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Sustainable Development and Protection of Environment in the European Convention on Human Rights¹

1. Introduction

Sustainable development means a complete balance between the three factors of civilization's progress: economic, social, and environmental². Sustainable development is a consequence of the Earth's limited resources. Thus, it consists in managing the planet in such a way that the current prosperity of society will not result in restrictions on the fulfillment of needs by the coming generations³. This particular way of managing the planet takes on special significance now. The scientific community warns that only a radical change in the behavior of states, corporations and individuals can curb negative trends, such as a warming climate⁴ and an increase in pollution⁵.

¹ The text presented here is an expansion and completion of the paper entitled "Sustainable Development in the European Convention on Human Rights" presented at the scientific conference "Islands and Oceans: Public Law in a Plural World", 3–5 July 2023, Wellington, New Zealand.

² E. Javanmardi, S. Liu, N. Xie, *Exploring...*, p. 5.

³ *Ibidem*, p. 1.

⁴ IPCC, *Climate Change 2021...*

⁵ I. Manisalidis et al., *Environmental...*, p. 10.

The concept of sustainability has a broad meaning⁶. It does not refer only to environmental issues or stopping climate change. The United Nations has unveiled Agenda 2030, a strategy for world development until 2030⁷. This program contains seventeen Sustainable Development Goals divided into five areas: People, Planet, Prosperity, Peace and Partnership. Each Goal contains specific tasks to be achieved by 2030 – a total of 169 tasks. These include, for example, eradicating poverty and hunger, working for gender equality, protecting the environment in the broadest sense, but also developing strong democratic institutions. Sustainability is also an important part of European Union policy⁸. The European Union has also pledged to move toward an economically sustainable Europe in which people “living well within the limits of our planet”⁹. Moreover, Article 37 of the Charter of Fundamental Rights of the European Union¹⁰ declares that “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. For the purposes of this text, sustainable development is understood narrowly and refers to environmental issues¹¹.

The Council of Europe is also involved in the process of implementing the Sustainable Development Goals¹². But what’s even more important, the Council of Europe member states signed the European Convention on Human Rights in 1950 (hereinafter, ECHR, the Convention). Under this act, the European Court of Human Rights was established (hereinafter, ECtHR, the Court). This body has ensured effective and efficient protection of human rights. In practice, its activities are part of the implementation of Sustainable Development Goal No. 16, especially: ensuring public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; promoting the rule of law at the national and

⁶ G. Bándi, *Sustainable...*, p. 17.

⁷ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly UN on 25 September 2015, < <https://sdgs.un.org/2030agenda> >, accessed: 4 November 2023.

⁸ M. Kenig-Witkowska, *The Concept...*, pp. 64–80.

⁹ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 “Living well, within the limits of our planet”, OJ L 2013, 354/171.

¹⁰ Consolidated Version of the Charter of Fundamental Rights of the European Union, OJ C 2016, 202/390.

¹¹ A. Kipáne, A. Vilks, *Legal...*, pp. 169–179.

¹² Council of Europe Contribution to the United Nations 2030 agenda for sustainable development goals, < <https://www.coe.int/en/web/un-agenda-2030> >, accessed: 4 November 2023.

international levels and ensure equal access to justice or promoting and enforcing non-discriminatory laws and policies for sustainable development¹³. The question, however, is whether the ECHR is an effective instrument for realizing sustainable development understood as environmental protection?

European Court of Human Rights considers the Convention as a living instrument¹⁴. This brings the text of the Convention up to the challenges of today. The Court “discovered” the new content of many of the Convention’s provisions, such as the rights of LGBT persons¹⁵. The question is, does the Convention provide the right to sustainable development and/or to the protection of environment? The answer to this question is negative. European Tribunal of Human Rights in 2003 in one of the environmental cases – *Kyrtatos v Greece*, stated clearly:

(...) severe environmental pollution may affect individual’s (...) private and family life (...). Yet the crucial element which must be present in determining whether, in the circumstances of the case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person’s private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection to the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect¹⁶.

However, this does not mean that the court does not recognize the importance of environmental protection, as well as sustainable development. We need to remember that the protection of the environment is in practice a side effect of the protection of the fundamental rights of the individual or general interest. When the Convention was enacted, environmental protection was not considered one of the key tasks of the state. Over time, however, it began to be recognized that environmental protection is in the general interest of society. This problem is recognized by the ECtHR itself. In a case involving noise pollution, five judges jointly issued a dissenting opinion in which they stated:

¹³ R. Sopilnyk, J. Piwowarski, *Access...*, pp. 43–53.

¹⁴ E. Bjorge, *Domestic...*, pp. 131–154.

¹⁵ < https://ks.echr.coe.int/documents/d/echr-ks/guide_lgbti_rights_eng >, accessed: 3 July 2024.

¹⁶ Judgment of the ECHR of 22 May 2003, *Kyrtatos v Greece*, application no. 41666/98, § 52.

In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle: “...Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being”¹⁷.

For this reason, the Court has repeatedly referred to environmental issues, referring to the use of the Convention as a “living instrument”. European Court of Human Rights tried to adopt a dynamic approach to the protection of the environment. The Court has issued a lot of judgments recognizing claims with an environmental component, relying mainly on the following grounds: right to life, right to respect for private and family life, freedom of expression, freedom of assembly and association, right to an effective remedy and protection of property¹⁸. They concerned, among others, to noise pollution¹⁹, steel plants²⁰, mines²¹ etc.²²

The Court’s case law in this regard can be divided into two categories. In the first category, the protection of the environment justifies limiting rights under the Convention. In this case, national authorities may interfere with individual rights when they determine that it is necessary to do so to protect the general public interest, which is the protection of the environment. The second category includes those Convention rights that can be directly violated when negative environmental factors exist. National authorities may then be required to take action to ensure adequate protection of these rights²³. Both of these situations will be briefly presented with selected examples.

¹⁷ Judgment of the ECtHR of 8 July 2003, *Hatton and Others v. the United Kingdom*, application no. 36022/97, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner. See also: J. Verschuuren, *Contribution...*, p. 4.

¹⁸ A. Gouritin, *Sustainable...*, p. 515.

¹⁹ E.g. Judgment of the ECtHR of 21 February 1990, *Powell and Rayner v the United Kingdom*, application no. 9310/81.

²⁰ E.g. Judgment of the ECtHR of 24 January 2019, *Cordella and Others v Italy*, applications nos. 54414/13 and 54264/15.

²¹ E.g. Judgment of the ECtHR of 10 November 2004, *Taşkın and Others v Turkey*, application no. 46117/99.

²² A. Gouritin, *Sustainable...*, pp. 515–516.

²³ C. Pogodziński, *Prawo do środowiska...*, pp. 79–80.

2. Environmental protection and general public interest

When a state affects an individual's rights under the Convention, the primary justification for such interference is that the state invokes the general interest in justifying such interference. The interference may take various forms, but its immediate purpose must be to protect the general interest, which in this case is the environment. It means that environmental rights can ground the interference with the enjoyment of a right guaranteed by the Convention, for example, the right to property or private life²⁴.

Taking the right to property under the Additional Protocol to the Convention no. 1 (hereinafter, Protocol no. 1) as an example, one can point to cases in which the Court found that there was no violation of the Convention due to environmental protection done in the general interest²⁵. The decisive factor in this regard was to determine whether the restriction of individual rights was for a legitimate purpose, i.e., whether the state was acting in the general public interest. For example, in the case of *Hamer v Belgium* the subject of the dispute was the illegal construction of a residential building by the applicant's parents in a wooded area²⁶. As a result of the proceedings, the building was demolished. The applicant claimed a violation of Article 6 (1) of ECHR and Article 1 Protocol no. 1. The Court found no violation of the right to property, however, finding a violation of Article 6 (1) ECHR. More importantly, however, the Court found that the environment is a value in itself, the quality of which is in the interest of both society and public authorities. The Court's position is worth quoting in full:

It reiterates that while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI), in today's society the protection of the environment is an increasingly important consideration (see *Fredin v. Sweden* (no. 1), 18 February 1991, § 48, Series A no. 192). The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority

²⁴ C. Pogodziński, *Prawo do środowiska...*, pp. 79–80; see also: A. Gouritin, *Sustainable...*, p. 515.

²⁵ ECtHR, Environment and the European Convention of Human Rights, Factsheet, April 2024, < https://www.echr.coe.int/documents/d/echr/fs_environment_eng >, accessed: 4 November 2023.

²⁶ Judgment of the ECtHR of 27 November 2007, *Hamer v Belgium*, application no. 21861/03.

over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective²⁷.

Also noteworthy are the Court's theses in the case *Depalle v France*²⁸. The case concerns the withdrawal of temporary occupancy authorizations for houses that were located in a public coastal area. The need to protect coastal areas was cited as one of the reasons. The local authorities not only revoked the authorizations but called on the applicants to restore the areas at their cost. The Court acknowledged all these interests: environmental interests, collective use, and nature conservation as constituting the legitimate goal of the national interference with the right to private property and stated that:

(...) environmental conservation, which in today's society is an increasingly important consideration (...), has become a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities (...). The Court therefore considers that the interference pursued a legitimate aim that was in the general interest: to promote unrestricted access to the shore, the importance of which has been clearly established²⁹.

The Court came to an extremely interesting conclusion in the case of *Fägerskiöld v Sweden*³⁰. The complaint to the Court was filed by Swedish citizens – a married couple who in the mid-1980s purchased a recreational plot of land, along with a summer house on it. Their permanent residence was in Jönköping. In 1991 and 1992, two wind turbines were erected on a nearby property, 430 and 620 meters from their property, respectively. Then, in 1998, the third and largest turbine was erected 371 meters away. According to the applicants, the wind turbines emitted a constant and pulsating noise, and sometimes a light effect. The applicants filed a complaint, invoking Article 8 ECHR and Article 1 Protocol no. 1. They claimed that the continuous pulsating noise emitted by the turbine and the reflection of light from its blades violated their property right and prevented them from fully exercising

²⁷ Judgment of the ECtHR of 27 November 2007, *Hamer v Belgium*, application no. 21861/03, § 79.

²⁸ Judgment of the ECtHR of 29 March 2010, *Depalle v France*, application no. 34044/02.

²⁹ *Ibidem*, § 81.

³⁰ Judgment of the ECtHR of 26 February 2008, *Fägerskiöld v Sweden*, application no. 37664/04.

their right to respect for private and family life. They also claimed that the property had lost value. The Swedish government stressed that:

(...) legitimate aim of protecting the economic well-being of the country and the rights and freedoms of others by contributing to the sustainable development of Sweden's natural resources and ensuring that its citizens could live in a safe and peaceful environment and wind power is a renewable source of energy considered to be environmentally friendly and to contribute to the sustainable development of society.

In the Court's view, the inconvenience in the sphere of the complainants' private life caused by the wind turbines could not be considered to constitute serious environmental pollution. It found that the level of noise emitted was not so high as to seriously violate the applicants' rights to respect their "home" and "private and family life". But more importantly, although the Court rejected the plaintiffs' environmental arguments, in practice, it did precisely that, to protect the environment. The Court stated that:

(...) there is no doubt that the operating of the wind turbine is in the general interest as it is an environmentally friendly source of energy which contributes to the sustainable development of natural resources. It observes that the wind turbine at issue in the present case is capable of producing enough energy to heat between 40 and 50 private households over a one-year period, which is beneficial both for the environment and for society³¹.

3. Environmental protection and the exercise of other freedoms and rights contained in the Convention

It may be that the good condition of the natural environment is a prerequisite for the exercise of the freedoms and rights contained in the Convention. A particularly notable example is the case of the iron plant in Taranto³². The complaint to the Court was brought by 180 Italian citizens who lived in or near the Italian municipality of Taranto. The municipality is home to Europe's largest industrial steelworks complex. It covers an area of more than 1500

³¹ See also: W. Huck, *Sustainable...*, p. 314.

³² Judgment of the ECHR of 24 January 2019, *Cordella and Others v Italy*, applications nos. 54414/13 and 54264/15.

hectares and employs more than 11 000 people. The negative impact on the environment and human health of air pollutant emissions from iron plants has been the subject of alarming reports by scientists for years. In 1990, the Italian government recognised the municipality of Taranto and the surrounding municipalities as areas of “special environmental risk” and drew up a plan for the clean-up of the area. Since 2012, the government has adopted a series of successive action plans, setting a deadline of the end of 2023 for the introduction of measures. The subject of the complaint was the inaction of the Italian authorities resulting in a violation of Article 8 of the Convention.

Serious environmental damage can impair the well-being of individuals and deprive them of the enjoyment of their homes, harming their private lives. In cases in which the concept of the threshold of seriousness has been specifically examined in relation to the environment, the Court has held that a justiciable allegation under Article 8 ECHR may arise if the environmental hazard reaches a seriousness that significantly impairs the applicant’s ability to enjoy his or her dwelling or private or family life. The assessment of this level in this type of case is relative and depends on all the factual circumstances of the case, in particular, the intensity and duration of the nuisance and its physical or psychological effects on the person’s health or quality of life. The ECtHR stated also that the proper balance was struck between the interests of the applicants – which is to avoid serious environmental damage that could affect their well-being and private life – and the interests of society as a whole. Accordingly, there was a violation of Article 8 of the Convention in the present case. Some of the safeguards that protect the health and lives of residents are still not in place, casting doubt on the Court’s effectiveness. Rightly points out Roberta Greco, that:

In general, treating environmental protection as a human rights issue may engage States’ responsibility for violations of human rights treaties, whenever they fail to provide a legal framework to prevent and put an end to environmental harm affecting the enjoyment of human rights. Accordingly, international accountability mechanisms and regional human rights courts can be helpful to address these violations. However, their effective capability to lead States to regulate dangerous activities, provide environmental information and enforce environmental law remains to be ascertained³³.

³³ R. Greco, *Cordella et al v Italy*..., p. 7.

4. Climate change litigation

As the judgments cited above show, the ECtHR seeks to protect the environment using the legal framework provided by the Convention. This is not an easy task. The Convention is explicitly about human rights, not environmental protection. The Convention does not contain additional human rights that relate to environmental protection or living in a clean environment. This means, of course, that the legal instruments that the Court can use are limited and, primarily, inadequate. Today, however, the environmental challenges facing the world are even greater. This problem is particularly noticeable in the case of climate change. Progressive, rapid climate change poses a significant threat to the functioning of the human race³⁴. Anthropogenic greenhouse gas emissions are already causing changes to global temperatures and the world is far from achieving the goal of the Paris Agreement: “(...) the increase in the global average temperature to well below 2°C above pre-industrial levels”³⁵. Countries closer to the equator and island states are already feeling the negative effects of climate change³⁶. There will undoubtedly also be an increase in the number of cases involving so-called “climate refugees”³⁷. Further climate change will only exacerbate this phenomenon.

Noteworthy are the numerous proceedings initiated in recent years that relate to climate change³⁸. At present, these have not been resolved. Of greatest interest was the case *Duarte Agostinho and Others v Portugal and Others*³⁹. The complainants are four children from Portugal. It is interesting to note, however, that the complainants do not exclusively invoke Articles 2 and 8 ECHR. They allege that the states did not keep their human rights obligations by failing to agree to emissions reductions that will keep temperature rise to 1,5 degrees Celsius, as envisioned by the Paris Climate Agreement.

They point to a violation of Article 14 ECHR, which expresses the prohibition of discrimination. They claim that climate change particularly affects

³⁴ IPCC, *Climate Change 2021...*

³⁵ Paris Climate Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156, Article 2 (1) (a). See also: C. Voigt, *The power...*, pp. 237–249.

³⁶ International Law Commission, *Sea-level...*; see also: J. McAdam, *Protecting...*, pp. 708–725.

³⁷ UNHCR, *Legal Considerations...*, pp. 151–165.

³⁸ C. Heri, *Climate...*, p. 926.

³⁹ Case in pending before ECtHR, application no. 39371/20. See also: H. Keller, C. Heri, R. Piškóty, *Something...*, pp. 1–26.

their generation⁴⁰. They also invoke the principle of intergenerational equality. It is also noteworthy that it is the youth who are pointing out the importance of environmental protection, working to truly expand the catalog of human rights. The position is understandable. For example, the WHO estimates that between 2030 and 2050, climate change will cause 250 000 deaths annually due to malnutrition, malaria, and heat stress⁴¹.

No doubt the Court itself recognises the importance of the case. The Chamber of the European Court of Human Rights to which the case had been allocated has relinquished jurisdiction in favor of the Grand Chamber of the Court based on Article 30 ECHR⁴². The referred case is a strategic litigation. The idea of strategic litigation is based on recognizing the design function of judicial jurisprudence about the legal system and recognizing the judiciary as a space for channeling and resolving social conflicts. Conducting an individual case is a good opportunity to start a public debate on the rights of a given community, or to join in this debate. I am negative about the applicants' chances of obtaining a favorable judgment. However, I do not believe that this is their primary objective. It is clear that it is not for the Court to assess the implementation of the so-called Paris Agreement (it can, of course, examine other circumstances). The most important thing is to draw attention to the increasing degradation of the environment. Indeed, the filing of the complaint represents another attempt to change thinking about the Earth and the consequences of the current economy. Regardless of the ECtHR ruling, Helen Keller and Corina Heri are right that: "the issue of climate change highlights fundamental questions about the Court's role"⁴³.

5. Conclusions

To conclude, the Court's dynamism is limited. The Court is not equipped with competencies that can protect the personal and collective dimensions of sustainability, including the protection of the environment. Limitations

⁴⁰ A. Daly, *Climate...*, p. 19.

⁴¹ *Ibidem*, p. 3.

⁴² Article 30 ECHR: "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber".

⁴³ H. Keller, C. Heri, *The Future...*, p. 174.

of the protection of the environment arise from the fact that the European Convention on Human Rights is not a specific instrument for environmental protection. It also appears that the relatively good state of the environment and the absence of the highly disruptive effects of climate change in Europe is preventing the Court from being more active on these issues. However, even if this situation were to change, Council of Europe member states should consider introducing such a right that would provide a direct basis for environmental protection, such as the right to live in a clean environment or similar.

The ECtHR case law did not lead to a harmonization of environmental standards across Europe, nor the adoption of environmental policies. For Europe, therefore, it seems that the EU's approach towards sustainable development is a more promising option. The EU's impact on the environment has been far greater⁴⁴.

New cases brought before the Court may change this perspective. The fact is that Europe ensures the relatively high quality of the environment and takes measures to stop climate change. However, this does not mean that these changes will not affect the European continent. On the contrary, the problem is global and multidimensional, and Europe, like elsewhere in the world, will suffer.

Any changes made to the Convention, although needed, will also not be sufficient. Stopping unfavorable trends on environmental issues is only possible through the cooperation of all countries that will conduct their obligations in good faith⁴⁵. A case like *Duarte Agostinho and Others v Portugal and Others*, however, gives some optimism. It shows that for an important part of society, the one that will decide public affairs shortly, problems of sustainable development, including, among other things, environmental protection, are an important, even vital, issue.

Abstract


The concept of sustainable development is multidimensional. It can be thought of as actions taken at the social, environmental, and economic levels to ensure that the needs of future generations are met like those of current generations. Sustainable development appears in numerous acts at national and international levels. The most comprehensive approach to this issue was presented by UNESCO, which

⁴⁴ J. Verschuuren, *Contribution...*, p. 15.

⁴⁵ P.V. Tzevelekos, K. Dzehtsiarou, *Climate...*, pp. 5–7.

presented a list of seventeen sustainable development goals. The implementation of the Sustainable Development Goals is also an objective of the Council of Europe. The body of particular importance for their implementation is the ECtHR. This article addresses only a selected issue relating to one of the tasks of sustainable development, i.e., environmental protection. The Convention does not contain provisions relating to environmental protection. Nevertheless, the ECtHR directly refers to environmental issues in its case law. The text considers how the Court tries to protect the environment. At least two such situations can be distinguished. Firstly, the Court refers to the possibility of limiting conventional freedoms and rights for the protection of the public interest, which is environmental protection. Secondly, the ECtHR forces states to need to protect the environment due to the inability to exercise the freedoms and rights conventional (in particular those expressed in Articles 2 and 8 ECHR). The text also analyzes the potential effects of complaints brought from 2020 on stopping climate change.

Keywords: sustainable development, environmental protection, ECtHR, European Convention on Human Rights, climate change

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