

GREEN RIGHTS AND ENTITLEMENTS WITHIN THE URBANISATION ERA – CHALLENGES FROM THE PERSPECTIVE OF URBANISATION-SENSITIVE HUMAN RIGHTS

Gábor Kecskés*

ABSTRACT

The right to a healthy environment has increasingly received more attention by the international community, in so far as it has been studying the texts of the national constitutions and paying attention to the practice of the relevant constitutional, as well as treaty-based, interpretative bodies. Some green rights and other similar entitlements induced by the global threats caused by climate change, environmental degradation and their collateral effects have implicitly become part of the content of a small number of human rights treaties, such as the European Convention on Human Rights. The explicit recognition of the right to (a healthy) environment is still missing from the human rights treaties; however, several parts and the inherent content of this ambitious right are included in a great number of treaties (in the form of the right to food, water, sanitation, etc.). Nevertheless, the meaning, the notion, the normative spheres and the required state obligations, have remained unclear within the texts.

Key words: right to a healthy environment, state aims, urbanisation-sensitive rights, right to housing, enforcement

1. URBAN LIVING AND ITS HUMAN RIGHTS CONCERNS

The study deals with the interpretative options for rights that are highly affected by urbanisation, addressing whether these rights are: i) *traditional substantive human rights* with clear content; or are rather ii) *state aims, goals, and objectives* (disguised as human rights), and thus, the states tend to reach these aims without legal obligations; or if iii) these rights are solely linked to other human rights, taking the form of *underlying auxiliary rights*, which are only components of other rights;¹ or if iv) they are rather *general behavioural postulates and potential future expectations* in the name of the interests of future generations in the form of soft law requirements. It is worth mentioning, however, that, for instance, in the case of the right to adequate housing, a clear distinction and clear classification cannot be drawn, because that right simultaneously involves the segments of state aims, substantive rights and auxiliary rights.²

*Research fellow, Hungarian Academy of Sciences, Centre for Social Sciences, Institute for Legal Studies, Hungary, senior lecturer, Széchenyi István University, Hungary, kecskes.gabor@tk.mta.hu.

¹ Such as, e.g. the right to have information about environmental matters, the right to privacy, the right to housing, the right to health, or the right to an adequate standard of living.

² There are several classification methods within the field of human rights. Most of them can be easily interlinked with the abovementioned 4-tiered criteria. For instance, Marie-Bénédicte Dembour divides the human rights based upon their character and the 'schools' behind them, such as the i) *natural school*, which identifies human rights as absolute entitlements (equivalent to the traditional human rights approach); ii) the *orthodox approach*, which conceives human rights as political values (in connection with state aims, ambitions); iii) the *protest school* focuses on claims on behalf of the underprivileged and vulnerable groups (which are also state aims and ambitions, requiring positive, financial measures from the state to provide them); and iv) the *discourse school*, which denies their real relevance, as it thinks such 'rights' cannot remedy the real disadvantages and wrongful acts, as well as the needs of the individual (which is more or less equivalent to the aforementioned general behavioural postulate approach). See Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought', 32(1) Human Rights Quarterly 1 (2010) pp. 1-20.

The present challenges deriving from urbanisation and urban living require clarification and clear distinctions in the positioning of the human rights approaches³ that are relevant to environmentally relevant rights and entitlements.⁴ The modern means of urbanisation (urban living) are definitely connected with the vast majority of human rights, but the concrete challenges and pitfalls of urban living standards saliently emerge within two rights, namely within the domain of the right to adequate housing (or an adequate standard of living and its wide scope of components)⁵ and the right to (a healthy) environment.

As early as 1992, Leckie had raised the question of interconnecting urbanisation-induced rights, and in doing so, drew a parallel between the right to health and the right to housing or the right to environmental hygiene/quality (at present, the latter is equivalent to the right to a healthy environment).⁶ This approach is very convincing, to a certain degree, since these rights cannot be interpreted without recognising their mutual primary importance in a 'symbiotic application'. One year later, the 1993 World Conference on Human Rights held in Vienna reaffirmed the main notion of the connection between human rights, that is, that civil, political, economic, social and cultural rights, stating that they 'are universal, indivisible, interdependent and closely interrelated.'⁷ The same is true for the third generation of human rights, including the right to a healthy environment.

The so-called urbanisation-sensitive rights⁸ generally have been the subject of several misunderstandings. For instance, Merrills expressed a legitimate thought in declaring that "the first mistake [is] that reviewing the need for rights (...) is assuming that rights are no more than a way of expressing preferences or interests."⁹ Based on the foregoing, the urbanisation-sensitive rights rather include

- i. group rights or individual rights of a procedural nature;
- ii. the rights of future generations with uncertain right-holders or beneficiaries (the *personae materiae* of such rights is not certain);
- iii. *pro futuro* obligations with state preferences and intense discretion;
- iv. procedural rights (a small number of substantive or standalone rights);
- v. the deficiencies of the second generation of human rights and the uncertainty of the third generation of human rights; and
- vi. the rapidly changing and newly emerging challenges.¹⁰

³ On the challenges of human rights induced by urbanisation, see in general, Anja Mihr, 'Urbanization & Human Rights', Paper presented at the 2009 Amsterdam Conference on the Human Dimension of Global Environmental Change, Earth System Governance Conference, Volendam, December 2009, The Netherlands, <<http://www.anjamihir.com/resources/Urbanization%2BHuman+Rights-AnjaMihr.pdf>> accessed 20.3.2016 and Thijs van Lindert and Doukje Lettinga (eds), *The Future of Human Rights in an Urban World. Exploring Opportunities, Threats and Challenges*, The Strategic Studies Project initiated by Amnesty International Netherlands. 2014. <www.amnesty.nl/sites/default/files/public/the_future_of_human_rights_in_an_urban_world_0.pdf> accessed 16.3.2016.

⁴ On the contemporary 'green rights' paradigm shifts, David R. Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment*, University of British Columbia Press 2011.

⁵ See *Handbook on European Non-Discrimination Law*, European Union Agency for Fundamental Rights 2010, p. 75.

⁶ Scott Leckie, *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law*, The International Institute for Environment and Development (IIED) 1992, pp. 50, 53-63.

⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN General Assembly, 12 July 1993, UN Doc. A/CONF.157/23. Para. I. 5.

⁸ In the focus of the present work, the author uses the phrase first and foremost for the right to an adequate standard of living and the right to a healthy environment.

⁹ John G. Merrills, *Environmental Rights*, in Daniel Bodansky, Jutta Brunnée, Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press 2007, p. 665.

¹⁰ E.g. Kenna gives an exact enumeration of the most acute challenges, stating "[t]he growth and power of globalized corporations involved in housing; the globalization of property rights, housing finance markets, and the promotion of owner-occupation; globalized real estate investment in housing; the reordering of cities and slums; new roles for the State in relation to housing; and the effect of globalized migrants and refugees all present new and undetermined challenges." Padraic Kenna, 'Globalization and Housing Rights', 15(2) *Indiana Journal of Global Legal Studies* 2 (2008) pp. 397-469.

The given rights are overwhelmingly multi-layered rights containing several ‘consecutive’ meanings and parts entailing different entitlements, government obligations, financial contributions and enforcement/justiciability mechanisms. Taken as a whole, the phases shall include at least the duty to recognise, to protect, to ensure, and to give procedural rights (mainly, access to the courts), though further entitlements or obligations shall be applied as deliberations by the state. Decades ago, Alston pointed out that “international lawyers seeking enlightenment as to the meaning of rights such as those pertaining to food, education, health care, clothing and shelter will find little guidance in national law”.¹¹

2. URBAN LIVING AND THE RIGHTS RELATED TO (MATERIAL) LIVING STANDARDS

2.1. The Scope of Rights and Right Holders

While the right to a healthy environment has become a rather procedural right in recent years, the elements of other issues related to living standards have received more attention on the part of international human rights instruments. In spite of the procedural aspects, due to the no-withdrawal principle in the level of protection has gained ground so extensively, this supposedly brings it closer to a substantive right approach. The author adopts and consequently uses the term ‘urbanisation-sensitive rights’, because their exposure to urbanisational changes and the modern challenges of urban living have posed new ways and methods of defining new rights and re-defining old ones.

It is a well-known fact that predominantly the right to food,¹² the right to water¹³, the right to sanitation or the right to adequate housing¹⁴ appear in treaties (with different levels of recognition). However, it is uncertain whether these rights are equivalent to the classical group of rights or whether they are rather non-obligatory state aims disguised as human rights. The majority of the traditional criteria of the first generation of human rights (negative obligations of states, exact and well-defined content for enforcement by the individual) are missing. With the newly emerging problems regarding these human rights such as poverty, overpopulation, water and food shortage, deteriorating environment in politically and economically hotspots, which are emerging in the urbanisation era, the main shortcomings are the concentration on the domain of the human rights

¹¹ Philip Alston, ‘Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights’, 9(3) Human Rights Quarterly 3 (1987) p. 351.

¹² On the content of this right, see General Comment No. 12, The right to adequate food (art. 11), Committee on Economic, Social and Cultural Rights, 12 May 1999, E/C.12/1999/5.

¹³ See in detail, Edith Brown Weiss, *International Law for a Water-Scarce World*, Martinus Nijhoff Publishers 2013, pp. 191-242 and Pierre Thielbörger, *The Right(s) to Water. The Multi-Level Governance of a Unique Human Right*, Springer 2014, p. 236. On the content of the right to water under the aegis of articles 11-12 of the International Covenant of Economic, Social and Cultural Rights, see General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, 20 January 2003, E/C.12/2002/11.

¹⁴ The right to housing or an adequate standard of living is recognised by many global international treaties, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, UN Doc. A/6014 (1966) (entry into force 4.1.1969) art. 5, point (d) para. (iii); the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, UN Doc. A/6316 (1966) (entry into force 3.1.1976), art. 11; the 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, UN Doc. A/34/46 (entry into force 3.9.1981) art. 14, point 2. h; the 1989 Convention on the Rights of the Child, 1577 UNTS 3, UN Doc. A/44/49 (1989) (entry into force 2.9.1990), art. 27, point 3; the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res. 45/158, UN Doc. A/RES/45/158 (entry into force 1.7.2003), art. 43, point (d) and the 2006 Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, UN Doc. A/RES/61/106 (entry into force 3.5.2008), art. 28, point 1.

On the right to adequate housing within the International Covenant on Economic, Social and Cultural Rights, see General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, and General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions, 20 May 1997, E/1998/22.

holders/beneficiaries, the sphere of the progressive, conducive and financial requirements of the state, as well as the ambiguous enforcement of such rights.

It is worth mentioning that the definiteness of the urbanisation-sensitive rights is unclear; they seem to be desired state aims and ambitions, rather than enforceable specific obligations of the state towards the obligee. Second, states may heavily invest in providing these rights, and therefore, the level of deliberation and financial opportunities in the states are relatively high. Thirdly, the applications of these rights, as well as the need to apply socio-economic rights, differ for different groups of individuals. Unlike the first generation freedom rights, which are – more or less – universal and universally applicable, socio-economic, regional and other attributes deeply influence the domain and needs of the individuals and groups of different regions; therefore, generally uniform and identical protection and promotion cannot be accomplished due to the different circumstances in lifestyle (urban or rural) and economic as well as ecological characteristics.

The form of deliberation on the side of the state and the rather gentle positive discrimination mechanisms of the people or communities in need would heavily influence the urbanisation-sensitive rights (food, water, sanitation, adequate standard of living). Based on whether people live in rural places (e.g. in remote places like farm houses) or in urban settlements (e.g. in a metropolis), the demands and the challenges are too heterogenous to be universally resolved on the state level by merely legal acts.

2.2. The Forms of State Intervention and State Activities within the Given Field

The scarcity of resources and unequal access to these prerequisites make the latitude of the state even more complicated. This is the reason why a special and very general ‘minimum needs’ approach shall prevail in guaranteeing such rights. *Eric Posner* stated that, in the case of economic development (and environmental issues, as well), “international concern should be focused on human welfare rather than on human rights.”¹⁵ Furthermore, applying such rights requires positive, active participation and financial measures on the part of the states. Unlike civil and political rights, economic-based urbanisation-sensitive rights cannot be guaranteed without positive, mainly financial, state intervention. This issue raises the three key questions of

- i. recognition/identification;
- ii. progressive implementation; and
- iii. enforcement/fulfilment of such rights.¹⁶

This means that such rights are extremely exposed to financial crises, economic recession and the political stances/ideology of the governments. Therefore, the application of urbanisation-sensitive rights depends heavily on the consequences of (rather) external conditions. The minimum core obligations and the patterns of the content of certain rights have been set forth and specified within non-binding documents, providing a benchmark and a non-binding interpretation of the capital importance of the necessary threshold, the implicit meaning and the states’ obligations regarding certain rights.¹⁷ Based upon the foregoing, in accordance with the 1987 Limburg Principles, the four enforcement criteria shall be the following:

- 1) state parties’ obligation to ensure respect for minimum substance;
- 2) resources are to be provided by the state or the international community;
- 3) adequate measures on the access to resources on an equitable and effective basis;

¹⁵ See Eric A. Posner, ‘Human Welfare, Not Human Rights’, 108(7) *Columbia Law Review* 7 (2008) pp. 1758-1801.

¹⁶ This clear distinction was first elaborated by *Asbjørn Eide* in an official document. See *The Right to Adequate Food as a Human Right*, Report prepared by Asbjørn Eide, Final Report, E/CN.4/Sub.2/1987/23, 7 July 1987.

¹⁷ On the minimum standards and principles of economic, social and cultural rights, see 1987 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Paras. 25-28.

- 4) the need to assure the satisfaction of subsistence requirements, as well as the provision of essential services, for everyone.

2.3. The Enforcement of the Rights Exposed to Urbanisation

As Jack Donnelly rightly asserted, in the case of human rights, “universal possession does not mean universal enforcement”.¹⁸ The enforcement of the economic, social and cultural rights (including urbanisation-sensitive rights) was previously considered to be a utopistic, but aspirational idea with a limited chance of success, as well as a lack of political interest as a state aim. The first landmark shift was the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 5 May 2013.¹⁹ The relevant practice of the Committee on Economic, Social and Cultural Rights is still very exiguous, but the relevance of the entry into force should not be underestimated with regard to the potential forthcoming enforcement and justiciability consideration, which may appear in the form of complaints before the Committee.

While the exact content of the urbanisation-sensitive rights is unclear, the enforcement mechanism will necessarily remain complicated and cumbersome. The particularities (at the level of the states) of the application of such rights in domestic legal systems are too heterogeneous to efficiently unify them by delivering common applicability and justiciability rules (rather, minimum standards and principles must be declared).²⁰

The factors which create obstacles to the enforcement mechanism are at least four-fold:

- 1) if the substantive content of the right is still absent, the main ground of enforceability is also absent;
- 2) the primarily deliberative and discretionary state financial intervention is generally non-actionable;
- 3) several legally neutral and external factors can hardly influence the application of the urbanisation-sensitive rights, which are far beyond the margin and the necessary border of the legal systems; and
- 4) the liability issues deriving from the state obligations are unclear, and the causal linkage is not certain and has seldom been proven before judicial and *quasi* judicial bodies.

One of the major solutions is the recognition of the procedural side of the urbanisation-sensitive rights, by guaranteeing the involvement and participation of the interested party within the process, which ends with a potentially non-human rights friendly decision. The procedural access to a court or other forms of judicial bodies is quite general worldwide, and thus, the right to judicial access and the right to information can be potential ‘mother rights’ through which enforcement – at a procedural level – should be concluded. And furthermore, if the procedural enforcement mechanisms are effective and the enforcement process is ongoing, the monitoring bodies, chiefly, the judicial bodies, have the opportunity to fill the abstract notions of urbanisation-sensitive rights with inherent content. For instance, the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights,²¹ the European Court of Human Rights, as well as the European Committee of Social Rights have the clear, explicit competence to receive individual complaints in the field of economic, social and cultural rights.

¹⁸ Jack Donnelly, ‘The Relative Universality of Human Rights’, 29(2) Human Rights Quarterly 2 (2007) p. 283.

¹⁹ As of March 2016, 21 State Parties have ratified the Optional Protocol, see <<http://indicators.ohchr.org/>> accessed 20.3.2016.

²⁰ On justifying particularity with regard to universal recognition and not identical practices, see Donnelly, ‘The Relative Universality of Human Rights’ (n 18) pp. 298-301.

²¹ See Mónica Fera Tinta, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’, 29(2) Human Rights Quarterly 2 (2007) pp. 431-459.

3. URBAN LIVING AND ENVIRONMENTAL RIGHTS

3.1. The Evolution of the Right to a Healthy Environment

As Miller pointed out in 1995, “by the time of the 1972 United Nations Conference on the Human Environment, the idea that an acceptable environment might constitute a precondition for the enjoyment of certain human rights no longer seemed controversial”.²² The symbolic first principle of the 1972 Stockholm Declaration on the Human Environment provided the initial declaration of the clear linkage between well-being, the human rights of individuals and the environment; the aforementioned section reads as follows: “*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, and he bears a solemn responsibility to protect and improve the environment for present and future generations...*”²³ However, as stated by Dinah Shelton, “*it does not proclaim a fundamental human right to a healthy environment, but implies that basic environmental health is necessary for the free enjoyment and exercise of recognized human rights.*”²⁴

Although the cited section of the Stockholm Declaration is non-binding and is not proof of explicit recognition, it encouraged (as a common reference basis) further initiatives, mainly state legislation, where the right to a healthy environment has received explicit constitutional recognition and (partial) protection²⁵ - however, this recognition has occurred slowly, and the explicit recognition has raised several questions and anomalies. For instance, in 1976, Mower referred to some rights – including and highlighting the archetypical right to a healthy environment – stating that “there is a rather impressive list of rights which are held to be unrelated to the [European Convention on Human Rights], but which are also of real importance.”²⁶ This explains the difficult situation which arose when the recognition of the need for right to a healthy environment was proclaimed, but codification did not subsequently follow these efforts. Nevertheless, there were some forerunners in the 1990s²⁷ that expressed the need for a substantive right, and they argued that, without the right to a healthy environment, “individuals would have no redress for environmental damage”, but these proposals “met with the disapproval of States and thus failed to be adopted”.²⁸

Decades later, we can take into consideration several international agreements enumerating the right to (a healthy) environment, including both universal and regional treaties.²⁹ Nevertheless, the

²² Christopher Miller, ‘Environmental Rights: European Fact or English Fiction?’, 22(3) *Journal of Law and Society* 3 (1995) pp. 374-375.

²³ This *expressis verbis* recognition is missing from the subsequent summit declaration (1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I)/31 ILM 874, and the 2002 Johannesburg Declaration on Sustainable Development, UN Doc. A/CONF.199/20, 2002), but some of their paragraphs may contain the notion and the general requirements of this ambitious Stockholm-based novelty.

²⁴ Dinah Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’, 28 *Stanford Journal of International Law* 103 (1991) p. 112. On the link between the environmental challenges of human rights, see Alan Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection*, Oxford University Press 1996.

²⁵ However, Merrills shows that “*the incorporation of environmental rights into national constitutions or their adoption into international treaties does not guarantee that the holder of such rights will always be successful when they come into conflict with other rights, but it certainly means that environmental rights must always be taken into account and also that good reasons will be needed for denying them effect.*” Merrills, *Environmental Rights* (n 9) p. 666.

²⁶ A. Glenn Mower, ‘Human Rights in Western Europe: Progress and Problems’, 52(2) *International Affairs* (Royal Institute of International Affairs) 2 (1976) p. 248.

²⁷ E.g. Human rights and the environment, UN Commission on Human Rights, 24 February 1995, E/CN.4/RES/1995/14.

²⁸ See Anna Riddell, *New Perspectives on Connecting Human Rights and International Environmental Law*, in Vasilka Sancin (ed), *International Environmental Law: Contemporary Concerns and Challenges*, GV Založba 2012, p. 133.

²⁹ See, e.g., Sueli Giorgetta, *The Right to a Healthy Environment*, in Nico Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development. Principles and Practice*, Martinus Nijhoff Publishers 2004, pp. 379-404; Tim Hayward, *Constitutional Environmental Rights*, Oxford University Press 2005; Patricia Birnie, Alan Boyle and Catherine Redgewell (eds), *International Law & The Environment*, Oxford University Press 2009, pp. 271-302; Dinah Shelton, *Human Rights and*

inherent content of the right to a healthy environment remained uncertain and controversial. In the mid-1990s, Philippe Cullet asserted that the “*right to environment should nevertheless not be classified as a synthesis right, because it embodies specific characteristics that can be distinguished from other rights, and does not constitute a 'shell-right' aimed at enhancing the realization of the other ones.*”³⁰ In the following years, on the level of the treaty-texts, we did not come closer to setting forth the core meaning of such rights, but the international community has come closer to establishing some application criteria by studying the complaints, the judicial judgements and the numerous constitutional solutions delivered on the interpretation and application of the right to a healthy environment. The reason is that the meaning of the ‘right to environment’ can be drawn from three main sources, namely i) from the legal literature; ii) from the interpretation of the international monitoring and judicial bodies and iii) from domestic law (considering analogies and detailed laws that unfold the content and referring to the practice of domestic judicial courts).

From the legal literature, for instance, Law and Versteeg outlined an all-inclusive, broad notion (which is worth studying; however, it seems to be too ambitious and extensive, as it embraces criminal liability as well), as they define the right to a healthy environment within socio-economic rights as including “the duty to protect the environment, (civil or criminal) liability for damaging the environment, right to information about the environment, right to compensation when living environment is damaged, right to participate in environmental planning.”³¹ In any case, this definition clearly shows that the domain and interpretation basis of this special right is very controversial and not universal(ly accepted) but, to a certain degree, desired.

The other way of defining this very abstract notion is to identify the attributes mentioned before or after the word ‘environment’. This very catchy argumentation and doctrinal novelty includes the words ‘adequate’, ‘clean’, ‘satisfactory’, ‘human’ or other self-evident attributes attached to the word ‘environment’ or ‘healthy environment’; however, it is very doubtful whether appending words that are clearly inherent to the core elements of environmental protection really provide substantial added value or facilitate the interpretation or application of the notion. As a matter of fact, regardless of the wording, these phrases and surplus words cannot dissolve the hindrances and uncertainties of the meaning of the right in themselves.

In line with Cullet’s argumentation, as of today, i.e. 21 years later, the general consideration is still the same, and the right to a healthy environment “embrace[s] fundamentally the whole of environmental law and represent[s] the fundamental tenets on which international environmental law has been built”³²; therefore, the domain of the right is closely interrelated to the contemporary international environmental documents and efforts taken by the actors in the field of international law (although the constitutional courts of many countries are eager to explain and develop the meaning of the right).

the Environment: Substantive Rights, in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law*, Edward Elgar 2010, pp. 265-283; Jona Razzaque, *Human Rights to a Clean Environment: Procedural Rights*, in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law*, Edward Elgar 2010, pp. 284-300; Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights*, Cambridge University Press 2011 and Linda Hajjar Leib, *Human Rights and the Environment. Philosophical, Theoretical and Legal Perspectives*, Martinus Nijhoff Publishers 2011.

³⁰ Philippe Cullet, ‘Definition of an Environmental Right in a Human Rights Context’, 13(1) *Netherlands Quarterly of Human Rights* 25 (1995) p. 27. He defined synthesis rights as general rights embodying a number of elements that may also be found in other rights. However, he mentioned that the previous definition did not have general approval. For instance, Jennifer A. Downs, ‘A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right’, 3 *Duke Journal of Comparative and International Law* 351 (1993) pp. 358-362.

³¹ David S. Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’, 99(5) *California Law Review* 1163 (2011) p. 1193.

³² Cullet, ‘Definition of an Environmental Right in a Human Rights Context’ (n 30) p. 37.

One of the most important questions is whether the right to a healthy environment is a substantive right or a procedural right, or both of them. The domain of this special right is two-fold: It has a substantive meaning,³³ though its procedural aspect³⁴ is the most obvious and actionable part of the right.³⁵ The proof of this procedural approach is the adoption of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.³⁶ The so-called 'green democracy convention' proclaimed the three pillars system, providing rights for individuals as well as their associations. The three pillars include a due and democratic process upon which individuals or groups of individuals shall be informed (first pillar), the beneficiary or beneficiaries and the interested parties shall be invited to participate in the process of decision-making (second pillar) and the individuals or groups with legal interest shall have access to a court when a potentially hazardous activity is expected to take place (third pillar). The 3-tiered criteria establish a clear procedural link between the human rights (information and access to a court) and the environment. In sum, the procedural rights in the domain of the right to a healthy environment can help to avoid the uncertainties which have emerged due to the controversial substantive right approach, because this procedure is explicitly allusive and enforceable, with clear contours towards the public.

3.2. The Right to (a Healthy) Environment in Binding International Documents

Neither the most relevant global human rights documents (the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights) nor the 1950 European Convention on Human Rights and its protocols contain any explicit rules on the right to a healthy environment.

However, the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights contain two articles which implicitly embrace the right to a healthy environment, while recognising the most urbanisation-induced rights. There is no doubt that Article 25 of the 1948 Declaration ("right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing..."), as well as Articles 11-12 of the 1966 International Covenant on Economic, Social and Cultural Rights shall not be interpreted irrespective of the state of the environment and the environmental needs of the individual. And even in the case of the European Convention on Human Rights and its protocols, the Strasbourg court has already protected "indirectly some connotations of a human right to environment, thanks to an exercise of judicial activism and judicial self-restraint".³⁷

Within the African and the American human rights systems, the texts of some relevant regional treaties are more favourable to the enjoyment of the right to environmental(ly relevant entitlements). In Africa, the 1981 African Charter on Human and Peoples' Rights recognised the right to a general satisfactory environment that is "favourable to their development" (Article 24). In the

³³ On the constituents of the substantive rights within the academic debates, see Shelton, *Human Rights and the Environment: Substantive Rights* (n 29) pp. 265-283. and Hana Müllerová, *Human Right to Environment at the National Level: Only on Paper or Really Applied?*, in Vasilka Sancin and Maša Kovič Dine (eds), *International Environmental Law. Contemporary Concerns and Challenges in 2014*, GV Založba 2014, pp. 163-164.

³⁴ Razzaque, *Human Rights to a Clean Environment: Procedural Rights* (n 29) pp. 284-300.

³⁵ As Bratspies mentions, "many environmental treaties are long on aspirations but short on specifics. When treaties do include specific, enforceable obligations, those obligations are typically procedural rather than substantive." Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?', 13(1) *Santa Clara Journal of International Law* 31 (2015) p. 47.

³⁶ 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Economic Commission for Europe, 2161 UNTS 447 (entry into force 30.10.2001).

³⁷ See Daniel García San José, *Environmental Protection and the European Convention on Human Rights*, Council of Europe Publishing 2005, p. 6.

inter-American system, the 1988 San Salvador Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights recognised the right to a healthy environment as well.³⁸ The aforementioned Protocol, as a proponent of economic, social and cultural rights, is considered to be an urbanisation-friendly document setting out – beyond the right to a healthy environment – the right to just, equitable, and satisfactory conditions of work (Article 7), the right to health (Article 10) and the right to food (Article 12) as well.

Within the European context, the right to a healthy environment has not achieved standalone recognition in the regional European treaties (whether these treaties were adopted under the aegis of the EU or the Council of Europe). The 1996 European Social Charter used laconic wording in Article 3 by guaranteeing the right to safe and healthy working conditions; however, such recognition did not reach the level of the identification of a certain right.³⁹ The 2000 Charter of Fundamental Rights of the European Union only set out the protection of the environment in very general terms,⁴⁰ without recognising a substantive standalone right to a healthy environment.

Moreover, the 1950 European Convention on Human Rights is silent on this explicit right. However, since then, the European Court of Human Rights has had a long docket and list of cases in which the judicial forum implicitly expressed the right to a healthy environment, or some of its inherent parts, as components of other, codified freedom rights.⁴¹ This judicial practice can be traced back to the milestone decision in *López Ostra v. Spain* in 1994,⁴² where the Strasbourg court concluded that the failure of protection against industrial pollution may imply the violation of the 'right to respect of private and family life' (Article 8 of the Convention).

Since then, the European Court of Human Rights has taken into account several environmental concerns, as the judicial forum has delivered judgements on the violation of the right to life (Article 2), the prohibition of inhuman or degrading treatment (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life and home (Article 8), the right to an effective remedy (Article 13) and the protection of property (Article 1 of Protocol No. 1 to the Convention).⁴³

3.3. Right to Environment and the Cities – New Initiatives

Cities, city councils are lawmakers; however, their competence and jurisdiction are far away from labelling them as the main contributors of the right to a healthy environment. Anyway, cities and urban areas became the more frequent space of human lives (in 2008, 50% of the global population lived in urban areas), as cities and city population are the first 'sensors' (or victims) of global climate change and environmental degradation. The density in cities and the urban areas' increased exposure to climate changes make them more sensitive to environmental changes. Beyond their lobby activities towards governments, NGOs and the global community, the urban areas have very limited opportunities to act and legislate efficiently with their own measures. As for the climate

³⁸ Article 11, Right to a Healthy Environment – “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.”

³⁹ Its wording just ensures “the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers’ and workers’ organisations: to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.” (Article 3, para. 1.)

⁴⁰ Article 37 reads as follows regarding environmental protection – “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

⁴¹ See e.g. Environment and the European Convention on Human Rights, Factsheet, November 2015 <www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 13.3.2016.

⁴² *López Ostra v. Spain* (1995) 20 EHRR.

⁴³ See Environment and the European Convention on Human Rights (n 43).

change, only global city initiatives are prosperous, however, signs of such activities are very rare and unseen. On the other hand, by prudently organizing the city transportation, green areas, waste management, water service, food consumption, recycling, energy use or seeking after clean air by setting out emission limits, cities can act minor but locally crucial tasks, which could easily accumulate regional and global positive impacts by urging other urban areas to do the same.

However, several non-binding but symbolic initiatives have been taken many forms in the recent decades. The present study explicitly refers two of them: i) WHO European Healthy Cities Network and ii) resilient cities.

3.3.1. The European Healthy Cities Network of the World Health Organization

The European Healthy Cities Network of the World Health Organization⁴⁴ informally assembles more than 100 cities and towns in order to facilitate more healthy and sustainable human settlements. On the field of political initiatives, the Network has been so eager to pass political declarations and commitments by means of setting out priorities and strategic aims to “addressing equity and the social determinants of health and striving to improve governance for health and promote health in all policies.”⁴⁵

In 2003, the cities and towns adopted the Belfast Declaration for Healthy Cities (The power of local action). The political leaders addressed their claims to the national governments as well as the WHO, and they committed themselves to

- reducing inequalities and addressing poverty;
- city health development planning;
- promoting good governance and creating inclusive cities that ensure all citizens have a key role in shaping services and influencing city policies and plans;
- promoting health impact assessment and
- taking an active role in shaping and implementing national, European and global strategies, and contributing to localization of the United Nation’s Millennium Development Goals.

5 years later, the Network passed the 2008 Zagreb Declaration for Healthy Cities (Health and health equity in all local policies) in which they reaffirm e.g. the need for

- the right to enjoyment of the highest attainable standard of health as one of the fundamental rights;
- for the principles and values related to equity, empowerment, partnership, solidarity and sustainable development and
- partnership with the national and regional governments in the European Region as well as the WHO Regional Office for Europe.

In 2014, the Network adopted the Athens Declaration for Healthy Cities (Strengthening urban leadership for health, health equity and well-being for all) in which the political leaders emphasized the goals and themes, such as:

- improving health for all and reducing health inequities and improving leadership and participatory governance for health;
- promoting systematic action to address health inequalities through local government approaches and
- developing policies and interventions within a life-course approach that include action on children’s well-being, early childhood development; improving employment, working

⁴⁴ See <<http://www.euro.who.int/en/health-topics/environment-and-health/urban-health/activities/healthy-cities/who-european-healthy-cities-network>> accessed 10.4.2016.

⁴⁵ See *ibid.*

conditions and lifelong learning; enhancing the conditions of life for older people; improving social protection and reducing poverty; addressing community resilience; enhancing social inclusion and cohesion; mainstreaming rights and equality.

3.3.2. Resilient cities

Besides the political slogan-based healthy cities initiatives, the resilient cities approach was developed by the sociologists and ecologists with sociological background in the recent decades. The resilient urban areas adapt themselves to

- the global challenges by resolving or mitigating the negative impacts by local measures and
- the local challenges since the “resilient city is a sustainable network of physical systems and human communities. (...) They include its built roads, buildings, infrastructure, communications, and energy facilities, as well as its waterways, soils, topography, geology, and other natural systems. In sum, the physical systems act as the body of the city, its bones, arteries, and muscles...”⁴⁶

The concept seeks to find the role of the individual and the numerous groups of individuals within the sustainable operation of human settlements. The resilient cities’ approach highlights clearly that the one-size-fits-all approach cannot be applied, while the need and special circumstances are sharply differing upon cities and local opportunities, as well. The greatest achievement of the resilient cities’ approach is to give floor and chance for sharing and spreading the best practices of the cities to other urban areas; and this approach embraces the whole spectrum of social (and urban development) sciences, as it convenes the knowledge of the politicians, lawyers, ecologists, sociologists and engineers to a common ground in order to focus on these issues in an integrated approach.

4. CONCLUSION

In 1995, Cullet had already emphasised that a “right to environment (...) has the advantage of representing a less biased formulation while recognizing that the contents of the right are likely to evolve very rapidly as new environmental problems emerge.”⁴⁷ There is no doubt that the newly emerging environmental (and urban) challenges, as well as the rapidly changing weather and climate conditions, demand the presence of general clauses and human rights for abstract notions in order to reach a proper level of adaptiveness and resilience.

As Bratspies underlined, more than 90 states have recognised the right in their constitutions.⁴⁸ Therefore, there is a “possibility that the right to a healthy environment may be becoming a general principle of law recognized by civilized nations” and thus, a source of international law under Article 38 of the ICJ Statute.⁴⁹ Although it is very controversial, this statement provides enough ammunition and reference points for future legislative efforts.

Generally, the domain of human rights is not dateless, but functions in a certain geographical and temporal reality, such as today. In 2016, no one can imagine the relevance and need for a right to a healthy environment for the year 2050. But if mankind (or just some regions) maintains the right to a healthy environment in the international and national instruments for a long period of time, it is

⁴⁶ See 2014 Idaho Law Review Symposium, in: Stephen Miller, ‘Symposium Introduction: Resilient Cities: Environment – Economy – Equity’, 50 Idaho Law Journal 1 (2013-14) p.2.

⁴⁷ Cullet, ‘Definition of an Environmental Right in a Human Rights Context’ (n 31) pp. 30-31.

⁴⁸ See Boyd (n 4) pp. 59-62.

⁴⁹ Bratspies, ‘Do We Need a Human Right to a Healthy Environment?’ (n 36) p. 60.

quite certain that the monitoring and judicial bodies at that time will also interpret and apply the right of the then-beneficiaries with a clear recognition of their particular interests by paying attention to societal challenges, even if the content of the right has changed significantly.

Lastly, the new initiatives (healthy cities network and resilient cities) clearly show the increased local, sub-national and even international (healthy cities network) commitments of the affected parties from the whole range of stakeholders.

BIBLIOGRAPHY

Case law

López Ostra v. Spain, 16798/90 [1994] ECHR 46, 9 December 1994.

Books

Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights*, Cambridge University Press 2011. p.1026.

Patricia Birnie, Alan Boyle and Catherine Redgewell (eds), *International Law & The Environment*, Oxford University Press 2009, p.888.

David R. Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment*, University of British Columbia Press 2011. p.468.

Alan Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection*, Oxford University Press 1996. p.313.

Linda Hajjar Leib, *Human Rights and the Environment. Philosophical, Theoretical and Legal Perspectives*, Martinus Nijhoff Publishers 2011. p.182.

Tim Hayward, *Constitutional Environmental Rights*, Oxford University Press 2005. p.248.

Scott Leckie, 'From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law', The International Institute for Environment and Development (IIED) 1992, p.109.

Daniel García San José, *Environmental Protection and the European Convention on Human Rights*, Council of Europe Publishing 2005, p.76.

Pierre Thielbörger, *The Right(s) to Water. The Multi-Level Governance of a Unique Human Right*, Springer 2014, p. 236.

Edith Brown Weiss, *International Law for a Water-Scarce World*, Martinus Nijhoff Publishers 2013, p.344.

Articles

Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights', 9(3) Human Rights Quarterly 3 (1987) pp. 332-381.

Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?', 13 Santa Clara Journal of International Law (2015) pp. 31-79.

Philippe Cullet, 'Definition of an Environmental Right in a Human Rights Context' 13 Netherlands Quarterly of Human Rights (1995) pp. 25-40.

Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought', 32(1) Human Rights Quarterly 1 (2010), pp. 1-20.

Jack Donnelly, 'The Relative Universality of Human Rights', 29(2) Human Rights Quarterly 2 (2007) pp. 281-306.

Jennifer A. Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right', 3 Duke Journal of Comparative and International Law (1993) pp. 351-385.

Sueli Giorgetta, *The Right to a Healthy Environment*, in Nico Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development. Principles and Practice*, Martinus Nijhoff Publishers 2004, pp. 379-404.

Padraic Kenna, 'Globalization and housing rights', 15(2) Indiana Journal of Global Legal Studies 2 (2008) pp. 397-469.

David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' 99(5) California Law Review 5 (2011) pp. 1163-1257.

John G. Merrills, *Environmental Rights*, in Daniel Bodansky, Jutta Brunnée, Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press 2007, pp. 663-680.

Christopher Miller, 'Environmental Rights: European Fact or English Fiction?', 22(3) Journal of Law and Society 3 (1995) pp. 374-397.

Stephen Miller, 'Symposium Introduction: Resilient Cities: Environment – Economy – Equity', 50 Idaho Law Journal 1 (2013-14) pp.1-17.

A. Glenn Mower, 'Human Rights in Western Europe: Progress and Problems', 52(2) International Affairs (Royal Institute of International Affairs) 2 (1976) pp. 235-251.

Hana Müllerová, *Human Right to Environment at the National Level: Only on Paper or Really Applied?*, in Vasilka Sancin and Maša Kovič Dine (eds), *International Environmental Law. Contemporary Concerns and Challenges in 2014*, GV Založba 2014, pp. 157-170.

Eric A. Posner, 'Human Welfare, Not Human Rights', 108(7) Columbia Law Review 7 (2008) pp. 1758-1801.

Jona Razzaque, *Human Rights to a Clean Environment: Procedural Rights*, in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law*, Edward Elgar 2010, pp. 284-300.

Anna Riddell, *New Perspectives on Connecting Human Rights and International Environmental Law*, in Vasilka Sancin (ed), *International Environmental Law: Contemporary Concerns and Challenges*, GV Založba 2012, pp. 131-156.

Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', 28 *Stanford Journal of International Law* (1991) pp. 103-138.

Dinah Shelton, *Human Rights and the Environment: Substantive Rights*, in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law*, Edward Elgar 2010, pp. 265-283.

Mónica Fera Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', 29(2) *Human Rights Quarterly* 2 (2007) pp. 431-459.

Web Sources

Environment and the European Convention on Human Rights, Factsheet, November 2015, <www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 13.3.2016.

Ratification of 18 International Human Rights Treaties – <<http://indicators.ohchr.org/>> accessed 20.3.2016.

WHO European Healthy Cities Initiatives <<http://www.euro.who.int/en/health-topics/environment-and-health/urban-health/activities/healthy-cities/who-european-healthy-cities-network>> accessed 10.4.2016.

Other sources

Handbook on European Non-Discrimination Law. European Union Agency for Fundamental Rights 2010, p. 151.

Anja Mihr, 'Urbanization & Human Rights', Paper presented at 2009 Amsterdam Conference on the Human Dimension of Global Environmental Change, Earth System Governance Conference, Volendam, December 2009, The Netherlands, <<http://www.anjamihir.com/resources/Urbanization%2BHuman+Rights-AnjaMihr.pdf>>, accessed 20.3.2016.

Thijs van Lindert and Doutje Lettinga (eds), *The Future of Human Rights in an Urban World. Exploring Opportunities, Threats and Challenges*, The Strategic Studies Project initiated by Amnesty International Netherlands. 2014. <www.amnesty.nl/sites/default/files/public/the_future_of_human_rights_in_an_urban_world_0.pdf>, accessed 16.03.2016.

BIOGRAPHY

Gábor Kecskés (JD, PhD in law) is a research fellow and scientific secretary of the Institute for Legal Studies of the Centre for Social Sciences at the Hungarian Academy of Sciences. He is also a senior lecturer at the Széchenyi István University in Győr, where he holds a position as the secretary of the Postgraduate Doctoral School of Law and Political Sciences. He obtained his PhD degree in 2012 for the dissertation entitled 'The liability for environmental damages in public international law' (in Hungarian), besides he achieved a diploma within the field of nuclear law under the aegis of the International School of Nuclear Law organized by the OECD Nuclear Energy Agency and the

Université de Montpellier in Session 2007. He has been awarded the Environmental Scientific Youth Award of the President of the Hungarian Academy of Sciences in 2011 for his study within the field of water law in international law.