

PRESERVING THE RIGHT TO A HEALTHY ENVIRONMENT IN THE ECHR JURISPRUDENCE

Lucreția DOGARU*

ABSTRACT: *Both at global and European level the necessity to recognize a new fundamental human right, that is the right to a healthy and balanced environment, has only gradually developed.*

The main concern consists of the question: to what extent can individuals invoke this new subjective rights to a healthy environment, alongside the state's correlative obligation in front of a international judicial body.

The right to a healthy environment was recognized in the European case-law by „rebound”, namely through an extensive interpretation of the applicability domain of certain rights, expressly provided for in the provisions of the Convention. Although there are no provisions in the Convention or its additional protocols that expressly refer to the right to a healthy and ecologically balanced environment, the European Court of Human Rights has recognized in its case-law and that of the European Commission, that certain types of deteriorations of the environment with serious consequences for the individuals or even the failure of the public authorities to provide information regarding the ecological risks that individuals are exposed to can constitute breaches of certain rights protected through the provisions of the Convention, such as right to life (article 2 of the Convention), right to private and family life (article 8 (1))¹ of the Convention) or right to property (article 1 of the Additional Protocol 1 to the Convention).

KEYWORDS: *right to a healthy environment, ECHR case-law, right to private and family life, state responsibility, positive obligation*

JEL CLASSIFICATION: K32

1. ASPECTS REGARDING THE SANCTIONING OF THE RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN LAW

The EU treaties do not expressly sanction the right to a healthy environment or to the quality of life. In order to protect such fundamental rights, the European Court of

* Professor, Ph.D., "Petru Maior" University of Tirgu-Mures, Faculty of Economics, Law and Administrative Sciences, ROMANIA.

¹ See M. Déjeant – Pons, M. Pallemaerts, *Human rights and the Environment*, published by Council of Europe, 2001, p. 15.

Justice has frequently inspired from the common constitutional customs of the member states as well as from the international treaties to which these have contributed or are part of. The key treaty in this matter is represented by the European Convention of Human Rights².

The European Charter of Fundamental Rights of 2001 provides in article 37, concerning the environmental protection that a high level of environmental protection and of environment quality improvement must be integrated in the EU politics and be guaranteed according to the principle of sustainable development. However, these provisions were criticized by the European Parliament for they do not grant the individual the right to a clean environment³.

Up until the Single European Act there were no express and clear provisions in the texts of the treaties regarding environmental protection, for the main activity of the Community was primarily directed towards the creation of an internal market and when directives were adopted the Preamble of the Rome Treaty as well as article 2 of TCE were invoked as legal grounds. The first acts on environmental protection issued by European institutions were adopted at the end of the 1960' and as a consequence of the European Council from Paris, 1972, successive action programs based on ecological problems were drafted⁴.

The enactment activity continued after the first global Conference on environment from Stockholm – 1972 and after the 1992 Rio de Janeiro Conference on environment and development, so much that today, according to the European Commission⁵ more than 200 legal instruments specific to secondary legislation are in force.

In the European law, general distinct legal norms are dedicated to environmental protection, for example Title XVI (XIX), entitled „Environment Protection”, of the Treaty establishing the European Economic Community, signed in Rome at march 25th 1957.

Taking into consideration that in the EU regions there are different situations, the environmental politics place an important focus on a high level of protection and sustainable conservation so that the main objective followed consists of „adopting adequate measure that will ensure the necessary efficiency in fighting pollution”⁶.

The protection and insurance of a healthy living environment at EU level has been done, as previously mentioned, successively, not only at legislative level but also through environmental programs that were drafted to this end such as the 5th Program of Action for Environment of the European Community and the Program for the 2001-2010 period entitled „Our Future, Our Choice” – addressing issues as climate changes, biodiversity, environmental protection, health etc.⁷

² Stated in case/1973, *-Nold v. KG v. Commission*, decision of 1974. Similarly, article 6, Title 1 of the Maastricht Treaty establishes the obligation of the European Union to respect the fundamental rights as these are protected by the European Convention of Human Rights and as these derive from the common constitutional customs of member states as general principles of european law.

³ M. Sukin, D. M. Ong, R. Wight, *Sourcebook on Environmental Law*, Routledge Cavendish, 2001, p. 851.

⁴ See T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H. Beck, Bucharest, 2007, p. 694.

⁵ European Commission, *Towards Sustainability*, E Of.J. 138, 1993, p. 11; L. Kramer, *Focus on European Environmental Law*, Sweet and Maxwell, London, 1997, p. 26.

⁶ For details D. Mazilu, *Dreptul comunitar al mediului*, Lumina Lex, Bucharest, 2008, p. 14-15.

⁷ I. M. Aromes, *O nouă provocare – dreptul de a trăi într-un „oraș verde”*, Human Rights Revue, no. 2/2005, p. 55.

According to the scholarly literature⁸, transnational pollution, global warming and the nuclear perils that pose a threat to the human life and health represent problems of international dimension and consequently require an international and unitary solution and answer.

In 1972 the Stockholm Declaration was adopted by the Environment Conference and this document contains certain environment principles, amongst which the principle of the right of nations to a healthy life, in harmony with nature can be found. In 1991, the United Nations Conference on Environment and development lead to the adoption of the Rio Declaration that encloses 27 principles on sustainable development and the need of a healthy, quality environment⁹.

At international level, the relationship between human rights and the right to a healthy environment is analyzed from different perspective. For some authors¹⁰, there are 3 main orientations: there are no human rights without the right to a healthy environment; the right to a healthy environment is an already existing right; the right to a healthy environment derives from other human rights (such as the right to life, health, information)¹¹.

The recognition of the fact that human rights are connected with environmental protection was underlined in the Report entitled Human Rights and Environment, report that accentuates that the damage caused to the environment has a direct effect on the exercise of other certain rights, as the right to life and right to health¹².

The notion of healthy environment entails not only an unpolluted environment but also a balanced one from an ecological point of view, as established in the Project of Declaration of Principles on Human Rights and Environment, document that recognizes expressly the cultural and spiritual importance of the natural environment. The special connection between the human and nature is acknowledged also in the World Charter on Nature, stating that civilization has its roots in nature and the coexistence in harmony with nature offers to mankind the best opportunities for creativity development. From this perspective, thus, the preservation of nature becomes a condition for individual welfare and requires a dimension of human rights¹³.

2. ASPECTS CONCERNING THE RECOGNITION OF THE RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Both at global and European level the necessity to recognize a new fundamental human right, that is the right to a healthy and balanced environment, has only gradually developed.

⁸ M. Shaw, *International Law*, Cambridge University Press, 2003, p. 754.

⁹ A. Aust, *Handbook of International Law*, Cambridge University Press, 2005, p. 330.

¹⁰ M. Fitzmaurice, *The Right of the Child to a Clean Environment*, Southern Illinois University Law Journal, no. 23/1999, p. 611-656.

¹¹ D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, Stanford Journal of International Law, no. 28/1991, p. 105.

¹² N. Schrijver, F. Weiss, B. Sima, *International Law and Sustainable Development: Principles and Practice*, Martinus Nijhoff Publisher, 2004, p. 389.

¹³ Appreciated by M. Déjeant – Pons, M. Pallemmaerts, *Human rights and the Environment*, published by Council of Europe, 2001, p. 20.

The phrase „environment” is not mentioned in the provisions of the European Convention on Human Rights and less the concept of a right to a healthy environment. At a first analysis it can be thus stated that the right to a healthy environment is not part of the rights and liberties category that it generates¹⁴.

Similarly, the Convention does not directly determine whether an individual has the right to a healthy environment. The first cases concerning environmental issues brought before the Court had as a starting point the idea that the Convention does not provide for the right to environmental protection or environmental quality standards. In most cases, the Convention has been used as a support for numerous requests having as object the insurance of an acceptable level of environmental quality¹⁵.

The main concern consists of the question: to what extent can individuals invoke this new subjective right to a healthy environment, alongside the state’s correlative obligation in front of an international judicial body. What is being followed recently by the Convention bodies is the transformation of the right to a healthy environment in a subjective right protected by the Convention. We mention the fact that the states members to the Council of Europe have not adopted an additional protocol to the Convention that would provide also this right, as proceeded with other fundamental rights (property, education, free elections).

The right to a healthy environment was recognized in the European case-law through „rebound”, namely through an extensive interpretation of the applicability domain of certain rights, expressly provided for in the provisions of the Convention¹⁶. It derives consequently that any infringement of the right to a healthy environment can not be invoked as such before the European Court for it is not protected *in terminis* by the Convention.

Analyzing the case-law of the European Court of Human Rights, we can observe that the violation of the right to a healthy environment has been discussed in connection with other fundamental rights expressly provided for, such as the right to life, right to private and family life, right to property, right to a fair trial, freedom of speech¹⁷.

There is no provision in the Convention or in its additional protocols that refers directly to the right to a healthy and ecologically balanced environment. Still, the European Court of Human Rights has recognized in its case-law and that of the European Commission, that certain types of deteriorations of the environment with serious consequences for the individuals or even the failure of the public authorities to provide information regarding the ecological risks that individuals are exposed to can constitute breaches of certain rights protected through the provisions of the Convention, such as right to life (article 2 of the Convention), right to private and family life (article 8 (1)¹⁸ of

¹⁴ See C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, C.H. Beck, Bucharest, 2005, p. 621.

¹⁵ S. Wolf, N. Stanley, *Wolf and Stanley on Environmental Law*, Routledge Cavendish, 2003, p. 481.

¹⁶ F. Sudre, *La protection du droit à l’environnement par la Convention européenne des droits de l’homme*, Vol. Communauté européenne et environnement, colloque, Angers, october 1994, Documentation française, 1997, p. 209.

¹⁷ For details C. Bîrsan, *cited above*, p. 622.

¹⁸ See M. Déjeant – Pons, M. Pallemarts, *Human rights and the Environment*, published by Council of Europe, 2001, p. 15.

the Convention) or right to property (article 1 of the Additional Protocol 1 to the Convention).

3. ECHR CASE-LAW REGARDING THE RIGHT TO A HEALTHY ENVIRONMENT

Alongside the right to life, provided for in article 2, par. (1) of the Convention, the right to private and family life sanctioned in article 8, par. (1) has been most frequently used in cases that involve damages to the environment by pollution. The evolutive interpretation of the Court concerning these concepts has allowed for these damages produced to the environment to fall within the scope of the notions of „right to life”, „private life” and that of „family life”.

Therefore, the ECHR case-law¹⁹ offers new means of improving environmental protection by extending the concept of human rights and by creating a link between these two notions that have been separately analyzed.

Through its decision in the *López-Ostra vs. Spain*²⁰ case from 1994, the ECHR has opened a path for the protection of human rights against environmental pollution. This decision of the Court represents the first indirect recognition of the existence of a human right to a healthy and safe environment, by determining the violation of article 8 in the context of pollution²¹. The decision in this case proved a jurisprudential flexibility as well as the legal desire of seeing that environmental violations be considered as violations of human rights, intensifying thus the legal protection of pollution victims and offering them, nonetheless, the possibility of bringing a claim before the ECHR by invoking article 8 in respect to every pollution source.

The protection of the right to a healthy environment, through article 8 of the Convention concerning the right to private life, family life and residence has, however, its limitations. Thereby, in a case²² where the plaintiffs argued, on the grounds of this legal text, that the urban constructions in the south-east of a Greek island lead to the „destruction of the environment they live in”, the European court underlined that the essential element that allows to be determined whether if, in the circumstances of a case, the violations brought to the environment represents a breach of one of the rights protected by the provisions of par. (1) of article 8 consists of the existence of a negative effect induced on the private or family life of a person, the mere general degradation of it not being enough of a cause. Neither article 8 nor any other provision of the Convention does not guarantee, specifically, the general protection of the environment as such, and in this case the plaintiffs did not allege a high enough level of damage in order to be taken into consideration, on the grounds of article 8, par. 2 of the Conventions²³.

¹⁹ For details see A. Rest, *Improved Environmental Protection through an Expanded Concept of Human Rights*, Environmental Policy and Law Review, no. 213/1997, p. 27.

²⁰ *López-Ostra v. Spain*, no. 16798/90, decision of 9 december 1994.

²¹ A. Kiss, D. Shelton, *Manual of European Environmental Law*, Cambridge University Press, New York, 1993, p. 42.

²² *Kyrtatos v. Greece*, no. 41666/1998, decision of 22nd may 2003.

²³ *Idem*.

The Court has decided in numerous cases concerning the respect of private and family life guaranteed by article 8, such as *Khatun and others vs. UK*²⁴ from 1998, where the plaintiffs filed a request to the Court due to the disturbances caused by dust pollution generated by a construction site from the area. In the case, the Court denied the requests and accepted the arguments of the other party regarding the public welfare.

As far as our country is concerned, Romania has been found guilty for the first time by the European Court of Human Rights in 2009 for violating the right to a healthy environment in the *Tătar vs. România*²⁵, a case concerning the impact on the environment of a cyanide based technology used for the extraction of gold. The plaintiffs invoked the passivity of the national authorities, arguing that these were responsible for not taking the necessary measures in order to protect their health and the environment against the pollution resulting from the extraction of gold and the technology used, obligation stated in article 8 of the Convention. Moreover, they argued that there had not been an efficient consultation with the public before the exploitation started and that the technology used posed a threat to their lives and for the environment. With all the evidence invoked by the Government in its defense, the Court decided that in the case the plaintiffs complained not by the existence of an act but more so by an inaction, demonstrating that the society stood at the origin of the ecologic accident from January 2000, as described in an ample manner by the international press and that constituted the object of a report of both the European Union and the United Nations.

The Court considered that although there does not exist a causal probability, the existence of a serious and substantial risk for the health and welfare of the plaintiffs imposes on the State to fulfill its positive obligation to adopt reasonable and adequate measures capable of protecting the rights regarding the respect of private life and their residence as well as the right to enjoy a healthy and protected environment. The Court, concluding that the Romanian authorities have failed in fulfilling their obligation to prerequisites and of a satisfactory manner evaluate the eventual risks of the activity in question and to take the adequate and capable measures to protect the rights of the plaintiffs in respect of their private life and their residence as well as the right to enjoy a healthy and protected environment. Also, the Court established that the national authorities have failed in fulfilling their obligation to inform the population of the city of Baia-Mare that was in the impossibility of knowing the possible prevention means of a similar accident or the measure imposed in similar cases.

In *Brândușe vs. Romania* case of 2009, the plaintiff was executing an imprisonment punishment in the penitentiary of the city of Arad and invoked a high degree of olfactory pollution caused by the garbage tip of the city situated in the proximity of the penitentiary and whose organization and use was contrary to the environment legislation. Through its decision from the 7th of march 2009, the Court stated that article 8 is applicable in the case even if the plaintiffs health had not been affected taking into consideration the period of time during which he had to endure the pollution, the quality of his life being affected in such a manner that it turned into a breach of his private life. The Court determined that the authorities are responsible for not fulfilling their obligations regarding the decisional process, the impact studies, the lack of public information.

²⁴ *Khatun and others v. UK*, decision of 1st July 1998.

²⁵ *Tătar v. România*, no. 6702/01, decision of 27th January 2009.

Article 8 of the Convention has been linked to the environmental issue in numerous cases involving phonic pollution. The Court interpreted the concept of residence in the sense that it includes the right to enjoy the peaceful use of the housing, and article 8 offers this protection against any intrusions on private life and residence caused by noises or disturbances²⁶. We remind in this context: *Arrondelle vs. United Kingdom, Powell & Rayner vs. United Kingdom, Baggs vs. United Kingdom*²⁷.

In the *Taski and others vs. Turkey* case of 2005, the plaintiffs invoked the risk that the nearby gold mine poses for the accumulation of cyanide that can persist for decade, an thus violating their right to a healthy environment. The Court showed in this case that the severe pollution of the environment that can affect the wellbeing of individuals and can prevent them from enjoying their homes so that it negatively impacts their private and family life and thus determining the violation by the state of the provisions of article 8 from the Convention. The same provision is invoked as well in the *Giacomelli vs. Italy* case of 2006, where the plaintiff complaints about the phonic and olfactive pollution caused by a garbage depository installations nearby the city of Brescia, constituting a permanent risk to her health and home. The Court decided in the case that a home is the place where private and family life develops and that the individual, based on article 8 has the right to demand respect to its residence, entailing not only the property right but also to enjoy in peace and quiet that space.

The right to environment can be capitalized by bringing a complaint based on article 2 of the Convention as well as article 3, as an element of the right to physical integrity and health²⁸.

In the *Oneriyildiz vs. Turkey*²⁹ case, the Court delibered considering a complaint regarding the right to a healthy environment based on article 2 of the Convention.

The meaningful interferences in the quality of life and the threatening of life caused by the activity of the public authorities can represent the basis of an action according to article 2 of the Convention. We mention the famous *Guerra vs. Italy* case of 1998 where the Court decided that the Government that held information about the circumstances that created a predictable and imminent peril of a possible damage to the physical health and integrity can constitute a breach of article 2. The plaintiffs proved the fact that the activity carried out by the factory in the case represents a „major accident that puts in peril the environment”³⁰ by emissions of harmful gases into the atmosphere. Clearly, the provisions of the Convention spread also in the area of protection of physical integrity.

The problem of state responsibility as failure of public information appeared in the *LCB vs. United Kingdom*³¹ case of 1998. The problem of the actions that the state is bound to take in case of perils also constituted the subject of other decisions in other cases, such

²⁶ See Ursula Kilkelly, *A Guide to the implementation of Article 8 of the European Convention on Human Rights*, Human Rights Handbooks, No.1, DGHR-Council of Europe, 2001, p. 10.

²⁷ For details, see Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, Background Paper, No.2, Joint UNEP-OHCHR Expert Seminar on Human Rights and Environment, 14-16 January, Geneva.

²⁸ See A. J. Bradbook, IUCN Academy of Environmental Law Colloquium, IUCN Academy of Environmental Law, *The Law for Sustainable Development*, Cambridge University Press, 2005, p. 275.

²⁹ *Oneriyildiz v. Turkey*, no. 48939/99, decision of 18th June 2002.

³⁰ Dissenting opinion of judge Jambrek in the *Guerra v. Italy* case, cited above.

³¹ *LCB v. UK*, no. 23413/94, decision of 9th June 1998.

as the *McGinley and Egan vs. United Kingdom*³² of 1998. Whenever certain activities entail hidden risks to the health of individuals, the obligation to inform the potential victims includes both drawing up of documents and specific procedures of information access. The idea of state responsibility according to article 2 of the Convention was underlined in the *Osman vs. United Kingdom*³³ case, where it was shown that any public authority that has information about the existence of a serious health risk and fails to take preventive measures, leading to damages, will be held accountable for violating article 2 of the European Convention on Human Rights.

The European Court of Human Rights has recognized that environmental degradation can involve those provision of the Convention that protect the property right of a person³⁴.

Article 1 of Additional Protocol 1 to the Convention states „*Every natural or legal person is entitled to the peaceful enjoyment of his possessions*”. Numerous cases have been solved by invoking the violation of this provision, the Court establishing that the damages caused by various forms of pollution having as a result a depreciation in the value of the good object of the property right.

In the *Oneryildiz vs. Turkey* case of 2004, the Court pronounced on a complaint regarding the right to a healthy environment, based of article 2 of the Convention and article 1 of Additional Protocol 1 to the Convention regarding property³⁵.

4. CONCLUSIONS

From a human rights point of view, the right to a healthy and quality environment is a fundamental right whose nature and characteristics do not change over time passage or as a consequence of circumstance changes.

The fundamental human rights are inalienable and this inalienability applies also in the case of the right to a healthy environment.

Alongside the right to life, regulated in article 2 (1) of the Convention, the right to private and family life provided for in article 8 (1) has been most frequently used in cases involving damages to the environment caused by pollution. The evolutive interpretation of the Court concerning these concepts has allowed for these damages produced to the environment to fall within the scope of the notions of „right to life”, „private life” and that of „family life”.

Despite the progress made by the Court in respect to the case-law regarding the environment and the fundamental human rights the problem of direct access to the European justice is still one of the time being. Therefore, an individual does not have the possibility to bring a claim before the ECHR until it exhausts all internal means: charges brought before all the competent courts in the state of origin. This period of time and the complex judicial system has considerably limited the protection of the right to a healthy environment.

³² *McGinley and Egan v. UK*, above cited.

³³ *Osman v UK*, no. 28194/95, decision of 28th december 1998.

³⁴ See Brennan Van Dyke, *Proposal to Introduce The Right to a Healthy Environment Into the European Convention Regime*, Virginia Environmental Law Journal, No.13/1994, p. 328.

³⁵ *Oneryildiz v. Turkey*, no. 48939/99, decision of 18th june 2002.