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ENVIRONMENTAL PROTECTION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS BEYOND ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: OBLIQUE PROTECTION

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INTRODUCTION

It should first be stressed that the word environment does not appear in the European Convention on Human Rights (henceforth Convention)[1] nor in its additional Protocols. However, this does not mean that the European Court of Human Rights (henceforth ECHR) is unaware of the growing concern of European citizens with environmental protection and the need to take this objective into account when weighing up the interests underlying certain measures taken by public authorities[2]. Nothing could be more natural, moreover, if we bear in mind the dynamic and vivifying nature of the ECHR case law, aligned with the trend of "creative interpretation" that has been seen in the case law of international human rights courts[3].

What some more enthusiastic doctrine qualifies as the recognition of a *right to the environment* by the Court of Strasbourg is, after all, an operation to convert classic "negative rights"[4] (rights to life; to privacy and to the inviolability of home; to freedom of expression - Articles 2nd, 8th and 10th of the Convention) into rights to claims[5]. As SUDRE explains, this application of the theory of "positive obligations" contributes to overcoming the classic conception of rights of freedom as simply negative rights[6], interpreting rights *evolutionarily* as the inviolability of the home or life and pointing them out as the support of pretensions of public action. This theory was used for the first time by the ECHR in the Case related to certain aspects of language teaching in Belgian schools (cases nºs 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July1968), and has continued to serve as a basis for several decisions, although not always consensual[7].

This text will not analyze the cases, majority, of tutelage reflecting the environment through article 8 of the Convention[8]. In fact, this text aims to illuminate only and fundamentally three aspects: on the one hand, to highlight how the ECHR, limited by a cast of essentially negative rights, has

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[1] Convenção Europeia dos Direitos do Homem e das Liberdades Fundamentais, assinada em Roma em 4 de Novembro de 1950 no seio do Conselho da Europa e com início de vigência em 3 de Setembro de 1953. A Convenção foi ratificada por 47 Estados (cfr. http://conventions.coe.int).

[2] Para um exaustivo levantamento da jurisprudência produzida pela CEDH (até 2012) no entrecruzamento de direitos vários com a protecção da saúde e do ambiente, veja-se o quadro publicado no Manual on Human Rights and Environment, Council of Europe, 2ª ed., 2012, 143-147 — https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/human-rights-and-environment. Todos os arestos citados podem ser consultados em https://hudoc.echr.coe.int/

[3] Cecilia MEDINA (2013), 649 segs.

[4] Sobre o sentido e alcance primário do nº 1 (do artigo 8º) na delimitação do âmbito de proteção dos direitos aí plasmados, Carlo RUSSO (2000), pp. 307 segs.

[5] Cfr. Jaume VERNET e Jordi JARIA (2007), 521.

[6] Frédéric SUDRE (1995), 363.

[7] Cfr. Fredéric SUDRE (1995), 380 segs.

[8] Esse foi um exercício a que nos já dedicámos em momento anterior — Carla Amado GO - MES (2010), 163 segs.

creatively succeeded in transforming duties of abstention into duties of State protection - calling for a certain "conceptual autonomy" from the Convention[9] - thus providing for protections that reflect the environment as a general interest; on the other hand, to illustrate how the "environment" as an objective value is recognized in ECHR case law as a weighting factor or a reason for a decision; and finally, to point out that protections of the environment as an intrinsic value are barred from the ECHR.

In the first set of cases, the protection of the environment as a context of life - even if urban - is an accidental objective, which derives from the protection of personality rights whose content is reconstructed by the ECHR (1.). In the second group of cases, the protection of the environment/health is the reason for the exercise of the right, the substratum that *carries with it a sense* of a certain action of a subject or group of subjects (2.). In the third place, the environment appears as an objective value, as a *ratio decidendi*, justifying a certain compression of a right (3.). In any of the cases, the protection of the quality of the environment, as an ecosystem or of a particular component, does not constitute the object of the process, because neither is the diffuse interest protected by the ECHR nor it contemplates the legitimacy of altruistic authors to petition for their defense (4.).

For reasons of organization of this work, the cases in which the ECHR associated Article 8 of the Convention with the protection of the environment as a place for living and for people reservation will not be addressed here[10]. On the other hand, mention will be made both to application decisions and to those that disregarded the application of the protection rule allegedly violated whenever in the motivation reflects the interest of environmental protection invocation. The selection criterion is based on the identification of the "protection of the environment" as the basis for the decision, and situations in which it does not appear either as a primary or predominant element[11] or as a differentiating element (in the sense that the general interest protected could have been any other)[12] have been ruled out.

1 THE PROTECTION OF THE ENVIRONMENT BY MEANS OF PERSONALITY RIGHTS: AN OBLIQUE TUTELAGE

In a first group of cases, the protection of the environment is a consequence of the defense of individualized subjective positions - and hardly the expression has the technical meaning that its autonomy as an object of a new branch of law justifies. To recover damages to physical and psychic integrity resulting from the inhalation of toxic products from a factory; or as a result of the explosion of gases accumulated in a garbage dump; or caused by excessive noise generated by aircraft taking off and landing, results in compensation for purely personal damages, relating to legal assets that coincide with the integrity and health of people. The pretension of reparation does not take advantage of the environment in general; at best, the preventive effect of the ECHR's decision will contribute to the increase of the quality of the environment as a met individual greatness - and most of the time this "environment" corresponds to an urban, human, and not strictly natural context.

- **Environmental protection and the right to life (Article 2 of the Convention)**

More than a decade after the Öneryildiz v. Turkey case (case no. 48939/99, June 18th, 2002), this gesture remains a milestone in the expansion of the protection object of Article 2 rule of the Convention - in fact, this decision reveals an increasing boldness of the ECHR in imposing positive

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[9] Cfr. Manuel António Lopes ROCHA (2002), 627.

[10] Para uma análise de alguns desses casos, até 2012, veja-se Carla Amado GOMES (2010), passim, e bibliografia aí citada.

[11] E bem assim casos que não reconduzimos à tutela do ambiente enquanto conjunto de componentes naturais e suas inter-relações [cfr. Carla Amado GOMES (2018), 23-49]. Assim, casos como Borysiewicz c. Polónia, proc. nº 71146/01, 1 julho 2008, no qual não se invocava a violação do artigo 8º, ficam de fora desta análise — e bem assim todos os que envolvem a protecção da saúde, privada ou pública, através da norma de protecção do artigo 8º [de resto, casos como Hatton e outros c. Reino Unido, proc. nº 36022/97, 8 Julho 2003, ou Flamenbaum e outros c. França, proc. nºs 3675/04, 23264/04, 1 março 2012 — são recenseados no Thematic Report Health-related issues in the case-law of the European Court of Human Rights, Council of Europe, 2015, 22-23 — https://www.echr.coe.int/Documents/Research_report_health.pdf], ou seja, indexados aos bens jurídicos integridade física e psíquica/saúde.

[12] Anota-se desde já que a única excepção que admitimos foi a do caso Matos e Silva Ltda e outros c. Portugal, melhor referenciado infra, em 3.2. ii), e a razão prende-se com o facto de essa decisão ser a única, no quadro desta temática, a envolver o Estado português.

obligations on the state[13]. The facts are dramatic: in 1993, thirty-nine people died as a result of a methane gas explosion in a garbage dump on the outskirts of Istanbul, nine of whom belonged to the applicant's family. Having started a long judicial battle to hold the local authorities responsible for the loss of their relatives and the tent where they lived, the appellant was always denied his claim to compensation, on a patrimonial basis (for the loss of the tent, which he considered - although this recognition was expressly refused to him in court - his "property") and on a non patrimonial basis. Having exhausted his in-tern appeals, he advanced to the ECHR, invoking a violation of the Convention regarding the rights to life, privacy, information, property and effective judicial protection (Articles 2, 8, 10, 1 of Protocol 1, and 6, respectively).

For the economy of this text, it should be emphasized that the ECHR reduced the question of the protection duties to the protection of life, judging the claim for non-pecuniary loss based on the violation of Article 2 of the Convention[14]. This is because, although it was widely proven that the authorities knew the inherent risks in the garbage dump and that they had communicated them to the "residents" - illegal - in order to provoke their stampede with a view to the subsequent rehabilitation of the area, the ECHR understood that the authorities did not exhaust the possible measures to prevent risks to people's lives[15].

As DE FONTBRESSIN points out, the ECHR "conferred a kind of transcendental effect on the right to a healthy environment from a biased understanding of the right to life"[16]. Following an appeal by the Turkish state, the Grand Chamber confirmed this position[17], although without unanimity regarding the effects drawn from the violation of Article 2. Some judges, reiterating arguments already put forward in Opinions Dissenting at the first pronouncement, stressed the fact that the ECHR had not even alluded - let alone pondered - to the fact that the injured parties had contributed to the damage. They objected that it would have been the stubbornness of not abandoning tents that they thought were theirs - even though they were illegally built - that led them to remain in a high-risk place, with full awareness of it.

There may be some social "activism" underlying this ruling, as LAURENT underlines[18]. The ECHR would have liked to issue an exemplary decision, which would have encouraged the Turkish authorities - particularly in the regions bordering Istanbul - to requalify the degraded areas and rehouse the population who tries to invade the degraded land without any conditions; otherwise they might suffer further convictions[19].

A similar case of omission of the duty to prevent life risks, this time in the face of extreme natural phenomena - namely floods - deserved a similar approach from the Court in Boudaïeva and others c. Russia (procs. 15339/02; 21166/02; 20058/02; 11673/02, and 15343/02, 20 March 2008). The appellants were victims or relatives of victims of a violent flood in the spring of 2000 in the city of Tirnaouz, and they sued the authorities for failure to take preventive measures that directly caused moral and property damages to themselves and their relatives. The area was often devastated by such events, and the containment dams had deteriorated sharply in the previous year, and local authorities alerted the central government to the imperious need for financial aid for its reconstruction a few

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[13] Sobre este aresto, v. Catherine LAURENT (2003), 279 segs.

[14] Cumpre chamar a atenção para um caso anterior a este, no qual o pedido fora desestimado, mas que já abria boas perspectivas argumentativas a partir do direito à vida. Trata-se do caso L.C.B. c. Reino Unido (proc. nº 23413/949, 9 junho 1998), no qual se discutiu a responsabilidade do Estado por omissão de medidas de protecção do direito à vida num caso de alegada contaminação de um filho ainda não concebido pelo pai, que sofrera exposição a radiações nucleares na sequência de ensaios realizados pelo Ministério da Defesa. A CEDH admitiu a hipótese teórica de fazer derivar do artigo 2º da Convenção deveres de adopção de medidas de informação, salvaguarda e minimização de efeitos, mas afastou a obrigação de indemnizar com base no facto de, em 1960, a informação sobre a transmissão dos efeitos de exposição a radiação a um filho não existir e, subsequentemente, tal exposição não ser sequer considerada um factor de risco. Cfr. Françoise JARVIS e Ann SHERLOCK (1999), 18.

[15] Note-se que, em casos que envolvem exposição intensa a factores poluentes, poderá estar também em causa a violação do artigo 3º da Convenção, que proíbe a submissão da pessoa a tratamentos degradantes. No caso Lopez Ostra c. Espanha, proc. 16798/90, 9 dezembro 1994 (que não cabe analisar neste texto), o Tribunal reconduziu todas as ofensas ao artigo 8º da Convenção, mas não é de excluir, segundo Jean-François RENUCCI (2007), 794, que se a poluição atingir um grau de intensidade intolerável, a convocação do artigo 3º da Convenção seja igualmente feita.

[16] Patrick DE FONTBRESSIN (2006), 96.

[17] Por acórdão de 30 de Novembro de 2004.

[18] Catherine LAURENT (2003), 297.

[19] Sublinhando este mesmo aspecto, Jean-François RENUCCI (2007), 793.

months before the tragedy occurred, which officially led to eight deaths.

The ECHR proved the culpable omission of preventive measures and the consequent violation of the right to life of family members of some applicants. Specifically, the Court found that the lack of early warning systems and the lack of clear information on the risks added to the clear inadequacy of the containment barriers, which helped the population to resettle in their homes before the danger had effectively passed. The protection of the right to life is not limited to an obligation of non-interference and punishment of offenses to this legal asset, but is primarily translated into a set of positive measures to safeguard the physical integrity of people, to be implemented by public entities. Recalling the Öneryildiz case, the ECHR emphasized that such positive obligation materializes from the outset in the provision of objective, timely and sufficient information on vital risks (cf. §§ 130 secs.)[20], to which are added material duties of installation of equipment and introduction of risk mitigation procedures.

A similar picture was appreciated by the ECHR in the case of Kolyadenko and others v. Russia (cases number 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012). Here, too, lives were lost following the fast flooding to which the authorities responded by opening pipes from a tank, without prior warning from the people downstream the river. Among other provisions, the ECHR considered Article 2 of the Convention to have been violated because of a serious failure, imputable to municipal authorities, of protection duties in the construction of defenses against rising water levels and planning, but also because the State had not ensured means for an effective criminal prosecution of those responsible.

Thus, the pretentious scope of protection of the rule in Article 2 has been violated both in its substantial dimension and in its procedural/procedural aspects. In fact, the Strasbourg Court stressed that criminal prosecution does not have to be ensured whenever a public service fails; however, since these are omissions that can put lives at risk, the Court considers that the establishment of criminal responsibility is indispensable to the credibility of the system and to the feeling of security that citizens must have in the face of the authorities that control equipment intended for risk prevention and to which duties of planning and mapping of the territory are committed in order to hinder construction in flood areas (§190). By ordering the filing of complaints with a view to ascertaining such responsibilities, the State has violated the duty to protect life in its procedural dimension.

The duty of the State (Turkish) to protect life was also judged by the ECHR as being disregarded in the case of Özel and others v. Turkey (cases no. 14350/05; 15245/05, and 16051/05, 17 November 2015), here in a predominantly procedural dimension. The ECHR found serious omissions in the field of urban planning and licensing of buildings in areas of high seismic risk by both municipal authorities and real estate operators, omissions that allowed the construction of several buildings in total non-compliance with safety rules, whose collapse caused the death of relatives of the applicants. According to the Court, the violation of Article 2 occurred here both because the compensation granted to the victims' relatives was derisory and because the need to issue a higher administrative authorization to criminally prosecute the municipal officials involved in the licensing process delayed intolerably the (scarce) compensation of the authors (which occurred between eight and twelve years after the earthquake).

From the analysis of these cases it can be concluded that:

- the right to life must be protected both by preventing illegal interference, by the State and by third parties, and by actively promoting positive measures to prevent and minimize vital, natural and technological risks;
- The right to life, in this pretentious aspect of demanding positive benefits, is both substantial and procedural in nature, the latter being translated into the imperative of ensuring guarantees of accountability of the concrete responsible for the omission, maxima criminal. In this second dimension, it is possible to glimpse a strengthening of the criminal way of preventing and punishing "environmental" offenses (by attributing to them the sense of conduct that causes degradation in people's quality of life[21]);
- the right to life ends up consuming the right to be informed about vital risks. The "right to know", which is increasingly important in the context of the society of risk[22] rather than appearing as a realization of the right to be informed[23] - thus at the heart

[20] Cfr. também o caso Tatar c. Roménia, (processo nº 67021/01, 6 julho 2009).

[21] Cfr. Valeria SCALIA (2015), passim.

[22] Cfr. Carla Amado GOMES (2014), 17 segs.

[23] Recorde-se que o TEDH recusou filiar o direito a ser informados sobre riscos de poluição no artigo 10º da Convenção no caso Anna Maria Guerra e outros c. Itália (processos nºs 116/1996/735/932, 19 fevereiro 1998). Os autores, um conjunto de residentes nas imediações de uma fábrica de químicos que utilizava trióxido de arsénio recorreu à Corte de Estrasburgo depois de terem tentado obter informações (junto das autoridades e inclusive dos tribunais nacionais) sobre os componentes emitidos pela instalação, cuja disseminação já provocara, na sequência de um acidente ocorrido em 1976, a hospitalização de uma centena e meia de pessoas por envenenamento. A disposição da Convenção

of Article 10 of the Convention - ultimately incorporates the core of the right to the protection of life as a right to positive state benefits.

This "concentrationist" tendency of the ECHR, in the sense of empowering classical rights faculties, strengthening them, contrary to another line of thought also perceptible in the last decades, of dismemberment (above all, and precisely, of the right to life) and pulverization of rights, such as the rights of access to water, to food, to access to electric energy, is curious. From another band, it induces mixed feelings this assimilation of procedural rights, civically so relevant, by substantive rights[24]: If this movement goes against a trend clearly favorable to its "emancipation," maxima in the framework of the Aarhus Convention[25], and if the ECHR could always have chosen, with more propriety, the path of Article 10 of the Convention, the truth is that the sensitivity of the Strasbourg Court to the procedural side of the "right to the environment" attests to the "cross-fertilization" of the Aarhus systems and the Convention by the hand of jurisprudence[26].

2 PROTECTION OF THE ENVIRONMENT THROUGH FREEDOM OF EXPRESSION (ARTICLE 10 OF THE CONVENTION): A GUARDIANSHIP CHARGED WITH MEANING

The ECHR has so far made two applications of the first segment of Article 10 of the Convention, which encompasses the right to freedom of expression, associated with the defense of the environment/public health. In both cases, the ECHR stressed the importance of disclosure of information on environmental risks by citizens and associations.

The first case involved Latvia - case Vides Aizsardzibas Klubs v. Latvia (case no. 57829/00, 27 May 2004). A non-governmental environmental protection association published a report in a local newspaper alerting to the risks of a planned intervention by the municipal authorities in the Gulf of Riga, which was allegedly facilitated illegally by the mayor. He sued the association for defamation, and the national courts proved him right by ordering him to pay compensation. The association appealed to the ECHR for violation of freedom of expression and the dissemination of socially relevant information, and the Strasbourg Court proved it right by saying that, as a "watchdog" of the public authorities with regard to the protection of the environment, in the context of the powers that national law recognizes it, it is its function to disseminate information on actions that it considers illegal (emphasizing that, before the national courts, the defamed did not prove the untruth of facts advertised) in the field of environment and public health, this mission being essential in the framework of a democratic society (§ 42).

The second case also involved the action of a small civic association in the United Kingdom, whose members published a leaflet alerting to practices followed by the multinational MacDonald's - namely, violation of labor rights, deforestation and sale of food harmful to health. In the case Steel and Morris v. United Kingdom (case number 68416/01, February 15th, 2005), the Court was called to pronounce, among other aspects, on the scope of freedom of expression regarding facts and value judgments in the environmental and health fields, in comparison with the freedom of economic

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alegadamente violada foi o artigo 10º, cuja invocação foi apoiada (embora não unanimemente) pelo Comité que considerou que uma vez que os queixosos residiam numa área de alto risco ambiental tinham direito a receber informação sobre o teor desse risco.

A CEDH recusou aplicar o artigo 10º, escudando-se em que o nº 2 desse dispositivo "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart him (...) That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own"(§53).

[24] Para Jean-François RENUCCI (2007), 795, esta assimilação é paradoxal, embora explicável em razão da abordagem transversal realizada pela CEDH.

[25] Convenção sobre o acesso à informação, participação pública no procedimento de decisão e acesso á justiça ambiental, assinada em 25 de Junho de 1998, em vigor desde 30 de Outubro de 2001.

[26] Chamando a atenção para a jurisprudência Taskin (que será referida infra) na sinalização de um tratamento procedimental específico de direitos de acesso à informação e participação no contexto ambiental, Francesco FRANCIONI (2010), 50. Por seu turno, Jonathan VERSCHUUREN (2014), 7, enfatiza a importância da «adopção» das directrizes de Aarhus, ainda que enviesada, pela CEDH, sobretudo em face de Estados, como a Turquia, que não ratificaram a Convenção de Aarhus.

initiative and the reputation of a company[27].

The ECHR considered Article 10 (in addition to Article 6) to have been violated because the association was faced with a lack of legal assistance and an enormous burden of proof in the case brought against it by MacDonald's for defamation, in addition to pointing out the disproportionate nature of the fines imposed on the members of the association specifically sued. Without denying the multinational company's right to a defense, and without giving up emphasizing that freedom of expression has limits, the Court emphasized that the nature of the information disseminated (and, moreover, already known for some time in the public domain) is of essential importance in a democratic society, and that the procedural difficulties and the large fines are factors that discourage civic action that should not be admitted.

The need to respect due process, as set out in Article 6(1) of the Convention, has been absorbed here by a right that is essentially substantive. As we saw in the previous point, with the capture, by the right to life, of procedural and procedural protective dimensions, freedom of expression must also be assured both in its content and in the methods of its defense. This last decision, like many other ECHR manifestations, has a scope that goes beyond the concrete case, aiming to promote the exercise of freedom of expression and the dissemination of information for a healthier and more responsible life in society. In the words of the Court, in § 95 of the Steel and Morris case, "the general interest in promoting the free flow of information and ideas about the activity of powerful commercial entities, and the likely effect of restraining doubtful commercial conduct by others are factors that should be emphasized in this context, given the legitimate and growing role that groups of civic activists can play in stimulating public discussion on socially relevant matters".

As can be seen from the analysis of the two cases briefly described, the environment appears here to fill, to direct, the freedom of expression. This is the offended right and the link to environmental protection arises because freedom of expression is used to pursue the dissemination of doubtful environmental and health behaviors of large business groups. The protection of the environment (and of health) thus carries with it a sense of freedom of expression.

3 ENVIRONMENTAL PROTECTION AND CONDITIONING OF FUNDAMENTAL RIGHTS

There is a third group of cases where environmental protection is the basis for conditioning or restricting various rights.

3.1 Environmental protection and the right to liberty (Article 5 of the Convention)

In Mangouras v. Spain (GC, case no. 12050/04, September 28, 2010), the ECHR was called upon to evaluate the violation of the right to liberty - accepted by Article 5 of the Convention - namely the right to be present before a judge as soon as possible and to be tried within a reasonable time. The appellant was the captain of the Prestige, which sank off the Spanish coast in November 2002, leaking 70,000 tons of oil and causing an environmental disaster in the area. The appellant took the view that his right to freedom had been offended because he remained in custody for eighty-three days until the insurance company of the owner of the vessel paid the bail of three million Euros, which it considered manifestly excessive in view of his personal situation.

The ECHR held that the Spanish judge did not violate the Convention because, although Article 5(3) requires that bail be maintained only as long as the reasons justifying the arrest prevail and that, as a rule, the value of the bail is determined on the basis of the detainee's assets, it is not inappropriate to admit that, in certain circumstances, the value of the bail is calculated on the basis of the damage caused - which was of an enormous magnitude (§§ 78 to 81). In the words of the ECHR, "the seriousness of the offences, the national and international nature of the disaster caused by the shipwreck and the public commotion verified made the presence of the appellant an "essential objective".// In this context, the Court cannot ignore the growing and legitimate concern, both in Europe and in the rest of the world, regarding environmental attacks. This is attested to by the international movement for the approval of measures to prevent marine pollution and the unanimous determination of States and international organizations to identify those responsible, to judge them and to impose sanctions on them. The growing tendency to criminalize these situations is a further sign that States intend to muscle in the pursuit of these conducts that harm the environment" (§§ 85-86).

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[27] Um caso muito similar foi julgado pela CEDH em 2001 – caso Verein gegen Tierfabriken (VgT) c. Suiça, proc. nº 24699/94, 28 junho 2001. Também aqui estava em causa a liberdade de expressão de uma associação de defesa dos animais, que quis difundir um anúncio televisivo sobre as condições de criação, transporte e abate de porcos e viu-lhe negada essa pretensão pela estação televisiva, com o fundamento de que seria uma peça “demasiado política”. A CEDH detectou violação do artigo 10º, uma vez que a divulgação da informação em causa era socialmente relevante e que, em consequência, a interferência era injustificável numa sociedade democrática.

3.2 Environmental protection and property rights (Article 1 of Protocol 1 to the Convention)

There are several cases in which the ECHR has been called to investigate whether there has been a violation of property rights for reasons related to environmental protection. Let us begin by addressing a first group of situations in which the Court of Strasbourg rejected such an allegation (i.), failing to verify the violation of Article 1 of Protocol 1 and emphasizing the importance of safeguarding ecological values, even with some sacrifice of private property.

i.) Two cases decided in 1991 show some similarity. Both in Fredin v. Sweden (no. 1), case no. 12033/86, February 18th, 1991, and in Pine Valley Developments and others v. Ireland, case no. 12742/87, November 29th, 1991, there were permits to use natural resources revoked for environmental protection reasons (in the first case, revocation of a permit to operate a gravel mine; in the second case, revocation of a permit to build an industrial warehouse). In both cases, the ECHR granted that the decisions involved a violation of the applicants' expectations; however, it stresses, on the one hand, that such expectations must give way to the need to protect the environment and, on the other, that the revocation does not seem disproportionate in the context of balancing interests, since environmental protection reasons are becoming more and more urgent and it would be expected that they would eventually be invoked.

Two other cases appreciated later are also approaching. These were two demolitions ordered by the authorities, one concerning a clandestine vacation home built in a forest reserve (which remained there for almost four decades) - in the Hamer v. Belgium, GC, case no. 21861/03, November 27, 2007 - and the other concerning houses acquired by the appellants in the public maritime domain and occupied for more than three decades - in the Depalle c. cases. France and Brosset-Triboulet and others v. France, GC, cases number 34044/02 and 34078/02, 29 March 2010. In both cases, the ECHR noted the long periods during which the appellants occupied the houses, but stressed, both in the first case and in the second - although not in exactly the same terms - that there was no reason to protect the appellants' expectations in view of the need to protect the environment - "a value that raises in public opinion a growing and sustained interest"[28] - given that the investment of trust would have to be considered necessarily precarious.

In fact, in the Hamer case, despite censuring the authorities' implicit consent to the construction and the alienation of the ecological constraints against which its permanence was at stake, the Court ended up considering that the demolition, although late, was not a disproportionate measure, precisely because the values in question should overlap with the applicant's economic claim, and this had always been fragile. In the Depalle and Brosset-Triboulet cases, the ECHR stressed that the precariousness of the use of houses had been systematically stressed (there were periodically renewed permits) and that the supervening of coastal protection planning instruments dictated the end of the possibility of occupying the coastline in private use - the authorities' tolerance could not endure in the face of the clear expression of the primacy of environmental values over other private interests.

The last point we want to make in this first group is the case of O'Sullivan McCarthy Mussel Development Lda c. Ireland, case number 44460/16, 7 June 2018. The company O'Sullivan marketed mussels, catching them in embryos and breeding them for sale two years later, developing its activity in the port of Castlemain. Every year it had its fishing and breeding permit renewed, until in 2008, due to low regeneration rates of the species, the authorities closed the port temporarily, forcing it to suspend its activity. This closure occurred within the framework of compliance with the Habitats Directive, a European regulation dedicated to the protection of habitats integrated into the Natura 2000 network, a regulatory scenario known to the company and which posed potential risk to its business.

Despite O'Sullivan's claim that suspension of its activities without compensation would result in "indirect expropriation", with consequent violation of its right to property, the ECHR understood that the measure was legitimate and proportionate both in terms of European Union law and the Convention. In terms of European Union law because, in view of the protection requirements of the Habitats Directive, twenty-four ports had been temporarily closed in Ireland, since it had not been proved that there was no ecological risk if they remained in operation - and in view of this the Irish State had no alternative but to order the suspension of activities in those ports. From the point of view of the Convention, the allocation of property rights was neither intolerable nor arbitrary, since not only was the measure temporary in nature (the company resumed activities as soon as the following year), but it was fully justified by reasons of general interest, translated into the safeguarding of ecological values.

In a second group of cases (ii.), the ECHR found the applicants' right to property, allegedly sacrificed in the name of environmental protection objectives, to have been infringed.

ii.) The case Matos e Silva Lda and others v. Portugal, case number 15777/89, 16 September 1996, was one of the first to illustrate such problem. Two Portuguese companies based in Loulé and their manager sued the Portuguese State for violation of property rights and delay in administering justice. Both violations were manifest: the first, because the expropriation process in fact lasted more than thirteen years; the second, because the applicants were successively expropriated in fact, first half and

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[28] Cfr. o §79 do caso Hamer.

then the other half of a rustic piece of land on their property, which they found themselves deprived of using their economic activity of salt extraction, agriculture and aquaculture, for alleged reasons of ecological protection. The deprivation of the use of the land was intended to allow the constitution of a nature reserve, the implementation of a protection area for migratory birds, and the installation of aquaculture equipment; however, such plans never materialized. Thus, although the reasons for the deprivation of property use were formally amenable to legitimate interference for ecological reasons, their failure to materialize and the heavy burden imposed on the applicants led to the violation of Article 1 of Protocol 1 to the Convention (as well as Article 6(1) thereof).

In the case of Papastavrou and others v. Greece, case number 43672/99, April 10, 2003, the reason of the appellants, who claimed a fair compensation for an illicit expropriation, was attested. In fact, having been deprived of the use of a parcel of rustic land for alleged reforestation purposes, the appellants proved that such deprivation constituted a de facto expropriation, which was not justified because, in the end, the land was unfit for the cultivation of the tree species that had been foreseen. In other words, the balance between private property rights and the general interest of environmental protection did not occur because reforestation was simply impossible.

A third moment in which the ECHR confirmed the violation of property rights when confronted with the allegation of environmental protection was the case of N.A. and others v. Turkey (case no. 37451/97, October 11, 2005). This time, the interest of ecological preservation - of a coastal area - was fully justified, but the applicants, who had received authorization to build a hotel there, were prevented from completing the construction due to a court order. The violation of Article 1 meant that such expropriation was not accompanied by fair compensation.

4 THE REFUSAL OF ENVIRONMENTAL PROTECTION AS AN INTRINSIC VALUE (AND THE DENIAL OF ACTIO POPULARIS)

The Convention, as already written, does not contemplate the term environment and the biased attempts to "pull" it into its catalog in a subjective version, are nothing more than an evolutionary interpretation of classic negative rights protection norms, finding the Court of Strasbourg a positive dimension of state action in its promotion beyond the safeguard against illicit interference by public authorities and third parties. However, we have seen that the ECHR recognizes the social relevance of the environmental issue and uses it as a pledge of the necessity and appropriateness of certain measures restricting the rights of freedom. What the ECHR does not sanction, however, is the possibility that the environment, as a greatness of intrinsic value, may be targeted as an autonomous object of tutelage. This refusal is particularly evident in decisions in which altruistic authors - individual citizens or associations - denounce the absence or inadequacy of jurisdictional guarantees to protect the environment (situations combated by Articles 13 and 6 of the Convention).

It should be noted that, according to Article 34 of the Convention, individual appeals presuppose the quality of "victim". The ECHR has understood that the victim can be both direct and indirect, as well as merely potential or "by rebound", but requires that the damage be felt in a personal way, in the person or property of the appellant[29]. In fact, and this is an understanding that has transcended from the Committee's time, an appellant cannot claim a violation of the interests of the general population[30].

In addition, it should be remembered that Article 13 establishes the right of access to a court to defend any right enshrined in the Convention[31]. Article 6(1) establishes a general principle of access to a court for the defense of rights enshrined in the Convention and has a number of concrete features (which are growing in the context of criminal proceedings), including the right to a fair trial, to a decision within a reasonable time and to an independent and impartial tribunal. However, this provision aims to ensure that this right is exercised in relation to "civil rights and obligations", i.e., and in line with the structure of the legal situations accepted by the Convention, to defend subjective, individualized positions[32] - not for general or diffuse interests.

This was the decisive argument for declaring Article 6(1) in the case of Balmer-Schafroth and

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[29] Cfr. Michele de SALVIA (2003), 626 segs; Ireneu Cabral BARRETO (2010), 377-387. Jean-François RENUCCI (2007), 848-849, chama a atenção para que o reconhecimento da qualidade de “vítima” a afectados potenciais ou “por ricochete” constitui uma descaracterização da noção de recurso individual e uma aproximação inequívoca à actio popularis.

[30] Cfr. Jacques VELU e Rusen ERGEC (1990), 806-809.

[31] Facto que tenderia a inviabilizar a invocação do artigo 13º para protecção do “direito ao ambiente”, pois tal direito não tem assento na Convenção.

[32] Sobre o sentido e alcance do artigo 6º, veja-se Jean-Claude SOYER e Michele de SALVIA (1995), 239 segs.; Ireneu Cabral BARRETO (2010), 141 segs.

others v. Switzerland, Case No. 67/1996/686/876, August 26th, 1997. The appellants, ten Swiss citizens residing in the No. 1 containment area of the Muhleberg nuclear power station, challenged the decision to extend the life of the plant and to increase its production capacity by 10% in the Federal Council, and participated in the decision-making process. The decision in favor of extending the operating license was supported by several opinions and reports from independent experts, and their judicial inquiry was denied because it was an eminently technical decision. The appellants pleaded violation of Articles 13 and 6, paragraph 1; the ECHR, however, held that no serious, specific and imminent impairment of their rights to life and physical integrity was characterized. Hence, they concluded that the damage was merely general and hypothetical, and therefore could not be construed as a violation of article 6, no. 1.

Judge Petitti cast a resounding losing vote on this decision, to which six judges (Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek) joined. The judge found it intolerable that a decision of the magnitude of the useful life extension of a probably obsolete nuclear power plant, already after the Chernobyl disaster, could be immune from judicial control. "If there is one area in which blind trust should not be placed in the Executive, it is nuclear power, because the reasons of state, the demands of governance, the interests involved and lobbying are more abundant than in other spheres. George Washington said that governments, like fire, are dangerous and fearful servants, gentlemen. In the past (1939-45) as in the present, we have been too concerned with the consequences of the actions of public authorities and certain private actors, rather than with protecting people's rights. That is why, in the name of protecting democracy, the ECHR established a principle of access to justice to protect the rights of individuals against power".

The evident split that was noted in this decision did not, however, prevent, three years later, a very similar case (first of all, against the same State Party and because of the identical situation in fact) from meriting parallel treatment - we refer to the case of Athanassoglou and others v. Switzerland, GC, case no. 27644/95, 6 April 2000. Faced with an allegation of violation of the rights of access to justice and of the principle of due process, the applicants, who wanted to syndicate the government's decision to extend the validity of the operating permit for the Beznau nuclear power plant, came up against the government's objection, confirmed by the ECHR, since they would not have characterized a serious and imminent violation of any individualized right.

The ECHR, in a decision contested by five judges, stated, from a band, that legitimacy must be supported by an allegation of effective violation of a right accepted by the Convention, and that article 6, paragraph 1, presupposes the direct and exclusive affectation of subjective positions. Of another band, the ECHR dismissed the courts' competence to substitute themselves for organs with political functions, obtaining that it is not for them to review fundamental choices for the model of society in which they are integrated (§§ 52 and 53). It ended its reasoning by stating that democratic processes are those that best serve the political choice of whether or not to produce and use nuclear energy (§ 54).

In the losing vote of Judges Costa, Tulkens, Fischbach, Casadevall and Maruste, on the other hand, the deep concern about the consequence of the non-unionability of vital political decisions that such a position of the Convention implies is again expressed. In fact, they stress, "the nature of administrative decisions that ensure or refuse authorization to operate nuclear power plants cannot mean their exemption from judicial control. On the contrary, the risks such plants pose to the population and the environment mean that there must be increasing control of such decisions, by independent and impartial courts, through adversarial processes, with the parties and above all the judges obviously assisted by experts". While stressing that it is prudent to refuse popular action, judges condemn the fact that, due to a purely subjective logic of the right to action, decisions of this magnitude are shielded from the inquiry of the courts.

It is curious to note a trend reversal by the ECHR, which seven years before these two decisions had proved much more generous in its appreciation of the intensity and proximity of the risk required to demonstrate a link between a threat and the injury of a right. In fact, in Zander v. Switzerland, case no. 14282/88, November 25, 1993, the appellants sought to syndicate the validity of a new authorization granted to a mining company that operated a mine in the vicinity of their house and whose activities had already been suspended due to contamination of the groundwater with cyanide - a fact that had led to the need for water distribution by municipal services. The new authorization allowed the expansion of mining activities and the consequent renovation and expansion of the risk of water contamination, without conditioning such a decision to the supply of water to citizens living in the vicinity. Because they were not allowed to challenge such a decision in the national courts, the appellants denounced to the ECHR what they considered to be a violation of article 6, no. 1, and the Court confirmed the fairness of the allegation.

It should be noted that here the ECHR did not require proof of a serious and certain allocation of rights (to life? to the reservation of private life?) by virtue of the issuance of the permit and the non-supply of water from outside the network susceptible to contamination. The Court was satisfied with the allegation of a "mere" risk of pollution, which is far removed from the strict criteria used in the Balmer-Schafroth eAthanassou-glou cases[33]. Perhaps the strategic nature of the issue - nuclear energy

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[33] Note-se que posteriormente a esta decisão duas decisões de inadmissibilidade do Comité começaram a inverter a inicial abertura: Noel Narvii Tauira e 18 outros c. França, queixa nº 28204/95, 4 dezembro 1995, e L. M e R. c. Suiça, queixa nº 30003/96, 1º junho 1996.

production and the energy independence of states - has instilled a posture especially reserved for the ECHR...

Appealing the same argumentative logic, but with different consequences, in the case of Gorraiz Lizagarra and others v. Spain, case number 62543/00, April 27th, 2004, the ECHR considered an appeal filed by five residents in a village that was submerged by a dam, accompanied by an association that was constituted to defend its interests and the ecological values of the region. The appellants pointed out several violations, among which the rights to a fair trial to the reservation of private life and inviolability of home and property, but also the affectation of the general interest of conservation of natural values of the area. The preliminary point would therefore be whether their claims could be analyzed by the Court, since more than the defense of individualized positions would be at stake.

Having stressed that "the outcome of the process must be decisive for the safeguarding of the rights at stake: mere tenuous connections or remote consequences are not enough" (§ 43), the ECHR considered that the locus standi would not fail, since the five applicants defended themselves against the direct repercussions of the construction of the dam on their individual legal spheres, and that the association itself invoked violations of the rights of its five associates - a fact that unquestionably gave the dispute an economic and individual dimension (§ 46).

In the cases of Taskin and others v. Turkey (case no. 46117/99, November 10, 2004) and Okyay and others v. Turkey (case no. 36220/97, July 12, 2005), the violation of article 6, no. 1, was more evident, since the health risks of the proximity of gold mines (which use sodium cyanide in the extraction) and coal plants (operating clandestinely and emanating intense atmospheric pollution) were considered serious and current, and should allow the investigation of such situations in the national courts. It should be emphasized that the Taskin case reflects an evolution of the notion of risk managed by the ECHR, because the current line of risk (outlined in the López Ostra[34] case, whose analysis does not fit in this text) has been crossed to be sufficient to allow for its predictability in the face of analyses produced within the environmental impact assessment procedure (cf. § 113 of the Taskin case)[35].

A similar decision was made in the case of L'Erablière asbl c. Belgium, Case No. 4923/07, February 24th, 2009. Here, an association for the protection of the environment, urban planning and the landscape in the Marche-Nassogne region appealed to the ECHR for confirmation of a violation of Article 6(1), as it was refused a decision by the Council of State to suspend a landfill permit in the region (allegedly because it did not provide a description of the facts - which it did by reference to the suspended decision). The ECHR, in line with the decisions already commented, understood that the fact that the members of the association were all residents in the municipalities of the Marche-Nassogne region and that the interests defended, although outlined in a generic way, coincide with the defense of individualized positions, justified the invocation of article 6, no. 1, which it considered to have been violated.

In fact, according to the Court, "increasing the capacity of the landfill by more than one fifth of initial capacity could have a considerable impact on the lives of residents in the region, given the direct inconvenience it would cause to their quality of life as well as the indirect damage that would result from the depreciation of the value of their property" (§ 28). Thus, admitting the legitimacy of the appellants before the ECHR does not imply recognizing the popular action, whose refusal is justified "in order to avoid bringing before the Court cases in which the appellants are not parties", in the words of the appellant. "In this case, however, taking into account the circumstances and in particular the nature of the measure challenged, the statute of the association and its founders, and the fact that the objective pursued is limited in time and space, justifies the disqualification of the action in favor of a general interest as an actio popularis" (§ 29).

It is very curious the "screening" that the ECHR does in these cases, distinguishing defense of general interests/differences of defense of individual interests. Although the association, when it is constituted, intends to capture a collective interest for an associative sphere, individualizing it in a certain dimension, what happens is that the association is constituted with a single objective: the defense of homogenous individual rights, of the rights of its members - of subjective rights, therefore. Or at least it is this dimension that the ECHR intends to retain, in order to be able to seek the legitimacy to be in court to the associates, together or individually considered, and not to the associative substrate, which could be defending diffuse interests regardless of potential or effective injury to the rights of the associates. The question at the end of this journey is this: Is there then any example in which the ECHR has recognized legitimacy to an association that defends the environment without establishing the link (or transvestism) between the collective interest and the rights of members?

The moment in which the ECHR came closer to this neutralization - and, consequently, to the acceptance of actio popularis - was in the context of the case National Collectivity of information and

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[34] Supra identificado – cfr. nota 33.

[35] Cfr. Chris HILSON (2008), ponto III.

opposition to the central Melox - Collectivity Stop Melox and Mox c. France (case no. 75218/01, admissibility decision of 28 March 2006). The association invoked a violation of article 6, no. 1, in the aspect of affront to the principle of fair trial, in the context of a procedural initiative filed against a decision of authorization to extend the activities of the central Melox. The question of its legitimacy before the ECHR arose preliminarily, since this entity did not present itself as an association of persons united by a bond of residence fighting against a common objective, but rather as an association for the defense of general interests, particularly environmental and health.

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5 FINAL REFLECTIONS

The analysis, even if brief, of the decisions surveyed, allows the conclusion that the ECHR refuses to recognize legitimacy to appellants who appear in court only in defense of diffuse interests, namely the environment, without the support of individual or institutional rights. However interesting the theory of positive obligations applied to personality rights may be, such originality cannot obscure the fact that the environment as such (in its ecological purity, one might say) remains outside the Convention's protection objectives and that only an addition by Protocol could alter this scenario[36]. In the current framework, as the doctrine points out, "Since only the "victims" of a violation of the Convention have the legitimacy to propose an action, any litigation initiated by environmental groups would have to take the form of an individual action, focused on the rights of some subjects and not on the defense of the general (environmental) interest. It is clear that ecological damage per se is unlikely to constitute a violation of the Convention. It only gains relevance through the violation of an individual right enshrined in the text of the Convention"[37].

However, it is not credible that such inclusion will occur, since the Convention was designed essentially as an instrument to defend individual rights against the will of the public power[38] - and the environment is a greater greatness than the subject, and does not fit these narrow parameters[39]. However, it should be emphasized that the increasing attention the ECHR has given to the value of the environment as a general interest capable of trumpeting individual legal positions, maximizes the right to property - remember the Hamer and Depalle and Brosset-Triboulet cases - would perhaps justify it, and first of all for the sake of consistency with another instrument of overwhelmingly European application (the Aarhus Convention), the inclusion in the Convention of procedural rights, such as access to environmental information and participation in environmental decision-making procedures, especially when relating to installations and products likely to generate massive risks for the environment and health[40].

Another development that may occur, according to Alan BOYLE, is the extraterritorial

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[36] Jean-François RENUCCI (2007), 798, sublinha a originalidade da abordagem da CEDH à questão ambiental, mas considera que a tutela do "direito ao ambiente" é limitada.

[37] Françoise JARVIS e Ann SHERLOCK (1999), p. 15.

[38] Cfr. Manual on Human Rights and Environment, it., 7 — https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/human-rights-and-environment.

[39] Cfr. Pierre LAMBERT (2000), 565, que afirma que o conceito de direitos do homem é demasiado estreito para albergar uma realidade como o ambiente.

[40] Como realça Alan BOYLE (2006), 478, 491 e 505, é paradoxal que a jurisprudência da CEDH venha consistentemente construindo um direito a viver num ambiente sadio a partir dos artigos 2º e 8º e que o texto da Convenção não preveja meios para que os cidadãos reclamem a possibilidade de realização e exercício de tais direitos perante as autoridades nacionais. Cria-se assim um duplo standard na medida em que o direito à informação ambiental está, na Convenção, sempre instrumentalizado à protecção de um direito de personalidade, ao contrário do que sucede na Convenção de Aarhus, no contexto da qual o seu exercício é garantido enquanto expressão de cidadania.

application of the Convention in cases with an "environmental" connotation. The author, appealing to the jurisprudence Cyprus c. Turkey(2001)[41], draws attention to the possible application of the principle of extraterritorial application of the Convention to situations of transboundary pollution, since if the ECHR accepts that states must control the actions of their military when outside their national territory (as in the case of Cyprus against Turkey), they must be able to be held responsible for injuries to rights caused to subjects who are not in their territory as long as the source of risk is in territory under their jurisdiction[42]. To date, the ECHR has not ruled on this possibility, although in the cases of L.C.B. v. United Kingdom, case no. 36536/02, June 9th, 1998, and McGinley and Egan v. United Kingdom, case no. 21825/91, June 9th, 1998, the duty to protect the health of British citizens displaced in the Christmas Islands was under consideration in view of a nuclear test program carried out there by the British State (the cases did not, however, merit a decision on admissibility)[43].

[41] Chipre c. Turquia, proc. nº 25781/94, §§78 a 81, 10 maio 2001 — o Tribunal caracteriza a Convenção como um instrumento de “ordem pública” europeia, pelo que os Estados-Partes devem promover o seu respeito pelos poderes públicos, seus representantes e funcionários, ainda que estes estejam fora das fronteiras territoriais que definem em primeira linha a sua jurisdição.

[42] Alan BOYLE (2006), 500.

[43] Manual on Human Rights and Environment, cit., 114.