Principles in the Service of Conception and Protection of the Right to Live in a Healthy Environment: (In)Consistency of the European Court's Case-Law

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PRAVNI fakultet
Univerzitet UNION

PROPERTY LAW – CHALLENGES OF THE 21st CENTURY

Proceedings

International Scientific Conference
held on 9 October, 2020 in Belgrade, Serbia

Editors
Jelena Simić
Aleksa Radonjić

Belgrade, 2021.

UDK 502:341.645(4)

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PRINCIPLES IN THE SERVICE OF CONCEPTION AND PROTECTION OF THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT – (IN)CONSISTENCY OF THE EUROPEAN COURT'S CASE-LAW

Abstract: *During the last two decades, the European Court of Human Rights has increasingly examined complaints where individuals have argued that a breach of their Convention rights has resulted from adverse environmental factors. Since healthy environment per se is not protected under the Convention, the Court decided environmental cases on a case-by-case basis, mainly under Article 8 concerning the right to private and family life, home and correspondence. Therefore, the Convention practice in the protection of these rights that would in traditional proprietary law be sought as protection from emissions or from the disturbance of property, has thus been given a new, Convention dimension. However, in those cases the Court did not set out clear standards or guidelines, thus contributing to states' uncertainty regarding their obligations under the Convention, as well as to the Court's own inconsistency that is ultimately threatening its legitimacy. This paper will look at the Court's environmental cases through the lenses of interpretative methods and principles, and analyse certain aspects of its (in)consistency when delivering judgments concerning the right to live in a healthy environment.*

Keywords: right to live in a healthy environment; interpretative methods and principles; inconsistency of the European Court's case-law.

1. INTRODUCTION

In the paper *Coexistence of* actio negatoria *and the right to live in a healthy environment*[1], the authors brought domestic regulation of the protection of property rights from harassment in the perspective of the protection that the European Court of Human Rights (hereinafter: the Court, European Court) provides for the right to live in a healthy environment, primarily through the protection of the right to respect for private life and home. Based on presumptions

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1 Mihelčić, G., Marochini Zrinski, M., 2018, Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 39(1), pp. 241–266.

pointed out in the conclusion of that paper, the author would like to start this paper as a sequence of the mentioned paper. Here, not much attention will be given to environmental cases discussed in the *Coexistence of* actio negatoria... paper, instead environmental cases will be discussed from a somewhat different perspective, through the lenses of interpretative principles and methods and by discussing the problems arising out of the Court's inconsistency when deciding those cases. Since a healthy environment *per se* is not protected under the Convention, the Court decided environmental cases on a case-by-case basis, mainly under Article 8 of the Convention.[2] One of the problems in those cases arises from the fact that the Court did not set out clear standards or guidelines. Even though having consistent and strict guidelines in cases concerning the right to live in a healthy environment is not an easy task, it is on the Court to strive for that goal.

This paper will be divided as follows: the introduction will be followed by an overview of basic features of the Croatian national system regarding the protection from emissions. Second, a short analysis will be given of the Court's interpretative methods and principles relevant for the right to live in a healthy environment. The interpretative methods and principles relevant for the topic will be presented since the Court had to use them in order to guarantee a right not originally guaranteed under the Convention. Third, main features of environmental protection under Article 8 will be briefly presented. The central part of the paper will focus on the inconsistency of the Court's decision making when deciding environmental cases, together with problems arising out of use of external legal sources within the comparative method of interpretation.

1.1. BASIC FEATURES OF THE CROATIAN LEGAL SYSTEM AND ITS CONNECTION WITH THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT AS GUARANTEED UNDER THE CONVENTION

The Croatian legal framework does not give a definition of emissions, but Article 110, paragraph 1 of the Act on Ownership and Other Real Rights[3] stipulates that no one may exploit or use a piece of property in a way that results in smoke, unpleasant odours, soot, sewage waters, earthquakes, noise etc. reaching the property of another, either by accident or by forces of nature, if they are excessive in view of the purpose appropriate for the property in question considering the place and time, or if they cause more substantial damages or if they are

2 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. The Court has also examined environmental complaints in the context of Article 2 and the right to life, Article 6 and the right to a fair trial, Article 10 and the freedom of expression and Article 1 of Protocol No. 1 and the right to property. Despite a relatively large number of complaints concerning these rights, most of the complaints concerned the right to private and family life, so these cases will be of biggest interest for this paper.

3 Act on Ownership and Other Real Rights, Official Gazette (hereinafter: OG), nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15 – consolidated version and 94/17 (hereinafter: AO).

impermissible based on the provisions of a particular piece of legislation (excessive indirect emissions). Leaving aside foreign regulations governing the definition of the concept in the regulations governing environmental protection, e.g., Article 4, paragraph 1, point 7 of Environmental Protection Act,[4] the author will briefly review the traditional civil law concept that has grown on the concept created by the Civil Obligations Act.[5]

The basic authority of the owner who is harassed (even by emissions) is to require for it to stop (Article 167, paragraph 1 in conjunction with paragraph 4 of the AO). The peculiarity of protection against emissions in comparison with ordinary protection of property from harassment appears in relation to the circle of authorised persons who may seek protection. In the case of protection from emissions, this circle is wider for both the active and passive parties (see Article 100, paragraph 2 of the AO and Article 100, paragraph 4 of the AO).[6]

Emission protection also differs from ordinary protection against harassment in its content. The owner of the real estate is primarily not obliged to suffer direct emissions, so he is authorised to require an end to such harassment and the payment of compensation of any damages that he suffered as the result (see Article 110, paragraph 4 of the AO). The rule contained in Article 110, paragraph 1 of the AO prohibits use of someone else's property in a way that results in smoke, unpleasant odours, soot, sewage waters, earthquakes, noise etc. reaching the property of another, either by accident or by forces of nature, if they are excessive (excessive indirect emissions).

The owner of real estate exposed to such emissions is authorised to request the owner of the property from which such emissions originate to eliminate the causes of the emissions and to compensate the resulting damage, as well as to refrain in the future from actions on his property that were the cause of the excessive emissions until he takes all measures required to eliminate the possibility of excessive emissions. With regard to Article 110, paragraph 3 of the AO, where excessive emissions are the product of activities for which there is a permission by the competent authority, the owners of the exposed property do not have the right to request the owner to refrain from the activity for as long as the permission is in force; however, they are authorised to request compensation for damage caused by the emissions, as well as the taking of appropriate measures to prevent excessive emissions in the future, that is, the occurrence of damage, or to minimise it.

Regarding the protection provided under the Civil Obligations Act, it is stipulated in Article 1047 and it includes a request to eliminate a major source of danger, as well as to refrain from activities causing disturbance or a risk of damage. In relation to this, Article 167 Paragraph 3 of the AO also needs to be emphasized since it stipulates, if damages are incurred as the result of harassment,

4 Environmental Protection Act, OG, International Agreements (hereinafter: IA), nos. 18/97, 6/99 – consolidated version, 8/99, 14/02, 13/03, 9/05, 1/06 and 2/10 (hereinafter: EPA).

5 Civil Obligations Act, OG, nos. 35/05, 41/08, 125/11 and 78/15 (hereinafter: COA).

6 For more details on the Croatial legal framework concerning emissions, see Mihelčić, G., Marochini Zrinski, M., 2018, pp. 241–246.

the manner in which the owner is entitled to claim compensation according to the general rules governing compensation of damage.

The case-law of the Court shows that the Court views the types of interferences and influences in a different, broader context than the national system does. In the language of our national rules, in determining the type of interference and influence, the Court goes beyond the framework set out in Article 110 of the AO, and approaches the concept offered in Article 4 para. 1 point 7 of EEA.

Namely, when providing protection of the right to live in a healthy environment, the Court does so by conceiving this concept in the spirit of the principle of autonomous concept, as well as relying on the principle of evolutive interpretation, the principle of effectiveness but also on the principle of subsidiarity (the margin of appreciation doctrine). Since the Convention originally does not guarantee the right to live in a healthy environment, the Court also had to resort to comparative and teleological methods of interpretation of Article 8 when protecting this right. Such a conception does not correspond to our notion of real estate, neither generally, nor to one by which the owner is granted emission protection. Consequently, the protection of the right to respect for one's home and its peaceful and comfortable enjoyment in the spirit of the right to live in a healthy environment is provided to a wider circle of places.[7]

The relationship between the protection of the right to live in a healthy environment and *actio negatoria* can be observed through the prism of several characteristics, and in this sense, certain features of *actio negatoria* can be highlighted: negative definition of the concept of emissions, manageability of protection in protection of property from harassment, the requirement that there are direct or indirect excessive emissions and in relation to this, narrowing the protection when it comes to allowed excessive indirect emissions, and the aspect of protection concerning the liability for damage.[8]

2. THE INTERPRETATIVE METHODS AND PRINCIPLES USED IN DEFINING AND GUARANTEEING THE RIGHT TO (LIVE IN) A HEALTHY ENVIRONMENT UNDER ARTICLE 8 OF THE CONVENTION

The Convention does not explicitly guarantee the right to (live in) a healthy environment, but this right was derived from the broad concept of the right to respect for private life and home through the Court's interpretation of the Convention.[9] Without going into details, some introductory remarks need to be given,

7 Mihelčić, G., Marochini Zrinski, M., 2018, p. 253.

8 *Ibid*., pp. 261–263.

9 When writing on the right to live in a healthy environment, authors agree that the protection of the right to live in a healthy environment under the existing human rights conventions is rather limited due to its 'individualistic' perspective. See: Francioni, F., 2010, International Human Rights in an Environmental Horizon, *European Journal of International Law*, Volume 21, Issue 1, pp. 41–55; Boyle, A., 2008, Human Rights and the Environment: A Reassessment, 18 *Fordham Environmental Law Review,* pp. 471–511.

since the Convention itself gives no guidelines[10] on how the Court should interpret the Convention[11] and particularly because the right to live in a healthy environment is not guaranteed under the Convention, but created through the Court's use of various methods and principles of interpretation. The author finds this issue particularly relevant.

Generally, interpretative[12] methods[13] used by the Court can be presented as the method of comparative interpretation, the teleological method, the textual method of interpretation, the subjective (historical) method and the systemic method. On the other hand, the principles[14] of interpretation are the evolutive principle (the living instrument doctrine), the autonomous concept[15], the prin-

10 However, from the perspective of public international law, since the Convention is a multilateral international treaty, its interpretation should be governed by the Vienna Convention on the Law of Treaties (United Nations Treaty Series, vol. 1155, p. 331), as it is part of customary international law.

11 Once Protocol 15 comes into force, the margin of appreciation as a specific doctrine will become an integral part of the Convention since, at the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention". However, even this recital, that will be added to the Preamble once Protocol 15 comes into force, is debatable since it clearly connects the margin of appreciation with the principle of subsidiarity while, as will be discussed here, the Court does not use the margin of appreciation exclusively in relation to the principle of subsidiarity, i.e. to allow the states a wide margin of appreciation.

12 General international rules of interpretation have been codified in the VCLT. The relevant provisions for treaty interpretation are Articles 31, 32 and 33, and methods of interpretation that can be deduced from these provisions are textual interpretation, teleological interpretation and contextual (systemic) interpretation. The ECtHR rarely invokes the VCLT and its provisions, although we might say that numerous interpretative principles used by the Court can be derived from the teleological method of interpretation as stipulated in Article 31 of the VCLT. So, the teleological interpretation serves as a basis for autonomous and evolutive interpretation, as well as for the principle of effective interpretation.

13 According to Hanneke Senden: "A method of interpretation provides a technique which leads to an objectified argument for a reasoning in a certain direction. A principle of interpretation on the other hand serves as an objective or aim that can be considered when interpreting a provision with the help of an interpretation method. A principle of interpretation does not provide an element that will help to determine the meaning of a provision." Senden, H. C. K., 2011, *Interpretation of fundamental rights in a multilevel legal system: an analysis of the European Court of Human Rights and the Court of Justice of the European Union,* Doctoral Thesis, Leiden University, p. 45. This paper will use the division as presented by Senden, H.

14 This is a division on methods and principles accepted by the author, but there is no uniform agreement on the methods and principles of interpretation in general, let alone in the Convention system. For a somewhat different division between methods and principles, see: Wisniewski, A., 2016, *The European Court of Human Rights, Between judicial activism and passivism*, Gdansk University Press, Gdansk; Greer, S., 2006, *The European Convention on Human Rights. Achievements, Problems and Prospects*, CUP, Cambridge.

15 The use of the principle of autonomous concept can be justified by reference to Article 31(4) of the Vienna Convention providing that terms may be given a special meaning. It represents a specific principle of interpretation of the Convention in accordance with its purpose and aim, giving the convention terms an autonomous meaning, regardless of the national meaning. The main task of this principle is to ensure a uniform application of Convention terms

ciple of effective interpretation and finally, as interpretative tools that do not fit into either of these categories, there are the margin of appreciation doctrine[16] and the doctrine of fourth instance.[17] For the purpose of this paper and with regard to their relevance for guaranteeing the right to live in a healthy environment, the evolutive principle (the living instrument doctrine), the principle of effectiveness and the margin of appreciation doctrine will be briefly presented[18] together with the comparative and teleological methods of interpretation.

2.1. THE LIVING INSTRUMENT DOCTRINE – PRINCIPLE OF EVOLUTIVE INTERPRETATION

The living instrument doctrine (the evolutive principle) is generally one of the most important principles of interpretation.[19] It requires the interpretation of the Convention "in the light of current day conditions", whereas the Convention should be developed through the Court's interpretation of its provisions. However, this does not mean that judges have the authority to read in new rights into the Convention, since this would mean going beyond their judicial powers and creating the law, thereby entering the legislative sphere. The living instrument doctrine has been subject to debate from the very beginning of the Court's work, even by the judges themselves, and regarded as impermissible judicial activism. However, since the Convention is a human rights document, it has a role to make the protection of the rights guaranteed by the Convention flexible. Many authors consider the application of the evolutive principle justified, and the reasons why the Court states that it uses this principle – legitimate.[20]

within national systems of member states. For more on autonomous concept see Senden, H., 2011, pp. 173–191; Letsas, G., 2004, The Truth in Autonomous Concepts: How to Interpret the ECHR, *EJIL 15*, pp. 279–305; Letsas, G., 2009, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 37–58.

16 On the other hand, the margin of appreciation doctrine is, in the author's opinion, closely connected with the use of the comparative method of interpretation, since when there is consensus among member states, the margin of appreciation allowed will be narrow, and vice versa, when there is no consensus, the states will be allowed wide margin of appreciation. At least, that is (and should be) in most cases.

17 Mahoney, P., 1990, Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin, *11 Hum.Rts.L.J. 57*, pp. 57–89, p. 60; Marochini, M., 2014, The interpretation of the European Convention on Human Rights, *Zbornik radova Pravnog fakulteta u Splitu*, vol. 51, no. 1, pp. 63–84. This division is partially taken from the papers mentioned here, but also upgraded with the division taken from Senden, H., 2011.

18 For a very detailed analysis of all the methods and principles of interpretation used by the ECtHR, see: Senden, H., *ibid*.

19 We might say that the VCLT also provides, albeit limited, basis for evolutive interpretation, namely its provisions on interpretation in accordance with the 'subsequent agreement' (this will be really rare since it requires active agreement from the states on the topic) and the 'subsequent practice' of the states. Senden, H., 2011, p. 151.

20 Dzehtsiarou, K., 2015, *European consensus and the legitimacy of the European Court of Human Rights*, Cambridge University Press, Cambridge, pp. 1730–1746; Letsas, G., The ECHR as a living instrument: Its meaning and legitimacy, in Føllesdal, A., Peters, B. and Ulfstein, G. (eds.), 2013, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Studies on Human Rights Conventions, Cambridge University Press,

Unlike proponents, critics see the main problem with using the living instrument doctrine in the Court's legitimacy to do so.[21] However, it might be said that the principle of evolutionary interpretation is a generally accepted principle, but this does not mean that it is still not the subject of debate.

The evolutionary interpretation plays a special role in relation to the right to live in a healthy environment, although the Court never directly invoked the living instrument doctrine/evolutive interpretation when deciding environmental cases. It might be said that, since the environment is not mentioned in any of the Convention provisions, all the cases regarding the right to live in a healthy environment are products of evolutive interpretation of the Convention.[22]

2.2. THE PRINCIPLE OF EFFECTIVENESS

By introducing and using the principle of effectiveness, the Court is giving provisions of the Convention the "fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning."[23] The essence of this principle is that states cannot be in compliance with the Convention simply by prohibiting conduct that contravenes the Convention, but they might have to take positive action to protect Convention rights.[24] Therefore, the general idea under this approach is to impose positive obligations on the contracting states.

Regarding the right to live in a healthy environment, what can be singled out is the state's obligation to take measures against harmful effects on the environment and environment affecting the enjoyment of the individual's private life and home. From the Court's case-law concerning the right to live in a healthy environment, one can see that the Court has not always found it necessary to distinguish between the negative obligation of the state to refrain from certain doings and the positive obligation of the state to take certain measures.[25] The

Cambridge, pp. 106–141; Theil, S., 2017, Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?, *European Public Law*, 23 (3), pp. 587–614.

21 Dzehtsirou, K., 2011, p. 1735.

22 The only time when the Court directly invoked the living instrument doctrine in a case concerning the right to live in a healthy environment was in the Dissenting opinion of judges Costa, Rees, Turner, Zupančič and Steiner in the *Hatton and others v. the United Kingdom* judgment, no. 36022/97, judgment of 7 March 2003 (GC).

23 Merrills, J. G., 1990, *The development of international law by the European Court of Human Rights*, Manchester University Press, Manchester, p. 208.

24 McRae, D., Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body, in Breintenmoser, S. and Ehrenzeller B. et al. (eds), 2007, *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber*, Zürich/St. Gallen Dike Baden-Baden Nomos, pp. 1411–1412.

25 In the seminal environmental case, *Powell and Rayner v. the United Kingdom*, no. 310/81, judgment of 21 February 1990, regarding the type of obligations imposed on states, the Court stated: "Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an 'interference by a public authority' to be justified in accordance

Court confirmed this line of thinking in the first case where an environmental complaint was upheld – *Lopez Ostra v. Spain*, as well as in the highly debated *Hatton and others v. the United Kingdom* case.[26] This is rather understandable, since the Court places the biggest emphasis on striking the balance between individual and community interests; regardless whether the state's failure to fulfill its positive obligation or the interference with the applicant's rights are at stake.[27]

2.3. THE MARGIN OF APPRECIATION DOCTRINE

Although the doctrine of margin of appreciation should concern the application of the Convention, in practice, it allows states certain discretion when deciding on the scope of individual Convention rights, thus entering the domain of interpretation of the Convention.[28] The Court has developed the doctrine of margin of appreciation in order to allow the contracting states some autonomy, a sort of space for manoeuvre[29] that the national authorities have (but within Convention limits), in fulfilling their obligations under the Convention. Also, some interpretation toll was necessary "to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in tradition and culture."[30]

It is important to point out that the margin of appreciation doctrine is often criticised on two different levels, either in general as a doctrine[31] or in its use in

with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, 'in striking [the required] balance the aims mentioned in the second paragraph may be of certain relevance.", para. 41.

26 *Lopez Ostra v. Spain*, no. 16798/90, judgment of 9 December 1994; *Hatton and others v. the United Kingdom* (GC), paras. 98 and 119.

27 Later, the Court distinguished between positive and negative obligations in *Cuenca Zarzoso v. Spain*, no. 23383/12, judgment of 16 January 2018, where it was found that "the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for his home and his private life, in breach of Article 8 of the Convention.", para. 54. See also: *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, para. 107; *Di Sarno v. Italy*, no. 30765/08, judgment of 10 January 2012, para. 110.

28 According to Wisniewski, A., 2016, "The margin of appreciation doctrine is regarded as one of the most controversial among the principles, methods or techniques used by the European Court of Human Rights for interpreting and applying the European Convention on Human Rights.", p. 105. Therefore, he does not find it necessary to define whether the margin of appreciation is a principle or method or a technique. On the other hand, Senden, H. does not mention it, either as a method or as a principle.

29 Greer, S., 2005, p. 5.

30 Mahoney, P., 1998, Marvellous Richness of Diversity or Invidious Cultural Relativism, *Human rights law journal: in association with the International Institute of Human Rights, Human Rights Law Journal*, Vol. 19, No. 1, pp. 1–6, p. 1.

31 Jeffrey A. B., 2004–2005, The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law, *Columbia Journal of European Law*, Vol. 11, No. 1, pp. 113–150; Macdonald, R., The Margin of Appreciation in Macdonald, R., Mat-

certain circumstances.[32] According to certain scholars, the Court nowadays uses the margin of appreciation as a substitute for coherent legal analysis of the issues at stake, as well as to avoid very controversial judgments.[33] However, scholars generally agree that the margin of appreciation doctrine can be justified,[34] but that the problem lies in knowing when and how to apply it to the facts of a particular case[35] as well as in the lack of criteria regarding wide and narrow margin of appreciation attributed to states. And, as will be seen, this is exactly the case with environmental cases.[36]

It might be said that the principle of evolutive interpretation and the principle of effective interpretation can be derived from the (objective) teleological method of interpretation. However, it can also be said that all the interpretative aids discussed are closely connected with the comparative method of interpretation.[37] Both methods will be briefly presented in the text that follows.

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scher, F. and Petzold, H. (eds), 1993, *The European System for Protection of Human Rights*, Martinus Nijhoff Publishers, Brill.

32 Greer, P., The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Human Rights Files, 17/2000, p. 5. Moderate critics agree with the use of the doctrine but claim that the Court should provide strong arguments when using it. Van Dijk, P. and van Hoof, G.J.H., 1998, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague-Boston-London, p. 93.

33 Lord Lester of Herne Hill, 1998, Universality versus Subsidiarity: A Reply, 1 *European Human Rights Law Review*, pp. 73–81, p. 75. See also Judge Loucaides (former judge of the Court) in reflections on his experience as a judge of the Court. He particularly criticizes the jurisprudence showing certain reluctance of the Court (ERRC webpage 26 May 2010) <http://www.errc.org/cikk.php?page=8&cikk=3613> (1 June 2020); or Macdonald, R., *ibid*. Also, judge de Meyer in a partly dissenting opinion in the case *Z. v. Finland*, no. 22009/93, judgment of 25 February 1997, stated that "it is high time for the Court to banish that concept from its reasoning" and how "there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not. [...] It is for the Court, not each State individually, to decide that issue, and the Court's view must apply to everyone within the jurisdiction of each State.", point III.

34 In 2006, Yuval Shany argued that there was such a thing as a general margin of appreciation doctrine in international law and contended that it had two principal elements. While noting that international courts do not generally distinguish between them, he argued that the first element had to do with 'judicial deference', where international courts should refrain from reviewing national decisions de novo, and that the second element indicated 'normative flexibility', allowing different interpretations of the same norm depending on context. Shany, Y., 2005, Toward a General Margin of Appreciation Doctrine in International Law?, *European Journal of International Law*, Vol. 16 No. 5, pp. 907–940.

35 Carozza, P. G., 1998, Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights, *73 NOTRE DAME L. REV.*, pp. 1217–1238, 1220; and Harris, D. J. et al., 2018, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, p. 13.

36 For example, the Grand Chamber sometimes decided the same case differently than the Chamber, while both decisions were reached by using the margin of appreciation attributed to states. This is completely legitimate; however, it can create some uncertainty among states, if the Court has not provided good legal reasoning for doing so. The best example of it is the well-known health environment case *Hatton and others v. the United Kingdom* (GC) and *Hatton and others v. the United Kingdom,* no. 36022/97, judgment of 2 October 2001.

37 According to Senden, "[e]volutive interpretation indicates the direction in which an interpretation might go and comparative interpretation provides the substantive justification for a specific evolutive interpretation." Senden, H., 2011, p. 286.

2.4. THE TELEOLOGICAL METHOD OF INTERPRETATION

The teleological method is considered a basic interpretative method interconnected with numerous principles of interpretation. It can be derived from Article 31 of the VCLT stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Regarding the object and purpose of a treaty, we might say that judges can look at both the subjective and objective object and purpose. The subjective object and purpose of the Convention would mean the purpose the drafters had when creating the Convention. Although employingthe subjective object and purpose can be considered important for consistent and coherent interpretation of the Convention, it is nowadays really rare.[38] On the other hand, the objective object and purpose are closely linked to the evolutive and effective (as well as autonomous) principles of interpretation, since they allow judges to establish what a rational lawmaker would consider the purpose to be at the time of the interpretation, which obviously might have even changed over time.[39] Bernhardt has argued that the special nature of human rights treaties requires the ECtHR to take an objective approach to interpretation, and the author agrees with this opinion.[40]

2.5. THE COMPARATIVE METHOD OF INTERPRETATION

Unlike the teleological method, the comparative method cannot be derived from the VCLT, but has been developed by the courts themselves. The comparative method represents interpretation where the judge in question uses different internal and external materials to find the meaning of a specific provision, or to find whether there is a consensus among states regarding certain questionable issues.[41] It is why it is also called the consensus method of interpretation. Writing on two components of comparative interpretation, Senden points out how the internal component means, "on the one hand, that the comparative study limits itself to a comparison between the countries that fall within the jurisdiction of the court in question."[42] The external component of comparative interpretation refers to the use of sources that are not covered by the internal component of this method. In general, that means reliance on documents or on information

38 This would imply the Court looking at the *travaux préparatoires* when interpreting the Convention, and the Court does so really rarely (although sometimes it does; see: *James and Others v. the United Kingdom*, no. 8793/79, judgment of 21 February 1986, para. 64. See also: *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009, para. 48; *Banković and others v. Belgium and Others*, no. 52207/99, decision of 12 December 2001 (decision on admissibility)).

39 Senden, H., 2011, p. 96

40 Bernhardt, R., 1999, Evolutive Treaty Interpretation, Especially of the Convention on Human Rights, *42 GYIL 14*, pp. 11–25, 68 and 71. Confirmed by Orakhelashvili, A., 2003, Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights, *European Journal of International Law*, Volume 14, Issue 3, pp. 529–568, p. 535.

41 Senden, H., 2011, pp. 66–67.

42 *Ibid*., p. 115.

derived from outside the jurisdiction of the court in question."[43] There is wide criticism of the use of comparative interpretation, either in general or when it is used referring to external sources.[44] The author holds that the use of the (internal) comparative method is and should be closely connected to the use of the evolutive interpretation and the principle of effectiveness as well as with the doctrine of margin of appreciation. What about the external component of this method? This problematic issue will be further elaborated by looking at the Court's inconsistent use of external sources. Namely, both proponents and opponents of comparative interpretation agree that the decisive use of foreign material is inappropriate. However, despite this viewpoint, the Court does use foreign sources, and it often does so inconsistently, as will be seen in the next chapter.

3. INCONSISTENCY OF THE COURT'S DECISION MAKING IN ENVIRONMENTAL CASES WITH EMPHASIS ON THE USE OF EXTERNAL LEGAL SOURCES

3.1. MAIN FEATURES OF ENVIRONMENTAL PROTECTION

Before looking at the problem of inconsistency, main features of environmental protection under Article 8 will be briefly presented. The first feature of the right to (live in) a healthy environment is that the environment *per se* is not protected under any of the Convention provisions, but the Court examines whether environmental degradation affected the rights guaranteed under the Convention – or the existence of a causal link. In this regard, the *Kyrtatos v. Greece*[45] case may be mentioned, where the Court pointed out the need for existence of environmental impacts on private life and home, and marked "a general deterioration of the environment" as insufficient. Therefore, the Court would only examine environmental cases where there is a causal link between the environmental impact and the applicant's individual right as guaranteed under the Convention.[46] The assessment of the existence of a causal link is made in each

43 *Ibid*., p. 115 et seq.

44 *Ibid*., p. 123 et seq. We might say how the use of the internal component of comparative interpretation is justified under the Convention by reference to the Preamble, which refers to the "common heritage" of the European states. However, even this component can be debatable since there will rarely exist consensus among all member states.

45 *Kyrtatos v. Greece,* no. 41666/98, judgment of 22 May 2003.

46 If we want to divide the environmental cases into groups concerning similar factual situations, we might do so in the following manner: 1. cases concerning excessive noise (like *Powell and Rayner v. the United Kingdom*, *Hatton and others v. the United Kingdom*, *Dees v. Hungary* (no. 2345/06, judgment of 9 November 2010), *Mileva and others v. Bulgaria* (no. 43449/02, judgment of 25 November 2010), *Moreno Gomez v. Spain* (no. 4143/02, judgment of 16 November 2004), *Oluić v. Croatia* (no. 22330/05, judgment of 5 February 2009)); 2. cases concerning industrial pollution and waste management (*Lopez Ostra v. Spain*, *Jugheli and others v. Georgia* (no. 38342/05, judgment of 13 July 2017), *Bacila v. Romania* (no 19234/04, judgment of 30 March 2010), *Fadeyeva and others v. Russia* (no. 55723/00, judgment of 9 June 2005), *Ledyayeva and others v. Russia* (nos. 53157/99, 53247/99, 53695/00 and 56850/00,

individual case and by applying the principles discussed. If the Court established the causal link it would examine whether the impact on the applicant's right satisfied the minimal level of severity[47] and whether the state failed to fulfil its positive obligations (or infringed with its negative obligations). How does the Court determine the minimal degree of severity? It was emphasized that, in addition to being assessed in each case separately, this determination is characterized by the following parameters: the intensity of disturbances or influences, their duration, the consequences they have for the individual, and the so-called general environmental context.[48] The impact of the environmental detriment on the rights alone is sufficient and it is not required that, for example, the applicant's health deteriorated due to any disturbances and influences.

The above seems relatively clear. However, the situation is not clear since the Court, in deciding environmental cases inconsistently, uses various interpretative methods and principles, thereby creating uncertainty among states and applicants; and what is particularly problematic – inconsistently uses external legal sources.

judgment of 26 October 2006), *Taşkin and others v. Turkey* (no. 46117/99, judgment of 10 November 2004), *Lemke v. Turkey* (no. 17381/02, judgment of 5 June 2007), *Tătar v. Romania*, *Ivan Atanasov v. Bulgaria* (no. 12853/03, judgment of 2 December 2010), *Dubetzka and others v. Bulgaria* (no. 30499/03, judgment of 10. February 2011), *Giacomelli v. Italy* (no. 59909/00, judgment of 2 November 2006), *Di Sarno and others v. Italy*, *Cordella and others v. Italy* (nos. 54414/13 and 54264/15, judgment of 24 January 2019)); 3. cases concerning spatial and urban planning (*Krytatos v. Greece*, *Martinez, Martinez and Maria Pino Manzano v. Spain* (no. 61654/08, judgment of 3 July 2012), *Dzemyuk v. Ukraine* (no. 42488/02, judgment of 4 September 2014), *Hardy and Maile v. the United Kingdom* (no. 31965/07, judgment of 14 February 2012)); 4. cases regarding risk assessment and access to information (like *McGinley and Egan v. United Kingdom* (nos. 21825/93 and 23414/94, judgment of 28 January 2000), *Guerra and others v. Italy* (no. 14967/89, [GC] judgment of 19 February 1998), *Roche v. France* (no. 32555/96, judgment of 19 October 2005), *Vilnes and others v. Norway* (nos. 52806/09 and 22703/10, judgment of 5 December 2013), *Brincat and others v. Malta* (nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, judgment of 24 July 2014)).

47 In the case of *Fadeyeva v Russia*, the Court stated how, in order to classify the case within the scope of Article 8, two conditions must be met: firstly, that there was an actual interference with the applicant's private sphere, and, second, that a level of severity was attained.

48 In the *Fadeyeva* case, from 1982 on the applicant and her family were living less than 500 meters from a large steel plant. In order to limit the impact of pollution from the plant, a 5,000 meter wide 'sanitary security zone' existed. The zone was supposed to separate the plant from residential areas although, in practice, several thousand people, including the applicant and her family, lived in the zone. In 1996, the government noted that the plant was responsible for 96 per cent of all emissions in the area and that the overlap between industrial and residential areas was plainly harmful to health. The pollution was found to be responsible for the huge increase in the number of children with respiratory and skin diseases and the higher number of adult cancer deaths. The Court observed that, in order to fall under Article 8, complaints relating to environmental nuisances have to show that there has been actual interference with an individual's "private sphere" and that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a significant period of time the concentration of various toxic elements in the air near the applicant's house had seriously exceeded safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being had reached a level sufficient to bring it within the scope of Article 8 as well as to find a violation of the same article.

3.2. THE COURT'S INCONSISTENT USE OF EXTERNAL LEGAL SOURCES

As was already mentioned, the Court did not set out clear standards or guidelines for deciding environmental cases, and this problem already became visible in one of the first environmental cases, *Hatton and others v. the United Kingdom*. In the mentioned case, both the Chamber and the Grand Chamber judgments were delivered with separate opinions, and various interpretative principles and methods were invoked in them. The mentioned judgments show how the lack of standards and guidelines in environmental matters allows the Court to invoke various interpretative methods and principles. The Chamber, by five votes to two, held that mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others, thus finding a violation of Article 8. Two judges issued dissenting opinions invoking the Court's overly wide use of the living instrument doctrine, as well as stating that the Court has impermissibly narrowed the margin of appreciation attributed to states.[49] Later on, the case was referred to the Grand Chamber, which found no violation of Article 8. The majority of the Grand Chamber did not find that the authorities overstepped their margin of appreciation. However, five judges issued a joint dissenting opinion advocating a stronger role for the Court in responding to complaints concerning environmental pollution, and invoking the use of the living instrument doctrine.[50]

Nevertheless, the focus here will not be on the problems surrounding the inconsistency of the Court's case-law on the right to live in a healthy environment in general, but on the problems arising out of the use of external legal sources.

3.2.1. The case of Taşkin and others v. Turkey

The first case where the Court explicitly invoked external legal sources came as early as 2004 – *Taşkin and others v. Turkey.* The case concerned the national authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process that, according to the applicants, had given rise to a violation of their rights guaranteed by Article 8. The Court found a violation of Article 8, pointing out that Article 8 applied to severe environmental pollution which could affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The Court reached its decision referring to the 1992 Rio Declaration and the 1998 Aarhus Convention, although the Rio Declaration is not itself a legally binding instrument, and Turkey is not a party to the Aarhus Convention. The Court invoked those instruments in the *infra* discussed *Tătar v. Romania* judgment; however, invoking those instruments in the *Taşkin and others* case is more problem-

49 *Hatton and others v. the United Kingdom*, partly dissenting opinion of judge Greve and dissenting opinion of Sir Brian Kerr.

50 Dissenting opinion of judges Costa, Rees, Turner, Zupančič and Steiner in the *Hatton and others v. the United Kingdom* judgment (GC).

atic, since Romania, at the time when the *Tătar* judgment was delivered, at least ratified the Aarhus Convention. The Aarhus Convention, and let alone the Rio Declaration, cannot be considered as part of customary international law, but they are clearly external legal sources to all states that have not ratified/accepted them. To date, the Aarhus Convention has 47 state parties[51] (out of possible 193, but including the EU), most of them members of the Council of Europe; however, Turkey has not signed or ratified it. The Rio Declaration (on environment and development), although signed by 175 states, contains only non-binding principles, including the precautionary principle that will be discussed in the text that follows. Therefore, in the *Taşkin and others* judgement the Court used the evolutive principle of interpretation of Article 8, relying on the external component of the comparative method.

3.2.2. The Tătar v. Romania case

In the *Tătar v. Romania* case, the company S.c. Aurul S.A., used sodium cyanide while exploiting the Baia Mare gold mine. On 30 January 2000, an environmental accident occurred, and a dam breached, releasing about 100,000 cubic metres of cyanide-contaminated tailings water into the environment. The accident occurred in the vicinity of the applicants' home and the company did not halt its operations after the accident. In deciding on possible violations of the Convention, the Court noted that the applicant had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Nevertheless, despite the lack of such a link, the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the state, under Article 8, to assess the risks both at the time it granted the operating permit for the extraction process in the gold mine, and subsequently to the accident that occurred, as well as to take appropriate measures. The Court concluded that the Romanian authorities had failed in their duty to assess the risks entailed by the activity and had failed to take suitable measures to protect the applicants' rights under Article 8 and more generally their right to a healthy environment. The *Tătar* judgment is relevant for several reasons. First, in this case the Court explicitly invoked the precautionary principle under environmental law and the principle of effectiveness by imposing positive obligations on states.[52] Furthermore, the Court referred to the precautionary principle, as contained in the Declaration of Rio as well as in the jurisprudence of the European Court of Justice, both being external legal sources for the Court.

Therefore, in *Tătar* the Court invoked external legal sources and the principles contained therein, using the external comparative method of interpretation

51 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999).

52 *Tătar v. Romania*, paras. 75, 109 and 120. This principle is expressed in the Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I) REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT), which stipulates that, where there are "threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

together with the principle of effectiveness. Besides being unwise for the Court to invoke external sources, it is even more dangerous to randomly invoke them, both for the reasons of legitimacy and consistency. And this is exactly what happened in a later judgment from 2010, *Bacila v. Romania.*

3.2.3. The case of Bacila v Romania

In this case the applicant claimed a violation of Article 8 due to emissions from a lead and zinc plant. Analyses carried out by public and private bodies established that heavy metals could be found in the air, waterways, soil and in vegetation while the rate of illness of inhabitants of the affected town was seven times higher than in the rest of the country. For that reason, the Court found a violation of Article 8 due to the state's failure to strike a fair balance between the public interest of maintaining economic activity of the biggest employer in the town and the applicant's effective enjoyment of the right to respect for private life and home. Again, the Court did not look for the causal link between the deterioration of health and economic activity, but only the existence of a risk. Here, the Court failed to invoke the precautionary principle. However, judge Zupančič in his concurring opinion raised some interesting points regarding precautionary principle:[53]

> "In both cases (*Tătar v. Romania and Bacila v. Romania*, emphasis added) what is at stake is the causal link between the environmental pollution, on the one hand, and the actual damage caused to the health of the application, on the other hand. [...] The precautionary principle is a constitutional principle in some countries (France, for example). It logically follows that it generates constitutional rights, for example the right to be protected by legislation as well as by judicial decisions questions of the constitutional principle of precaution. There is no doubt that the precautionary principle creates constitutional rights. By logical projection, Article 8 of the European Convention on Human Rights and perhaps other provisions of this instrument can in turn give rise to human rights which coincide with guaranteed constitutional rights [...] Consequently, in accordance with the precautionary principle, it is up to the company which engages in an activity dangerous for the environment that it is incumbent to prove, preferably in advance, that the activity in question will not be toxic to the environment and, by extension, neither will it be to humans....It is simply fair to overturn the presumption in order to protect the individual in his physical integrity and in his human dignity in an environment that would not be dangerously degraded if the legal and factual barriers available to the State were put in place and operated according to the precautionary principle."[54]

Judge Zupančič referred to the precautionary principle, not as an external source of law, but as a constitutional principle creating constitutional rights that

53 Judge Zupančič has, together with judge Gyuluman, issued a partly dissenting opinion in the *Tătar* case, agreeing with the majority that there has been a violation of (procedural) aspect of Article 8 but strongly dissenting the opinion of the majority that the applicant needed to prove the existence of the causal link between the exposure to certain doses of sodium cyanide and the worsening of his illness.

54 Concurring opinion of judge Zupančič in *Bacila v. Romania* (translated by the author, available in French).

can be, by logical projection, applied in a manner that Article 8 (and perhaps other provisions of the Convention) can in turn give rise to human rights that coincide with guaranteed constitutional rights. Maybe, if the Court followed the argumentation and reasoning of judge Zupančič and used the precautionary principle as an internal (constitutional) principle, it would clear the uncertainty surrounding the use of this principle as well as justify its use in environmental cases. However, the Court failed to do so, thereby leaving this principle outside the Convention legal space and leaving room for its arbitrary use.

3.2.4. The case of Hardy and Maile v. the United Kingdom

Later on, following the *Tătar* and *Bacila* cases, in the *Hardy and Maile* case the Court restated the main features of the causal link and within it the necessary/minimal level of severity and the state's positive obligations. In this case, the applicants complained on the construction and operation of two liquefied natural gas ("LNG") terminals on sites at Milford Haven harbour. The applicants claimed that the UK had failed in its duties under Articles 2 and 8 of the Convention regarding the regulation of hazardous activities and the dissemination of relevant information. The Court decided to look at the case only from the Article 8 standpoint, and in assessing the causal link and the minimal level of severity found that the potential risks posed by the LNG terminals were such as to establish a sufficiently close link with the applicants' private lives and homes for the purposes of Article 8. Article 8 was accordingly applicable. However, the Court found no violation of Article 8, raising similar argument as in the *Hatton and others* case. In reaching the conclusion that no violation took place, the Court specifically took note of the very extensive regulatory framework in place in the UK (including several licensing regimes) governing facilities of the relevant type. Just like in *Hatton and others* case, it concluded that in cases raising environmental issues the state must be allowed a wide margin of appreciation.[55] It is also interesting to notice that, after invoking the precautionary principle in the *Tătar* case, the principle was completely ignored here even though the applicants explicitly invited the Court to interpret Article 8 in light thereof. This, we might say, is a clear sign of the Court's viewpoint of the precautionary principle as an external source of law. The question remains why the Court invoked this principle in the *Tătar* case and decided to ignore it in later cases, particularly in the instant one where the applicants explicitly invoked it.

3.2.5. The case of Di Sarno and others v. Italy

The trend of relying on international environmental law and EU environmental law is also visible in the 2012 *Di Sarno* judgment. In this case, a state of emergency was declared in the Campania region from February 1994 to December 2009 regarding the collection, treatment, and disposal of waste. Eighteen nationals who lived and/or worked in the region of Campania initiated proceedings alleging a violation of their rights under Articles 2, 8 and 13. The reasoning of

55 *Hardy and Maile v. the United Kingdom*, para. 217.

the Court regarding violation of Article 8 is very interesting from the perspective of this paper. First, the Court found that the Italian authorities had satisfied their Article 8 procedural obligation to provide information about the risks to the individuals. Regarding the substantive aspect of Article 8, the Court examined the complaint from the standpoint of the state's positive obligations under Article 8. In reaching the decision, the Court invoked both positive obligations and the margin of appreciation states enjoy in the choice of the concrete means they use to fulfil their positive obligations under Article 8 of the Convention. Although the applicants had not complained of any medical problems and the Court determined that their lives and health had not been in danger as a result of their exposure to waste, it did find a violation of their Article 8 right to home and private life. The Court concluded, relying on the precautionary principle, that "[t]he collection, treatment and disposal of waste are without a doubt dangerous activities [...] That being so, the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment."[56] Therefore, the Court reached its conclusion relying on EU law (this time the Court invoked the precautionary principle enshrined in Article 174 of the Treaty establishing the European Community and in the case-law of the Court of Justice of the European Union), which had found Italy in violation of its obligations under EU law, as well as on the Aarhus Convention and the draft Articles of the International Law Commission on state responsibility (in the context of dismissing Italy's claim that its failures were justified by references to *force majeure*). The Court again returned to the precautionary principle, here as part of EU law and not as a principle enshrined in the Rio Declaration, however, again without providing any legal justification for doing so.

3.2.6. The case of Cordella and others v. Italy

Finally, in its latest environmental case, *Cordella and others v. Italy* the applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto on the environment and on their health, and about the ineffectiveness of the domestic remedies.[57] In deciding the case, the Court invoked the *Fadeyeva* case and other relevant case-law, finding that the State had failed to strike a fair balance between the competing industrial and individual interests, and also failed to adopt the necessary measures to ensure the effective protection of the applicants' right to private life, thus violating Article 8. The Court grounded its decision on two crucial elements: first, the numerous scientific reports that established the existence of a causal link between Ilva's industrial emissions and the drastic sanitary records of people living in the "high environmental risk" municipalities; and second, the uncertainty generated by the political impasse and by the number of administrative and legal acts that consolidated the dangerous status quo. The Court, however, did not find it necessary to invoke any

56 *Di Sarno and others v. Italy*, para. 110.

57 The case of *Cordella and others v. Italy*, Press Release issued by the Registrar of the Court, ECHR 029 (2019) 24.01.2019.

of the principles of international environmental law or any other conventions or declarations.

As it has been mentioned in the first part of the paper, the inconsistent use of interpretative methods and principles can have serious impact on the Court's legitimacy. Here, the emphasis was placed on the Court's inconsistent use of the external component of the comparative method of interpretation.

3.3. THE PROBLEMS SURROUNDING THE USE OF EXTERNAL LEGAL SOURCES

The problem of invoking external legal sources has already been detected after the *Christine Goodwin v. the United Kingdom* judgment from 2001[58] where the Court simply changed the existing case-law under the aegis of Article 8 right to respect for private life, without even invoking European or international consensus[59] but only an international trend.[60] Furthermore, the Court invoked three principles of the rule of law: legal certainty, foreseeability, and equality, and yet in this case it did not apply any of those principles.[61] In this case the Court decided to depart from its previous case-law[62] and expand the scope of the right

58 *Christine Goodwin v. the United Kingdom*, no. 28957/95, judgment of 11 July 2002. See also: *I. v. the United Kingdom*, no. 25680/94, judgment of 11 July 2002.

59 If there is no consensus among states on a certain issue, the Court gives arguments to Waldron who strongly disagrees with judicial review (of legislation) calling it illegitimate and stating: "By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights." Waldron, J., 2006, The Core of the Case Against Judicial Review, *The Yale Law Journal*, pp. 1346–1406, p. 1353. The problem of democratic legitimacy of the Court has also been invoked by Dzehtsiarou, K., 2017, What is Law for the European Court of Human Rights?, *Georgetown Journal of International Law*, Vol. 49, No. 1, 2017, pp. 89–134. He writes regarding the use of internal and external sources that "by relying on internal legal sources, the Court injects some elements of majoritarian decision-making and increases the democratic legitimacy of its judgments. The Court considers what understanding of the Convention rights are adopted by the majority of the Contracting Parties. All of the Contracting Parties to the Convention are at least nominally democracies and, therefore, the inclusion of democratically adopted decisions into the Court's decision-making process would offer some response to the counter-majoritarian difficulty.", p. 133. What also needs to be mentioned here is the criticism of the famous judge Scalia who, when cirticising the Court's use of the living instrument doctrine (for the first time in the *Tyrer* judgment) stated: "The Court was quick to adopt the proposition that the Convention was (as the Court put it in 1978) a 'living instrument which must be interpreted in the light of present-day conditions'. And thus the world, or at least the West, has arrived at its current state of judicial hegemony. I am questioning the propriety – indeed, the sanity – of having a value-laden decision such as this made for the entire society (and in the case of Europe for a number of different societies) by unelected judges." Justice Scalia, a speech delivered to the Polish Constitutional Court in 2009 named "Mullahs of the West: Judges as Moral Arbiters." https://www.rpo.gov.pl/pliki/12537879280.pdf, 1 October 2020, p. 14.

60 *Christine Goodwin v. the United Kingdom*, para. 84.

61 *Ibid*., para. 74.

62 *Rees v. the United Kingdom*, no. 9532/81, judgment of 17 October 1976; *Cossey v. the United Kingdom*, no. 10843/84, judgment of 27 September 1990.

to private life, without providing legal reasons for using the external instead of internal aspect of the comparative method of interpretation.[63]

We might say that the Court has created a relatively large case-law on the right to live in a healthy environment, however, without establishing clear standards on the methods and principles it uses. As Ole Pedersen wrote: "The Court's attempt to develop the Convention in light of other instruments, while admirable, rests on somewhat vague jurisprudential and doctrinal grounds."[64] It is completely legitimate to ask why the Court (occasionally) relies on CJEU's findings relating to the EU's waste directives or on the rules on state liability and *force majeure*, developed by the International Law Commission, and also randomly invokes the precautionary principle and environmental conventions and declarations. "When simply applying these rules and norms (thereby ignoring their inherent contingency), the Court is arguably guilty of simplifying matters, resulting in its case-law lacking doctrinal rigor."[65]

This problem has been detected and presented in detail in Kanstantsin Dzehtsiarou's paper *What Is Law for the European Court of Human Rights*, albeit from a somewhat different perspective. However, we can summarise his main points as follows: judges of the European Court of Human Rights (ECtHR) take into account both legal and non-legal considerations when deciding "hard" cases. Legal considerations can be further divided into internal and external ones.[66] The former originate from within the Convention system, while the latter are provisions borrowed from outside of the realm of the Convention, such as international treaties or laws and practices from nations outside of the Council of Europe (like EU law or decisions of the CJEU). Only international legal norms which are implemented in the domestic legal systems of the contracting parties to the Convention become internal legal sources (which we cannot say of the Aarhus Convention and the Rio Declaration, and let alone the rulings of the International Law Commission). Therefore, reliance on internal, as opposed to external sources can help minimise the challenges that the ECtHR is currently facing regarding its legitimacy.[67]

63 Also see: *Frette v. France*, no. 36515/97, judgment of 26 February 2002.

64 Pedersen, O. W., 2018, The European Court of Human Rights and International Environmental Law, Chapter 5 in Knox, J. H. and Pejan, R. (eds), *The Human Right to a Healthy Environment*, Cambridge, CUP 2018. Available online: file:///Users/mmarochini/Downloads/SSRN-id3196971%20(3).pdf, p. 11.

65 *Ibid*.

66 Dzehtsiarou, K., 2017.

67 *Ibid*. This is for the following reasons: reliance on internal sources can demonstrate to the contracting parties that the ECtHR is not a foreign or arbitrary decision-maker; and internal sources allow the Court to be creative and innovative, and, at the same time, to take its subsidiary role seriously; there is a presumption that internal legal sources are in compliance with the Convention since laws and practices of every contracting party must take the Convention into account; the Preamble to the Convention states its aim as the achievement of a greater unity among the European states through better protection of human rights; the contracting parties are the main addressees of the judgments and are instrumental for the legitimacy and effectiveness of the ECtHR; the Court's reliance on the laws of the contracting parties is a well-established method of interpretation of the Convention since the Court

4. CONCLUSION

The right to live in a healthy environment can be considered a phenomenon in the Convention system, since it is a right not guaranteed under the Convention but developed by the Court through its use of various interpretative methods and principles.

One of the assumptions required for the protection of the right to live in a healthy environment, is that the effects and disturbances from the environment violate a certain Convention right. Regarding the types of disturbances and influences, it is not impossible to draw parallels with the types of emissions provided for in Article 110 of the Croatian AO. However, different types of disturbances and influences also appear within the Convention system and protection from them is equally provided, while these categories would more appropriately fit within our COA emission rules. Also, a more important difference between the protection afforded by the Court and the right to live in a healthy environment, on the one side, and the national protection against emissions, on the other, is shown by the fact that the Court unites, in a particular way, the types of protections known and provided for in our legal system under a "common umbrella". With the necessary reservation, it might be said that the Court does not insist on distinguishing between indirect and direct emissions, nor does it insist on the excess of indirect emissions, at least not in the sense of our domestic property law rules.[68]

As already said, in order for influences and disturbances to be Convention-relevant, it is required that they violate a Convention right and most importantly that they can be attributed to the state because of something it did / did not do, or something it should / should not do – the institution of positive / negative obligations of states or the principle of effectiveness. The domestic *actio negatoria* protection, even in its indemnity aspect, functions under different assumptions, although according to our rules on protection from emissions, it is not necessary for damage to occur due to emissions – something that can be singled out as a general link between the protection afforded by the Convention and our national protection. Another thing that can be emphasized is the need to strike a fair balance between the public and individual interests.[69]

If we look at the scope of *actio negatoria* and compare it with the protection of the right to live in a healthy environment, the main difference is that the former can be sought preventively while the latter cannot; although even in such situation there may be exceptions, for example, in cases where the state failed to take certain preventive measures.

It can be concluded that there are significant differences between the *actio negatoria* involving emissions and the protection provided by the right to live in a healthy environment. However, we can imagine a situation where it will

started relying on them very early in its case-law; and internal sources reintegrate the notion of consent in the Court's decision-making.

68 Mihelčić, G., Marochini Zrinski, M., 2018, p. 262.

69 *Loc. cit.*

become possible before national courts to raise an objection regarding the right live in a healthy environment when its benefits (and this could be a possibility to determine the assumptions relevant to *actio negatoria* in a less complex way) might improve the position of the holder of *actio negatoria*. On the other hand, having in mind the option according to which property protection against emissions is preceded by the protection under special regulations, there is also a possibility that protection of the right to live in a healthy environment enables the overcoming of discrepancies in that sense.[70]

Nevertheless, in order to have direct impact on the improvement of (any) national protection from emission, the Court must refrain from delivering inconsistent judgments. The fact is that the Court has taken the individualistic approach when deciding environmental cases and states have not disputed this approach. This individualistic approach means that the Court only looked at environmental cases when the applicant has proven the causal link between the environmental detriment and his right as guaranteed under the Convention. However, when delivering judgments, the Court relies on international and regional law instruments and principles contained therein, without any need for establishing clear standards or at least guidelines for the use these instruments and principles.

What are the consequences for such conduct of the Court, from the legitimacy point of view?

Since the right to live in a healthy environment is not originally guaranteed under the Convention, it was preferable, or even necessary for the Court to choose an interpretative direction it would take when deciding an environmental case. However, the Court failed to do so, avoiding to directly invoke any of the interpretative methods and principles, and mainly invoking the margin of appreciation doctrine as an interpretative tool that allows it to decide on a case-by-case basis. However, all of it can be considered legitimate since the Court did not overstep its powers, but used legitimate interpretative tools available, even if it did so in a rather inconsistent manner. From the legitimacy point of view, the Court can claim the individualistic approach and the margin of appreciation doctrine in order to (or at least try to) defend the inconsistency in its case-law.

This brings us to the final point, one that can be hard to ignore and even harder to defend from the legitimacy point of view, and that is the Court's inconsistent use of external sources of law when deciding environmental cases. The problematic issues surrounding and arising out of the Court's use of external sources have been elaborated in the paper. The external legal sources the Court uses are generally not accepted by all member states of the Council of Europe, nor are they part of customary international law, thereby lacking consensus among states. It does not contribute to unity among states, and it creates uncertainty regarding their obligations under the Convention, particularly when it comes to those rights like the right to live in a healthy environment, not originally guaranteed under the Convention. Therefore, reliance on internal sources

70 *Ibid*., p. 263.

and on its own interpretative principles can contribute to and enhance the Court's legitimacy. Furthermore, arbitrary reliance on any sources, without clear guidelines on the cases and situations where it will use them, further threatens the Court's legitimacy, since it does not follow the principles of rule of law: legal certainty, foreseeability and equality.

In conclusion, if it aims to keep its legitimacy as well as its role as an ultimate arbitrator and authority in Europe, the Court needs to, both in general terms and in particular in cases concerning the right to live in a healthy environment, consistently rely on internal sources of law and minimize the use of external sources. The Court also needs to set out clear standards and guidelines as well as follow the principles of rule of law.

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