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The European Court of Human Rights and the Major Arguments in Environmental Law

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Abstract: *The recognition of the right to a healthy environment is the result of a jurisprudential evolution which, without presupposing the explicit recognition of new rights, called for the extension of the scope of application of already existing rights (protection by ricochet, according to the established formula). In this context, the ECHR played and plays an important role in concretizing the right to a healthy environment, a right that indirectly imposes related implications to other rights that guarantee the essential right, namely the right to life of the natural person. Through its activity, the approach of the ECHR is an original one in that it resorts to hypothetical individual rights to sanction infringements of a collective good, such as the environment. This work is a summary that includes the arguments given by the ECHR for the right to a healthy environment, a right that can only be accessed by exploiting other rights such as: the right to life, the right to safety, etc. Although the right to a healthy environment is not a concept of the European Convention of Human Rights but a concept formed by the Council of Europe, however, the impacts on the environment cannot be directly caused by the violation of the right to a healthy environment, which is not guaranteed by the ECHR, can be, instead, the cause of the violation of other rights protected by the Convention.*

Keywords: *Right to a healthy environment, EU Court of Justice, Human Rights Convention, jurisprudence.*

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Introduction

The recognition of the right to a healthy environment is actually the recognition of a jurisdictional activity of the ECHR, which aims to violate rights that function in connection with this right. In this sense, we are talking about decisions given by the Court such as: the right to life (art. 2 of the Convention), the right to respect for private and family life (art. 8 of the Convention); the property right (art. 1 Protocol 1 of the Convention); the right to free expression (art. 10 of the Convention); the right to a fair trial (art. 6 of the Convention). The right to a healthy environment cannot be treated individually because this right only works in competition with the mentioned rights, all of which are related to the human being.

The recognition of the right to a healthy environment is the result of the jurisprudence exercise which, without presupposing the actual creation of new rights, called for the expansion of the scope of application of already existing rights. However, this right is not found in the text of the European Convention on Human Rights, yet he is present in the spirit of the Convention, beyond its letter. (E. Naim-Gesbert, 2012)

Tangential aspects between other rights and freedoms and a healthy environment

The approach of the ECHR is to use hypothetically individual rights, such as the right to life, to private life, to the respect of the domicile or the property right, to sanction infringements of a collective good, such as the environment. However, the original purpose of the Convention, from which the individualization of these rights actually starts, is to protect human beings from possible abuses by the state or other international bodies, an action that includes the negative obligation of abstinence on the part of the states.

Later, the Court's interpretation evolved from this negative obligation of abstinence imposed on the states, giving a positive content to certain civil and political rights, to ensure a concrete and effective application of the provisions of the European Convention. For example, the protection of privacy requires the state to adopt measures to ensure that these rights are guaranteed. However, the measures are left to the discretion of the states, there being no form of limitation or application.

Viewed from this perspective, the Court expressed itself, in 1985, in the sense that "(...) the choice of measures intended to guarantee compliance with art. 8 in relations between persons depends, in principle, on the margin

of appreciation of the contracting states. In this regard, there are different ways to ensure respect for private life and the nature of the state's obligation depends on the aspect of private life in question" (Decision, *X and Y v. The Netherlands, 1985).* Any positive obligation (civil and political obligations) or negative obligations (the state's obligation to refrain from taking actions that end up violating some rights) must be assumed by the state because regardless of how they are viewed, they also have implications on the relations of private nature between persons. In this situation, we are facing the phenomenon called by the Court a "horizontal" effect, thus allowing the Court to apply the Convention in private law relations, retaining the international responsibility of the state and in case the guaranteed rights are not respected in inter-individual relations.

Several provisions of the Convention, therefore, provide a basis for complaints regarding the violation of the right to a healthy environment precisely because of the application of these connections.

Privacy and home protection

In this sense, we mention, for example, the law regarding the protection of private life and that of the home as one of the most frequent situations in which environmental law is connected. Thus, the right to the environment in the mentioned situation can be viewed from the perspective of the invasion of the right to private life by causing calamities in the private space, but also in the opposite sense, the man in the private area can cause pollution of the environment.

Specifically, environmental protection takes two forms by art. 8 of the Convention which states "Every person has the right to respect for his private and family life, his home and his correspondence".

The first case of environmental pollution, analysed through the prism of Art. 8, in 1990, looked at Heathrow airport near London and two neighbours, Mr Powell and Mr Rayner, whose home was particularly exposed to noise pollution (Decision, *Powell and Rayner v. Great Britain, 1990).* As such, the noise pollution produced by the aircraft taking off from the airport is a clear reason why environmental law damages the quality of the private life of the two.

It is the first time that the Court has introduced the idea that touching a person's home affects the quality of their private life.

In this case, the claimant's request was not accepted by the Court, considering that, according to it, the British authorities took the necessary measures to mitigate the pollution caused by the activity in question, an activity which, moreover, aimed at a general interest. However, the Court's

jurisprudence emphasized the idea maintained in the sense of establishing the link in terms of infringements on the right to respect for the home and private life, respectively the infringement on the quality of life, by establishing a polluting environment. In this sense, see the *Lopez Ostra v. Spain* case, on December 9, 1994 (Decision, *Lopez-Ostra v. Spain, 1994)*, in which for the first time the Court condemned a state, Spain, for violating Art. 8 on this basis.

The case of *Lopez Ostra v. Spain* boils down to the situation in which Mrs. Lopez-Ostra lived with her husband and their two daughters in the city of Lorca (Murcia region of Spain) at a very short distance (only 12 m) from a purification station, built later, a station that collected the waters coming from several tanneries and which had several malfunctions (causing gas emanations, unbearable odours and several illnesses). ECHR showed that "it is self-evident that serious impacts to the environment can affect a person's well-being and prevent him from enjoying his home, affecting his private and family life, even without seriously endangering the health of people in question" (Decision, *Lopez-Ostra v. Spain*, cited above, § 51), the fundamental "formula", which will only be enriched and nuanced by the subsequent decisions of the Court.

Regarding infringements on the right to privacy, we mention the case of *Moreno Gomez v. Spain*, of November 16, 2004 (Decision, *Moreno Gomez v. Spain, 2004)*, in which the plaintiff's complaint had as its object the opening of a new nightclub in the building where she lived, located in a residential area of Valencia, declared acoustically saturated zone. Since 1974, the Valencia Municipal Council continued to grant authorizations for the opening of bars, pubs and discotheques in the vicinity of the neighbourhood where the applicant lived, making it impossible for the residents of the neighbourhood to rest.

In this context, the ECHR noted the fact that exceeding the maximum noise level in the area was detected several times by the municipal services, so it was not necessary to demand that a resident of the area prove what is already officially known by the town hall.

Taking into account the intensity of noise pollution, beyond the authorized level during the night, as well as the fact that this situation has been repeated for several years, the Court decided that Art. 8 was violated, noting that "infringements on the right to respect for one's home do not only concern material or physical violations, such as unauthorised entry into one's home, but also immaterial or incorporeal violations, such as noise, emissions, odours or other interferences".

Under the same reasoning, we also find the solution of the mentioned Court in the case of *Fadeyeva v. Russia*, from June 9 (Decision, *Fadeyeva v. Russia, 2005)*. To summarize the case, Ms. Fadeyeva's apartment was located within a sanitary safety zone located around a major steel plant where, in theory, no construction would have been allowed. Given the serious pollution found, in the Court's opinion, Ms. Fadeyeva's quality of life at home was affected. The state had a positive obligation either to move the persons concerned out of the dangerous area or to ensure the reduction of polluting emissions.

The notion of domicile as an aspect of intimate location has quite varied meanings for the Court. Thus, in the case of *Brânduşe v. Romania*, (Decision, *Brânduşe v. Romania, 2009)* a man successively detained in the penitentiaries in Arad and Timisoara claimed that his detention environment was contrary to art. 3 (prohibition of inhuman and degrading treatments) and art. 8 (right to respect for private life) of the Convention.

In this case, the Court found that Art. 8 of the Convention was violated due to the placement of an old landfill near the penitentiary in Arad, which caused strong unpleasant odours and affected the health of the inmates: "the quality of life and well-being of the person in question was affected in a way that affected his private life and which was not only the consequence of the deprivation of liberty regime".

Strong olfactory pollution therefore attracts the applicability of art. 8 and this, even though "the plaintiff's health has not deteriorated". After this finding, the Court emphasized that "the authorities are responsible for the emanations and olfactory pollution" in question, in particular by the fact that they did not take "measures for the effective closure of the site", although the expertise demonstrated its incompatibility with environmental requirements. Considering this finding, to which is added the difficulties of prisoners' access to the mentioned expertise, the Court decided to condemn Romania for the violation of Art. 8 of the Convention.

The connection supported by the Court in the context of the invocation of Article 8 of the Convention is explainable, in the sense that the right to a healthy environment is valued by supporting other fundamental rights.

Under the same aspect, Romania is condemned in the case of *Tatar v. Romania* of January 27, 2009 (Decision, *Tatar v. Romania, 2009)*. Here the Court will specify that "the positive obligation to take all reasonable and appropriate measures to protect the rights that the plaintiffs can invoke based on para. (1) of art. 8 implies, first of all, for the states, the primary

duty to establish a legislative and administrative framework aimed at the effective prevention of damage to the environment and human health".

Thus, it is mentioned in the case, that on January 30, 2000, as a result of the failure of the dykes of the sedimentation basins of the exploitation of a gold and silver mine in Romania, more than 100,000 m3 of water containing sodium cyanide and heavy metals were discharged into the rivers, reaching the Black Sea through the Danube Delta.

Mr. Tătar and his son lived, at the time of the facts, in the city of Baia Mare, in a residential neighbourhood located near the extraction plant and the settling basins. Mr. Tătar the father argued before the ECHR that the technical procedure used by the company Aurul Baia Mare SA represented a danger to his life and that of his son, who developed chronic asthma. He also complained about the passivity of the authorities in the face of that situation and his countless complaints.

Rejecting the basis of the violation of the right to life, the Court examined the request through the lens of Art. 8 regarding the right to respect for private life and home. She decided that the right of the two plaintiffs to a healthy and protected environment was violated by Romania. The decision is the first in which Romania was convicted by the ECHR in a case related to environmental protection.

A fundamental decision of the ECHR enshrines another important ground that can be invoked to remove environmental impacts, represented by Art. 2 para. (1) of the Convention which provides that "The right to life of every person is protected by law".

Therefore, by the Court's decision in the mentioned case, the protection of a healthy environment is justified about the health aspect of the plaintiffs.

Limiting the use of one's property at the expense of the right to a healthy environment

Another aspect that surprises the Court vis-a-vis environmental law is the limitation of the use of the good in the context of establishing a healthy environment. In this sense, in the case of *Hamer v. Belgium (*Decision, *Hamer v. Belgium,2007)*, the Court will explicitly strengthen its position. Mrs Hamer, who inherited her parents' holiday home, built without a permit in a forest, was sentenced to demolish the building, although the Belgian authorities had known about the situation for 27 years without reacting.

The Court argued that "the environment is a value whose defence raises a constant and sustained interest in public opinion, and therefore in public authorities. (...) The public authorities thus assume a responsibility

that should materialize through their timely intervention, in order not to deprive of any effect the provisions regarding the protection of the environment that they have decided to implement".

The right to a healthy environment is also justified by connection with the right to free expression or the right to association and assembly.

Freedom of expression and a healthy environment

Violation of freedom of expression, recognized by art. 10, was held in the case of *Noel Mamère v. France (* Decision, *Mamère v. France*, 2006) related to the conviction for defamation of Noel Mamère, for the statements made against the director of the Central Service for Protection against Ionizing Radiation (SC P.R.I.) in the case of the Chernobyl accident. The Court ruled that, given the "extreme importance of the debate of general interest, in which the comments in question were included, the conviction of the applicant for defamation could not be considered proportionate, and therefore "necessary" "in a democratic society", in the sense of art. 10 of the Convention".

Freedom of assembly and freedom of association versus the right to a healthy environment

According to Art. 11 paragraph (1) of the Convention, "Every person has the right to freedom of peaceful assembly and freedom of association, including to form trade unions with others and to join trade unions for the defence of his interests".

The ECHR mentioned the violation of freedom of assembly and association, guaranteed by art. 11, in the case of *Zelini Balkani v. Bulgaria*, of April 12, 2007 (Decision, *Zelini Balkani v. Bulgaria, 2007)*, about environmental protection.

The petitioner, which has the status of a non-profit environmental protection organization based in Plovdiv, Bulgaria, supported its objectives through its organizational purpose in a confrontation with the local authorities. At one point, the municipality of Plovdiv started an action to clean the banks and the bed of the river Maritza, which runs through the city. The action involved the uprooting and cutting of trees and other plants that blocked the flow of the river.

The petitioner considered that the municipality's actions violated domestic environmental protection legislation and that the disorganized uprooting and cutting of trees and plants could disturb the ecological balance of the river. The organization thus informed the municipality of its intention to hold a public meeting the following day in front of the municipality. The

purpose of the gathering was to protest against the municipality's actions and to demand that the uprooting and unorganized cutting of trees and plants near the river be stopped because they were destroying the habitat of rare and endangered bird species. The municipality did not allow the organization of the assembly, and its actions continued unhindered.

The applicant organisation challenged the municipality's ban in court. Under Art. 11 of the Convention, the Court noted that the Regional Court of Plovdiv found that the municipality's ban was issued in violation of the law. Consequently, the ban represented an interference in the exercise of the applicant organization's right to free assembly. The Court found in this case the existence of a violation of Art. 11 of the Convention.

Conclusions

As can be noted, several articles in the Convention fold very well in combination with the right to a healthy environment, which allows the Court to find violations of rights and freedoms that are about the right to a healthy environment.

Although there is currently vast legislation regarding the protection of the environment, the abundance of the Court's jurisprudence shows that the evocation of human rights to achieve environmental protection and sustainable development is the path adopted by more and more claimants.

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