



Protection of The Human Right to A Healthy Environment in Europe

KEYWORDS

human right to a healthy environment, sustainable development, right of the third generation human rights, European Convention on Human Rights, European Union

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ABSTRACT

The article aims to highlight that, although international, European and national documents entrench sustainable development, environmental protection and, as a consequence, the human right to a healthy environment as features of the contemporary era, reality is actually different. This is proved by the serious environmental accidents, the extreme weather phenomena all over the world, along with the painful discovery that the odyssey of damages lasts for years even in the case of famous catastrophes [1]. We believe that the above-mentioned reality might be changed by imposing more serious sanctions, including penalties under criminal law, by the adoption of a European Environmental Code, of an International Environmental Code and by the establishment of a Court of the United Nations for the Environment.

INTRODUCTION

By using the comparative method, i.e. by analyzing the European Convention on Human Rights and the basic treaties of the European Union, as well as the case law of the two courts, the European Court of Human Rights and the Court of Justice of the European Union, our aim is to show that the protection of the human right to a healthy environment in Europe is precarious and distorted.

We have to admit that the right to a healthy environment, together with the right to peace, the right to the harmonious development of cultures make the third generation of human rights; also called "solidarity human rights", "solidarity" of the present generation with future generations, these rights are frail because "they do not have a precise significance, a precise content, a determined holder, they are not enforceable as such, they do not enable their holder to defend his right before a court, since they do not involve an organized sanction" [2]. This is the real situation, therefore these rights are not explicit, which might generate confusion in such a sensitive matter as environmental protection and fundamental human rights.

2. (NON-) PROTECTION OF THE RIGHT TO A HEALTHY ENVIRONMENT

2.1 Defining the scope of the right to a healthy environment

It is well known that the human right to a healthy environment has the following components: a) access to environmental information, by observing the confidentiality conditions provided by the legislation in force; b) the right of association in organisations for the protection of the environment; c) the right to be consulted in the process of decision-making with regard to the development of environmental policy and legislation, the issuing of regulatory acts in the field; d) the right to make a request on environmental matters, directly or by the organisations for the protection of the environment, to the administrative and/or judicial authorities, regardless of the (non-)existence of a damage; e) the right to remedy for the damage which has been caused. The Government Emergency Ordinance no. 195/2005 on the protection of the environment, as subsequently amended, in the Romanian legislation, contains

all these prerogatives in art. 5 which has the following introductory wording: "The state shall recognize everyone's right to 'a healthy and ecologically balanced environment' guaranteeing for this purpose..."

Totally or partially, the right to a healthy environment has finally acquired international and regional recognition. For example, we would like to mention at international level: the Stockholm Declaration (June 1972) [3], the Rio de Janeiro Declaration on the environment and development (June 1992) [4], the Aarhus Convention (June 1998- the Convention on access to information, public participation in decision-making and access to justice in environmental matters) [5].

2.2 Case law and weak points

The right to a healthy environment is not mentioned in the text of the European Convention on Human Rights or one of its additional protocols [6]. The explanation is simple: the Convention was drafted as a reaction to the atrocities committed during World War II, therefore it articulates individual rights, aiming to protect first of all human physical integrity and freedom, seriously injured by war.

In the aftermath of World War II, when people felt the urgent need to protect their physical and moral integrity, the European Court had to face the reality of certain rights which were not circumscribed to the content of the Convention. It is the case of the right to a healthy environment which receives consecration "by default", that is by *extensive interpretation* of some rights expressly provided in the Convention [7]. Thus, art. 8 "Right to respect for private and family life", was extensively interpreted. It stipulates: "1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The first case where the right to a healthy environment finds its application by the extensive interpretation of art. 8, is the case of *Lopez Ostra v. Spain*, in the judgment of which it is specified: "Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". Consequently, the Court held that the pollution caused by a waste-treatment plant close to the applicants' home led to the infringement by national authorities of the right to a healthy environment, and impliedly, of the right to private life [8]. Along the same line, noise pollution caused by the operation of an airport located in the applicants' vicinity, is an interference with their private life [9]. Judgments remain important because they reveal that "a conflict between two individuals can lead to the application of the Convention and the sanctioning of a state" by the Court, when "authorities did not intervene, as they ought to do in order to guarantee the respect for the right consecrated in the document". Therefore, States Parties are required to take the necessary measures to guarantee the right to a healthy environment, measures which must be practical and effective, not only theoretical and declarative and this, even when it comes to relations between private individuals.

From the attempts of the European Court to give shape to this fundamental right, one can infer a series of rules: 1) to ensure the respect for this right, the states have essentially positive obligations: for example, to inform people about the serious risks of pollution caused by an activity which is harmful to the environment; 2) the crucial element that allows to determine whether the damage caused to the environment constitutes a violation of one of the rights provided in paragraph 1 of art. 8, is the existence of an adverse effect on the private or family life of a person and not simply its general degradation [10]; 3) the inconvenience suffered by individuals as a result of environmental pollution must reach a sufficient level of seriousness to be taken into account, on the ground of art. 8 paragraph 1 [11].

In its turn, the Charter of Fundamental Rights of the European Union provides under art.37: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". The principle relies on art. 3(3) of the Treaty on European Union ("The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment") and articles 11 ("Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development") and 191 ((1) Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change; (2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles

that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay...; (3) In preparing its policy on the environment, the Union shall take account of: available scientific and technical data; environmental conditions in the various regions of the Union; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions"... of the Treaty on the Functioning of the European Union.

With regard to the components of the right to a healthy environment, the Court of Justice in Luxembourg makes a series of specifications.

Thus, by referring to the *right of access to environmental information*, the Court (Fourth Chamber), in a recent judgment of 16 December 2010, in C-266/09 – specifies that "the right of access to environmental information can crystallise only on the date on which the competent authorities have to take a decision on the request which has been made to them" because "only then (...) do those authorities have to assess, in the light of all the factual and legal circumstances of the case, whether or not the information requested should be supplied" (point 34). Starting from the interpretation of art. 2 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC of the Council, the Court of Justice holds that "the provision of information on the presence of residues of plant protection products in or on plants such as lettuce, as in the main proceedings, thus aims, by making it possible to verify the level at which the MRL was set, to limit the risk that a component of biological diversity will be affected and the risk that those residues will be dispersed in particular in soil or groundwater. Although such information does not directly involve an assessment of the consequences of those residues for human health, it concerns elements of the environment which may affect human health if excess levels of those residues are present, which is precisely what that information is intended to ascertain"[12].

The issue of the refusal of access to environmental information, in case it refers to a commercial and industrial secret is solved by the Court of Justice in the following terms: "That article (Article 4 of Directive 2003/4) allows Member States to provide that a request for environmental information may, except where the information relates to emissions into the environment, be refused if disclosure of the information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law. However, the article also requires that such a ground for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure, and that in every particular case the public interest served by disclosure must be weighed against the interest served by the refusal"[13].

In another judgment – Judgment of the Court (Second Chamber) of 15 October 2009 in C-263/08, the Court of Justice answers the question whether "members of the public concerned are to have access to a review procedure to challenge a decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent even where they had the opportunity to participate in the court's examination of the question of development consent and to express their

views"[14]. The answer is as follows: "First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure"[15].

Another question to which the Court is required to answer is whether "Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Directive 85/337/EEC but no right of access to a review procedure to challenge the decision adopted at the end of that procedure" – the question was motivated by the existence in the national legislation of the norm in accordance with which only an association of at least 2,000 members can challenge a decision by a review procedure in the environmental field. In its answer, the Court holds: "it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active; ... however, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 ...; ... Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with"[16].

The right to be consulted in the decision-making process concerning the development of the environmental policy and legislation, the issuing of the regulatory acts in the field, as well as the right to refer environmental matters, directly or by organisations for the protection of the environment, to the administrative and/or judicial authorities, according to each case, regardless of a prejudice which was or was not caused, are subject to a comprehensive interpretation in the Judgment of the Court (Second Chamber) of 25 July 2008, in C-237/07. The question to which the Court had to answer was whether article 7 par. (3) of Directive 96/62 ... must be interpreted in the sense that the third party whose health is at risk has the right to elaborate an action plan, even if independently of an action plan, he is able to make use of his right of defence against the risk that the limit values or alert thresholds may be exceeded, by bringing an action before a court and requiring the authorities' intervention. In order to clarify this issue, the Court of Justice reminds the already famous principle of the direct effect of community law in the following terms: "the Court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise. It is for the competent national authorities and courts to interpret national law, as far as possible, in a way that is compatible with the purpose of that directive. Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned"[17]. In all cases in which the failure to observe the measures imposed by the directives concerning air and water quality and aiming to protect public health could jeopardise people's health, they must be able to invoke the binding norms contained in the directives.

3. SOLUTIONS

The European Court of Human Rights and the Court of Justice of the European Union definitely have an overwhelming influence on national legal orders and represent an important source of unification of European practice because the case law of the courts in Strasbourg and Luxembourg follow the same logic, in the sense that they assert fundamental guarantees. In the Romanian legal system as well, the case law of the two courts is directly applicable and has constitutional and supralegislative force regardless of whether the judgments were given in cases in which Romania was a party or in any other case, including those prior to Romania's ratification of the Convention or its accession to the European Union. Moreover, the Court of Justice of the European Union has constantly shown in its case law that the protection of fundamental human rights is an integral part of the general principles of law, whereby the Court makes sure that they are respected, and that they are inspired by the constitutional traditions common to all Member States, as well as the guidelines provided by international organizations for the protection of human rights, organizations which the Member States subscribed to or cooperate with. Yet, we can hardly speak of a genuine protection of the human right to a healthy environment. The finding is correct and depends on the 'youth' of environmental law itself; but its maturity is proved by the increasing number of cases brought before courts by individuals or communities concerned with the environment where they live, with the recognition of pure ecological damage [18], i.e. totally separated from the economic one, which is the real legal revolution, the green growth, as sustainable development is also called, set as a national, European and international objective, environmental protection under criminal law. The future of environmental protection and of the right to a healthy environment depends on the adoption of a European Environmental Code, an International Environmental Code, and the establishment of a Court of the United Nations for the Environment.

4. CONCLUSIONS

The crucial issue in the field of environmental protection seems to be the ineffective repression of environmental tort. Its originality is undeniable, and is given by the importance of indirect damage, the overlapping of synergistic effects, the irreversibility of damage, the difficulty to find the responsible ones. Moreover, the doctrine also wonders who is the victim, man or nature [19], therefore one can speak of the duality of environmental damage, since the harm caused to the environment leads not only to harm caused to man and his activities, to his health and property, but also to the environment as such, to species, to ecosystems [20]. From the constant repetition by the ECtHR [21], that the right to life is an inalienable attribute of the human being and represents the supreme value on the human rights scale, to the entrenchment of the right to a healthy environment, of the principles of environmental law, all indicate the wide openness that European courts prove in solving environmental problems. The contemporary reality faced with the continuous growth of the potential risks of accident, from traffic accidents to nuclear or genetic disasters, is reflected in legal terms by what is called the "tort liability crisis" or "tort deadlock" [22]. The immediate purpose of the equity principle is to protect the patrimony of the victim of a prejudice and therefore the aim is to put the victim's patrimony back to its original position, before the harm actually occurred, which is obviously achieved by full compensation in kind of the damage suffered. Thus equity meets the requirement, which crosses

like a red thread the idea of responsibility in modern society, to find the responsible ones in order to ensure due protection of victims, as holders of the right to a healthy environment.

REFERENCE

- [1] such as the Amoco Cadiz oil spill (the wreck resulted in the release of 220,000 tons of oil near Brittany, destroying not only the marine fauna, but also the sea industries of Brittany. The accident occurred on 17 March 1978, but in the papers game, only on 11 January 1988 did the court rule that the Amoco company had to pay 85.2 million dollars for damage caused by the "Amoco Cadiz" catastrophe) or Erika (the sinking of Erika tanker occurred on 12 December 1999, and released a large part of the cargo into the sea, causing pollution on the French Atlantic coast, and the judgment of the ECJ (Grand Chamber) - in case C 188/07, concerning a reference for a preliminary ruling formulated under art. 234 EC by the Cour de cassation (France), received at the Court on 3 April 2007, in the proceedings *Commune de Mesquer v. Total France SA, Total International Ltd* - was delivered on 24 June 2008). S.Țurlea (1989), *S.O.S! natura în pericol*, București, Editura Politică, p.62. [2] Rivera (1982), "Vers de nouveaux droits de l'homme", *Revue des Sciences morales et politiques*, no. 4, p.686, cited by I.Dogaru, D.C.Dănișor (1998), *Drepturile omului și libertățile publice*, Chișinău, Editura Zamolxe, p.48. [3] Art. 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". [4] Principle 1 provides: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature". [5] The Convention recognizes and consecrates attributes of the right to a healthy environment, which results from its very name "Convention on access to information, public participation in decision-making and access to justice in environmental matters". [6] First Additional Protocol to the Convention, Paris, 20 March 1952 (protection of property, right to education, right to free elections, territorial application). Protocol 4, Strasbourg, 16 September 1963 (prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, prohibition of collective expulsion of aliens, territorial application); Protocol 6 on the abolition of the death penalty, Strasbourg, 28 April 1983 (abolition of the death penalty in time of war, prohibition of derogation, prohibition of reservations); Protocol 7, Strasbourg, 22 November 1984 (procedural safeguards relating to the expulsion of aliens entitled to two levels of jurisdiction in criminal matters, right to compensation for miscarriage of justice, right not to be tried or punished twice, equality between spouses); Protocol 12, Rome, 4 November 2000 (general prohibition of discrimination); Protocol 13, Vilnius, 3 May 2002 (abolition of the death penalty, prohibition of derogation, prohibition of reservations, territorial application). C.Bîrsan, M.Eftimie (2006), *Convenția europeană a drepturilor omului*, Editura Hamangiu. [7] B.Selejan-Guțan (2004), *Protecția europeană a drepturilor omului*, București, Editura All Beck, p.154. M.Voicu, (2001), *Protecția europeană a drepturilor omului*. Teorie și jurisprudență, București, Editura Lumina Lex, p.162 et sqq. [8] 9 December 1994. C.Bîrsan (2005), op. cit., *Convenția europeană a drepturilor omului*. Comentariu pe articole, p.622. [9] *Case Powell. Rainer v. the United Kingdom* (1990). B.Selejan-Guțan (2004), op.cit., *Protecția europeană a drepturilor omului*, București, Editura All Beck, p.154. See also: *Buckley v. the United Kingdom* Decision of 25 September 1996, par.74 and par.77; *Coster v. the United Kingdom* (application 24876/94); *Chapman v. the United Kingdom* (application 27238/95); S. Barba v. the United Kingdom (application 24882/94); *Lee v. the United Kingdom* (application 25289/94) and *Jane Smith v. the United Kingdom* (application 25154/94); *McGinley and Egan v. the United Kingdom*, Judgment of 9 June 1998; *Zvolsky and Zvolská v. the Czech Republic*, Judgment of 12 November 2002; *Papastavrou et al. v. Greece*, Judgment of 10 April 2003; *Hattpe et al. v. the United Kingdom*, Judgment of 2 October 2001; *Grand Chamber v. the United Kingdom*, Judgment of 8 July 2003; *Katsoulis et al. v. Greece*, Judgment of 8 July 2004; *Zazanis et al. v. Greece*, Judgment of 18 November 2004; *Taskin v. Turkey*, Judgment of 10 November 2004; *Gorraiz Lizarraga et al. v. Spain*, Judgment of 10 November 2004. [10] C.Bîrsan (2005), op. cit., *Convenția europeană a drepturilor omului*. Comentariu pe articole, p.625. [11] *Kyrtatos v. Greece*, 22 May 2003. In this case the applicants complained that the urban development located in the southeast of a Greek island led to the "destruction of the environment in which they live". *Idem*. [12] (par. 42) [13] (par. 52) [14] (par. 32). [15] (par. 38). [16] (par. 50). [17] (par. 36). [18] Henceforth, the exercise of rights by the civil party allows for the remedy of the material damage, as well as moral damage, direct and indirect damage, caused to collective interests, but also that resulting from harm to the environment. M. Boutonnet (2008), "La reconnaissance du préjudice environnemental", *Environnement- Revue Mensuelle Lexisnexis Jurisclasseur-février*, 12-14; M.Memlouk (2008), "Préjudice écologique pur: du mirage à l'impasse", *Bulletin du droit de l'environnement industriel*, juillet, Collection Lamy Environnement, 697-704; L. 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