

A Review of the Case Law of the European Court of Human Rights in the Context of Environmental Justice^{1*}

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ABSTRACT

Environmental rights have not been specified in the European Convention on Human Rights (ECHR). The ECHR therefore cannot be directly invoked when environmental problems are in question. The question of recognising environmental rights has been frequently raised under the ECHR. However, the concept of environmental justice (EJ) which arose in the US in the late 1970s and which focuses on the fair distribution of environmental burdens and benefits has not been studied in the ECHR or in the case law of the European Court of Human Rights (ECtHR). This paper argues that ECtHR has not followed a steady flow in favour of EJ when hearing the cases. In this context, It will be considered whether the existing provisions of the ECHR guarantee EJ. Besides, the question will be asked whether the ECtHR has ever determined environmental injustices or environmental discrimination, which was encountered in the US, based on racial and economic factors when deciding environmental cases in its history.

Key words: Environmental justice, Environmental rights, Human rights, The US, ECHR, ECtHR.

ÖZET

Avrupa İnsan Hakları Mahkemesi İçtihatlarının Çevresel Adalet Bağlamında Bir Değerlendirmesi

Çevresel haklar Avrupa İnsan Hakları Sözleşmesi'nde (AİHS) yer almamaktadır. Bu nedenle, çevresel problemler mevzu bahis olması halinde sözleşme doğrudan öne sürülememektedir. AİHS altında çevre hakkının tanınması konusu sıklıkla gündeme gelmiştir. Lakin, 1970'lerin sonunda Amerika Birleşik Devletleri'nde gündeme gelen ve çevresel fayda ve zararların eşit dağıtılması hususuna odaklanan çevresel adalet kavramı AİHS bağlamında veya Avrupa İnsan Hakları Mahkemesi (AİHM) içtihatları bağlamında ele alınmamıştır. Bu çalışmanın amacı, AİHM'nin çevre konulu davaları ele alırken çevresel adalet kavramına istikrarlı bir şekilde yer vermediğini göstermeye yönelik olarak hazırlanmıştır. AİHS'deki mevcut hakların çevresel adaleti sağlamada yeterli olup olmadıkları da incelenecektir. Ayrıca, AİHM'nin çevre konulu davaları ele alırken ABD'de görüldüğü gibi ırksal veya ekonomik faktörlere dayalı açık bir çevresel adaletsizlik veya bir ayrımcılık durumuna değinip değinmediği de sorgulanacaktır.

Anahtar kelimeler: Çevresel adalet, Çevre hakkı, İnsan hakları, ABD, AİHS, AİHM.

Introduction

The combination of justice and the environment in one phrase gained currency at the end of the 1970s. The concept of EJ which aims at the fair distribution of environmental costs and benefits among people was first academically studied by Bullard in 1990.¹ According to Bullard, 'race' and 'class' are the main factors which cause environmental injustices.² People of colour and economically disadvantaged groups have been negatively affected by these environmental inequalities.³

The protection of the environment has started to be discussed as a matter of human rights. Indeed, the classical approach to human rights had not dealt with the preservation of the environment in the strict sense.⁴ However, after some important international conferences on the relation between the environment and human rights, such as the Stockholm Conference on the Human Environment 1972, the environment became recognised in the field of human rights. Following this, regional human rights regimes have attached an importance to the environment and some of them have adopted an environmental right in their treaties, such as the African human rights system and the Inter-American human rights system. Nonetheless, in contrast to the above-mentioned regional systems, the ECHR, which is the treaty of the European human rights system, does not directly include any provision on the preservation of the environment.⁵ However, despite this, the existing rights and freedoms under the ECHR have been interpreted by the ECtHR to secure environmental rights in many cases.⁶

This paper argues that ECtHR has not followed a steady flow in favour of EJ when hearing the cases. The main reason here why the European human rights system has not systematically taken EJ into consideration whereas the American system has done is that environmental discrimination or injustices as stated by Bullard is based on racial and economic parameters, and discrepancies between the groups (racial groups, economically disadvantaged groups) in American society in terms of these parameters is much more obvious than the ones in Europe. In other words, people who had suffered from race and class based environmental injustices in the US directly stated that

1 BULLARD, Robert D., **Dumping in Dixie: Race, Class, and Environmental Quality**, 3. Edition, Westview Press, 2000. EJ tries to prevent every kind of inequalities in the context of the environment. Promoting public health, housing and similar issues can be included in the scope of EJ. See also BULLARD, Robert D. / JOHNSON G. / WRIGHT, H. "Confronting Environmental Injustices: It's Right Thing To Do", Race, Gender & Class, Year: 1997, Volume: 5, Number: 1, (pp. 63 - 79).

2 BULLARD, 2000. Race and class are important factors encountered in the US in terms of EJ, but this formula does not strictly work in any region of the world. As it will be seen further, indigenous people, some minority groups and economically disadvantaged groups have been subjected to environmental inequalities and the sorts of these groups may vary from one region/continent to another.

3 BULLARD, 2000.

4 GEARTY, Conor "Do Human Rights Help or Hinder Environmental Protection", Journal of Human Rights and the Environment, Year: 2010, Volume: 1, Number: 1, (pp. 7 - 22).

5 PEDERSEN, Ole W. "The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law", European Public Law Year: 2010, Volume: 16, Number: 4, (pp.571 - 607).

6 PEDERSEN, 2010.

they are the victims of environmental discrimination. An argument with regard to race-based environmental injustices/discrimination has not been made when people has been claiming their environment related rights whereas some cases tell that economic factors sometimes cause such kinds of injustices in Europe. Therefore, the American system is familiar to deal with EJ issues than European system.

This paper begins with a brief definition and the evolution of the concept of EJ in the US and how it has had an impact on the American human rights system. This paper does not fully consist of a comparison of the American and the European systems in terms of EJ. It rather aims to give an outline as to the American system in order to understand the European system. Then, the protection of the environment and environmental rights by the ECHR and the ECtHR will be discussed by referring to selected cases in the following section. Next, it will be assessed whether the ECtHR has taken the causes of environmental injustices into consideration when assessing the cases particularly under the right to life and right to respect for private and family life. Moreover, the approach of the Court to the preservation of the people who are negatively affected by environmental injustices will be examined. Finally, the question of what can be done in the name of the maintenance of EJ in European system will be assessed.

1. The Emergence of Environmental Justice and the American Approach to The Concept

The concept of EJ previously defined as the fair distribution of environmental costs and benefits among people is relatively a new term coming to the fore in the last quarter of 20th century. Dr. Bullard who argues that race and class are real factors behind environmental injustices in the US indicates particular places where environmental injustices had been seen such as Dallas, Texas and Houston with the largest Afro-American population.⁷ These residential areas in which black and poor communities with low resistance exist had been used as toxic dumping areas and the inhabitants of these areas had consequently been exposed to health problems.⁸

Continuation of such pollution in black's habitats discriminatorily had led a backlash against those who intentionally used these places as dumping areas. Afro-Americans, thereupon, entered a protest which has affected the developments in the following periods in Warren County in 1982 against environmental discrimination.⁹ President Clinton then signed Executive order 12 898 to integrate EJ into programs and policies established by federal agencies.¹⁰ Besides, the necessity of maintenance of EJ was approved by the decision given in the case of CAN'T vs. LES, which will be mentioned when

7 BULLARD, Robert "Environmental Justice For All: It's The Right Thing To Do", *J. Env'tl.L.&Litig*, 1994, 9, (pp. 281-308).

8 BULLARD, 2000.

9 BULLARD, Robert D / JOHNSON Glenn "Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making", *Journal of Social Issues*, 2000, 56, 3 (pp. 555-578).

10 GERRARD, Michael B / FOSTER, Sheila R., **The Law of Environmental Justice Theories and Procedures to Address Disproportionate Risks**, 2. Edition, American Bar Association, Chicago, 2008, p.102.

comparing the relevant cases from the European System in the blow sections, in 1997¹¹ and this achievement is accepted as the basis for the following cases as to EJ. As for human rights discourse in the US, Additional Protocol (San Salvador Protocol) to the American Convention on Human Rights (ACHR) has adopted protective provision regarding to the Environment in Article 11 and this naturally contributes to EJ too.¹²

2. Environmental Rights and Environmental Justice in the European Human Rights System

The ECHR, like the Conventions of the Inter-American system and the African system, is created for the preservation of civil and political rights.¹³ It can only be invoked when 'individual rights' are in question rather than environmental rights,¹⁴ referred to as 'collective rights' which can be enjoyed by a group of people or a community.¹⁵ The absence of a provision on the environment, environmental rights or a similar notion concerning the protection of the environment in the ECHR or in the Protocols¹⁶ is an indication that the ECHR is for the protection of civil and political rights. After the Stockholm Conference, a series of attempts have been made in the name of the recognition of an additional protocol for the right to environment in the ECHR, yet they have remained inconclusive because of the political unwillingness of the party states.¹⁷ According to Shelton, there are three reasons behind this unwillingness:¹⁸ First, a concern about diluting the ECHR by new proposed human rights; second, claims over the lack of justiciability of environmental rights; and third, fears of party states stemming from their significant environmental problems that might cause legal troubles for them in the event of the right being recognised.¹⁹ Furthermore, DeMerieux is of the opinion that the adoption of an environmental right in the ECHR is not vital because such a right might conflict with other fundamental rights.²⁰

11 ÇAĞLAYAN, Sezai, An Assessment of the Concept of Environmental Justice within the Context of the Case Law of the European Court of Human Rights, Unpublished Post Graduate Thesis, Leicester, the University of Leicester, Law School, 2014, p.8.

12 ÇAĞLAYAN, 2014, p. 17.

13 CHURCILL, Robin R., "Environmental Rights in Existing Human Rights Treaties", *Human Rights Approaches to Environmental Protection* (Ed. A. Boyle and M. Anderson), Clarendon Press, 1998.

14 SHERLOCK, Ann / JARVIS, Françoise "The European Convention on Human Rights and the Environment", *E.L. Rev Supp*, Year: 1999, Volume: 24, (pp. 15 - 29).

15 DINSTEIN, Yoram "Collective Human Rights of Peoples and Minorities", *International and Comparative Law Quarterly*, Year: 1976, Volume: 25, Number: 1, (pp. 102 - 120).

16 JOSE Daniel G S., **Environmental Protection and the European Convention on Human Rights**, Council of Europe Publishing, Strasbourg, 2005, p. 7.

17 SHELTON, Dinah "Human Rights, Environmental Rights, and the Right to Environment", *Stan. J. Int'l L.*, Year: 1991-1992, Volume: 28, (pp. 103 - 133).

18 SHELTON, 1991-1992.

19 SHELTON, 1991-1992.

20 DEMERIEUX, Margaret "Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms", *Oxford Journal of Legal Studies*, Year: 2001, Volume: 21, Num-

The approach of the ECHR towards the protection of the environment shows that the ECHR might be said to be closer to the 'Anthropocentric approach' which indicates that the protection of the environment is important for human life.²¹ No claims concerning environmental rights can be made unless they are related to the protection of 'individual rights'.²² To put it another way, the ECHR requires the applicants to demonstrate that they are victims of a violation of a right defined under the ECHR.²³ For instance, *X and Y v Federal Republic of Germany*²⁴ was known as the first 'environmental case' to be concluded by the European Commission as 'inadmissible' since the ECHR does not contain any 'substantive' provision about environmental rights.²⁵ In this case, the applicants applied to the Commission for the protection of nature rather than their individual rights and the case was not accepted because of the reason in question.²⁶ However, like the argument that proponents of the 'Anthropocentric approach' defend, the European Commission thereafter considered the protection of the environment as a requirement for the realisation of the individual rights and decided subsequent cases as admissible.²⁷ The cases of *Arrondelle v. the United Kingdom*,²⁸ *Baggs v. the United Kingdom*²⁹ and others which will be assessed through the paper can be shown as examples in this respect.

The non-existence of a substantive environmental right in the ECHR has led environmental cases to be examined based on the interpretation of the existing human rights provisions³⁰ because the derogation of the environment may negatively affect these basic individual rights. However, before commencing the interpretation of the existing provisions under the ECHR, there is one more issue concerning the interpretation of the existing rights for environmental cases. This is the doctrine of margin of appreciation. The doctrine amounts to a kind of freedom of action given by the ECHR to the member states in order to accomplish their duties under the ECHR.³¹ The point which makes the doctrine important is the discrepancies between

ber: 3, (pp. 521 - 561).

21 The 'Anthropocentric approach' defends the argument that the environment is a provider of natural sources for the maintenance of human life. See FERIS, Loretta "Constitutional Environmental Rights: An Under-Utilized Resource", S. Afr. J. on Hum. Rts., Year: 2008, Volume: 24, Number: 1, (pp. 29 - 49).

22 SHERLOCK / FRANCOISE, 1999, p. 15.

23 SHERLOCK / FRANCOISE, 1999, p. 27- 28.

24 App no 7407/76 (European Commission, 11 July 1973).

25 MOECKLI, Daniel / SHAH, Sangeeta / SIVAKUMARAN, Sandesh / HARRIS, David, adr., **International Human Rights Law** OUP, 2010, p. 628.

26 SANDS, Philippe, **Principles of International Environmental Law**, 3. Edition, Cambridge University Press, Cambridge, 2012. p. 782.

27 JOSE Daniel G S., 2005, p. 8.

28 App no 7889/77 (European Commission, 15 July 1980).

29 App no 9310/81 (European Commission, 19 January 1985).

30 MOECKLI, Daniel / SHAH, Sangeeta / SIVAKUMARAN, Sandesh / HARRIS, David, adr., 2010, p. 628.

31 GREER, Steven, **The Margin of Appreciation: Interpretation and Discretion under the European Con-**

the national constitutions and the ECHR in terms of environmental protection. As Boyle states,³² some member states have already adopted an environmental right in their constitutions although the ECHR does not mention this right. For example, Article 56 of the Turkish Constitution refers to a 'healthy' and 'balanced environment'³³ while the Spanish constitution sees the environment as vital for the 'development of the person' and the 'environment' itself under section 45.³⁴ Article 42 of the Russian Constitution also mentions a 'favourable environment'.³⁵ Therefore, as will be seen later, results of the cases decided by the ECtHR may show a change because of the margin of appreciation.

In the light of the foregoing, the ECtHR has been accepted as an indirect provider of environmental rights which is protected by way of interpreting the existing individual rights.³⁶ The 'right to life' (Art 2), 'right to fair trial' (Art 6), 'right to respect for private and family life' (Art 8), 'freedom of expression' (Art 10) and 'right to property' (Art 1 of Protocol 1) of the ECHR have been referred by the ECtHR in this context.³⁷ As will be seen, Articles 2 and 8 are the ones which are broadly referred in environmental cases. Furthermore, Article 13 'right to an effective remedy' and Article 14 'prohibition of discrimination' are also important for EJ as they require people not to be discriminated against and enable them access to remedies.

3.Has the ECtHR ever Interpreted the Environment-related cases as Discriminatory or Considered any Causes of Environmental Injustices in its Case Law?

a. The Cases under the Right to Life (Article 2)

*Oneryildiz v Turkey*³⁸ was an environment-related case concluded by the ECtHR. In this case, the applicant who was dwelling in a slum quarter in Umraniye/Istanbul with his twelve relatives³⁹ filed a complaint against Turkey alleging that the Turkish authorities were responsible for the methane explosion which destroyed his home and which caused the deaths of his relatives.⁴⁰ The ECtHR held that Article 2, Article 1 of Protocol 1 and Article 13 had been violated by Turkey.⁴¹

vention on Human Rights, Human Rights Files no 17, Council of Europe Publishing, Strasburg, 2000, p. 5.

32 BOYLE, Alan "Human Rights or Environmental Rights? A Reassessment", *Fordham Environmental Law Review*, Year: 2007, Volume: 18, (pp. 471 - 511).

33 BOYLE, 2007, p. 9.

34 BOYLE, 2007, p. 8.

35 BOYLE, 2007, p. 9.

36 MOECKLI, Daniel / SHAH, Sangeeta / SIVAKUMARAN, Sandesh / HARRIS, David, *adr.*, 2010, p. 628.

37 MOECKLI, Daniel / SHAH, Sangeeta / SIVAKUMARAN, Sandesh / HARRIS, David, *adr.*, 2010, p. 628.

38 App no 48939/99 (ECtHR, 30 November 2004).

39 *Ibid* para [9].

40 *Ibid* para [2].

41 *Ibid* para [165].

Neither the applicant nor the ECtHR referred to the notion of EJ directly in this case. The ECtHR, however, emphasised the positive obligations of the state and referred to the right to life in Article 2 which considers the lives of 'everyone' in the country.⁴² The area of the applicant's home was already used as a landfill site before the slum dwellers moved there.⁴³ In other words, the slum dwellers knowingly built their homes around the landfill site. Starting from the question of 'which came first'⁴⁴ that was the moot point of EJ in the US, it is quite clear that the landfill in *Oneryildiz v Turkey* case came first and it was not intentionally established in the area where those people lived. However, despite the fact that there was no intended discrimination of the slum dwellers, the applicant claimed that they should have been informed by the officials about possible harmful effects of the landfill because the social and educational backgrounds of the slum dwellers did not enable them to predict such dangers.⁴⁵ The ECtHR once again underlined the importance of 'positive obligations' of the state by requiring the state to provide more adequate information.⁴⁶ In relation to this case, Hilson claims that specific information about the risk, i.e. the possible methane explosion, had to be given when the slum dwellers were making their choice around the landfill site.⁴⁷ The decision of the Court and Hilson's argument show that access to environmental information is one of the pillars of procedural environmental rights and also a fundamental requirement of EJ.⁴⁸ Although there are no specific environmental rights in the ECHR, the ECtHR contributed to EJ in the above case through Article 2.

Another significant case with regard to environmental rights derived from the right to life is the case of *Budayeva and others v Russia*.⁴⁹ The applicants who were the inhabitants of a town named Tyrnauz⁵⁰ were the victims of a mudslide.⁵¹ They claimed that Russia had breached Articles 2 and 3 asserting that their relatives had died in the

42 Ibid para [71].

43 Ibid para [10].

44 The question of which came first is about the sequence of the siting of hazardous waste landfills and residential areas of coloured people in the US. Some argue that the hazardous waste landfills were first established then black people moved there, while others claim that the landfills were later founded in the areas where black people lived. See BEEN, Vicki "Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics", *The Yale Law Journal* 1383, Year: 1994, Volume: 103, No: 6, (pp. 1383 - 1422).; BULLARD, 2000.

45 *Oneryildiz* para [86].

46 Ibid para [90].

47 HILSON, Christopher "Risk and the European Convention on Human Rights: Towards a New Approach", *Cambridge Yearbook of European Studies*, Year: 2008-2009, Volume: 11, (pp. 353 - 375).

48 Access to environmental information is one of the three principles of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), and to get adequate environmental information is vital for the achievement of EJ.

49 App no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (ECtHR, 20 March 2008).

50 Ibid para [13].

51 Ibid para [14].

mudslide due to the lack of positive action by the state.⁵² The ECtHR found a violation of the right to life.⁵³

The case of *Budayeva and others v Russia* shows how the ECtHR can achieve E.J. There are several reasons why this case contributed to E.J. Firstly, the ECtHR considered the importance of access to information in this case as already developed in *Oneryildiz v Turkey* case. The applicants asserted that no warning in a way that everyone could understand was given.⁵⁴ Although there was a central warning system, as the Government claimed, the town in which the applicants lived was not covered by this system.⁵⁵ They further claimed that there were no signs or similar warnings in the area to inform them.⁵⁶ Secondly, it would seem that the Government remained knowingly silent about the disaster. The Mountain Institute and the Head of the Elbrus District Administration had warned the Minister and the Prime Minister of the KBR a few times about the forthcoming disaster.⁵⁷ Consequently, the ECtHR held that the Government should have taken appropriate measures to inform the public by way of warnings before the disasters occurred and that the measures taken by the government had to cover inherent risks as well.⁵⁸ As can be seen, the approach of the Government towards the protection of the local people from an environment-related problem was not fair and the burdens of environmental problems were imposed on the people in Tyrnauz.

b. The Cases under the Right to Respect for Private and Family Life (Article 8)

Article 8 of the ECHR, together with Article 2, has also been invoked to protect environmental rights and the quality of the environment.⁵⁹ However, because Article 8 does not include any specific references to the environment, it does not cover any environmental case and issue.⁶⁰ Article 8 can only be invoked if environmental factors directly and significantly interfere with 'private life', 'family life' and 'home'.⁶¹ The ECtHR firstly takes into account a 'causal link' between an environmental factor concerned and its negative effect on persons, and then examines whether a 'certain threshold of harm' has been met.⁶² The cases decided under Article 8 generally concern noise pollution, 'airborne pollutants' and 'hazardous waste'.⁶³

52 Ibid para [26].

53 Ibid para [205].

54 Ibid para [29], [63], [72], [81].

55 Ibid para [125].

56 Ibid para [126].

57 Ibid [148].

58 Ibid [131], [132], [152].

59 DEMERIEUX, 2001, p. 561.

60 The Council of Europe (CoE), **Manuel on Human Rights and the Environment**, 2. Edition, 2012, p. 45.

61 CoE, 2012, p. 45.

62 CoE, 2012, p. 45 - 46.

63 Justice and Environment, **Human Rights and the Environment: The Case Law of the European Court of**

The cases concerning hazardous waste and industrial pollution will first be assessed because their content is closely connected with EJ. For instance, the case of *López Ostra v Spain*⁶⁴ was the first case in which the ECtHR found a violation of Article 8 in the context of the environment.⁶⁵ This case was brought by an applicant living in the town (Lorca) against Spain on the basis that the officials failed to prevent the operation of an illegal waste treatment plant which was built next to the applicant's home.⁶⁶ In spite of the experts' reports proving the risks of the plant⁶⁷ and the margin of appreciation given to the state, Spain failed to 'strike a fair balance' between the applicant's rights and the interests of the town.⁶⁸ The fact that the victims were local people enables this case to be assessed in the context of EJ. As mentioned above, the Spanish Constitution⁶⁹ contains a provision to protect the environment for the development of people. Nevertheless, the state gave priority to economic interests and did not strike a fair balance between these interests and the welfare of local people⁷⁰ which is important for EJ.

Similarly, the case of *Guerra and others v Italy*⁷¹ was a similar environmental case which could be evaluated in terms of EJ. As in *López Ostra*, the applicants were residents of a town which was about one kilometre away from a chemical factory.⁷² The factory was similarly confirmed to emit detrimental gases which posed a 'high risk' to the health of the local people.⁷³ There are two issues that should be examined here in the context of EJ. First, even though there was a provision as to the access to environmental information in domestic law and in the Council of Europe Resolutions,⁷⁴ the officials failed to provide adequate information. Second, despite an explosion in 1976 affecting 150 people,⁷⁵ local people had been subjected to unhealthy living conditions until 1994 when the factory was closed.⁷⁶ Therefore, the ECtHR decided that the state had failed to comply with its positive obligation to preserve local peoples' families, private life and homes under Article 8.⁷⁷

Human Rights in Environmental Cases, Brno, 2011.

64 App no 16798/90 (ECtHR, 09 December 1994).

65 DEMERIEUX, 2001, p. 529.

66 *López Ostra v Spain* para [7].

67 *Ibid* para [11], [18].

68 *Ibid* para [58].

69 See 2 above.

70 *Ibid*.

71 App no 116/1996/735/932 (ECtHR, 19 February 1998).

72 *Ibid* para [12].

73 *Ibid* para [13].

74 *Ibid* para [29], [34].

75 *Ibid* para [57].

76 *Ibid* para [18].

77 *Ibid* para [60].

Another case, that of *Taskin v Turkey*⁷⁸ is a clear example of how a state ignored the interests of local people in the light of general economic interest, and how the ECtHR dealt with this. The applicants were villagers who were opposed to permission which was given for the operation of a gold mine using cyanide in Bergama, Izmir.⁷⁹ The ECtHR concluded that there was a violation of Article 8.⁸⁰ However, the legal process before the ECtHR was not straightforward. The permission required for the operation of the gold mine was first granted in 1989⁸¹ yet it had been cancelled by the Supreme Administrative Court in 1997.⁸² However, the necessary permissions were granted for the operation of the mine with the help of the Prime Minister and the Ministry of Environment based on a report of the TUBITAK (specialized agency) in 2000.⁸³ The efforts of the Prime Minister to enable the mine to operate after the decision of the Supreme Court had been regarded as unlawful and defined as a resistance against law by Azrak.⁸⁴ The decision of the Turkish Council of Ministers in allowing the operation of the gold mine was not made public in 2002.⁸⁵ This decision conflicted with the importance of a right of access to information which is a requirement for EJ. This case is important for EJ because the ECtHR takes into account the Aarhus Convention and Article 10 of the Rio Declaration on Environment and Development.⁸⁶ The Aarhus Convention refers to the Rio Declaration when requiring access to information.⁸⁷ The ECtHR has assessed the Supreme Court's decision emphasising that geographical proximity of the mine to the area where people lived posed a threat for peoples' rights,⁸⁸ and concluded that the applicants' right to respect for private and family life in Article 8 had been violated.⁸⁹

Despite the decisions of the ECtHR and the domestic courts, the gold mine had been actively operated until 2009.⁹⁰ The people of Bergama have played a vital role in winning victories in the ECtHR and in the domestic level against the gold mine as stressed by Coban.⁹¹ The resistance of the local people in *Taskin v Turkey* who tried

78 App no 46117/99 (ECtHR, 10 November 2004).

79 Ibid para [11], [17].

80 Ibid para [126].

81 *Taskin* para [14].

82 Ibid [26].

83 Ibid [45], [46].

84 HORUS, Mehmet "20. Yilinda Bergama Davasi", *Elektrik Muhendisligi*, Year: 2009, Number: 436, (pp. 80 - 83).

85 Ibid para [75].

86 Ibid para [98], [99].

87 Ibid.

88 Ibid para [112].

89 Ibid para [126].

90 HORUS, 2009, p. 83.

91 COBAN, Aykut "Community-based Ecological Resistance: The Bergama Movement in Turkey", *Environmental Politics*, Year: 2004, Volume: 13, Number: 2, (pp. 438 - 460).

to prevent the unequal distribution of environmental burdens resembles an early US case, *CANT v LES*,⁹² which was decided in favour of EJ defenders. Just as with Warren County,⁹³ Bergama has become a symbol of resistance.⁹⁴

Finally, the ECtHR decided the cases of *Powell and Rayner v the UK*⁹⁵ and *Hatton and others v the UK*⁹⁶ under Article 8. Both of the applications were filed by applicants that resided near Heathrow Airport and both complained about noise pollution from flights above a certain acceptable level of noise pollution.⁹⁷ For EJ, it is important to analyse whether the airport was deliberately built in the area where the applicants lived and what made the cases different from the cases discussed above. The airport was built in 1946 and expanded with the growing demand for air transport.⁹⁸ Night flights, which had been main cause of noise pollution, had been reduced at certain times in 1988, 1993 and 1998.⁹⁹ Furthermore, in contrast to installations and factories which damage people who are within the context of EJ, the airport is important not only for the UK's economy more generally, but also for the employment of workers on a large scale.¹⁰⁰ Therefore, the ECtHR did not find a violation of Article 8 in these two cases.¹⁰¹ The Court took into account the margin of appreciation of the state in striking a fair balance between interests of individuals and community.¹⁰² More recently, in a similar case, *Bor v Hungary*,¹⁰³ the ECtHR found in favour of the applicant.¹⁰⁴ The ECtHR in this case emphasised the inadequacy of the domestic law and stressed the importance of fair balance once again.¹⁰⁵ When comparing the cases of *Bor v. Hungary* and the above cases filed against Heathrow Airport, it can be seen that the size of the enterprise is relevant in striking a fair balance. The ECtHR underlined the significance of measures which the

92 *CANT v LES* 45 NRC 367 (1997). This case was the first case concluded in favour of EJ defenders. It was a struggle between Louisiana Energy Service (LES), which tried to construct a uranium enrichment plant in a rural area where poor-black people lived in Louisiana, and Citizens Against Nuclear Trash (CANT). Even though LES's research determined this poor-black area as the 'best place' for the uranium enrichment plant, the Nuclear Regulatory Commission (NRC) found that 'racial bias played a part in the selection process.' Dr. Bullard as an intervenor witness in this case played a significant role in the achievement of this success by revealing 'institutionalized racism' in his statistical analysis.

93 Warren County is the symbol of EJ defenders in the US because the first demonstration against hazardous-wastes in the US had taken place in Warren County. See BULLARD, 2000, p. 14.

94 HORUS, 2009, p. 83.

95 App no 9310/81 (ECtHR, 21 February 1990).

96 App no 36022/97 (ECtHR, 8 July 2003).

97 *Powell and Rayner v the UK* para [8]; *Hatton and others v the UK* para [11].

98 *Powell and Rayner v the UK* para [11].

99 *Hatton and others v the UK* para [29].

100 *Powell and Rayner v the UK* para [12].

101 *Ibid* para [46]; *Hatton and others v the UK* para [130].

102 *Hatton and others v the UK* para [98], [100].

103 App no 50474/08 (ECtHR, 18 June 2013).

104 *Ibid* para [28].

105 *Ibid* para [24], [26], [27].

domestic courts had to take for the prevention of 'disproportionate individual burdens' in *Bor v Hungary*¹⁰⁶ while it had not emphasised individual burden and held that a fair balance between competing interests had been struck in the *Heathrow Airport* cases.

c. Other Relevant Rights for EJ

Apart from Articles 2 and 8, the applicants in environmental cases have also alleged the violation of other fundamental rights under the ECHR. For example, the right to a fair trial is one of the civil rights which can be invoked in environmental cases and in indigenous complaints, which will be discussed under the next heading.¹⁰⁷ The right to a fair trial is important in the determination of 'civil rights' and liabilities, and 'criminal charges' against persons. This right under Article 6 can also be invoked in environmental cases in which people are subjected to environmental burdens.

More importantly, Article 10 of the ECHR is also a vital right which can be invoked in environmental cases.¹⁰⁸ Nevertheless, Article 10 does not promote 'access to information'¹⁰⁹ as fully as the Aarhus Convention. *Guerra and others v Italy* was an example in which the applicants alleged the violation of Article 10.¹¹⁰ However, 'freedom to receive information' does not require positive obligations, and therefore Article 10 was not taken into consideration in this case.¹¹¹ Article 13 (Right to an Effective Remedy) is another significant right in terms of 'access to justice'¹¹² and naturally for those who are seeking EJ. Furthermore, Article 1 of Protocol 1 of the ECHR which provides 'protection of property' can be invoked as seen in the case of *Oneryildiz v Turkey*.¹¹³

In sum, the cases regarding the right to life, including *Oneryildiz v Turkey*¹¹⁴ and *Budayeva and others v Russia*¹¹⁵ showed that even though the ECtHR had not mentioned an obvious 'institutional discrimination' or a similar expression, or environmental injustices explicitly, the party states had shown negligence in the protection of people's lives. The failures of the states have therefore caused the unequal distribution of environmental burdens. In contrast, the ECtHR has referred to the importance of a 'fair balance' between the interests of individuals and community and the margin of appreciation in the event that comprehensive economic concerns are in question as seen in the *Powell*

106 Ibid para [27].

107 KOIVUROVA, Timo "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Reteospect and Prospect", *International Journal on Minority and Group Rights*, Year: 2011, Volume: 18, (pp. 1-37).

108 SHERLOCK and FRANCOISE, 1999, p. 20.

109 SHERLOCK and FRANCOISE, 1999, p. 20.

110 *Guerraandothers v Italy* para [47].

111 Ibid para [53], [54].

112 KUIJER, Martin, "Effective Remedies As A Fundamental Right", **Seminar On Human Rights and Access to Justice in the EU** (April 2014).; See also *Oneryildiz*.

113 *Oneryildiz* (n 38) para [119].

114 Ibid.

115 *Budeyeva*.

and *Rayner v the UK*¹¹⁶ and the *Hatton and others v the UK*.¹¹⁷ However, the result of *Bor v Hungary* contrasts with the result of *Heathrow* and demonstrates how the economic size of an organisation can impact on the determination of 'fair balance'.

4. Has the ECtHR Taken into Consideration 'Indigenous People' and the 'Have-nots' When Environmental Cases Are in Question?

Racial groups, indigenous people, minorities and the have-nots as target groups of EJ are the ones which might easily be more affected by environmental degradations than economically developed groups as mentioned above.¹¹⁸ There are legal differences between the definitions of the above terms describing specific groups of people.¹¹⁹ However, what is important here is to show their general vulnerability within the context of EJ and the case law of the ECtHR.

At an international level, Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the ILO Indigenous and Tribal Peoples Convention protect minorities and indigenous people. At a regional level, the CoE has two important documents in this regard: the European Charter for Regional or Minority Languages and The Framework Convention for the Protection of National Minorities. Most importantly, Protocol 12 to the ECHR (the Protection of Human Rights and Fundamental Freedoms) can be accepted as an important development in this respect.¹²⁰ Although Article 14 of the ECHR (Prohibition of Discrimination) seems effective in protecting minorities, it guarantees the non-discrimination in the enjoyments of the rights under the ECHR, and therefore it is not an 'independent right' as pointed out by *Koivurova*.¹²¹ Nonetheless, Article 8 of the ECHR plays an important role for the preservation of 'minorities' life style' as concluded by the European Commission.¹²²

However, the ECtHR has not decided any cases which can be accepted as 'landmark' cases for the benefit of indigenous people.¹²³ The case of *G. and E. v. Norway*,¹²⁴ for example, showed that traditional lifestyles of indigenous people can be protected under Article 8. However, the European Commission held that some part of the land in which indigenous people lived could be sacrificed in the name of the economic wellbeing of

¹¹⁶ *Powell*.

¹¹⁷ *Hatton*.

¹¹⁸ See 1 above

¹¹⁹ FRESA, Lucia, "A New Interpretation of the Term 'Indigenous People': What Are the Legal Consequences of Being Recognised as 'Minorities' Instead of as 'Indigenous People' For the Indigenous People of the World?" *Centro Italiano Studi Per La Pace* (1999-2000).

¹²⁰ KOIVUROVA, 2011, p. 29.

¹²¹ KOIVUROVA, 2011, p. 29.

¹²² KOIVUROVA, 2011, p. 25.

¹²³ KOIVUROVA, 2011, p. 3.

¹²⁴ App no 9278/81 and 9415/81 (ECtHR, 3 October 1983).

the country.¹²⁵ Similarly, *Noack and others v. Germany*¹²⁶ also supports the above argument that the protection of indigenous people under the ECHR is not adequate. The applicant alleged that the relocation of their village because of the creation of a lignite mine would damage their community, culture and basic assets.¹²⁷ They made an application under Articles 8 and 14, Article 1 of Protocol 1, Article 2 of Protocol 4 and Article 9.¹²⁸ However, the Court decided that the new area chosen for the people was only 20 kilometres away and this relocation would not have a major effect on their lifestyles.¹²⁹ It declared that the application was inadmissible.¹³⁰ As can be seen in these two cases, the ECtHR and the Commission make decisions in favour of the economic well-being of the party states in spite of their negative environmental damage as indicated by Shelton.¹³¹

Environmental rights recognised in the African and Inter-American system have contributed to embracing the 'holistic nature of the land and environmental rights' of the minority groups.¹³² The Inter-American Court of Human Rights in *Maya Indigenas*¹³³ emphasised the importance of the aforesaid ILO Convention although the state concerned (Belize) was not party to the ILO Convention.¹³⁴ Because the protection of indigenous people is one of EJ's concerns, the two regional systems, the Inter-American and the African systems, are effective in this respect. However, the absence of an environmental right in the ECHR leads such a holistic approach not to be adopted for the preservation of land-environmental rights of indigenous people. *G. and E. v. Norway* and *Noack and others v. Germany* also demonstrate the inadequacy of the ECtHR in the context of this holistic approach.

5. How Can Environmental Justice Be Sustained in the European System?

The adoption of a new protocol to the ECHR will substantively help in the protection of the environment and for those who are exposed to the side effects of environmental degradation mainly based on human activities. The question of adopting a new protocol to the ECHR as to environmental rights has received extensive treatment in the scholarly literature. Nevertheless, it seems that such a protocol will not be adopted. It is, therefore,

125 SHELTON, Dinah, "Human Rights and the Environment: Jurisprudence of Human Rights Bodies1" **Joint UNEP-OHCHR Expert Seminar** (January 2002), Geneva.

126 App no 46346/99 (ECtHR, 25 May 2000).

127 Ibid.

128 Ibid.

129 Ibid.

130 Ibid.

131 SHELTON, 2002.

132 HULME, Karen, "International Environmental Law and Human Rights", **Routledge Handbook of International Human Rights Law**, (Ed. S. Sheeran and N. Rodley), Routledge, 2013.

133 *Maya Indigenous Community of the Toledo District v Belize* [2004] IACHR Case 12.053 Report No 40/0.

134 **Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System**, <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncstralLands.pdf> (Access date 31.08. 2014).

important to note that the existing fundamental rights under the ECHR are the only arguments which can be used to protect the environment and its inhabitants. Indeed, these existing rights and freedoms under the ECHR overlap with the main concerns of EJ, such as 'public health' and 'dwelling'.¹³⁵ As discussed above, Articles 2 and 8 are the rights under the ECHR which have been mostly invoked in the environmental cases.¹³⁶

Accordingly, the fact that the 'ECHR is a living instrument', its interpretation in accordance with the 'present-day conditions'¹³⁷ shows the effectiveness and flexibility of the ECHR. The usage of the Aarhus Convention by the ECtHR in its case law is a clear example that the ECHR is a living instrument. Protocol 12 to the ECHR is also an important step to counter potential discrimination of minorities and other vulnerable people. However, the doctrine of the margin of appreciation and attempts to strike a fair balance between interests of the community and individuals may sometimes cause disruption to the maintenance of EJ as seen in the cases of *Hatton, G. and E. v. Norway* and *Noack and others v. Germany*.

Strengthening the protection of indigenous people and others who have been negatively influenced by environmental damage is vital.¹³⁸ As Boyle states,¹³⁹ existing human rights law should consider the protection of the environment and the maintenance of sustainable development, which aims to balance the environment and economic concerns. In order to make the ECHR/ECtHR more effective in the context of EJ, indigenous people and the environment together should be effectively taken into account. Expecting for an additional protocol to the ECHR about the environment cannot, of course, be a rational offer, or judging party states to the ECHR why they do not be a party to an environment related international treaties. These kinds of statements cannot go beyond suggestions and not be acceptable in terms of legal context. Yet, the ECtHR may approach to EJ related cases and be much more careful when "striking a fair balance" between the interests of complainant and general interest in a sensible way.

Conclusion

The American human rights system and its components firstly came across environmental discrimination as a result of extreme racial and economic differences among people within its territory. The system has therefore updated itself so as to reduce such kinds of discrimination in the society otherwise the situation could have been worsening the rights of people. Protests against environmental discriminations and cases opened against those who had intentionally caused environmental injustices has created and

135 BULLARD, Robert D. / JOHNSON G. / WRIGHT, H. "Confronting Environmental Injustices: It's Right Thing To Do", *Race, Gender & Class*, Year: 1997, Volume: 5, Number: 1, (pp. 63 - 79).

136 See 3 above.

137 LETSAS, George, **The ECHR as a Living Instrument: Its Meaning and Legitimacy**, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (Access date 29.08. 2014).

138 BOYLE, Alan "Human Rights and the Environment: Where Next?", *The European Journal of International Law*, Year: 2012, Volume: 23, Number: 3, (pp. 613 - 642).

139 BOYLE, 2012, p. 625.; See also *Taskin*.

awareness in the US over the last thirty years. Nonetheless, the situation in Europe has been different, race has not been a factor leading to a tremendous environmental injustices. Comprehensive legal regulations have not been needed by the Europeans in terms of EJ. The ECHR and the Court have encountered the environment related cases and tried to solved them by referring related rights such as, the right to life (article 2) and the right to respect for private and family life (article 8). The Court has also cited relevant international agreements which signed by the party states in environment related cases because the Court calls the ECHR as "a living instrument".

Both local judicial bodies and human rights mechanism in the American system have interested in the reduction of environmental injustices so they are familiar to the concept of EJ. However, the fact that race is not a clear factor causing discrimination in the European system constrains the concept (EJ) to be used in legal cases. This study investigated whether the ECtHR as an important element for European human rights system has ever mentioned environmental injustices or environmental discrimination in its case law. It is found in the examination of the above cases held by the ECHR that the concept of EJ or environmental injustices/discrimination have not been expressed. Even though some of the above cases have shown that plaintiffs were physically injured by the defendants' actions or inactions of the party states, a systematic environmental injustices or discrimination have not been found by the ECtHR. Demographic structure in Europe is not the same as in the US. Thus, race has not been a characteristic feature of environmental injustices although economic reasons have occasionally caused some inequalities in the European system.

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