

## THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON ENVIRONMENTAL ISSUES

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### Summary

The paper will focus on the practice of the European Court of Human Rights on environmental issues. The starting premise is that numerous human rights are in fact endangered by environmental degradation. A healthy environment is essential for the full enjoyment of human rights, and conversely, the use of rights (including the right to information, participation and remedies) is critical to protecting the environment. In this regard the analysis is essentially anthropocentric, as it focuses on the harmful impact on humans rather than the environment itself. The aim of the paper is to show that the rich case law of the European Court of Human Rights is potentially applicable in a number of situations where environmental pollution violates the rights of the citizens of North Macedonia - the right to respect for life and health, as well as private life and the home of those living in the immediate vicinity of sources of pollution (plants, landfills and quarries, waste material from already closed facilities or contaminated land and waters); protection of persons whose rights are directly threatened by construction activities or urban massacre in the city of Skopje, and the noise in urbanized areas. On the other hand, this approach in which environmental threats are considered a problem that can be controlled and administered is an approach not sufficient for the reality of the pollution of the country.

**Key words:** *environment, pollution, human rights, European Court of Human Rights*

### INTRODUCTION

The level of contamination of our vital space does not cause the level of anxiety that is to be expected and the commitment of the state that would be appropriate to it. The environmental aspects in Republic of North Macedonia are still fighting for their moral authority - to be accepted as premises that do not go against common sense but vice versa, are pointing out how contrary to common sense is to destroy our own system for life support.

Again, even when moral authority will win, in the realm of the state politics it all crumbles like a soap bubble in the face of "real development needs" rhetoric. The priority is to alleviate poverty through economic development, and this is a dilemma facing developing countries where short-

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term survival jeopardizes long-term sustainability. However, the level of contamination, pollution or destruction of our environment is such that we do not just sacrifice long-term sustainability, but impose a direct risk to health, home, food and well-being and indeed to human life itself.

So the question is how can we change this? What are the ways in which the state can be forced to take effective measures?

My focus here is on the existing mechanisms of international law, more precisely the case law of the European Court of Human Rights as the richest jurisprudence, containing the most judgments on human rights and the environment.

This analysis is essentially anthropocentric, as it focuses on the harmful impact on humans rather than the environment itself. And it is, indeed, a limited approach that is open to the fundamental objection that it reduces the ecological values of the very limited sphere of individual interest. And environmental law always raises the question of whether the language of human rights is the appropriate medium for expressing environmental norms and values, which we will now leave aside.

So the starting premise here is that numerous human rights are in fact endangered by environmental degradation. A healthy environment is essential for the full enjoyment of human rights, and conversely, the use of rights (including the right to information, participation and remedies) is critical to protecting the environment.

## **PART I**

The European Court of Human Rights over the last few decades has succeeded in developing an elaborate and extensive body of case law which, in all but the name, ensures the right to a healthy environment.<sup>1</sup> The Court designed this body of jurisprudence primarily on the basis of the rights to life and respect for private and family life. Its jurisprudence has a wide range, ranging from noise protection, to various forms of industrial pollution, nuclear activities, waste management, to natural disasters and floods, and addresses the risk of injury, and not only the application of the Convention to the already materialized damages<sup>2</sup>.

The recapitulation of the Court's decisions in this area sets out some general principles.

First, the Convention is not designed to provide general protection of the environment as such and does not explicitly guarantee the right to a solid, healthy environment. However, different rights under the Convention indirectly affect environmental requirements, most notably the right to life, the right to respect for private and family life, the right to peaceful enjoyment of property and property, and the right to a fair trial. And the Convention's implications for the protection of the environment can be summarized as follows:

1. The State has an obligation to regulate and control environmental problems where they violate the implementation of the Convention's human rights and to ensure that the law is enforced.
2. The State also has an obligation to make available information concerning serious environmental risks and to provide legal procedures for participation in environmental decision-making and access to justice in environmental cases.

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<sup>1</sup> See Stephens, T., *International Courts and Environmental Protection*, Cambridge University Press, 2009.

<sup>2</sup> See more at Boyle, A., *Human Rights or Environmental Rights? A Reassessment*, Fordham University Law School, 2007; Knox J.H., Pejan R. (eds), *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, p. 9.

3. Environmental protection is a legitimate aim which in appropriate cases can justify the restriction of certain rights, including the right to private life and the right to property.<sup>3</sup>

### ***1. Regulation and control of environmental problems and enforcement of law***

The starting point for any discussion of human rights and the environment is that the failure of the state to regulate or control environmental problems or protect the environment may mean interfering with our individual rights. Cases like *Guerra*<sup>4</sup>; *López Ostra*<sup>5</sup>; *Öneryildiz*<sup>6</sup>; *Taskin*<sup>7</sup>; *Fadeyeva*<sup>8</sup> and *Dubetska*<sup>9</sup> show how the right to private life or the right to life can be used to force authorities to regulate environmental risks, enforce environmental laws or publish information. All of these cases have common features. First, there is an industrial problem - for example, a chemical plant, smelter, tannery, mine, coal processing plant or landfill. Second, there is a failure to take appropriate preventive measures to control these known sources of serious risk to life, health, privacy or property.

The European Convention of Human Rights may not directly require states to protect the environment, but the Court's decisions require that they protect every person whose rights are, or may be, seriously affected by environmental problems. And this state responsibility stems from both its own actions and the failure to regulate the private industry (the cases I mentioned include a state-run power plant, factory and mine; a municipal-run landfill, and a tannery and chemical plant owned by a private company).

What are the state obligations in this context?

The State has an obligation to "take reasonable and appropriate measures" to secure the rights of the Convention. This "positive obligation to take all appropriate measures to protect life" (as the Court noted in *Öneryildiz v. Turkey*) primarily implies the primary duty of the state to establish a legislative and administrative framework designed to ensure effective deterrence from threats to the right to life including regulations which take into account the specific characteristics of the situation or activity and the level of potential risk to life.<sup>10</sup> This obligation also covers the issuance of permits or licenses (for example for the opening of a mine, factory or other plant), furthers, the establishment, operation, safety and supervision of hazardous activities, and requires all concerned to take "practical measures to ensure effective protection of citizens whose lives may be endangered by inherent risks."<sup>11</sup> It is not a responsibility that can be left to the industry alone. And, furthermore, in relation to industrial pollution, in *Dubetska v. Ukraine*, the Court has emphasized that the State has a duty to take care of the environmental management of a mine, factory or similar plant "regardless of whether it is still in use".<sup>12</sup> This is important to us because we have problems with hazardous waste materials and landfills from already closed factories

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<sup>3</sup> *Ibid.*, pp. 13-14.

<sup>4</sup> *Guerra and Others v. Italy*, Application no. 116/1996/735/932, Judgment of 19 February 1998.

<sup>5</sup> *López Ostra v. Spain*, Application no. 16798/90, Judgment of 9 December 1994.

<sup>6</sup> *Öneryildiz v. Turkey*, Application no. 48939/99, Judgment of 18 June 2002 (Chamber); *Öneryildiz v. Turkey*, Application no. 48939/99, Judgment of 30 November 2004 (Grand Chamber).

<sup>7</sup> *Taskin and Others v. Turkey*, Application no. 46117/99, Judgment of 10 November 2004.

<sup>8</sup> *Fadeyeva v. Russia*, Application no. 55723/00, Decision of admissibility of 16 October 2003; *Fadeyeva v. Russia*, Application no. 55723/00, Judgment of 5 June 2005.

<sup>9</sup> *Dubetska and Others v. Ukraine*, Application no. 30499/03, Judgment of 10 February 2011.

<sup>10</sup> See *Öneryildiz v. Turkey*, Application no. 48939/99, Judgment of 18 June 2002 (Chamber); *Öneryildiz v. Turkey*, Application no. 48939/99, Judgment of 30 November 2004 (Grand Chamber).

<sup>11</sup> *Ibid.*

<sup>12</sup> See *Dubetska and Others v. Ukraine*, Application no. 30499/03, Judgment of 10 February 2011.

(slags from the smelter in Veles, Jugohrom landfill, etc.). The practical measures of the state also include the enforcement of the law. For example, a characteristic feature of Guerra; López Ostra; Taskin and Fadeyeva is that these polluting industries have been operating illegally or in violation of environmental laws and emissions standards. In López Ostra and Taskin the national courts ordered the closure of the specific facilities, but their rulings were ignored or rejected by the political authorities.<sup>13</sup> States cannot expect to persuade the Court that the needs of the community will best be met by non-application of the law. Also, if the national court weighed the rights involved and revoked the license for harmful activity on the ground that it did not serve the public interest, the European Court would not change this judgment in favor of the national government. And finally, the beneficiaries of this duty to regulate and control the sources of environmental damage is not the community as a whole, much less the environment itself, but only those individuals whose rights will be affected by any failure to act.<sup>14</sup>

## ***2. Access to and provision of environmental information***

According to the European Court of Human Rights environmental risk information must be made available to those likely to be affected. In the case of Öneriyildiz v. Turkey<sup>15</sup>, the Court placed a "particular emphasis" on the right of the public to information on life-threatening activities. In Budayeva and others v. Russia<sup>16</sup> the Court also found such a positive obligation in the event of natural disasters and floods. In addition, where governments engage in hazardous activities with unknown health consequences (such as nuclear tests), there is an obligation to establish an "effective and accessible" procedure that allows those involved to obtain relevant information. The Guerra case shows that failure to provide access to information may also violate the right to privacy.

In all these situations the essential point is to enable individuals to assess the danger or risks to which they are exposed. This obligation is not limited to information on risks that have already been materialized, but also applies to the risks of future damage, and not only to the activities of states, but also to entities that take risky activities (for example factories, landfills or mines owned by private companies).

Interestingly, in appropriate cases the right to environmental information may include *a duty to be informed; not only the right of access to information*. In the case of Guerra, Italy's failure to provide "essential information" about the seriousness and nature of the toxic emissions from the chemical plant was found to constitute a violation of the right to private life. It was noted that the applicants were "particularly at risk" in the event of an accident at the factory, and there was also a breach of the Italian legislation requiring that information relating to hazardous activities be made public.<sup>17</sup> This case assumes that the state must actively inform those concerned, not only that there must be a procedure for obtaining information upon request. This stricter formulation makes sense where the situation involves an immediate and serious risk to life or health: simply

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<sup>13</sup> See López Ostra v. Spain, Application no. 16798/90, Judgment of 9 December 1994 and Taskin and Others v. Turkey, Application no. 46117/99, Judgment of 10 November 2004.

<sup>14</sup> Boyle, A., *Human Rights or Environmental Rights? A Reassessment*, Fordham University Law School, 2007, pp.16-17.

<sup>15</sup> Öneriyildiz v. Turkey, Application no. 48939/99, Judgment of 18 June 2002 (Chamber); Öneriyildiz v. Turkey, Application no. 48939/99, Judgment of 30 November 2004 (Grand Chamber).

<sup>16</sup> Budayeva and Others v. Russia, Application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008

<sup>17</sup> See Guerra and Others v. Italy, Application no. 116/1996/735/932, Judgment of 19 February 1998.

leaving to those who may suffer injury to seek information on such risks themselves could in no way fulfill the State's obligation in such cases to protect its citizens.<sup>18</sup>

More specifically, in the case of *Tătar v. Romania*<sup>19</sup> the European Court of Human Rights identified situations in which *the State must ex officio collect information on environmental risks*. The first case concerns the obligation to collect and publish/disseminate information on current, past and future environmental and human health impacts of environmental incidents. The second case concerns the State's obligation to collect and publish information on preventive measures and recommendations on how to manage future environmental incidents.

In addition, this obligation to provide information on the state of the environment will be fulfilled only if the *information is complete, and not partial; is essential*; and it covers both information on *actual damage or pollution* which is a source of violation of Convention rights, as well as information on *past damage*.

### ***3. The environmental protection as a legitimate goal***

Inevitably, there will be circumstances where environmental goals on the one hand and the rights of specific individuals or groups on the other - may conflict. For example, regulating pollution activities or controlling the extraction of natural resources may disrupt the use or value of one's property, or hinder economic development. Especially in cases involving alleged state interference with the peaceful enjoyment of property, the Strasbourg Court has consistently taken the view that environmental protection is a *legitimate aim of public policy*. And it refused to give the property rights an inappropriate advantage.

However, when balancing environmental concerns with Convention rights, the Court recognizes that national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. The Court therefore allows the national authorities in principle broad discretion. However, when it comes to the serious impact on health, for example when the right to life is affected, the degree of permitted balance would inevitably be lower.

This balancing of interests to be maintained by the state is not only essential, but also has important procedural dimensions. Practically, (as the Court points out in *Taskin*) "where the state has to decide on complex environmental and economic policy issues, the decision-making process must first involve appropriate investigations and studies in order to allow to anticipate and assess in advance the effects of appropriate actions that can harm the environment and violate the rights of individuals, and enable a fair balance between the different conflicting interests at stake<sup>20</sup> (for example, what will be the economic impact of opening a mine versus the effects on the environment and the rights of residents in the area).<sup>21</sup>

Equally important then is the obligation of the state to enable participation in the decision-making process related to environmental protection. As with access to information, the right to participate in decision-making under the European Convention of Human Rights is not available to everyone, nor does it concern environmental decisions in general. Only those whose rights are somehow affected will benefit from this protection. In assessing whether a State has fulfilled this

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<sup>18</sup> Boyle, A., *Human Rights or Environmental Rights? A Reassessment*, Fordham University Law School, 2007, pp. 17-20.

<sup>19</sup> *Tătar v. Romania*, Application no. 67021/01, Judgment of 27 January 2009.

<sup>20</sup> *Taskin and Others v. Turkey*, Application no. 46117/99, Judgment of 10 November 2004.

<sup>21</sup> This is done mainly through EIA studies. See Boyle, A., *Human Rights or Environmental Rights? A Reassessment*, Fordham University Law School, 2007, p. 24.

obligation, the European Court will consider all procedural aspects, including the type of policy or decision, the extent to which individuals' views are taken into account during the decision-making process, and the available procedural guarantees. As noted in the case of Taskin<sup>22</sup>, "the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider their interests or their observations have not been given due weight in the decision-making process. (Appropriate, fair and effective remedies must be provided). In the case of Giacomelli v. Italy<sup>23</sup>, for example, the Court found violation of the applicant's private life, because domestic law's mechanisms had no practical effect, and in particular because the applicant was not able to participate in the licensing process (for a waste processing plant), as well as to submit its comments to the competent authorities.

## **PART II**

This case-law of the European Court of Human Rights clearly shows how much environmental protection can be derived from existing human rights law.

However, the protection of human rights benefits victims of violations of the Convention only. If the health, private life, property or civil rights of the person addressing the Court are not sufficiently affected by the environmental loss, then there is no reason to continue the proceedings. There is no *actio popularis* under the European Convention of Human Rights. Even those individuals who are victims of injury cannot appeal to the Court to decide in favor of environmental protection simply because they believe that the public interest will be best served there. They can only ask the Court to measure their rights against the public interest in another value such as trade or development. *In doing this individuals may provide some environmental protection victories, but these will be incidental consequences, not the result of a wider commitment to a particular type of environment.*

In addition, the Court is significantly more likely to rule against a State where it has in one way or another failed to implement, apply or adhere to its own domestic environmental standards and rules. Therefore, the Court is more likely to support an environmental claim based on the "rule of law" argument. Where the State concerned has set up a regulatory system designed to reduce risks and where this system allows for the participation of those at risk, the Court is less inclined to find a violation (except where the State has completely ignored this system of rules).

So the case law of the European Court of Human Rights is an important contribution to what is commonly referred to as the "greening" of international human rights law. The Court has also increased the scope of States' obligations in this respect. At the same time, the strict adherence to the requirement of "being a victim" and the associated ban on *actio popularis*, the limited acceptance of extraterritorial jurisdiction (for cross-border pollution) and the causality criterion (proving the causal link between industrial pollution and health damage) constitute significant barriers to the submission of environmental claims. In this sense, the case law of the European Court of Human Rights serves both to inspire and to frustrate us.

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<sup>22</sup> Taskin and Others v. Turkey, Application no. 46117/99, Judgment of 10 November 2004.

<sup>23</sup> Giacomelli v. Italy, Application no. 59909/00, Judgment of 26 March 2007.

## CONCLUSION

In light of this dichotomy, we can conclude that, on the one hand, this already developed case law is potentially applicable in a number of situations where environmental pollution violates our citizens' rights - the right to respect for life and health as well as private life, and the home of those living in the immediate vicinity of sources of pollution (plants, landfills and quarries, waste material from already closed facilities or contaminated land and waters), persons whose rights are directly threatened by construction activities or urban massacre, and the noise in urbanized areas.

On the other hand, it is all part of an approach in which environmental threats are considered a problem that can be controlled and administered.

Is relying solely on this approach sufficient for our reality? The cities of Republic of North Macedonia are the most polluted in Europe and among the most polluted in the world. The winter periods bring alarming levels of polluted air, with the most polluted days during the year and with thousands of deaths annually as a result of only the air pollution, not adding the rest sources of pollution and all those we have no information about...

Does this long-term and cumulative pollution allow us to think about our vital space within regular politics (regular problems that require regular remedies) or perhaps this should be considered a security policy issue (in the context of the concept of "human security") thereby assigning it a totally different weight and providing different resources in domestic politics.<sup>24</sup>

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<sup>24</sup> See Pop Ivanov, L., Mirchevska, M., *Macedonia and Kosovo Should Treat Air Pollution As A National Security Threat*, Article 1, Institute for Global Politics and Law, 2018.

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