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Alexandru CONSTANTINESCU [1]

Abstract

Due to the increasing importance of living in a healthy environment, in the context of enhanced pollution nowadays and due to the fact that the European Convention for Protection of Human Rights does not consider this human right, The European Court of Human Rights (E.C.H.R.) has decided its enclosure in the sphere of application of the 8th article of Convention, together with the right to a private life, to a family life and to a private home. Therefore, the jurisprudence of E.C.H.R. has succeeded to replace the non-existence of this right among those which are established by the Convention, thus ensuring an efficient protection of this essential human right.

Keywords:

healthy environment, The European Court of Human Rights, human right, pollution

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I. The affirmation of the right to a healthy environment worldwide

When *the European Convention on Human Rights (The Convention)* was adopted (Rome, 1950) it failed to include in the elaborated purports the phrase "the right to a healthy environment", primarily because at that time the environmental issues did not represent a major concern since the pollution was not global.

The interest for the juridical approach of the environmental issues appeared later on, namely in 1972, during the first World Conference of the United Nations for Environment and Development held in Stockholm which was attended by 114 states. The most important document adopted at this conference was the *Declaration on the environment* which enacted 26 principles regarding the rights and the obligations of the states in that field and elaborated the ways of development of international cooperation in the field (Dutu, (2007): 56). The importance of the document rests in the fact that it affirmed for the first time the relation between the environment protection and the human rights. Thus, the *1st Principle* of the document stipulates: *"Man has the fundamental right to liberty, equality and proper living conditions, in a quality environment which allows them to live in dignity and prosperity. They have the sacred duty to protect and improve the environment for the present and future generations (…)"(*Popescu and Popescu, (2002): 121). However, the document does not directly acknowledge the right to a healthy environment.

Two decades after the Stockholm Conference *the 2nd ONU World Conference for Environment and Development in Rio de Janeiro (1922)* took place[1]. Even if they once again failed to acknowledge the right to a healthy environment, the documents of the *Rio Conference* established a series of rights regarded as procedural rights derived from the material right to a healthy environment: the right to have access to justice in case of environmental matters (Nitu, (2005): 45).

The first international juridical document that explicitly established the right to a healthy environment was adopted during the *Conference of the Organization of African Unity*[2] in 1981 under the name of "The African Charter on Human and People's Rights", an international document with a regional character which provides in art. 24 that "all peoples have the right to a general satisfactory environment, proper for their development".

Continuing the regional direction of adopting new juridical instruments that establish the right to environment, the *American Convention on Human Rights*,

[2] The Organization of African Unity (O.A.U) with its headquarters at Addis Abeba (Ethiopia) was founded in 1963 by 32 African nations on order to promote African unity and solidarity. On July 11th 2001, O.A.U. was dissolved and in July 2002 it was replaced by the African Union modeled after the European Union.

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held in San Salvador in 1998 established in an "*Additional Protocol*", art.11, paragraph 1, the right to a healthy environment, stipulating that "every person has the right to live in a healthy environment and benefit from the basic public services", as well as the obligation of the states to "promote the protection, the preservation and the improvement of the environment" (art.11, paragraph 2).

The convention on access to information, the public participation in environmental decision-making and the access to justice in environmental matters signed by Aarhus in 1998[3] represents a major contribution in the affirmation of the justiciability of the right to a healthy environment in Europe (Dutu, (2008): 327), being particularly important because even in the preamble it acknowledges that *"every person has the right to live in an environment proper for their health and welfare (…)"*. The *Convention* considers that: "in order to be able to keep this right (…) the citizens should have access to information, and should be entitled to participate in the decision-making process and have access to justice in environment matters (…)"Popescu and Popescu, 2002, p.121)[4]

After the Stockholm Conference from 1972, the procedural guarantee of the right to a healthy environment and its acknowledgment as an independent right became part of the common constitutional traditions. Thus, all the constitutions of the European states, established or revised after 1972, included provisions related to this right which was considered as part of the 3rd generation of the human rights, the rights of solidarity.

In spite of the fact that there is no legal document in Europe to establish and guarantee the fundamental right to a healthy environment, it is invested with the status of essential element of the constitutional traditions of the European states (Dragomir and Dragomir, (2006): 135).

II. The guarantee of the right to a healthy environment by article 8 of the *European Convention on Human Rights*

In spite of the fact that the right to a healthy environment has been the subject of various international regulations, the importance of the Convention and of the jurisprudence of the *European Court of Human Rights* (*the Court* hereinafter) in this filed is related to determining the extent to which the right to environment has been turned into a subjective law protected by the *Convention*

[3] Ratified by Romania by Law no.86/2000

[4] In respect to the coverage of the justiciability of the right to a healthy environment, the Convention, more precisely art.9 (the Access to Justice) stipulates three situations: the access to justice to ensure the access to information, the access to justice to ensure public participation to environmental decision-making and the access to the administrative or juridical procedures to make an appeal against the acts or omissions of the private people and public authorities that transgress the provisions of national environment legislation.

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which may be referred to in relation to the correlative obligation of the states in front of the *Convention's* authorities (Bîrsan, (2003): 11).

Given the importance of this right and the need to cover the fact that it is not explicitly established by the *Convention*, the *Court* used the technique "of indirect protection", which has allowed for the extension of the protection of certain rights guaranteed by the *Convention* to rights which are not expressly stipulated therein. Thus, covering the significance of art. 8, paragraph 1 which acknowledges the right of every person to respect of their private life, of their family life, of their domicile, and of their mail, as well as of art. 6 paragraph 1 which guarantees the right to a fait trial, the jurisprudence of the *Court* stipulates the guarantee of the right to a healthy environment as an independent right, in three key areas:

- its reference to the content of the right guaranteed by art.8 paragraph 1 of the Convention;
- the existence of a right to information on environmental quality and risks;
- the existence of a right to a fair trial in cases involving the trespass of this right.

Over time E.C.H.R. has developed a broad flexible conception on the notion of "private life" within the meaning of art.8 paragraph 1 of the *Convention* and it was this kind of interpretation that allowed for the "indirect" extension of the right to a healthy environment.

In this context, an infringement of the right to a healthy environment cannot be used as such in front of the *Court* because it is not guaranteed *in terminis* by the *Convention,* but indirectly it has been associated with the right to private life, being regarded as part of this right. In this way, an "indirect" protection of the right to a healthy environment was established and the individuals were given the opportunity to appeal to the trespass of art.8 paragraph 1 whenever they believed that their right to a healthy environment was violated.

On this line, ever since the 70's, the Court had started to admit gradually and more explicitly that pollution affects the privacy right of people (Berger, 2005: 170).

The reason why the right to a healthy environment has been referred to by means of art. 8 paragraph 1 in the field of action and application of the Convention was *Lopez-Ostra versus Spain*[5].

In this case, the complainant complained in front of the intern court about the pollution determined by the smell, noises and gases released by the water-treatment plant next to her home which has made her life environment unbearable, causing her and her family serious health problems. In front of the *Court*, the complainant considered herself the victim of the violation of the right

[5] E.C.H.R. decision from 09.12.1994, request no.16798/90, available at www.echr.coe.int

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to home respect, which made her private family life unbearable (Berger, (2005): 455). Solving the case, the Court considered that the serious damage of the environment might have interfered with her private family life, without necessarily endangering her health seriously. In all these cases we should consider to keep a proper balance between the interests of the person and those of the society as a whole.

By distinguishing between the impact of the environmental conditions on the human health and their influence on the life quality the notion of private life has been interpreted as one which assumes a certain comfort, in the absence of which the respect of the right to private life, to family and to domicile would not be effective, but only fictitious and it has been acknowledged that the right guaranteed by art. 81 of *Convention* includes the right to live in a healthy environment as well (Nitu, (2005): 45).

Thenceforth, the Court admitted that the complainant suffered some damage as a result of the violation of art. 8, namely, the market value of the apartment went down and urged the move to another apartment which resulted in various expenses and inconveniences.

The decision of this case is important because it imposes to the states-parties of the *Convention* a positive obligation namely to take the necessary measures in order to ensure the effective protection of the right stipulated by art.8 paragraph 1 in respect to the right to a healthy environment, including possible counter-actions of the third parties.

The doctrine (De Salvia, (2003): 163) considers that in order to be guaranteed by the *Convention* the environmental matters, as well the individual rights of man have to be proved within the European system of juridical protection of the human rights.

III. The guarantee of the right to a healthy environment by means of the right to information on the pollution risks and by means of the right to a fair trial

In order to ensure effective protection of the right to a clean environment, the E.C.H.R. jurisprudence established a series of guarantees of the right to a healthy environment, namely: the right to information on the pollution risks and the quality of the environment and the right to a fair trial.

The enactment by means of the E.C.H.R. jurisprudence of the right to environmental information, as a procedural guarantee of the fundamental right to a healthy environment is in accordance with the regulation of this issue by means of the *Aarhus Convention*[6] from 1998.

[6] The convention regarding the access to information, the participation of the public in the decision-making process and the access to justice in environmental matters ratified in Romania by Law no.86 on May 10th 2000 published in the Official Gazette, no.224/May 22nd 2000.

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According to art.5 paragraph 1, letter c, of the Aarhus Convention "in case of any imminent threat on human health or on the environment caused by human activities or due to natural causes, all the information that may give an opportunity to the public to take measures to prevent or improve the negative effects caused by that threat and which are held by a public authority must be disseminated immediately and without delay to the public that may be affected".

The right to information, as a guarantee of the right to a healthy environment has been mentioned for the first time in the case of Guerra vs. Italy[7].

The complainants claimed that the fact that the authorities failed to take the measures of information on the risks and actions that had to be undertaken in case of major accidents represented an attack on the freedom of information, as guaranteed by art. 10 of the *Convention*. The *Commission* considers that: *"informing the public is undoubtedly one of the essential tools for the protection of the welfare and health of the populations when the environment is in danger"*.

The importance of this case rests in the fact that although the trespass of art.10 of the *Convention* was called to record, the *Court* decided to examine the cause under art. 8, mentioning that Italy violated this article of the *Convention* in that the authorities had failed to provide the essential information regarding the major risks that the claimants faced due to the functioning of the objective.

This decision resulted in a progress of the E.C.H.R. jurisprudence in terms of environmental law, meaning that after it was established in the case Lopez-Ostra vs. Spain that the state had the positive obligation to take measures to stop or reduce the pollution, the *Court* went further, stating the obligation of the state to provide information on the serious pollution risks.

The enactment by means of the European jurisprudence of the right to environmental information, as a procedural guarantee of the fundamental right to a healthy environment is in accordance with the regulation of this issue by the Aarhus Convention from 1998. This guarantees the right to have access to information although the solicitor hasn't declared an interest in this, as well as the right of the public to be informed by the public authorities on the environmental issues.

On the other hand, according to art.61 of the *Convention*, any person has the right to a fair public trial, within a reasonable period of time by an independent and impartial court established by law, which will decide on the trespass of the rights and obligations in regard to the protection of the environment.

The *Convention* and especially the E.C.H.R. jurisprudence have showed that the right to a healthy environment has to be perceived, interpreted and guaranteed not as an abstract right but as an effective right, and this

[7] E.C.H.R., decision from February 19th 1998, available at www.echr.coe.int

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effectiveness may be ensured by establishing special procedural guarantees, among which the right to a fair trial has a very important role.

The special attention to the fundamental right to environment by establishing the procedural guarantees is justified by the importance of this topical right, which has been enacted in the jurisprudence by referring to the content of other rights expressly acknowledged and guaranteed, which points out the connection between these fundamental rights of humans and the right to a healthy environment.

IV. Conclusions

Although in the past the quality of the environment was irrelevant and mostly ignored, nowadays, thanks to public awareness, it has allowed for the right of humans to a healthy environment to increasingly acquire an independent status. Being a right belonging to the 3rd generation, the right to a healthy and ecologically balanced environment proved to have the most rapid evolution in its generation in terms of its guarantee and effectiveness in court. In this respect, one may easily notice its constitutionalization in the states only in a few decades, by promoting an appropriate development regionally and internationally.

At the same time, the emergence of global environmental problems (the greenhouse effect, the decrease in thickness of the ozone layer, deforestation, etc.) contributed to the consolidation of its status as a fundamental right and as the right to survival of mankind (Dutu, (2008): 338). In terms of the jurisprudential enactment, the right to a healthy environment was affirmed by means of the interpretation of art.8.1 of the *European Convention on Human Rights*, without being expressly acknowledged in the field, as part of the right to privacy and family life, by assigning it an "indirect" protection.

The E.C.H.R. jurisprudence pointed out especially the procedural guarantees of this right, of the right to information on the risks of pollution and environmental quality, the right to a fair trial, and last but not least, the obligation of the States to take "positive steps" to ensure the effectiveness of the right to a healthy environment. In addition, we should mention the specific way in which the right to a healthy environment has been assimilated to the jurisprudence of the *Court,* by using the content of other rights already acknowledged and fully guaranteed and by emphasizing its affinity with other fundamental human rights. Referenced with regulations of positive law, these jurisprudential findings prove that the right to a healthy environment, the right to health and the right to life intersect, influence one other, while the attacks to the environment may affect a person's wellbeing and quality of life, which may further affect that person's private life.

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References

Berger, V. (2005) *Jurisprudenta Curtii Europene a Drepturilor Omului (The Jurisprudence of the European Court of the Human Rights),* 5th Edition, The Publishing House of the Romanian Institute of Human Rights, Bucharest;

Birsan, C. (2003) Protectia dreptului la viata privata si familiala, la corespondenta si la domiciliu in Conventia Europeana a Drepturilor Omului(The Protection of the Right to a Private and Family Life, to Mail and Domicile in the European Convention of the Human Rights), in *Supplement of the Pandectele Române magazine*, no.1, pp.11-72;

De Salvia, M. (2003) Mediul înconjurator si Conventia Europeana a Drepturilor Omului (The Environment and the European Convention of the Human Rights), in *Pandectele Romane magazine*, nr. 6, pp.162-172;

Dragomir, I., Dragomir, G. (2006) Dreptul la un mediu sanatos ca principiu general al dreptului comunitar (The Right to a Healthy Environment as a General Principle of Community Law), 2006, in *Magazine of Public Law*, no.3, pp.134-138;

Dutu, M. (2008) *Tratat de dreptul mediului (Treaty of Environmental Law)*, 3rd edition, C.H.Beck Publishing House, Bucharest,

Nitu, D. (2005) Dreptul la mediu (The Right to Environment) in *Themis magazine- the magazine of the National Institute of Magistracy*, no.3, pp.45-56;

Popescu, D., Popescu, M. (2002) *Dreptul Mediului. Documente si tratate internationale" (Environmental Law. International Documents and Treaties)*, vol.1, Artprint Publishing House, Bucharest, 2002;

The European Charter of Human Rights: http://www.echr.coe.int.

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