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Comparative view of the regulations of environmental protection contained in the constitutions of: Kingdom of Spain, Republic of India and Republic of South Africa

Keywords: constitution, environmental protection, subjective law, horizontal activity of individual rights

Słowa kluczowe: konstytucja, ochrona środowiska, prawo podmiotowe, horyzontalne działanie praw jednostki

Summary

The aim of this article is to present regulations connected with environmental protection on examples three constitutions: Kingdom of Spain, Republic of India and Republic of the South Africa. The aspect of this research is to analyze abovementioned regulations in the context of duties connecting with environmental protection. It is also significant aspect indicated the possibility of constitute the subjective rights to the use of environment and asserting rights directly from culprit pollution in horizontal activity. In this article, considering derives from editorial construction and taxonomy discussing provisions contained in above basic laws. Furthermore, on selected examples from judicature and doctrine had been presented a stance in order to define, which of these constitutional regulations are obliged to protect rights' properly in cases of environmental protection.

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Streszczenie**Analiza porównawcza przepisów dotyczących ochrony środowiska
na przykładzie konstytucji: Królestwa Hiszpanii, Republiki Indii
i Republiki Południowej Afryki**

Celem niniejszego artykułu jest przedstawienie regulacji dotyczących ochrony środowiska na przykładzie trzech konstytucji: Królestwa Hiszpanii, Republiki Indii i Republiki Południowej Afryki. Przedmiotem badań jest analiza tych przepisów w kontekście obowiązków związanych z przestrzeganiem stanu środowiska. Istotna jawi się również kwestia możliwości powołania się na prawo obywatelskie do ochrony środowiska oraz sposobność dochodzenia tego prawa wprost od sprawcy zanieczyszczenia w tzw. wymiarze horyzontalnym. Na kanwie niniejszych rozważań odniesiono się również do konstrukcji redakcyjnych omawianych przepisów, ich usystematyzowania w powyższych ustawach zasadniczych. Ponadto, na wybranych przykładach z orzecznictwa i doktryny dokonano oceny w zakresie wskazania, które z omawianych regulacji konstytucyjnych należy zaniechać, aby zapewnić prawa z tytułu naruszenia stanu środowiska.

I.

Selection of articles from Constitutions of the Kingdom of Spain, Republic of India, Republic of South Africa in the context of comparative analysis of environmental regulations contained in them, is not random. The selection was influenced by, above all, willingness to examine the constitutional regulations by their assertion in environmental protection. What adds the flavour is the fact that the countries are located on different continents and vary regarding culture, politics, and society. In these states, constitution is the most supreme law. Other legal regulations, which are lower and which are non- congruent with the supreme norms may not be applied by courts. It is quite interesting to discuss the constitutional provisions from the country representative democratic governance (Spain), the former colony of the British Commonwealth received as common law system (India) or mixed law system consisted of civil and common law characterised in South Africa. At the same time,

the countries fight with environmental control problems head-to-head. The pollution problem is global and independent from geographical location or politics. However, based on present research it is important how despite these differences the enforcement rights of environmental protection are influenced by constitutional regulations.

The overview of these regulations aims at answering the question if laws deriving from the violation of the environmental control can be claimed based on the constitutional regulations or on the basis of their co-usage along with other regulations made by ordinary law. It is also connected with other subject concerning the regulations of aforementioned constitutions provide subjective rights to the use of environment, including the right to demand a quality environment, i.e. healthy (sanitary), safe. Here a doubt arises if this right may be eligible for each subject or the burden of responsibility for environmental pollution disposal rests exclusively within competence of the public authorities? Finally, the systematic of the aforementioned basic laws is important. In other words, how these regulations are situated in constitutions by editorial and how it influences their interpretation. I consider whether are they defined as guiding principle as a duty of realization by State by attainment of social and economic goals, or classified as a fundamental right. In this respect selected examples of Spanish, Indian, and South African jurisdiction were referred to. The problem presented in this case concerns whether the constitutional doctrine and jurisdiction of those countries heads towards the holistic approach by considering environmental control regulations in substantial, as well as functional relation with other regulations deriving rights and freedoms (i.e. right to life, right to health).

In therein article, the connotation of environmental control issues with subjective rights, such as right of property and freedom of free enterprise, were omitted. Thereby, there were no mentioned collisions about relation between public and individual interest.

II.

The Constitution of the Kingdom of Spain (hereinafter: the Spanish Constitution) was adopted by both houses of the Cortes Generales on 31st October

1978, adopted by the Nation in the referendum on 6th December 1978 (and sanctioned by the King of Spain on 27th December 1978)². The shape of the constitution was influenced by the political-systemic situation connected with the restoration of democratic government in Spain in the middle of 1970's after General Franco's nearly 40-year-long dictatorship. In 1992 the Spanish Constitution was amended, but there were not introduced new environmental provisions. Legislative construction of Spanish Constitution reminiscents the shape of the most European Constitutions. Environmental control provisions are located in the article 45 (in Chapter 3 "Principles governing Economic and Social Policy", in Title 1 "Basic laws and duties"):

1. "Everyone has the right to use the environment proper for unit's development, as well as they has the duty to preserve it.
2. The public authorities ensure that natural resources are rationally used for protection and the quality of life improvement and preservation and restoration of the environment by relying on the essential collective solidarity.
3. Those, who break the resolution defined in the previous paragraph will be subject to criminal or, in justified cases, administrative responsibility; at the same time they are obliged to repair the damages"³.

The editorial constitutional systematics may introduce justified doubts connected with an interpretation of the provisions. These rules were situated among the economical-social policies and not basic rights (of personal nature) despite the name of the title, which literally may have been applied that they really are. Following the systematic of the aforementioned constitution it should be said that the laws stemming from the article 45 (section 1 and 2) are guidelines for the legislative and public authorities and interpretative postulate for courts. Therefore, subjective rights cannot be inferred from them. In the Spanish Constitution there is no regulation allowing addressing claims connecting with environmental protection, on the bodies governed by private law (in so-called horizontal relationships). They are only guiding principles upon which the subject cannot be ensured to have specific permissions. For the public authorities they are guide to setting the

² *Konstytucja Hiszpanii z dnia 27 grudnia 1978 r. znowelizowana 27 sierpnia 1992r.*, trans. & introduction T. Moldawa, Warszawa 2008, p. 15.

³ *Ibidem*, pp. 42–43.

objectives and directions for the country. As a matter of fact, those laws are made by ordinary law⁴. This means that any claims in that matter can be investigated on the basis of regulations of statutory ranking. Constitutional guiding resolutions can be the basis to the control of constitutionality of acts and regulations but only from the side public authorities and not private parties (vertical operation). The environment may only be applied before ordinary courts⁵. In section 3 abovementioned article of the Spanish constitution is stated about sanctions resulting from a breach of the environmental condition. Bearing a responsibility within this scope is raised to a constitutional level. It is clear, that the construction of these regulations thereof is highly reminiscent to the one contained in the Polish basic law. There is a visible lack of constitutional law defining the range and form of the right to the environment. It is proved by the constitutional judgment, which emphasised that the “environment is essentially an anthropocentric and relative concept”⁶. The concept of environment should be not only involve elements of environment such as air, water, soil but also their interaction themselves⁷. These days, irrespective from that, the importance of preserving the environmental protection requirements is also stressed on the doctrine, as well as judicature, in the context of maintaining social-economical balance. Conversely stance appeared before enter Spain to the European Union in 1984. The weak position of article was then very visible. The Constitutional Court declared that “prohibitions on the carrying out of mining activities due to environmental provisions” may not take a higher place as a economic development⁸.

⁴ M. Mazurkiewicz, *Regulacja ochrony środowiska w Polsce*, “Ochrona środowiska Prawo i Polityka” 1997, No. 2, p. 5, T. Gizbert-Studnicki, A Grabowski, *Normy programowe w konstytucji*, [In:] *Charakter i struktura norm konstytucji*, ed. J. Trzcíński, Warszawa 1997, p. 97.

⁵ A. Garcíá-Ureta, I. Lasagabaster, *Environmental Governance in Spain*, [In:] *Environmental Protection in Multilayered Systems. Comparative Lessons from the Water Sector*, eds. M. Alberton, F. Palermo, Leiden- Boston 2012, pp. 113–114.

⁶ Judgment of The Constitutional Court of Spain on 26 June 1995, 102/95 <http://hj.tribunalconstitucional.es/en/Resolucion/Show/2956> (6.10.2016).

⁷ M. Campins Eutja, L. Casado, J.E. Nieto Moreno, A. Pigrau Solé, I. Pont Castejón, *Environmental law in Spain*, The Netherlands 2011, p. 30.

⁸ A. Garcíá-Ureta, I. Lasagabaster, *Environmental Governance in Spain*, [In:] *Environmental Protection...*, p. 115.

Spain is characterised by a complex administrative system consisting from municipalities (country and city communities) creating provinces which in turn consist from autonomous regions⁹. Executing the environment control rules and introducing mechanisms counteracting the degradation of the environment basically lies in the autonomous regions' field of competence. The efficiency in executing these laws depends on the development of autonomous regions. For example, Catalonia (wealthy region) is more advanced in this process. In case of this rule, public authorities neither make specific decisions nor settle disputes. It can be said that the independent regions along with imposed competences take over great responsibility and control in effective accomplishments of the tasks related to the protection and improvement of the environment¹⁰. The Constitutional Court held that the configuration of competence on environmental issues "shared by the national government and the autonomous regions, has an initial static, objective element as a environment per se, and a further dynamic, functional element, which is the protection of the environment"¹¹.

As it was mentioned before, the laws in the fields of environment protection based on the Spanish Constitution cannot be defined as subjective. Still remains precedent the case investigated by the European Court of Human Rights in the claim *Lopez Ostra vs the Spain* in which environmental pollution was identified as a factor influencing people's peace in such a manner, that it violates their right to respect for private and family life¹². In turn, in the claim *Moreno Gomez vs the Spain*¹³, the same Court held that disturbing the peace with noises made by nightclubs should be understood as the violation of the right to respect for home. In both decision it was indicated that

⁹ *Konstytucja Hiszpanii z dnia 27*, op.cit., p. 5.

¹⁰ A. Lenschow, *Transformation in European environmental governance*, [In:] *The Transformation of Governance in the European Union*, eds. B. Kohler- Koch, R. Eising, London & New York 1999, p. 54.

¹¹ Judgment of The Constitutional Court of Spain on 26 June 1995, 102/95 <http://hj.tribunalconstitucional.es/en/Resolucion/Show/2956> (6.10.2016).

¹² H. Müllerova, *Ochrona środowiska a Europejski Trybunał Praw Człowieka*, "Ochrona Środowiska – Prawo i Polityka" 2010, No. 1, p. 39.

¹³ <https://santiagosinruido.wordpress.com/jurisprudencia-europea-caso-moreno-gomez-de-valencia> (9.10.2016).

the laws of the complainants should be secured under the article 8 of the Convention of the Human Rights.

The fact that in the Spanish Constitution they are state postulates, and not formed subjective rights, does not mean that they have no legitimacy. They represent certain rules and articulate both optimising warrants aiming at achieving specific objectives and values referring to the environmental protection. So they regard burdens and duties sustained and executed by the public authorities who are obliged to maintain the optimal state of the environment to provide safety of life conditions.

III.

Similar text systematic of the constitution locating the environmental regulations can be found in the Constitution of the Republic of India (hereinafter: the Indian Constitution) adopted by on 26th November 1949 (enter into force on 26th January 1950)¹⁴. It is one of the longest national constitutions. Its shape was influenced by the political system of Great Britain¹⁵. Environmental regulations were introduced into the aforementioned constitution in the 42nd amendment on 29th August 1976. The above regulations contained in Part IV titled “Directive Principles of State Policy” (hereinafter: DPSP) in article 48a: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”. In Part IVa titled “Fundamental Duties” in article 51 a (g) followed: “It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”¹⁶. Basically, the environmental provisions are both principles of state policy. The environment protect and preserve the nature has been guaranteed under DPSP, which are not directly enforceable¹⁷. DPSP are represented by the authorities responsible for protecting environment. “Fundamental

¹⁴ https://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (10.10.2016).

¹⁵ C.M. Abraham, *Environmental Jurisprudence in India*, Hague 1999, p. 14.

¹⁶ https://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (10.10.2016).

¹⁷ J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, Hague 2004, p. 70.

Duties” are embodied in a Part IVa, so it seems that they are elaborated on indicated regulations in Part IV. An obligation of an individual with regard to observing environmental provisions is – as in Spanish Constitution – also included. These two articles should be interpreted jointly and severally in order to recognize fundamental rights contained in the Indian Constitution and also in regulations executed by the Parliament and the State legislature. India is a federal State in which authority is divided between federal bodies and states. The federal Parliament’s legislative competences include exemplary issues such as nuclear energy, mining. State legislatures govern water supply, and fishing matters. Shared competences (between federal and state) occur in a nature conservation¹⁸.

The influence of harmful factors polluting the environment is, without a doubt, a priority of India’s state authorities. According to the newest data, 13 Indian cities are on the list of 20 most polluted placed on the world with the capital of India taking the first place. High concentrations of air pollution kill over 10,000 people on the city each year¹⁹. The reason for that is the stratification of the society which cannot deal with the scale of the pollution, bad financial situation of the regions which cannot afford cutting edge equipment allowing precise measurements of air quality standards. The Indian Constitution handled devolution of power to the local authorities, which is not an effective, because of limited financial, administrative measures²⁰.

The legal system reliance on the judicial precedent borrowing from the common law system. In case law dominates a view that the environment should be classified as a factor defining healthy life of a man and as a condition necessary to provide. The perfect example is the stress put on the right to clean water which is the manifestation of the right to healthy environment and which should be interpreted with the right to live. In *Narmada Bachao Andolan vs Union of India and Ors*²¹. the Supreme Court of India held that

¹⁸ S. Sharma, *Governing Environment: Federal Perspective from India and Canada*, Newcastle 2016, p. 29.

¹⁹ <http://naukawpolsce.pap.pl/aktualnosci/news,408838,who-co-czwarty-zgon-zwiazany-z-zanieczyszczeniem-srodowiska.html> (4.10.2016).

²⁰ S. Chandra Das, *The Financial System in India. Markets, Instruments, Institutions, Services and Regulations*, Delhi 2015, p. 385.

²¹ R. Madhav, *Context for water sector & water law reforms in India*, [In:] *Water Law for the Twenty- First Century, National & International Aspects of Water Law Reform in India*, eds.

“water is the basic need for the survival of human beings and is part of the right to life [...]”. Therefore, the quality of environment is in relation with the state of human health, which in turn is an element of life. It seems reasonable to say that the right to live implies the right to health. Environment protection considered as a common, national good. The proofs are included in the cases: *Subhash Kumar vs State of Bihar*²², *Damodhar Rao vs Special Officer, Municipal Corporation Hyderabad*²³, *Charan Lal Sahu Etc. vs Union Of India*²⁴, where right to environment should be guaranteed under article 21, because – as it held – environmental pollution is a violation of the fundamental right to life. It should be pointed out that the right to life (article 21) is articulated among fundamental rights. It reads as follows “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The editorial design of the regulation above shows that it belongs to so-called negative rights which aim to protect defined goods of entity, in this case the environment. At the same time, the norm of the law derived from this regulation forbids specific action violating goods valuable for this entity²⁵. In my opinion, despite the adopted case-law, only from the duty to take care of the environment the horizontal effect cannot be derived. I consider that making a claim against the subject obliged to suffer damage in relation to the deterioration of the environment is not possible, even the right to a healthy environment is strongly emphasized in jurisdiction. DPSP are only principle guidance and cannot have been considered as fundamental rights.

Furthermore, the jurisdiction went one step ahead and showed that each noise inconvenience in the surrounding area disrupting the normal functioning in case of refer to both its limit values and the specific space and time conditions, should be read as a right to livelihood. The Supreme Court held that: “Anyone who wishes to live in peace, comfort, and quiet with-

P. Cullet, A.G. Gualtieri, R. Madhav, U. Ramanathan, Abindgon 2010, p. 120.

²² Judgement of The Supreme Court of India on 9th January 1991 <https://indiankanoon.org/doc/1646284> (7.10.2016).

²³ Judgement of Andra Pradesh High Court on 20th January 1987 <http://www.nlsenlaw.org/urban-poor-and-the-law/national-legal-framework/supreme-court-cases-2/t-damodharao-v-special-officer-municipal-corporation-hyderabad-air-1987-andhra-pra-171> (9.10.2016).

²⁴ Judgment of The Supreme Court of India on 22th December 1989 <https://indiankanoon.org/doc/299215> (9.10.2016).

²⁵ M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych*, Kraków 2014, pp. 30–31.

in his house has a right to prevent the noise as pollutant reaching him [...]. How and when a nuisance created by noise becomes actionable has to be answered by reference to its degree and the surrounding circumstances including the place and the time”²⁶. In my opinion, this statement raises controversy because even subjective, individual feeling relating to the environmental inconvenience is taken under protection. Another remarkable court ruling states that the right to life has a very wide interpretation and its range must be related to the rights to private and family life stated that it is visible correlation “of the right of peaceful, comfortable environment”. Some authors said it is clearly connection to state on the right to pollution free environment²⁷.

With the exemplary rulings in the view, it can be concluded that the environment, according to the Indian constitutional jurisdiction, is a “particular value”. From the analysis of selected constitutional rulings it can be concluded that they precede legislation (or replaces the lack of). I would point out that the examples above lead to the conclusion about decentralisation of judicial power²⁸ which issues decisions as a counter to the guiding principles of constitutional resolutions and the systematic editorial of the regulations itself. Furthermore, it is clear, that the judicial authority investigating the issues is set as not equal position to the executive and legislative authorities. The examples above prove that, it is set above the other two authorities.

In India, it is visible to put much attention on balanced development. However, the term of balanced development does not appear directly in legal acts – neither the Constitution nor acts²⁹. In another matter the Supreme court decided in case *Vellore Citizen Welfare Forum vs Union of India* that the balanced development [...] is part of the Indian nature conservation legislation finding its constitutional legality in provisions of the articles 21, 47, 48a, and 51 a(g)³⁰. This has been clearly demonstrated in another statement

²⁶ A. Venkat, *Environmental Law and Policy*, New Delhi 2011, p. 60.

²⁷ Ibidem.

²⁸ The evaluation of a conformity of legal acts with the constitution is a competence of the Supreme Court and the High Courts.

²⁹ Z. Bukowski, *Zrównoważony rozwój w systemie prawa*, Toruń 2009, p. 432.

³⁰ Judgement of The Supreme Court of India on 28th August 1996 <http://legalsutra.com/tag/vellore-citizens-welfare-forum-v-union-of-india> (9.10.2016).

*Sachidanand Pandey vs State of West Benga*³¹, in which Court indicated saying that any disputes of ecological background should be settled in accordance to the article 48a.

It is visible that the court deems possibility to live in healthy environment as necessary for every man to function. An extremely important element of the implemented policy is, without doubt, the development of solutions which move toward efficient fight with environment pollution. It is important for India because the scale of excess over the acceptable amounts in air in big cities means that very radical steps should be taken. The fact that Indian legal system is based on the *common law* may be an efficient solution to ensure the stability and predictability of law, because of the fact that courts have the power to recognize follies³². In my opinion, the recognised by jurisdiction establishment of entitie's right to life and health protection caused by the environment protection does not conflict with the discussed regulations literally contained in the Constitution. What is more important, the environmental control presents as State's obligation and this State, by carrying out duties, protects the entity by referring its right to other rights and freedoms.

IV.

The South African Constitution (adopted by on 8th May 1996, enter into force on 4th of February 1997)³³ introduced a right to the environment in the provisions contained in Chapter 2 "Bill of Rights", article 24 ("Environment") as follows: "Everyone has the right to an environment that is not harmful to their health or well-being and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that i) prevent pollution and ecological degradation ii) promote conservation and iii) secure ecologically sustainable development and use of natural resources while promoting justifiable

³¹ Judgement of The Supreme Court of India on 11th February 1987 <http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=007891961000> (9.10.2016).

³² S. Elias, *Legal Research, How to Find and Understand the Law*, California 2009, pp. 8–9.

³³ *Konstytucja Republiki Południowej Afryki z dnia 8 maja 1996 r.*, trans. A. Wojtyczek-Bonnand, trans. & introduction K. Wojtyczek, Warszawa 2006, p. 16.

economic and social development”³⁴. The characteristic of the Constitution of South Africa is the recognition of not only subjectivity entities and persons but also cultural, religious, and linguistic communities. It is in line with the African tradition which sees unit as a part of defined community. Worthy of mention among the characteristics is the recognition of horizontal actions of human rights. It is a distinctive feature as such clear indication cannot be seen in the regulations of the Constitutions discussed earlier on³⁵. At this point a doubt arises how should “every” be interpreted; should it refer only to natural persons or should it also consider legal persons, associations, and units?

The term of subjective right assumed a creation relationship consisted of at least four elements: 1) legal beneficiary, 2) entity responsible for realization that particular right, 3) legal duties defined attitude from the responsible entity in behalf of entity of legal beneficiary and 4) the group of presumptions depended on actualisation this duty³⁶. According to constitutional literal context, it seems that the environment (as well as its protection) is defined as good which must be taken care of, but there is not alleged as subjective right. The article 8 section 2³⁷ appears to prejudge the acceptance of a model of the direct action of the constitutional laws by the South African legislator. However, it is not used in the judicial practice at all. In that respect, this provision is interpreted in the light of other constitutional provisions which consist of indirect horizontal action of the constitutional laws³⁸. The constitutional law is binding for the entity (imposes obligations on it) but is used only when it is realised in legislation or case law³⁹. For that reason the court first researches if the specific law is realised in legislation; if not – is it realised in case law and even if this is not confirmed – the case law is developed, creating a rule realising this law. In the doctrine it is indicated that in a situation where the

³⁴ Ibidem, pp. 57–58.

³⁵ Ibidem, p. 19.

³⁶ K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 20.

³⁷ A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and nature of any duty imposed by the right.

³⁸ M. Florczak- Wątor, op.cit., p. 126.

³⁹ Article 8 section 3 of The South African Constitution.

case law does not give the entity a legal basis to exercise its rights before the court, such basis should be created by the court by appropriate case law development⁴⁰.

The Constitution of South Africa stresses the co-operation of the authorities on every level. South Africa is a federal State. The central legislature is a prior before provincial legislature, if it is necessary to realize some constitutional values⁴¹, exemplary environmental issues. To conceive environmental law effectively, it has been enacted numerous provincial and local statutes. It has been clearly clarified by the Constitutional Court in *Government of the Republic of South Africa vs Grootboom* followed: “reasonable legislative and other measures should be read as being mutually supportive to the extent that the duty to protect environment can only be realized if the statutory environmental law framework is supported and implemented by plans, policies and programmes”⁴². On the regional level the first international legal act recognising man’s right to the environment was African Charter on Human and Peoples’ Rights of 1981 which stated in the article 24 that “All peoples shall have the right to a general satisfactory environment favourable to their development”⁴³. In the Charter the right to the environment was formulated in the collective categories and not in individual categories (as it occurs in constitutional provisions.) For this purpose the African Commission on Human and Peoples’ Rights formulating recommendations for States Parties and to interpreting provisions and African Court on Human and Peoples’ Rights upholding the laws provided in the Charter, enforcing its provisions and acting as judge and advisor were founded. The African Court (adopted on 1998 by the gathering of Heads of State and Government of Organisation of African Unity) was founded to follow the state of environment. On the African continent there is also second act on the international basis in force, i.e. the African Convention on Nature and Natural Resources Conservation of 11th July

⁴⁰ M. Florczak- Wątor, op.cit., p. 126.

⁴¹ *Konstytucja Republiki Południowej Afryki*, op.cit., p. 43.

⁴² Judgment of The Constitutional Court of South Africa on 17th December 1999 <https://www.escri-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc> (10.10.2016).

⁴³ K. Urbańska, *Prawo podmiotowe do dobrego środowiska w prawie międzynarodowym i polskim*, Poznań 2015, p. 136.

2003⁴⁴. Furthermore, the South Africa enacted in 1998 National Environment Management Act (hereinafter: NEMA), a document describing a number of environmental control requirements. Although courts are obliged to enforce framework law like NEMA, this act is indispensable for the implementation of constitutional environmental provisions. NEMA stresses the importance of co-operation between the competent institutions in the context of proper implementation of environmental control regulations. The environmental principle is support the sustainable development⁴⁵. This act also presents the harmonious institutions of environmental cases that will implement of environmental protection properly⁴⁶. In *BP Southern African Ltd vs MEC for Agriculture, Conservation, Environment & Land Affairs* case, High Court⁴⁷ observed that [...] “ecologically sustainable development and the use of natural resources are to be promoted with justifiable economic and social development”⁴⁸. In the latter case, The Constitutional Court confirmed in *Fuel Retailers Association of Southern Africa vs Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Oths*: “the idea of sustainability reflects a concern equity between generations”⁴⁹.

The next matter is the fact that the pollution indicator is comparably high as in India. The environment rights are interpreted as a measure to fight with poverty⁵⁰. There is inside the South Africa’s borders the problem with access to drinking water is visible. In a case *Residents of Bon Vista Mansions vs Southern Metropolitan Local Council*, held that it municipality constituted

⁴⁴ K. Urbańska, op.cit., p. 137.

⁴⁵ *Compendium of South African Environmental Legislation*, eds. M. Van der Linde, L. Feris, Pretoria 2010, p. 502.

⁴⁶ Ibidem, p. 503.

⁴⁷ In practice, the Constitutional affairs belongs to the higher courts and the Supreme Court of Appeals. The courts can recognise any Constitutional affairs with the exception of the affairs which can be recognised only by the Constitutional Court. The Constitutional Court confirms statements verifying invalidity due to unconstitutionality.

⁴⁸ Judgment of The South African High Court on 31st March 2004 <http://www.saflii.org/za/cases/ZAGPHC/2004/18.html> (9.10.2016).

⁴⁹ Judgment of The Constitutional Court in South Africa on 7th June 2007 <http://www.saflii.org/za/cases/ZACC/2007/13.html> (10.10.2016).

⁵⁰ Y.L. Bouthillier, M.A. Cohen, J.J. Gonzalez Marquez, A. Mumma, S. Smith, *Poverty Alleviation and Environmental Law*, Cheltenham, Northampton 2012, pp. 3–4.

“a breach of the State’s duty to respect the right of access to water”⁵¹. Therefore, it is no wonder that the legislation addresses the legal solutions improving the system of human rights protection in the context of nature preservation.

In South Africa (as well as the whole African continent) we have to deal with a distinctive jurisdictional procedure. For an effective, as well as efficient, execution of the constitutional environmental control regulations (in relation to health and life protection) other regional and nationwide regulations are co-executed. This is mostly the result of the South African legal system being based on a mixed system joining the tradition of continental system, common law, and local African customary law⁵². It can be said that the rights safeguard guarantee is threefold. On the first part by the constitutional regulations (based on environmental issues which are not sufficient autonomously), second – by an established legislation, and third – by the continental customary law, which is strongly developed in Africa.

V.

Referring to the environmental control regulations on the basis of Spanish, Indian, and South African Constitutions it should be emphasised strongly that environmental control issues play a significant role. These states are aware of an impact of the human activity on the environment and an influence of the environment on the human health and life. Including the environmental provisions in the Spanish constitution indicate that they are qualified as the social rights. These rights, in principle, constitute rather postulates to a realisation of which a concerned state should pursue, instead of reconstructing a subjective right on their basis. Pursuant to these rights, a possibility to require a realisation of the qualifications is limited. An extend of their realisation depends on a financial condition of the bodies appropriate for adhering to the environment condition. An entity may only demand to take actions by the public authorities which are aimed at materialising these rights.

⁵¹ Judgment of The South African High Court (no information about date), in September 2001 <http://www.righttowater.info/rights-in-practice/legal-approach-case-studies/enforcing-the-right-to-water-south-africa-2> (9.10.2016).

⁵² *Konstytucja Republiki Południowej Afryki*, op.cit., pp. 23–24.

Referring to the selected above examples from the Indian judicature it should be stressed that much attention was devoted to the relations between the laws of environmental control and life and health protection. In the Hindu judicial practice are frequently mentioned referrals to the other freedoms and rights within a context of the environmental protection. But, the right to life may have not been a basis to make claims for environmental protection as in the pollution cases. Both in Spain, and in India ensuring the environmental protection is a public task. DPSP are realized and guided by the government of India. The public authorities are obliged to undertake actions that are aimed at protecting citizens against the environmental threats. As it has been mentioned above, this obligation is a kind of a political declaration in nature. The indicated regulations are in the support of healthy environment and, what is distinctive (as opposed to the indicated constitutions) also taking care of other living species.

Looking at the regulations and the existing legal system in the Constitution of South Africa it can be concluded that in terms of effective complying with environmental control requirements it reflects needs and expectations of those using the environment. The Constitution of the Republic of South Africa on a subject of pursuing rights related to a violation of the environmental protection assumes a model of the direct horizontal application of the constitutional rights. It means a basis for a claim constitutes a statutory, not a constitutional provision. A direct application of the constitution may take place in the situations, when rights connected with environment included in the constitutional provisions are precisely determined. In the above basic law, such an indication cannot be found. Nevertheless, it seems that this model due to the statutory terms and values which lie at the basis of the constitutional rights, can contribute to a more active observance of the law within a scope of the environmental protection. Noteworthy is the particularly important role of judicial authority which is manifested by realising the law in case of the inability to rely on it.

In view of this considering, it is difficult to decisively determine unambiguously which of regulations above countries are effective for environmental rights. However, in order to achieve the effective usage of pollution free environment not only granting rights to exercise rights basing on them, but also developing efficient mechanisms to counteract the environment deterioration should be sufficient.

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