

ENVIRONMENTAL PROTECTION DERIVED FROM THE EUROPEAN CONVENTION FOR HUMAN RIGHTS AND FROM THE EUROPEAN SOCIAL CHARTER

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Abstract

The present study started from our wish to present to the large audience the case-law of the European Court of Human Rights and of the European Committee of Social Rights regarding the environment protection. Although the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the revised European Social Charter do not expressly guarantee a right to a sound, quiet and healthy environment, both instruments offer a certain degree of protection with regard to environmental matters, as we shall demonstrate within the present study with the evolving case-law in this area.

As regards the reason why we have chosen for this research both instruments, note should be made with regards to the fact that the European Social Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms, and should be interpreted as creating fundamental economic, social and cultural rights. Although contested sometimes, because of its construction, as having a limited purpose, different than the Convention for the Protection of Human Rights and Fundamental Freedoms, we consider that it was conceived like this in order to offer flexibility, giving the chance to the States to choose the rights they will guarantee.

We consider that disseminating the case law of both international bodies would contribute to strengthen environmental protection at the national level.

Keywords: *environmental protection, Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter, Council of Europe, European Court of Human Rights, European Committee of Social Rights.*

1. Introductory Considerations

It is indisputable that “human rights concern the universal identity of the human being and are underlying on the principle of

equality of all human beings”¹, therefore all individuals have the right to complain if the domestic authorities², natural or legal persons violate their individual rights under the Convention in certain conditions.

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¹ Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs (Introduction in the problem of international human rights law)*, ERA Publishing House, Bucharest, 2000, p. 4.

² The domestic authorities can breach individual rights through juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta-Claudia Cliza, *Drept administrativ (Administrative Law)*, part 2, Pro Universitaria Publishing House, Bucharest, 2011, p. 14 and following, and Marta Claudia Cliza, *Revocation of Administrative Act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

Throughout the time, the legal doctrine has divided the catalogue of human rights resulting from international instruments into several categories of rights, depending on several criteria³. The most important criterion is the nature of rights, according to which we can distinguish the following: civil rights⁴, political rights⁵, economic and social rights⁶, as well as cultural rights⁷.

Unlike the civil and political rights which are first generation rights, the economic, social, and cultural rights are second generation rights, which entail the positive intervention of the States in order to create the material and social conditions required for the fulfilment thereof.

Although a long time neglected, nowadays the environment has become an important concern to mankind. Although it has been protected by the international law, no general framework convention has been created and no generally accepted definitions are available. Of course that there are several international treaties and political documents which govern different specific environmental issues (e.g. like climate change, biodiversity) and which impose to the states various legal obligations regarding the environment protection.

For the theme of the present study, we have researched in the case-law of both above mentioned institutions of the Council of Europe - the largest human rights organization of Europe, consisting of 47-Member States of the European continent,

renowned for many human rights regulations.

The most important regulations in this field are:

- a) the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter “*the Convention*”) designed to protect, in the first place, civil and political rights of human being, democracy and the rule of law. The human rights protection mechanism enshrined in the Convention (i.e. the European Court of Human Rights) is considered the most advanced in the world, its effectiveness being due to the right of individual applications (art. 34 of the Convention) as a consequence of the acceptance of the binding force and execution of judgments of the European Court of Human Rights (art. 46 of the Convention).
- b) the *European Social Charter* (initial or revised version – hereinafter referred to as “*the Charter*”) designed to protect fundamental social, economic, and cultural rights. This treaty is deemed to be the social Constitution of Europe. On May 3rd, 1996, the European Social Charter was subject to a review in order to adapt it to the social and economic developments, thus allowing its scope to be extended to a new series of economic and social rights.

Having in view the purpose of our present research, we underline that at the Council of Europe’s level, neither the

³Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului (International Protection of Human Rights)*, Hamangiu Publishing, Bucharest, 2019, p. 12.

⁴The category of civil rights includes, for example, the right to life, the right to liberty and security of person, the right not to be arbitrarily arrested, detained or expelled, the right to citizenship.

⁵The category of political rights includes, for example, the right to freedom of thought, conscience and religion, the right to vote and to be elected, the right of asylum.

⁶The category of economic and social rights includes, for example, the right to work, the right to equal pay for equal work, the right to safe and healthy working conditions, the right to paid leave, the right to health (which implies a person’s right to enjoy the best physical and mental health that he/she can achieve).

⁷The category of cultural rights includes, for example, the right to education, the right to benefit from scientific and technical progress, the right to benefit from the protection of patrimonial and non-patrimonial rights deriving from its own creations.

Convention, nor the Charter were drafted to provide a general environment protection (or definition) as such. Both regional instruments mentioned above do not explicitly define the term “environment” or guarantee a right to “a sound, quiet and healthy environment”.

However, we emphasize that, after the careful analysis of the evolving case-law of the European Court of Human Rights (hereinafter “*the Court*”) and of the decisions and conclusions of the European Committee of Social Rights (hereinafter “*the Committee*”), it appears that both the Convention and the Charter, indirectly, offer protection with regard to environmental issues, as we shall demonstrate further.

For instance, the Strasbourg judges have examined different complaints brought by individuals who invoked the fact that a breach of an individual right foreseen in the Convention or in an additional protocol has resulted from different adverse environmental factors (e.g. industrial pollution, noise levels from airports). Those complaints⁸ seem to increase in number, from year to year.

Of course that it is very important to determine under the umbrella of which articles of the Convention could arise the interpretation arguments related to the environment protection.

On one hand, according to the analysed case-law of the Court, the following articles of the Convention could be invoked: the right to life (Article 2), the right to prohibition of inhuman or degrading treatment (Article 3 of the Convention), the right to a fair trial and to have access to a court (Article 6 of the Convention), the right

to respect for private and family life as well as the home (Article 8 of the Convention), the right to receive and impart information and ideas (Article 10 of the Convention), the right to an effective remedy (Article 13 of the Convention), the right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol no. 1 to the Convention).

On the other hand, according to the case-law of the Committee, the right to a healthy environment should be interpreted as a component of the right to protection of health (Article 11 of the Charter).

In the present study, we shall mention the most relevant cases of the above-mentioned international bodies, but please bear in mind that these examples and considerations are not exhaustive.

2. Environmental Protection Principles Derived from the European Convention on Human Rights

As mentioned above, although the Convention does not expressly provide a right to a sound, quiet and healthy environment, several environmental factors can affect the individual rights foreseen in the Convention or in the additional protocols. This is due to the fact that the Court has always adopted an evolutive approach of the interpretation of the rights and freedoms foreseen in the Convention, the judges considering this European convention as a living instrument. Needless to say that the Court affords the national authorities of the state a wide margin of appreciation in order to decide and to implement measures in this area. This fact

⁸ On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, Case-Law Aspects Concerning the Regulation of States Obligation to Make Good the Damage Caused to Individuals, by Infringements of European Union Law, in the Proceedings of CKS eBook, Pro Universitaria Publishing House, Bucharest, 2012, pp. 999-1008.

is also determined by the subsidiarity principle.

We shall analyse further on the relationship between the rights enshrined in the Convention and the environment:

a) The environment and the obligation to respect human rights

Article 1 of the Convention provides that:

*“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”*⁹

The Convention applies according to the general principles of international law, to the territory of the States. In cases when a Contracting Party is not being able to exercise authority on a part of its territory, the scope of jurisdiction shall be reduced¹⁰. Additionally, please note that in exceptional circumstances, certain acts of the States, producing effects outside their territories could constitute an exercise of their jurisdiction. Such circumstances raise the issue of exercising effective overall control over a foreign territory or authority. Even if it is not a case of extraterritorial jurisdiction, in the event of extradition or expulsion, the measures have effect outside the Convention’s territory, but they can be attributed to a Contracting Party which shall be responsible for breaching the Convention (if the case).

b) The environment and the right to life

Article 2 of the Convention provides that:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived

of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”*¹¹

Therefore, Article 2 of the Convention imposes negative and positive obligations on the Contracting States. According to the positive obligation imposed by this article, the public authorities have to take appropriate steps in order to guarantee the rights foreseen in the Convention, in relation to the agents of the respective State or with other (private) persons that are not connected directly with the respective State.

As mentioned in the Court’s judgment in the case *Makaratzis v. Greece*, “[s]o far, the Court has considered environmental issues in four cases brought under Article 2, two of which relate to dangerous activities and two which relate to natural disasters. In theory, Article 2 can apply even though loss of life has not occurred, for example in situations where potentially lethal force is used inappropriately”¹².

Therefore, the positive obligation may apply in case of dangerous activities (e.g. nuclear tests, explosions on the municipal rubbish tip) carried out by public authorities

⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 6, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁰ Case of *Ilaşcu and Others v. Moldova and Russia*, Grand Chamber judgment 8 July 2004, paras. 313, 333, available at <http://hudoc.echr.coe.int/eng/?i=001-127836>.

¹¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 6, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹² Case of *Makaratzis v. Greece*, Grand Chamber judgment dated 20 December 2004, para. 49, available at <http://hudoc.echr.coe.int/eng/?i=001-67820>.

or by private companies. The obligations of the public authorities must be analysed based on the harmfulness of the dangerous activities in case and on the foreseeability of the risks to life¹³.

In every case involving dangerous activities, the Court shall analyse if the public authorities knew or ought to have known that there was, in the case at stake, a real and immediate risk to the lives of people living in places affected by dangerous activities. In such cases, the authorities have obligations under Article 2 of the Convention to protect those people by taking appropriate preventive measures, including to inform those persons of the risks they are exposed by living there. The national legislation and the administrative framework do not have to be defective (e.g. regulations governing the licensing, incorporation, operation, and supervision of potential risk activities¹⁴, maintaining a warning infrastructure).

Needless to say that this positive obligation has to be respected even in case of natural disasters¹⁵ (which are *per se* beyond human control), the public authorities being obliged to prevent the loss of life through several possible actions (e.g. warning the population, implementing emergency relief polices, carrying out appropriate judicial enquiries¹⁶).

In case of loss of life due to an infringement of the right to life, the public authorities must provide in the case an adequate response, the applicants being able to follow the domestic procedures to obtain satisfaction. This adequate response includes the duty of the public authorities, *ex*

officio, to carry out a prompt, independent and impartial investigation which to ascertain how the incident/accident took place, why life was lost, and what was wrong in the regulatory system (legislative or administrative).

In case of dangerous activities, the Court considers that if the domestic authorities failed to take all appropriate measures to avoid loss of life, it might not be sufficient civil, disciplinary or administrative remedies, criminal offence charges being required¹⁷. Discussions can be made regarding if the loss of life has been unintentional or not – human error for example.

c) The environment and the right to liberty and security

Article 5 of the Convention provides that:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his

¹³ Case of *L.C.B. v. the United Kingdom*, judgment dated 9 June 1998, paras. 37-41, available at <http://hudoc.echr.coe.int/eng?i=001-58176>; case of *Önerıldız v. Turkey*, Grand Chamber judgment dated 30 November 2004, para. 73, available at <http://hudoc.echr.coe.int/eng?i=001-67614>.

¹⁴ Case of *Önerıldız v. Turkey* [GC], para. 90; case of *Budayeva and Others v. Russia*, judgment dated 22 March 2008, paras. 129 and 132, available at <http://hudoc.echr.coe.int/eng?i=001-85436>.

¹⁵ Case of *Budayeva and Others v. Russia*, para. 135.

¹⁶ *Ibidem*.

¹⁷ Case of *Önerıldız v. Turkey* [GC], paras. 92-93; case of *Budayeva and Others v. Russia*, paras. 139-140.

committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”¹⁸

Even though a few years ago we could not have imagined that environmental protection could impact the interpretation of Article 5 of the Convention, the Strasbourg judges have underlined that in case of serious offences against the environment causing ecological disasters (e.g. massive spilling of oil), the interest of the public consists in to bring those responsible to justice. Therefore, an important environment damage may justify arrest and detention¹⁹.

d) The environment and the access to justice and the existence of an effective domestic remedy

Article 6 paragraph (1) of the Convention provides that:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”²⁰

According to this article, each individual has the right to initiate judicial or administrative proceedings for protecting his or her rights. The right to a fair trial includes the right of access to a court, the right to see executed a final and enforceable court

¹⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms, pp. 8-9, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁹ Case of *Mangouras v. Spain*, Grand Chamber judgement dated 8 January 2009, available at <http://hudoc.echr.coe.int/eng?i=001-100686>.

²⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 9, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

decision, and the right to respect the court decisions.

Article 6 of the Convention will be applicable if there is a direct link²¹ between an environmental issue and a civil right that has been invoked, because mere tenuous connections and/or remote consequences shall not be sufficient.

Based on Article 6 of the Convention, the environmental associations are entitled to bring proceedings in the domestic legal systems, in order to defend the interests of their members, going beyond the general public interest – to protect the environment²².

In complex environmental matters involving environmental policy questions, the Court underlined that the decision-making process of the domestic remedies have to respect the rights and interests of individuals under Articles 2 and/or 8 of the Convention – in case they were not respected, those individuals have to be able to appeal to a court²³.

e) The environment and the respect for private and family life

Article 8 of the Convention provides that:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*²⁴

According to this article, “the respect for the right to private life, family life, the respect for the domicile of a person and the secrecy of his/her correspondence impose, first of all, negative obligations on the part of the state authorities”²⁵. Besides these negative obligations, the public authorities have positive obligations, which are necessary for ensuring effective respect for private and family life.

Along the decades, although no explicit right to a clean and quiet environment exists in the Convention, the Court found in several cases that “severe environmental pollution” due to noise, emissions or smells can affect people’s lives and can prevent them from enjoying their homes, fact that can violate Article 8 of the Convention²⁶. The simple environmental degradation is not sufficient, in principle, to attract the violation of Article 8, because the

²¹ Case of *Balmer-Schafroth and Others v. Switzerland*, Grand Chamber judgment dated 26 August 1997, para. 40, available at <http://hudoc.echr.coe.int/eng?i=001-58084>.

²² Case of *Gorraiz Lizarraga and Others v. Spain*, judgment dated 27 April 2004, paras. 46-47, available at <http://hudoc.echr.coe.int/eng?i=001-61731>.

²³ Case of *Taşkın and Others v. Turkey*, judgment dated 10 November 2004, para. 119, available at <http://hudoc.echr.coe.int/eng?i=001-67401>.

²⁴ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 11, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁵ Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole (The European Convention on Human Rights. Article-by-article Commentary)*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

²⁶ Case of *Hatton and Others v. the United Kingdom*, Grand Chamber judgment dated 8 July 2003, para. 96, available at <http://hudoc.echr.coe.int/eng?i=001-61188>; case of *Moreno Gómez v. Spain*, judgment dated 16 November 2004, para. 53, available at <http://hudoc.echr.coe.int/eng?i=001-67478>; case of *Giacomelli v. Italy*, judgment dated 2 November 2006, para. 76, available at <http://hudoc.echr.coe.int/eng?i=001-77785>; case of *Borysiewicz v. Poland*, judgment dated 1 July 2008, para. 48, available at <http://hudoc.echr.coe.int/eng?i=001-87213>; case of *Deés v. Hungary*, judgment dated 9 November 2010, para. 21, available at <http://hudoc.echr.coe.int/eng?i=001-101647>.

degradation must in a direct and serious manner affect the private life of a person, his/her family life or his/her home. Therefore, a causal link between the environmental pollution and the negative impact on the person must exist and the environment degradation has to attain a high threshold depending on different criteria (e.g. intensity, duration, effects).

It is interesting that a violation of Article 8 of the Convention, based on environment pollution, can be successfully invoked by a prisoner arguing that the cell is his/her “living space”²⁷.

Under this article, the State has a positive obligation to adopt reasonable and sufficient measures to protect the rights of individuals to respect for their private lives and their home, as well to a healthy protected environment²⁸.

Arbitrary interference by the public authorities is not allowed, positive measures should be taken by the authorities when environmental harm is caused by the representatives of the State or by private actors. Environmental risks must be presented to the public and the authorities need to make sure that measures taken by the State must be properly implemented to prevent environmental disturbance.

Of course that if the public authorities decisions interfere with the right enshrined in Article 8, a fair balance must be struck between the interest of the community and the interest of a certain individual. We underline, however, that the Court recognizes the State a wide margin of

appreciation. The “onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community”²⁹.

However, it is interesting that the States can invoke environment protection as a legitimate aim allowing the domestic authorities to restrict the right foreseen in Article 8 of the Convention³⁰.

f) The environment and the freedom of expression

Article 10 of the Convention provides that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in

²⁷ Case of *Brândușe v. Romania*, judgment dated 7 July 2009, para. 67, available at <http://hudoc.echr.coe.int/eng?i=001-92073>.

²⁸ Case of *Tătar v. Romania*, judgment dated 27 January 2009, para. 107, available at <http://hudoc.echr.coe.int/eng?i=001-90909>.

²⁹ Case of *Dubetska and Others. v. Ukraine*, judgment dated 10 February 2011, para. 145, available at <http://hudoc.echr.coe.int/eng?i=001-103273>; case of *Fadeyeva and Others v. Russia*, judgment dated 9 June 2005, para. 128, available at <http://hudoc.echr.coe.int/eng?i=001-69315>.

³⁰ Please see case *Chapman v. the United Kingdom*, Grand Chamber judgment dated 18 January 2001, para. 82, available at <http://hudoc.echr.coe.int/eng?i=001-59154>.

confidence, or for maintaining the authority and impartiality of the judiciary."³¹

According to the Court, Article 10 of the Convention gives to the individuals the right to receive and to share information and ideas on the environment, because it is a topic of general public interest.

Relevant for this relationship is the case *Steel and Morris v. the United Kingdom*³² in which the Court, by the damages awarded to the applicants due to the lack of fairness in the domestic procedures, recognized that their freedom of expression had been violated.

The right enshrined in Article 10 is not an absolute right, therefore the authorities have to prove that their interferences fulfil the three cumulative conditions foreseen in paragraph (2): (i) legal basis for their action, accessible law and foreseeable effects, (ii) the action pursues one of the specific interests provided in paragraph (2) and (iii) the action is necessary in a democratic society meaning that the means chosen by the authorities have to be proportionate to the interest they are pursuing.

Please note that in the case law of the Court, the judges decided that the information on environment issues provided by groups or activists is very often very sensitive, therefore the level of protection shall be high³³.

Each time the authorities decide to engage in dangerous activities which represent a treat to the health of the individuals, an effective and accessible

procedure for information of the individuals must be established³⁴. If environmental studies or health impact assessments are carried out, then the results of the respective studies must be available for the interested individuals³⁵.

g) The environment and the domestic effective remedy

Article 13 of the Convention provides that:

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*³⁶

This article guarantees everyone that, if he or she has an arguable claim regarding the violation of a right foreseen in the Convention, an effective remedy before a national authority (not necessarily a judicial authority) exists. The State benefits of a large margin of appreciation.

The meaning of this rule is to avoid the cases to arrive in front of the Strasbourg Court, given that the individual could obtain relief at the domestic level, by presenting its case to impartial members.

From the analysis of the case law implying environmental matters, it can be noted that remedies were sought by applicants under Article 2 of the Convention (right to life), Article 8 of the Convention (respect for private and family life) or Article 1 of Protocol 1 (protection of property).

³¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 12, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³² Case *Steel and Morris v. the United Kingdom*, judgment dated 15 February 2005, para. 89, available at <http://hudoc.echr.coe.int/eng?i=001-68224>.

³³ E.g. case of *Vides Aizsardzības Klubs v. Latvia*, judgment dated 27 May 2004, available at <http://hudoc.echr.coe.int/eng?i=001-66349>.

³⁴ Case of *McGinley and Egan v. the United Kingdom*, judgment dated 9 June 1998, paras. 97 and 101, available at <http://hudoc.echr.coe.int/eng?i=001-58175>.

³⁵ Case of *Brândușe v. Romania*, para. 63.

³⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 13, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

h) The environment and the protection of property

Article 1 of the Protocol 1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”³⁷

Under this article, each individual has the right to enjoy peacefully his or her possessions, being also protected for unlawful deprivation of property. The value of a property might be reduced due to environment issues or even it might become impossible to be sold (which could amount to a partial expropriation).

Protection of the environment can be, according to the Strasbourg judges, a general interest restriction³⁸ imposed by the public authorities and even massive infringements to the right of property can be justified³⁹. However, the restrictions must be lawful and proportionate to the legitimate aim pursued. In assessing if the fair balance test has been respected, the State is granted a wide margin of appreciation which means that the interference has to be disproportionate.

In its case-law, the Court acknowledged that “[w]hile the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities’ power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals’ possessions from weather hazards than in deciding on the measures needed to protect lives”⁴⁰.

Additionally, please note that under this article, from the environment protection perspective, certain environmental standards may be required to be ensured by the domestic authorities – meaning positive measures to protect this right⁴¹ especially in case of dangerous activities⁴².

3. Environmental Protection Principles Derived from the European Social Charter and the Revised European Social Charter

Also relevant for our analysis is the activity of the European Committee of Social Rights (hereinafter “*the Committee*”) is a quasi-judicial body formed of fifteen independent members. Through a reporting procedure and a collective complaints procedure, the Committee rules on the

³⁷ The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 33, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³⁸ Case of *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, para. 57, available at <http://hudoc.echr.coe.int/eng?i=001-57711>.

³⁹ Case of *Depalle v. France*, Grand Chamber judgment dated 29 March 2010, available at <http://hudoc.echr.coe.int/eng?i=001-97978>; case of *Brosset-Triboulet and Others v. France*, Grand Chamber judgment dated 29 March 2010, available at <http://hudoc.echr.coe.int/eng?i=001-98036>.

⁴⁰ Case of *Budayeva and Others v. Russia*, para. 175.

⁴¹ Case of *Önerıldız v. Turkey* [GC], para. 134; case of *Budayeva and Others v. Russia*, para. 172.

⁴² *Idem*.

conformity of domestic law and the European Social Charter, having already created an important “case-law”.

Despite the criticism of the declarative value of the Charter’s Part I, it is obvious, however, that it is the most evolved catalogue of economic, social and cultural rights.

We underline that the text of the Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms and must be interpreted as creating fundamental economic, social and cultural rights. This is due to the fact there cannot be complete isolation between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other hand.

As regards the relationship between the environment and the right to the protection of health, please have in mind that the following provisions of the Charter are relevant for the present analysis:

“Part I

11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

(...)

Part II

(...)

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

– to remove as far as possible the causes of ill-health;

– to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

– to prevent as far as possible epidemic, endemic and other diseases.”⁴³

According to the dynamic interpretative approach⁴⁴ of the Committee, the Charter is a living instrument having as a purpose the protection of rights not merely theoretically, but also in fact. Based on this interpretation, according to the Committee, Article 11 of the Charter includes the right to a healthy environment⁴⁵ and is complementary⁴⁶ to Articles 2 and 3 of the European Convention on Human Rights. In each judgment, in order to decide if a Contracting State violated its obligations under Article 11 of the Charter as regards the environmental protection, the Committee will analyse the margin of discretion of the State, if the State managed to strike a reasonable balance between the general interest and the interests of the individuals affected.

In the famous *Marangopoulos* judgment, the Committee underlined that environmental protection is one of the key components of the right to health enshrined in Article 11 of the Charter⁴⁷. Based on this right, the Contracting States are responsible for the activities that harm the environment, no matter if the activities are carried out by the national authorities or by private companies. We consider correct the appreciation of the Committee regarding the private companies because each Contracting

⁴³ The European Social Charter is available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>.

⁴⁴ Inspired from the reasoning in the case of *Tyrer v. The United Kingdom*, judgment dated 25 April 1978, para. 31.

⁴⁵ ECSR, case of *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, decision dated 6 December 2006, paras. 195-196, available at <http://hudoc.esc.coe.int/eng/?i=cc-30-2005-dmerits-en>.

⁴⁶ *Idem*, para. 202.

⁴⁷ *Marangopoulos v. Greece*, para. 195.

State is required to ensure compliance with the Charter's undertakings.

As regards pollution, please bear in mind that steps should be taken gradually, within a reasonable time, by each Contracting State in order to overcome it. For instance, in order to overcome air pollution, the Contracting States should include in their strategy specific measures such as: developing and updating regularly the environmental legislation, taking specific steps to prevent air pollution (e.g. introducing threshold values for CO₂ emissions), creating supervisory machinery for applying the environmental rules, educating and informing the public about the environmental issues.

Increased attention should be given by the States in order to prevent nuclear accidents and to protect the communities living in such areas of risk. Moreover, please note that the Contracting States should also protect their population against the nuclear accidents' consequences on their territory, even though they happened abroad.

4. Final Considerations

Although the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the revised European Social Charter do not expressly guarantee a right to a sound, quiet and healthy environment, both instruments offer a certain degree of protection with regard to environmental matters, as we have demonstrated within the present study with the evolving case-law in this area.

The European Social Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms, and should be interpreted as creating fundamental economic, social and cultural rights. Although contested sometimes, because of its

construction, as having a limited purpose, different than the Convention for the Protection of Human Rights and Fundamental Freedoms, we consider that it was conceived like this in order to offer flexibility, giving the chance to the States to choose the rights they will guarantee.

Human rights and economic and social development are interdependent. At the European level, the European Social Charter is the equivalent of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Council of Europe's wish being that of establishing two conventions on the fundamental human rights, for civil and political rights, on the one hand, and for economic, social and cultural rights, on the other hand.

Needlessly to say that the case-law of the European Court of Human Rights contributes to the convergence of these two international conventions and this is obvious from analysing the right to a healthy environment.

Increased attention has been lately paid to the European Social Charter, one argument being the establishment of an academic network on the European Social Charter in order to draft a volume of comments on the articles of the European Social Charter and for a better visibility of the activity of the European Committee of Social Rights (in French, *Réseau académique sur la Charte sociale européenne et les droits sociaux* - R.A.C.S.E.⁴⁸). R.A.C.S.E.'s members (e.g. the authors of the present study) are mainly renowned university professors from European university centres, as well as lawyers and practitioners of law, whose work is related to the topic and practice of human rights and, in particular, of the European Social Charter, familiar with the work of the European Committee of Social Rights.

⁴⁸ For more information please see <https://www.racse-anesc.org/en/>.

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