Water Policy 20 (2018) 282–307

The European Court of Human Rights and the right to clean water and sanitation

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Abstract

The human right to clean water and sanitation is currently under discussion in the European Union. During this discussion, it should not be forgotten that another European organisation, namely the European Court of Human Rights (ECtHR), is becoming increasingly active regarding pan-European minimum standards relating to the right to clean water and sanitation. Although it is widely recognised that clean drinking water and sanitation are essential to the realisation of all human rights, no such obligation can be found in the European Convention on Human Rights (ECHR). This article reviews the creative development of the jurisprudence of the ECtHR concerning the right to clean water and sanitation using two interpretation techniques, namely the 'living instrument' doctrine and the 'practical and effective' doctrine. Today, the ECtHR recognises, for example, that a breach of a State's obligation to respect the right to water can amount to a violation of Article 3 of the Convention on inhuman or degrading treatment. By failing to oblige companies to curb water pollution, the Court has also held that a State can be liable for a breach of Article 8 of the Convention, namely the right to respect for private and family life.

Keywords: European Convention on Human Rights; Human rights; Sanitation; Water

1. Introduction

Teisman *et al*. (2013) think that 'oftentimes the water governance capacity to solve water problems is insufficient due to the institutional fragmentation of responsibilities.' In the water governance system, various stakeholders from different domains, sectors, and scales, with sometimes conflicting interests and values, take part (Teisman *et al*., 2009). These different institutions and organisations are often bound by functional and geographical jurisdictions (Sabatier *et al*., 2005; Tropp, 2007). I will argue that the European Court of Human Rights (ECtHR) can play a role in making sure that nevertheless a common minimum standard regarding water and sanitation is being respected all across Europe.

doi: 10.2166/wp.2018.045

The Water Governance Facility of the United Nations Development Programme (UNDP) defines water governance as 'the political, social, economic, and administrative systems that are in place, and which directly or indirectly affect the use, development, and management of water resources and the delivery of water service at different levels of society' (Water Governance Facility, 2012). When talking about water governance in the European context, the activities of the European Union in this field often overshadow the innovative efforts of another, pan-European organisation, the Council of Europe (47 Member States with 820 million citizens). This often occurs even though the Council of Europe was the first institution in Europe to address newly arising environmental challenges[1].

Bressers & Kuks (2013) provide us with many examples of bottom-up organisations in water management. In this article, I will mainly discuss the role of a top-down organisation, the ECtHR, which actually plays an important role in strengthening the position of bottom-up organisations, e.g. non-governmental organisations (NGOs). Bressers & Kuks (2013) further argue that there are five dimensions of governance. Their assumption is that 'stability in a governance system results from mutual adjustment between the five dimensions of such a system.' They further claim that changes within a governance system occur through internal built-up tensions disturbing the regime stability or external triggers. I will argue that the jurisprudence of the ECtHR can be an important trigger for such changes: judgements are handed down after internally built-up tensions, by an entity that is somewhat external to the system.

Teisman *et al*. (2013) argue that:

> '*[g]overnance as an empirical phenomenon has been portrayed as the growing interdependence between actors from both the public, the societal and the private domains and increasing interrelations and interconnectivity between these actors involved in issues of collective action, and a diminishing role for a single governance level in formulating and implementing public policy*.'

In recent years, the ECtHR, which bases its jurisprudence on the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR')[2] has handled an increasing number of cases in the aforementioned context. The huge impact of the jurisprudence of the ECtHR, which can also lead to a diminishing role for a single governance level, can be observed when we look at the changes within the rights for non-married fathers in Germany; this fundamental change was triggered by the ECtHR (ECtHR, *Zaunegger v. Germany*, application n° 22028/04, judgement of 03.12.2009).

In this article, I will argue that the judgements of the ECtHR may have an impact on the development of water- and sanitation-related rights. This should give the reader a better understanding of how and in which area the jurisprudence of the ECHR might have to be taken into consideration, alongside the

[1] See, for example, the European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (entered into force in 1971), the Convention on the Conservation of European Wildlife and Natural Habitats (entered into force in 1982), the European Landscape Convention (entered into force in 2004), or the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (from 1993), and Art. 19 of the European Charter on Water Resources (a Committee of Ministers recommendation in 2001), which even mentions the human right to water together with the obligation of users to pay for water services.

[2] This jurisprudence is increasingly cited by other Courts, e.g. SCt USA, *Lawrence v. Texas*, 26.06.2003, discussed the case law of the ECtHR; conversely, the ECtHR cited SCt India in ECtHR (Grand Chamber), *Hämäläinen v. Finland*, application n° 37359/09, judgement of 16.07.2014.

judgements of EU Courts. Governance 'also deals with the interplay between governments, private sector and citizen participation as well as the many pitfalls and trade-offs by doing that' (Warner, 2006). To better grasp the reasoning of the Court, it is crucial to be familiar with not only the development of this Court system but also the different norms on which the Court bases its judgements. They will also briefly be outlined in this article.

The purpose of this article is to contribute to the debate on water governance on the pan-European level by discussing the role of the ECtHR. Maybe the ECtHR can contribute to making sure that the 'tapestry of competing authority claims' (Mehta *et al.*, 1999), which is the result of the complexity of relations between the different actors involved in governance, is not left unresolved, as feared by Teisman *et al.* (2013).

1.1. Historic development

Starting with the historic development, we can remind ourselves that in the aftermath of the Second World War, environmental problems – amongst them access to clean water and sanitation – were not yet considered a significant threat to human rights and were thus not included in the ECHR (Schmidt-Radefeldt, 2000). Another reason for this non-inclusion might be that the authors of the ECHR were of the opinion that the preservation of the environment was 'understood by itself'; environmental considerations were also not included in other post-war human rights documents such as the UN Human Rights Pacts of 1966. However, the mind-set of European people has changed since then, along with the rationale of the Court[3]. In some national jurisdictions, such as Germany, environmental considerations were subsequently added to an existing Constitution to coincide with the growing awareness of the danger that environmental pollution can pose for our fundamental rights. Despite these developments, on a pan-European level, an additional protocol to the ECHR, which could also have included a right to clean water and sanitation, was rejected by the Member States of the Council of Europe (Steiger, 1973; Parliamentary Assembly, 2009).

1.2. Water- and sanitation-relevant guarantees in the ECHR

Continuing with the water- and sanitation-relevant guarantees in the ECHR, it can be recalled that contrary to the European Social Charter (ESC) of the Council of Europe of 1961 (revised in 1996), which protects second-generation human rights, e.g. the right to health (Art. 11) and to adequate housing (Art. 31), the ECHR primarily protects first-generation human rights. Certain second-generation human rights have been added by the First Additional Protocol to the ECHR, namely the right to property (Art. 1 Protocol I)[4]. Discrimination with respect to access to water is within the ambit of the general

[3] For more general remarks on this development of the Court's reasoning, which led to the growing recognition of social and economic rights, see Matscher (2007) and Warbrick (2007).

[4] It states: 'Protection of property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

prohibition of discrimination under Protocol XII ECHR of 2000 (not yet ratified by all Member States). In the case of an accessory discrimination involving substantive ECHR rights, Art. 14[5] applies.

However, the fact that the human right to clean water and sanitation is not mentioned in the ECHR[6] did not prevent the judges of the ECtHR from taking a creative stance and integrating environmental considerations into their jurisprudence. Today, using interpretation techniques, namely the 'living instrument' doctrine and the 'practical and effective' doctrine, it can be said that the Convention guarantees pan-European minimum standards relating to the right to a clean environment (even though it must be underlined that a general degradation of the environment is not sufficient for the Convention to be applicable[7]), and more specifically the right to clean water and sanitation. Even though it is debatable whether the environment is a human rights good[8], a clean – or at least not entirely polluted – environment is a condition for the enjoyment of most rights enshrined in the Convention (Parliamentary Assembly, 2003; Bothe, 2007; Peters, 2008).

In the past, the ECtHR has addressed environmental issues as components of Art. 2[9] (right to life) and Art. 8[10] (right to respect of private and family life), as well as Art. 10[11] (right to freedom of expression and information) and Art. 1 of Protocol I (right to property)[12] and the procedural guarantees such as the

[5] It states: 'Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[6] It is explicitly mentioned in other human rights treaties, such as the Arab Charter on Human Rights of 2004, which mentions this right in its Art. 39; for developments outside of Europe, see Brunner *et al.* (2015).

[7] ECtHR, *Ivan Atanasov v. Bulgaria*, application n° 12853/03, judgement of 2.12.2010, §§ 66, 75–76; ECtHR, *Kyrtatos v. Greece*, application n° 41666/98, judgement of 22.05.2003, § 52; ECtHR, *Fadeyeva v. Russia*, application n° 55723/00, judgement of 9.06.2005; ECtHR, *Dubetska and others v. Ukraine*, application n° 30499/03, judgement of 10.02.2011 (final 10.05.2011).

[8] Ladwig (2007) asks this question regarding the human right to clean water.

[9] It states: 'Right to life: 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

[10] It states: 'Right to respect for private and family life: 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.'

[11] It states: 'Freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[12] On the protection of property and the ECHR in general, see Ress (2007), and Wildhaber & Wildhaber (2009); on the link of this norm to environmental issues, see Svaby (1998) and Tavernier (2005).

right to a fair trial and effective remedy (Art. 6.1[13] and Art. 13[14]) (Braig, 2013, 2015). In detention settings, Art. 3[15] (prohibition of torture, and inhuman or degrading treatment) plays a crucial role. The fact that the ECtHR brings the right to life and the right to a clean environment increasingly in conjunction indicates that Art. 2 could at least theoretically become the environmental fundamental right par excellence (Weber, 1991; de Fontbressin, 1998). Given that environmental protection (and thus the protection of water resources) in the context of Art. 8 of the Convention has certain limits due to broad statutory exemptions, it may be an obvious choice to rely on Art. 2 ECHR instead (Kley-Struller, 1995; Rest, 1997; Xenos, 2007), especially in view of the environmental jurisprudence to protect physical integrity in Germany[16].

How far environmental factors can become virulent under Art. 2 depends in particular on the interpretation of the asset 'life.' The key question is to what extent, under this Conventional guarantee, human life must be protected apart from homicide[17].

One might argue that residents who live in an area affected by industrial plants should have a right to information about the emitted pollutants by those installations and their respective emission levels (if they are measured)[18]. One might further think that when a sufficient risk of harm is suspected, there should be a valid claim for measurements to be performed accordingly. According to this argument, there needs to be a valid claim for continued drinking water analysis to be performed. Also, according to this reasoning, there should be a valid claim to know the results of such an analysis, because it would be tantamount to force someone to drink water containing pollutants, if such information were not granted.

Contrary to the ESC, in which 14 countries accept the jurisdiction of the European Committee of Social Rights (ECeSR) for a collective complaints procedure accessible only to trade unions and certain organisations, the ECHR permits individual applications to the ECtHR. Also, compliance is relatively

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[13] It states: 'Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (…)'

[14] It states: 'Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

[15] It states: 'Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[16] See e.g. BVerwGE 82, 61 – *Brennelement-Zwischenlager*; BVerfGE 77, 170 – *Lagerung chemischer Waffen*; BVerfGE 56, 54 – *Fluglärm I*; BVerfGE 53, 30 – *Mülheim-Kärlich*; BVerfGE 49, 89 – *Kalkar I*; *'Elektrosmog-Beschluss'*, BVerfG 28.02.2002, 1 BvR 1676/01.

[17] As the ECtHR provides for *a posteriori* and not *a priori* protection mechanism, in the field of risk prevention there remain structurally related gaps, which can hardly be filled in view of the state of today's jurisprudence, argues Schmidt-Radefeldt (2000); on the link between risk and the ECHR, see Hilson (2008–2009); on the positive obligations stemming from Art. 2 ECHR, see Tulkens (2004).

[18] This might apply to situations such as the Flint water crisis in the United States or the discussion about glyphosate in drinking water in Europe, which allegedly exceeds the permitted levels according to the EU Drinking Water Directive by far; also, see, referring to Art. 2 of the German Basic Law, Murswiek (2009); on the right to information and the ECHR, see Maljean-Dubois (1998).

high in Europe (Shany, 2014), as the 47 states concerned[19] accept that judgements are binding on them – execution of ECtHR judgements is monitored by the Committee of Ministers of the Council of Europe.

In the following sections, it will be demonstrated how the ECtHR links the previously mentioned rights to a State's positive obligation to ensure that people benefit from clean drinking water and sanitation. To do so, I will briefly outline the Court's most important rulings in the area of water supply contamination, lack of clean water and sanitation in detention, water as a public service, and discrimination issues in this context. Moreover, the protection of journalists who keep the public informed of deficiencies in a State's obligation to provide the population with clean drinking water will be treated.

2. Water supply contamination

Treaty bodies[20] have had to deal with a large number of cases concerning externalities caused by massive pollution in Asia[21], in Africa[22], and in the Americas[23]. In previous years, such cases are comparatively rare in Europe.

However, in some more recent cases, the Strasbourg Court has stated that water supply contamination can lead to a violation of the Convention. The first case in which the Court addressed this was *Zander v. Sweden* (ECtHR, *Zander v. Sweden*, application n° 14282/88, judgement of 25.11.1993), which concerned the impossibility for landowners to appeal a decision impacting their ability to use their well for drinking purposes.

2.1. Pilot judgement Zander v. Sweden

Mr and Mrs Zander owned a property next to a dump on which the company VAFAB started treating waste in July 1983. However, analyses showed already in 1979 that drinking water from a well located in the vicinity of the applicants' property had been contaminated by cyanide. As a result, the competent Health Care Board prohibited water use from the well and temporarily supplied the landowner with municipal drinking water. In 1984, the National Food Agency shifted the maximum permitted level

[19] This is a high number, compared to the only 5 States which accept that individuals may complain to the African Court on Human and Peoples' Rights under the African Charter on Human and Peoples' Rights (ACHPR) and 21 States accept the jurisdiction of the Inter-American Court of Human Rights (IACtHR).

[20] Domestic Courts have also been dealing with such cases, see e.g. British Columbia SCt, Canada, *Halalt First Nation v. British Columbia*, 13.07.2011; SCt Chile, case 5339–2013, 25.09.2013; SCt Costa Rica, *Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana*, 30.07.1993, case 3705–93; see González-Salzberg (2011).

[21] In several Asian countries, individuals successfully claimed constitutional protection against water pollution, see e.g. SCt Bangladesh, *Mohiuddin Farooque v. Government of Bangladesh*, 15.07.2001, Writ Petition 891/1994; SCt India, *Vellore Citizens Welfare Forum v. Union of India*, 28.08.1996, 1996 AIR, (SC) 2715 (1996), SCt Nepal, *Leaders v. Godawi Marble Industries*, 31.10.1995, SCt Pakistan, *West Pakistan Salt Miners Labor Union at Khwra Khelum v. Industries and Mineral Development at Punjab*, 12.07.1994, case 120/1993, 1994 SCMR, SCt Philippines, *Juan Antonio Oposa and others v. Department for Environment and Natural Resources*, 30.07.1993, case 101083.

[22] See e.g. ACnHPR, *Centre for Minority Rights Development v. Kenya*, 27.11.2009; ACnHPR, *SERAC and CESR v. Nigeria*, 27.10.2001 under ACHPR.

[23] See, e.g. IACnHR, *Yanomani Indian Community v. Brazil*, 5.03.1985; IACnHR, *M&C Dann v. USA*, 27.12.2002 under ADRDM; HRCe, *Lubicon Lake Band v. Canada*, 26.03.1990, under CCPR; IACtHR, *Kichwa Community of Sarayaku v. Ecuador*, 27.06.2012; see San Sebastian & Hurtig (2004); IACtHR, *Saramaka People v. Suriname*, 28.11.2007.

of cyanide in water from 0.01 mg to 0.1 mg per litre. Consequently, the affected landowners were no longer supplied with municipal drinking water. In 1986, VAFAB successfully applied to the Licensing Board for a permit renewal, which was however subject to certain conditions. The applicants unsuccessfully appealed this decision.

The applicants claimed compensation for non-pecuniary damages, because they had to collect drinking water from other locations, because they feared that their well was polluted. In addition, they argued that the value of their property had fallen and the denial of the judicial review had aggravated the distress they had suffered as a result of the fear of pollution.

The Court declared that 'the applicants could arguably maintain that they were entitled under Swedish Law to protection against the water in their well being polluted as a result of VAFAB's activities' (ECtHR, *Zander v. Sweden*, § 24). The Court also asserted that the right at stake was of a civil nature, because:

> '*the applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land on which it was situated. The right to property is clearly a 'civil right' within the meaning of Art. 6.1*' (ECtHR, *Zander v. Sweden*, § 27).

Consequently, the Court found that there had been a violation of Art. 6.1 of the Convention (ECtHR, *Zander v. Sweden*, § 28–29) and ordered the Swedish Government to pay 30,000 Swedish Kronor to each of the applicants as non-pecuniary damage (ECtHR, *Zander v. Sweden*, findings § 2).

The previous case, which is considered by some to have established the right to water in Europe (Smets, 2006), shows that environmental legal issues, including issues relating to clean water, increasingly prove to be civil rights within the meaning of the ECHR. However, the jurisprudence of the ECtHR relating to the cases in which environmental legal issues affect civil rights is still proving casuistic[24].

2.2. Subsequent successful water supply contamination cases

After this landmark judgement of *Zander v. Sweden*, the Court had the possibility to demonstrate in a number of cases that it accepts that the Convention's guarantees can apply to cases in which the right to clean water is called into question:

In the judgement of *Dzemyuk v. Ukraine* (ECtHR, *Dzemyuk v. Ukraine*, application n° 42488/02, judgement of 4.09.2014 [final 4.12.2014]), the applicant used water from wells for his household needs, because there was no centralised water supply in his village. In August 2000, the Village Council opened a cemetery some 40 metres from the applicant's house. The applicant instituted proceedings seeking closure of the cemetery. He alleged that the construction of the cemetery had led to the contamination of his drinking water supply. As a result, he was suffering from hypertension and various cardiovascular-related diseases. In this respect, he supplied supporting medical certificates.

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[24] Ennöckl & Painz (2004); referring to ECtHR (Grand Chamber), *Balmer-Schafroth and others v. Switzerland*; application n° 22110/93, judgement of 26.08.1997 and ECtHR (Grand Chamber), *Athanassoglou and others v. Switzerland*, application n° 27644/95, judgement of 6.04.2000, on the one hand and ECtHR, *Zander v. Sweden* on the other; see Council of Europe (2012) for an analysis of these cases; this manual contains most of the environmental judgements until 2012.

The Court explained that severe water pollution may negatively affect the quality of an individual's life, but it may be impossible to quantify its actual effects in each individual case[25]. The Court accepted that the applicant and his family might have been affected by water pollution. However, in the absence of direct evidence of actual damage to the applicant's health, the Court has to establish whether the potential risks to the environment result in a link (see ECtHR, *Hardy and Maile v. the United Kingdom*, application n° 31965/07, judgement of 14.02.2012, § 189) with the applicant's private life and home sufficient to trigger the application of Art. 8 ECHR (ECtHR, *Dzemyuk v. Ukraine*, § 82).

The Court noted that the high level of *E. coli* found in the water of the applicant's well, which far exceeded the permitted levels for water to be used for household needs, confirmed the existence of environmental risks to which the applicant was exposed. These factors attained a sufficient degree of seriousness to trigger the application of Art. 8 (ECtHR, *Dzemyuk v. Ukraine*, §§ 83–84).

According to the Court, the siting and use of the cemetery was illegal in a number of ways. First, environmental regulations were breached. Second, the conclusions of the environmental health authorities were disregarded. The unlawfulness of the placement of the cemetery and the non-compliance with health and water protection zones were signalled on numerous occasions by the authorities and were acknowledged in several decisions of the domestic courts. However, the dangers inherent in water pollution were not acted upon. Third, final and binding judicial decisions were never enforced. The competent domestic authorities failed to respect and to give full effect to the judgement holding that the Village Council was obliged to close the cemetery. As this direct interference with the applicant's right to respect for his home and private and family life had not been 'in accordance with the law,' there had been a violation of Art. 8 ECHR (ECtHR, *Dzemyuk v. Ukraine*, §§ 91–92).

The Court held that the complaint under Art. 6.1 regarding the failure of the domestic authorities and private individuals to comply with the final judgement prohibiting the use of the plot near his house for burial purposes is linked to the complaints previously examined. It must therefore also be declared admissible. However, the Court considered it unnecessary to examine the issue separately under Art. 6.1 (ECtHR, *Dzemyuk v. Ukraine*, §§ 93–95). The applicant's complaint under Art. 6.1 that the proceedings concerning his dispute with the Village Council had been unfair and excessively lengthy was declared inadmissible as manifestly ill-founded (ECtHR, *Dzemyuk v. Ukraine*, §§ 96–98). The Court awarded the applicant 6,000 Euro in respect of non-pecuniary damage (ECtHR, *Dzemyuk v. Ukraine*, § 102).

The similar case of *Dubetska and others v. Ukraine* concerned the failure to protect individuals from pollution resulting from coal mining activities in the vicinity of the applicants' homes, which, according to various studies, impacted the drinking water quality. Noting the contamination of the well water with mercury and cadmium, a report concluded in 2005 that people living in the surrounding area were exposed to a higher risk of cancer and respiratory and kidney diseases. In Strasbourg, the applicants successfully alleged a violation of Art. 8 ECHR (ECtHR, *Dubetska and others v. Ukraine*, findings § 3). The Court found that the State had failed to effectively remedy the situation for more than 12 years, e.g. by successfully penalising the persons responsible or by resettling the applicants (ECtHR, *Dubetska and others v. Ukraine*, § 146–149) and ordered the State to pay between 32,000 and

[25] ECtHR, *Dzemyuk v. Ukraine*, § 79; see, *mutatis mutandis*, ECtHR, *Ledyayeva and others v. Russia*, application n° 53157/99, 53247/99, 53695/00 and 56850/00, § 90, judgement of 26.10.2006; commented on by Dute (2007).

33,000 Euro to the applicants in respect of non-pecuniary damage (ECtHR, *Dubetska and others v. Ukraine*, § 163, findings § 4).

The case of *Băcilă v. Romania* (ECtHR, *Băcilă v. Romania*, application n° 19234/04, judgement of 30.03.2010) dealt with an applicant who lived near a plant operated by the company Sometra, which was at the time the biggest employer in Copşa Mică. Several analyses established that amounts of heavy metals up to 20 times the maximum permitted levels could be found in the town's waterways. The rate of illness was seven times higher in Copşa Mică than in the rest of the country. In 2005, analyses indicated that the concentration of lead in the applicants' blood exceeded the permissible limit. In 2009, the shareholders of the company's parent group decided to shut down the plant temporarily. The damage to health caused by the plant's emissions had been established by numerous reports (ECtHR, *Băcilă v. Romania*, § 63).

Even though the municipal authorities had not been directly responsible for the emissions, no evidence had been produced of the implementation of the measures that were attached to the environmental permits for the operation. Furthermore, between 2003 and 2006, the plant had been operating without an environmental permit, even though the authorities were aware of the pollution caused (ECtHR, *Băcilă v. Romania*, §§ 67–68).

The Court observed that the authorities had been reluctant to take measures against the company before 2007 (ECtHR, *Băcilă v. Romania*, § 69). In view of the serious and proven consequences of the pollution, the State had a duty, despite the margin of appreciation afforded to States in such matters (on this doctrine see Brems (1996)), to take measures to protect the applicants' well-being (ECtHR, *Băcilă v. Romania*, § 71). Therefore, in violation of Art. 8, the authorities had failed to strike a fair balance between the interest in ensuring the town's economic stability and the applicant's effective enjoyment of the right to respect for her home and for her private and family life (ECtHR, *Băcilă v. Romania*, § 72–73).

2.3. Precautionary principle anchored in water supply contamination case

Perhaps the most striking case regarding water contamination is *Tătar v. Romania*[26] concerning an accident during which, according to a United Nations Study, about 100,000 m^3 of cyanide-contaminated water was released.

The applicants, a father and son, alleged that the technology used by a company for their gold mining activity had put their lives in danger. Part of the company's activity was located in the vicinity of the applicants' home. After the accident in 2000, the applicants complained of inaction on the part of the authorities regarding the numerous complaints lodged by the father about the threat to their lives, to the environment, and to his asthmatic son's health.

The Court held that there had been a violation of Art. 8 of the Convention (ECtHR, *Tătar v. Romania*, § 137), finding that the Romanian authorities had failed in their duty to assess the risks that the activity of the company operating the mine might entail, and to take suitable measures to protect the rights of those concerned to respect for their private lives and homes, and more generally their right to enjoy a healthy and protected environment (ECtHR, *Tătar v. Romania*, § 101). The Court recalled in particular that pollution could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorising, setting

[26] ECtHR, *Tătar v. Romania*, application n° 67021/01, judgement of 27.01.2009; for an analysis of this very far-reaching and thus contested judgement, see Pomade (2010), Shelton (2010) and Vial (2009).

up, operating, providing safety for, and monitoring industrial activities, especially activities that were dangerous for the environment and human health. It further noted that the applicants had failed to prove the existence of a causal link between exposure to the used sodium cyanide and asthma (ECtHR, *Tătar v. Romania*, § 196).

It interestingly observed, however, that the company had been able to continue its industrial operations after the accident, in breach of the precautionary principle (ECtHR, *Tătar v. Romania*, § 109), which was mentioned here by the Court for the very first time. The Court also made clear that authorities had to ensure public access to the conclusions of investigations and studies, reiterating that the State had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues (ECtHR, *Tătar v. Romania*, § 113). Regarding the obligation to conduct an environmental impact assessment, the Court explicitly pointed out that important questions posed by participants of a public consultation, e.g. regarding water quality, must be answered (ECtHR, *Tătar v. Romania*, § 114).

2.4. Unsuccessful water contamination cases

The Court came to a different conclusion in the case of *Ivan Atanasov v. Bulgaria*, which dealt with an applicant who lived close to a tailings pond from a former copper ore mine. Authorities accepted a reclamation scheme that would use sludge from a wastewater treatment plant, even though this scheme had received negative environmental evaluations. Sewage sludge was transported to the pond, at times without any permission at all or despite insufficient environmental impact assessments. Chemical testing of the sludge recorded illegal levels of toxic substances, and water tests revealed the presence of heavy metals above permissible levels.

Contrary to what one might have expected after the far-reaching judgement in the case of *Tătar v. Romania*, the Court reasoned that the pollution in question did not reach a level significant enough to trigger Art. 8. This was contrary to what the applicant, who feared that the dangerous substances would end up in the food chain via the groundwater, claimed. According to the Court, there was no evidence that the applicant's land was significantly affected. While there were heavy metals in the water, the applicant failed to prove that this caused a sufficiently adverse health reaction (ECtHR, *Ivan Atanasov v. Bulgaria*, § 66; §§ 75–76).

Disregarding the precautionary principle that was considered crucial by the Court in the *Tătar* case, it therefore ruled that there was no violation of Art. 8 and Art. 1 of Protocol I (ECtHR, *Ivan Atanasov v. Bulgaria*, § 80). Neither Art. 6.1 nor Art. 13 of the Convention (ECtHR, *Ivan Atanasov v. Bulgaria*, § 92, § 97; §§ 101–102) were applicable due to the merely hypothetical consequences that the applicant feared for himself and the environment (ECtHR, *Ivan Atanasov v. Bulgaria*, §§ 92–96).

Similarly, the application of *Ioan Marchis and others v. Romania* (ECtHR, *Ioan Marchiş and others v. Romania*, application n° 38197/03, decision of 28.06.2011) was rejected as manifestly ill-founded (ECtHR, *Marchiş and others v. Romania*, §§ 39–49). In this case, residents complained about a privately built tailing pond a few hundred metres from their homes. According to the Court, the justification of the national courts was plausible and did not seem arbitrary (ECtHR, *Marchiş and others v. Romania*, § 36). The applicants had submitted no evidence to prove the environmental depletion (ECtHR, *Marchiş and others v. Romania*, § 38; § 45).

The Court equally rejected applications in which the applicants sought compensation for the consequences suffered as a result of the accident in a Russian nuclear reactor in the city of Majakim in

September 1957. During this accident, water contaminated with radioactive matter flowed into a river from which the nearby towns obtained their drinking water. Subsequently, applicants complained about intrauterine growth retardation and permanent brain damage (*Akhmadeyevy v. Russia*, application n° 34888/06; *Dzherykina v. Russia*, application n° 44545/08).

2.5. Art. 8 ECHR as the principle guarantee for the protection of the environment

As these previously outlined cases show, Art. 8 ECHR – and not Art. 2 as one might have expected[27] – is today the principal guarantee used by the ECtHR for the protection of the environment (Cook, 2002). The analysed cases show that even though the Court has so far not recognised a freestanding right to a clean and healthy environment[28], Art. 8 can cover various types of pollution, among them water pollution. The careful analysis of the Art. 8 cases that are linked to environmental pollution gives us an idea what criteria the Court uses to decide whether an environmental depletion is contrary to the Convention. First, in the assessment of a violation of Art. 8, the Court requires that the applicant be 'directly and seriously affected'[29]. This seems to be more likely if the applicant lives close to the pollution. However, it is not necessary that the applicant's health be seriously endangered to trigger a violation of Art. 8[30]. Second, to reach the threshold of seriousness that can then lead to a violation of the Convention, the consequences must be intense and repeated[31]. Third, it is normally necessary for the applicants to establish a causal link between the environmental depletion and the respect for private and family life (Thienel, 2007). Fourth, the probability of risks must be demonstrated, otherwise the status of the victim will be found lacking (see ECtHR, *Asselbourg and others v. Luxemburg*, application n° 29121/95, decision of 29.06.1999). In an effort to consequently apply these criteria to different case scenarios, one can quickly see that several challenges arise. In 2010, Judge Zupančič described some of them in a provocative way. They will be outlined in the following paragraph.

2.6. A growing necessity for a reversal of the burden of proof?

According to Judge Zupančič in his separate opinion in the judgement of *Băcilă v. Romania* from 2010 (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 4), the hypothesis that

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[27] However, this might also be due to the fact that the ECtHR has not yet been confronted with cases of death caused by polluted water.

[28] ECtHR, *Kyrtatos v. Greece*, § 52; for an analysis of this judgement, see Harrison (2006): 512; ECtHR, *Moreno Gómez v. Spain*, application n° 4143/02, judgement of 16.11.2004; ECtHR, *Borysiewicz v. Poland*, application n° 71146/01, judgement of 1.07.2008, § 48; ECtHR, *Giacomelli v. Italy*, application n° 59909/00, judgement of 2.11.2006, § 76; ECtHR (Grand Chamber), *Hatton and others v. the United Kingdom*, § 96; for an analysis of this judgement, see Hart & Wheeler (2004), Heselhaus & Marauhn (2005), Hyam (2003) and Post (2004).

[29] See Breitenmoser (2005), DeMerieux (2001), Fitzmaurice (2011), Loucaides (2004), Pedersen (2010), Praduroux (2008), Turgut (2007), Wildhaber (2001), Winisdoerffer (2003) and Winisdoerffer & Dunn (2007).

[30] ECtHR, *López Ostra v. Spain*, application n° 16798/90, judgement of 9.12.1994, § 51; this has notably been confirmed in ECtHR, *Taşkin and others v. Turkey*, application n° 46117/99, judgement of 10.11.2004; for an analysis of this judgement, see Harrison (2006).

[31] See several judgements on environmental infringements e.g. ECtHR, *Vearncombe and others v. United Kingdom and France*, application n° 12816/87, judgement of 18.11.1989; ECtHR, *Fägerskiöld v. Sweden*, application n° 37664/04, judgement of 26.02.2008.

industrial activities were *prima facie* not harmful to the environment should be reversed to be in line with the precautionary principle[32]. Hence, according to Zupančič, it is only logical that, in the future, a company that is planning a potential polluting activity should have to prove its innoxiousness for the environment (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 5). According to him, it is 'absurd' to insist on proof of a causal link. Because of the often present 'causal chains' (e.g. the food chain), commonly only a very general deterioration of health can be observed, thereby making it difficult for an individual to provide evidence of a causal link (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 6). Zupančič therefore argues that it is undisputed that xenoestrogens, which have a negative impact on population growth, are increasingly present in our environment. Although many people are affected by xenoestrogens, it is impossible for anyone to prove that his or her infertility is a 'direct consequence' of phthalates (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 6). Zupančič claims that it was therefore 'paradoxical' that the 'archaic' causal theory prevented a case from being brought to the ECtHR, and the applicants could not benefit from legal protection against the worst human rights infringements (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 7). The causal theory can thus be a conceptual barrier (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 8). Zupančič therefore pleads for a reversal of the burden of proof (ECtHR, *Băcilă v. Romania* – separate opinion of judge Zupančič, § 9). Whereas the criticism voiced by Zupančič will certainly lead to a number of controversies in the future, the Court has benefited from previous cases to at least already clarify that the States have some minimum standards to respect regarding the protection of the environment. These standards will be outlined in the following paragraphs.

2.7. Detailed material and procedural obligations under Art. 8 ECHR

Even though we are not at this stage yet, it might seem surprising how far the Court went in the case of *Tătar v. Romania*, bearing again in mind that Art. 8 does not specify any right to clean water or sanitation. This case is an example of the application of the still controversially discussed (Mahoney, 1990; Xenos, 2011) doctrine of positive obligations (Besson, 2003; Dröge, 2003; Gouritin, 2009; Colombine, 2010). Regarding environmental issues, the Court has defined various *procedural* and *substantial* obligations under Art. 8.

Regarding the *procedural* obligations, we can distil the following from the jurisprudence. First, the State must adopt measures, e.g. legislation in order to stop or at least limit infringements to the environment that would otherwise endanger the right to a home and the right to life (ECtHR, *Deés v. Hungary*, application n° 2345/06, judgement of 9.11.2010, § 21). Public authorities must make sure that adopted measures are successfully implemented[33]. If necessary to effectively regulate dangerous activities, whether public or not, these measures must be preventive[34]. Second, the State has an obligation to

[32] On the link between the ECHR and the precautionary principle, see also de Fontbressin (2005); further see Diggelmann (2007).

[33] ECtHR, *Moreno Gómez v. Spain*, § 61; for an analysis of this judgement, see Tietzmann e Salvia (2006).

[34] ECtHR, *Tătar v. Romania*, § 87; ECtHR, *Fadeyeva v. Russia*, §§ 69, 88–89; for an analysis of this judgement on steel works, see Grekos (2005), Harrison (2006) and Leach (2005).

inform the public about potential environmental risks that could potentially affect the right to private life; the State must also provide access to information on these risks[35]. The State not only has to respect the right to receive information, but also must make sure that information can be disseminated[36]. Third, in certain cases, there is a duty of the State to carry out an environmental impact assessment. States are under a duty to take into account the interests of any individuals who may be affected. It is important that the public is able to make representations to the public authorities[37].

Regarding the substantive obligations, what is being expected by the States to comply with the Convention is less clear-cut. In the *López Ostra v. Spain* case[38], the Court held that the State has 'to take reasonable and appropriate measures to secure the applicant's rights' in relation to Art. 8 (ECtHR, *López Ostra v. Spain*, § 52). *In casu* a sewage and waste disposal facility had been built only 12 metres away from the applicant's house. Even though it caused pollution, which had caused some health hazards for the applicants, the cleaning of wastewater polluted with chromium was not prohibited. The government's inaction thus led to a violation of Art. 8 ECHR (ECtHR, *López Ostra v. Spain*, § 58).

Teisman *et al.* (2013) argued that water governance:

> '*concerns also other actors in the playing field, such as NGOs, private (water) companies, and (organised) citizens. The transition in modern water management from technocratic towards more adaptive and democratic approaches is widely acknowledged (Sabatier* et al.*, 2005; van Buuren* et al.*, 2012). There are all kinds of initiatives in the water domains, illustrating this development: citizen participation, public-private partnerships, civic environmentalism, and community-based initiatives*' (Brunner & Steelman, 2005).

As the obligations outlined in this section show, this tendency is clearly fostered by the recent jurisprudence of the ECtHR.

2.8. Limits to the protection against environmental depletion

Having seen that the Court has, in a relatively small number of cases, already established a good number of relatively clear procedural obligations and even some substantive obligations to the

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[35] ECtHR (Grand Chamber), *Öneryildiz v. Turkey*, application n° 48939/99, judgement of 30.11.2004; judgement commented on by Deffains (2005) and Laurent (2003); similarly ECeSR, *International Federation for Human Rights v. Greece*, 23.01.2013 (lacking information about drinking water pollution violated the human rights to water and sanitation under the aspect of the right to health: pollution of a river with heavy metal from tanneries finally compromised drinking water quality in one region, but the government failed to take precautionary measures and only belatedly informed the population that municipal water was unfit for consumption).

[36] ECtHR, *Guerra and others v. Italy*, application n° 14967/89, 19.02.1998 Seveso dioxin disaster; for an analysis of this pilot judgement, see Schmidt-Radefeldt (1999) and Tavernier (1999); ECtHR, *Budayeva and others v. Russia*, application n° 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgement of 22.03.2008.

[37] ECtHR, *Taşkin and others v. Turkey*, § 119; this has been confirmed in ECtHR, *Brânduşe v. Romania*, application n° 6586/03, judgement of 7.04.2009, § 63; ECtHR, *Tătar v. Romania*, §§ 113, 116–117, 119; ECtHR, *Giacomelli v. Italy*: illegal and hazardous waste plant, with the potential for toxic ground water contamination.

[38] For an analysis of this pilot judgement, see e.g. Anton & Shelton (2011), Desgagné (1995), Francioni (2010), García San José (2004), Jarvis & Sherlock (1999) and Mowbray (2004).

Member States regarding environmental protection, it must not be forgotten that the Court has also clearly stated that there are nevertheless certain limits to this protection of rights under the Convention[39].

First, an 'interference by a public authority' might be justifiable if 'the competing interests of the individual and of the community as a whole' have been taken into consideration (ECtHR, *Lopez Ostra v. Spain*, § 51).

Second, the likelihood of the risk to health determines to which extent the State needs to act *proprio motu*.

Third, the more that is expected from the State, the bigger is the capacity of the State to anticipate infringements of conventional rights through the establishment of a proper legislative and administrative framework (see, regarding Art. 2: ECtHR, *Budayeva and others v. Russia*) and the bigger is the level of seriousness of dangerous activities (ECtHR [Grand Chamber], *Öneryildiz v. Turkey*, § 73).

Fourth, it has been acknowledged that the shift from government to governance (Kooiman, 1993; Sørensen & Torfing, 2007) is an indicator for the fact that today's governments seem increasingly less able to develop and implement, in an effective way, public policy on their own. States can no longer rely on the availability of all necessary resources (e.g. money or expertise) to govern (Kooiman, 1993; Rhodes, 2000). This is particularly true in the field of environmental protection, where the financial and technical resources to guarantee an ideal protection of the citizens from environmental depletion are nearly unlimited. Therefore, the technical and financial constraints also significantly limit what the ECtHR can reasonably expect the Member States to do in this field. How much investment can be reasonably expected from the Member States remains to be seen.

Finally, the Court regularly highlights its subsidiary role (ECtHR [Grand Chamber], *Hatton and others v. United Kingdom*, application n° 360022/97, judgement of 8.07.2003; Breitenmoser (2007)).

After having seen *that*, and under *what* circumstances, the ECtHR is an increasingly important stakeholder when it comes to the setting of rules regarding water supply contamination in Europe, in the next section, the role of this Court regarding the supply of water and adequate sanitation in detention settings will be analysed.

3. Deprivation of water and adequate sanitation in detention

It can be helpful to keep in mind that already on the global level, a substantial number of cases concern detention situations in which individuals completely dependent on the State have been denied access to water[40] or sanitation[41]. The baseline of these cases reveals that the treaty bodies find degrading treatment in such conditions[42].

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[39] These limits are outlined by Kiousopoulou (2011), Hectors (2008), Herdegen (2008), Lenz (2001), Müller (2009), Sudre (2003) and Tomuschat (2007).

[40] See, e.g. IACtHR, *Vélez Loor v. Panama*, 23.11.2010; UNO Committee against Torture, *Imed Abdelli v. Tunisia*, 14.11.2003; HRCe, *Peter Mwamba v. Zambia*, 10.03.2010; HRCe, *Michael and Brian Hill v. Spain*, 2.04.1997.

[41] See, e.g. ACnHPR, *Institute for Human Rights and Development in Africa v. Angola*, 22.05.2008; IACnHR, *Paul Lallion v. Grenada*, 21.10.2002.

[42] With some exceptions, e.g. HRCe, *Kalenga v. Zambia*, 27.07.1993: lacking access of detainees to water or sanitation facilities alone does not amount to inhumane treatment.

3.1. Frequent violations of Art. 3 in detention settings

Similarly, on the European level, the ECtHR has found that insufficient access to clean water and sanitation in detention constitutes a violation of Art. 3 ECHR[43] and can subsequently lead to a State's obligation to pay non-pecuniary damages[44].

Exemplary of the Court's reasoning in such cases is the case of *Tadevosyan v. Armenia*[45], which concerned the restriction of a detainee's access to the toilet and drinking water to only two times per day. The Court referred to the 2004 Report on Armenia of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (Council of Europe, 2004) and declared, before finding a violation of Art. 3 (ECtHR, *Tadevosyan v. Armenia*, § 53–57): 'Persons in custody should be able to satisfy the needs of nature when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should have ready access to drinking water.'

3.2. Reversal of the burden of proof in detention settings

The cases *Marian Stoicescu v. Romania* (ECtHR, *Marian Stoicescu v. Romania*, application n° 12934/02, judgement of 16.07.2009), and *Fedotov v. Russia* show that the ECtHR accepts, under certain circumstances, a reversal of the burden of proof in detention settings. In the first case, the Court found a violation of Art. 3 (ECtHR, *Marian Stoicescu v. Romania*, §§ 25, 28) and declared, without being able to rely on proofs of the applicant, that the water provided was unfit for human consumption and that no water analysis had been undertaken at the time of the facts (ECtHR, *Marian Stoicescu v. Romania*, §§ 9, 24, 26). In the second case, which concerned a State's failure to provide access to water and sanitation to a detainee for over 32 hours (see also ECtHR, *Kadiķis v. Latvia*, application n° 62393/00, judgement of 4.05.2006; ECtHR, *Shchebet v. Russia*, application n° 16074/07, judgement of 12.06.2008), the Court stated that, in certain circumstances, the respondent Government alone has access to information capable of corroborating or refuting factual allegations (see also ECtHR, *Kadiķis v. Latvia*, application n° 62393/00, judgement of 4.05.2006; ECtHR, *Shchebet v. Russia*, application n° 16074/07, judgement of 12.06.2008). Because *in casu* there were no records of the applicant's detention, the Court declared

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[43] ECtHR, *Tadevosyan v. Armenia*, application n° 41698/04, judgement of 2.12.2008, ECtHR §§ 58–59; ECtHR, *Fedotov v. Russia*, application n° 5140/02, judgement of 25.10.2005, findings § 2; for further analysis of these judgements, see Deloge (2012).

[44] EUR 5,000 in ECtHR, *Eugen Gabriel Radu v. Romania*, application n° 3036/04, judgement of 13.10.2009, findings § 3; EUR 7,400 in ECtHR, *Fedotov v. Russia*, findings § 7; EUR 10,000 in ECtHR, *Melnik v. Ukraine*, application n° 72286/2001, judgement of 28.03.2006, findings § 4; EUR 15,000 for both applicants in ECtHR, *Riad and Idiab v. Belgium*, application n° 29787/03 and 29810/03, judgement of 24.01.2008, findings § 5; EUR 4,500 in ECtHR, *Tadevosyan v. Armenia*, findings § 6.

[45] For similar cases, see e.g. ECtHR, *Eugen Gabriel Radu v. Romania* (detention without adequate sanitation); ECtHR, *Ushakov v. Russia*, application n° 10641/09, judgement of 25.10.2011 (detention with inacceptable sanitation situation, because toilets were located close to dining tables); ECtHR, *Melnik v. Ukraine* (detainee with poor health), in which the Court stated that: '(…) the fact that the applicant had only once-weekly access to a shower and that his linen and clothes could be washed only once a week raises concerns as to the conditions of hygiene and sanitation. Such conditions would have had an aggravating effect on his poor health.' (§§ 107–109); ECtHR, *Riad and Idiab v. Belgium* (detention of asylum seekers for over 10 days in the transit zone of an airport without providing them with food, drink, and facilities to take a shower or wash their clothes); ECtHR, *MSS v. Belgium and Greece*, application n° 30696/09, judgement of 21.01.2011.

that '[h]e cannot therefore be criticised for not furnishing substantial evidence of the material conditions of his detention.' (ECtHR, *Fedotov v. Russia*, § 61).

3.3. High intervention threshold for Art. 3

Regardless of these developments that can be deemed positive for applicants in detention settings, it should not be forgotten that the ECtHR still appears to use a high intervention threshold for Art. 3 ECHR to prevent violations of this norm resulting from merely trivial environmental nuisances (Duffy, 1983; Déjeant-Pons, 1995; Zeichen, 2004). This tendency might be questionable regarding some case constellations, e.g. in which the primary care with tap water can no longer be guaranteed by the government[46].

Having discussed the relevance of Art. 3 in the water- and sanitation-related case law of the Court, which is a case law that is already fairly well developed and detailed, I will now turn to a less well-developed case-law, namely the water- and sanitation-related jurisprudence on discrimination.

4. Water as a public service and discrimination

A major aspect of water- and sanitation-related international case law concerns discrimination against members of a vulnerable population. On a global level, governments have been held responsible for protecting vulnerable groups' access to water and sanitation in various cases[47]. In Europe, water- and sanitation-related discrimination issues are rarely addressed by the ECtHR[48].

4.1. Inconclusive and scarce case-law on water-related discrimination

Before the ECtHR, Art. 14 on the prohibition of discrimination was only invoked marginally in the water-related case of *Butan and Dragomir v. Romania* (ECtHR, *Butan and Dragomir v. Romania*, application n° 40067/2006, judgement of 14.02.2008). In this case, the Court assessed the failure of national authorities to ensure the enforcement of a judicial ruling ordering a private water company[49], under a public concession, to connect an apartment to the water supply system. This amounted to a violation of the right to effective access to a tribunal (ECtHR, *Butan and Dragomir v. Romania*, §§ 40–41), in violation of Art. 6.1[50]. Regarding the alleged violation of Articles 3, 8, 13, and 14 of the Convention,

[46] This is broadly discussed by Schmidt-Radefeldt (2000); see also European Commission of Human Rights, *Van Volsem v. Belgium*, application n° 14641/89, decision of 9.5.1990 (inadmissible).

[47] Protection was also afforded by domestic courts in different countries, e.g. SCt Argentina, *Defensor del Pueblo de la Nacion c. Estado Nacional*, 18.09.2007; Mexico SCt Justice, *amparo en revisión 631/2012*, 08.05.2013; District Court, Columbus, OH, USA, Kennedy v. City of Zanesville, 10.07.2008.

[48] These issues have been addressed by other bodies; see, e.g. ECeSR, *European Roma Rights Centre v. Italy*, 7.12.2005; UNO Committee on the Elimination of Racial Discrimination, *LR v. Slovak Republic*, 10.03.2005.

[49] On private stakeholders and the ECHR, see Cherednychenko (2006), de Fontbressin (2008) and van der Plancke & van Leuven (2008).

[50] ECtHR, *Butan and Dragomir v. Romania*, § 42; EUR 10,000 in respect of non-pecuniary damage (ECtHR, *Butan and Dragomir v. Romania*, findings § 4).

and Art. 1 of Protocol I to the ECHR, the Court declared that it was not necessary to rule on these separately (ECtHR, *Butan and Dragomir v. Romania*, § 45).

4.2. Water-related discrimination as an upcoming challenge for the ECtHR

Even though this very specific case is not sufficient to provide us with a good understanding of how the ECtHR will handle water-related discrimination in the future, in light of its previous case-law on discrimination[51], the Court might investigate more closely the minority rights at stake in future cases (Breitenmoser, 2008), it is likely that the Court might come to similar conclusions as the Human Rights Committee (HRCe)[52] or treaty bodies in other parts of the world[53].

The right to water and sanitation under the ECHR may turn against minorities when it is invoked to solve water-related problems of a society as a whole at the expense of more vulnerable communities[54]. However, there seems to be a tendency by the ECtHR to decide that, although, for example, eviction orders might be considered lawful and pursue a legitimate goal[55], they might not be proportional. Instead, authorities should assist the people affected to find alternative accommodation (with better sanitary standards)[56]. It is likely that the recent landmark judgement in the case *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*[57] – which enables NGOs to lodge a case on behalf of extremely vulnerable societal groups who cannot represent themselves – will allow more water-related discrimination cases to come before the ECtHR in future. Besides NGOs, we will see in the next section that the media play an important role as a watchdog on the right to clean water and sanitation.

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[51] See e.g. ECtHR, *Yordanova and others v. Bulgaria*, application n° 25446/06, judgement of 24.04.2012 (final 24.09.2012) (enforcing eviction orders against Roma families from hitherto tolerated irregular settlements violates Art. 8 ECHR) and several cases concerning the conflict of interest between vulnerable minorities and the protection of the environment: ECtHR, *Buckley v. United Kingdom*, application n° 20348/92, judgement of 25.09.1996; ECtHR (Grand Chamber), *Coster v. United Kingdom*, application n° 24876/94, judgement of 18.01.2001; ECtHR (Grand Chamber), *Chapman v. United Kingdom*, application n° 27238/95, judgement of 18.01.2001; ECtHR (Grand Chamber), *Beard v. United Kingdom*, application n° 24882/94, judgement of 18.1.2001; ECtHR (Grand Chamber), *Lee v. United Kingdom*, application n° 25289/94, judgement of 18.01.2001; ECtHR (Grand Chamber), *Smith v. United Kingdom*, application n° 25154/94, judgement of 18.01.2001; as these judgements were assessed critically not only by a number of judges in dissenting opinions, but also in the literature; see Johnson *et al*., (2008), Mowbray (2004), de Schutter (1997) and García San José (2005).

[52] HRCe, *Naidenova v. Bulgaria*, 27.11.2012; HRCe, *S.I.D. and others v. Bulgaria*, 21.07.2014; HRCe, *Georgopoulou v. Greece*, 29.07.2010.

[53] See, e.g. Constitutional Court of South Africa, *Joe Slovo Community v. Thubelisha Homes*, 10.06.2009 (following the planned eviction of 20,000 slum dwellers, the government was responsible to provide adequate alternative accommodation. Thereby, under the right to an adequate standard of living homes 'must be equipped with basic services, including […] fresh water and reasonable provision for toilet facilities'); High Court, Embu, Kenya, *Ibrahim Sangor Osman v. Minister for Provincial Administration*, 16.11.2011 (under the human right to water and sanitation, following the demolition of an informal settlement the government had to provide reasonable accommodation).

[54] See, e.g. regarding indigenous communities and water problems of a large town, HRCe, *Poma Poma v. Peru*, 24.04.2009.

[55] This might be the case if the aim is to remedy an untenable sanitation situation (no water in homes, open defecation).

[56] ECtHR, *Winterstein and others v. France*, application n° 27013/07, judgement of 17.10.2013 (private life violation was found, if eviction orders against Roma families from hitherto tolerated irregular settlements were enforced).

[57] ECtHR (Grand Chamber), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romaniq* application n° 47848/08, judgement of 17.07.2014; for the role of NGOs and the ECtHR, see Gattini (2007), Gossement (2008) and Schall (2008); ECtHR, *L'Erablière A.S.B.L. v. Belgium*, application n° 49230/07, judgement of 24.02.2009: environmental organisations may explicitly participate in decision making.

5. Public discourse and water

The lack of clean water is often not only an individual problem, but also a structural problem that concerns, for example, entire parts of a city. More than in the case law of other human rights bodies, the ECtHR has had the ability to recognise that journalists can play a major role in ensuring that the right to clean water is respected and upheld. This has been acknowledged by the Court, which has underlined the importance of public discourse in environmental cases in general[58], and more specifically in water-related contexts, e.g. in the case of *Kaperzyński v. Poland* (ECtHR, *Kaperzyński v. Poland*, application n° 43206/07, judgement of 3.04.2012) which concerned a journalist's criminal conviction after having publicly criticised the way the authorities dealt with deficiencies in the local sewage system. He alleged in particular that the quality of the drinking water was insufficient. The applicant was sentenced to 20 hours' community service per month for a period of 4 months, suspended, and deprived of the right to work as a journalist for 2 years.

The Court found that depriving a journalist of the right to exercise his or profession was a very harsh sentence, which potentially had a significant dissuasive effect on an open and unhindered public debate on matters of public interest (ECtHR, *Kaperzyński v. Poland*, §§ 68–71).

Although *in casu* the interference was foreseen by the law and had followed a legitimate aim, it was not necessary in a democratic society (ECtHR, *Kaperzyński v. Poland*, §§ 59–76). There had accordingly been a violation of Art. 10[59].

In the similar case of *Tănăsoaica v. Romania* (ECtHR, *Tănăsoaica v. Romania*, application n° 3490/03, judgement of 19.06.2012), the Court also concluded that the interference, *in casu* a conviction following the criminal complaint filed by the company's director for insult and defamation, was not necessary in a democratic society and thus constituted a violation of Art. 10 ECHR[60]. The applicant, a journalist, published an article headlined 'S.C.A. is poisoning us with ammonium' in which he claimed that 11 commercial companies were sources of water pollution, including the company S.C.A, with a rate of ammonium pollution that was 8 times over the acceptable threshold.

6. Conclusion and outlook

Bressers & Kuks (2013) found that, amongst others, the following factors can favour regime change towards more integration: a tradition of public debate on water issues and citizen participation; a strong position of 'green' NGOs; and free and alert mass media to induce awareness of challenges to the system. In this article, I argued that the ECtHR can play a central role in fostering the development of these power configuration factors on a pan-European level. Namely, the above outlined judgements show that Art. 8 (and Art. 3 for applicants in detention) has played a considerable role in establishing a right to clean water and sanitation under the ECHR. In addition to that, Art. 2 might increasingly come into play in more severe cases of water pollution that lead to the death of consumers

[58] This has been discussed in the context of a judgement by the Court in which it held that the criminal defamation conviction of a mayor for criticising the head of a nuclear pollution watchdog agency violated his right to freedom of expression: ECtHR, *Mamère v. France*, application n° 12697/03, judgement of 07.11.2006; further see ECtHR, *Vides Aizsardzības Klubs v. Latvia*, application n° 57829/00, judgement of 27.05.2004.

[59] 3,000 Euro in respect of non-pecuniary damage; ECtHR, *Kaperzyński v. Poland*, § 77–81.

[60] 7,500 Euro in respect of non-pecuniary damage; ECtHR, *Tănăsoaica v. Romania*, § 57–61.

Besides Art. 2, 3, and 8, for which the relevance of these guarantees to environmental cases has just been outlined, it is likely that Art. 1 of Protocol I of the ECtHR will play a role in upcoming water-related cases. In the past, the Court has already had the chance to clarify in a more general way that States need to find a fair balance between property rights and environmental protection[61]. It remains to be seen how this will be applied to water-related cases (e.g. expropriations to protect the water source of a water license holder from pollution).

We have seen that these Convention guarantees can help applicants within a pan-European context to benefit from clean water and sanitation and can therefore not be disregarded in the governance discussion on water- and sanitation-related issues. In addition, also in the global debate on water governance, the ECtHR might play an increasingly important role. This is due to a landmark ruling of 1989. In this ruling *Soering v. United Kingdom*[62], the Court decided that an extradition to a country where the applicant risks facing severe infringements of his conventional rights (in the present case death row), is contrary to the Convention. In light of this jurisprudence, it remains to be seen what strategy the Court is going to develop to deal with a possibly growing number of applications from refugees, who in the future are likely to flee from countries where clean water resources and sanitation are not sufficiently available.

In this context, it can be mentioned that international instruments for the protection of the environment, such as the Aarhus Convention or the Rio Declaration, are already taken into account by the ECtHR case law (ECtHR, *Demir and Baykara v. Turkey*, application n° 34503/97, judgement of 12.11.2008, § 82). It will be interesting to see how the Court integrates future international instruments, referring more specifically to water issues, into its jurisprudence.

There is however a certain risk that, similar to the UN Committee on Economic, Social and Cultural Rights, which has been criticised in the past for having 'pulled out of the hat' a new human right to water (Aichele, 2007), the ECtHR might face analogous allegations (a fear of Merino (2006)). Also, it has to be acknowledged that, like other HR treaties, the ECtHR addresses private actors that are polluting water resources only indirectly, through the positive obligations. At least these obligations go beyond the mere regulation of the conduct of private actors[63].

The fact that water management and governance is a fairly knowledge-intensive domain of policy (van Buuren, 2013) might bring us to the point where we have to discuss again, if for the field of the environment, that a specialised Court or a separate branch of the ECtHR should be set up to deal adequately with very complex and highly technical issues.

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[61] ECtHR, *Hamer v. Belgium*, application n° 21861/03, judgement of 27.11.2007: protection dominated: a holiday home was built without planning permission; 37 years later, police discovered that it was built in a woodland area, where no building-permit could be obtained, and a court ordered its demolition; this interference was proportional, as property rights should not always take precedence over environmental considerations; ECtHR, *Turgut and others v. Turkey*, application n° 1411/03, judgement of 8.07.2008: property rights dominated: a piece of land that for generations belonged to the applicant's family was expropriated without compensation for nature-conservation purposes, whereby experts declared it as part of a State forest; violation of the right to property.

[62] ECtHR, *Soering v. United Kingdom*, application n° 14038/88, judgement of 7.07.1989, §§ 85, 90; see Zühlke & Pastille (1999): no extradition to the United States if risk of facing death penalty; see also ECtHR, *D. v. United Kingdom*, application n° 30240/96, judgement of 2.05.1997: no extradition if there is a risk of dying as a result of loss of adequate treatment for an HIV patient.

[63] On this debate, also see ECtHR, *Steel and Morris v. United Kingdom*, application n° 68416/01, judgement of 15.02.2005: domestic courts have to protect the right to free speech of environmental activists against McDonald's; see Gearty (2010).

In the meantime, we can expect that the jurisprudence of the ECtHR will become increasingly important for all EU Member States, all of which are Council of Europe members, even though recent developments regarding the accession of the EU to the ECHR (the Charter of Fundamental Rights) (2000/C364/01) reaffirms ECHR rights and augments them by environmental rights (e.g. Article 37 Charter mentions environmental protection). Art. 6(2) Treaty of European Union (TEU; Lisbon version) requires the European Union to accede to the Convention. Art. 6 does not even limit itself to providing a legal basis for accession, but states, 'The Union shall accede …' A failure to do so could be ground for an action for failure to act before the Court of Justice (Jacqué, 2011). However, on December 18, 2014, the Court of Justice of the European Union delivered its opinion on the compatibility with EU law of the draft agreement on the future accession of the EU to the Convention[64] and ruled that the agreement was not compatible with EU law – a ruling that leaves us somewhat in a state of uncertainty.

Acknowledgements

I wish to thank Professor Stephan Breitenmoser and Dr Robert Weyeneth (both University of Basel) for helpful comments. All remaining errors are mine.

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[64] Opinion Pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties, Opinion 2/13 (Opinion of the Full Court, Dec. 18, 2014.

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Received 25 March 2017; accepted in revised form 15 December 2017. Available online 5 January 2018