International Journal of Academic Research in Business and Social Sciences
2016, Vol. 6, No. 9
ISSN: 2222-6990

The Fundamental Human Right to a Healthy Environment

Georgiana-Florina Ionescu
Lawyer, The Bucharest Bar, Bucharest, Romania,
E-mail: ionescuavocat@yahoo.com

DOI: 10.6007/IJARBSS/v6-i9/2326 URL: http://dx.doi.org/10.6007/IJARBSS/v6-i9/2326

Abstract

The development of environmental law as a new instrument of protecting the environment necessary to the health of people and to life is of course involved in recognizing the fundamental values consecrated in the declarations of rights and public freedoms. Environmental law has led to lengthy debates regarding the existence of the human right to an adequate environment.

Internationally, numerous declarations establish the recognition of the human right to an environment, as an expression of the fundamental importance of the environment to people. In this sense the Stockholm declaration (1972) illustrates that *"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 (Principle 1)"*.

Keywords: Legal standing, direct/indirect prejudice, direct damages

1. Introduction

The Romanian Constitution, adopted in 1991, although a modern constitution which had access to other regulations at a constitutional level provided by other countries, did not go as far as enumerating among the other fundamental rights and freedoms the right to an environment. However we can affirm that the constitutional provisions were conductive to such an acknowledgment. In this regard it can be noticed that the recognition of some rights such as: the right to information (art.31), the right to protection of health (art.33), the right of association (art.37), the right of petition (art.37) on the one side and restriction on the exercise of certain rights or freedoms (art.49) on the other for *"...the defense of health, for the prevention of the consequences of a natural disaster or extremely grave disaster."* actually represent aspects of the content of environmental law.

After more than a decade, The Constitution revised through referendum in 2003 consecrates, in art. 35, the right of every person to a healthy and balanced environment. This consecration differentiates the right to a healthy environment from the right to health *ab initio,* offering a much needed individualization. As far as art. 35, paragraph 2 is concerned, that being the obligation of the state to provide the legislative framework for the exercise of such right,

we consider it necessary to emphasize the fact that it preceded the dispositions in the second paragraph.

2. The fundamental human right to a healthy environment

From the way the text of the Constitution is formulated it is easy to draw the conclusion that this right is recognized to both private entities individually and to legal entities, because the latter also benefits from the same legal guarantees in exercising this right. Moreover, the bearer of this right is not only Romanian citizens, but any individual subject of law. But some authors consider that the phrase "persons" used in article 35 of the Constitution is inadequate and doesn't fully cover the issues of environmental protection, due to the fact that the constitutional norm doesn't explicitly refer to persons who don't live on Romanian territory, and instead are passing through or are traveling etc. This is why it would be necessary to establish to which extent the phrase "persons" can be stretched, through replacing this term so that even foreign citizen or stateless person, during their time spent on Romanian territory should bear the obligation of protecting the environment (Nedelcu and Surdescu, 2010). In this regard, we can show that in art. 5 of the framework law for the protection of the environment no. 137/1995 provided, ever since it was adopted, expressly that "*The State recognizes the right of all persons to a healthy environment"*, providing also a series of guarantees.

The guarantees refer to:

a) the access to information regarding environmental quality, which after the modification and completion though G.E.O. no. 91/2002, states the following: "access to information regarding the environment while respecting the conditions of confidentiality provided by the legislation in force";

b) the right of association in organizations defending environmental quality;

c) the right of being consulted in the decision-making regarding the development of environmental policies, legislation and regulations, the issuing of environmental agreements and permits, including for territorial and urban planning;

d) the right to appeal directly or through some associations to the administrative or judicial authorities in view of prevention or in the case of direct or indirect damage occurrence;

e) the right of indemnification for the damage experienced.

The right to a healthy environment has a complex normative content, being at the same time both a subjective right as we as an obligation for any individual subject of law. In this sense, the law provides that "environmental protection is the obligation and responsibility of central and local public administration authorities and all private and legal entities" (art. 6). Important provisions that protect the ambient environment result from all Romanian legislation, but if we critically analyze the legal issue we ascertain that in the present, the roman law of the environment is constituted by a sum of diverse regulations, but not fully correlated, incomplete in some aspects that aren't yes systematically disposed. The general principles don't fully find their meanings in the area of specific regulations. In a statistic it is shown that approximately 1000 legislations are in force, many of which being adopted after 2001. This statistic draws a couple of important conclusions. We can ascertain first and foremost that the main regulatory authority in the environmental protection domain is the executive power, the

direct intervention of the parliament remaining secondary. The explication resides in the fact that, on the one side, the adoption procedure of the law is too slow in relation to the pressing issue of the regulation in the domain of ecology, and on the other side the accentuated technical aspect of the environmental legislation, which requires a close elaboration, with substantial participation from specialists. Secondly, the important role international regulation plays is noticeable, both through the consistent number of international acts, adopted in Romania, and through the fact that according to the Constitution treaties ratified according to the Constitution are part of the internal law (Fainasi, 2011).

If all these legal guarantees are more or less commonplace, being included in disparate fashion in other regulations pertaining to civil law, administrative law, constitutional law and other branches of law, it seems worthy of mentioning especially the right of every private individual, directly or through any association, to gain active procedural legitimacy for the prevention or repair of any environmental damage suffered, that normally cannot be included in the category of direct damage. Through this, our legislation has become a law pioneering in repairing environmental damages suffered by "goods pertaining to the environment" which, by their nature generally cannot be appropriated and therefore cannot be considered objects of a direct prejudice that can be found in the assets or heritage of any private or legal entity. As far as the legal standing *ex lege* is concerned, according to the aforementioned art. 5, for private entities we can plead the idea of a "Actio popularis" – for common interests, but the actions in this category could only be directed against a general act, to the extent that its dispositions made reference to their own legal position. On the other hand, it must be mentioned that jurisprudence broadened the definition of the term "legal problem", admitting that certain "ideal interests" can be defended in the court of law.

The framework law for the protection of the environment grants through this legal standing a broad access to justice for the protection of the environment, but at the same time it also grants a real guarantee for defending the right, recognized and now, guaranteed through the constitutional dispositions "to a healthy and ecologically balanced environment". The law has consecrated the "principles and strategic elements" which help the steadfast development of society and the way of evaluating the impact on the environment and the authorization of social and economic activities, establishing sectoral regulations for protecting the environment (Duțu and Duțu, 2015).

In this case we can also set forward the opinion of professor Vlad Constantinesco regarding the notion of "interest" to file an application in court, notion which was substantially attenuated ever since the violation of a right was retained, though a literal interpretation, as an "interest" by the administrative court at the end of the 19th century, starting from the idea of circles of interest. According to this idea, it is not necessary for a right to be individual and refer specifically to the complainant. Pertaining to a category of people being sufficient, with the exception of a simple affiliation to a national community. Furthermore, the interest of addressing justice was largely recognized to legal entities, according to their object, to associations, syndicates etc. As far as the regulation of the previously referenced Romanian law is concerned, it is believed that it concerns a legal standing as far as environmental damage is concerned. This is also emphasized by the dispositions in art. 87 (Law no. 137/1995) according

to which non-governmental organizations acquire a legal standing, being able to introduce legal actions regarding the preservation of the environment, regardless of who suffered the damages.

It must be emphasized that in the dispositions in art. 35, paragraph 3 of the Romanian Constitution expressly regulating the duty of all private and legal entities of protecting and alleviating the surrounding environment. Thus, at a first glance, as far as private entities as bearers of the fundamental right to a healthy and at the same time ecologically balanced environment are concerned, they are also bearers of the obligation of protecting the environment. As bearers of this obligation, they cannot plead to be exonerated of the liability, if they through the activities they conduct are causing a prejudice, and they cannot plead that through the respective action they did not violate certain concrete express dispositions provided by legal regulations.

They did not respect their obligation of protecting the environment. These constitutional dispositions can be found in art. 6 of the framework law, which, through the modifications brought on by the G.E.O. no. 91/2002 specifies: "The protection of the environment constitutes the obligation and responsibility of the central and legal public administrative authorities as well as of all private and legal entities."

Precisely because the constantly acknowledged importance of this right, it has gained appropriate legal protection through the recognizing and sanctioning of what the doctrine designates as "environmental crime".

This environmental crime was defined as "a socially dangerous act, committed with guilt, that threatens the values and interests in the environmental protection domain, consisting in the pollution of the environment or in the disruption of pollution-preventing activities, or of reducing and eliminating the effects of pollution" (Lupan, 2009).

Even though the European Convention on Human Rights doesn't expressly consecrate the right to a healthy and ecologically balanced environment, the European Convention on Human Rights has recognized indirectly in some cases, damages done to the right to a healthy environment. Although initially some specialists suggested invoking the right to health and well-being which stemmed from the right to life, recognized in art. 2 of the Convention, for this purpose the Court preferred nevertheless to turn to art. 6.1. Which guarantees the right to a fair trial and art. 8.1. which recognizes the right of every person to have their private and family life, and their home respected. It can be assessed that presently ECHR jurisprudence has crystalized in what guaranteeing the protection of the environment as an individual right is concerned under three main aspects: its appurtenance to the content of the right guaranteed by art. 8.1 of the Convention, the existence of a right to being informed regarding the quality and dangers of the environment and the existence of a right to a fair trial in this (Duțu, 2004).

ECHR jurisprudence has developed a broad outlook, nuanced and interpretable of the notion of "private life" according to art. 8.1 of the European Convention, which has allowed it to be easily extended in relation to the fundamental right to a healthy environment. For example, in the case "Niemietz against Germany" the European judge extends the meaning of this notion also to "the right of the individual to establish and develop relationships with his

fellows, covering, consequently the professional or commercial activities, as well as the places where they are exercised."

The European Court on Human Rights made it so this right could be included in the scope of protection of art. 8.1 on account of the case "Lopez-Ostra against Spain". Through the given interpretation, the European judge considered that every person's right to "respect for one's private and family life, and home" included the right to live in a healthy environment.

The guaranteeing of the protection of the environment as an individual right was assured by the Court also under the form of a right to being informed regarding the pollution risks and the quality of the environment. In this sense through the case of "Guerra and others against Italy" the Court declared a violation of art. 8 of the Convention due to the fact that the authorities omitted to transmit essential information related to the major risks caused by the construction of a chemical plant near their village.

ECHR jurisprudence went even further and established through the decision given in the case of "Mc Ginleyand Egan against Great Britain" like when a government commits to conduct dangerous activities, nuclear experiments, susceptible to having "nefarious hidden consequences" on the health of the people who participate in them, respecting art.8 presupposes implementing an "effective and accessible procedure" which permits those interested to request to have communicated all the pertinent information.

The third aspect of guaranteeing the right to a healthy environment in the Court law is that of perceiving it as a preliminary condition for making "a just satisfaction" available to the right, as specified in art. 50 of the Convention.

The case "Zander against Switzerland" from the 25th of November 1993 reflects the operating mechanism of the third aspect of the protection given by the Court to the right to a healthy environment.

The reasoning of the court refers to the fact that the right to a fair trial specified in art. 6 of the Convention are conditioned by the existence of a contestation of "the civil rights and obligations". Thus, the court states a general law according to which art. 6 is applicable to any contestation containing an object of heritage and it is based on any damage brought to a right of such nature. As the right to property is a "civil" right as far as the Convention is concerned, any damage brought to it can serve as a preliminary and obligatory condition in order to obtain fair trial for a right. The conclusion which can be drawn from the aforementioned is that any damage brought on to the right to property though acts of pollution opens the way to action in front of the European Court on Human Rights, based on art. 6 of the Convention.

Concerning the protection of this right at a European level, in the spirit of the Convention what can be noticed is an extension of the notion of victim of an infringement of a right recognized by the Convention. In the case of protecting the right to a healthy environment, the European judge recognizes the quality of victim of the potential victims. This extension depends on what is specific to this right, that being that in order for a protection to be needed by authorities, it is sufficient to ascertain the existence of a risk.

In the case of "Guerra and others against Germany" the Commission referred to the notion of potential infringement of the Convention in the sense that the complainant had the right to sue on the basis of the risk of industrial property. Through the same case it was

considered that "article 10 of the Convention thus imposes to the states not only to make information regarding the environment accessible to the public but also imposes positive obligations of collecting, elaborating and broadcasting information that by nature are not directly accessible and that can't be otherwise be made known to the public except through public authorities.

Thus it follows that the environment represents an economic value, and in consequence when damages are done to it the venal value of the good is diminished. The perception of the environment as a heritage was instated by the Court already from 1993 in the case of "Zender against Sweden". The case regarded the expansion of an industrial waste deposit by the neighbors of the complainants, expansion that led to the pollution of the water in their well. Through the decision given by the Court it was stated that "Mr. and Mrs. Zender can claim that they had the right, by virtue of the Swedish legislation, to protection against the pollution of their well, through the action of competent authorities against the owner of the deposit" (Duțu and Duțu, 2011).

This right is civil in nature, being tied to the right to property; in consequence the litigation has as an object "their right to enjoy drinking water provided by the well, as an element of their right of property over the land".

"In what concerns the nature of the right in question, the commission showed that this right is tied to the quality of the environment on the land of the complainant and that the existence of certain inconveniences or risks for this environment can very well be an element which can affect in a major way the value of the land."

It was also reflected in the ECHR jurisprudence in the case of "Pine Valley Developments Ltd. against Ireland" through the decision made in the 29th of November 1991 that a novel element was considered to exist in the structure of the right to property, the urbanism certificate.

Thus the Court has reached the conclusion that issuing an urbanism certificate by national competent authorities, upon which the complainant trading companies bought a terrain upon which they wished to erect a construction constitutes "a legitimate hope" of accomplishing their arrangement plan for that land so that this certificate represents, by referring to art. 1 of Protocol no. 1 "an element of the right to property".

3. Conclusions

In what relations between national law and European law are concerned, the influence the latter can have upon future court orders, what we remark is the rising tendency of the role of the European court practice determined by the appurtenance of Romania to the European Union on the one side, but also as a result of numerous convictions of our country determined by violations of the European Convention on Human Rights, stemming from the uneven practice of our courts (synonymous with a lack of legal security). And this tendency will manifest in equal measure in terms of the protection of the right to a healthy environment.

However there are countries part of the European Union that have actually explicitly added in their constitutions the right to a healthy environment: Belgium, Bulgaria, Croatia,

Finland, France, Portugal, Slovakia, Slovenia, Hungary. The other states chose to offer legal protection of this right using phrase that encompasses the same principle.

References:

1. Nedelcu A., Surdescu O., (2010), Reflectii cu privire la consitutionalizarea dreptului la un mediu sanatos in Uniunea Europeana (Reflections regarding the constitutionalization of the right to a healthy environment in the European Union), in "Sfera politicii" (The political sphere), no. 7, p. 71.
2. Fainasi F., (2011), Un drept fundamental al omului in plina expansiune normativa: dreptul la un mediu sanatos (A fundamental human right in the midst of normative expansion) , in "Justitie, stat de drept si cultura juridica" (Justice, state law and legal culture), Universul juridic, Bucharest, p. 290.
3. Dutu M.; Dutu A., (2015), Raspunderea in dreptul mediului (Liability in environmental law), Academia Română Publishing House, Bucharest, p. 45.
4. Lupan E., (2009), Tratat de dreptul protecției mediului (Treaty on environmental protection law), All Beck Publishing House, Bucharest, p. 535.
5. Dutu M., (2004), Dreptul International al Mediului (International environmental law), Editura Economică Publishing House, Bucharest, p. 159.
6. Dutu M.; Dutu A., (2011), Dreptul de proprietate si exigentele protectiei mediului (The right to property and the requirements of environmental protection), Bucharest, Universul Juridic Publishing House, p. 55.