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TOWARDS A RIGHT TO THE ENVIRONMENT IN EUROPE: NOISE AND JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: *The purpose of this paper is to point out that there is not a clear and direct right to enjoy an environment of quality in the European Convention of Human Rights. Nevertheless, the jurisprudence of the Court has played an important role in creating a specific category of a fundamental right to the environment. An interesting interpretation of the European Convention of Human Rights has been done in the judgements quoted in this article expanding the limits of the Convention through a wide interpretation of the "traditional" human rights.*

Key words: *Noise – Noise Pollution - Human Rights – European Court of Human Rights.*

1. Introduction

If in recent decades, during the rapid creation of international environmental law, a general principle has been gradually devised that establishes a general duty of the Member States to protect the environment, quoted in certain regional legal instruments [1] and clearly declared in article 192 of the United Nations Convention on the Law of the Sea [2], what is certain is that we are still very far from being able to conclusively confirm the existence of appropriate measures that protect man's right to the conservation of the environment in order that we may enjoy a high quality of life.

In international instruments of certain importance, such as the Stockholm Declaration of 1972 [3], we are able to find references stating that "man has the fundamental right to adequate conditions of life in an environment of quality", but they are no more than programmatic statements, commonly heard when talking about protecting the environment, but not providing subjective rights to those people that are potentially affected by specific interferences to the environment in which they live to such an extent that they invoke that right before administrative and legal bodies that may be able to provide help.

It is also true that the so-called latest Declarations of Rights, as well as including traditional fundamental rights, also include new rights that open up interesting points of view and developments. In this sense, with regards to Europe we must give special mention to the Charter of the Fundamental Rights of the European Union [4] or Charter of Nice [5], which is generally positive as regards the political and dogmatic contribution to the creation and development of fundamental rights, but uncertain as to its

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legal efficiency, and whose future is closely tied to the Lisbon Treaty. Article 37 of this instrument includes the protection of the environment [6], but doubts concerning the Charter coming into force and its true impact on EU law make it necessary to stay cautious.

This study aims to discuss the importance of jurisprudence in European courts in the design of a specific category of fundamental right to the environment, through the wide interpretation of existing texts, which has taken shape around the problem of noise. Despite certain developments in the European Court of Justice [7], it is in the European Court of Human Rights where a development really worth mentioning has been reached. With respect to noise pollution, a specific category of fundamental right has been being created that, although technically linked to the right to inviolability of the home, could emerge as the basis for a specific right: the right to the environment.

2. Noise, the European Convention on Human Rights and the European Court of Human Rights

Traditionally, the protection of citizens against noise pollution has not been a subject of great priority for the administrations, when to our understanding it is an element of great importance for people's quality of life and health. In its fight against noise pollution, the European Union has established a common approach aimed at preventing or reducing the damaging effects of being exposed to environmental noise. The key regulation is the Directive 2002/49/CE of the European Parliament and of the Council of 25 June 2002, relating to the assessment and management of environmental noise [8]. However, administrative proceedings aimed at preventing the effects of noise pollution have not traditionally been very efficient or top priority in the majority of European States.

In this respect, we would like to highlight the very interesting jurisprudential line of the European Court of Human Rights, which considers noise interference in a private home to be a violation of a fundamental right. Consequently, in the ruling of the case known as *Moreno Gómez v. Spain [9]*, the Court considered there to have been a violation of article 8 of the European Convention on Human Rights [10], as a result of the respondent State not having provided the appropriate support to the appellant in order to protect her home against the noise emissions that prevented her from enjoying her right to peace [11].

This interesting interpretation of the European Convention on Human Rights, relating to the protection of respect for private life and the home that is the indirect protection of rights that are not specifically recognised in the Convention, expanding the protection of the right to the environment [12], is not new. It began with a judgments, also against Spain, in the case *López Ostra v. Spain [13]*. All things considered, the Court establishes that the violations of the right to respect for the home are not only those of a material or physical nature, such as the entry of an unauthorised person into the home, but they are also attacks that are neither material nor physical, such as noises, emissions, smells and other interferences. If the attacks are serious they can deprive someone of their right to respect for the home, because they are prevented from enjoying being there.

The Court had already had the opportunity to make a declaration with respect to the specific subject that we are dealing with: noise pollution and the problems affecting those living in the proximity of an airport, in a case against the United Kingdom [14]. The case is

Powell and Rayner v. United Kingdom, which was a ground breaking resolution concerning noise pollution for neighbours produced by air traffic [15]. The ruling of the 21st February 1990 recognised that a serious noise interference in a home produced by aeroplanes could eventually imply the violation of the right recognised in article 8 of the Convention, taking as a starting point the fact that "*the quality of the applicants' and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow airport*" (paragraph 40). However, in this case and following the idea of the margin of interpretation of the States, sign of the tendency towards judicial self-control [16], the United Kingdom was not found guilty, as it was considered that it was necessary to safeguard the balance between the legitimate interests of the individual and those of the community as a whole, and that in the assessment of both interests "*the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention*" (paragraph 41 of the ruling). The sentence concludes that "*in forming a judgement as to the proper scope of noise abatement measures for aircraft arriving at and departing from Heathrow airport, the British government cannot arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8*" (paragraph 45).

In this way, the European Court of Human Rights has been qualifying its position and establishing a framework of indirect protection of the right to the environment (not specifically recognised in the Convention passed in 1950) in its jurisprudence [17].

3. The European Court of Human Rights' Ruling of the *Hatton* Case

The ruling of the *Hatton and others v. the United Kingdom [18]* case on the 2nd October 2001 is of particular interest for the subject matter of this study, as the applicants argued the violation of the right concerning respect for private family life that is set out in article 8 of the Convention, in relation to the noise caused by air traffic in a British airport [19].

One of the main reasonings of the Court is to remember the positive duties that the States party to the Convention have to adopt in order to ensure the effective enjoyment of the rights recognised in the Convention and its Additional Protocols. Therefore, even though neither Heathrow airport nor the aircraft operating there are controlled by the British government (ie. there is no direct interference on the part of the public administrations), they must ensure the effective compliance with the Convention.

However, the main reasoning of the Tribunal, and one that is of particular interest to this ruling, is that relating to the principle of proportionality. Interestingly, the Court does not specifically invoke this principle, despite referring to the two elements that are implicit in it: on the one hand, the duty of respecting a fair balance between the interests in play (paragraphs 96 and 97), and on the other hand, the duty of the States, as regards interference in the exercising of the rights recognised in the Convention, of not subjecting individuals to an unnecessary danger, understanding this to mean not choosing less costly paths from the point of view of human rights, for the securing of the legitimate ends being pursued with this interference (paragraph 97). In short, the Court is going to recognise a small margin of interpretation for the authorities of the State being accused, such that the State must clearly and convincingly justify the need for

interference and the impossibility of using other measures.

In the sentence, the Court reached the conclusion that the importance of the economic contribution of night flights for the national economy had not been assessed critically, and only one limited investigation had been carried out into the nature of sleep disturbance, and that, in short, it was inacceptable that the modest steps taken to improve the problem of night-time noise were capable of constituting the necessary measures to protect applicants' position and rights. Furthermore, the Court concluded that the government had not found the correct balance between the economic well-being of the country and the effective enjoyment of the applicants' right to respect for their home and private lives. Consequently, the Court considered that a violation of article 8 of the Convention existed and condemned the United Kingdom.

However, the British government appealed the judgment, and so the case passed to the Grand Chamber of the European Court of Human Rights [20]. The Grand Chamber, in the judgment on the 8th July 2003, considered the appeal and largely revoked the first ruling, deeming, amongst other matters, that there had been no violation of article 8 of the Convention (although it did maintain the United Kingdom's sentence due to violation of article 13, the right to an effective remedy; a procedural aspect that is not the focus of this study).

The Grand Chamber reasons that in previous rulings in which the protection of the environment was an issue, the national administrations had infringed the regulations that came from their own laws. Nonetheless, as regards this lawsuit, the British government had acted in accordance with its legal guidelines by introducing in 1993 (in accordance with the law) a quota system. The Grand Chamber also considers it reasonable to imagine that night flights contribute significantly to the development of the national economy. Given that the applicants had not reliably proved, with the ruling underway, that the night-time noises had caused their homes to drop in value, and since they could easily have moved house, as well as due to the fact that the British administration had carried out a series of investigations and studies, the Grand Chamber believes that in search of a fair balance, the margin of interpretation has not been exceeded. Finally, with twelve votes against five, it considers that there was no violation of article 8 of the Convention [21].

4. Final Thoughts

In any case, these judicial decisions have, in our opinion, the value of shaping a concept that up until now has been rather vague, but which is being made acceptable: the citizens' right to an environment as a fundamental right. It is true that such a right does not appear as such in the main Conventions and international instruments [22] that relate to the protection and safeguarding of fundamental rights and public liberties, although in certain instruments a relationship does clearly exist between human rights and the protection of the environment, such as the *African charter on human and peoples' rights* in 1981, the *Additional protocol to the American convention on human rights* passed in San Salvador in 1989, the *Convention on the rights of the child*, also in 1989, and the *Convention of the International Work Organisation relating to indigenous peoples established in independent countries*, in 1989 as well. In this respect, a wider concept relating to the protection of the environment as a fundamental right has been gradually developed in sectorial and regional instruments.

Without wishing to go into too much depth, we must describe the adoption in Europe of an instrument of enormous relevance due to the depth of its specific contributions to the rights of individuals, known as the Aarhus Convention. This convention was adopted on the 25th June 1998 by a ministerial conference that was taking place under the auspices of the Economic Commission for Europe [23], signed not only by a large number of European States, but also by the European Community. The Convention's preamble establishes the express recognition that everybody has the right to live in an environment that ensures their health and well-being, and the duty (both individually and as a whole) to protect and improve the environment for the sake of current and future generations. It adds that in order to make this right worthwhile and to fulfil this duty, the citizens must have access to information, be authorised to participate in the taking of decisions and have access to justice in environmental matters. These three factors (participation, information and access to justice) help develop with great success within the European framework what is being called, in an ambiguous manner up until now, environmental democracy.

In conclusion, despite the lack of a specific definition for a fundamental right to the environment that provides the individual with genuine rights, a jurisprudential line is developing in Europe that consolidates the individual's genuine right to a suitable environment, carrying out an extensive interpretation of the existing legal instruments.

In short, noise is one more element that contributes to the deterioration of quality of life, but there is no doubt that its features (objectivity of its measurement, ease of identifying its impact on a specific area, existence of scientific studies on the effect it has on people's health etc.) have helped it become the object of complaints made by individuals, who have received the support of the European Court of Human Rights through the rulings that have been described.

The social repercussion of such judgments, along with their development through the individual legal systems of Member States, will contribute to an ever-growing pressure for the development and consolidation of a fundamental right of the human being to enjoy an environment with a greater level of protection that guarantees a decent quality of life in balance with the fragile ecosystems of our damaged planet.

References

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2. JUSTE RUIZ, J., *International Environmental Law*, McGraw Hill, Madrid, 1999, p. 69. Article 192 of the United Nations Convention on the Law of the Sea states: All States have the obligation to protect and preserve the marine environment.
3. Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972. Doc. A/CONF 48/14.
4. Published in the *Official Journal* nº C 303, 14 December 2007.
5. JIMENEZ QUESADA, L., "La Carta de los Derechos Fundamentales de la Unión Europea: rango legal y contenidos sustantivos", *Cuadernos Europeos de Deusto*, 2009, 40, pp. 63-83: FERNÁNDEZ TOMÁS, A., "La Carta de Derechos Fundamentales de la Unión Europea: un nuevo hito en el camino de protección", *Gaceta Jurídica de la Unión Europea y de la Competencia*, 2001, nº 214, pp. 15-30.

6. The article states: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".
7. Edwards, V., "European Court of Justice: significant environmental cases 2007", *Journal of Environmental Law*, 2008, vol. 20, nº 1, pp. 137-150.
8. *DO* L 189 of the 18 July 2002.
9. Judgement of the European Court of Human Rights, Fourth Section, application nº 4143/02, 16 November 2004.
10. Article 8 of the European Convention on Human Rights 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 country in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".
11. Spain signed the Convention on 24 November 1977 and ratified it on 4 October 1979 (*BOE* nº 243, 10 October 1979), when Protocols 3 and 5 were already in force. Spain signed the additional Protocol on 23 February 1978 and ratified it on 27 November 1990 *(BOE* 12 January 1991). Spain has also signed the additional protocol number 4 on 23 February 1978, but it has still not been ratified, meaning that it is not a party State in this protocol. However, according to article 18 of the Vienna Convention on the Law of Treaties, on the 23 May 1969, it has the duty to avoid acts by virtue of which the subject and the purpose of the additional Protocol number 4 are thwarted. The additional protocol number 4, relating to the abolition of the death penalty, was ratified on 14 January 1985 (*BOE* 17 April 1985). The additional protocol number 7 was signed on 22 November 1984, and has not yet been ratified. The important Protocol number 11 that recognises the individual *ius standi*, was published in the Official Spanish Bulletin (*BOE*) on 26 June 1998. The consolidated text was published in the *BOE* on 6 May 1999.
12. CARRILLO SALCEDO, J. A., *El Convenio Europeo de Derechos Humanos*, Madrid, Tecnos, 2003. p. 107.
13. Judgment of 9 December 1994, series A, nº 303 – C, 51.
14. By way of a precedent, the appeals made by the British citizens Baggs and Arrondelle, who were affected by the noise from the airports, also exist. The applicants reached a friendly settlement with the United Kingdom, after the Commission had accepted their appeals. Case *Arrondelle v. United Kingdom*, 7889/77. Decision 15 July 1980 and the Report of 13 May 1983 (*DR* 26, p. 5). Case *Baggs v. United Kingdom*, 9310/81, Decision 16 October 1985 (*DR* 44, p. 13) and the Report of 8 July 1987.
15. An appeal made by two neighbours with properties near Heathrow airport, who regularly suffered from the noise made by the aircrafts landing and departing from the airport.
16. CARRILLO SALCEDO, J. A., *El Convenio Europeo de Derechos Humanos, op. cit.*, p. 91.
17. As well as the rulings and decisions that are mentioned, the following cases are particularly interesting:

Vearncombe and Others v. Federal Republic of Germany (noise), appeal nº 12816/87, Decision on 18/1/1989, DR nº 59, p. 186*; X. v. France* (noise and other inconveniences), appeal nº 13728, Decision on 17/5/1990; *Zander v. Sweden* (water pollution), appeal nº 14282/88, Decision on 14/10/1992; *Guerra and others v. Italy*, ruling on 19/2/1998; *Öneryildiz v. Turkey*, ruling on 18/6/2002.

18. As regards the ruling in question, see: GARCIA SAN JOSE, D. "Ruido nocturno e insomnio: los derechos a la vida privada y familiar y al respeto del domicilio frente al interés general de los vuelos durante la noche. Comentario a la STEDH de 2 de octubre de 2001, en el caso Hatton y otros contra el Reino Unido" in *Revista Española de Derecho Constitucional*, Year 22, No. 64, Jan-Apr 2002, pp. 239 – 260; DOMENECH PASCUAL, G. "La obligación del Estado de proteger los derechos humanos afectados por el ruido de los aeropuertos. Comentario a la STEDH de 2 de octubre de 2001" in *Revista de Derecho Urbanístico y Medio Ambiente*, vol. 36, nº 192, 2002, pp. 57 – 82; and on the subject in general, see MARTIN-RETORTILLO BAQUER, L. "El ruido de los grandes aeropuertos en la jurisprudencia del Tribunal Europeo de Derechos Humanos" in *Derecho de Medio Ambiente*, Centre of Legal Studies of the Justice Administration, nº 16, 1995, pp. 117 – 134.
19. The causes of the matter lie in the alteration in 1993 of the legal system controlling night-time air traffic movements (taking off and landing) that take place in airports in the United Kingdom. The system changed from one in which a maximum number of night movements permitted was established, to a system of quotas, thus considerably increasing the air traffic, such that the applicants (living near Heathrow airport) argued that they found it difficult to sleep after four o'clock in the morning, and impossible after 6 o'clock. The sound levels exceeded eighty decibels, whereas according to the World Health Organisation, it is advisable to not exceed a maximum of sixty decibels.
20. The amended Protocol number 11 of the Convention introduced a two stage jurisdiction system, reinforcing the features of independence of the European Court of Human Rights' protection mechanism "*through a commitment solution consisting in maintaining the principle of the reexamination as a structural component of the new mechanism, allowing the cases of particular importance to be reexamined twice by means of two different formations of the new Court, the Chambers and the Grand Chamber*" (SANCHEZ LEGIDO, A.*; La reforma del mecanismo de protección del Convenio Europeo de Derechos Humanos*, Colex, Madrid, 1995, p. 285).
21. The judges Costa, Ress, Türmen, Zupancic and Sieiner cast an individual vote of great interest, in which they stated their disagreement with the ruling and expressed their opinion that there had been a violation of article 8 of the Convention, based on a *human right to the environment*, not originally existing in the text of the Convention.
22. The inclusion of the right to protection of the environment in article 37 of the European Union's Charter of Fundamental Rights or Charter of Nice implies a certain original nature, despite its very significant limitations,

which literally reads as follows: "I*n accordance with the principle of sustainable development, the policies of the Union will comprise and ensure a high level of environmental protection and the improvement of the quality of the environment*". For more on this subject, see HERRERO DE LA FUENTE, A.; "El derecho a la protección del medio ambiente y el artículo 37 de la Carta de Derechos Fundamentales de la Unión Europea" in HERRERO DE LA FUENTE, A. (Ed.), *La Carta de Derechos Fundamentales de la Unión Europea. Una perspectiva pluridisciplinar*, Cuadernos del Instituto Rei Afonso Henriques de Cooperación Transfronteriza, nº 2, Zamora, 2003, pp. 113 – 136. The article mentioned can nowadays be found inserted in the text of the Treaty through which a Constitution for Europe is established, with the number II-97.

23. See PILGRAU SOLER, A., (dir.), *Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente, diez años del Convenio de Aarhus*, Barcelona, Atelier, 2008. PEÑALVER CABRÉ, A., "Nuevos instrumentos para la aplicación de la legislación ambiental ante la inactividad administrativa: de las acciones ciudadanas al Convenio de Aarhus", *Revista de Administraciones Públicas*, 2007, nº 172, pp. 439-485.