

# The role of the european court law constitutional administrative essay

[Law](#)



**ASSIGN  
BUSTER**

## **Introduction**

Protection of the environment has only recently become a concern for the international community. In the first half of the twentieth century, the priority instead was the reconstruction of the troubled post-World War economy and the guarantee of civil, political, social and economic human rights. It is hence not surprising that the main international human rights instruments such as the 1948 Universal Declaration of Human Rights 1 and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms 2 (ECHR; "the Convention") make no reference to the environment. However, with growing awareness of the global environmental issues and after a number of United Nations Conferences on the Environment, it is now commonly accepted that human rights and the environment are interrelated. The first United Nations Conference on the Human Environment took place in Stockholm in 1972; it concluded with the signing of the Stockholm Declaration 3, which outlined the important relationship between the respect for human rights and the protection of the environment. The preamble of the Declaration states that "both aspects of man's environment, the natural and manmade, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself" 4. Furthermore, Principle 1 of the Declaration affirms that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". The link between human rights and the environment was further promoted at the 1992 Rio de Janeiro Conference on

Environment and Development (UNCED). Principle 10 of the Declaration 5 adopted at the Conference states that " environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." The principles set out in the Rio Declaration have been recalled and refined at the 2002 Johannesburg Summit 6. Since 1950, a number of rights have been added to the European Convention on Human Rights, but none referred to the environment. With growing international concern for the well being of our environment, it is not a surprise that efforts towards the introduction of a right to the environment are being pursued by a great number of politicians, environmentalists and scholars around the world. For many years, people have been trying to succeed at least in introducing a provision outlining the importance of environmental protection into not only international conventions, but also constitutions at the national level. Progress in the protection of the environment has occurred during the past few decades; however there is still no comprehensive international legally binding instrument on the issue in Europe. There are however certain agreements which are binding and ensure certain aspects of environmental protection. At the European level, the Convention on Access to Information,

Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 7 guarantees certain procedural rights in relation to the environment; although it is important to point out that this is not a right to a decent environment as such. This paper will examine specifically, the role of the European Court of Human Rights (ECtHR; "the Court") in the promotion of environmental rights and in combating environmental degradation. The Court was set up in 1959, with the intention of dealing with individual or State applications alleging violations of the civil and political rights protected by the European Convention on Human Rights. Since 1959, the Court has delivered a total of more than 10, 000 judgements, which are binding on the Member States and in a number of cases resulted in States having to alter their national legislation or administrative practice in order to ensure compliance with the Convention 8. In recent years, a number of cases concerning environmental issues have come before the Court, where the applicants claimed that the adverse environmental factors led to interferences with their rights protected by the Convention, such as: the right to respect for private and family life (Article 8), the right to property (Article 1 of Protocol 1) and right to life (Article 2). These cases will be studied below and the approach of the Court when dealing with environmental harm which also affects the fundamental rights of the individual analysed. It will be shown that the Court has developed a number of methods of indirect protection of the environment. The limitations of these methods will be discussed, as well as the impact of factors such as national sovereignty and the margin of appreciation on the Court's decisions. Overall, it will be established that there is no right to the

environment under the Convention and the scope of the Court's protective powers in this area is in fact rather limited.

## **" Environment" – a Definition**

It is perhaps important to mention the definition of the term " environment" before studying the concept of environmental protection and the role of the Court in depth. Unfortunately, there is no standard definition in international law, neither is the concept defined in the Convention or any of the Court's case law. The fact that there is no attempt by the Court to define the concept is the first sign that there is clearly no right to an environment in the Convention. We therefore have to look at other sources to try and find a definition, yet even these examples are very broad and unclear. The International Court of Justice, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stated that:" the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" 9. The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides in its Article 2 (10) 10:" Environment" includes:- natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors;- property which forms part of the cultural heritage; and- the characteristic aspects of the landscape.

## **The European Court of Human Rights**

The ECHR dates back to 4th November 1950 and since then, multiple protocols have been added to it. All of the 47 members of the Council of

Europe have ratified the Convention and hence accepted the jurisdiction of the European Court of Human Rights to ensure compliance 11. The Convention was not designed to provide general protection of the environment and therefore does not mention any right to a sound and healthy environment. The European Court of Human Rights has nevertheless handled an increasing number of complaints in which individuals have argued that adverse environmental conditions breached at least one of their Convention rights. In such cases, the adverse environmental factors may affect the individual in three different ways: First, the fundamental rights of the individual protected by the Convention may be directly affected by the adverse environmental factors. For example the pollution from a nearby chemical plant might damage the health of the individual. Second, protection of the environment may be in the ' general interest' of the community and therefore justify the interference in the human rights of the individual. For example, the State may restrict the peaceful enjoyment of the individual's possessions in order to protect the environment if it is considered to be in the ' common good' of the community to do so and the action is hence justified. Third, the Court has established that public authorities must follow certain procedures and observe certain requirements in relation to the release of information, communication with the public, access to justice and in some cases the participation of the public in the decision making processes. The individual may hence bring forward a claim to uphold his procedural rights if these have been infringed. The Convention allows individuals to apply directly to the European Court of Human Rights if they feel that their rights or freedoms have been infringed 12. The application is

then dealt with by the European Commission of Human Rights, who decides whether it fulfils the admissibility requirements of Article 35. If the Court finds that there has been an unjustified or illegal violation of the Convention, it is able to award compensation to victims and/or order the state in question to take the necessary measures required to ensure compliance. As no right to a clean environment is mentioned in the Convention or any of its protocols, many applications to the court relating to the protection of the environment in its early existence were dismissed on the basis of *ratione materiae* 13. The Court has dealt with this obstacle in recent years through the exercise of 'judicial activism' – utilising the Convention to provide a certain degree of indirect protection with regard to environmental matters 14. The fact that the Court is not bound by its previous decisions means that it is able to take an 'evolutive approach' 15 to the protection of the environment and by applying a broad interpretive approach, utilise the existing Articles to stop the interferences in the Convention Rights caused by adverse environmental factors. In a number of judgements, the Court has referred to the Convention as a "living document" 16 and hence its interpretation of the rights and freedoms protected by it can be adapted to the social conditions, which change with time. This active approach is favoured in the first category of cases mentioned above, where the protection of the rights of the individual would indirectly lead to the prevention of the degradation of the environment. On the other hand, alongside judicial activism, the Court has also demonstrated an element of 'judicial self restraint', particularly evident in the second category of cases where the interference with the Convention Rights of the individual can be

justified, if the State is acting in the 'general interest' of the community. Judges in Strasbourg often value the wide margin of appreciation in such cases and hence hold back, as can be seen in *Coster and others v UK* 17. Mahoney explains that the margin of appreciation should be seen as a 'voluntary concession made by the Court in the exercise of judicial restraint'. In general, all interferences with the fundamental rights of the individual must be 'in accordance with the law' and pursue a 'legitimate aim necessary in a democratic society' 18. To assess whether this has been satisfied, the Court uses both the test of 'fair balance' between the state's interests and the interest of the individual and the test of 'proportionality' 19. Has the State acted proportionally pursuing the relevant legitimate aim and has a fair balance been struck between the various competing interests at stake (for example if there are other less severe methods of dealing with a particular situation, then they must be applied)? There is a shared responsibility of protecting human rights and freedoms between the Court and the Contracting States, yet the Court has recognised that national authorities are often best placed to make decisions in cases concerning the environment, as a number of difficult social and technical aspects have to be considered. This ideal is referred to as the 'principle of subsidiarity' and has been stressed in the 2010 Interlaken Declaration of the High Level Conference on the Future of the European Court of Human Rights 20. In certain cases however, a European approach is required and hence the Court will be more willing to intervene. In such cases the margin of appreciation is very limited and often irrelevant, as the Court seeks to standardise rather than harmonise the particular State's approach to an issue. As stated by Paul



Mahoney – ‘judicial activism and judicial self restraint in the ECtHR are both sides of the same coin’ 21. It is this dynamic approach of the Court, which leads to the environment being protected even when the Convention as an instrument, was never designed to do so. The three main categories of indirect protection will be investigated below with reference to all of these principles and considerations.

## **The Admissibility Criteria**

Article 34" The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. Article 35 of the ECHR outlines the admissibility procedure for applications to the Court regarding any breaches of fundamental rights protected by the Convention." Article 35.3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. X and Y v The Federal Republic of Germany 22 – was the first published case brought before the Court which related to environmental issues. The applicant brought the case under

<https://assignbuster.com/the-role-of-the-european-court-law-constitutional-administrative-essay/>

Articles 2, 3 and 5, complaining about the use of an adjacent plot of land which was used for military purposes. The Commission dismissed the case on jurisdictional grounds, as incompatible *ratione materiae*, explaining further that the 'right to nature preservation' effectively being argued for in this case is not included in the catalogue of rights and freedoms protected by the Convention. Soon however, the Commission confirmed that bad environmental conditions could in some cases interfere with the individual's enjoyment of rights and freedoms guaranteed by the Convention. Hence applications complaining of environmental abuse were considered admissible, thus creating an indirect way ('par ricochet') of protecting the environment. Parallel to these claims, the Commission also started accepting applications which related to individual complaints about interferences in the Convention Rights which, which were being argued by the relevant State as acts pursuing a legitimate aim, namely, that of 'safeguarding good environmental conditions as a general interest' (second category of cases).

### **Indirect Protection of the Environment – Environmental Pollution an Interference with the Exercise of Convention Rights**

This category of environmental protection relates to cases where the State fails to act in order to protect the fundamental rights and freedoms of the individual or acts in a way contrary to these rights, and by doing one of these two things also harms the environment. Such actions are not justified under the Convention, hence the need for the European Court to interfere in the situation. In these cases there is a clear relationship between the protection of the fundamental right in question and the protection of the environment,

hence the protection of such rights, indirectly leads to the protection of the environment. Powell and Rayner v. the United Kingdom 23 and López Ostra v. Spain 24 began this series of cases and as will be seen below, applicants have submitted cases under a number of different Articles since then. Most of the cases in this category were only seriously considered by the Court in relation to Article 8 and one in particular related to Article 2 (Öneryıldız v. Turkey 25 - this case is the first and currently only example of a potential violation of the right to life under Article 2 26). These cases will now be discussed below under the relevant Articles of the Convention.

Article 2 - 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." Article 2 of the Convention protects the right to life. The State therefore has a positive obligation to safeguard the lives of the people within their jurisdiction through a properly implemented legislative and administrative framework. Dangerous activities carried out by both public authorities and private companies such as running nuclear tests and operating chemical factories which pollute the surrounding environment with dangerous chemicals may infringe the right to life and hence the authorities must be able to regulate and manage the potential risk.

Furthermore, the public has a right of information concerning such activities, especially if they pose a risk to the health of the individual or especially a risk of death. If the authorities failed to follow such procedures then the Court is able to charge them with a criminal offense and/or order for compensation to be paid to the applicants. *Öneryildiz v. Turkey* (2002 Chamber; 2004 Grand Chamber) 27 The applicant's family lived near a slum in Turkey. A methane explosion occurred in 1993, killing nine members of the applicant's family and injuring many others. The applicant complained that the Turkish Government's failure to warn him of the dangers related to living near the rubbish tip amounted to a breach of Article 2 of the ECHR. The Chamber concluded that the authorities should have known that the inhabitants of such areas (slums) faced a real and immediate risk to their health and life; they therefore failed to comply with their duty to inform the inhabitants of those risks. The case was appealed to the Grand Chamber. The Grand Chamber agreed with the lower Chamber that the Turkish authorities had known or ought to have known of the risks to the inhabitants of the slum and hence failed in their duty under Article 2 of the Convention to take the necessary preventive measures. This is especially so, as the authorities themselves had set up the site and authorised its operation. Evidence also showed that the Council responsible for the site, opposed the recommendation of the Prime Minister's Environment Office to bring the rubbish tip in line with applicable standards. In paragraph 90 of this case and similarly in a later case of *Budayeva and Others v Russia* 28, the Court outlined the requirement of the State to have in place a legislative and administrative framework to deal with such situations. Particular emphasis in

those judgements was also put on the public's right to information of such activities and their dangers. Article 8 – 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." Powell and Rayner v. the United Kingdom (1990)<sup>29</sup>This case referred to noise pollution. Due to the close proximity of the applicants to Heathrow Airport, there was a significant amount of noise from aircraft at night. The applicants claimed that they were victims of an unjustified interference by the United Kingdom in the right guaranteed to them by Article 8 of the Convention. The Court agreed that the quality of the applicants' private life and the enjoyment of their home had been adversely affected by the noise generated by Heathrow Airport. The Court however also pointed out that international airports were crucial to the economic success of countries and hence need to be situated in densely populated areas. In this case, the Court unanimously decided that the UK did not exceed the margin of appreciation afforded to them. The balance has not been upset and the Court recognised the importance of large international airports to the wellbeing of the State's national economy. Furthermore, the Government of the United Kingdom have taken all the necessary precautions to prevent an imbalance being created between the harm done to the individual and the general interest

pursued. This case is a demonstration of the fact that the Court is unwilling to allow the environmental concerns of individuals take priority over the broader economic concerns of the community. In paragraph 44 of the judgement, the Court made a comment in relation to the margin of appreciation it respected in its decision – it stated that there is ‘ no substitute for the assessment of the national authorities of what might be the best policy in such complicated social and technical cases. In this area, the Member States enjoy a wide margin of appreciation and are best suited to make the decision.’ On a more positive note for individuals and environmental protection in general, it could be said that this is one of the earliest examples of the Court’s willingness to be more ‘ open’ when dealing with applications relating to environmental concerns of individuals 30. López Ostra v. Spain (1994) 31In the case of López Ostra v. Spain - the applicant, relying on Articles 8 and 3 of the Convention stated that her right to enjoy her home and private life has been violated due to a waste treatment plant which had been situated closely to her home. The central issue for the Court was whether the defending State has struck a fair balance between protecting the individual rights of the applicant and the interests of the broader community. In relation to Article 8, the Court unanimously found there to be a violation due to the reluctance of the local Spanish authorities to remedy the situation. The case did not amount to degrading treatment under Article 3 however. The Court in this case, although finding a violation of the Convention, once again related to the precedence of the general interest of the community and the enjoyment of a wide margin of appreciation by the member States in cases concerning the environment.’

Naturally, severe environmental pollution may affect individuals' wellbeing and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of the positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights...-... or in terms of the 'interference by a public authority' to be justified... the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation'.<sup>32</sup> This case opened the door to further similar cases. *Guerra and others v. Italy* (1998)<sup>33</sup> Applicants alleged a violation of 2, 8 and 10 as the state failed to notify them of risk factors and how to proceed in the event of an accident at the nearby chemical factory. The Court agreed that such environmental pollution could adversely affect the enjoyment of peoples' homes and private and family life. There had been a breach in this case of Article 8; the local authority should have notified them of the potential risks of living in the area so that they could make an informed choice. Here it was not the action of the authority which led to the breach but instead their failure to act. *Hatton and others v. the United Kingdom* (2001)<sup>34</sup> The applicant alleged a violation of Article 8, due to the high level of noise from the nearby Heathrow Airport. Prior to 1993, Heathrow controlled the noise levels from aircraft by limiting the amount of takeoffs and landings taking place at night time. After 1993 however, the system is one based on noise quotas; each aircraft type is assigned a "quota count", the noisier the aircraft, the higher the quota

count. These limits were strictly imposed between 11. 30pm and 6am. The European Court once again recalled that under Article 8, the State enjoys a certain margin of appreciation in determining the steps necessary for compliance; these steps must however satisfy the requirement of proportionality. As a general rule, the Court stated: 'in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others'.

35 In this case, the Government's efforts to mitigate the noise nuisance constituted 'modest steps' at improving the night noise climate. They had not 'interfered' with the private or family life of the applicants as the airport nor the aircraft were owned or operated by the Government, however they still had a positive duty to take reasonable and appropriate measures to secure the applicant's rights under Article 8 and to strike a fair balance between the individual's personal rights and the interests of the community as a whole (economical interests). The Court held that the UK failed to do this and hence were in breach of Article 8 in this case. The mere reference of the State in this case to the economic well-being of the community as a whole, was not sufficient in itself to outweigh the rights of the applicants. Although the Court recognised that night flights did to some extent contribute to the national economy as a whole, the significance of the contribution has never been assessed and evaluated by the Government. The Court further stated that only limited research had been conducted into the area of sleep disturbance and prevention post 1993 and a proper and complete investigation is required 36. The most important point in this judgement was the need for a fair balance to be struck between the right of



the individual and the wider interest of the community. The case was referred to the Grand Chamber by request of the Government on 19 December 2001. In its opinion and contrary to that of the Lower Chamber, it held by 12 votes to 5 that there has not been a violation of Article 8. They said that although the noise pollution did cause sleep disturbances, it did not intrude into an aspect of private life comparable to that of the criminal measures considered in the case of *Dudgeon* 37 (where there was a very narrow margin of appreciation and continuous infringements by the State). Hence the Grand Chamber decided that the State had a wide margin of appreciation in this case and that they struck a fair balance between the interests of the community as a whole and the individual rights of the applicants. There had not been a breach of Article 8 of the Convention. It is important to note in this case that the dissenting judges issued a very powerful opinion on the case, stating in paragraph 2 of the Joint Dissenting Opinion: 'In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against nuisance caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.' In other words, they stated that the judgement of the Court in this case stepped away from the "evolutive" approach applied in previous cases such as *Lopez Ostra* and deviated from these developments in environmental protection. In paragraph 5 of the Joint Dissenting Opinion they even said that it was "a step backwards". The case was a clear affirmation by the Grand Chamber of the Court that there is no such 'human right to a clean

environment’ and that environmental considerations in such cases do not have any special status. Furthermore, while conducting the ‘ fair balance test’ and the test of ‘ proportionality’, adverse environmental factors are only one of many considerations for the Court. Even though the Court confirmed that the State has a positive duty to safeguard rights protected by Article 8 of the Convention, yet does enjoy a rather wide margin of appreciation, again highlighting the Court’s subsidiary role in such cases 38. *Kyrtatos v. Greece* (2003) 39The applicants complained that a local construction site had led to the destruction of the physical environment around their property and hence negatively affected their life (relying on Article 8 of the Convention). They stated that the area directly opposite their home had lost all of its scenic beauty and that there was further environmental pollution caused by noise and light emanating from the firms operating in the area. The ECtHR responded stating: ‘ Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.’ 40It did however state that environmental pollution may interfere with the peaceful enjoyment of the applicants’ homes. For this to be so however, one of the rights mentioned in paragraph 1 of Article 8 must have been adversely affected. Unfortunately, general deterioration of the local environment is not one of those rights; there must be a harmful effect on the individual’s private life. In this case there was no such interference. *Taskin v. Turkey* (2004) 41Ten Turkish nationals complained about a local company which was granted a permit to operate a goldmine in their area using a

process of cyanidation, one which brings risks to health and the destruction of the local ecosystem. They previously successfully set aside the permit on these grounds, however these previous judicial decisions were not considered by the national Administrative Court when granting this one. The applicants appealed to the ECtHR, alleging a violation of their rights protected by Articles 2, 8, 6. 1 and 13. The Court stated that by refusing to comply with the previous judicial decision, the authorities had failed to discharge their obligation to protect the applicants' rights under Article 8. The Court also held unanimously that there has been a violation of Article 6. 1. The European Court emphasised the fact that the applicants did not complain of a general and undermined risk for the environment but instead of a real and direct risk for their physical integrity caused by the cyanide leaching during the gold extraction. *Moreno Gómez v. Spain* (2004) 42 The applicants complained that the Valencia City Council's failure to put a stop to continuous night-time disturbances amounted to a breach of Article 8. The right at stake was 'the right to sleep at night' and that was a crucial component of the right to private life. It was found that the State was in breach of Article 8, as they failed to take reasonable steps to try and protect that right. *Fadeyeva v. Russia* (2005) 43 The applicant lived in close proximity to a privately owned steel plant and over a significant period of time was exposed to a high concentration of toxic chemicals. The Court held that the exposure of the applicant to various toxic elements from the local chemical plant exceeded levels that were safe for her health and the detriment to her wellbeing violated her right under Article 8. In its judgement, the Court outlined the conditions which have to be fulfilled in order for the applicant to

succeed in a claim under Article 8. The applicant has to prove that firstly the State interfered with their " private sphere" and secondly that the nuisance reached a sufficient level of severity:" in order to fall under Article 8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the Applicant's private sphere, and, second, that a level of severity was attained." 44The Court affirmed once again that the State has a wide margin of appreciation and that it is best suited to make decisions regarding local environmental needs and conditions and that the Court merely acts as a ' subsidiary body' ensuring that the justifications provided by the State in cases of interference with the individual's Convention Rights are well grounded and sufficient. On the other hand it is important to note that the State may be held responsible in cases where it fails to regulate the private industry, as it did here. The State has a positive duty to protect individuals and must take all reasonable measures to protect the applicant's right under Article 8 of the Convention. *Dubetska and Others v. Ukraine* (2011) 45A very similar case to that of *Fadeyeva v. Russia*, where the Court stressed the detriment complained of must reach a minimum threshold before it will constitute a breach of Article 8. The applicant was living in a rural area near both a coal mine and a factory. She complained that she suffered chronic health problems as a result of the pollution from these two industrial plants. In its analysis, the Court explained that industrial pollution undoubtedly affects the health of the individual and their quality of life, however it is often difficult for the Court to quantify the amount of contribution to the ill health by other relevant environmental factors. The Court found however, that in this case the applicant lived in an

unsafe area (subject to the local legislative framework) and hence there was a breach of Article 8. Article 1, of Protocol 1 - 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." Article 1 Protocol 1 gives States the power to limit the fundamental right to property if necessary to succeed in their duty to safeguard the environment and affirm the general interest of the community. This method of indirect protection will be studied in the next section of the paper. It is important to consider first, how the peaceful enjoyment of one's possessions may instead directly require the State to guarantee certain environmental standards. This means that in certain situations, the State may have positive obligations to protect this right. This obligation may especially arise in cases of dangerous activities which have a harmful effect on the environment in which the applicants reside. In *Öneryıldız v. Turkey* 46 (a case previously mentioned under claims brought under Article 2 above) the Court stated in its judgement, that the applicant could claim protection under Article 1 of Protocol 1. The failure of the national authority to regulate the dump site had amounted to a breach of positive duty under Article 1 of Protocol 1. As this case was brought predominantly under Article 2 of the Convention, it is important to explain the difference between the State duties

and responsibilities under Article 2 and Article 1 of Protocol 1. The Court has clarified this in the case of *Budayeva and Others v. Russia*: ' While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives.' 47

### **Indirect Protection of the Environment – A matter of general interest**

The second method of indirect protection of the environment applied by the Court, is to allow States to exercise their margin of appreciation in the consideration of environmental issues as a matter of general interest, hence justifying the interference with Convention Rights of the individual concerned. In the case of protection of the environment as a matter of general interest the Court weighs out the competing interests of the parties and although in these cases it may recognise that a fundamental right has been breached by the State, if a fair balance had been struck and the limitations justified, then the decision would not be contrary to the Convention. This indicates that although the protection of an individual's fundamental human rights is crucial, if at conflict with the legitimate general interest of the community, the latter will prevail. The process which the

Court follows is a very careful one. The importance of the rule of law in a democratic society is particularly relevant to explain the need for a cautious approach. It begins with an assessment of whether the action of interference in the human right was in accordance with the internal law of the State. Was it legal? The second step in the process of the Court is to analyse whether the State was pursuing a legitimate purpose - did it act in the interest of the public? States enjoy a wide margin of appreciation when the question of what is in the public interest is at stake, hence unless there is no reasonable foundation for their claim, the State will enjoy very wide discretion 48. Third, the Court will apply a test of proportionality to the case at hand and assess the competing interests of the parties. Were the legitimate aim of the interference and the means used to interfere reasonably proportional to each other? Ultimately the test is also applied to see whether there is reasonable proportionality between the general interest of the community on the one hand and the need to protect the individual's human rights on the other. Hence it is a two-part test. Through this assessment, the Court makes sure that the applicant does not have to bear an excessive and disproportionate burden 49. Article 1, of Protocol 1 Under this Article, the individuals are entitled to the peaceful enjoyment of their possessions and are protected from the unlawful deprivation of property. On the other hand, this right is not absolute and the public authorities are entitled to control the use of private property in accordance with the general interest of the community. Hakansson and Sturesson v Sweden (1990) 50 The Land Acquisition Act 1979 required individuals who purchased land in this case to either apply for a special permit to keep the property for more than two years or to otherwise

resell it in two years. The owners appealed to the Court stating that this is a serious violation of their rights under Article 1, Protocol 1. The Court held that as the interference in this case was to promote the rationalisation of agriculture, undoubtedly a legitimate " public interest" for the purposes of Article 1, Protocol 1. Hence proportionality was maintained. *Pine Valley Developments Ltd and others v. Ireland* (1991) 51The applicants (*Pine Valley and Healy Holdings*) were companies which specialised in the development of land. They had purchased a significant area of land in the county Dublin, however were subsequently refused planning permission. The ECtHR stated that this was not a violation of Article 1, Protocol 1 as it was done proportionately with a legitimate aim - to preserve the green belt. *Coster v UK* (2001) 52The case stressed the fact that the margin of appreciation granted to national authorities in matters such as planning and general policy is quite wide. Article 1, Protocol 1 guarantees to the individual the right to property, however one of the rules that property is subject to, is that the use of property can be controlled in accordance with the general interest. *Posti and Rahko v. Finland*, judgment of 24 September, 2002. 53Applicants to the European Court in this case were fishermen of the coastal region of the Gulf of Bothnia. Under section 116, subsection 3 of the 1982 Fishing Act the Ministry of Agriculture and Forestry has the power to restrict fishing in order to safeguard future fish stock. The local authority hence prohibited the fishing of salmon in the area where the fishermen operated. The applicants claimed that they had a right under Article 1 of Protocol 1 to the peaceful enjoyment of their possessions, which included the right to fish in the coastal area of the Gulf. They stated that the decree



violated this right. The ECtHR found this interference to be proportionate to the legitimate aim pursued by the state - a general interest of protecting fish stocks. *Zvolský and Zvolská v. the Czech Republic* (2003) 54 In this case, the Court found that there has been a violation of Article 1, Protocol 1. As even though the aim pursued in this case was legitimate, the fact that applicants had to return, without any compensation, property which they acquired in good faith as a gift under a deed amounted to a disproportionate burden which cannot be justified under the general interest exception. *Katsoulis and others v. Greece* (2004) 55 In this case, the owners of the land applied to Supreme Court to have permission to erect a multi-storey building. The town planning department of the district council however then laid down new conditions which were not present in the relevant legislation. These new conditions which effectively refused to comply with the earlier Supreme Administrative Court's judgement, were unanimously held by the Court to be a violation of Article 6. 1 and Article 1, of Protocol 1. Article 8 *Buckley v. the United Kingdom*, judgment of 26 August 1996 56 The applicant was a British citizen. As she was of Gypsy origin, she had lived in caravans with her three children parked on land owned by her in South Cambridgeshire, England. In 1989, the applicant applied retrospectively to the local council for planning permission for the three caravans on her sight. The District Council refused this permission as among other reasons, the planned use of the land would detract from the rural and open quality of the landscape. This was contrary to the aim of the local development plan which was aimed at protecting the local countryside from all but essential development. The European Court in this case affirmed reluctance to interfere with the discretion of the local

council on how to implement town and country planning schemes. In such situations, national authorities are much better placed than an international court, to make a decision relating to the local countryside. It is much more able to evaluate the situation and come to a proportionate decision. This was a similar judgement to a previous case of the Court - *Gillow v. the United Kingdom* (23 October 1986) 57. In this case as in *Buckley*, the Court was satisfied that the responsible planning authority supplied sufficient relevant reasons to justify the resulting interference with the fundamental right to respect for the applicant's home. The Court held that there has been no violation of Article 8 in both of these cases and the actions of the local planning authority were proportional. Article 9 *Vergos v. Greece* (judgment of 24 June 2004) 58 The applicant in this case tried to build a church on land owned by him. The planning permit was however refused by the local authority. He claimed that this was a violation under Article 9 of the Convention, under which he has a fundamental right to demonstrate his religious belief. The Court however stated that this was not a case concerning religious freedom but rather one concerning local land-planning regulations. As seen before under applications regarding Article 8 breaches, the national authority is given a wide margin of appreciation in the planning of land use, hence there was no breach found here and the actions of the local authority were held to be proportionate.

### **The Right to Receive and Impart Information and Ideas on Environmental Matters.**

Article 10 of the Convention protects the general right to receive and impart information. From this stems the third category of the indirect protection of

the environment. In relation to environmental decisions and issues, the Court has found that there is a strong public interest in giving individuals the ability to contribute to the decision making process on matters of public interest. This right is also particularly important in a democratic society. There is a positive duty on the state to disclose information if the individual rights protected by Articles 2 and 8 are at risk. If this right is restricted by the State, then it must justify that restriction by demonstrating that the restriction is proportionate to the legitimate aim pursued and that a fair balance between the interests of the individual and that of the community has been struck. In other words, it must be shown that such restrictions were ultimately 'necessary in a democratic society' 59. As well as using the term 'necessary' to describe interferences with this right, the Court also described those interferences which have a "pressing social need" as justified 60.

Below are a few key examples of the Court's judgements in this area. Article 10" 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." *Vides Aizsardzības Klubs v. Latvia* 61 An environmental association was ordered to pay damages by the national court of Latvia to a local mayor, after they failed to prove their public allegations of him failing to halt building works which were causing significant damage to the local coastline. In its judgement, the ECtHR noted that there was a very sensitive issue at hand in this case and this kind of participation by a public 'watchdog' was essential to a democratic society even if the information publicised was in some cases inaccurate, as long as it was published in good faith. The organisation pursued a legitimate aim under article 10 and it was hence disproportional to fine it for being inaccurate. *Guerra and Others v. Italy* 62 In the case above, the Court protected the publication of information by non-governmental organisations relating to important environmental issues. In this case, it upheld the fact that failure by authorities to warn the public of the potential risks and emergency procedures to be followed in the case of a serious accident infringed their right to freedom of information protected by Article 10 of the Convention. Furthermore, based on Article 2 of the Convention, states are duty-bound to "adequately inform the public about any life threatening emergencies, including natural disasters" 63. If the government of the State involves itself in dangerous activities which might adversely affect individuals' health, an accessible, effective procedure must be designed and set up to enable individuals to seek and receive all of the relevant and important information 64. The Court has also stated that the public should have access to the results of any health impact assessments which have been carried out by the State 65.

## **Analyses of the Court's Approach**

When assessing the case law of the ECtHR it is possible to point out a few advantages and disadvantages, contributions and set-backs to the promotion of environmental rights and the combating of environmental degradation.

First of all, it is easy to notice that the Court sees the concept of 'environment' as a very broad one. There is no attempt to define the concept by the Court and hence 'environmental issues' considered in the case law, range from general ones, such as local planning of land and protection of agriculture and forestry, to more specific components such as protection of nature reserves, fish stocks and particular species of animals such as the woodpecker 66. This positive approach and broad interpretation, allows for the Court to get involved in a wide range of specific global environmental issues, promote the importance of the protection and monitoring of these, as well as highlight the fact that combating environmental degradation is a legitimate governmental purpose 67. The Court applies the same technique in both of the contrasting approaches to the indirect protection of the environment; when adverse environmental factors interfere with the Convention Rights of the individuals and when upholding the protection of the environment as a general interest pursued by the State. In summary, it is a three step process of firstly establishing legality, then approving a legitimate purpose and finally judging proportionality. A difference in the rigidity of evaluation varies however, as the Court in situations where adverse environmental factors cause an interference with Convention Rights applies a much more rigid approach, when assessing the margin of appreciation of the Defendant State 68. For the interference in the

applicants' rights to be justified, the State must not simply provide relevant reasons, but show that the measures taken were strictly necessary and that there were no other less restrictive means available to achieve the desired legitimate governmental purpose 69. The test of proportionality is therefore applied much more strictly in these cases. For example, it has been demonstrated in the above cases that ' protection of the economic wellbeing of the country' is no longer considered to be a sufficient justification in itself, for the interference in rights protected by Articles 2 and 8 70. In this first category of cases, of which Article 8 provides the most common basis, the Court takes a more cautious stance in relation to allowing States a wide margin of discretion when their actions or inactions interfere with the fundamental rights of the individual protected by the Articles of the Convention and by doing so indirectly harm the environment. The Court clarified that States do not only have a negative duty to not violate fundamental rights guaranteed by the Convention but also a positive duty such as to ensure that all reasonable and appropriate measures have been taken to prevent risks to the right to life and right to privacy. We can see the Court stepping away from the traditional negative approach to such cases and taking a tougher stance on the protection of human rights and hence indirectly protection of the environment; the ' greening' of existing human rights laws. This also leads to the Court applying a much more expansive interpretation of the particular Convention Rights. For example, when considering the right to privacy (Article 8) in the case of Lopez Ostra v Spain 71, the Court accepted that ' severe environmental pollution may affect the individuals' well being and prevent them from enjoying their homes in a way

as to affect their private and family life adversely, without however seriously endangering their health'. Other examples that are now considered by the Court to be under the right protected by Article 8 include: right to be informed about real and potential risks 72 and the right to sleep peacefully at night 73. Did the Court effectively create a right to a 'clean' environment? Dr. Nükhet Yılmaz Turgut believes that there is a commonly shared view, that human beings, at least at a theoretical level (if not at a practical one) have a right to a 'decent environment' 74. However as this right may only concern and be enforced by humans and not other organisms, perhaps it is more accurate to suggest 'a right to live in a healthy environment' 75. This right establishes a fundamental connection with the 'right to live' and furthermore live in a 'healthy' environment; perhaps the two most important aspects of survival for all organisms 76. In the series of cases investigated where the alleged environmental pollutions had caused a breach of the fundamental rights protected by Articles 2 and 8 of the Convention, it was made clear by the Court that the key issue was not the environmental harm caused, but the need to protect the rights and freedoms of the claimants guaranteed by the Convention. A number of issues flow from this - firstly we can conclude that effective protection of individual rights under these Articles leads to indirect protection of the environment. Secondly, only certain rights (Articles) have been considered in these cases. It seems also that the Court concentrated on the short term, identifiable interests of the claimants rather than considering the long term implications of the environmental harm in each case. There is hence no requirement on States to eliminate environmental harm under the ECHR. Only if a definite link

between the interference with the fundamental rights of the individual and the environmental harm has been established, will measures to stop the relevant environmental harm be ordered by the Court. Furthermore, what level of adverse effect is tolerable and allowed? The Court is cautious on setting the 'minimum level of harm' and in the case of *Fadeyeva v. Russia* 77, stated that the relevant 'minimum' threshold depends upon all of the circumstances of the particular case and can include issues such as the duration and intensity of the nuisance, and the seriousness of the mental and physical harm. There must be a causal link between the interference and the applicant's rights at issue. Although again there is no clear guideline on how to establish the link and how strong it has to be, looking at the terminology of the Court in relation to it, the following terms were used to describe the threat to the individual: immediate, personal, real, serious, imminent and specific 78. If the threat is superficial, tenuous, remote, and hypothetical (terms mentioned by the Court in the cases of *Balmer-Schafroth and Others v. Switzerland* 79, *Athasanooglou and Others v. Switzerland* 80 and *Kyrtatos v. Greece* 81), then it will not be substantially dangerous to warrant the Court making a declaration that the harm interferes with the fundamental rights of the individual. In the cases of *Balmer-Schafroth and Others v. Switzerland* and *Athasanooglou and Others v. Switzerland* both concerning the operation of nearby nuclear plants, the Court stated that because the applicants failed to show that they faced a real and immediate risk, any environmental risks were consequently also dismissed. In *Kyrtatos v. Greece*, the Court highlighted that the crucial element is the presence of a harmful effect on the claimant's private or family life and not simply the



general deterioration of the surrounding environment; neither Article 8 nor any other Article in the Convention are designed to provide general protection of the environment. Since the Court is primarily concerned with ensuring the health of individuals, 'the right to live in a healthy environment' is given a very narrow formulation in respect of Article 8. It is because of this very narrow approach it could almost be said that the protection of the environment in these cases was coincidental and it is very difficult to suggest that the Court has established environmentalist jurisprudence 82. Desgagne discusses how this 'victim requirement' is another factor which particularly limits environmental protection by the Court 83. Applications are generally brought forward by individuals, a group of individuals or non-governmental organisations and inter-state applications to the Commission have been rare. The applicant must be a "victim of a violation of (his or her) rights" as mentioned in Article 34 which governs the application procedure for individuals and non-governmental organisations. In *Klass v Federal Republic of Germany* 84 the term "victim" was held to be a "person directly affected by the contentious act or omission." Therefore applications by non-governmental organisations must initially show that they have been affected by the adverse environmental factors and not that they are simply acting in the interests of their members or the public 85. Although it is important to point out that there is no requirement of injury to be caused to the individual or group of individuals. The victim requirement prevents people from submitting applications to the Court simply because they may believe that a certain action by the State is wrong or contravenes the Convention; infringements must be concrete and as mentioned before, a

direct link between the environmental damage and the infringement must be established. This procedure makes it very difficult to protect the environment and prevent environmental degradation. The Court has recognised the importance of environmental protection but " thus far, the Court and the Commission have not completely closed the circle of the interrelationship between the enjoyment of human rights and the level of environmental quality" 86. Collective and individual aspects have not been merged and the thresholds for success remain high. It is widely accepted that protection of the environment is in the interest of the common good or the general interest. The cases above, were examples where this general interest conflicts with the fundamental rights of individuals or in other words the interests of the individuals. Could this show that in this category of cases, the environment has supremacy over certain other interests? Is this because long term interests are considered giving the environmental issue more weight? Although it is recognised that in some cases governments are able to pursue the legitimate aim of protecting the environment and by doing so limiting certain fundamental rights and freedoms of individuals, human rights law does not directly protect the environment. The above judgements do not provide a direct legal basis for the right to the environment, therefore it could be said that the Court did not in fact challenge the traditional concepts of human rights protection. Handl 87 further states that the ' right to an environment' is a mixture of economic, social, political and cultural rights. This is exactly what makes it rather vague in nature and therefore its implementation in practice, very difficult. As it represents such a wide spectrum of various human rights issues, compliance would be very

problematic. He also agrees that this method of protection is biased towards the individualist approach. Minimum standards of the environment should be made clear by the Court, which should ideally take into account not only the effect on health and private lives of the applicants but also the nonmonetary value attached to the quality of the surrounding environment.

## **Effects of the judgements on Member States**

There is a clear change occurring in the interpretation of the 1950 ECHR, which does not include any express provisions relating to the environment, yet what effect does this have on the Member States? Since the case of X and Y v Federal Republic of Germany 88 which was rejected as incompatible rationae materiae by the Commission as there is ‘no right to nature preservation included among the rights and freedoms guaranteed by the Convention’, an alternative approach has emerged. Lopez Ostra 89 was a significant turning point in the protection of the environment through the ECHR, it was the first time the Court found a breach of the Convention Rights as a result of adverse environmental factors present in a Member State. In general however, the cases studied above show that the Court has demonstrated an unwillingness to order the State to take specific actions to mitigate the damage to the environment 90. It reiterates continuously that it is best for the State to choose how to implement environmental protection policies and the specific means to be used in its domestic legal system in order to ensure compliance with the provisions of the Convention or to tackle the situation which has given rise to a violation of the Convention 91. The Convention is directly applicable in the countries that ratified it. In other words, the national courts in those jurisdictions are bound to apply the

European Convention in the same way as they apply their own provisions of national law 92. In the United Kingdom for example, the provisions of the ECHR are given direct effect in domestic law by the 1998 Human Rights Act 93. To what extent are the judgements of the European Court of Human Rights applied by the national courts of the member states of the Council of Europe? A number of member states view it as legally binding while others may only show humble respect for it. A good example of a national resolution accepting the authority of the judgements of the European Court can be seen in a 2003 resolution of the Russian Supreme Court which states: " The Russian Federation, as a Member-State of the Convention on Protection of Human Rights and Basic Freedoms recognises the jurisdiction of the European Court on Human Rights as mandatory with respect to interpretation and application of the Convention and Protocols thereof in the event of an assumed breach by the Russian Federation of provisions of these treaty acts when the assumed breach has taken place after their entry into force in respect to the Russian Federation. . . . [Therefore] the application by courts of the said Convention should take into account the practice of the European Court on Human Rights to avoid any violation of the Convention on Human Rights and Basic Freedoms." (Resolution " On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation, . . . The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention. . . ." 94. Therefore it is regardless whether the Court's judgements were issued in relation to the

Russian Federation or any other country, when a case concerns the provisions of the ECHR, they are to be considered and applied in national courts. Furthermore, if the case reaches the European Court, then the parties involved are obliged to accept the jurisdiction of the Court and abide by its judgement 95. The protection of the environment at national level is ideal, especially as the Court has a mammoth backlog of cases; 120, 000 recorded in 2010 96. One of the ways the ECtHR can contribute to more successful protection of the environment at national level is by upholding orders made by the national courts, as it did in *Okyay v Turkey* 97. In this case, the ECtHR upheld the decision of a local court to close down three power plants which were polluting the environment. The applicants successfully demonstrated that there was a violation of the right under Article 6 of the ECHR when the national authorities failed to implement an order made by the domestic court.