PUBLIC AND PRIVATE IN CONTEMPORARY SOCIETIES

A cura di
Claudia Morgana Cascione,
Giorgio Giannone Codiglione, Paolo Pardolesi

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Salvatore Sica*

Introduction

The distinction between the legal categories of "public" and "private" is historically among the most controversial and, especially in the so-called era of "hyperhistory", is marked by a lability of boundaries both at a conceptual level and in terms of practical application.

Digital transformation is among the drivers of this process, alongside the evolution of economic and social relationships, in a context that is characterized by an increase in cross-cultural exchanges and cross-contamination, in addition to environmental and social emergencies.

The privatization of aspects traditionally attributed to government, together with the increasingly public nature of relationships previously regarded as pertaining to the private sphere, raises questions in many fields of knowledge, including that of the law. The once reassuring traditional legal categories have been heavily influenced. In particular, the permanently contested divide between public law and private law nowadays is being put under ever greater pressure, revealing its limited adequacy in the interpretation of the legal implications of new social phenomena.

It is interesting to examine this subject from a diachronic perspective, albeit without claiming to be exhaustive and with the sole intention of capturing the main evolutionary trajectories of the subject.

It is well known that in the Roman paradigm, this divergence is based on the distinctiveness of public law as a point of reference for the *statum rei romanae*; the *jus publicum* is identified as a function of the *res romana*, understood as a collectivity, which is markedly different from the private nature of other relationships, that are characterised by the *spectat ad singulorum utilitatem*. And it is in the reference to the *res romana* - and its superindividual dimension - that the hendiadys public law/power is consolidated, in the sense that the former attributes precisely to itself, the power of interference in the dimension of the private, even to the detriment of the *utilitas* of the individual, based on the assumption of the pre-eminent interest of the collectivity and its institutional-state representation.

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Beginning from these roots, over time there have been an infinite number of theoretical expressions and a multiplicity of historical concretizations of this principle, which have nevertheless been marked by the lowest common denominator by which the dimension of the private is "other", as is the ordering dimension of the public sphere.

Therefore, the "great dichotomy" of legal thought has the singular fate of being constantly contested (consider the pointed Marxian criticisms), interpreted in different ways but never definitively set aside, as if it were an ontological necessity rather than a conceptual abstraction; without taking in account the diverse contexts: both in common law and civil law, in ancient societies and those of the 20th century, up until now the problem has been posed regarding the authority of a "super individual" that is capable of imposing itself on the choices of individuals. In short, it seems to be possible to agree with Bobbio on the ineluctability of the distinction, or, taking up Carbonnier that "*tout le droit se divise en deux parties: droit public, et droit privé*"; to the extent that when the compass of scholars (and societies) loses this cardinal point, there are those who go so far as to even hypothesize *le declin du droit.*

This reflection does not interfere with the (well-founded) observation of those who note that the genesis of the distinction under consideration is in fact relatively recent and should be placed in the context of the French Revolution and the Napoleonic construction of the state, whereas quite different antinomies could be found in earlier eras: *Jus divinum/Jus humanum*, *Jus civile/canonicum*, *Jus commune/Jus proprium o Jus inventum/ Jus positum*.

This aspect, indeed, pertains to the "history" of public law; and one can also adhere to the reconstruction of those who, with acuity, note that "public and private is not the law, which is one and inseparable, but the relationship (*res*) between and the subjects (*personae*) over whom the legal system regulates." This reflection is clearly weighted with authority and is well-founded, but it must be read in light of Rousseau's basic statement when he mentions the *lois politiques*, that is, those who "regulate the relationship of everything with everything, or of the social body with the State."

The essence of public law, in contrast to that of private law, is precisely in the relationship of "everything with everything", which reaches its highest historical realization in the process of constitutionalization of continental European law; if, therefore, the idea of power is coessential to the dichotomy, it is perhaps true that from 1789 onwards we no longer witness the constant metamorphosis of the foundation of the dichotomy,

especially due to the advent on the scene of the social question; it is rather a matter of taking note of the different interpretations of the distinction between the spheres of the public and the private, starting from the liberal paradigm up until the construction of the welfare state in the Italian and German post-World War II Constitutions.

In essence, the marriage between capitalism and liberalism seemed unbreakable, since they seem made for each other, the one complementing the other: the ideology of individual prerogative fueled by the wonderful and progressive fortunes of economic initiative.

Nothing had ever succeeded in undermining such a well-matched ménage, consolidated over the course of nearly two centuries. Neither Marxian ideology nor, even less, the failed historical experience of true socialism, had tainted their success.

Indeed, these perfect partners had looked at each other even more smugly in their happy coexistence in the aftermath of the fall of the Berlin Wall.

Some doubts had arisen with social democracy and, in general, with postwar democratic constitutions, but capitalism and liberalism had found themselves more united than ever before, reassured by the fact that, after all, welfare state models were still just modern and evolved variants of the original idea (individual, freedom, initiative) albeit pervaded by the need for rebalancing and redistribution.

Well, the enemy was just around the corner, ready to burst in when no one expected: technology and, above all, information and communication.

It is important to acknowledge that a series of technology-related phenomena is seriously undermining the classical freedoms of liberal constitutions with the West hardly taking any notice. The intricate interconnections of the Information Communication Society, also contribute in no small measure to making the situation even more complex.

Consider, on one hand, the U.S. Courts debating whether to use brain scanners to better learn the truth from witnesses, or the case of Canada, where they would like to use hypnosis during trials, or that of England where they want to proceed with genetic data collection as a preventive measure; it should also be noted that the Geneva Convention and *Habeas Corpus* itself has been "suspended" in many recent cases, while GPS allows global control over an individual's every movement, the secrecy of correspondence has become evanescent, wiretapping is the rule, and parents' associations want to impose electronic bracelets on teenage children. Not to mention, on the other hand, the uncontrolled circulation of personal data on the Internet.

In short, everywhere, and specifically in the West, our classic freedoms are at risk in this moment of the triumph of economic liberalism.

The question arises of whether or not the price of progressively reducing the protection of individual prerogatives in order to achieve the "revenue" of global, incessant, uninterrupted communication, is justified.

And again: is the direct relationship between the growth of the "Communication Society" and the increase in the opacity of the actors and stage-holders of the "global theater" acceptable?

These are, on closer inspection, different characteristics of the same, multifaceted, inescapable phenomenon.

But while there is one dimension of the issue pertaining to the breakdown of the hendiadys "freedom of enterprise-guarantee of social progress," there is also another, far deeper dimension that must be grasped with extreme lucidity: without the apparatus of ideas and values that justified its foundation, with the institutions of the liberal tradition in greater trouble every day, on the normative front, the balance of power, the affirmation of established sovereignty, business activity aspires to self-referentiality, cultivating it as a value; multinational corporations feel "self-sufficient" in the justification of their own existence, of mutual agreements, of intertwined battles, with competition, indeed, becoming itself, in the same moment, a value, a criterion of selection and even a "guarantee" for citizens.

Domitilla Vanni

Environmental disasters litigation and human rights: suing the state for civil liability

Summary: 1. Introduction – 2. The international level: the ECtHR *Cordella* case – 3. A look at some national Courts judgments – 4. Conclusive remarks.

1. *Introduction*

One cannot fail to emphasise the existence of increasingly blurred boundaries between public and private[1], and the gradual disappearance of the traditional distinction between the two areas, especially in continental legal systems, a phenomenon that is clear in various sectors, with significant consequences in the field of litigation for environmental disasters, in which the involvement of public authorities appears to be increasingly strong in a traditionally dominated by private law subjects sector.

In this sense, I considered it appropriate to start from the international level of protection of individual rights, and in particular from recent developments in the European Court of Human Rights caselaw with regard to cases of environmental disaster, and then to verify within individual national legal systems – such as that of the Netherlands and United Kingdom – the sensitivity and progressive openness towards new instruments of protection in this area, which attribute due responsibility to the State.

Given the openness of the English Courts in the sense of the transposition of human rights within the common law[2], especially following the entry into force of the Human Rights Act[3], I also found interesting to take a look at the English legal system and in particular at some interesting Supreme Court of UK pronouncements which – on the

[1] S. Sica, G. Giannone Codiglione, *La libertà fragile. Pubblico e privato al tempo della rete*, ESI, Napoli 2014.

[2] M. Amos, *Human Rights Law*, Bloomsbury, Oxford 2021[3], p. 17 ff.

[3] The Human Rights Act 1998 (c. 42) received royal assent on 9 November 1998 and came into force on 2 October 2000.

one hand – revealed a particular openness in relation to the extension of the jurisdiction of the English Courts on cases of environmental disasters taking place outside English territory (on the African continent) thus determining a significant improvement of legal protection; on the other hand, it shown a singular attitude of self restraint with reference to a very serious case of environmental offence in terms of the lack of continuity of the offence – configurable as tort of nuisance – such as to determine the rejection of the claims for compensation due to the fact that the respective limitation period has expired.

2. *The international level: the ECtHR* Cordella *case*

Given that, as is well known, environmental protection is characterised by the plurality of rules and legal systems involved, both at a national and a supranational level[4], even in the absence of a specific competence of the EU, it seems very interesting – in addressing in a comparative perspective the thorny issue of the protection of individual rights injured by environmental disasters against the State – to take the starting point from a well-known European Court of Human Rights ruling on the subject of environmental disasters, i.e. the *Cordella v. Italy*[5] case.

It concerned the renowned company Ilva spa, operating in the iron and steel sector since the early 20th century, originally state-owned, then privatised in 1995, placed under extraordinary administration due to its state of insolvency, whose emissions on the environment and population living in the vicinity of its plants have constituted an intense social and judicial debate. Already in 2002, epidemiological studies had shown a link

[4] At the international level the International Convention on Civil Liability for Oil Pollution Damage (adopted in Brussels on 29 November 1969 and known as the CLC); the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (also adopted in Brussels on 18 December 1971, known as the IFC), which is a supplement to the former; the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, supplemented by the Brussels Supplementary Convention of 31 January 1963 (2) and the Brussels Convention of 17 December 1971 guaranteeing its applicability; the Brussels Convention of 25 May 1962 on Liability for Owners of Nuclear Vessels, not yet in force and the Paris Agreement adopted by 196 Parties at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015 and entered into force on 4 November 2016.

[5] ECtHR *Cordella and Others v. Italy*, no 54414/13 and 54264/1, 24 January 2019 section I.

between the emitted particles by a plant in Cornigliano, which produced coke (a particular type of coal) and the mortality rate of the surrounding population. Thus, production was transferred to Taranto, which has a very large plant of about 1,500 hectares (the largest steel complex in Europe).

The plaintiffs in the Cordella case resided in the city of Taranto and neighbouring municipalities. The impact of the plant's emissions on the environment and health of the local population was the subject of several scientific reports.

Complaining of the effects of emissions from the Ilva steel plant in Taranto on their own health and environment, the applicants complained of a violation of their rights to life, to respect for their private life and to an effective remedy (Articles 2, 8 and 13 of the Convention)[6].

First, the Court emphasizes that neither Article 8 nor any other provision of the Convention specifically guarantees a general protection of the environment as such[7]. According to the Court's caselaw, the crucial element in determining whether, in the circumstances of a case, the environmental damage involved a violation of one of the rights guaranteed by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere, and not simply the general degradation

[6] Citing *Radomilja and Others v. Croatia* [GC], no. 37685/10 and 22768/12, 20 March 2018.
Article 2 ECHR provides:
«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 8 ECHR provides:
«1. Everyone has the right to respect for his or her private life (...).
2. There shall be no interference by a public authority with the exercise of this right unless such interference is provided for by law and constitutes a measure which, in a democratic society, is necessary for national security, public safety, the economic well-being of the country, for the defence of order and the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».
Art.13 ECHR provides:
«Everyone whose rights and freedoms recognised in the (...) Convention have been violated is entitled to an effective remedy before a national court, even when the violation has been committed by persons acting in the exercise of their official duties».

[7] *Kyrtatos v. Greece*, No. 41666/98, ECHR 2003 VI.

of the environment[8]. Indeed, the numerous scientific reports and studies[9] available to the Court attest to the existence of a causal link between the production activity of the Ilva company in Taranto and the compromised health situation, particularly in the municipalities mentioned above. For the most recent study in this matter, the Court also refers to the 2017 ARPA report, which reaffirms the causal link mentioned above and attests to the continued existence of a critical health status in the «high environmental risk» zone. In the face of the government's challenge arising from the plea of failure to exhaust domestic remedies, the plaintiffs point out that none of the remedies invoked by the government address their grievances. They assert that the latter consist not in the claim of economic redress, but in the complaint of the State's failure to adopt administrative and legislative measures aimed at protecting their health and the environment, on the one hand, and the challenge to the application of measures that allowed the Ilva company to continue its polluting activity, on the other. This case differs from *Smaltini v. Italy*[10] in which the plaintiff complained that she had contracted a disease as a result of her exposure to pollution caused by the Ilva company. The subject of that case, therefore, would have concerned the causal link between this plaintiff's illness and the harmful emissions, and not, as in the present case, a failure on the part of the State to take measures to protect the plaintiffs' health and their environment. The Government further points out that, in *Smaltini* case, the Court concluded that there was no evidence as to the existence of a causal link between the pathology contracted by the applicant and the harmful emissions from the Ilva plant and, consequently, that the action was manifestly unfounded. The Government also argues that Ilva has always conducted its production activities by complying with the permits granted by the municipality, region, and province. It adds that plans have been prepared to prevent pollution and to take measures to ensure air quality in the area. In addition, various measures have reportedly been taken that allow for a significant improvement in air quality.

The Court recalls that serious damage, done to the environment, can affect people's well-being and deprive them of the enjoyment of their homes in such a way as to harm their private lives[11]. In this regard, the Court also

[8] *Fadeïeva v. Russia*, No. 55723/00, ECHR 2005 IV.

[9] See in particular the SENTIERI report, paragraphs 20 et seq.

[10] ECtHR *Smaltini v. Italy* (application no. 43961/09) 24 March 2015. See L. Ferraris, *Smaltini v. Italy: A missed opportunity to sanction Ilva's polluting activity within the ECHR System*, in «Journal for European Environmental & Planning Law», 13, n. 1, 2016, p. 91 f.

[11] Citing *López Ostra v. Spain*, Dec. 9, 1994, Series A No. 303-C, and *Guerra and Others*

recalls that in cases in which the notion of a threshold of seriousness was specifically examined in the field of the environment, the Court has held that a defensible grievance under Article 8 may arise if an ecological risk reaches a level of seriousness that significantly reduces the plaintiff' s ability to enjoy his or her home or private or family life. The assessment of this minimum level in this type of case is relative and depends on all the elements of the case, in particular the intensity and duration of the harmfulness and its physical or psychological consequences on the health or quality of life of the person concerned[12]. Article 8 does not merely order the State to refrain from arbitrary interference: positive obligations inherent in effective respect for privacy can be added to this negative commitment. In any case, whether one approaches the issue from the standpoint of the positive obligation of the state to take reasonable and appropriate measures to protect the rights of the individual, pursuant to the first paragraph of Article 8, or from the standpoint of interference by a public authority, to be justified under the second paragraph, the applicable principles are quite similar. In both cases, regard must be had to the fair balance to be struck between the competing interests of the individual and society as a whole, and the State enjoys in each case a certain margin of appreciation[13].

First and foremost, States have a positive obligation, particularly in the case of a hazardous activity, to put in place legislation adapted to that specific activity, on the basis of the level of risk which could result from it. Such legislation must regulate the authorization, operation, exploitation, safety, and control of the activities in question, as well as require any person affected by it to take practical measures appropriate to ensure the effective protection of citizens whose lives are at risk of being exposed to the dangers inherent in the field in question[14]. Finally, it is often impossible to quantify the effects of major industrial pollution in each individual case and to distinguish the influence of other factors such as, for example, age and occupation. The same assessment must be made with regard to the deterioration in quality of life resulting from industrial pollution. Quality of life is a very subjective concept which is not easy to define. Therefore, for the purposes of ascertaining the factual circumstances of the cases before it, the European Court has no choice but to rely first and foremost,

v. Italy, Feb. 19, 1998, Recueil 1998-I.

[12] *Fadeïeva*, cited above, *Dubetska and others v. Ukraine*, No. 30499/03, Feb. 10, 2011, and *Grimkovskaya v. Ukraine*, No. 38182/03, July 21, 2011.

[13] *López Ostra*, cited above, and *Guerra et al*., cited above.

[14] See, *mutatis mutandis*, *Oneryildiz v. Turkey,* [GC], No. 48939/99, ECHR 2004-XII, and *Brincat and Others v. Malta*, No. 60908/11 et al. 4, July 24, 2014.

though not exclusively, on the findings of the courts and other relevant domestic authorities[15]. In the present case, the plaintiffs complain about the absence of state measures to protect their health and the environment. It is only on this last issue, which is different from the one at issue in the *Smaltini* case, that the Court is called upon to rule. The Court notes that, since the 1970s, various scientific studies have denounced the polluting effects of emissions from the Ilva Taranto plants on the environment and people's health. In the meantime, the government has intervened several times with urgent measures (the 'save-Ilva' decree-laws) in order to ensure the continuation of the steel plant's production activity, and this despite the finding by the competent judicial authorities, based on chemical and epidemiological expert reports, of the existence of serious risks to health and the environment. In view of the above, the Court finds that the national authorities have failed to take all necessary measures to ensure the effective protection of the right of the persons concerned to respect for their privacy. Therefore, the proper balance between the interest of the plaintiffs – in not suffering serious damage to the environment that could jeopardize their well-being and private life – and the interest of society as a whole has not been respected. So the Court, unanimously, declares that there has been a violation both of Article 8 of the Convention and Article 13 of the Convention and that the acknowledgment of a violation is in itself a sufficient equitable satisfaction for the non-pecuniary damage suffered by the plaintiffs concerned, ordering the State to pay the plaintiffs' legal fees. The Court did not award any compensation to the plaintiffs, nor did it indicate to Italy what specific measures would have to be implemented to bring environmental remediation to completion.

As emerges from the reconstruction of the facts offered by the ruling itself, the grievances revolve around two main cornerstones: (a) the scientific studies, including epidemiological studies, which over the years have highlighted the serious health situation as a result of the pollution produced by Ilva; b) the conduct of the Italian State, which has authorized, through ad hoc measures, the continuation of the industrial activity, contrasting with the ablatory measures adopted by the judicial authority as part of the maxi-criminal proceedings against the company's managers, accused, precisely because of the serious environmental impairment of the area and its health repercussions on workers and the local population, of crimes against public safety and public health *ex* art. 434 of the

[15] *Lediaïeva and others v. Russia*, Nos. 53157/99 and 3 others, Oct. 26, 2006, and *Jugheli and others v. Georgia*, No. 38342/05, July 13, 2017.

Italian Criminal Code. As for the hinge sub a), the results offered by numerous scientific studies, published between 1997 and 2017 by national and international institutions competent in health and environmental matters[16], all unequivocally indicate the existence of risks to human life and health etiologically related to the harmful emissions of the Taranto steel plant. Strasbourg Court chose to examine the applicants' grievances only with reference to Article 8 of the Convention (right to privacy), and not instead, as the plaintiffs requested, to Article 2 (right to life). On this point, the grounds of the ruling merely refer to the overlapping nature of the two complaints and the Court's prerogatives in terms of legal qualification of the facts. It is worth dwelling briefly on the questions of admissibility of the appeal, both because of their intrinsic interest and because the Court anticipates here some of the considerations that will later be recalled in the reasons on the merits. First and foremost, the claimants' status as victims[17] comes to the fore, as the Italian government disputed on the grounds that they had not brought individual offenses to the Court's attention, but rather a situation of environmental contamination affecting public health. The Court confirms its case law on the inadmissibility of *actio popularis*, which is outside its jurisdiction as a court of individual fundamental rights violations, and also reiterates that neither Article 8 of the ECHR nor any other provision of the Convention guarantees protection of the environment as such. At the same time, however, the Court reaffirms the principle that environmental damage can result in violations of the right to privacy guaranteed by Article 8(1) whenever there is an offense to the private or family sphere of a particular person. This condition appears to be fulfilled in the case at hand, as the plaintiffs' areas of residence are – with some exceptions – among those deemed to be at risk to health by the Ministry of the Environment; areas where pollution has made all inhabitants more vulnerable to various diseases, as shown by the scientific studies attached to the appeals. A further question of admissibility concerns the prior exhaustion of domestic remedies. On this view, the Court rejects the government's complaints, on the one hand noting the absence in the Italian legal system of measures to obtain the remediation of areas affected by forms of pollution dangerous to humans; on the other hand, noting that the immunities introduced by the 'save-Ilva' decrees of 2015 and

[16] Such as the World Health Organization and the Italian Istituto Superiore di Sanità.

[17] About the notion of victim in CEDU see V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, Il Mulino, Bologna 2019[2], pp. 428-436; D. Harris, M. O' Boyle, C. Warbirck, *Law of the European Convention of Human Rights*, Oxford University Press, Oxford 2018[4], pp. 87-92.

2016 preclude in root criminal or administrative actions against the special administrator and the new owners of the company. Again, after recalling that the question of constitutionality is not among the remedies whose failure to do so determines the inadmissibility of the action, the Court dwells on the remedies provided by Legislative Decree No. 152 of 2006[18] for environmental damage, observing in this regard that these measures can only be adopted by the Ministry of the Environment, individuals being endowed with mere soliciting prerogatives against the same ministry.

On the merits, the European Court finds the plaintiffs' complaints well-founded and declares, first of all, a violation of Article 8 of the Convention. The point of departure is the reminder, which had already emerged in the admissibility questions, regarding the close connection between serious environmental damage and the reflex offenses caused to the 'well-being' of persons, such as to harm their 'private life'. Article 8 of the Convention, the Court points out, comes into play provided that the ecological risk reaches a level of severity capable of significantly diminishing the possibility of enjoying one's home or private or family life. The assessment as to whether the 'minimum threshold of severity' is exceeded must take into account the intensity and duration of the harassment caused by the polluting factor, as well as its physical and psychological effects on the health and 'quality of life' of the person concerned. Incidentally, the court makes it clear that it considers it indifferent to approach such questions from the perspective of the positive obligations incumbent on the state, stemming from Paragraph 1 of Article 8, or from the perspective of the legitimacy of the authorities' interference with the right to privacy, according to Paragraph 2 of the same provision. Having thus concluded the enunciation of the general principles applicable to the matter, and turning to the examination of the case at hand, the Court first of all circumscribes the object of its scrutiny to the diligence exercised by the competent national authorities and to the reasonableness of the justifications put forward by the Government in support of the need to compress individual interests for the benefit of general ones; with the exclusion of the profiles pertaining to the establishment of the causal link with respect to the pathologies alleged by some of the applicants. Against the backdrop of such a health situation, the Court finds the measures taken by national authorities both insufficient and unbalanced in favor of production needs: not only, in fact, the interventions carried out over the years have not produced satisfactory results, as is also shown by the infringement proceedings against Italy pending before the European

[18] The so called 'Environmental Code'.

Commission but the 'save-Ilva' decrees have also authorized the continuation of an activity that had been judged to be a serious risk to health and the environment even by the judicial authorities, providing, moreover, ad hoc immunity for the conduct of the operators. Based on these considerations, the Court comes to the conclusion that the Italian State has so far failed to ensure a fair balance between the interest of the plaintiffs in not suffering the environmental offenses likely to affect their well-being and the interest of society as a whole. With regard to remedies, as also noted above, the Court rejects the claims for compensation made under Article 41 of the ECHR, deeming the establishment of the violations sufficient for the purpose of compensation for non-pecuniary damage; and it also rejects the request to order Italy to adopt the specific general measures indicated by the appeals, nonetheless stressing the urgency of implementing the plan for the remediation of the steel plant and the environment surrounding it in the shortest possible time.

Despite the fact that the European Convention was born as an instrument for the protection of civil and political rights (so-called 'first-generation' fundamental rights), as well as economic, social and cultural rights (so-called 'second-generation' rights), it has over time shown to be very sensitive in regard to the so called 'third-generation' rights, such as that to a healthy environment[19]. This is an evolutionary process, effectively defined as «greening of the existing first generation of human rights»[20], which has crossed the Court caselaw since the 1990s, running on the thin border that separates individual rights from collective interests.

The development of this case study, while has certainly increased the range of protections available to individuals threatened by pollution phenomena and other environmental risks, on the other hand, has produced a series of new questions and issues to be resolved. The first concerns the boundary between the right to life and the right to private life, in their 'greened' or 'ecological' dimension, which the Court has progressively drawn and which however does not yet appear completely settled. The second problematic profile, which is also closely connected to the first,

[19] R.L. Zohadi, *The Generations of Human Rights*, in «International Studies Journal», 96, n. 4, 2004, pp. 95-113; R. Freedman, "*Third Generation Rights": Is There Room for Hybrid Constructs Within International Human Rights Law?*, in «Cambridge Journal of International and Comparative studies», 2, n. 4, 2013, pp. 935-959;

[20] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, in «Fordham Environmental Law Review», 18, n. 3, 2007, pp. 471-511; Id., *Human Rights and the Environment: Where Next?*, in «European Journal of International Law», 23, n. 3, 2012, pp. 613-617.

concerns the substantial incompleteness of the protection currently offered by the Convention regarding the relationship between the environment and human health. After having illustrated the underlying reasons for the problem, attention will be turned to the ancient question regarding the opportunity to introduce an autonomous human right to a healthy environment into the Convention system. As anticipated, the protection of life and psycho-physical health from threats arising from environmental pollution essentially takes place within the framework of articles 2 and 8 of the Convention, subjected over the years to an evolutionary interpretation which has broadened the respective scopes of application to an 'ecological' dimension not yet fully explored.

So the scope of application of the art. 2 is easily identifiable through the reference to a clearly defined legal good, life, threatened or actually damaged by the risk factor. Conversely, the scope of application of the art. 8 is much less crystalline, being entrusted to the vaguer concepts of 'well-being' and 'quality of life', in turn defined by the Court through reference to an open catalog of other interests – such as health, personal tranquility, the enjoyment of home and family activities, etc. – susceptible to being compromised whenever man finds himself leading his existence within a contaminated environment. This is a complex judgment, carried out on a case-by-case basis, aimed primarily at establishing whether the aforementioned interests have been harmed beyond the minimum threshold of severity (in turn identified in relative terms, for example using as a parameter the environmental risks inherent to the «life in modern cities»). Among the few fixed points – within a union largely entrusted to the prudent appreciation of the Strasbourg judges – there is the principle according to which damage to health is not an indispensable element for the existence of the violation which means, all things considered, that in its absence the offense cannot be automatically excluded; while in his presence it will tend to be affirmed. So the dividing line between art. 2 and art. 8 just outlined comes into crisis in cases – such as the one here examined – in which the available scientific evidence highlights widespread risks for people's health and lives, even in the absence of individually ascertained causal links.

The practical consequences which derive from the classification of a case of environmental pollution in the right to life or private life are essentially of three types. First of all, the conditions for lawful action by States change: more precisely, the limits within which States can carry out risky activities or can authorize their exercise by private entities. Human life, in fact, receives basically absolute protection from the Convention: therefore, the only room for maneuver granted to States concerns the

choice of concrete measures to protect it, within the framework of the traditional 'margin of appreciation' which characterizes the fulfillment of positive obligations, a margin that is wider the more complex technical issues are involved. 'Private life' instead falls within the category of those fundamental rights characterized by greater flexibility. The State, first of all, can limit its exercise within the limits set out in the art. 8 par. 2, i.e. on the condition that the interference is provided for by law and is necessary and proportionate to pursue one of the interests indicated therein (which also includes, as far as it is particularly relevant for our purposes, the «economic well-being of the country»). Secondly, the scope of the positive obligations deriving from the art. 8 is in turn determined on the basis of balances with other interests worthy of protection. Beyond the basic distinction between negative and positive obligations arising from the art. 8, often destined to fade in concrete cases, the point is that it is up to the State, in exercising its margin of appreciation, to reconcile the individual interests falling within the category of 'private life' with the counter-interests belonging to society as a whole complex; while it is up to the European Court to establish whether this reconciliation complies with the canons of reasonableness. Therefore, art. 8 leaves the States wide discretion for the purposes of defining the rules for the exercise of polluting activities and therefore of what we could define as the 'permitted risk' area: an area traced by authorizations, procedures, threshold values, and other administrative tools of control, in which the balances between the multiple interests at stake take place.

The second practical consequence deriving from the option in favor of art. 2 or art. 8 ECHR concerns the so-called prosecution obligations. As it is known, in fact, from art. 2 entails the obligation on States to establish an effective system of sanctions, including of a criminal nature, for unjustified attacks on the right to life, as well as the procedural one to conduct investigations suitable for identifying and sanctioning those responsible for the violations.

The third and final practical reflection concerns the compensation for non-pecuniary damage, which intuitively is of a different amount depending on whether those are affected by legal goods such as 'well-being' and 'quality of life' (compensation for which in the opinion of the Court is sometimes sufficient the mere recognition of the violation), or life itself.

The option in favor of art. 2 or art. 8 ECHR does not, however, affect the elements of the concrete fact that the Court takes into consideration in order to evaluate the legitimacy of the conduct of the States and the correct balance between the interests at stake.

Even from a purely semantic point of view, the description of the

offense in terms of compromising their 'well-being' and their 'quality of life' appears completely incapable of capturing the negative value inherent in the risk of contracting pathologies.

Obviously the option in favor of the applicability of the art. 2 would have had significant practical implications, in line with what has already been highlighted above. The conduct implemented by the Italian Government – which the Cordella ruling deemed unsuitable for establishing a fair balance between the right to private life of individuals and the interest of society in the exercise of productive activity – would in fact have been *a fortiori* considered harmful of the right to life, due to the failure to prepare suitable countermeasures to deal with the risk of death ascertained by epidemiological evidence. Consequently, in terms of general measures to implement the sentence, Italy would not have been called upon to issue a regulation capable of identifying a correct balance between the interests at stake, but rather to prepare all the measures capable of reducing the risks to life at a level close to zero, with a margin of appreciation limited to the choice of concrete measures to adopt to achieve this aim. Furthermore, the Court could have affirmed the existence of the obligation to criminally prosecute conduct characterized by serious and conscious negligence, reflexively questioning the legitimacy of the causes of exclusion of punishability provided for by the 'save-Ilva' legislation. Finally, the outcome of the procedure would probably have been different also with regard to the rulings pursuant to art. 41 ECHR, which could have resulted in the State being condemned to pay compensation for the non-pecuniary damage suffered by the individual appellants[21].

The belief remains that the environmental problem, or rather the protection of fundamental rights threatened by environmental risks, today deserves a more advanced safeguard, freed from first generation rights, and above all capable of defining with a greater degree of certainty the contours of the interests protected and the conditions of legitimacy of state action.

These perplexities reopen the debate on the opportunity to introduce an autonomous right to a healthy environment[22], giving concreteness to what was an aspiration that emerged from the genesis of international

[21] About the vagueness of section 8 ECHR see Harris, Boyle, Warbirck, *Law of the European Convention of Human Rights*, cit., p. 501.

[22] M. Fitzmaurice, J. Marshall, *The Human Rights to a Clean Environment - Phantom or Reality? The European Court of Human Rights and The English Courts Perspective on Balancing Rights in Environmental cases*, in «Nordic Journal of International Law», 76, n. 2-3, 2007, pp. 103-151; Boyle, *Human Rights and the Environment: Where Next?*, cit., pp. 626-633.

environmental law, the Stockholm Declaration of 1972[23]. From this perspective, the solution towards which future reflections could be oriented could therefore be that of a *de jure condendo* intervention within the Council of Europe, aimed at recognizing a right with autonomous contours, through which individuals can implement their own expectations of 'environmental safety', without this precluding states from a certain margin of appreciation in cost-benefit assessments and in the adjustments that by definition cannot satisfy everyone.

Configuring a 'right to a healthy environment' as a right in itself, which has so far remained halfway between two provisions which evidently were not created to protect it, could represent a way to enrich the Convention, in line with Sustainable Development Goals[24] defined by the UN, through the conferral of a clearer and more defined ad hoc individual advantageous – and also more effective – position. In summary, the Cordella ruling must be given the merit of having turned the spotlight on the responsibilities attributable to the State, guilty for having introduced legislation inspired by an unreasonable cost-benefit calculation.

Furthermore, it seemed particularly appreciable the effort made by the Court to exploit the knowledge offered by the epidemiological studies carried out in the Taranto area to reach the conclusion that all the inhabitants, including the appellants, saw an increase in the risk of falling ill, and therefore the own 'vulnerability', with consequent significant damage to one's 'well-being' and 'quality of life'. However, the choice to frame the risk to the life of those exposed within Article 8 of the ECHR, rather than art. 2 ECHR, the latter solution which would have been – according to the reconstruction offered here – more in line with the Court caselaw itself on the boundaries between the two provisions, as well as evidently heralding a more incisive protection (for example, but not only, on the compensation level).

[23] The birth date of the modern international environmental law is made to coincide with the Stockholm Declaration of 1972, adopted as a result of the United Nations Conference on the Human Environment.

[24] The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity.

3. *A look at some national Courts judgments*

At a national level, there has been a recent tendency to resort to the national courts for environmental protection also with regard to environmental disasters which have occurred outside the European continent thanks to a favourable orientation towards the recognition of their jurisdiction, so expanding legal protection of victims of environmental disasters.

For example, between 2004 and 2007, the villages of Oruma, Goi and Ikot Ada Udo in Nigeria were polluted by oil from infrastructure built by Royal Dutch Shell. More than 15 years later, at the end of December, the company finally agreed to pay four farmers and their communities 15 million euros as compensation of damages and to install a leak detection system, after a Court in the Netherlands ruled determined that Shell's Nigerian subsidiary was responsible and that the parent company owed a duty of care. The legal battle has been so long that all of the original plaintiffs died and Shell admits no liability under the settlement. But *Milieudefensie*, the Dutch arm of Friends of the Earth which fought the case, says it shows «big polluters around the world that they can no longer get away with destructive practices». Many large European companies operate abroad and until recently it was difficult to hold them to account for the environmental damage they may have caused. In November, a Dutch Court ruled that it had jurisdiction to hear a compensation claim filed against Oslo-based aluminum producer Norsk Hydro and its subsidiaries over pollution in northern Brazil. The decision was welcomed by thousands of indigenous people and descendants of slaves who are suing the company for harming the local environment and public health, although Norsk Hydro 'strongly denies' their claims[25].

[25] The Hague Court of Appeal on 29 January 2021, ECLI:NL:GHDHA:2021:132 (Oruma), and ECLI:NL:GHDHA:2021:133 (Goi). Separately, there has been a substantial amount of litigation over carbon emissions targets for transnational corporations. In *Milieudefensie et al v. Royal Dutch Shell,* District Court of the Hague, 26 May 2021, c/09/571932/HA ZA 19-379, a district court of The Hague in the Netherlands ordered Royal Dutch Shell, a British-Dutch multinational with headquarters in The Hague, to reduce its carbon emissions level by 45 percent from its 2019 emission level, by 2030. This ground-breaking decision is the first in which a corporation has been required by a court to align its policies with the obligations of the 2015 Paris Agreement. The petitioners were the Friends of the Earth, six other organizations, and 17,000 Dutch citizens. The question for the court was not whether the company was complying with local emission laws, but rather whether the company was following international standards. The Court based Royal Dutch Shell's (RDS) obligation to reduce its emissions on its duty of care towards current and future Dutch residents. Dutch tort law specifically Book 6, Section 162 of the Civil Code, creates

These rulings followed the 2019 UK Supreme Court judgment *Vedanta Resources*[26] stating the Shell company could legitimately be sued in negligence over the activities of its Zambian subsidiary just as the company owed a duty of care towards Nigerian citizens for alleged environmental damage and violations of human rights by its Nigerian branch. Of particular interest is this decision as the jurisdiction of English courts was declared and the submission of a collective action 'group litigation order' by the victims of an environmental disaster before the English jurisdiction was authorized, deeming applicable the article 4 of the Recast Brussels Regulation[27] according to which «persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State». The case in particular saw a dispute arising from the alleged toxic emissions from the Nchanga copper mine, in the Chingola district, in Zambia. The appellants are a group currently comprising Zambian citizens living in four communities in Chingola District. These are very poor members of rural farming communities served by streams that are the only source of water for drinking (for themselves and their livestock) and for irrigating crops. They claim that both their health and their agricultural activities have been damaged by repeated discharges of toxic substances from the Nchanga copper mine into these waterways from 2005 to today. The Nchanga copper mine consists partly of an open pit mine, said to be the second largest in the world, and partly of a deep mine. Its owner is the second defendant Konkola Copper Mines plc, a public company incorporated in Zambia. The first defendant Vedanta Resources plc is the parent company of KCM. It is the parent company of a multinational group, listed on the London Stock Exchange, with interests in the minerals, energy, oil and gas sectors on four continents. Vedanta is incorporated and domiciled in the United Kingdom. Although Vedanta says it has only 19 employees, eight of whom are its directors, the Vedanta Group employs approximately 82,000 people worldwide. KCM is not a 100% subsidiary of Vedanta, as the Zambian government holds a significant minority stake, but materials published by Vedanta state that its ultimate control over KCM should not be considered less than it would have if it were wholly owned property.

an unwritten standard of care which the Court interpreted on the basis of 14 factors, including the consequences of RDS's CO_2 emissions, possible reduction pathways, the United Nations Guiding Principles on Business and Human Rights (UNGPs).

[26] *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20.

[27] Article 4 of the Recast Brussels Regulation (Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

The claims against both defendants were made on the basis of a tort of negligence. These claims were made against KCM on the basis that it is the operator of the mine. As regards Vedanta, passive standing would arise from the «very high level of control and direction which it has exercised at all relevant times over the second defendant KCM's mining operations and its compliance with applicable health, safety and environmental standards».

Conversely, with reference to a proposed action of private nuisance against private individuals, i.e. companies of the Shell group, by a recent judgment[28] dated March 2023, the English Supreme Court appeared less sensitive – ruling on a case of extreme environmental damage – and unanimously rejected a private nuisance action in the context of a major oil spill. The question addressed was whether there was a continuing nuisance and therefore a continuing cause of action for the purposes of the running of the statute of limitations for tort of nuisance. The appellants were two Nigerian citizens, the defendants are companies within the Shell group of companies. The Bonga oil field is located approximately 120 km off the coast of Nigeria. On December 20, 2011, an oil spill lasting approximately six hours occurred at 3:00 am during a loading operation. The spill was caused by a rupture in one of the flow lines during the transfer of crude oil to a waiting tanker (the 'Bonga Spill'). It is estimated that the equivalent of at least 40,000 barrels of crude oil ended up in the ocean. The defendants would be responsible for the operation behind the Bonga Spill. It had been inferred that the oil migrated from the Bonga offshore oil field to reach the Nigerian Atlantic coast, where they say it had a devastating impact and was not removed or cleaned up. Although the defendants dispute these claims, arguing that the spill was successfully contained and dispersed offshore and had no impact on the coast, it is presumed for the purposes of this appeal that some oil reached the Nigerian Atlantic coast in the weeks of December 20, 2011. The issue of limitation arose when the claimants sought to make some changes to their claim form and claim details over six years after the Bonga Spill. The claimants argue that as long as the undue interference with their land continues, since the oil on their land has not been removed or cleaned up, there is an ongoing tort cause of action piling up by the day. After two levels of judgment, the Supreme Court unanimously rejected the appeal. Lord Burrows gives the judgment, with which Lord Reed (President), Lord Briggs, Lord Kitchin and Lord Sales agree. On the basis of this judgment it is presumed that the tort of private nuisance can be committed if the nuisance comes from the sea or is a single one-off event.

[28] *Jalla and or v. Shell International Trading and Shipping Co Ltd and or* [2023] UKSC 16.

The tort is committed when the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with (or, as has been commonly expressed, causes a substantial and unreasonable interference with) the use and enjoyment of the applicant's land. A private nuisance claim is actionable only on evidence of harm and is not actionable in itself. This requirement is satisfied by ascertaining the undue interference in the use and enjoyment of the land. This includes physical damage to the land itself and damage to buildings or vegetation growing on the land. But commonly there will be undue interference with the use and enjoyment of the land – such as the impact of noise or smell or smoke or vibration or being neglected[29] – despite there being no physical damage to the ground or buildings or vegetation. A continuing nuisance is in principle no different from any other tort or continuing tort. In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is a repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the plaintiff's land. For ongoing annoyance, the interference may be similar on each occasion, but the important point is that it continues day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations and prying eyes are ongoing nuisances where such interference continues regularly. The cause of action then accrues again on an ongoing basis. Applying the relevant principles to the facts of the case, the appellants' argument that a continuing nuisance exists, because on the alleged facts the oil is still present on their land and has not been removed or cleaned up, is rejected. The effect of granting the appellants' request would be to indefinitely extend the running of the limitation period until the land is restored.

Moving to the Dutch legal system, a favourable orientation to the recognition of State liability for environmental damages has been endorsed in the Urgenda case[30] of 2019. In fact, on 20 December 2019 the Dutch Supreme Court, the highest court of the Netherlands, confirmed the previous 1st and 2nd degree decisions in the Urgenda Climate case, establishing the Dutch government has the obligation to urgently and significantly reduce emissions in line with its human rights obligations.

The question addressed by the Court was whether the Dutch State is obliged to reduce, by the end of 2020, greenhouse gas emissions from

[29] As in *Fearn v. Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 WLR 339.
[30] *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.).

Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.

Urgenda asked for a Court order directing the State to reduce greenhouse gas emissions so that, by the end of 2020, those emissions have been reduced by 40%, or at least 25%, compared to 1990.

In 2015, the District Court granted Urgenda's request, meaning the State was ordered to reduce emissions by the end of 2020 by at least 25% compared to 1990. In 2018, the Court of Appeal upheld the District Court's ruling. The State appealed the Court of Appeal's decision in the final instance, raising a large number of objections.

The Supreme Court concludes that the State's appeal must be rejected. This means that the order issued by the District Court against the State and affirmed by the Court of Appeals, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will remain a final order it will be a definitive order[31].

Both Urgenda and the State share the climate science view that there is a real threat that the climate will undergo dangerous change in the coming decades. Climate science and the international community largely agree on the presence of this threat. The emission of greenhouse gases, including CO2, is leading to a greater concentration of these gases in the atmosphere. These greenhouse gases trap heat radiated from the Earth. As an ever-increasing volume of greenhouse gases has been emitted over the past century and a half since the start of the industrial revolution, the Earth is becoming increasingly hotter. This will put at risk the lives, well-being and living environment of many people around the world, including in the Netherlands.

Each country is therefore responsible for its own part. This means that a country cannot escape its share of responsibility for taking measures by arguing that, compared to the rest of the world, its emissions are relatively limited and that reducing its emissions would have minimal impact on a global scale. The State is therefore obliged to reduce greenhouse gas

[31] Both Urgenda and the State share the climate science view that there is a real threat that the climate will undergo dangerous change in the coming decades. Climate science and the international community largely agree on the presence of this threat. The emission of greenhouse gases, including CO2, is leading to a greater concentration of these gases in the atmosphere. These greenhouse gases trap heat radiated from the Earth. As an ever-increasing volume of greenhouse gases has been emitted over the past century and a half since the start of the industrial revolution, the Earth is becoming increasingly hotter. This will put at risk the lives, well-being and living environment of many people around the world, including in the Netherlands. Some of these consequences are already happening now.

emissions from its territory in proportion to its share of responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 of the ECHR, because there is a serious risk that dangerous climate changes will occur which will endanger the lives and well-being of many people in the Netherlands.

What specifically does the State's obligation to do 'its part' entail?

When giving substance to the positive obligations imposed on the State under Articles 2 and 8 of the ECHR, account must be taken of widely held scientific knowledge and internationally accepted standards. The 2007 IPCC[32] report contained a scenario in which earth warming could reasonably be expected to be limited to a maximum of 2°C. To achieve this goal, developed countries, including the Netherlands, would have to reduce their emissions by 25-40% in 2020 and 80-95% in 2050 compared to 1990[33].

The State and Urgenda agree that it is necessary to limit the concentration of greenhouse gases in the atmosphere to achieve the 2°C or 1.5°C target. Their opinions differ, however, regarding how quickly greenhouse gas emissions should be reduced. Until 2011, state policy aimed to achieve a 30% emissions reduction in 2020 compared to 1990. According to the State, this was necessary to stay on a credible path and keep the 2°C goal within reach. After 2011, however, the state's reduction target for 2020 was lowered from a 30% reduction by the Netherlands to a 20% reduction in the EU context. After the reduction to 2020, the state intends to accelerate the reduction to 49% in 2030 and 95% in 2050. These targets for 2030 and 2050 were then set in the Dutch climate law. However, the State did not explain how – and why – a reduction of just 20% in 2020 is considered responsible in the EU context, in contrast to the 25-40% reduction in 2020, which is widely supported internationally and considered necessary. Climate science and the international community agree that the longer reduction measures to reach the intended end goal

[32] The IPCC (The Intergovernmental Panel on Climate Change) is a scientific body and intergovernmental organization established under the United Nations to manage climate studies and developments.

[33] At the annual climate conferences held since 2007 under the UNFCCC, almost all countries have regularly underlined the need to act according to the IPCC scenario and achieve a 25-40% reduction in greenhouse gas emissions in 2020. The scientifically supported need to reduce emissions by 30% in 2020 compared to 1990 has been expressed on several occasions by and in the EU. Furthermore, since 2007 a widely shared view has emerged that, to be safe, earth's warming must remain limited to 1.5°C, rather than 2°C. The 2015 Paris Agreement therefore expressly states that states must strive to limit warming to 1.5°C. This will require an even greater reduction in emissions than previously assumed.

are postponed, the more extensive and costly they will become. The postponement also poses a greater risk of abrupt climate change as a tipping point is reached. In light of this generally shared view, it was up to the State to explain that the acceleration of the proposed reduction after 2020 would be feasible and sufficiently effective to achieve the objectives for 2030 and 2050, and therefore to keep the target within reach of 2°C and 1.5°C. The state, however, did not do this.

The Court of Appeal was therefore entitled to rule that the State must respect the objective, deemed necessary by the international community, of a reduction of at least 25% in 2020.The state argued that it is not up to the courts to undertake the policy considerations necessary for a decision on reducing greenhouse gas emissions. In the Dutch government system, decision-making on greenhouse gas emissions belongs to the government and parliament. They have a wide margin of discretion to make the necessary policy considerations in this regard. It is up to the Courts to decide whether, in making their decisions, the government and parliament have kept within the limits of the law by which they are bound. These limits derive, among other things, from the ECHR. The Dutch Constitution provides that the Dutch courts apply the provisions of this convention and that they do so in accordance with the interpretation of the European Court of Human Rights. The Court of Appeal held that the State policy regarding the reduction of greenhouse gases obviously does not satisfy the requirements of Articles 2 and 8 of the ECHR for the adoption of appropriate measures to protect the residents of the Netherlands from dangerous climate change. Furthermore, the order that the Court of Appeal gave to the State was limited to the lower limit (25%) of the internationally approved minimum necessary reduction of 25-40% in 2020. The issued order leaves it up to the State to determine what specific measures to take to comply with this order. If legislative measures are necessary to achieve such compliance, it is up to the State to determine what specific legislation is desirable and necessary.

Finally the Dutch Supreme Court stated that the order which the District Court gave to the State, confirmed by the Court of Appeal, committing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will be left in place. On the basis of Articles 2 and 8 of the ECHR, the State is obliged to implement such a reduction, due to the risk of dangerous climate changes which could have a serious impact on the lives and well-being of residents in the Netherlands.

4. *Conclusive remarks*

Reflecting on the liability of the State for environmental damage in connection with the protection of human rights brings to the surface the debate on the punitive[34] function of civil liability – alongside the compensatory function – as well as the use of instruments which appear more effectively capable of deterring particularly serious conducts and at the same time capable of ensuring protection extended to all victims of the wrongdoing[35]. In this perspective, in Italy[36], new insights may come from the recent class action reform[37] which allows persons, not only groups or associations but also single members belonging to the class, representing individual homogeneous rights to promote a class action against the wrongdoer, although it is not clear yet whether those individual homogenous rights include not only rights to health and property but also rights to a healthy and balanced environment, so that each person, individually or through associations, might promote a class action to claim reparation of environmental damage. Recognizing environmental associations the right to a class action might be very effective in the event of

[34] On the punitive function of environmental liability *tout court,* where compensation is not connected with the loss because it reflects the public interest that the environment shall not be contaminated, see P.G. Monateri, *Il futuro della responsabilità civile per danni all'ambiente in Italia*, in B. Pozzo (a cura di), *La responsabilità ambientale*. *La nuova direttiva sulla responsabilità ambientale in materia di prevenzione e riparazione del danno ambientale*, Giuffrè, Milano 2005, p. 138. See also G. Visintini, *Responsabilità civile e danni ambientali*, in Enciclopedia del diritto, Giuffrè, Milano 2011, p. 1015, arguing that it is not surprising that the State has refused to give private persons (either individuals or associations) standing, given that environmental interests are not 'collective' but 'widespread', ie they do not belong to a given organised group but to the whole community of citizens.

[35] N. Bryner, *A Constitutional Human Right to a Healthy Environment*, in D. Fisher (a cura di), *Research Handbook on Fundamental Concepts of Environmental Law*, Edward Elgar Publishing, 2016, p. 179. In the US, the success of class actions for mass torts is due to the lack of a system of public assistance, so that civil liability often turns out to be the only way for many victims to receive compensation: Monateri, *La responsabilità civile*, in R. Sacco (a cura di), *Trattato di diritto civile*, UTET, Milano 1998, p. 901.
See also Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC published on 04.12.2020 in Official Journal of the European Union.

[36] In Italy the matter is regulated by legislative decree n. 152/2006 recently modified by Law 30 dicembre 2023, n. 214.

[37] Law 12 April 2019 no 31. See A.D. De Santis, *The New Italian Class Action*: *Hope Springs Eternal*, in «Italian Law Journal», 5, n. 2, 2019, p. 757.

multiple victims of an environmental disaster. Even though the damage as a whole is high, each victim merely undergoes a minimal damage thereof, so that an individual victim is not encouraged to promote an action against the polluter given the costs of litigation[38].

About the nature of environmental liability, also in the light of the European legal system[39], it became evident that the establishment of strict liability is unanimously considered one of the most striking innovative aspects of the European regulation[40]. In fact, it innovated by contemplating, as a general rule, the environmental strict liability[41] as a result of the exercise of certain activities considered dangerous and potentially capable of producing damages, in which the operator will be liable, regardless of fault, in the cases expressly provided for, *i.e.* environmental damages and their imminent threat caused by any of the professional activities, which are understood to be sources of risk for people and the environment. It is undisputed that strict liability best serves the polluter pays principle. Since no proof of fault or unlawfulness on the part of the operator is required, it is easier, more efficient, and quicker to establish. It will be necessary, however, to establish the existence of a causal link between the activity in question and the environmental damage or imminent threat thereof, to which must be added the fact that the damage must obviously be capable of being evaluated[42].

In conclusion, the brief analysis so far conducted on civil liability of the State[43] for environmental disasters has once again represented an

[38] Monateri, *La responsabilità civile*, cit., p. 913.

[39] In European agenda see the communications by the EU Commission on 'The Sustainable Europe Investment Plan' and 'The European Green Deal', available at <www.ec.europa.eu/info/strategy/priorities-2019-2024/european-green- dealit> accessed 9 October 2020; 'A new Circular Economy Action Plan For a cleaner and more competitive Europe', available at <https://eur-lex.europa.eu/legal content/EN/TXT/?qid=1583933814386&uri=COM:2020:98:FIN>. See B. Pozzo, *Towards Civil Liability for Environmental Damage in Europe: The White Paper of the Commission of the European Communities*, in «Global Jurist [i]», 1, n. 2, 2001

[40] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage; C. Castronovo, *Responsabilità civile*, Giuffrè, Milano 2018, p. 852, points out that the title of Directive 2004/35/CE emphasizes the compensatory and deterrent functions of civil liability.

[41] See Monateri, *La responsabilità civile*, cit., p. 37, claiming that strict liability is the most efficient model whenever the prevention of damage is unilateral, the damages owed match the loss sustained and the role of the potential tortfeasor and the victim are known before the accident takes place.

[42] C. Aragao Seia, *Environmental Liability, Study for a Future Amendment of European Legislation*, in «Perspectives of Law and Public Administration», 12, n. 2, 2023

[43] K. Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, in

interesting opportunity for comparison between legal systems and for reflecting on an unprecedented case of circulation of legal models which – in this specific context of environmental damage – is taking place not only between homologous formants[44] of different systems (such as the European Court of Strasbourg and the national supreme courts) but also between different formants, in particular from the judicial to the legislative one, within equally different systems. In this sense, I believe that the recent approach to environmental damage by national and supranational courts, that is increasingly incisive and shaping, can be enhanced with respect to a formant which as a result of the growing involvement of States in the responsibility for environmental damage and in the consequent positive obligations to prepare legislative measures suitable for a more effective protection of the human rights at stake – appears less and less autonomous and 'protagonist' compared to the past as well as more coherent with traditionally considered distant formants.

Abstract

The research will explore in a comparative perspective environmental disasters litigation to examine the degree of effective protection of individuals against the States who are sued in civil liability, both in a national and supranational framework. The elements of damage being compensated in tort liability will be analyzed in each of the considered systems to analyze its amplitude and its capacity to include every kind of harm beside exploring the possibility to promote more effective judicial tools (i.e. class actions) to enlarge protection and to prevent any other attempt to human life in this sensitive area of civil liability. A particular attention will be addressed to the violation of human rights derived from environmental disasters with particular reference to art. 8 of ECHR recently enhanced by European Court of Human Rights (see 2019 Cordella v. Italy judgment), as the violation of it is considered suitable for integrating the State liability regardless of the infringement of an autonomous, clearly defined right to health, whose subsistence can aggravate State liability and extend compensation of damage while whose absence will not prevent the success of judicial action for damages. In this sense a new conception of wellness inside the art. 8 of ECHR is recognized, able to trace to the environmental contamination the infringement of the right to a peaceful life susceptible to compensation.

Keywords: Envinromental; Litigations; Civil Liability; Human Rights; Damage.

«Urban Lawyer», 23, n. 3, 1991, pp. 333-354.

[44] R. Sacco, *Les Buts et les méthodes de la comparaison du droit*, in *Reports Nationaux Italiens au IX Congrès International de droit comparé*, Atti del convegno (Teheran 1974), Giuffré, Milano 1978, pp. 113–131; Id., *Introduzione al diritto comparato,* Giappichelli, Torino 1980; Id., *Legal formants: a dynamic approach to comparative law*, in «American Journal of Comparative Law», 39, n. 1, 1991, pp. 343–401.

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One of the emerging phenomena in contemporary societies is the blurring of the boundaries between the 'public' and the 'private' dimensions. The digital transformation is among the drivers of such a process, together with the evolution of economic and social relationships, in a context characterized by growing exchanges and cultural contaminations, as well as environmental and social emergencies. The privatisation of aspects traditionally attributed to government, along with the increasingly public characterisation of relationships previously regarded as pertaining to the private sphere, question many fields of knowledge, including the law. The once reassuring traditional legal categories are deeply affected. In particular, the always contested divide between public law and private law is nowadays more and more under stress and reveals its limited adequacy to read the legal implications of new social phenomena.

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