claimed that nuclear testing on Mururoa atoll could generate a risk of pollution.

¹¹ The decision of European Commission of Human Rights 1 July 1996, App. No. 30003/96. – EHRR 1996, 3, 801. The applicants claimed that their right to private and family life has been infringed by the existence of a nearby railway station, which fostered the transport of nuclear waste.

¹² Same was stated by the United Nations Human Rights Committee (UN HRC) while defining the victims within the meaning of article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights in *EW et al v. Netherlands*, 8 April 1993, Communication No. 429/1990. – Human Rights Committee Annual Report 1993, Vol. II, Annex XIII, sec. G; for a statement that the Protocol does not admit rights to future generations see *UN HRC EHP v. Canada*, 27 October 1982, Communication No. 67/1980. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/fd1dce90b1957160c1256abe003484d9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/fd1dce90b1957160c1256abe003484d9?Opendocument) (10.06.2003)

The potential of article 6 Convention for the Protection of Human Rights and Fundamental Freedoms can be derived from *Zander v. Sweden*¹³ where the Swedish government expressed fears that the application of this provision may result in “an obligation for states to introduce a multitude of comprehensive court remedies covering a wide range of environmental matters and to deal with complaints about exposure to potential not just actual risk of damage”. However the Court maintained the view that there needs to be actual harm and article 6 will not apply to risks of harm.¹⁴

Environmental grounds have been invoked with more success where the harm is obvious or where other concerns such as availability of information or balancing of different interests are at stake. In *Lopez Ostra*¹⁵ the Court acknowledged that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without however seriously endangering their health.¹⁶ The case is also important because the Court did not require the applicant to exhaust administrative remedies to challenge operation of the plant under the environmental laws, but only to exhaust remedies applicable to enforcement of basic rights. In *Guerra v. Italy*¹⁷ the question was raised about the obligation of the Italian state to provide relevant information on the emissions emanating from a high-risk chemical factory. The Court found that article 8 entails a positive obligation to collect and disseminate information because the lack of information would bar applicants from being able to assess the risks they might encounter. In *Fredin v. Sweden*¹⁸ the Court acknowledged the possibility to challenge measures taken in the public interest where they would “manifestly run counter to the interests of environmental protection”. In cases of property rights the Court has stressed the importance of striking a fair balance.¹⁹

To conclude, even though existing human rights allow pursuit of environmental aims to a certain extent, the requirements for direct causation, level of harm to the claimant and the inability to represent future generations limit their efficiency greatly. In an anthropocentric framework environmental protection remains instrumental and thus unable to achieve its preventive and precautionary aims. As long as groups having direct interest in the state of the environment are prevented from effective remedies, it remains up to individuals to contest environmentally harmful activities. However with a view of the limited resources they possess, this option remains rather weak. Also the few successful cases are unlikely to have any impact within national frameworks and thus are unable to guide states towards allowing higher protection of the environment. Therefore it is submitted that specific environmental rights are necessary in order to fully realise protective aims and through them also sustainable development.

3. The scope of the basic right to clean environment

A fair number of states in Europe and the rest of the world have introduced environmental provisions to their constitutions since the 1970s.²⁰ However, such a right is mostly not directly enforceable and serves only as a state aim. The following chapter analyses the components that make up a clear and enforceable basic right to the environment.

¹³ The decision of European Commission of Human Rights 25 November 1993, App. No. 14282/88. – EHRR 1993, 18, 175.

¹⁴ See also the decision of European Commission of Human Rights *Balmer-Schafroth and Others v. Switzerland* 26 August 1997, App. No. 22110/93. – EHRR 1997, 25, 598, where applicants living within 5 kilometers of a nuclear power station claimed that in view of their right to bodily integrity and their property rights, an operation permit should not have been granted to the plant. Court found article 6 inapplicable, because there was not a sufficient link between the decision to give the permit and the possible harm to physical integrity and because no serious, specific or imminent danger was proven. In his dissenting opinion, Judge Pettiti pointed to the fact that the decision clearly undermined the precautionary principle.

¹⁵ The decision of European Commission of Human Rights 9 December 1994, App. No. 16798/90. – EHRR 1995, 20, 277. Lopez-Ostra submitted that the fumes and smells from a badly managed waste treatment plant had caused health problems to her family members.

¹⁶ The success of Lopez-Ostra gave rise to many cases, especially by gypsies claiming their right to natural surroundings. See M. Demerieux. Deriving environmental rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms. – Oxford Journal of Legal Studies, 2001, vol. 21, No. 3, p. 530.

¹⁷ The decision of European Commission of Human Rights 19 February 1998, App. No. 14967/89. – EHRR 1998, 26, 357.

¹⁸ The decision of European Commission of Human Rights 18 February 1991, App. No. 12033/86. – EHRR 1991, 13, 784. The case concerned the interpretation of Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No. 1 article 1(2) that allows states to enforce property laws in view of the general interest.

¹⁹ In *Oerlemans v. The Netherlands*, ECtHR, 27 November 1991, App. No. 12565/86. – Reports on Judgments and Decisions Series A-219. The Court stated that it “[...] recognizes that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question”.

²⁰ Of approximately 191 nations in the world, there are 109 national constitutions that mention protection of the environment or natural resources. Human Rights and the Environment. Earthjustice, 2003, p. 23

3.1. The right to environment as a moral/political argument, as a state goal or as a principle?

It is indisputable that due to growing degradation of natural conditions and the unforeseeable problems that might accompany this, we need to address environmental concerns in law; the moral grounds of environmental protection are obvious and so also is the political will to regulate it. Indeed the mere moral justification does not automatically mean that there is already a corresponding right.^{*21} But the argument for stating a clean environment as a basic right is not standing on moral arguments only.^{*22}

We may argue that instead of a binding rule, the right to a clean environment should be a policy principle with an assignment to guide the decision-makers.^{*23} However it would be difficult for an individual to seek environmental protection from the state where there is only an overall non-binding principle.^{*24}

Most of the provisions in European constitutions can be regarded as imposing duties on the state to take regulatory action for the protection and improvement of the environment.^{*25} They can be viewed either as a legal basis for environmental regulation or as declarations of state goal.

An example of a state goal is article 20a of the German Constitution. Article 20a was added to the *Grundgesetz* in 1994. All *Länder* constitutions contain similar declarations of state goal and some also contain special rules.^{*26}

Article 20a reads: “The State, with its responsibility for future generations, protects the natural foundations of life within the framework of the Constitution, by legislation and, in the administration of law and justice, by the executive and the judiciary.”

The article does not grant an actionable right to the citizen. Thus it is not a fundamental environmental right. It is mainly the responsibility of the state to protect the natural basis of existence.^{*27}

The normative contents of basic right to the environment should allow balancing of different interests. In the situation where the right to the environment is interdependent and indivisible from other basic rights' norms and finds itself often in collision with them, too strict a rule is not an option. Stating a principle on the other hand, enables to include the aspect of proportionality and therefore to weigh different social, economic and environmental needs; also its necessity and appropriateness in a specific situation.^{*28} This kind of principle should nevertheless entail a binding nature in that it would be considered as “optimization order”^{*29} to find the best possible solution in a given factual as well as legal framework.

3.2. Substantive right to environment

3.2.1. Object of the right

On an international level the definition of the right to the environment is often tackled by different priorities of States and different environmental conditions. This can be overcome by a national legal framework. National constitutions allow the consideration of local particularities and a more detailed scope.^{*30}

²¹ J. G. Merrills. Environmental protection and human rights: Conceptual aspects. – A. Boyle, M. R. Anderson (Note 4), p. 38.

²² See the statement that “Often, the real value of a human right is that it is available as a moral trump card precisely when legal arrangements fail.” M. R. Anderson. Human Rights Approaches to Environmental Protection: an overview. – A. Boyle, M. R. Anderson (Note 4), p. 12.

²³ M. Ernits sees § 53 of the Estonian Constitution to be only a guiding principle for the legislator. Põhiõiguste mõiste ja tähtsus õigussüsteemis (The Concept and Importance of Fundamental Rights in the Legal System). – *Juridica*, 1996, No. 9, pp. 463–471 (in Estonian).

²⁴ See C. Fabre. Social Rights under the Constitution: government and the decent life, chapter 3.2.3. “From moral rights to Constitutional Rights”. Oxford: Clarendon, 2000, pp. 98–105.

²⁵ R. Seerden, M. Heldeweg (eds.). Comparative Environmental Law in Europe. An Introduction to Public Environmental Law in EU Member States. Antwerpen: Maklu, 1996. p. 427.

²⁶ M. Rodi. Public Environmental Law in Germany. – R. Seerden, M. Heldeweg (Note 25), p. 151.

²⁷ *Ibid.*, p. 157.

²⁸ R. Alexy. Kollisioon ja kaalumine kui põhiõiguste dogmaatika põhiprobleemid (Conflict and Weighing in the Doctrine of Fundamental Rights). – *Juridica*, 2001, No. 1, pp. 5–13 (in Estonian); see also R. Dworkin. Taking Rights Seriously. Cambridge: Harvard University Press, 1977, pp. 22–39.

²⁹ R. Alexy (Note 28), p. 5.

³⁰ The idea is supported by P. W. Birnie and A. Boyle in that even though they argue against the necessity to construe a right to the environment on an international level, they nevertheless acknowledge, that the same arguments may not hold sway in national frameworks. See P. W. Birnie, A. Boyle. International law and the environment. 2nd ed. Oxford: Oxford University Press, 2002, p. 266; also in A. Boyle. The Role of International Human Rights Law in the Protection of the Environment. – A. Boyle, M. R. Anderson (Note 4), p. 64.

About 60 national constitutions enacting the right to the environment do it with a great variety of formulations. References are made *e.g.* to “clean”, “healthy”, “decent”, “viable”, “satisfactory”, “sustainable”.^{*31} Defining specific focus (such as “healthy environment”) is one option to solve the problem with excessively vague adjectives.^{*32} However international documents containing this kind of right have in most cases proven to be too narrow and therefore inappropriate to achieve environmental protection.

A second possibility is to amplify the general right with more specific formulations and parameters. This is done in the draft articles annexed to the Ksentini Report.^{*33} However that option could become too long and cumbersome for the text of the constitution.

The third approach is not to try to define the exact substance in the constitution at all, but to leave it open for the courts to formulate the final scope via case law.^{*34} Given the fact that there is quite a clear view in the public mind of an environment which should be conserved, the right can be applied with a reference to the economic and social context of the time.^{*35}

3.2.2. Subjects of the right

The second inevitable question is who can rely on the right to the environment. In the case where the right to the environment is formulated as a basic right in a constitution, then certainly the state is the one obligated to supply means of protection in the form of specific legislation and policies as well as to refrain from activities detrimental to the environment.

However the right to the environment, resting on the notion of “common objective – common concern”, includes a much wider scope of subjects. As a solidarity right it must encompass as its holders individuals as well as groups and in addition to allow considerations for future generations.^{*36} Only then is it possible to set sustainability and intra- and inter-generational equity as the final goal. Thus there should be no distinction between addressees and beneficiaries of the right, because in order to effectively implement the right the holders also bear a duty to participate in the enhancement of the environment.^{*37}

Some European constitutions contain a duty of care provision^{*38} and some have added to the rights-based wording a general responsibility of all persons towards nature and the environment.^{*39} Such provisions relate to the ethics of responsibility, which implies that instead of rights we should speak about duties towards nature — because nature is not able to defend itself against harmful activities. But what if someone fails to fulfil this duty?

It becomes thus inevitable to vest the basic right to the environment with third-party applicability (*Drittwirkung* in German legal literature^{*40}), meaning, that the norm should be applicable against the state as well as against third persons (groups, enterprises or individuals) causing environmental degradation.

3.2.3. Overcoming the enforcement difficulties

The key to a successful enforcement process is found in clear definition, explicit and accessible procedures and effective remedies.

³¹ Final Report of the UN Special Rapporteur F. Z. Ksentini, Human Rights and Environment (hereinafter referred to as the Ksentini Report), Annex III Developments in national legislation and practices, UN Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th session, 17 August 1994, E/CN.4/Sub.2/1994/9. Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/eeab2b6937bcca18025675c005779c3?Opendocument> (10.06.2003). See also K. Bosselmann, Human Rights and the Environment: Redefining Fundamental Principles. Available at: <http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/bosselmann/home.htm> (15.04.2003).

³² P. W. Birnie, A. Boyle (Note 30), p. 256.

³³ Ksentini Report (Note 31).

³⁴ A. Kiss, D. Shelton. International Environmental Law. New York: Transnational Publications, 1991, p. 24.

³⁵ A. Kiss. Définition et nature juridique d'un droit de l'homme à l'environnement in Environnement et droits de l'homme, UNESCO, 1987, as cited in S. Prakash. The right to the Environment. Emerging Implications in Theory and Praxis. – Netherlands Quarterly of Human Rights, 1995, vol. 13, No. 4, p. 425.

³⁶ See Perusoikeuskomitean mietintö 1992:3. Helsinki, 1992, pp. 358–359. For a reasoning of whether we should also accord rights to natural objects, see also S. Douglas-Scott. Environmental Rights: Taking the Environment Seriously? – L. Gearty, A. Tomkins (eds.). Understanding Human Rights. London, New York: Pinter, 1999, pp. 440–446.

³⁷ P. Cullet. Definition of an Environmental Right in a Human Rights Context. – Netherlands Quarterly of Human Rights, 1995, vol. 13, No. 1, p. 32.

³⁸ *E.g.* article 20 of the Finnish Constitution. – Official Journal, 731/1999. Available at <http://www.finlex.fi/pdf/saadkaan/E9990731.PDF> (17.07.2003).

³⁹ *E.g.* article 66 of the Portuguese Constitution, http://www.parlamento.pt/ingles/cons_leg/crp_ing/

⁴⁰ See C. Starck. Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court. – D. Friedman, D. Barak-Erez (eds.). Human Rights in Private Law, Oxford: Hart Publishing, 2001, p. 97.

Although the wording of many environmental provisions in European constitutions contains a right to a certain environment^{*41}, general opinion is that these rights are not justiciable and do not create direct rights and obligations due to their vagueness. There seems to be no opportunity for individuals or groups of citizens to start judicial action against the state and to force it to take regulatory action to benefit the environment.^{*42} It can be concluded that a justiciable and ecologically comprehensible right to the environment has not developed in any of the European countries.^{*43}

The opinions on judicial applicability and clarity of these provisions may not be correct *ad infinitum* as they have not taken into account that many of these provisions have not been grounds for court cases and that the vague wording may acquire substance case-by-case.

The procedural side of enforcing the right to the environment is crucial and should include the right to information, to free and meaningful participation in planning and decision-making and access to effective remedies and redress in administrative and judicial proceedings for environmental harm or the threat of such harm.^{*44}

Even though the procedural aspect is decisive in enforcing the right by democratic means, it does not substitute the substantive content of the norm, but acts more like an instrumental right by giving the structural framework necessary for the realisation of the substantive right to the environment as well as other basic rights.^{*45} The procedure itself does not guarantee that when balanced against other rights, the environment is afforded proper weight and thus increasing availability of information, participation in decision-making and access to justice do not, on their own, lead to environmentally sustainable regulation, decisions or conditions.

Individuals and groups^{*46} should be able to actively seize the right to the environment and also less-privileged groups should be able to participate in the decision-making process.^{*47} It would be possible to define or delimit the number of groups by the requirement of special interest in the case. Interest could be shown in the professional aims and purposes of a non-governmental organisation.

No matter how well a norm is formulated, it becomes dormant if the people are unwilling to rely on it.^{*48} Since environmental quality is a value judgment varying across cultures and geographic contexts, then participation rather than a substantive legal definition can provide the most realistic, flexible and context-sensitive approach to a right to the environment.^{*49}

In the enforcement of the right to the environment the notion of express damage to be shown by the applicant should be abandoned. In the need for proactive protection it is vital not only to penalise, but also to prevent degrading activities. The basic right to the environment ought to allow standing also in cases where there is no actual harm, but only a risk of its occurrence.^{*50} Applying the precautionary principle, we should allow court-proceeding in cases where there is no proof of future harm, but only scientific data implicating the possibility of such harm.^{*51}

⁴¹ E.g. article 110b of the Norwegian Constitution. Available at <http://www.odin.dep.no/odin/engelsk/norway/system/032005-990424/> (17.07.2003); article 45 of the Spanish Constitution. Available at http://www.senado.es/constitu_i/index.html (17.7.2003), article 66 of the Portuguese Constitution. Available at <http://www.portugal.gov.pt/en/Political+System/Constitution/default.htm> (17.7.2003).

⁴² Only in cases where the government has drastically lowered the level of environmental protection Austrian and Dutch citizens may have a justiciable claim. (R. Seerden, M. Heldeweg (Note 25), p. 427).

⁴³ C. Calliess. *Umweltgrundrechte im Recht der Europäischen Union*. – K. Bosselmann (ed.). *Ökologische Grundrechte. Zum Verhältnis zwischen individueller Freiheit und Natur*. Baden-Baden: Nomos, 1998, p. 212.

⁴⁴ On an international level such rights are afforded by the UN Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice. – Environmental Matters, at <http://www.unep.org/env/pp/documents/cep43e.pdf> (27.04.2003); also European Convention for the Protection of Human Rights and Fundamental Freedoms, article 10.

⁴⁵ P. Cullet (Note 37), p. 37. It has frequently been argued that procedural rights, contrary to a substantial environmental right, are a powerful tool in environmental protection. See e.g. K.-H. Ladeur. *Environmental Constitutional Law*. – G. Winter (ed.). *European Environmental Law. A Comparative Perspective*. Ashgate: Dartmouth/Aldershot, 1996, p. 24; G. Handl. *Human rights and protection of the environment*. – A. Eide, C. Krause, A. Rosas (eds.). *Economic, social and cultural rights*. Martinus Nijhoff Publishers, 2001, p. 327.

⁴⁶ For the discussion on the role of NGOs in environmental protection see J. Cameron, R. Mackenzie. *Access to Environmental Justice and Procedural Rights in International Institutions*. – A. Boyle, M. R. Anderson (Note 4), pp. 137–151.

⁴⁷ Shelton notes, that “High short-term costs involved in many environmental protection measures often make environmental decisions unpopular with economically affected communities. The recognition that environmental protection is a core value and right can be particularly valuable in countering this disapproval and ensuring that the long-term needs of humanity are not sacrificed to short-term interests.” D. Shelton (Note 2), p. 191.

⁴⁸ This was the case in Hungary, see G. Bandi. *The Right to Environment in Theory and Practice: The Hungarian Experience*. – Connecticut Journal of International Law, 1993, No. 2, pp. 439–467.

⁴⁹ S. Prakash (Note 35), p. 423.

⁵⁰ For a list of effective preventive measures see B. van Dyke. *Proposal to introduce the right to a healthy environment into the European Convention regime*. – Virginia Environmental Law Journal, 1994, No. 2, p. 338.

⁵¹ For analysis of the precautionary principle see J. Morris (ed.). *Rethinking Risk and the Precautionary Principle*. Oxford: Butterworth, 2000; T. O’Riordan, J. Cameron (eds.). *Interpreting the precautionary principle*. London: Earthscan Publications Ltd., 1994.

4. Environmental provisions in Estonian Constitution

4.1. The Preamble, § 5 and § 53 of the Constitution

The Preamble of the Estonian Constitution says that the Estonian state is, *inter alia*, a pledge to present and future generations for their social progress and general welfare.

Section 5 of the General Provisions of the Constitution reads as follows: “The natural resources and natural wealth of Estonia are national riches which shall be used sustainably.”

Section 53 of the Basic Rights, Freedoms and Duties chapter provides the following: “Everyone has a duty to preserve the living and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law.”

4.1.1. “Sustainable use” as state goal

Together with the objective of the state set out in the Preamble to guarantee present and future generations social progress and general welfare, § 5 makes sustainable development as a general state goal. This view has been supported by the Committee of Experts on the Constitution which has concluded in their final paper that § 5 should be viewed as setting a state goal to achieve sustainable use of natural resources and natural wealth.⁵² The examination of the protocols of the Constitutional Assembly, where one of the members, speaking about this provision, says that the goal is to preserve the environment suitable for future generations, also supports the idea of sustainable development as a state goal.

“Natural resources and natural wealth”, as stated in § 5, cover all the possible aspects of the environment to which the sustainability imperative applies — starting with mineral wealth, forests, animals, fish and ending with clean air, clean water and biodiversity.

What is meant by “sustainable use of natural resources and wealth” and by the more general “sustainable development”? The definition of sustainable development and sustainable use can be deduced from international instruments Estonia has signed or is a party to.⁵³ International organisations and states agreed in the 1992 UN Conference on Environment and Development in the Rio Declaration on Environment and Development and Agenda 21 that development viewed only as an increase of material wealth is threatening mankind’s survival and the environment because it exceeds the carrying capacity of the biosphere as an ecosystem. The use of natural resources and wealth is sustainable only when it does not consume natural resources faster than they could be regenerated and does not burden the environment with amounts of waste and residuals that exceed its capacity to absorb them and does not degenerate biodiversity. This normative principle setting the direction and limits for the state action and inaction is binding on the state powers.

4.1.2. Can state goal be relied upon in courts?

The state goal is not granting any individual such rights the infringement of which would give legal standing in the courts, but individuals can rely on it in court cases and in their complaints to the Legal Chancellor. The judges, Legal Chancellor and the President can use conflict with this principle to submit a complaint to the Supreme Court for a law to be declared unconstitutional. The Legal Chancellor can also challenge state inaction to implement this principle.

4.1.3. Everyone’s duty to preserve living and natural environment

According to § 53 everyone has a duty to preserve the living and natural environment. The secondary duty of compensation is not an object of current analysis.

The first question that needs an answer is **who is bound by the duty**. The duty to preserve the environment is primarily addressed to individuals and legal persons. The main problem is whether the state and municipalities are also addressees of this duty.

The answer to this question has to be affirmative for the following reasons:

⁵² E.-J. Truuväli *et al.* Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Õigusteabe AS Juura, 2002, commentary to § 5 at pp. 69–70 (in Estonian).

⁵³ Definition of sustainable use through sustainable development has been founded on Michael Decleris’ work on legal aspects of sustainable development. M. Decleris. The law of sustainable development. General principles. Brussels: European Commission, 2000.

1. excluding the state and municipalities from the obliged subjects would be in conflict with the spirit of the Constitution as the state could deliberately harm the environment whilst at the same time demanding rigorous preservation of the environment from its subjects;
2. excluding the state conflicts with the goal of § 53 to guarantee an environment of a certain quality;
3. excluding the state leaves an individual no option to challenge the state action or inaction and thus conflicts with the rule of law that demands for procedures and grounds to be set for the individual to go to court against the state.

The environmental obligation of the state can be constructed through § 10 of the Constitution which provides that the basic rights, freedoms and duties are not limited to those mentioned in the basic rights chapter of the Constitution.^{*54} To include the state as an obliged subject of the § 53 obligation would be in accordance with the requirements of § 10.^{*55}

The next question is about the **content of this obligation** — what is meant by “preservation of living and natural environment”? These concepts have the same content as the ‘sustainable use’ of the state goal in subchapter 4.1.1.

The basic obligation can be implemented by the state only when the Parliament has further elaborated its content. Private persons can thus be obliged to preserve the nature in a certain way only when the law provides so. This reservation has its roots in § 3 (1) and § 13 (2).^{*56} The only way to affect situations where there is no law to regulate certain environmental issues that clearly cause irreversible harm to the environment is through the Legal Chancellor. To challenge state inaction in the field of lawmaking through courts is not possible in the Estonian legal system.

The question here is about the level of protection guaranteed by the Constitution. The level of protection is a question of value-judgement. Setting sustainable use of natural resources as one of the fundamental aims of the state and using comparatively radical wording for the environmental section implies great value to environmental protection and environment as such. The level of protection question cannot be decided on an abstract basis. Its contents will wash out in the light of specific cases and it is very clear that the modern world cannot evade tolerating damages to the environment up to a certain level.

The state has been guaranteed a wide discretion in determining the level of protection and means for achieving it. Nevertheless this has partly been determined by international obligations and partly by the existing level of protection. Lowering this level (*e.g.* closing protected areas, accepting higher emissions) would constitute a breach of § 53 since such action cannot be considered as preserving the environment.

It has been argued that environmental decision-making by the courts needs a more open and “political” legal reasoning than that to which we are used to. “In environmental issues courts have to act as representatives of civil society being able to maintain ecological considerations against, on the one hand, state and municipal interests and on the other hand, against the strong economic interests of society. The courts will have to weigh fundamentally opposite interests and values against each other and they will thereby be involved in more or less semi-political issues.”^{*57} Making such a complex structure as the environment the subject of a fundamental right requires that new meta-rules of argumentation and decision-making be created.^{*58}

4.1.4. Is there a right to sustainable living and natural environment?

Yes, the obligation of § 53 has a corresponding everyone’s right to sustainable living and the natural environment.

When somebody has a subjective right to something, there is always somebody who has an obligation to either actively or passively respect this right. The same applies to obligations — when there is an obligation, there is always somebody who has a subjective right to the object of this obligation and a relative subjective right to demand the fulfilment of this obligation.

The state obligation^{*59} that is objectively formulated in the basic rights chapter is not complemented with a subjective right only in cases where there are strong arguments against that. This can be so when the state’s

⁵⁴ Section 10: “The basic rights, freedoms and duties listed in this chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith and confirm to the principles of human dignity and of a state based on social justice, democracy and the rule of law.”

⁵⁵ R. Alexy. *Põhiõigused Eesti põhiseaduses* (Basic Rights in Estonian Constitution). – Juridica Special Edition, 2001, p. 30 (in Estonian).

⁵⁶ Subsection 3 (1): “The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.” Subsection 13 (2): “The law shall protect everyone from the arbitrary exercise of state authority.”

⁵⁷ L. D. Eriksson. *Environmental Rights as a Constitutional Problem*. – *Retfaerd Special Issue*, 1994, p. 107.

⁵⁸ K.-H. Ladeur (Note 45), p. 19.

⁵⁹ Section 53 gives rise to a state obligation to protect the environment, see subchapter 4.1.3.

obligation serves collective goals only.^{*60} Since every individual is interested in a living and natural environment of a certain quality, § 53 serves both collective goals and individual interests. Therefore § 53 gives rise to a subjective right that can be invoked in courts.

For its full realisation the Constitution has to be open for adjudication. For this reason it is important to interpret § 53 as granting subjective rights to individuals and legal persons. The possible difficulties in its application cannot justify declaring this section mere constitutional lyrics or, at best, justification for environmental regulation.

The construction of such a right through interpretation is in accordance with § 10 of the Constitution. The right to sustainable living and natural environment meets all these requirements. The creation of basic rights that correspond to the existing *expressis verbis* obligations based on § 10 has also been used by the Supreme Court of Estonia in two cases.^{*61} Relative subjective right to demand protection of the environment has been constructed by Tallinn Administrative Court.^{*62}

The rights and duties incumbent upon the state and municipal authorities and individuals, stemming from § 53, can be pictured in the following way:

1. The state and municipal authorities
 - A) duties
 - a) to refrain from harming the living and natural environment;
 - b) to guarantee that individuals and organisations do not act contrary to the obligation of preserving the environment;
 - c) to improve the environment if damage has already been caused (to compensate for the damage caused by the state itself would not be reasonable as the state can directly remove the harm).
 - B) rights
 - a) to demand preservation of the environment from individuals according to acts of parliament;
 - b) to demand compensation for environmental damage according to acts of parliament.
2. The individuals
 - A) duties
 - a) duty to preserve the living and natural environment according to the acts of parliament;
 - b) duty to compensate for the damages caused to the environment.
 - B) rights
 - a) right to a sustainable environment, right to demand protection of the environment from the state and municipal authorities;
 - b) right to demand creation of guarantees for protection of the environment from the state.

The state may demand preservation of the environment from the individuals insofar as it has been prescribed by law. The state cannot be a subject of a basic right to the preserved environment.

The individual bearers of a basic right can demand preservation of the environment from the state without relying on existing laws.^{*63} They can also argue that a certain individual act violates their right to the preserved environment because it has been given in accordance with a law that violates this right. The circle of potentially affected bearers of basic rights is very large and could therefore theoretically cause problems with predictability of administrative decisions.^{*64}

Since most of the environmental threats are caused by private actors rather than the state, it is important to view this right as granting state protection against private environmentally hazardous activities. This would enable individuals to go to court against the state on the grounds that the state is violating its obligation to preserve the environment and the right to the preserved environment of the individual by allowing harmful activities.

The right to a sustainable environment should protect certain a condition of the environment — the condition where the use of natural resources and generation of waste does not exceed the carrying capacity of the ecosystem or the environmental space.^{*65}

⁶⁰ R. Alexy (Note 55), pp. 20–21, as could be the case with § 27 (1) of the Estonian Constitution.

⁶¹ Right to procedure — the decision of the Supreme Court *en banc*, 28 October 2002, No. (3-4-1-5-02), para. 30. – Riigi Teataja (the State Gazette) III 2002, 28, 308 (in Estonian); right to good governance — the decision of the Constitutional Review Chamber of the Supreme Court, 17 February 2003, No. (3-4-1-1-03), para. 16. – Riigi Teataja (the State Gazette) III 2003, 5, 48 (in Estonian).

⁶² The decision of Tallinn Administrative Court *in Hürden v. Harku Municipality* in 5 June 2003, administrative case 3-693/2002.

⁶³ The state inaction in the field of lawmaking may not be challenged by individuals in the court, but can be done through the Legal Chancellor.

⁶⁴ K.-H. Ladeur (Note 45), p. 21.

⁶⁵ The right to sustainable environment should obtain its content the way state goal has been given a content (see subchapter 4.1.1 and 4.1.3).

5. Environmental protection *de lege ferenda*

5.1. Right to clean environment

The Constitution needs to establish better foundations for determining the level of an environmentally sustainable society. This is due to the following reasons:

- to overcome the difficulties of ascertaining which actions constitute a breach of the preservation obligation and which do not;
- for the duty to preserve the natural environment to be fulfilled;
- for the corresponding right to sustainable natural environment not being breached.

The amendment could be made by adding the concept of environmental space (or the carrying capacity of the ecosystem) to the existing provisions.^{*66} Reformulated § 53 could then be read as follows:

- (1) Everyone has a duty to preserve the living and natural environment in a condition where the use of resources and production of waste does not exceed the environment's ability to reproduce these resources and absorbing the waste does not degrade biological diversity.
- (2) Everyone has a duty to compensate for the excessive use of resources and production of waste and for damage caused to the environment.
- (3) The procedure for compensation shall be provided by law.
- (4) Everybody shall be guaranteed by law access to justice and the right to participation at all levels of decision-making in environmental matters.

Full implementation of this duty would yield structural changes in economic and social systems. To some extent we have to tolerate environmental harm and this mechanism of tolerance is based on the second paragraph whereby the state by establishing a system of compensation is allowed to determine the level of tolerable environmental harm.

5.2. Sustainability as state goal

Section 5 should specify more precisely what exactly is meant under 'sustainable use'. This should again be done through the concept of environmental space. Section 5 should set environmentally and socially sustainable development of the society as a state goal.

The state goal in the field of environmental protection is a sustainable society. Environmental sustainability can be achieved by fitting all the activities in the available environmental space by reducing environmental impact through more effective use of natural resources. This would automatically lead to an environment of high quality and the protection of the rights of future generations.

6. Conclusions

Existing human rights do not allow protection of the environment before the actual harm has occurred and are thus too anthropocentric and instrumental. Environmental considerations are not always afforded sufficient weight with other interests.

National legal frameworks enable taking into account specificities of each country and thus to formulate the basic right to a clean environment with a proper focus. Development of case law allows the overcoming of further problems with definition and enforcement. Public participation plays a crucial role in it.

The bearers of the basic obligation to preserve the living and natural environment as stipulated in § 53 of the Estonian Constitution are individuals, legal persons, the state and municipalities.

The basic obligation in § 53 of the Estonian Constitution gives rise to a subjective right to sustainable environment that can be invoked in the courts.

The state can demand protection of the environment from the individuals insofar as it has been prescribed by law. The state cannot be a subject of a basic right to sustainable environment.

⁶⁶ The concept of environmental space was first used in a study by Wuppertal Institute for Climate, Environment and Energy (<http://www.foeeurope.org/sustainability/europe/study/t-frame-study.htm> (04.04.2003), the ecological constitutional reform and the resulting structural changes in the society and economy have been discussed by Marek Strandberg. – M. Strandberg. Kahe maja kokkupanekust (Uniting Ecology and Economy). Lehed ja Tähed. Tallinn: MTÜ Loodusajakiri, 2003, pp. 179–194 (in Estonian).

Although the present wording of the Estonian Constitution can be construed in the light of the concept of environmental space (or the carrying capacity of ecosystems) it should state more clearly what is meant under this concept and connect it to the environmental basic right.

The activities in Estonia must fit into the carrying capacity of the ecosystem. This could be done by setting limits to these actions in the Constitution. Amending the rights chapter provides the advantage of allowing the rights to be invoked in courts by individuals.