

THE RIGHT TO A CLEAN ENVIRONMENT. INTERNATIONAL RECOGNITION OF A HUMAN RIGHT TO A CLEAN ENVIRONMENT BY ECtHR JURISPRUDENCE

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Abstract

European Convention on Human Rights (ECHR) does not specifically recognize a right to a clean environment, nor speaks specifically about environmental issues. However, there are many cases in the ECtHR jurisprudence which indirectly have a linkage with environmental protection.

Often, throughout its decisions, ECtHR considers a positive obligation of States to take all necessary measures to protect human life and thus to provide a suitable environment for human living.

The paper analyses the linkage between human rights and the international environment law and the role of ECtHR jurisprudence in enshrining an international human right in the field of environmental protection.

Keywords: *right to a clean environment, environmental protection, positive obligation of States, ECHR, international human right.*

1. Introduction

In recent years the issue of environmental protection has become of international interest. We must say that at international level and also at European level environment is of general interest. This development of international environment issues led to an increase in environmental cases in the national courts and international courts.

The first attempts to give individuals a human right to a clean environment and to enforce it in courts came in the 1970s, when the Council of Europe draft a Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, dealing with the individual right to a clean environment and unimpaired environment. The efforts failed because this elaboration was not politically acceptable. In 1985, after various debates at academic and political level, European Union adopted a directive which provided for an environment impact assessment for public or private projects which were likely to have a significant impact on the environment¹. Later the directive was replaced by a new directive² which established public access to information on environment as compulsory.

On this background, it has been suggested by the doctrine that we already can speak about an international human right to a clean environment³.

Recently, the three regional Human Rights Courts⁴ had been involved in environmental protection cases as a consequence of the environmental issues that affect more and more humans.

This paper will focus on the jurisprudence of the European Court of Human Rights (ECtHR) which, although does not specifically recognize a right to a clean environment, nor deals specifically with environmental issues, solved many cases indirectly linked to environmental protection. The increase in the ECtHR environmental case law is due to the fact that the exercise of certain Convention rights may be hampered by the existence of damage to the environment and exposure to environmental risks.

Due to the degree of flexibility in interpreting the admissibility requirements set out in Article 34 and Article 35 of the Convention, the Court case law indirectly supports international recognition of a human right to a clean environment.

The essential admissibility requirements concern the status of victim and the exhaustion of domestic remedies, that is within a period of six months from the date on which the final decision was taken. Above all, the case law submitted to the Court must be in regard to human rights violations.

The Convention had been interpreted by the Court in a very dynamic and evolving way⁵, so that the linkage between human rights and the environmental protection determine in an indirect way the qualification of many cases.

2. The admissibility requirements before the ECtHR

According to Article 34 the applications must be submitted by a person, a nongovernmental

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¹ Directive 85/335 on the assessment of the effects of certain public and private projects on the environment

² Directive 2003/4 on public access to environmental information.

³ Malcom Shaw, International law, Fifth Edition, Cambridge University Press, Cambridge, 2003, p.756

⁴ Inter-American Court of Human Rights, European Court of Human Rights, African Court of Human and People Rights.

⁵ Harris, O Boyle & Warbrick, Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014, p. 8.

organization or a group of individuals. The essential condition is that the claimant should be a victim of a violation by one of the High Contracting Parties of rights set forth in the Convention or in the Protocols thereto.

Article 35 (1) of the Convention establishes the admissibility criteria, most of them being procedural, like, the six month⁶ and the exhaustion of all domestic remedies.

Article 35 (3) gives more admissibility criteria such as, manifestly ill-founded applications⁷, and no significant disadvantage⁸, criteria that *require the Court to assess the merits of the case at this preliminary stage*⁹.

Regarding the rules of admissibility, the Court spelt out in many decisions that, those rules must be applied with some degree of flexibility and without excessive formalism¹⁰.

As the Court stated in the decision in Georgia v. Russia (II), the latter criteria apply only to individual applications, not to inter-state cases.

The former European Commission of Human Rights pointed out that the applicant cannot complain as a representative for people in general, because the Convention does not permit such an *action popularis*¹¹. There are though exceptions in this matter,¹² and in some decisions the Court stated that an NGO might act in certain circumstances as a representative for actual victims.

Paragraphs (2) and (3) of the Article 35 of the Convention stated that apart from the conditions from paragraph (1) the admissibility criteria required for the admission of an application are the conditions *ratione materiae, personae, loci and temporis*.

The competence *rationae personae* for an application has to be brought against a High Contracting Partie and that the claimant to have the so called victim status. This is a *sine qua non* condition. The Court established that in order that the Convention to be more effective, the application can be submitted not only by the direct victim, but also by the indirect victim.

The competence *rationae materiae* refers to the fact that the Court will examine only those application that are concerning the rights and the freedoms contained in the ECHR and its Protocols. An exception in this case is when a particular right which is not contained in the Convention is still protected by the Convention conditions, when this right is affecting in an indirect way rights covered by it. It is the case of environmental rights, which even if there are no

settled by the Convention, the breaking of this rights affect human rights.

The competence *rationae loci* means that the applicant must be within the jurisdiction of a contracting state in respect of Article 1 of the Convention.

The last competence, *rationae temporis* is in accordance with general principle of international law, principle of non-retroactivity of treaties, for this purpose the Court does not has the competence to examine complaints that took place before the entry into force or the ratification of the Convention by a High Contracting Partie.

3. International recognition of a human right to a clean environment by ECtHR jurisprudence

European Court of Human Right had recognized by her case-law the relationship between the protection of human rights law and the environment and that in an indirect way environmental degradation affects human rights. This relationship became a concern of the international community, which realized that environment degradation affects the wholl community and as a consequence their rights to a clean environment.

The ECHR is not meant to cover and guarantee the right to a clean environment. However, the Convention and her Protocols indirectly ensure a protection of environmental matters, in this respect the numerous cases before ECtHR creates a real and effective environmental jurisprudence.

The doctrine had stated that individual's right to a clean environment has not a conventional guarantee other than by attraction by another right and under its support¹³.

The Court stated in Loizidou v. Turkey, paragraph 71, *that the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law*.

Even if the violation of the right to a clean environment is not protected by the Convention, because it cannot be invoked directly to the Convention, can be the cause of violation of other rights that are guaranteed by it¹⁴.

In recent years, the Court has examined an impressive number of complaints in which individuals have spelt out that a breach of one of their Convention

⁶ According to Protocol 15 of the Convention, when it will be ratified the period of six months will be reduced to four.

⁷ Preliminary examination of the merit of an application decides if the applicant has failed or not to substantiate his allegation.

⁸ The Court has stated that the violation of a right must attain a minimum level of severity to be admitted by an international court.

⁹ Harris, O Boyle & Warbrick, Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014, p. 43.

¹⁰ Ilhan v. Turkey 2000, ECHR, para.51.

¹¹ X Association v. Sweden 1982, EctHR.

¹² Asselbourg and 78 Others and Greenpeace Luxembourg v. Luxembourg 1999, ECHR; Câmpeanu v. România 2014, EctHR.

¹³ Frederic Sucre, La protection du droit à l'environnement par la Cour européenne des droit de l'homme, Les Nations Unies et la protection de l'environnement, Paris, 1999, p.140.

¹⁴ Mircea Dutu, Dreptul internațional al mediului, Ed. Economica, Bucharest, 2010, p. 159.

rights has resulted from adverse environmental factors¹⁵.

There are a number of human rights that have relevance in the field of environmental protection, and the ECtHR jurisprudence had guaranteed the protection of environment in case-law matters that related to the environment which could affect the right to life, the right to respect for private and family life as well as the home, the right to an effective remedy, the right to property and the right to the peaceful enjoyment of one's possessions.

3.1. Right to life and the environment

The right to life contained in Article 2 confers a positive obligation on States to take all the necessary measures to safeguard human life.

The positive obligation on States may apply in the context of dangerous activities, such as the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites¹⁶.

In the case of *Oneryıldız v. Turkey* the Court found the violation of Article 2 of the Convention. The facts that determinate such decision were that a methane explosion occurred at the municipal rubbish tip in April 1993, killing thirty-nine people who had illegally built their dwellings around it. Nine members of the applicant's family died in the accident. The applicant complained in particular that no measures had been taken to prevent an explosion despite an expert report having drawn the authorities attention to the need to act preventively as such an explosion was not unlikely.

The Court found that there had been a violation of Article 2 of the Convention *in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives*. Regarding its procedural aspect, the Court held that *had been a violation of Article 2 on account of the lack of adequate protection by law safeguarding the right to life*.

On the other hand, in *L.C.B. v. the United Kingdom*, the applicant's father had been exposed to radiation while serving as a catering assistant in Royal Air Force at Christmas Island during four nuclear tests in 1950s. The applicant was born in 1966 and in 1970 was diagnosed with leukaemia. Her medical records suggest a possible cause - „Father Radiation”. The applicant alleged that the State failed in warning and advise parents about the impact of nuclear test on their future children and also for the State failure to monitor her health. The Court considered that there is no violation of Article 2 on the basis that the applicant had not established a causal link between the exposure of her father to radiation and her own suffering from leukaemia.

3.2. The Right to respect for private and family life, for home and environment.

Although environment degradation does not involve a violation of Article 8 of the Convention, in an indirect way environmental factors can directly and seriously affect private and family life.

Article 8 of the Convention protects the „right to respect” various interests and implies an extensive right to environmental matters. The State has the positive obligation to adopt measures the protection of the rights in this article.

In *Kyrtatos v. Greece* case the applicants denounce an illegal act of urban planning that destroyed a swamp protected under the Greek Constitution. Court found that there was no violation of Article 8 on the consideration that assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' houses, a situation which could have affected more directly the applicants' own well-being. In consideration of the second limb of the complaint, the Court found that the disturbances coming from the applicants' neighborhood as a result of the urban development of the area (noises, night-lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

In *Tătar v. Romania*, the applicants, father and son, complain that the technological process used by a company in their gold mining activity put their lives in danger because an important part of company activity was located close to their homes. In January 2000 an environmental accident occurred at the company. A United Nation report showed that a dam had breached, releasing an important quantity of sodium cyanide and contaminated tailings water into the environment. The applicants also alleged that the authorities did not take any action even if one of the applicants, lodged numerous complaints about that their lives were threatened (in particular the health of his asthmatic son). In this case the Court held that there had been a violation of Article 8 of the Convention, on the consideration that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take the necessary measures in order to protect the rights of those concerned, to respect their private lives and homes, and more generally their right to enjoy a healthy and protected environment. The Court pointed out that pollution

¹⁵ Manual on Human Rights and the Environment, Council of Europe Publishing, Strasbourg, 2012, p.8.

¹⁶ *Oneryıldız v. Turkey* [ECHR], paragraph 71.

could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating, authorizing, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health.

3.3. The Right to an effective remedy and the environment

Article 13 of the Convention speaks about the cooperative relationship between the Convention and national legal system. Article 13 establishes the States obligation to protect human rights and gives to individuals the guarantee of effective remedy if the human rights shall be violated.

In *Kolyadenko and Others v. Russia*, the applicants lived near the Pionerskaya river and water reservoir. They were affected by a heavy flash flood in the town Vladivostok because the authorities had released the water without any prior warning and failed to maintain the river channel. They also complained that their homes and property had been severely damaged. The Court held that there had been a violation of Article 2 of the Convention in its substantive aspect and in his procedural aspect, because Russia had failed in its positive obligation to protect the relevant applicants live and that there was not a judicial response to this event for the accountability of the authorities in charge. The Court held that there was a violation of Article 8 of the Convention and of article 1 of Protocol no. 1 (protection of property) of the Convention finding that the responsible authorities had failed to do everything in their power to protect the applicant's rights. About Article 13 of the Convention the Court held that there had been no violation on the fact that the outcome of the proceedings provided by Russian law had been unfavorable for the applicants, and they could not demonstrated that the available remedies had been insufficient for the purpose of Article 13.

3.4. Protection of property and the environment

Article 1 of Protocol No. 1 to the Convention guarantees the right to the peaceful enjoyment of one's possessions. The Court has found that the provisions of Article 1 of Protocol No. 1 apply in cases concerning environmental issues based on the premise that the protection of one's possession needs to be practical and effective. The general interest in the protection of the environment can justify certain

restrictions by public authorities on the individual right to the peaceful enjoyment of one's possessions¹⁷.

It is the case of *N.A. and Ors. V. Turkey* where the Court held that there had been a violation of Article 1 of Protocol no. 1 to the Convention on the consideration that the applicants, even if they had acquired the disputed plot of land in good faith, had not received any compensation for the transfer of their property to the Public Treasury or for the demolition of the hotel

4. Conclusion

Environmental protection is in a close relationship with human rights protection and this was recognized by human rights jurisprudence.

Through the jurisprudence of ECtHR has been recognized an individual right to a clean environment, derived from the circumstances in which Articles 2, 8, 13 of the Convention and Article 1 of Protocol no. 1 to the Convention have been applied.

The developing environmental issues had given reason for ECtHR to expand her jurisprudence in this sense with the condition that the violation of the rule of law should be held only if the applicant is sufficient affected and there is a direct link between the alleged victim and the violation. Also the applicant should have a legitimate interest, meaning that the environmental damage should have a direct impact on him.

The environment protection cannot be separated by the concept of human rights. It was demonstrated that environmental damage has a great impact on humankind, especially in connection with the right to life, right to health, the right of property.

The challenges of the future in protecting the environment and the more and more obvious fact that environmental problems affect in a direct way human rights will determine an intensification of environmental jurisprudence and more evident international recognition of the human right to a clean environment not only by ECtHR but also by others international courts.

Considering this facts it is necessary that the States and international organisations be more receptive to an enforcement of the right to a clean environment, considering the possibility of a new Protocol to the ECHR that regulates directly a human right to a clean environment.

As the Supreme Court of Costa Rica said, any doubt about the interpretation or application of a law should be resolved in favour of nature protection – *in dubio pro natura***.

¹⁷*Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, paragraph 57.

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