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Case Note

SOME ASPECTS OF ENVIRONMENTAL RIGHTS PROTECTION

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CONFLICTS OF INTEREST

The authors declare no conflict of interest of relevance to this topic.

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Abstract This note addresses some aspects of the basic principles of environmental rights protection and ECtHR practice. In particular, it analyses the new directions for environmental rights protection that the ECtHR gave us in Tătar v Romania. Some inconsistency of the ECtHR is highlighted since the case-law of environmental principles varies. Significant and important steps towards recognising the importance of procedural rights associated with public participation as this principle are indicated in international environmental law more generally. On the other hand, the Court's more recent forays into the territory of other environmental principles – particularly that of the precautionary principle – suggests that the Court is less eager to develop its extensive environmental case-law considering the principle of precaution.

Keywords: principles of environmental safety laws, environmental justice, environmental rights protection, ECtHR case law

1 INTRODUCTION – BASIC PRINCIPLES OF ENVIRONMENTAL RIGHTS PROTECTION

The Treaty of Amsterdam (1997) complemented the Fifth Environmental Action Program, further contributing to the advancement of the environmental policy defining environmental protection as the EU's operational policy.¹ Some scholars conclude that the EU environmental policy is built on both fundamental principles (the polluting party pays – the prevention principle) and auxiliary principles (the principle of preservation of biodiversity, the principle of the source, etc.).²

Today, the EU is highly competent in solving environmental problems, and environmental integration is now mandatory for every EU member state and candidates for EU accession. In addition to the principle 'the polluting party shall pay', which is backed up by

1 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Contents. Official Journal C 340, 10/11/1997, 1-144 <<https://CEr-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT>> (accessed 8 June 2021).

2 V Kolesnyk, 'The concept and general description of the principles of the environmental policy of the European Union' (2012) 1 Bulletin of the Chernivtsi Department of the National University 'Odessa Law Academy' 130-141.

Environmental Liability Directive 2004/35/CE,³ one should also mention the following EU environmental policy principles: 1) subsidiary (joint operations where a state is unable to act alone or where this solution will be more efficient than performance on the national level alone); 2) preventive actions; 3) the precautionary principle; 4) remedial actions to eliminate damage at the early stages; 5) environmental orientation (any activity that is conducted taking the environmental needs into account); 6) integration of environmental policy in the development and implementation of all the other policies.

In addition, considering the provisions set forth in the Resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' adopted by the UN General Assembly⁴ and the results of adaptation thereof in accordance with the Decree of the President of Ukraine,⁵ key activities to promote environmentally-friendly sustainable development are as follows: the environmentally substantiated allocation of production facilities; the environmentally-friendly development of industry, the energy sector, transportation systems, and public utilities; the environmentally-friendly development of agriculture; prudent use of renewable natural resources; rational use of non-renewable natural resources; extensive use of recoverable resources, waste management, treatment, and disposal; the improvement of environmental protection and management and the prevention and liquidation of accidents.

International environmental lawyers maintain that the principle of prevention of potential environmental risks, hazards, adverse environmental impact, and health hazards illustrates the entire current environmental policy. Its goal is to prevent potential risks, hazards, and adverse environmental impacts through the prudent use of natural resources to preserve the latter for future generations. The 'future' component represents an integral part of the principle of prudence, making it the cornerstone of all environmental impact planning programs.⁶

The principles of environmental safety law appear to be as follows: 1) sustainable development that implies equal treatment of economic, social, and environmental components, and acknowledging that no public progress will be possible in conditions of degrading environment; 2) the prevention of potential environmental risks, hazards, adverse environmental impact, and health hazards; 3) use of the natural resources on a paid basis and indemnities against the damage caused to the people and the environment or resulting from the breach of environmental safety laws; 4) free access to the environment-related information; 5) participation of all interested parties in drafting, discussion, adoption, and implementation of decisions to promote environmental safety; 6) international cooperation in the sphere of environmental safety.

Since the environmental safety principles form the cornerstone of the national environmental safety concept, one would logically expect the Coordination Center for Coal Industry Transformation to apply the same principles while drafting the Coal Industry Reform

3 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (30 April 2004) Official Journal of the European Union L 143/56-L 143/75.

4 Resolution adopted by the General Assembly on 25 September 2015, No 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> (accessed 8 June 2021).

5 Decree of the President of Ukraine No. 722/2019 of 30 September 2019 'On Targets of Sustainable Development of Ukraine for the Period Up to 2030' // *Otsiyny Visnyk Ukrayiny* of 15 October 2019 No 79, p. 7, Art. 2712.

6 Nicolas de Sadeleer, 'Environmental principles: From political slogans to legal rules' <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199254743.001.0001/acprof-9780199254743-chapter-02>> (accessed 8 June 2021).

Concept and the 2027 National Program of Coal Regions Transformation,⁷ with particular focus on the Environmental Component of the development of the regions resulting from the cuts in coal mining.

We agree with the idea of the Code of Environmental Laws of Ukraine (hereinafter, the CELU) development, which should be based on the principles of the rule of law and harmonising the national environmental laws with international laws.⁸ Therefore, adoption of the CELU should complete the codification in the sphere regulating the public relations in connection with the use of natural resources and environment protection, creating an environmental legal network adapted to the norms and principles of the EU laws and the international law on the whole, as was rightly noted. At the same time, the practice of the European Court of Human Rights (hereinafter, the ECtHR) gave us new directions for environmental rights protection that should be highlighted and used.

2 ENVIRONMENTAL RIGHTS PROTECTION AND THE ECtHR

Notwithstanding the Court's willingness to interpret the Convention as including certain safeguards in the context of environmental risks, the specific application of environmental principles has been limited. Two exemptions, however, stand out.

First, in recent years, the Court has made tentative moves towards reconciling the Convention and its environmental case law with a precautionary approach. The *Tătar v. Romania* decision thus represents the first attempt by the Court to interpret its environmental case law in light of the precautionary principle.⁹ In *Tătar*, the applicant complained about the failure of the Romanian government to take preventative steps in respect to the well-known Baia Mare mining operations, operating close to the applicant's home. Central to the applicant's argument was that several serious and well-documented accidents had occurred over the years, resulting in, among other things, large quantities of mining tailings being released into local waterways and the failure of the government to effectively regulate the activities that had resulted in the applicant's son becoming ill. Relying, in particular, on the fact that the domestic authorities had taken very little action following a particularly serious accident and the finding that the applicant had not succeeded in substantiating the claim that the mining activities had caused his son's illness, the Court turned to the precautionary principle.

The applicant in *Tătar* specifically invited the Court to interpret Art. 8 of the Convention in light of the precautionary principle, arguing that the Romanian government ought to be responsible for not taking precautionary measures as required by Art. 8.¹⁰ With little hesitation, the Court responded to the invitation by recognising the importance of the principle and finding that the principle required the Romanian government to inform the local residents about the relevant risks originating from the mining operations and put in place preventative measures aimed at keeping accidents from occurring again. In reaching this conclusion, the Court was seemingly aided by the fact that very few steps had been taken by the government and local authorities following previous accidents at the mine; in fact,

⁷ 'On Development of the 2027 National Coal Industry Transformation Program' <https://www.mineconomy.gov.ua/wp-content/uploads/2020/10/coalindustry_transformation_blue.pdf> (accessed 8 June 2021).

⁸ AP Hetman, 'Codification of Environmental Law in the Context of Constitutional Reform' (2016) 1-2 *Environmental Laws of Ukraine* 3-5.

⁹ Cauza Tătar Împotriva României (Cerere nr. 67021/01) <<http://hudoc.echr.coe.int/eng?i=001-124019>> (accessed 8 June 2021).

¹⁰ *ibid.*

the mining operations continued with few restrictions. Moreover, the Court found that the authorities had contributed significantly to the uncertainty and anxiety of the local residents by not releasing information, which would have allowed the applicants to assess the risks arising from the mining operations. In finding in favour of the applicant, the Court referred to the principle as promulgated in Art. 174 of the EC Treaty (now Art. 191 TFEU), the Rio Declaration, the Gabčíkovo-Nagymaros decision of the International Court of Justice, and the European Commission's 2000 communication on the principle and associated case-law from the Court of Justice. In effectively interpreting Art. 8 of the Convention in light of the precautionary principle, the Grand Chamber took a potentially bold step towards shaping its environmental case-law around a well-established environmental principle, as this has been defined by other courts and other international legal instruments. This approach, however, is not entirely problem-free for a whole host of reasons.

First, in relying on the precautionary principle as it is interpreted, developed, and understood in separate and different international regimes (unrelated to the ECtHR), the Court is arguably guilty of ignoring the fact that the principle itself is likely to have a different meaning in each of the regimes. That is, a definition of the precautionary principle in the Rio Declaration is not necessarily the same as the one developed by the ICJ in the context of general international law or in a dispute between two states relating to treaty interpretation in the context of the sharing of natural resources.¹¹ This suggests that the meaning of the precautionary principle, as indeed any other principle, is necessarily contingent upon the context in which it is applied.¹² The Court overlooked this in its willingness to embrace the principle.

This gives rise to a further complication in how the Court identifies the principle as part of 'relevant international law'. The status of the principle in international law is not clear, and there are persuasive arguments for and against finding that the precautionary principle amounts to a customary rule of international law.¹³ Having said that, from the Court's decision in *Tătar*, it is not possible to discern whether the Court thinks that the principle amounts to a customary rule of international law and hence a norm in light of which it ought to interpret the Convention. As is often the case in the Court's decisions, applicable international legal instruments and rules are often simply 'referred to' as forming part of 'relevant law', with little substantive assessment of what status these rules have.

Third, the willingness of the Court to rely on the precautionary principle is arguably at odds with the well-established margin of appreciation doctrine, which, as noted, plays an important role in environmental cases.¹⁴ The reason for this, partly relating to the point of contingency made above, is found in the fact that the principle does not in itself mandate specific outcomes of a given decision-making process. It merely provides a basis for making such decisions under certain criteria of scientific uncertainty and where the risk of environmental harm crosses a given threshold (and, at times, where regulatory action is cost-effective). The point is that such decisions necessarily entail an assessment of costs against benefits, advantages against disadvantages, and the risk of inaction against the cost of action. These decisions are inherently political (though that does not mean that the principle is not

11 E Fisher, 'Precaution, precaution everywhere: Developing a "common understanding" of the precautionary principle in the European community' (2002) 9 Maastricht J. Eur. & Comp. L. 7.

12 OW Pedersen, 'From abundance to indeterminacy: The precautionary principle and its two camps of custom' (2014) Transnational Environmental Law 323.

13 *ibid.*

14 See, in particular, *Hatton and Others v The United Kingdom* App no 36022/97 <<http://hudoc.echr.coe.int/eng?i=001-61188>> (accessed 8 June 2021); *Giacomelli v Italy* App no 59909/00 <<http://hudoc.echr.coe.int/eng?i=001-77785>> (accessed 8 June 2021).

justiciable at all) and arguably best left to the contracting states themselves.¹⁵ Consequently, in terms of specifying a general content and understanding of the precautionary principle, the main point to emerge is arguably that the principle's real lesson becomes one of process. That is, the objective of the principle is to secure that where environmental risks are identified, decisions are made transparently and in accordance with democratic ideals of administrative decision-making.¹⁶ If this is the case, the Court's willingness to apply the principle in *Tătar* makes all the more sense in light of the fact that the local authorities and the Romanian government decided to do very little, notwithstanding the specific concerns expressed by local residents following serious accidents at the mine.

A strong justification for the emphasis on the principle of public participation is found in the fact that not only has international environmental law developed several important pointers in this direction over the last twenty years but also in the fact that when the Court affords contracting States a wide margin of appreciation in substantive environmental decision-making, it arguably makes sense to specifically scrutinise the procedures behind a given decision. Thus in, *Fadeyeva v. Russia*, the Court noted that

It is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests.¹⁷

Similarly, in *Hatton and Others v. The United Kingdom*, the Grand Chamber observed that it would specifically consider 'the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available'. A particularly useful example of the Court's willingness to emphasise the principle of public participation is found in *Giacomelli v. Italy*, where the failure of the Italian authorities to implement the procedural processes found in domestic EIA obligations amounted to a violation of Article 8.¹⁸ This strong emphasis on public participation and access to independent scrutiny of decisions represent in all but name the 'three pillars' of the Aarhus Convention, and it is evident that the Court has taken its cue from the increasingly strong emphasis afforded to public participation in international environmental law in general.

3 CONCLUDING REMARKS

To sum up, the case law from the ECtHR, as this pertains to environmental principles, blows hot and cold. On the one hand, the Court has taken significant and important steps to recognise the importance of procedural rights associated with public participation as this principle is recognised in international environmental law more generally. On the other hand, the Court's more recent forays into the territory of other environmental principles – particularly that of the precautionary principle – suggests that the Court is less eager to develop its extensive environmental case law in light of the principle of precaution. To some, this may be a disappointment, but it should not be a surprise. Just as in environmental law

15 *Hatton and Others* (n 14).

16 E Fisher, R Harding, 'The precautionary principle: Towards a deliberative, transdisciplinary problem-solving process' in R Harding and E Fisher (eds), *Perspectives on the Precautionary Principle* (The Federation Press 1999) 291.

17 *Fadeyeva v. Russia* App no 55723/00 <<http://hudoc.echr.coe.int/eng?i=001-69315>> (accessed 8 June 2021).

18 *Giacomelli* (n 14).

in general and international environmental law specifically, the contours of environmental principles are not necessarily well defined, and the exact application is often left to domestic systems.

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