

Radosław Mędrzycki¹

Cardinal Stefan Wyszyński University in Warsaw, Poland

The Legal and Axiological Aspects of Preventing the Causes of Disability in the context of a ‘healthy environment’

Abstract. The present article is an attempt to discuss the legal and axiological aspects of preventing the causes of disability in the context of a “healthy” environment. The legal discourse on disability naturally touches upon matters related to the models of disability and the rights of the disabled. Yet, legal studies seldom link disability with environmental causes and consider the legal aspects of the subject from that perspective. This article explores the fundamental axiological conditions for combating the environmental factors of disability. The considerations resulted in listing the constitutional conditions in the form of a ‘healthy environment’ and two vital principles: the principle of sustainable development and the principle of intergenerational solidarity. Furthermore, both principles are based on supranational regulations.

Keywords: disability, solidarity, public law, axiology

Introduction

Medical and biological sciences are witnessing a lively discussion on the impact of environmental factors on congenital disability in children (Wigle et al., 2008). By way of example, some results suggest that certain types of disabilities in children are strictly related to the pollution in the natural environment. Rauch and Lanphear (2012) argue that chemical substances present in numerous commonly used plastic products have a considerable impact on a child’s development ‘and that many disabilities spring from the complex interplay of environmental risk factors and

1 PhD. at the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw. ORCID: <https://orcid.org/0000-0002-9407-4881>. E-mail: r.medrzycki@uksw.edu.pl

genetic susceptibility'. It is true that some studies cannot yet prove beyond a doubt the causal connection between specific types of pollution and disability in all cases. Nevertheless, it is highly probable that pollution leads to cell damage, which in turn results in a disability in children.

Obviously, such correlations are discovered through empirical studies. Social studies, on the other hand, including legal studies, should not be indifferent to the progress of empirical research. Empirical sciences can provide a strong impetus for legal considerations, especially when the studied issues are subject to legal regulation. Certainly, jurisprudence has sufficient autonomous subjects of its own. Still, it is sometimes worth taking an interdisciplinary approach to certain issues. Interdisciplinarity is the future of science and appears to overcome the particularism of conclusions without compromising the methodological regime. The point is, therefore, to notice the connections or relations which may at times not only be seen from a homogeneous perspective.

As argued above, certain conclusions indicate that a disability may result from the lack of an individual's environmental security. I would like to join in this discussion and present considerations whether any legal axiological mechanisms exist that would prevent the causes of a disability. Interest in this subject is sparked predominantly by the paradigm of legal discourse on disability.² It covers mostly the issues of the rights of the disabled as well as the medical and the social models of disability (Kurowski, 2014, p. 65). Yet, these relevant matters concern already existing disability perceived 'here and now', while the technological change and progress in medicine render it increasingly possible to look at disability as the result of specific past behaviours. Taking this view into consideration, it is worth reflecting on the legal and axiological principles of preventing the causes of a disability. Thus, this article will be an attempt at identifying that moment of constitutional regulation and, ultimately, at answering the question whether any legal grounds for mechanisms that protect against disability resulting from environmental factors exist at the highest level in the hierarchy of the Polish legal system. Polish regulations will be discussed against the background of international and European solutions. The doctrinal methodology renders it necessary to deal with a specific legal sphere yet does not restrict the conclusions only to Polish law.

2 Yet, some works on the axiological aspects of disability do exist, see e.g.: Breczko & Andruszkiewicz (2018). *The Question of the Value of Human Life in Theoretical Discussion and in Practice. A Legal Philosophical and Theory of Law Perspective*, Białystok Legal Studies, (23)4, 9-24.

Conceptualisation of the Notion of the ‘Disabled Person’

Taking into account the possible various understandings of the notion of a disabled person, we should begin with defining this fundamental idea. Among numerous possible meanings, the Polish law discerns two principal ones. According to Article 1 of the Convention on the Rights of Persons with Disabilities drafted in New York on 13 December 2006 (CRPD), a person with a disability is a person who has ‘long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’. The purpose of the CRPD is to contribute to the social inclusion of persons with disabilities. The convention emphasises the obligation to ensure equal treatment and non-discrimination of the disabled. The CRPD was drafted in response to a massive movement concerning the social model. ‘The social model of disability had become the motto of the international disability movement, and it served as a powerful tool to demand legal reform. The CRPD has further developed the social model into a human rights model of disability’ (Degener, 2017, p. 56).

A different model of disability can be found in Polish law. Pursuant to Articles 3 and 4 of the Act of 27 August 1997 on Social and Vocational Rehabilitation and Employment of People with Disabilities, there are three degrees of disability: advanced, intermediate and mild. A person with an advanced disability is a person who has physical impairment, who is incapable of work or capable of work under the conditions of protected labour and who is not able to live independently and requires permanent or long-term care and support from others in order to fulfil their social roles. A person with an intermediate disability is a person who has physical impairment, who is incapable of work or capable of work under the conditions of protected labour, or who requires temporary or partial care and assistance from others in order to fulfil their social roles. A person with a mild disability is a person with a physical impairment which significantly limits the person’s capacity for work in comparison to the capacity of a person with similar professional skills and with full mental and physical ability, or a person whose ability to fulfil their social roles is limited yet may be compensated with the use of orthopaedic appliances, aids or technical measures.

Scholars point out the difference between the definition in the statute and that in the convention. The latter emphasises the social aspects (interactive model), while the Polish statutory definitions are based on the medical model. The medical model sees the disabled person as someone who ought to be assisted through social security arrangements and the health protection system. The interactive model emphasises the barriers which prevent disabled people from achieving equality (Olejniczak-Szałowska, 2015). The outcome of the divergent approaches to disability are terminological disparities: in the social model, the term ‘person with disability’ and

not 'disabled person' is used. The Polish translation of the convention, however, consistently uses the term 'disabled person'.

Yet from the perspective of the present article, it is worth pointing out that the definitions of the disabled person in the CRPD and in domestic law are to some extent similar. The core of the definitions lies in the physical impairment, which is related to the incapacity for work under Polish law and in the (possible) difficulties in the full and effective participation in society under the CRPD (Perkowski & Oksztulski, 2018). Preventing physical impairment eliminates one of the factors which causes disability in the medical sense.

As has been indicated above, there is scientific evidence that congenital disability is caused by environmental pollution among others. Therefore, it should be studied whether constitutional law provides for specific mechanisms that determine a 'healthy environment', i.e. simply mechanisms which could in a manner 'prevent' a disability. First of all, however, the arguments for the need to 'prevent' a disability should be considered.

The World Health Organisation points out the common nature of disability. First, disability can personally affect anyone throughout his/her life. Accidents or diseases pose a risk to health which may result in physical impairment. Following the risk theory, risk(s) cannot be completely eliminated. Hence, anyone can personally experience a disability. Second, a disability affects persons of various ages and is more frequent at certain stages of life. Greater life expectancy of specific individuals, which together with low birth rates result in the ageing of entire populations. This directly causes an increase in the number of persons with various disabilities. The third point (which is related to the previous two) is that also healthy persons may experience a disability – in the form of not only incidental encounters but rather daily contact with such people, mostly relatives (Księżopolska-Orłowska & Wilmowska-Pietruszyńska, 2016, p. 32).

Let us ask a provocative question: is a disability desired? Research shows that there are happy families who treat a disability as an additional challenge and are able to deal while remaining a normally functioning social unit (Borowska-Beszta, Bartnikowska, Stochmiałek, 2016). Technological progress but also the development in the area of human rights have caused a disability to be perceived not as a burden but as an 'added value' in families.

Still, disability – even in the works of authors who acknowledge the value of having a disabled family member – is perceived in terms of a hindrance which has to be dealt with. Essentially, it is a matter of degree. Those authors who perceive disability as a value point out that the condition has been processed by the environment and that the family fulfils all its functions. I do not wish to undermine this perspective. I would like to stress, however, that from the anthropological point of view, it is better not to have difficulties. This, in turn, leads to the attitude present in probably the majority of works, namely that disability is a problem or a burden, which obviously

may not result in stigmatisation, violations ,of dignity of the disabled person, etc., but unfortunately it often does. ‘Disability is a global issue of public health because disabled people grapple throughout their entire lives with ubiquitous barriers in access to health and related services, such as rehabilitation, while their condition is worse than that of fully capable people. A disability is moreover a matter of human rights because disabled adults, young people and children experience stigmatisation, discrimination and inequality. Their rights, including their dignity, are violated, for example as a result of acts of violence, abuse, prejudice and disrespect on grounds of their disability. In addition, they are often deprived of autonomy’ (Książopolska-Orłowska & Wilmowska-Pietruszyńska, 2016, p. 33).

To conclude, a disability results in a situation that is unfavourable to the individual and their careers. This situation should not contribute to violations of any of those people’s rights. Since it is perceived as unfavourable, however, the next step can be to consider the legal restrictions in the aspect studied in the present article.

A ‘Healthy Environment’

According to the Constitutional Tribunal, a “healthy environment” is a constitutional value whose fulfilment should be subject to the process of interpretation of the Polish Constitution. On the other hand, the constitution does not lay down or guarantee the subjective right to “live in a healthy environment”³. This observation is fairly surprising if we take into consideration that the Polish Constitution does impose on the public institutions a set of obligations related to a ‘healthy’ environment. Setting aside environmental protection as everyone’s task (e.g. Article 86 of the Polish Constitution), let us reconstruct the constitutional duties of public authorities with regard to a ‘healthy’ environment.

The Tribunal itself points to Article 68(4) of the Polish Constitution, pursuant to which public authorities are obliged to prevent the results of environment degradation which have a negative impact on health, as well as Article 74(1) and (2) of the Constitution, according to which the state is obliged to implement policy which will ensure environmental security to the present and future generations and to protect the environment. In addition, the above has to be followed in accordance with the principle of sustainable development’ (Article 5 of the Polish Constitution).

Based on the domestic provisions, environmental security is not an abstract concept, but a state of facts that should be undertaken (should be the aim of public administration). While Article 74 of the Constitution is a programmatic norm with all the consequences that entails, environmental security has to have its referents

3 Judgment of the Constitutional Tribunal of 13 May 2009, file ref. Kp 2/09 (OTK ZU 5/A/2009).

rooted in reality – it is after all an objective to be pursued. These referents may be reconstructed based on the so far only Polish monograph on that subject.

Korzeniowski (2012) proves that:

- 1) environmental security is an element of the concepts of ‘public safety’ and ‘public order’;
- 2) environmental security may be treated as a social right (*sensu largo*); it is a fundamental human right;
- 3) moreover, environmental security ensures the subjective right to the environment;
- 4) the fundamental values of environmental security are equality and social justice;
- 5) environmental security is associated with the constitutional obligation to protect the environment; environment protection is an instrument that ensures environmental security;
- 6) there is positive feedback between the level of environmental security and the social security scheme, with environmental security being one of the elements of the environmental state (*Ökostaat, Umwelstaat*);
- 7) environmental security involves not only taking protective measures but also restoring natural balance.

What then does the concept of environmental security mean? It is ‘maintaining a certain level of protection which will among others enable humans to make use of the value of the environment and its resources. Environmental security may not be identified exclusively with the environment as such. It includes measures directed at numerous areas of social, economic and political life which may have a direct or indirect impact on the environment. It is a state in which normal exploitation of natural resources will not result in exceeding the maximum pollution levels laid down in the legislation. The purpose of environmental security is to determine the optimal conditions for human health by means of: 1) assessing their exposure to the adverse effect of pollution; 2) laying down the principles of preventing the effects of biological, chemical and physical pollution in the environment’ (Korzeniowski, 2012, pp. 173-174).

It is worth remembering that ‘the instrument of ensuring [...] environmental security is environment protection, and the legislative body has to follow the principle of sustainable development when protecting the environment’ (KP 2/09). The duty to ensure environmental security to the present and future generations is linked to the obligation to follow the principle of sustainable development, which places the needs of the present and the future generations on an equal level in the hierarchy (Górski, 2016).

The need to protect the environment is laid down directly in Article 5 of the Constitution. As it is pointed out in the literature, ‘environment protection’ cannot

be construed solely as ‘providing to the citizens unpolluted air, healthy drinking water or recreation areas, etc. but also as protecting the country’s specific landscape, landforms or drainage system which sets Poland apart and constitute a factor of its identity of no lesser significance than the language or the culture [...]’ (Sarnecki, 2016). Thus, environment protection is a permanent task of the public authorities on the central level as well as on all levels of local government. Protection of the environment should not be assigned to a particular ministry; it cannot be the responsibility of the minister of the environment alone. Taking into consideration that environmental protection should be learned, it is of great importance that the minister of the environment cooperates with the minister of national education. This is all the more important since the Constitution itself imposes on all the duty to protect the environment as well as liability for deteriorating its condition.

Furthermore, environment protection entails preventing the adverse impact environmental degradation has on health (Article 68(3) *in fine* of the Polish Constitution). The notion of prevention means not letting environmental decay have such effects which could affect human health. The literal interpretation of Article 68(3) of the Constitution shows that the provision does not impose on public authorities the duty to prevent ‘degradation of the environment’ as such, but rather to ensure that the degradation does not exceed a certain limit beyond which it will have a negative impact on people’s health. This stipulation should be construed in the context of the principle of sustainable development established by Article 5 of the Constitution (see further considerations). In other words, the point is not to maintain the *status quo* in the environment (if that is still possible at all), but rather to make use of nature in such a manner so as not to cross the ‘red line’. The chief factors which cause environmental degradation are ‘industry, transport, agriculture and public utilities, and the principal measures are the pollution of the atmosphere, the water and the soil’ (Cysewski, 1995, p. 51). The development of new technologies and humanity’s striving to make constant progress have resulted in an additional factor of environmental decay, namely strong electromagnetic radiation.

Taking the above into consideration, it can be stated that progress naturally entails the need to make use of the natural environment. Yet entities which make use of the environment can take various approaches: engaging in total exploitation and resource consumption for current needs or not giving up on progress yet taking care of the needs of future generations as well as the environment itself here and now. The Constitution supports rather the second approach, which is expressed directly in Article 5.

The Constitution namely provides that environment protection should be perceived from the perspective of the principle of sustainable development. As stated by Hulpke (p. 2): ‘logically, the concept of “sustainable development” adds a social dimension to the ecology versus economics debate’. Scholars generally share the view that this principle is the fundamental element in the interpretation

of constitutional norms in the context of environmental protection. In other words, the concept of environment protection in the Polish Constitution should always be construed in relation to this principle (Krzywoń, 2012). It is characteristic that the principle of sustainable development was derived from the notions of natural environment protection and intergenerational solidarity. The works of the 42nd session of the UN General Assembly produced a report titled 'Our Common Future'. The document states: 'sustainable development [...] implies meeting the needs of the present without compromising the ability of future generations to meet their own needs'. We could say that the principle of sustainable development is a relatively new 'mechanism' of environmental protection. As indicated by Piskorz-Ryń (2018, p. 53): 'progress remains the contemporary objective, but it is achieved in a different manner than before. It should take into account the existence of natural, social and systemic boundaries'. The article's thesis of sorts is that human health directly constitutes one of those boundaries. Arguably, history teaches us that environmental protection has had its ups and downs – periods of excessive exploitation were followed by phases of reflection and implementation of repair mechanisms. This can be distinctly noticed in the evolution of the principle of sustainable development over time, which may be related to forest conservation after periods of excessive exploitation (Hulpke, p. 1).

Yet the approach is changing – as it is particularly visible in environmental protection – from typically national to global. This, however, significantly hinders finding shared values and aims and requires considerably broader cooperation and understanding for the need for solidarity. Global solidarity – as can be seen particularly in the area of global environment protection – is for some countries a moral (subjective) norm of a potentially objectivised value (legal norm).

Sustainable development essentially affects the need to use renewable energy sources in order to produce electric power and thus to reduce air pollution, which adversely affects human health, including abnormalities of the foetus and further disabilities. The principle of sustainable development is essential from the perspective of energy law itself (Mędrzycki, 2016). As the author points out, 'The concept of sustainable development, particularly in its narrow sense, is an expression of the values related to keeping the natural environment in the best condition possible. Renewable energy sources (with all the limitations resulting from their diversity) in principle facilitate the achievement of those values. It should not be forgotten, however, that the concept of sustainable development in its broad sense may also limit a complete shift to renewable energy sources' (Mędrzycki, 2016, p. 24). It should be noticed that sustainable development has to be understood as a principle which affects the process of both creating legislation and specifying administrative law. Consequently, the application of administrative law, which is further related to the use of administrative authority in the form of authoritative and unilateral specification of the general and abstract norms of administrative law has

to take into consideration the fulfilment of the principle of sustainable development. In addition, legal scholars emphasise the major impact of the principle of sustainable development on environmental protection measures. The function of the principle may be clearly defined as protective.

The above considerations were an attempt to classify and describe the legal obligations of public authorities with regard to ensuring environmental security. It was necessary to demonstrate how constitutional norms shape the duties of the public administration in terms of maintaining a 'healthy environment', thus striving to protect foeti from harm which results in a disability. We omit here the subject of highly processed foods, which constitute a slightly different subject matter.

Another question could be asked at this point: what role does the principle of solidarity play in preventing a disability caused by environmental factors? It is particularly vital to study this principle since – as it will be explained further on – it is the key principle that should permeate national law, but it is also of immense significance for the EU integration process. If we agree that the European Union is built upon specific foundations, then one of them is definitely solidarity.

It is certain that solidarity determines social cohesion and is indispensable in the processes of building and maintaining a community. Yet solidarity is a legal, philosophical, ethical and religious notion. That is why the present considerations need to commence with specifying the content of the notion from the legal point of view. This does not imply that other contexts are less relevant. It is just that the present article concerns the law. Below, I would like to give a brief outline of the legal contexts of solidarity. The purpose is to acknowledge the significance of the principle of solidarity in the legal system.

Interestingly, solidarity in law stems from civil law, namely from the institution of joint and several liability for debts, which was initially a norm of customary law and was finally codified in Justinian the Great's *Corpus Juris Civilis* (Dobrzański, 2006, p. 13). The experience of joint liability is the foundation of today's meaning of solidarity, as well.

Solidarity is the basis of international relations and international law. This was expressed directly by the United Nations Organisation in its Millennium Declaration of 8 September 2000, where the UN deemed solidarity one of the foundations of international relations in the twenty-first century (Mik, 2009, p. 32). It is one of the chief principles in the Declaration (the remaining ones being: freedom, equality, tolerance, respect for nature and shared responsibility). When mentioning solidarity, the Declaration states: 'Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most'. Thus, solidarity in its global dimension appears to be necessary to achieve equity and social justice.

Solidarity is the foundation of the European Union. It is to a greater or lesser extent expressed directly or inferred by European courts from the EU primary law. This foundation of the European Communities and the European Union could in fact be seen from the beginning, when the notion of a united Europe began to take shape (Mik, 2009, p. 37-44). Robert Schuman pointed out on 9 May 1950 that solidarity had to develop first and foremost between the historically conflicted France and Germany (*de facto* solidarity). The next step was solidarity in production, which was supposed to make another war between the heretofore hostile countries impossible. 'In this way', wrote Schuman in his Declaration, 'there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions' (Schuman, 1950). Currently, solidarity is invoked in the Charter of Fundamental Rights of the European Union. The preamble states: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'. Also, Title IV of the Charter bears the name 'Solidarity'. It ought to be mentioned that solidarity was linked to environmental protection (Article 37 of the Charter).

The EU Charter of Fundamental Rights is the most important expression of values adopted by the member states and thus shapes the notion of the Union's (the European) common good.

The Polish Constitution invokes solidarity, as well. Similarly as the Charter, it does so already in the preamble, listing solidarity as one of the principles of functioning of the Republic of Poland. It establishes the obligation of solidarity with others. Thus, solidarity morphs from an ideological declaration into an element of Poland's system of norms, which determines the behaviour of the norm's addressee similarly as norms-principles do.

In addition, the Polish Constitution mentions solidarity in Article 20 as one of the pillars of social market economy. The duty of intergenerational solidarity, in turn, is based on Article 74(1) and (2).

Szukalski in his sociological analysis of solidarity between generations (2012, p. 53) accurately points out that intergenerational solidarity can be related to either contemporarily existing yet successive generations or the present generation and generations which have not yet been born. Intergenerational solidarity related to groups of currently living people from different generations is particularly vital to ensure the community's cohesion and to solve social conflicts (Cruz-Saco, 2010, p. 9). Legal scholars plainly indicate the cultural nature of bonds between generations: members of specific generations engage in various interactions, which have a positive impact on the generations. The classic exchange theory shows that elderly people have the opportunity to transfer their knowledge and skills. Younger people, on the

other hand, provide to the elderly services which the latter with age cannot take care of on their own (Cruz-Saco, 2010, p. 10).

As for the premises of the present article, I would like to limit its scope to relations between the present and the future generation(s). It is necessary to take this perspective in order to show how the present generation can affect the environment in which future generations will live as well as their environmental security.

Building a healthy environment is facilitated by understanding three possible mechanisms of its protection. The first one is derived from the approach called 'end of pipe' (EoP). It involves protecting the environment by measures which are implemented as a last stage of processes that as such harm the environment. The second solution employs the approach called "Clean Technologies" (CT). The idea is to develop processes of progress and exploitation in such a manner that they harm the environment as little as possible. While the first solution consists in minimising the effects of already existing pollution, the second one aims to prevent or significantly minimize pollution which is already at the production stage. . The third mechanism combines the previous two.

It should be noted that renewable sources of energy are key in creating a CT production environment. The beginnings of RES can be found in the documents of the United Nations as early as in the 1970s. The UN expressed their political support for the RES in documents such as e.g. 'Programme of Action for the Establishment of a New International Economic Order' (1974), 'United Nations Conference on New and Renewable Sources of Energy' (1978), 'United Nations Conference on New Renewable Sources of Energy' (1981), 'Nairobi Programme of Action for the Development and Utilization of New and Renewable Sources of Energy' and World Solar Programme 1996–2005 (1998). It ought to be indicated, however, that "The majority are acts which express intention and are not directly implemented in the national legal systems. Important and valuable are the debates at the UN, predominantly in the form of conferences, which have been held since the beginning of the 1980s. Furthermore, it can be noted that the UN have come to guard the observance and fulfilment of the principle of sustainable development, which is included in the majority of documents issued by UN agencies'. On the other hand, as noted by Szyrski (2017, p. 46), 'It is therefore clear that a separate area of law related to the power generation industry and renewable energy sources has emerged in EU law. EU law, which has a major impact on the national legislation in the member states, results in a greater share of renewable energy sources in their general gross energy consumption'.

The axiological side of these legal processes is fairly simple: the European Union perceives the implementation of RES as the chief instrument of ensuring energy security and combating energy poverty on the one hand and protecting global natural environment, in particular air, on the other hand.

Renewable energy sources are linked to the health of individual people. It is pointed out in the Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' that 'local coal-fuelled heating and combustion engines and installations are a significant source of mutagenic and carcinogenic poly-aromatic hydrocarbons (PAH) and dangerous emissions of particulate matter (PM 10, PM 2,5 and PM 1)'.

Conclusions

A review of medical and biological literature on disability indicates that research has been carried out on the correlation between environmental factors and biological damage which result in a disability in children. The studies seem to confirm the presumption that environmental pollution along with other factors is conducive to the development of disabilities, which is associated with the medical model of disability. It supposed to be that preventing some instances of a disability may be possible due to maintaining a 'healthy' environment, but in Poland it is still a matter of scientific discourse rather than the real interest of all public authorities.

A healthy environment is a constitutional value related to the constitutional concepts of 'environmental protection', 'environmental security' and sustainable development. The broadest among those concepts is environmental protection. From the perspective of this subject, however, the key notion is that of environmental security, which ought to be striven for by public authorities. This aim can be achieved if the task of protecting the environment is fulfilled. Yet, said protection should be pursued with consideration for the principle of sustainable development, which visibly balances environmental protection and development.

Sustainable development in turn is further linked to the regulatory principle of intergenerational solidarity, which demands a policy that will ensure the protection of the environment and natural resources so that they remain available to future generations. Thus, the above principles which underlie modern environmental protection contribute to the shaping of the axiological foundation of disability prevention.

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