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The Fundamental Right to a Healthy and Ecologically Harmonious Environment

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Abstract: The right to a healty enviroment is a fundamental right of very person in a state. It is absolutely natural for each person to demand/to live in a healty and unpolluted enviroment. The fight for the prevention of pollution and the elimination of its consequences should be a duty of every citizen of state. The establishing by law of numerous obligations to protect the enviroment, both by state and private companies does not diminish the importance of the moral and legal obligation of every citizen to protect the enviroment. The state recognise the right of every person to a healthy and ecologically balanced enviroment, providing the legal framework for exerting this right. The constitutional recognition of such a right is important for the economy, for enviromental legislation and for the enviromental protection/policy in general.

Keywords: enviroment; enviromental protection; pollution; healthy enviroment; ecologically balanced

1. Introduction

1.1. Preliminaries

Out of the corpus of fundamental rights and freedoms of men, that are internationally acknowledged and also by over-national institutions, the right to a healthy and ecologically harmonious environment represents the dynamic transposing of the superior interest of our generation into a general juridical and objective norm of law meant to "ensure an acceptable environment even at the global level, that encourages the development[2] of all the people in the world.

By acknowledging and admitting the fact that the right to a healthy environment represents a fundamental right, crowned with the more and more frequent Constitutional establishment, allows us to hope for the surpassing of the procedural and jurisprudential limits of the sphere of the respective right in order to also ensure it by some expressly given directive within the European Convention in order to protect the fundamental rights and freedoms of men. *A fortiori* the passing through this first stage – the legislative establishment will determine the national legislator to establish new duties meant to ensure the proper juridical context that would turn this right to advantage.

It was firstly internationally proclaimed at the First World Conference of the United Nations regarding the environment (Stockholm, June 1972) and adopted at the level of the states, and there is a certain difference between the national and the international legislation, the communitarian one. This difference appears because of the difficulties in effectively and materially ensuring this right and the

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[2] The African Charta of the rights of men and the peoples, 1981, art. 24.

lack of establishing a concrete threshold starting from which any prejudice provoked in terms of the environment represents a violation of a certain right that man has regarding the environment. (Duțu, 2010, p. 122 apud Sands, 1995, p. 222)

Within the context where the ecological issues take shape more and more we may notice that the fundamental right to a healthy and ecologically harmonious environment does not protect only a particular common interest, but it is of interest to the humankind as a whole. Its exceptional value is underlined by the status of the environment as the common heritage of the humankind. (Duțu, 2010, p. 112)

We may also notice that the right to a healthy environment can be correlated to the general and negative obligation not to prejudice its components in such a way that a pronounced decrease of its capacity to regenerate the ecosystems would not occur and the state of the environment would not be endangered as a result of man's abusive interference. The right to a healthy environment also implies accomplishing certain obligations so that the environment should be protected. Because the fundamental rights represent the content of the relationships between the physical persons and the state, it means that the obligations correlated to these rights belong to the state that recognizes them and guarantees them. In this way, the obligations of the states to take the legal, administrative, and any other measures that are necessary for the implementation of the right to a healthy environment is provisioned. The measures in discussion here have to have as a purpose the provenance of the degradation of the environment, the establishing of the necessary remedies and the settlement of the long-lasting employment of the natural resources. (Marinescu, 2008, p. 395)

In correlation with the right of ownership and in analogy with the right to health, the right to a healthy and ecologically harmonious environment for a good life regains an increasingly pronounced position within the whole of the fundamental rights that is indispensable to the surviving of the human being as a species among other species. (Duțu, 2010, p. 122) In this way, the present paper intends to offer an incursion within the historical and social-economical context wherein the idea of legally provisioning this essential right sprang as well as of presenting the way in which the vital right of the actual and future generation – the right to a healthy and ecologically harmonious environment – is admitted and guaranteed at the procedural and jurisprudential levels.

2. The Premises of the Appearance of the Right to a Healthy and Ecologically Harmonious Environment

The necessity for introducing a right or, in other words, a certain juridical norm meant to protect the inhabitants of the planet from the toxic effects of pollution is tightly related to the abusive intruding of man on the components of the environment. The main premises of the introducing of the fundamental right to a healthy and ecologically harmonious environment are indissolubly related to the causes and consequences of the degradation of the environment.

There are multiple causes that generate the degradation of the environment and they have serious consequences on the environment and human health. For instance, the demographic evolution determined the increase in the quantity of spoilage generated by human activity, and the accelerated development of the economy has as a result the increasing in the demand for natural resources and their irrational exploitation.

The improper administration of the chemical substances in agriculture causes the progressive degradation of the soil (salinization, compaction etc.) and the soil, once infected, provides toxic food.

As a result, a healthy environment as well as an ecologically equilibrated environment is out of the question within the present context of discussion.

The consequences of the degradation of the environment are seen within the ecological field as adverse reactions of nature against the mankind. The increase in radioactivity of the atmosphere, the soil, and the water, as a result of the nuclear weapons testing, of the accidents from the nuclear power stations have an extremely serious impact on the environment, especially on human health as well as on everything that is alive. The increase of CO, CO_2, NO_2 in the atmospheric concentration as a result of the discharging of the industrial gas and of the exhaust gas led to the global warming, the icebergs melting, the increase in the level of the World Ocean and at a larger frequency of the natural disasters, and the shortage of drinkable water becomes a serious issue. Confronted with the situation when we are to create legislative strategies, the general desire that the anthropic factor should take responsibility for its interventions and be sanctioned for the direct and continuous degradation of the environment appears. On the other hand, the following question arises: "Which is the limit that in case of a considerable prejudice caused to the environment represents a violation of a human right to a healthy environment? In other words, this incertitude regarding the state of the environment and the lack of a global legal establishment painfully confronted us with the ecological crisis of 1960 and only then made us realize that the right to a healthy environment is an essential, and not a common one.

3. The First Steps towards Legal Establishment

The beginning of the ecological crisis is tightly related to the consequences of the Second World War, more precisely, to the period after the 60's. The turn regarding the future of the Earth determined a state of conflict between the human and the natural entities in such a way that the maintaining of the ecological harmony was all of a sudden threatened. Meaning, under such circumstances, the necessity of the legal establishment of the right under discussion appeared, and the first steps left deep traces both within the constitutional provisions of many states and at the level of the strategies of the over-national organisms. As a result, the ecological issue was included among the major preoccupations regarding cooperation both at the national and international levels.

We are interested in this section to actually find the answer to two questions: "Which event is related to the international accreditation of this right?" and "When did the first legal establishment take place?" The long awaited answers started to take shape only after a decade of discussions, debates and propositions on the occasion of which they decided to organize a first conference regarding the environment in its entirety, and the host city was also designated the city of the Nobel prizes that is Stockholm, Sweden. In 1972, the debated had a positive influence on the social-economic tendencies and the legal-constitutional establishments regarding the protection of the environment so that a Declaration regarding the environment was written whose first article mentions the following: "The human being has a fundamental right to freedom, equality and satisfactory living conditions within an environment whose quality allows one to live in dignity and well-being. One has the solemn duty to protect and ameliorate the environment for the present and future generations". The first principle of the declaration shows both the values deeply rooted within the fundaments of the right such as freedom, equality, and dignity, and the appearance of a new right regarding the satisfactory living conditions and well-being within "an environment whose quality (...)".

By imposing itself as a fundamental right of the third generation, the right to a healthy environment not only is a juridical institution *in vogue,* but also is deeply rooted within the nowadays social and

economic realities.[1] Yet, the first establishment of the right to a healthy and ecologically harmonious environment took shape when the African Charta of the rights of men and the peoples appeared in 1981. This provision resides within article 24 that provisions that: „All the peoples have the right to a healthy global satisfactory environment favourable to their development". As a result, it is about a collective right with general and global bearings.

The next provision of the fundamental right can be identified within the Additional Protocol to the American Convention regarding the Human Rights, adopted in San Salvador on the 17th of November 1988, regarding the economic, social and cultural rights. Article 11 of the document "The Right to a Healthy Environment" elucidated two fundamental issues: 1. "Any person has the right to live in a healthy environment and to take advantage from the essential collective equipment"; 2. "The Partner States will encourage the protection, preservation, and the amelioration of the environment".

An important moment in the process of stimulating and promoting the strategies for the protection of the environment and for the ensuring of a healthy environment wherein the human beings on the Earth should lead a life without any pollution at all (be it chemical, thermic, bacteriological, or radioactive) was marked by the proposition of the elaboration of an additional protocol to the European Convention of the Human Rights regarding the conservation of nature (1970), meant to establish and guarantee the right to a healthy and unspoiled environment. Yet, notwithstanding the innovative element deeply involved in the writing of the additional protocol, the majority of the partner states were reserved about this right's guaranteeing. In this way, there is no express establishment within the Convention even in our days.

Unlike, the European Convention, there are other regional instruments that expressly ensure this right such as The African Charta of the Rights of the Peoples and The American Convention of the Human Rights. (Duțu, 2010, p. 124) When it comes to explaining this difference, apparently surprising, between the North and the South regarding the establishment of the fundamental right to a healthy environment is relatively simple: if in the case of the European Convention the provision regarding this right automatically also meant its guaranteeing through the especially established mechanism by means of the document itself, in the other cases (the two regional instruments, African and American) it has a purely declarative character. None the less, even in the case of the San Salvador Protocol, regarding the right to a healthy environment, it does not offer the individual the right to act in front of the inter-American Commission of the human rights in his/her defence.

By analysing the multitude of international documents adopted by the United Nations we may distinguish that in the last two decades a special attention was given to the establishment of the right to a healthy, clean and ecologically harmonious environment. The idea of legally establishing this right represented an object of research and debate, especially after 1990, when the majority of the world states remarked a profound decreasing in or a complete damage of the quality of the environment that surrounds us both as a result of the natural processes and of the abusive interference of man. In this way, the authorities established an objective by which to promote the protection of the environment and the ensuring of all the rights referring to a healthy environment by finding the limit of the maximum admissible concentration (CMA) for a chemical substance to be considered a pollutant. These normative limitations are different from the atmospheric component to the hidrical, edaphical, or of the alimentary products. For instance, article 2 of Decision no. 472 of June, 9 2000 regarding some measures of protection of the quality of the water resources underline the following: 1. The

[1] The Right to a Healthy Environment Within the Constitutions of some Countries of the European Union by Senior Lecturer Matei Diaconu, PhD.

maximum admissible concentrations of the pollutants contained by damaged waters, evacuated into the water resources, in permeable soils or certain depressions provided with natural discharge, as well as the sewerage system, are established for the area of discharge depending on the capacity to receive of the receptors and they are entered into the notifications and the authorizations for the mastering of the waters freed towards the beneficiaries, and the next paragraph shows the commitment of the state to designate an organism of control for the state of the waters in Romania at a certain time and which may ensure a satisfactory atmosphere and adequate conditions for the human beings and for the living organisms: 2. The National Company "Romanian Waters" SA intends by the national system of surveillance of the quality of the waters to see the state of the quality of the resources of water that are at the surface or underneath, as well as the way in which the concentrations of pollutants are respected as they are entered in the official papers emitted for the beneficiaries so that the quality of the waters should be protected.

Even if the steps towards legal establishment of the right to a healthy and ecologically harmonious environment were often accompanied by a multitude of hesitations at the level of guaranteeing this right, still they managed to make the right in discussion to be considered an essential one through certain normative acts having a fundamental character – The African Charta of the Rights of the Man and the Peoples, 1981, article 24 and the American Convention relative to the Human Rights. We hope that, in spite of all the impediments created by the mechanism itself by which the right to a healthy and ecologically harmonious environment was established by the European Convention of the Human Rights, the right to a healthy and ecologically harmonious environment should be established through a provision expressly formulated and by its content.

4. The Features of the Right to a Healthy and Ecologically Harmonious Environment

The right to a healthy and ecologically harmonious environment presents certain distinct features that singularizes its quintessence and successfully places it next to the other fundamental rights: the right to human dignity, to life, to the integrity of the person, to freedom and safety, to marriage and education:

1. The right to a healthy and ecologically harmonious environment is a *natural right,* in a tight connection to the right to property;
2. The right to a healthy and ecologically harmonious environment can be regarded as a *civil right claim,* compared to the right to health. By analogy to this, the doctrine considers it important to reposition it among the constitutional objectives;
3. From another perspective, there is an opinion according to which the right to a healthy and ecologically harmonious environment is also a *subjective right* whose respecting by third parties can be required by any physical or juridical person, public or private;
4. Created by the jurisprudence of the European Court of the Rights of the Human Rights by means of interpretation, article 8, paragraph 1 and article 6 of the European Convention of the Human Rights, the right to a healthy and ecologically harmonious environment is considered an *individual right* from the category of the "civil rights". As it is not part of the rights considered to be untouchable, it can make the object of certain derogations in exceptional circumstances (art.15 of the Convention), and the partner states cannot limit it but by the law (art.8 parag.2) and if it "represents a measure that in a democratic society is necessary for the national security, the public safety, or the economic safety of the country or for the protection of the rights and freedoms of the citizens".

We may appreciate that presently the CEDO jurisprudence crystalized in order to guarantee the protection of the environment as an individual right by mentioning three aspects (Duțu, 2010, p. 122):

1. Its belonging to the content of the right guaranteed by article 8, paragraph 1 of the Convention;
2. The existence of a right to be informed regarding the quality of the environment and the dangers for the environment;
3. The existence of a right to a fair process regarding the above mentioned.

The fundamental right to a healthy environment is a right that presupposes the following rights:

- To live in an non-polluted, not degraded environment;
- At a high level of health, unaffected by the degradation of the environment;
- To have access to the adequate resources of water and food;
- To a healthy work environment;
- To living conditions, or of using the fields, and to conditions of living within a healthy environment;
- Not to be exploited as a result of the developing of the environmental activities, except the justified cases and the right of those expropriated within the conditions established by the law, and to get the correspondingly redresses;
- To assistance in case of natural disasters or caused by the humans;
- To beneficiate from exploiting nature and its resources for a long time;
- To the preservation of the representative elements of nature and so on.[1]

5. Who is entitled to a Healthy and Ecologically Harmonious Environment?

From the point of view of the juridical literature, those entitled to a healthy and ecologically harmonious environment can be considered, on the one hand, the individuals who are the unique beneficiaries from this fundamental right and, on the other hand, the nature (that also includes the human beings) has to be protected. But, form a juridical point of view, only man can be entitled to a healthy environment.

Another dispute was born starting from the discussion whether the right to a healthy environment is an individual or a collective right that is part of the group of the rights of solidarity. Although we cannot contest neither the individual character nor the collective character of the fundamental right to a healthy environment we notice that the circumstances created by the issue of the environment at the end of the 20th century, of signalling all over the world about the vital necessity to protect the environment, it tends to detach itself from the category of the rights of solidarity, by expressing itself more and more as an individual subjective right, acknowledged and established by the law.

We may also remark that from the first line of the Romanian Constitution results that all the persons are entitled to this right. Because it does not say if it is about Romanian citizens exclusively, it can be

[1] http://revista.universuljuridic.ro/dreptul-la-un-mediu-sanatos-este-un-drept-fundamental/.

interpreted in the following way: this right is recognized to all the physical persons who are inhabiting the Romanian territory, no matter if they are Romanian citizens, foreign citizens, or stateless.[1]

6. The Jurisprudential Way by Which the Right to a Healthy and Ecologically Harmonious Environment was Recognized and Guaranteed

The CEDO jurisprudence developed a larger, nuanced, and flexible conception of the notion of private life with the meaning art.8 parag.1 of the European Convention that allowed it to be extended indirectly to the right to a healthy environment.

In this way, starting with the 70s, the Commission managed to gradually and more and more expressly admit that the pollutions affected the right to private life of the complainants and that, for instance, "a huge pollution could undoubtedly have a negative impact upon the physical wellbeing of a person and, as result, affect one's private live and also "can deprive the person of the possibility to enjoy the serenity of one's home". In its turn, the Court admitted next that "the noise provoked by airplanes diminished the quality of the private life and the serenity of one's home".

The right to a healthy and ecologically harmonious environment entered via interpretation article 8, paragraph 1 through the cause Lopez-Ostra against the Spain.

The decision of principle of December, 9, 1994 decided that the prejudices caused to the environment can cause damage to the wellbeing of a person and can deprive the individuals from their normal domiciliary habits, that presupposes to bluster their private and family lives, even though it does not represent a serious danger for the health of the person in discussion. As a result, the European legislator determined that the right of any person "to the respect of one's private, family and home life" also involves the right to live in a healthy and ecologically harmonious environment.

Another cause as much interesting by its jurisprudential development in terms of the environmental issues was created by the decision made regarding the business Guerra and co against Italy. Starting from the premise of the positive measures that the state has to take in order to ensure the effectiveness of the right to respecting one's private and family life, the Court stated that Italy broke article 8 of the Convention because of its essential authorities relativeness towards the major risks caused by the implanting of a chemical factory in the proximity of their village. Therefore, the stare as partner of the Convention has the positive obligation to not only take measures in order to make the pollution stop or reduce it (the cause Lopez-Ostra against Spain), but also to offer information about the serious risks of pollution. It is important to notice the fact that the community legislator justified his/her decision on the basis of article 8, and not on article 10 of the Convention, as it is considered to be inapplicable and having consequences associated with its meanings.

The CEDO decision in the case Lopez-Ostra against Spain (1994) attached via jurisprudential means the issue of the protection of the environment to the technique of the positive obligations that provisioned that the states that were part of the Convention should acquit of the obligation to adopt "positive measures" meant to ensure the effectiveness of the protected rights, including against the negative actions of the third parties. This offers the way to sanction the prejudices brought to the environment that find their source in the weakness of the public authorities and/or in the deeds of the individuals.

[1] The Right to a Healthy Environment within the Constitutions of some Countries of the EU Lect. univ. dr. Matei D.

The CEDO jurisprudence went even further by establishing that when a government engages itself into the developing of certain dangerous activities, such as the nuclear experience, susceptible to have "hidden evil consequences" on the health of the persons that take part into those, the respecting of article 8 presupposes creating a certain "effective and accessible procedure" that would allow to all those interested to require to be communicated the entire lot of pertinent information. (Mc Ginley and Egan against the Great Britain).

Also, it was considered that article 10 of the Convention imposes that the states should not only give information on the issues regarding the environment accessible to the public, but also positive obligations regarding the collecting, elaborating, and broadcasting the information that by its nature are not directly accessible and could not be otherwise brought to the knowledge of the public opinion but by means of the actions of the public authorities (the business Guerra against Italy). In this way, the existence of a real right to information regarding the environment was recognized.

Nevertheless, the jurisprudence of the European Court of the Human Rights also signalled many more cases when article 8, line 1 of the Convention were broken when the right that we are interested in was indirectly exploited. We shall insist upon the cases Moreno Gomez against Spain; Giacomelli against Italy; Ockan against Turkey and Lediayeva, Dobrokotova, Zolotareva, and Romashina against Russia.

7. The Constitutional Legal Recognizing and Guaranteeing the Fundamental Right to a Healthy Environment in Romania

After almost three decades and a half since the first conference of the United Nations regarding the environment took place and since the adopting of the first internal law regarding the protection of the environment, also in Romania the right to a healthy environment took shape as an independent branch of right, having a distinct character, and the fundamental right to a healthy and ecologically harmonious environment was recognized and guaranteed by the Constitution. The respective situation can be considered the result of a long term process developed under the influence of more factors and with the contribution of multiple actors. In this way, article 35 of the Romanian Constitution, revised and republished in 2003, the article named "The Right to a Healthy Environment" provisions that: 1. The State recognizes the right of each person to a healthy and ecologically harmonious environment; 2. The State ensures the legal context for the bearing of this right. 3. The physical and juridical persons have the obligation to protect and ameliorate the environment.

The accelerated of the appearance among the Romanians of the major preoccupations regarding the protection of the environment represented the process itself of adherence to the European Union that under the pressure of some tough ecological realities wanted to create, along with the work conditions favourable to its citizens, a healthy and ecologically harmonious environment, as well. Radical transformations took place at the level of the juridical provisions regarding the environment, and the entire process of legal metamorphosis also favoured the springing of certain concepts and principles in everyone's consciousness regarding the environment: the principle of conservation, the principle of ameliorating, of precaution, and the protection of the environment, and the principle that "the pollutant pays". (Duțu, 2010, pp. 112-120) The culmination of these efforts of the international institutions was the establishment and the constitutional guaranteeing accompanied by a significant legislative bundle subsequent of the fundamental right to a healthy and ecologically harmonious environment. In this way, the spirit of the Romanian constitutional establishment is given by the European tendencies in the field because a large part of the countries member of the European Union already guaranteed by their fundamental laws in more or less similar terms the right to a healthy environment. Anyway, the

formulation in the Romanian Constitution has a certain degree of generality meant to generate ambiguities.[1]

Nevertheless, the guaranteeing such a right does not mean that it is also effective. The primary issue becomes now that of the development of all the mechanisms necessary to the guaranteeing the effectiveness of its significances.

As a conclusion, the process of establishing and guaranteeing the right to a healthy environment has also known a similar evolution in Romania, similar to that of the other European states: a progressive emergence at the legislative level potentiated by the ratification of the international documents on the issue and the preparing of the Romanian adherence to the European Union, as well as by its recognizing as having an over legislative value within the jurisprudence of the European Charta of the Human Rights (CEDO), and its crowning by its constitutional recognition.

8. Conclusions

By sketching a retrospective in the past, we shall notice that the state of the environment became a very important aspect of the human rights and that the actual tendencies successfully places it among the fundamental rights, having their own and independent status.

Belonging to the third generation, the right to a healthy and ecologically harmonious environment known a dynamic evolution in terms of its guaranteeing and effectiveness through procedural and jurisprudential ways. In this way, the right to a healthy environment was asserted by means of the interpretation of article 8.1 of the European Convention of the Human Rights, as it did not have an express establishing as a component of the right to a private and family life, and giving it an indirect protection.

As a result, we conclude that the including of the right at the national level within the Constitution within just two decades accelerated its development at the regional and international level. At the same time, the appearance of the global ecological issues (the desertification, the climate changes, the destroying of the ozone layer etc.) favoured the consolidation of its status as a fundamental right and as a right to survival of the mankind.

Regarding the right to environment, the CEDO jurisprudence especially ensured the procedural guarantees this right, respectively the right to be informed regarding the risks of pollution and the quality of the environment, the right to a fair trial, and, last but not least, the obligation of the states to adopt “positive measures” meant to ensure the effectiveness of the right to a healthy environment.

Also, the original way to appeal to the content of other fundamental rights shaped even from the beginning its touching points with other fundamental human rights, the enrichment of the content and the reciprocal influence in realizing their significances. Complemented with the provisions of the positive law, these jurisprudential observations demonstrates that the right to a healthy environment and the quality of life intercross and influence each other, and the serious prejudices against the environment can affect the wellbeing of a person, which interferes with one’s private life, here including the right to live in a healthy and ecologically harmonious environment within the right to private and family life, and the right to property.

[1] The Right to a Healthy Environment within the Constitutions of certain Countries of the EU, Lect. univ. dr. Matei Diaconu, p. 1.

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