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COUNCIL OF EUROPE AND THE RIGHT TO A HEALTHY ENVIRONMENT

INTRODUCTION

The European Convention on Human Rights (the Convention, ECHR), as the most important human rights document in Europe does not contain a guarantee of the right to a healthy environment, nor does the European Social Charter (the Charter, ESC), the Convention's counterpart in socio- economic rights. However, through the European Court on Human Rights (the Court, ECtHR) jurisprudence and the European Committee on Social Rights (the Committee, ESCR) decisions and reports many aspects of the right to a healthy environment are now included in the Council of Europe system for protection of human rights.

In this paper, I will present the right to a healthy environment as protected under Article 8 of the Convention and under Article 11 of the Charter. Article 8 places on the states obligations to respect a wide range of personal interests. What will be one of the interests for this paper is the environmental protection. That type of protection can involve considerable public expenditure and "may be characterised as a newer generation right than the civil and political rights underpinning most of the Convention's substantive guarantees."[1] After giving a presentation on the most relevant case-law regarding the claims of Article 8 violations due to the environmental pollution, current state of execution of those judgments will be presented. Furthermore, the discussion that was led within the Council of Europe on making an Additional protocol to the European Convention, on the Right to a Healthy Environment will be presented. This issue has been raised both in 2003 and 2009 and on both occasions the Committee on Legal Affairs and Human Rights concluded that extending the Convention through the proposed additional protocol is not the correct solution. Finally, I will look at the European Social Charter (ESC) system. At the time when the Court started giving Article 8 an interpretation as guaranteeing the right to a healthy environment, there was no system of collective complaints under the ESC. The system of collective complaint was introduced in 1995. So far it has been ratified by only 14 states. The small number of state ratifications shows that still a small number of European states, members of Council of Europe are willing to put socio-economic rights under the scrutiny of the regional bodies. However, the system of collective complaints exists, together with the system of

[1] Mowbray, A., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, Hart publishing, 2004, pp.149-150

national reports that is obligatory for all the States Parties. Furthermore, the interpretation of the Article's 11 right to health (and within it the right to a healthy environment) under the ESC made by the ESCR will be presented. The reason for doing that is my attempt to show that maybe nowadays, considering all the problems with which the ECHR system is facing (particularly the extensive caseload, long time it takes to produce a judgment and even longer to enforce it), this is one of the issues that might be dealt through the ESC system. Also, in my opinion, the right to a healthy environment is still too vague to be guaranteed under the Convention.

ARTICLE 8 OF THE CONVENTION AND THE RIGHT TO A HEALTHY ENVIRONMENT

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In its application of Article 8, the Court has taken a flexible approach to the definition of the individual interests protected, with the result that the provision continues to broaden in scope. Lack of precision of interests protected by Article 8 has allowed the Court to develop its case law regarding Article 8 in line with the current developments in the society. Issues falling within Article 8 now include even search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, suicide, prisoners' right, inheritance, tenants' rights, and environmental protection.[2] In most of the cases regarding Article 8, its application requires a two-stage test. In the first stage comes the questioning whether the complaint falls within the scope of Article 8(1). If it does, in the second stage comes an examination of whether the state's interference is consistent with the requirements of Article 8

[2] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd ed.), OUP, 2009, p. 361

(2). Although a violation of Article 8 is mostly the consequence of some interference by the state, the Court has read the first paragraph as imposing 'positive obligations' to provide the minimum preconditions for the exercise of the interests protected within the Article. The 'positive obligations inherent' in Article 8(1) include both those requiring the state to take steps to provide rights or privileges for individuals and those which require it to protect persons against the activities of other private individuals which prevent the effective enjoyment of their rights.[3] However, the determination whether or not a positive obligation exists under Article 8 cannot be precisely defined. The Court has stated: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention."[4]

Now, I will present the so-called environmental cases and the developments of Courts jurisprudence.

'ENVIRONMENTAL CASES' UNDER ARTICLE 8 OF THE CONVENTION

Many of the cases where the Court has been asked to find a violation of Article 8 by failing to discharge a positive obligation have dealt with some claim of a defect in existing law (like *X nad Y v the Netherlands).*[5] However, the Court has occasionally upheld claims that a state has a positive obligation to take actions that go beyond changing its law. For example, it has held that the state's duty to provide opportunities for the individuals to develop family and private life and to enjoy their homes includes an obligation to take action to deal with severe environmental pollution affecting the applicant's homes. Environmental degradation does not necessarily involve a violation of Article 8 but the adverse effects must attain a certain minimum level. The assessment of that minimum will depend on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical and mental effects, as well as on the general environmental context.[6] The Court has also found a state in breach for its failure to notify affected residents of the risks associated with the operation of a fertilised plant, emitting toxic substances and inflammable gases *(Guerra and others v Italy*[7]*).* In a later case, *McGinley and Egan v United Kingdom,* the Court held*:* "…Where a Government engages in hazardous activities, such as

[3] Ibid., p. 362
[4] *Rees v the United Kingdom,* (1987) 9 E.H.R.R. 56
[5] Janis, Kay and Bradley, *European Human Rights Law: Text and Materials*, (3rd ed.), OUP, 2008, p. 392
[6] *Manual on Human Rights and the Environment*, Strasbourg, Council of Europe Publishing, 2006., p.14
[7] *Guerra and others v Italy,* (1998) 26 E.H.R.R. 357

those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[8]

As to the cases where the Court examined the issue of protecting persons from serious environmental pollution I will start by quoting the words of one of the most eminent scholar: "That type of protection can involve considerable public expenditure and may be characterised as a newer generation right that the civil and political rights underpinning most of the Convention's substantive guarantees."[9]

The first case which represents the starting point for this development is the *Arrondelle v United Kingdom*[10] from 1977. This case was followed by another case regarding noise pollution- *Powell and Rayner v United Kingdom.* Here, the applicants claimed that noise from Heathrow Airport gave rise to a violation of Article 8. The Court agreed that the "scope for enjoying the amenities of his home have been adversely affected' and that Article 8 is a 'material provision'."[11] It concluded, however, that in the light of the public need for the airport and the efforts that had been made to limit the noise, no violation of Article 8 had been made out. Strictly speaking, this case was decided under Article 13, which involved the Court having to determine whether the applicants had an arguable case under Article 8. However, it is important to consider it in the context of including the right to a healthy environment under the aegis of Article 8.

Next significant environmental case concerning the Heathrow airport is *Hatton and Others v United Kingdom.*[12]. Here, unlike in the *Powell and Rayner* case the Chamber majority found the regime governing night flights from Heathrow to be in breach of Article 8. The applicants complained that the government's policy on night flights at Heathrow airport in London violated their rights under Article 8. The Chamber, five votes to two, distinguished the current case from the earlier Heathrow case by reference to the different factual circumstances; namely the present action was concerned with night flights under the post 1993 regime. The majority held that:

"The Court would, however, underline that in striking the required balance, States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental protection, mere

[8] *McGinley and Egan v United Kingdom,* (1999) 27 E.H.R.R. 1, paragraph 101
[9] Mowbray, A., op.cit., p.149-150
[10] *Arrondelle v United Kingdom,* admissibility decision of 15 July 1980, No. 7899/77
[11] *Powell and Rayner v United Kingdom,* (1990) 12 E.H.R.R. 355, paragraph 40
[12] *Hatton and Others v United Kingdom*, (2002) 34 E.H.R.R. 1

reference to the economic well-being of the country is not sufficient to outweigh the rights of others…It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project."[13]

Judge Greve in her partly dissenting opinion stated that she did not believe there had been a breach of Article 8. She believed that majority had impermissibly narrowed the margin of appreciation accorded to states in environmental matters by the established case law. She was also of the opinion environmental problems do not constitute an individual problem but affect wider public.[14]

This case was referred to the Grand Chamber that found no violation of the same Article. It remarked that economic interests were specifically enumerated as a legitimate aim under Article 8(2) and that accordingly it was appropriate for the state to take them into account in policy-making.[15] Therefore, no violation of Article 8 occurred. However, five judges issued a joint dissenting opinion which advocated a stronger role for the Court in responding to complaints concerning environmental pollution.[16]

As we can see, the judges were not unanimous in their approach regarding the protection of the right to a healthy environment under Article 8 of the Convention, particularly when the economic well-being of the country has been invoked as a legitimate aim.

The first case where an environmental complaint was upheld was in 1994 in *Lopez Ostra v Spain*[17]. In this case the applicant complained that the fumes and noise from a waste treatment plant situated near her home made her family's living conditions unbearable. After having had to bear the nuisance caused by the plant for more than three years, the family moved when it became clear that the nuisance could go on indefinitely and when the applicants' daughter's paediatrician recommended them to do so. While recognising that the noise and smells had a negative effect on the applicant's quality of life, the national authorities argued that they did not constitute a grave health risk and that they did not reach a level of severity whereby the applicant's fundamental rights were breached. The Court balanced the 'town's economic well-being' against the applicant's interest in home and private and family life to decide whether there had been a breach of Article 8. Whilst the plant was necessary for the economic well-being of the town and its leather industry, the judges were united in concluding that a fair balance had not been struck

[13] *Hatton and Others v United Kingdom*, paragraph 97
[14] *Hatton and Others v United Kingdom,* Partly dissenting opinion of Judge Greve
[15] *Hatton and Others v United Kingdom,* (2003) 37 E.H.R.R. 28
[16] Judges: Costa, Ress, Turmen, Zupancic and Steiner
[17] *Lopez Ostra v Spain*, (1995) 20 E.H.R.R. 277

by the authorities in seeking to protect the applicant from the effects of severe pollution. The Court also stated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect adversely their private and family life, even if it does not seriously endanger their health. In this case, the Court found a violation of Article 8. This valuable decision showed that it is not sufficient for states to simply create pollution control regimes but they must also take adequate steps to enforce those rules.

Another relevant case is *Fadeyeva v Russia.*[18] Here the applicant lived in the vicinity of a steel plant, an important steel producing centre of the respondent state. From 1982 the applicant and her family were living less than 500 meters from a steel plant. In order to limit the impact of pollution from the plant, a 5,000 metre 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 increased number of adult cancer deaths The Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to show, firstly, that there has been an actual interference with the individual's "private sphere", and, secondly, 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 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 reached a level sufficient to bring it within the scope of Article 8 of the Convention and that there had been a violation of same article.

Finally, one of the most recent cases concerning hazardous industrial process and its impact on the local population is *Tatar v Romania.*[19] In this particular case the applicants lived in Baia Mare (Romania). The company S.C. Aurul S.A., obtained in 1998 a licence to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide and part of its activity was located in the vicinity of the applicants' home. On 30 January 2000 an environmental accident occurred at the site. A United Nations study reported that a dam had breached, releasing

[18] *Fadeyeva v Russia,* (2007) 45 E.H.R.R. 10
[19] *Tatar v Romania,* judgment of 27/01/2009, No. 67021/01

about 100,000 m3 of cyanide-contaminated tailings water into the environment. The report also stated that S.C. Aurul S.A. had not halted its operations. The applicants complained under Article 2 of the Convention that the activities carried out by the company placed their lives in danger, and that the authorities failed to take any action. However, the Court ruled that the applicants' complaints should be examined under Article 8. When it came to the medical condition of the first applicant the Court noted that the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. However, the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the State to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures. The Court also stressed the authorities' duty to inform the public and guarantee the right of its members to participate in the decision-making process concerning environmental issues. Finally, 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 the suitable measures to protect the applicants' rights under Article 8 and more generally their right to a healthy environment.

All these judgments demonstrate the Court's willingness to accept that complaints concerning environmental pollution can be brought within the ambit of Article 8. States can be liable if they fail to take adequate measures, such as through enacting and enforcing appropriate regulatory regimes or to ameliorate the effects of significant forms of pollution caused by private sector business that affect persons' enjoyment of their homes. Acknowledging the necessity of many possible sources of pollution in modern developed societies, the Court also accorded states a margin of appreciation in their difficult task of balancing the conflicting interests of society as a whole and the needs of residents near unavoidable sources of pollution.[20] Where decisions of public authorities affect the environment to the extent that there is an interference with the right to respect private and family life or the home, they must accord with the conditions set out in Article 8 (2).[21] That means such decisions must be provided for by the law, follow a legitimate aim and they must be proportionate to the legitimate aim pursued. As already mentioned, for the purpose of these cases, this basically means that a fair balance must be struck between the individual and the interests of a community as a whole. Since the public authorities are best placed to determine how the balance should be struck they enjoy a wide margin of appreciation. Therefore, in certain situations, interference by public authorities may be acceptable under the Convention- but it has to be justified. However, it is also relevant to point out that, because of

[20] Mowbray, A., op.cit., pp. 182-183
[21] *Manual on Human Rights and the Environment*, p. 14

the individual character of the complaints that can be brought under the Convention, these judgments were intended to apply only to the applicants that brought the complaints. However, as will be shown now, they rarely apply only to the applicants.

Let us now have a look at the Committee of Ministers (the CoM), latest reports on the execution[22] of the last two judgments presented here. The CoM is the body responsible, among others, for supervising the execution of the Court's judgments.
In both *Tatar v Romania* and *Fadeyeva v Russia* the Deputies decided to resume consideration of this item at the latest at their 1108th meeting (March 2011) (DH), in the light of an action plan / action report to be provided by the authorities.[23] However, in *Fadeyeva* case the CoM pointed out that all information provided by authorities so far, regarding the execution of the judgment, as well as the outstanding issues are summarised in the Memorandum CM/Inf/DH(2007)7. This report concerns not only *Fadeyeva* case but also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina* cases, judgment of 16/10/2006, No. 53157/99 53247/99; 56850/00; 53695/00. The Memorandum is being updated on the basis of the information provided by the applicants. The Memorandum is very detailed and consists of assessments of current situation in general and regarding the applicant, measures needed and the long term programmes planed in order to improve the situation. [24]

Although not presented in detail, what one can see from these CoM reports, violations of the right to a healthy environment concern not only the applicants, but also all the population that might be affected. Also, the judgements concerning healthy environment cannot be executed immediately but they require making of an action plan from the states and furthermore, enforcement of that action plan. This is mostly visible from the *Fadeyeva* case where the Committee of Ministers prepared a Memorandum consisting of measures required and the execution is still ongoing. The Russian authorities have shown that they have taken numerous measures to improve the situation regarding the industrial pollution together with the resettlement of the applicants in an ecologically safe area. However, despite all these measures taken, it will take years for the situation in the area to be in conformity with the healthy environment requirements, which is in connection with the great financial expenditure needed by the Russian government.

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[22] Visited on 20 May
[23] Council of Europe, Execution of Judgments of the European Court of Human Rights, Pending cases: state of execution, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp, *Tatar v Romania* and *Fadeyeva v Russia*
[24] ibid., *Fadeyeva v Russia*

We can draw certain conclusions from the presented cases. First of all, states have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health or the enjoyment of private life.[25] Its extent will depend on the harmfulness of the activity and the foreseeability of the risk. Secondly, although the Court refers to the need to balance the rights of the individual with the needs of the community as a whole, in reality the states' failure to apply or enforce their own environmental laws in each of these cases left no room for such a defence.[26] States cannot expect to persuade the Court that the needs of the community can best be met in such cases by not enforcing the law. Thirdly, and for this paper most importantly, the beneficiaries of this duty to regulate and control sources of environmental harm is not the community at large, still less the environment per se, but only those individuals whose rights will be affected by any failure to act. The duty is not one of protecting the environment, but of protecting humans from significantly harmful environmental impacts.[27] There is no right to environmental protection unless the environmental issues can be discussed within the context of private and family life or any other substantive Convention's article. Moreover, the disturbances must reach a sufficient degree of seriousness to be taken into account. What will also not be taken into account are *potential* violations of the Convention.

Therefore, the Convention does not look like a best mechanism for protection of the environment, particularly if one bears in mind the existence of the Conventions counterpart, the European Social Charter. Now, the discussion that was led on making an additional protocol to the Convention, on the right to a healthy environment will be presented.

[25] Boyle, A., *Human Rights or Environmental Rights? A Reassessment* (2007) Fordham Environmental Law Review Vol XVIII, pp.471-511, p. 487
[26] Loc.cit.
[27] Ibid., p. 17

DISCUSSION ON MAKING AN ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION, ON THE RIGHT TO A HEALTHY ENVIRONMENT

Because of new, environmental cases that appeared before the Court, the Committee on the Environment, Agriculture and Local and Regional Affairs has recommended that the Committee of Ministers should draw up an additional protocol to the European Convention, recognising the right to a healthy and viable environment. On 29 December 2009, the Committee on Legal Affairs and Human Rights (CLARH) has published its opinion on the 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment'.[28] In its conclusions, presented at the beginning of its opinion, the CLARH stated that although it recognises the importance of the healthy, viable and decent environments, it does not believe that extending the Convention through the proposed additional protocol is the correct solution.[29] Further in its opinion, the CLARH, via its rapporteur Mr Chope, provided reasoning for taking this position. Already in June 2003, this protocol has been rejected as being unjustifiable and potentially counterproductive. The new draft recommendation made by the Committee on the Environment, Agriculture and Local and Regional Affairs afforded the CLAHR the opportunity to re-examine its position.

In 2003 the CLAHR accepted the report from its rapporteur of that time, Mr Jurgens who expressed apprehension that the Convention and its Court would be given tasks beyond their competence and means.[30] It is also stated that "The Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention indirectly offers a certain degree of protection with regard to environmental matters as demonstrated by the evolving case law of the Court in this area."[31] In the draft recommendation it has been pointed out that the already developed case law demonstrates that, to include the right to a healthy environment in the Convention would simply be to set down a material right which already exists. However, the rapporteur Mr Chope didn't share this view. In his explanatory memorandum he stated that to include a new protocol, which was so vague, would lead to uncertainty and be a recipe for a

[28] Parliamentary Assembly, Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment, http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC12043.pdf,
[29] Ibid., paragraph I
[30] Ibid, paragraph 12
[31] Ibid., paragraph 13

substantial increase in the Court's case load. Also, in 2003 similar concerns were expressed by Mr Jungens:

"It must be remembered that, despite its enormous success in advancing the protection of a particular range of human rights in Europe, the Convention is not an instrument that is appropriate for all forms of rights. The Convention was intended to protect a narrow range of rights and its mechanisms designed specifically with those rights in mind; it is not structured for, nor capable of, the protection of all rights addressed by international instruments. Its past achievements are not a guarantee of limitless resilience: indeed, this very success can generate risks to its future integrity and to the capacity of the Court to work effectively in enforcing its provisions. These risks include the temptation to extend its jurisdiction to other forms of rights of uncertain content, scope and application. The inclusion of such 'untested rights' – which to a large extent could require primary elaboration not on national political and legal levels but through the case law of a pan- European judicial body – could not only undermine the standing of the Court but threaten it with an unmanageable burden of new applications (at a time when the level of applications is already a serious problem), to the detriment of protection of the rights currently included."[32]

In 2009 Mr Chope further elaborated this statement saying that "If we give citizens a broadly formulated, individual right to a healthy environment without being more specific as to the basis on which and against whom a citizen can in fact make a claim arising from that right, it becomes difficult for a judge to adjudicate."[33] It was again stressed that "introducing a right into the Convention that is impossible to enforce endangers the whole system."[34]

As we can see from both opinions the experts agreed that it would not be advisable to make an additional protocol to the European Convention on the right to a healthy environment. As the main obstacle, the rapporteus in both opinions emphasized the vagueness and uncertainty of the right to a healthy environment and its broadness as well as the dangeour that huge amount of new applications might come before the Court.

It is true that the Convention, despite being a living instrument, is intended to protect a narrow range of rights with mechanisms designed specifically with those rights in mind. However, the European Convention is not the only human rights instrument in Europe. One must not forget its socio-economic counterpart, the European Social Charter. The next chapter will be on Charter in general and the right to a healthy environment as interpreted by the European Committee on Social Rights.

[32] Parliamentary Assembly, Doc. 9833, Environment and human rights, http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9833.htm, paragraph 9
[33] Parliamentary Assembly, Preparation on an additional protocol..op.cit., paragraph 17
[34] Ibid., paragraph 41

THE EUROPEAN SOCIAL CHARTER

The European Social Charter sets out social and economic rights and freedoms. Following its revision, the 1996 Revised ESC, which came into force in 1999, is gradually replacing the initial 1961 treaty. By November 2009, all the Council of Europe states have signed either the Revised Charter or the 1961 Charter, while 43 Member States have ratified one version of the Charter.[35] The ESC is unique among human rights treaties since it permits its parties not to accept all the rights it contains. The probable reason for that are the considerable differences in the level of economic and social progress among members of the Council of Europe.[36] As to the compliance mechanism under the ESC, there are two forms of machinery for seeking to ensure that parties comply with obligations under the Charter. First is the system of reporting which has been in existence since 1961 and is obligatory for all the state parties to the Charter. As to the second machinery, the system of collective complaints, it has been introduced in 1995 and so far on 14 member states have accepted the collective complaint procedure. The European Committee on Social Rights ascertains whether countries have honoured the undertakings set out in the Charter. Under the collective complaints system there is no victim requirement and the ECSR can find a state to be in non conformity with its provisions before the actual environmental harm happens- it can act proactive. Economic, social and cultural rights are more concerned with "encouraging governments to pursue policies which create conditions of life enabling individuals or communities to develop to their full potential. They are programmatic, requiring progressive realisation in accordance with available resources, but nevertheless requiring states to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[37]

Now, the right to health under the ESC will be presented, followed by the presentation of the collective complaint No. 30/2005 concerning the right to a healthy environment.

[35] Council of Europe, European Social Charter, Presentation
http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp
[36] Gomien D, Harris D. And Zwaak L., *Law and Practice of the European Convention on Human Rights and the European Social Charter,* Strasbourg: Council of Europe, 1996, p. 379
[37] Boyle, Alan, op.cit., p. 34

THE RIGHT TO HEALTH UNDER THE EUROPEAN SOCIAL CHARTER

Article 11 of both versions of the European Social Charter guarantees *the right to protection of health*. The wording of Article 11 is the same under both versions, with the difference in the paragraph 3, which in the Revised Charter refers to accidents, while the original version of the Charter does not refer to them. [38] Of relevance for this paper is the ECSR's interpretation of the right to health as encompassing the right to a healthy environment.

Talking about the right to health in general, according to the Information document prepared by the secretariat of the ESC in March 2009[39], Article 11 provides for a series of rights to enable persons to enjoy the highest possible standard of health attainable. As to the healthy environment, it is emphasized that "The ECSR acknowledges that overcoming pollution is an objective that can only be achieved gradually. States must nevertheless take measures to achieve this goal within a reasonable time, with measurable progress and making maximum use of available resources. The measures taken are assessed with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations, and in terms of how the relevant law is applied in practice."[40] It then goes on by enumerating the measures necessary in order for the states to guarantee a healthy environment.[41]

The ECSR stresses out the economic and social nature of the right to a healthy environment, regardless of its obvious importance for the society and its individuals. The information document is based on the ECSR conclusions brought after giving examination on state reports. The ECSR, in its reports, has found that a number of contracting parties were not complying with various aspects of their obligations under Article 11(3), like Greece, Latvia, Ireland and Belgium.[42] What can also be seen is that the ECSR has been scrutinizing the situation in member states regarding environmental issues for years. Despite the lack of constant supervision, the states are on a regular basis- through the report system- informing the ECSR on the relevant

[38] With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia:*
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

[39] The right to health and the European Social Charter, Information document prepared by the secretariat of the ESC, March 2009,
http://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetHealth_en.pdf

[40] ibid., p. 2

[41] Ibid., p. 2-3

[42] Conclusions XIX-2 on Greece, Conclusions XIX-2 on Latvia, Conclusions 2009 on Ireland, Conclusions 2007 (vol.1) on Belgium
all available at: Council of Europe, European Social Charter, Conclusions of the European Committee on Social Rights or Case-law, Database

matters regarding the environment. One might suspect that by stating how overcoming pollution is an objective that can only be achieved gradually the ECSR will in its conclusions and decision making process be lenient to the states when assessing the measures they introduced in order to secure the healthy environment. However that is not the case.

Unfortunately, the case law on the Article's 11 right to a healthy environment is not numerous, to be exact- only one collective complaint on that issue has been brought so far.[43] Nevertheless, this one complaint gives us a very valuable overview of the ECSR's standpoint on the issue right to a healthy environment.

CASE *MARANGOPOULUS FOUNDATION FOR HUMAN RIGHTS V GREECE* CONCERNING THE RIGHT TO A HEALTHY ENVIRONMENT

The Marangopoulus foundation for human rights lodged a collective complaint on 4 April 2005 in relation to Articles 11 (right to protection of health), 2§4 (right to reduced working hours or additional holidays for workers in dangerous or unhealthy occupations), 3§1 (safety and health regulations at work) and 3§2 (provision for the enforcement of safety and health regulations by measures of supervision) of the ESC, all in relation to the lignite production by the Greek company. I will focus here only on the complaint regarding Article 11. Greece is the second largest lignite producer in the EU and fifth in the world. Since Greece's government acknowledged the polluting effects of lignite production, the questions before the ECSR were whether the pollution was attributable to Greece and whether it led to a violation of the right to health (as well as of the right to just conditions of work and the right to safe and healthy working conditions). The government claimed that the mining operations were undertaken by private entities for whose actions the state could not be held accountable.

In response to that argument the ECSR concluded that regardless of the company's legal status Greece was required to ensure compliance with its positive undertakings under the Charter. The ECSR's jurisdiction *ratione temporis* also had to be considered since the Protocol establishing the collective complaint procedure came into force in Greece in August 1998. On this issue the

[43] *Maragnopoulus Foundation for Human Rights (MFHR) v Greece,* complaint no. 30/2005, decision on the merits of 6 December 2006

ECSR relied on the notion of a 'continuing violation' developed by the ECtHR[44], meaning that the government will be held accountable for an event occurring before the entry into force of a treaty if it continues to produce effects after this. The ECSR found that there might be a breach of preventing the damage arising from air pollution for as long as the pollution continues. Also, the ECSR stressed that the Charter is a living instrument and that rights and freedoms set out in it are to be interpreted in the light of current conditions.[45]

The Committee took account of the growing link that states parties to the Charter and other international bodies now make between the protection of health and a healthy environment, and has interpreted Article 11 of the Charter as including the right to a healthy environment.[46] It than acknowledged that the use of lignite and its mining serve legitimate objectives under the Charter (such as energy independence, access to electricity at a reasonable cost, and economic growth), but nonetheless, it identified several areas in which the state's efforts fell short of Greece's national and international undertakings to overcome pollution, which, in turn, had resulted in a failure to protect the health of the population. It found that, although the Greek Constitution makes protection of the environment an obligation of the state and, at the same time, an individual right, national environmental protection legislation and regulations were not applied and enforced in an effective manner.[47] Based on these and other facts before it, the ECSR found no real evidence of Greece's commitment to improving the situation within a reasonable time.[48] The ECSR also concluded that, "even taking into consideration the margin of discretion granted to national authorities in such matters, Greece had not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest"[49], and thus there has been a violation of Greece's obligations with respect to the right to protection of health under the Charter.

In her paper on the case *Marangopoulos v Greece* Mirja Trilisch wrote that "*Marangopoulos v Greece* is, undoubtedly, one of the most important decisions the European Committee of Social Rights has taken so far…Most importantly, however, it places the right to a healthy environment in the mainstream of human rights.'[50] Furthermore, she emphasized the impact this decision has on the

[44] The case *Papamichalopous v Greece,* 260 E.H.R.R. Series A
[45] *Maragnopoulus Foundation for Human Rights (MFHR) v Greece,* paragraph 194
[46] Ibid., paragraphs 195 and 196
[47] Ibid., paragraphs 208- 216
[48] Ibid., paragraph 207
[49] Ibid., paragraph 221
[50] Trilsch, M., *Case Comment, European Committee of Social Rights: the right to a healthy environment,* I.J.C.L. 2009, 7(3), pp. 529-538,p. 532

material content of the right involved as well as on the removal of the right to a healthy environment from the constrained realm of so-called third generation right. The ECSR has through this decision proven its willingness and ability to decide on the complex and demanding issues like environmental pollution.

The Committee of Ministers is a body also responsible for supervising the ECSR decisions. Regarding the *Maragngopoulus* decision in 2008 it adopted a Resolution CM/ResChS(2008)1[51] and in it took note of the statement made by the respondent government and of the information it has communicated. The CoM welcomed measures already taken by the Greek authorities as well as further measures envisaged in order to ensure the effective implementation of the rights protected by the European Social Charter. Therefore, further improvements are necessary.
Just like with the ECtHR judgments we can see that it takes years for the states to execute decisions related to the healthy environment issues in order for them to be in full conformity with the ESC requirements.

CONCLUSION

The biggest problem with the ECSR is the non-binding character of its decisions and small number of state ratifications of the Collective Complaints Protocol and the long time periods between the state reports. However, even with those flosses, within the Council of Europe it is an effective way to supervise the countries methods of dealing with the environmental risks.
The Convention's main contribution to the human rights protection in Europe is that it protects individuals against actions of the state and that it imposed positive obligations on the states to protect individuals from various types of human rights violations. However, when it comes to the right to healthy environment, in my opinion it is not an issue that should be left for the European Convention and the Court. If we want the Convention to remain the most effective guardian of human rights ion Europe, we should focus on giving the existing rights (in all their broadness) better protection, rather then introducing new rights that would only create room for confusion, bring numerous new cases to the Courts and open space for the states to avoid fulfilling their obligations.

[51] Council of Europe, European Social Charter, Database, Committee of Ministers Resolutions, Resolution CM/ResChS(2008)1, http://hudoc.esc.coe.int/esc2008/document.asp?item=0

The Charter is under development, and the Council of Europe should focus into improving its machinery and the rights protected within it. The right to a healthy environment should primarily be a group right and not an individual one, since the effects of pollution or any other kind of environmental hazard will generally affect a large group of people. Also, environment disasters should rather be prevented than treated after they have happened. And if the Council of Europe puts and emphasis on the protective systems developed under the Charter and tries to make then as effective as possible, the environmental threats might be much better protected then under the Convention. As stated by Margared DeMerieux "Central to the idea of environmental rights and of the protection of the environment is that the interests of *populations as a whole* and indeed of *unborn generatuions* are crucial. "[52]

Both the ECtHR and the ECSR have admitted that the healthy environment is something which cannot be achieved immediately but only gradually. Although nowadays there is a tendency to abandon the distinction between socio-economic and civil and political rights, the fact that they are protected by two separate documents remains ands the right to a healthy environment is better placed under the socio-economic document.

[52] DeMerieux, M., *Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms,* Oxford Journal of Legal Studies, Vol. 21, No. 3 (2001), pp. 521-561, p. 534