

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT AND ITS IMPLICATIONS IN ROMANIAN LEGISLATION

Ph. D. Prof. Mircea Duțu

Rector of the Ecological University of Bucharest

Among the new fundamental human rights, of the third generation – that of „solidarity rights“, the right to a healthy and ecologically balanced environment takes pride of place, giving true innovative direction to the development of the human rights institution.

Its recognition and safeguard are still a complex, relatively lengthy process, however, and shows obvious particularities at the level of international, Community, or national legal regulations. Initially proclaimed in a general and approximate expression in Principle I of the Stockholm Declaration (1972), this right witnessed gradual constitutionalising, up to the point where nowadays many fundamental laws contain environment-related provisions. Conversely, its consecration at the level of international and Community law is still poor.¹

Following similar evolutions in other European countries, Romanian legislation has gradually assimilated the idea and the requirements of environmental law, to the point where, in revising the Constitution in October 2003, the right to a healthy and ecologically balanced environment is now expressly recognised and guaranteed.

¹ For a general presentation of international regulations in this field: Maguelonne Dejeant-Pons, Marc Pallemarts, *Droits de l'homme et environnement/Human right and the environment*, Conseil de l'Europe/Council of Europe, 2002.

The constitutional provisions are completed and detailed by the other provisions of national law, relevant international and Community texts, using specific approaches.

1. Evolution Preceding Constitutional Acknowledgement

The first framework law for environmental protection (No. 9/1973), adopted especially as a national response to the decisions of the first UN Conference on the human environment (Stockholm, June 1972), did not include any mention of such a right, in a socio-political context where the very institution of fundamental human rights had a precarious existence. The recognition and safeguard of the right to a healthy environment would only be raised in real terms after 1990. Thus, the Constitution of 8 December 1991 established a number of significant relevant provisions.

Among others, after having regulated in art. 20 the relationship between internal law and the international human rights treaties, art. 41(6) provided that „The right of property compels observance of the tasks related to environmental protection...“.

Also, according to art. 134(2) letter e „The State must ensure... the restoration and protection of the environment, and maintain the ecological balance“.

By means of such provisions, the constitutional lawmaker at the time confined himself to an indirect, implicit acknowledgement of such right, due to the concerns the major implications thereof might raise in a transition society. It was only through a special interpretation that the doctrine reached the conclusion that, by stating the obligation of the State to ensure the restoration and protection of the environment, and to maintain the ecological balance, the fundamental law had also recognised, in a correlative way, a related fundamental right of the citizens.² This point of view was also accepted by the jurisprudence of the Supreme Court of Justice.³

² Mircea Duțu, *About the need for recognition and the meanings of the fundamental human right to a healthy environment*, in „*Dreptul*“ Review no.9-12/1990, p.42-49; Idem, *Environmental Law*, „Gamian“ Publishing House, Bucharest, 1993, p.62.

³ Supreme Court of Justice Decision – Administrative Law Department, no. 1112 of 12 June 1997, in reference to the right to a healthy environment acknowledged in art. 5 of Law no. 137/1995 states „This subjective right, moreover, does have a constitutional basis, i.e. art. 134 para. 2 letter e, that obliges the State to ensure «the restoration and protection of the environment, and to maintain the ecological balance». Therefore, not only does the local government decision to build a hotel in the respective park break a subjective right, but it also infringes a fundamental right with a legal basis in the Constitution (art. 134 para. 2 letter e), even if it is not expressly included in the area of fundamental rights regulated by Chapter II Title II, as the right to a healthy environment“.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

Such a situation was still unclear from the point of view of constitutional consecration, the provisions of art. 134 (2) letter e not being equivalent to the recognition of a fundamental right to an ecologically balanced environment, which must always be an express recognition, but only to the recognition of a subjective right that would at most originate in the constitution. Moreover, even the respective provisions were placed under Title IV „Economy and Finance“ (marginal by its nature to the economy of the fundamental law) and not under Title II, „The fundamental rights, freedoms and duties“. Therefore, the protection this right would enjoy was still that granted to a subjective right, without access to the specific procedures provided for the fundamental „constitutionalised“ rights.

Following to some extent the general trends in consecrating and safeguarding the right to a healthy environment, at an early stage immediately following this first constitutional step, the legal regulations related to the procedural guarantees thereof were developed. Thus, Law No. 137 of 29 December 1995 on environmental protection stated that „The State recognises the right to a healthy environment for all persons“ (therefore not „fundamental“), and to this purpose guaranteed (art. 5) five procedural rights: access to environmental information, the right to associate in organisations to protect the quality of the environment, the right to consultation in environmental decision making, the right to have access to justice, the right to compensations for damages incurred.

Moreover, any natural or legal person had the obligation and responsibility to protect the environment (art. 7).

Also, Government Emergency Ordinance No. 243/2000 on atmosphere protection (approved by Law no. 655/2001) refers to the insurance, by regulating activities that directly or indirectly impact or may impact the quality of the atmosphere, and by the relevant national strategy, of the „right of every person to a good quality environment“ (art. 1 para. 2).

Along the same line of procedural aspects, Law No. 86/2000 ratified in Romania the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (1998), thereby consolidating the whole of the relevant national regulations in an international perspective.

Another opportunity to develop procedural guarantees of the right to a healthy environment was the approximation of the national legislation with the environmental *Acquis Communautaire*, in the process of pre-accession to the European Union. Thus, the requirements of important directives related to

„horizontal regulations“⁴ or „vertical legislation“⁵ were received and implemented into domestic law, as well as the rule stated in the jurisprudence of the Court of Justice of the European Communities that says the directives related to air and water quality must be interpreted in the sense that they grant the individuals rights that should be protected under the national jurisdictions of the Member States.⁶

Indeed, the national legal regulations do not exclusively target procedural aspects of the right to a healthy environment, as they also contain significant elements of its material content. The best example is in this regard that of the technical-legal norms on the quality of certain environmental media, emission norms, procedure norms, many of which taken over from Community provisions relating to ambient air quality, water quality (based on its various destinations) etc.

2. The Contribution of the Convention on Human Rights and Fundamental Freedoms to the Recognition and Protection of the Right to a Healthy Environment

Romania's ratification of the Convention on Human Rights and Fundamental Freedoms (by Law no. 30/1994) meant an essential mutation in the philosophy and perception of the concept and institution of human rights. And as art. 20 of the Constitution gives priority to the international regulations in this area, in relation to the provisions of domestic law, the provisions of the Convention and the jurisprudence rules regarding the right to a healthy environment will therefore hold overruling legal value. In the absence of express provisions at the level of positive law, ECHR jurisprudence has played an important role in the recognition of a fundamental right to a healthy environment, and after the Constitution was revised by Law no. 429/2003, its

⁴ Such as: Directive 2003/4/EC of the European Parliament and Council on public access to environmental information (repealing Directive no. 90/313/EEC), Directive no. 2003/35/EC of the European Parliament and Council, of 26 May 2003 on public participation in the development of environment related plans and programmes, amending, in relation to public participation and access to justice, Council Directives 85/337/EEC and 96/61/EC.

⁵ E.g. Directive no. 89/618/Euratom of 27 November 1989 on informing the public about applicable health protection measures and behaviour to be adopted in case of radiological emergency, Council Directive no. 90/219/CEE of 23 April 1990 on the contained use of genetically modified micro-organisms.

⁶ As, for instance, CJ/EC, decision of 30 May 1991, C-361/88, Commission vs. Germany, para. 16; decision of 17 October 1991, C-58/89, Commission vs. Germany, para. 14.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

explicit consecration also greatly contributes to the clarification and revelation of the meanings of its material and procedural content.

At the time when the Convention on Human Rights and Fundamental Freedoms was adopted – Rome, 4 November 1950 – environmental problems were not a significant concern at the level of either national authorities or public opinion, which accounts for the absence of express reference thereto in the text of the document. It was only in the 1960's that the ever more evident environmental crisis determined the gradual emergence of legal regulations, policies and strategies, and even specific institutional environmental protection structures. An important moment in the raising and promotion of such objectives was the preparation and conduct of the first UN world conference on the human environment (Stockholm, June 1972)⁷. In this general context, the Council of Europe proposed, in the declaration adopted by the European Conference on Nature Conservation (1970), the development of an additional protocol to the Convention to stipulate and guarantee the right to a healthy and non-degraded environment.

However, the Parties have shown reticence in regard to the novelty and very deep implications, primarily of a socio-economic order, of such a right, to its effective and material difficulty so that it is still not expressly consecrated in the Convention to this day.⁸ Yet, the evolution of reality has imposed the consecration of such a norm in the jurisprudence. Indeed, the European Court that, like the national judge, has the obligation to apply the rule of law even when new problems of national law emerge, that the lawmaker could not

⁷ Frédéric Sudre, *La protection du droit à l'environnement par CEDH*, invol., La Communauté européenne et l'environnement, La documentation Française, 1977, p.209 et al.

⁸ Unlike the European Convention, other regional instruments expressly consecrate such a right. Thus, the African Charter of Peoples' Rights, of 27 June 1981 provides in art. 24, „All the peoples have the right to a satisfactory and global environment, favourable for their development“; The additional San Salvador Protocol to the American Convention on Human Rights, in regard to the economic, social and cultural rights, of 17 November 1988, is the first conventional instrument that included the right to a clean environment in the body of human rights, establishing that „Any person shall have the right to live in a clean environment and benefit from the essential collective equipment“ (art. 11, para. 1.).

The explanation of such apparently surprising discrepancy between North and South in consecrating the fundamental right to a healthy environment is relatively simple: If in the case of the European Convention the provision of such a right automatically means its being guaranteed by a mechanism specially instituted in the document, in the case of the other two– African and American - regional instruments I has a purely declarative character. Moreover, even in the San Salvador protocol, in regard to a clean environment it does not give the individual the right to act in his defence before the Inter-American Commission of Human Rights.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

provide for at the time of its establishment, had to interpret and adapt the texts of the Convention in relation to the concrete and specific problems of environmental protection.

Moreover, one of the legal criteria that characterise the Court jurisprudence is the dynamic criterion, which enables the extension, under certain conditions, of the Convention's scope of application. As its preamble provides not only the „protection“ of human rights, but also their „development“, in considering the evolution of common law or of technological progress, the sense of a text at the time the treaty was drafted should be adapted to the relevant sense after the changes produced in society.

As the ECHR itself stipulated, in its decision of 18 December 1996 (Loizidou vs Turkey case) as a treaty that provides collective guarantee of human rights, the Convention is „a living instrument that has to be interpreted in the light of the conditions of present-day life. Moreover, its object and purpose require an interpretation and application of its provisions in such a way as to render its requirements concrete and effective“.

In this context, even the concept of „fundamental human rights“ and its meanings have witnessed a certain development, as appreciated by ECHR in the Airey case: „if (the Convention) essentially states civil and political rights, some of them will have economic or social extensions. Together with the Commission, the Court does not estimate therefore that any interpretation should be removed for the simple reason that in adopting it, it may involve the risk of extending over the scope of economic or social rights; this scope is not separated from the scope of the Convention by any insurmountable obstacle“.⁹

The praetorian technique used was „protection by ricochet“, which enables the extension of protection of certain rights guaranteed by the Convention to rights that are not expressly provided therein. Of course, at least in this case, a harm caused to the environment may not be considered to be the cause of a right being violated (to a healthy environment) not guaranteed by the Convention and, because of this, it may not be directly invoked before the ECHR, but it may be the cause of violating other rights protected by the Convention and as such subject to the board of controlling bodies of the Strasbourg Court.

⁹ Case of Airey vs. Ireland, decision of 6 February 1981.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

Therefore, the individual's right to a healthy environment does not hold a conventional guarantee except by „attraction“ by another right and under cover thereof.¹⁰

Although some specialists initially suggested the invocation of the right to health and welfare deriving from the right to life, recognised under art. 2 of the Convention, the Court preferred in this regard to call on art. 6.1 that guarantees the right to a fair trial and art. 8.1. recognising the right of any person to the respect of his/her private and family life and home.

It may be appreciated that the ECHR jurisprudence has now crystallized in guaranteeing environmental protection as an individual right under three main aspects: its belonging to the content of the right guaranteed by art. 8.1 of the Convention, the existence of a right to information on the quality and environmental hazards, and of a right to a fair trial in this regard (with all the implications they entail).

2.1. The individual right to a healthy environment – an aspect of the right to private life (art. 8.1. of the European Convention).

The ECHR caselaw has developed a broad, varied and flexible approach to the concept of „private life“ in the sense of art. 8.1 of the European Convention, which enabled its extension „by ricochet“ over the right to a healthy environment.¹¹

Thus it became possible for the Commission, starting in the eighth decade of the past century, to accept gradually, and more and more explicitly, that pollutions affected the right to private life of the claimants and that, for example „noise pollution may undoubtedly affect a person's physical welfare and therefore affect private life“, and that it „may also deprive the person of his/her possibility to enjoy the quietness of his/her home“. In its turn, the Court later admitted that „aircraft noise (...) has reduced the quality of private life and the quietness of the home“. ¹²

¹⁰ Frédéric Sudre, *La protection du droit à l'environnement par la Cour européenne des droits de l'homme*, in vol. „Les Nations Unies et la protection de l'environnement“, Ed. A.Pedone, Paris, 1999, p.140.

¹¹ The European judge does not limit the meaning of the term „private life“ to the intimate scope of human relationships, but extends it to the individual's right “to establish and develop relationships with his/her peers, therefore also covering the professional or commercial activities, and the locations where these are exercised” (Case *Niemietz vs. Germany*, 16 December 1992, A.251 B, para.29).

¹² Sentence in the case of *Powel and Rayner*, of 21.02.90, para.40

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

But the case in which the ECHR made the right to a healthy environment penetrate the scope of action and application of the Convention via an interpretation of art. 8.1, was the case of Lopez-Ostra vs. Spain. The sentence in principle of 9 December 1994 established that serious harm caused to the environment may affect a person's welfare and may deprive the latter of the normal use of his/her home, which affects his/her private and family life, even if it is not a serious hazard to the health of the deprived person. Therefore, the European judge considered that the right of any person to „the respect of private and family life and to a home“ also involves the right to live in a healthy environment.

As it had already done in other areas, the Court adapted the interpretation of a text in the Convention – art. 8.1. – to the evolution of society and its problems, in order to provide effective guarantee to the rights recognised in the document.

Concretely, the concept of private life was understood in the sense of involving a certain comfort, „welfare“, without which the respect of the right to private life and a family and home would not be effective, but only fictitious.

This extension of the scope of application of art. 8 of the Convention to environmental pollution and impacts was later confirmed in the important decision made in the case of Guerra et al. vs. Italy, passed by the Great Chamber, on 19 February 1998, providing that the harmful emissions of a chemical factory have „direct incidence“ on the right protected by art. 8. In the same spirit, by the decision in the case of Mc Ginley and Egan vs. Great Britain (9 June 1988) on the exposure of British soldiers to nuclear radiations, the Court included health protection within the scope of application of art. 8, considering that the claim of the plaintiffs to their health „shows a sufficiently close connection to their private and family life“ for that article to find application.

2.2. The right to information on pollution risks and the quality of the environment

Another important development of the environmental caselaw was achieved by the decision in the case of Guerra et al. vs. Italy. Thus, starting from the thesis of positive measures that the State has to take in providing effectiveness to the right to private and family life, the Court established that Italy had violated art. 8 of the Convention by the fact that the authorities didn't provide the information essential in relation to the major risks posed by the implementation of a chemical plant in the vicinity of their community.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

Therefore, the Party to the Convention has the positive obligation not only to take measures in order to stop or reduce pollution (case of Lopez-Ostra vs. Spain), but also to provide information on the serious pollution risks. Note that the Community judge has placed his decision based on art. 8 and not on art. 10 of the Convention, which is considered inapplicable, with all the relevant consequences in regard to its meanings.

The jurisprudence of the ECHR went even further, in establishing that when a government is committed to develop hazardous activities, such as nuclear experiments, that may have „hidden fatal consequences“ on the health of the persons participating in them, compliance with art. 8 involves the implementation of an „effective and accessible procedure“ that would allow the interested persons to request communication of all the pertinent information (Mc Ginley and Egan vs. Great Britain).

It was also deemed that Article 10 of the Convention therefore requires the states not only to provide environmental information that is accessible to the public, but also positive obligations to collect, develop and disseminate information that, by its nature, is not directly accessible and might not be otherwise made public unless by action of the public authorities (case of Guerra et al. vs. Italy). It therefore recognised the existence of a real right of access to environmental information.

2.3. Safeguarding the right to a healthy environment through the right to a „fair trial“

By virtue of its procedural nature, the exercise of the right to a fair trial provided in art. 6 para. 1 of the Convention is conditioned by the existence of an appeal „on the civil rights and obligations“ (or an accusation in criminal matters). Developing an autonomous interpretation of these conventional rights, the enforcing bodies of the Convention deem that, as a rule, art. 6 is applicable to any appeal of a „patrimonial“ object and is based on a harm deemed to be attached to rights that are patrimonial in their turn. The right of property is by excellence a „civil“ right under the Convention and serves as support in triggering the right to a fair trial (as established, for instance, by the decision in the case of Zander vs. Switzerland, of 25 November 1993), and its infringement by pollution acts enables the right to action before the ECHR, for the harm caused to the right to a fair trial. Therefore, the infringement of the right to a healthy environment may, of itself, trigger the right „to a fair satisfaction“, provided in art. 50 of the European Convention on Human Rights.

2.4. Consequences of the recognition and protection of the right to a healthy environment in the caselaw approach

The ECHR sentence in the case of Lopez-Ostra vs. Spain (1994) attached the environmental protection issues to the technique of positive obligations, in the caselaw approach, providing the burdening of the State Parties to the Convention with the obligation to adopt „positive measures“ aiming to ensure the effectiveness of the protected rights, including against the negative actions of third parties. This provides means to sanction damage to the environment originating in the misconduct of public powers and/or in that of private persons.

This is a way of sanctioning the passivity of public authorities although, in the respective case, they had not been totally inactive.¹³

The decision is also important in the fact that it reveals that a conflict between two private persons may lead to the application of the Convention and the sanctioning of a State by the Court, when the public authorities have not intervened as they should in concretely guaranteeing the observance of the right consecrated by the document. Therefore, in the light of such considerations, the Parties are obliged to take the necessary measures in guaranteeing the right to a healthy environment, and such measures need to be concrete and effective, not only theoretical and declarative, even when it is a matter of relationships between private persons.

There is no doubt that, based on the States' obligation to act, other actions may be imagined beyond the concrete cases already brought before the European Court, in cases placed in the context of relationships between private persons and in order to guarantee the right to live in a healthy environment, a right guaranteed by the 1950 Convention via caselaw.

Thus, in 1996, the Commission had occasion to sanction a state for the culpable omission to disseminate information on a risk of environmental pollution. In such court proceedings, in order to be admissible, an application needs to regard a Party to the Convention and refer to facts under its jurisdiction.

With regard to the latter, the Court established that „The concept of «jurisdiction» in the sense of Article 1 is not circumscribed to the national territory of the High Contracting Parties. A Contracting Party may also see its responsibility triggered when, following military action – whether legal or illegal – it

¹³ Indeed, the judicial courts had decided on a series of measures tending to close the treatment station temporarily, unlike the attitude of the administrative authorities, which had proved vacillating.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

practically exercises control over an area located outside its national territory]. (the case of *Loizidou vs. Turkey*, sentence of 18 December 1996).

Moreover, this is an obligation of result that is thus imposed to the states in the choice of means of implementation. However, the Court grants the States a margin of discretion in specifying that the Convention bodies do not have the obligation to substitute themselves to the national authorities to appreciate the ideal policy in this socially and technically difficult area.

As a rule, a person may not be granted the quality of victim of the breach of a right recognised by the Convention unless it had effectively suffered from this breach, and even if the breach had not caused any damage. In an environmental matter, recognition of a victim's quality for even potential victims is of utmost interest. Moreover, the Commission referred to the concept of potential breach of the Convention in the case of *Guerra et al. vs. Italy*, in the sense that the claimants had the right to sue based on the risk of industrial ownership.

Note that acceptance of the concepts of victim and potential infringement of the right guaranteed by the Convention may enable harmonisation between legal concepts and the imperative of environmental protection, especially in the sense of strengthening the status of the precaution principle.

Thus, in the case of *Tanire* regarding resumption of the French nuclear experiments in the Pacific, the Commission considered that, in order to be deemed victims of a breach of the Convention, the claimants must „be able to claim in a detailed and pertinent manner that in the absence of sufficient precautions taken by the authorities, the level of probability for a damage to occur is so important as to make it possible to consider that it is a breach of the Convention, provided that the incriminated fact should not entail consequences too far into the future“.

2.5. Conclusions

Created by the ECHR jurisprudence via interpretation of art. 8.1 and 6 of the European Convention, the right to a healthy environment is considered to be an individual right, in the „civil rights“ category. As it is not one of the rights that are considered intangible, it may make the object of derogation in exceptional circumstances (art. 15 of the Convention) and the State-Parties may only limit it by law (art. 2 para. 2 of art. 8) and if „it is a measure that, in a democratic society, is necessary for national security, public safety, or the country's economic safety ... or for the protection of the citizens' rights and freedoms“.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

These potential limitations preserve their exceptional character in regard to a healthy environment as well, since the ECHR jurisprudence demonstrates a very ecological conception of society when it appreciates the relationship between this right and the related social interest.

The Court pronounced in the sense of dispensing with the evidence requirement for effective damage to health in order to guarantee the right to a healthy environment, considering that serious environmental damage will of itself cause an affect to a person's welfare, a lack of normal use of the home and a disruption to private and family life.

In relation to the titleholders of the right to sue before the bodies of the Convention, individual action will primarily operate, and will be open to any natural person, non-governmental organisation, and group of private persons (with no clear distinction between the latter two categories).

State action is also possible, with an objective character, as, based on art. 24 of the Convention „Any contracting party may notify the Commission of any lack of application of the Convention provisions, that they think might be charged to another contracting party“¹⁴. Since pollution is of a transboundary nature, such legal basis may be called upon by a state against another in order to determine it to reduce or stop the activity that harms its environment. Note that, unlike the state claimant, the individual claimants have to demonstrate an interest to sue.

Finally, the fact that environmental jurisprudence itself has demonstrated that a conflict between two private persons may trigger the application of the Convention and the indictment of a State by the Court revealed the artificial nature of the opposition between the first and second generation rights, in the sense that all these rights involve positive obligations of the states. They are obliged to take the necessary measures to guarantee the rights provided by the Convention, which need to be concrete and effective. However, consideration is given to the special situation of the right to a healthy environment, to recognise and guarantee it under art. 8.1 and not of consecrating it as a self-standing, third generation solidarity right.

¹⁴ We are faced with the rare cases where the international court authorises an objective action of the states; it is deemed that the Convention Parties have share a legal interest to act whenever failure to apply the document's provisions becomes manifest, with no need to demonstrate any direct, concrete interest. Art.25 does not, however, institute an *actio popularis* that would allow any person to denounce any breach of the Convention by a State Party.

Therefore the European Court of Human Rights has clearly stated the human right to a healthy environment and required the State Parties to the Convention to ensure its effective character, but at the same time it promotes a reasonable vision and leaves a margin of discretion in the states' selection of the necessary means to guarantee and sometimes limit it.

3. Consecration of the Right to a Healthy Environment in the Revised Constitution.

Law no. 429/2003 to revise the Romanian Constitution introduces, under Title II „Fundamental Rights, Liberties, and Duties“, Chapter II „Fundamental Rights and Freedoms“ a new article (no. 35), called „Right to a healthy environment“.¹⁵

Placed in the economy of the constitutional chapter between the right to protection of health (art. 34) and the right to vote (art. 36)¹⁶ the new constitutional text provides:

„(1) The State recognises the right of any person to a healthy and ecologically balanced environment.

(2) The State provides the legislative framework for the exercise of this right.

(3) Natural and legal persons shall have the duty to protect and improve the environment“.

In this way, art. 35 has become the main base for constitutional regulation of this right, to which may be added the provisions of art. 44 (7) related to the right of property and according to which „The right of property compels to the observance of duties relating to environmental protection...“, and those of art. 135 (2) letter e according to which the State must provide, among others: „restoration and protection of the environment and maintenance of the ecological balance“ (an

¹⁵ In constitutionalising the right to a healthy environment, an important role was played by decision 148 of 16 April 2003 of the Constitutional Court on the constitutionality of the legislative proposal to revise the Romanian Constitution which, finding that the proposed introduction of an art. 46¹ to take on the provisions of art. 134 para. 2 letter e (as „the State and the public authorities are obliged to take measures in protecting and restoring the environment, and maintaining the ecological balance“) „is contrary to the logic and organisation of the regulatory material“, decided that „in order to meet the purpose of the legislative proposal, the Court considers it necessary to insert under Chapter II of Title II of the Constitution the human right to a healthy environment, with the correlative obligation of everyone to contribute to environmental protection and restoration“.

¹⁶ The placing of art. 35 under Title II, Chapter II of the Constitution is of no associative relevance, and is purely random, in the sense that it does not allow it to be attached to any of the groups of fundamental human rights.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

article placed, however, under Title IV “Economy and Public Finance”). The meanings of these two constitutional texts complete each other, in the sense that the provisions of art. 135 (2) letter e practically add to those of art. 35, since a State obligation has, at the level of the human rights, the correlative reflex of a fundamental right, in this case the right to a healthy environment. This is the way in which an advanced approach of environmental law becomes consecrated, as also present in the Aarhus Convention, which takes into account both its procedural (in the State assuming the obligation to ensure a legislative framework for the exercise thereof), and its material side (in the State’s obligation to ensure environmental restoration and protection, and maintain the ecological balance). Procedural rights are not perceived as rights in themselves, but as means to attain the ultimate objective, that of a healthy and ecologically balanced environment, that should enable humans to live in an environment of the best possible quality.

Also, the provisions of art. 44 (7) regulate, at least in part, the relationship between the right to an environment and the other fundamental rights, setting priority to „the duties related to environmental protection“, in a modern self-limitative approach constitutionally imposed by each separate right.

The new constitutional „skeleton“ of the right to a healthy environment thus provide express consecration and new perspectives for the promotion and guarantee of its requirements.

The present constitutional regulation helps define the new fundamental right as „the right to a healthy and ecologically balanced environment“, and the ordinary legislation as either the concept of „right to a healthy environment“ (art. 5 of the Framework Environmental Protection Law No. 137/1995), or that of a „right to a good quality environment“ (art. 1 para. 2 of Government Emergency Ordinance No. 243/2000 on atmosphere protection). Of course, in the context of the new constitutional provisions under art. 35, the name that is called for is that of „right to a healthy and ecologically balanced environment“.

This formula best expresses the dualist (man-nature) status of the right, in the sense that, as a fundamental human right to a healthy environment, it preserves its anthropocentric essence, as an imperative for an ecologically balanced environment, it asserts another, equally important essence, of a natural order, as environmental protection regards all the living creatures (including the human species) and the biosphere in general.

Therefore, in the broader, yet more precise sense of its special nature, the right to a healthy environment equally regards man and the natural elements that surround him, so placed as to represent an un-dissociable ecological whole.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

Finally, another important particular is that, as deriving from the provisions of art. 35(3) of the Constitution, the right to a healthy environment also assumes the duty of natural and legal persons to protect and improve the environment, which suggests that a more exact name of art. 35 should be that of „the right to a healthy environment and the duty to protect it“. This inter-dependent equation provides further specificity and a special regime to the new right.

Despite the fact that, at the international, Community, and national level frequent use is made of qualifications such as „healthy“, „clean“, „good quality“, „ecologically balanced“ environment etc. in characterising this fundamental right, there is no precise, legally consecrated understanding of these terms to date, which renders their practical application difficult. However, in relation to the various legal regulations in the present and the development trends evinced so far, important defining components may already be identified.¹⁷

Under this perspective, a first, very general understanding, is that of „right to the environment“, in the minimal sense of ensuring a viable surrounding nature, able to support human life. However, at least on a theoretical level, this requirement for a „*minimum minimorum*“ for survival seems to have been overcome and pretensions converge toward a healthy and „ecologically balanced“ environment.

In its first stage of constitutional occurrence, that of “healthy environment”, it already expresses a certain evolutionary stage of the human society, where human health essentially depends on the health of the environment in which it lives, the two concepts being inter-dependent in their existence and action. The technical-legal expression of this requirement is the provision of a good quality environment (of its constituent elements) and the preservation within defined limits and adequate action of the environmental factors.

Conditioning this right on „human health“ is equally represented at the national and Community level. Thus, Law No. 137/1995 provides for a „strategic

¹⁷ At the international level a satisfactory, viable, or healthy environment is defined by uncertain elements. Apart from cultural differences (especially in regard to North and South) a technical-scientific discrepancy is also apparent. This situation is eloquently expressed by the various formulas used in the international documents, which provides a certain amount of uncertainty in regard to the meanings of the fundamental right. In order to overcome this barrier, more precise terminology has been used (e.g. „healthy“, „ecologically balanced“) or proposed, which highlights the impossibility to define an ideal environment in abstract terms, leaving it to the institutions and courts to establish the concrete meanings, as previously in the case of other human rights. See: Patricia Birne, Alan Boyle, *International law & the environment*, second edition, Oxford University Press, 2002, p.252-271.

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

element“ for the promotion of sustainable development and „priority removal of the pollutants that directly and seriously damage human health“ and in the definition of environment also includes „conditions that may influence human welfare and health“. At the Community level as well, environment also means the state of human health, which is regarded as an indispensable constitutive element.¹⁸

In reference to the quality of „ecologically balanced environment“ the Annex to Law No. 137/1995 includes the definition „ecological balance = all the states and inter-relationships between the constitutive elements of an ecological system, that ensure the maintenance of the structure, functioning and ideal dynamics thereof“. Undoubtedly, in this context, man participates as a constitutive element, as a species among species, in the complex mechanism of nature, in a state that may ensure his reproduction and persistence.

In relation to the term „environment“, while the national legislation (Law No. 137/1995) has chosen an abstract definition (according to which the environment is the totality of natural conditions and elements on earth: air, water, soil, subsoil, characteristic aspects of the landscape, all the atmospheric strata, all the organic and inorganic matter, and living creatures, interacting natural systems, including the elements listed above, including material and spiritual values, the quality of life and the conditions that may influence human welfare and health), the new trend apparent, especially at the international level (Aarhus Convention, Directive 2003/4/EC of the Parliament and of the Council of 28 January 2003), looks at a more simplifying, yet more concrete approach, that might effectively form the object of procedural action, targeting: the environmental media (air, atmosphere, water, soil, landscape and natural areas, biodiversity and its components, genetically modified organisms and interactions among them), factors (e.g.: substances, energy, noise and radiation, and activities and measures) and the human condition (human health and security, human living conditions, cultural areas and buildings and how they are or may be affected by the state of the factors).

¹⁸ Thus, for example, in defining „environmental information“ Directive 2003/4/EC of 28 January 2003 on public access to environmental information includes, apart from the state of environmental media and factors, „the state of human health, security, possibly including contamination of the food chain and living conditions of persons, cultural sites and buildings, to the extent that they are or might be altered by environmental media or factors“ art. 2 (1).

3.1. Implications of the constitutional recognition and guarantee of the right to a healthy environment

Constitutionalisation of the right to a healthy environment presents important legal meanings in addition to the politico-moral impact of assimilating a new fundamental human right, of the „third generation“, that of solidarity rights and bearing a significant symbol of modernity and international standing.

Primarily, it creates a solid legal-constitutional basis in relation to which all the relevant existing regulations must be interpreted and applied, and the legal documents to be adopted must not contravene to the requirements of the existence and guarantee of this fundamental right.

Moreover, this constitutional right will strengthen the duties of public authorities to protect the environment, provides the judge with new means of reclaiming environmental damages and sanctioning damage caused to the environment and enhances the legal basis for correcting excess of power on the part of law-making or administrative authorities.¹⁹

Correct and effective application of the right to a healthy and ecologically balanced environment also assumes its specific development in the form of legally protected particular subjective rights, in close connection to the constitutional source, such as the right to access and benefit from shared resources: quality water, pure air, access to natural state fauna, flora and sea coast, etc.

3.2. Titleholders of the right to a healthy and ecologically balanced environment

As a subjective right, any fundamental human right is a prerogative set by the law, based on which the titleholder may, and sometimes must adopt a certain behaviour and ask others to behave adequately towards his/her right, under the sanction provided by the law, with the object of capitalising on a personal, direct, native and actual, legitimate and legally protected interest, in accordance with the general interest.²⁰

¹⁹ The approval of the Constitutional Court on the legislative proposal to revise the Romanian Constitution, which also provided the inclusion of the right to a healthy environment as a fundamental right, stated that „in this way we legitimise the action of the law-maker to establish sanctions for environmental pollution“ (Decision. 148 of 16 April 2003, item B2.1.)

²⁰ Ion Deleanu, *Constitutional Institutions and Procedures – in Comparative Law and in Romanian Law – Treaty*, „Servi-Sat“ Publishing House, 2003, p.101

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

Of course, of all the defining elements thereof, some present a number of particularities in regard to the right to the environment.

Thus, in relation to the „personal“ character of the protected interest, it is not an essential element, as environment is a „major public interest objective“ and as such, the mere damage to the environment equally affects the interests of each and every individual. The agreement between individual and general interests is also much more complex here, in the sense that they include a remarkable inter-dependence, generated by the man-nature unity.

These particularities also reflect on the titleholders of the right to a healthy and ecologically balanced environment.

Thus, in the words of art. 35 (1) of the Constitution, this right is recognised to „any person“; art. 5 of Law No. 137/1995 provides that the State recognises it to „all persons“.²¹

The titleholder of the right to the environment is the human being, irrespective of its belonging to a state of residence, civil state, etc., in its assumption as an individual (regarded *ut singuli*), collective (peoples, communities) and species among species entity. Its exercise may occur either individually, or collectively, with non-governmental organisations playing an important role in the latter case.

²¹ National constitutions recognise such an individual right either in the words „each/to each“ art. 23 of the Belgian Constitution, art. 66 of the Portuguese Constitution, German, Finnish, Hungarian Constitutions...) or „all/to all persons“ (as, for example, art. 225 of the Brazilian Constitution).

The international instruments of universal vocation refer to a „fundamental human right...“ (Stockholm Declaration, principle 1), a vision taken over in the Rio Declaration. In regard to regional instruments, the African Human and Peoples' Rights Charter (1981) recognises „to all peoples“ the right to the environment (art.24), thus consecrating not an individual human right, but a collective right of the peoples; conversely, the additional San Salvador Protocol of 17 November 1998 to the American Convention on Human Rights refers to the individual right to live in a healthy environment (art. 11). In its specific approach, the European Convention for the Protection of Fundamental Human Rights and Fundamental Freedoms considers that environmental damage affect the individual rights recognised by the document. The instruments regarding procedural guarantees to the right to a healthy environment use the broader term „public“ (public access to information, public participation in decision-making and public access to information, public participation in environmental decision-making and access to justice in environmental matters), understood to represent „one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups (art. 2 item 4 of the Aarhus Convention (1998), art. 2 item 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003.

The right to a healthy and ecologically balanced environment is a „solidarity right“ between the present generations, on the one hand, and the present and future generations, on the other hand.

The former type of solidarity is expressed in the common interest of mankind to provide a healthy and ecologically balanced environment and expresses the inter-dependence between the individuals of the same species and surrounding nature. The latter is mainly expressed by the concept of „right of future generations“. Although in the traditional legal approach, a person only acquires rights at the time of birth, when it comes to inheriting a good quality environment, it acquires a particular countenance. In a first stage it appears as a collective duty of the present generations to maintain and improve the quality of the environment in order to hand it down so to the future generations.

3.3. Guarantees to a healthy and ecologically balanced environment

In its quality of constitutionally recognised fundamental right, the right to a healthy environment benefits, on the one hand, from the guarantees related to fundamental rights and liberties in general, and, on the other hand, from specific procedural guarantees.

3.3.1. General guarantees. The general theory of constitutional law identifies two types of guarantees of the fundamental rights and liberties, of a complementary nature: substantial and procedural guarantees.²²

The first category includes, for example, the exceptional and conditioned nature of the measures to restrict the exercise of such a right (art. 53 of the Constitution), the categorical interdiction to suppress it (art. 152(2) of the fundamental law), its inclusion among the areas that shall not make the object of a constitutional revision (art. 152(2)).

Of significant relevance in this context are the institutionalised guarantees such as: control of law constitutionality (preliminary and preventive or ulterior and sanctioning, with a great significance retained in this regard by the procedure of exception of non-constitutionality), control over administrative activity (that may be political control, administrative control, in the form of conciliation procedures, jurisdictional control and triggering of administrative liability).

At the level of concrete regulations, the relevant framework law (No. 137/1995) taking over the concept of a „dualist“ right to the environment and

²² Ion Deleanu, op. ci., p.150-157.

in consensus with the constitutional provisions, consecrates environmental protection as both an obligation and a responsibility of the central and local governmental authorities, and of all the natural persons (art. 6). After regulating a general obligation of the administration in this regard, the framework law, in Chapter IV „Prerogatives and Responsibilities“ establishes in Section 1 prerogatives and responsibilities of the environmental authorities, in Section 2 prerogatives and responsibilities of other central and local authorities, and in Section 3 the obligations of natural and legal persons.

3.3.2. Special guarantees. The realisation of the right to a healthy environment is primarily provided from a procedural perspective by the recognition of guarantee-rights, currently widely consecrated at the level of national, international, and Community regulations. Of course, there is no clear and precise demarcation between the two dimensions of existence and realisation – material and procedural – of the right to the environment but on the contrary, a conceptual and executorial inter-dependence, consensual to the uniqueness of the pursued objective.

Thus, this reality has already been expressed in the Aarhus Convention that stipulates that „the citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters“ in order to be able to capitalise their „right to live in an environment adequate to his or her health and well-being“, but have „the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations“. (Preamble).

This indestructible connection is also stated in art. 1 of the Convention, sub-titled „Objectives“ that stipulates that: „In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.²³

²³ It is interesting, from this point of view, that, at Community level, in the absence of express full recognition of the right to the environment, procedural rights, primarily the right to access to environmental information held by the public authorities are justified by the fact that „better public access to environmental information and the dissemination of such information enable better awareness of the environmental problems, a more effective public participation in environmental decision making and ultimately, in environmental improvement“ (item 1 of the considerations of Directive 2003/4/CE of the Parliament and of the Council of 28 January 2003).

CONSTITUTIONALISING THE RIGHT TO A HEALTHY ENVIRONMENT

The legislative text of principle in regard to procedural guarantees is currently included in art. 5 of the Framework Environmental Protection Law No. 137/1995. It thus provides the following right-guarantees:

- access to environmental information, with observance of the confidentiality conditions provided by the legislation in force (art. 5, letter a);²⁴
- the right to associate in organisations in order to protect the quality of the environment (art. 5 letter b);²⁵
- the right of being consulted in the decision-making on the development of environmental policies, legislation and regulations, environmental permitting and licensing, including land development plans and urbanism (art. 5 letter c);²⁶
- the right to address, directly or through associations, the administrative or judicial authorities in order to prevent or in the occurrence of a direct or indirect damage (art. 5 letter d);
- the right to compensation for damages incurred (art. 5 letter e).

In regard to the latter, a special regime of civil liability for environmental damage has been established in art. 81 of Law No. 137/1995, which provides three rules in this respect: the objective nature, independent of any guilt, in relation to this liability; joint and several liability in the case of plurality of authors; and the mandatory character of insurance in case of activities that generate major risk. Moreover, it recognises the right of non-governmental organisations to sue in court on behalf of environment conservation, irrespective of who suffered the damage (art. 87).

²⁴ The general legal framework for the exercise of this right includes: Law No. 544/2001 on free access to public interest information; Government Decision No. 123/2002 to approve the Methodological Norms to implement Law No. 544/2001, Government Decision No. 1115/2002 on free access to environmental information, MWEP Order No. 1182/2002 to approve the methodology in managing and providing environmental information held by the environmental public authorities.

²⁵ The associative domain is currently regulated by Government Ordinance No. 26/2000 on associations and foundations.

²⁶ Law No. 137/1995 establishes among „strategic elements“ public participation in environmental decision-making (art. 3 letter i); special regulations organise public participation and consultation in the environmental impact assessment procedure and in the permitting for plans, programs and economic activities.



CONSTITUȚIONALIZAREA DREPTULUI LA UN MEDIU SĂNĂTOS ȘI IMPLICAȚIILE SALE ÎN LEGISLAȚIA ROMÂNĂ

Făcând parte din a 3-a generație de drepturi ale omului, așa-numitele „drepturi de solidaritate”, dreptul la un mediu sănătos și echilibrat ecologic a cunoscut un proces îndelungat și complex de recunoaștere atât la nivel internațional (Stockholm, 1972, Rio de Janeiro, 1992) cât și național.

Evoluția acestui drept în România, începută în 1973, a fost și mai problematică în condițiile în care drepturile omului au avut în perioada dictaturii comuniste o existență precară. Abia Constituția din 1991 conține dispoziții relevante cu privire la drepturile omului, la relația acestora cu tratatele internaționale în materie, precum și primele prevederi relative la obligația statului de a asigura „refacerea și protecția mediului” (art. 134.2).

Recunoașterea dreptului la mediu rămânea însă indirectă și implicită: doctrina juridică a susținut-o, iar Curtea Supremă a confirmat-o. Nu era vorba însă decât de un drept subiectiv, iar locul unde acesta era amintit (titlul IV: Economie și Finanțe) nu avea legătură cu drepturile omului reglementate în titlul II al Constituției. El a fost totuși dezvoltat în legea-cadru cu privire la mediu nr. 137/1995 care garantează și drepturi procedurale: accesul la informația de mediu, dreptul de a se asocia pentru protecția acestuia, cel de a participa la luarea deciziei și accesul la justiție în această materie, precum și în alte acte normative ca: OU nr. 243/2000 sau Legea 86/2000 care reglementează protecția atmosferei și respectiv ratifică Convenția de la Aarhus privind accesul publicului la informație etc. Garanțiile procedurale ale dreptului la mediu au fost de asemenea introduse în dreptul român ca urmare a obligației armonizării legislației românești cu legislația comunitară.

În continuare, autorul analizează **rolul și influența Convenției Europene a Drepturilor omului asupra filozofiei și evoluției dreptului la mediu** pe plan internațional și național cât și jurisprudența CEDO. În acest sens tehnica pretoriană a „protecției prin rigoșeu” a jucat un rol important în promovarea dreptului individual la un mediu sănătos. CEDO a considerat că încălcarea

unui drept care nu este prevăzut de Convenție poate fi asimilată încălcării altor drepturi protejate de aceasta. În acest sens dreptul la viața privată poate fi extins și poate conține și dreptul la un mediu sănătos.

De asemenea CEDO a stabilit că dezvoltarea unor activități generatoare de riscuri ca cele nucleare implică, conform art. 81 al Convenției, existența unui drept de informare cu privire la calitatea mediului, iar că prin intermediul dreptului la proprietate, atunci când acesta este prejudiciat printr-o activitate poluantă, dreptul la un mediu sănătos poate fi invocat în contextul dreptului la un proces echitabil, conform art. 61 al Convenției.

Consecințele recunoașterii și protecției acordate astfel dreptului la un mediu sănătos se concretizează în posibilitatea sancționării prejudiciului de mediu datorat acțiunii sau inacțiunii autorităților publice sau ale persoanelor private.

Jurisprudența CEDO a creat astfel, pe baza integrării sale în categoria drepturilor civile, un drept la un mediu sănătos, care nu poate fi limitat decât în cazurile excepționale prevăzute de lege, fără ca el să constituie însă un drept de sine stătător.

În ultima parte a studiului, autorul examinează **condițiile și implicațiile consacării în Constituția României a dreptului la un mediu sănătos.**

Noul text constituțional (art. 35) conține mai multe dispoziții interdependente: recunoașterea de către Stat a dreptului la un mediu sănătos și echilibrat ecologic (1), obligația Statului de a asigura cadrul legislativ al exercitării acestui drept (2) și îndatorarea persoanelor fizice și juridice de a proteja și ameliora mediul (3). Acestor noi dispoziții li se adaugă prevederea privind obligația statului de a asigura refacerea și ocrotirea mediului (art. 135.2.e) și cea referitoare la dreptul de proprietate care impun proprietarului respectarea sarcinilor privind protecția mediului (art. 44). Cele trei texte constituționale se completează reciproc îndeosebi pentru că noul articol pune în lumină faptul că dreptul la un mediu sănătos se referă atât la om, cât și la natură aflate într-o indisociabilă relație ecologică. Legea-cadru 137/1995 care în definiția mediului includea deja „condițiile care pot influența bunăstarea și sănătatea umană” făcea și ea referire la sistemul ecologic conceput ca un sistem la care omul participă ca element constitutiv în mecanismul complex al naturii.

Implicațiile recunoașterii constituționale și a garantării dreptului la un mediu sănătos sunt multiple: întărirea obligațiilor autorităților publice de a proteja mediul, crearea unei baze legale solide pentru sancționarea în justiție a daunelor de mediu, asigurarea unei protecții mai bune a drepturilor subiective legate de mediu.

În calitatea sa de drept recunoscut de Constituție, **dreptul la un mediu sănătos beneficiază de garanțiile drepturilor fundamentale** care pot fi substanțiale și procedurale. Primele se referă la posibilitatea restrictivă de limitare a acestui drept, la interdicția suprimării sale și la aspecte instituționale (controlul de constituționalitate sau controlul asupra activităților administrative), cele procedurale sunt prevăzute în art. 5 al legii-cadru 137/1995: accesul la informația de mediu, dreptul de asociere în vederea protecției mediului, participarea publicului la deciziile privind mediul, dreptul de a se adresa autorităților administrative sau judecătorești în cazul producerii acestora. Cu privire la acest drept de reparare a prejudiciului, regimul de răspundere civilă obiectivă, stabilit de legea-cadru, constituie deja un progres important în dreptul român al mediului.