FROM CLIMATE MARCH TO THE COURTROOM: ENVIRONMENTAL DEMOCRACY AND THE ECHR

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1. INTRODUCTION

Environmental democracy is a relatively new concept which combines the objective of effective environmental protection with a number of democratic ideals. It has been defined as consisting of three core rights: the right to free access to information on environmental matters; the right to participate meaningfully in environmental decision-making; the right to seek enforcement of environmental laws or compensation for harm.[1] These rights were first recognised by the international community in 1992 under Principle 10 of the Rio Declaration,[2] and were later at the centre of what is known as the Aarhus Convention of 1998.[3] The principles and ideals of this concept are beginning to have widespread effect in legal and political circles globally. The development of this concept has occurred along a similar timeframe to the development of environmental jurisprudence under the European Convention on Human Rights ("ECHR"), notably the emergence of so-called "derived environmental rights"[4] which is beginning to allow individuals to challenge the State concerning environmental issues that affect them directly.

The compatibility of this developing environmental human rights jurisprudence has raised a number of issues. To what extent is it possible for an individualistic system like that of human rights to protect interests which are not only global but non-anthropocentric like the environment? How can the judicial imposition of environmental obligations on elected governments be reconciled with the values and ideals of democracy? I will attempt to demonstrate here that, despite the existence of a number of limitations to this method of protection, the new human rights jurisprudence provides a novel approach which is highly beneficial; one which introduces a new means by which individuals may conceptualise the environment, their place in it and their rights and responsibilities pertaining to it, and one which not only encourages but also promotes and facilitates localised, democratic environmental action.

2. HUMAN RIGHTS, THE ENVIRONMENT AND ADMISSIBILITY

It must first be recognised that the system of human rights protection itself, and more specifically the ECHR regime, impose a number of limitations to that which can be achieved by using such an approach. The interests which may be protected under such a regime are

[1] Environmental Democracy Index, 'Background and Methodology' <http://www.environmentaldemocracyindex.org/about/background_and_methodology> accessed 12 November 2015
[2] Rio Declaration on Environment and Development 1992, Principle 10
[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998
[4] Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedom' [2001] 21 OJLS 521

inherently limited by underlying anthropocentric and individualist focuses, and the protection which may be afforded to the environment is undermined by the *ex post facto* nature of human rights adjudication, although the extent of such limitations may be debateable. Conversely, such focuses create the possibility for a renewed perspective on the relationship of the individual with his environment. Bearing in mind that different approaches to environmental protection can evidently coexist, and that the lacunas left by one method may be remedied by another, the human rights approach can be seen to provide a novel and useful angle from which to tackle environmental issues.

A) Anthropocentrism

Human rights are, by definition, human-centred. An initial, principled criticism of human rights-based environmental protection therefore is that such an anthropocentric approach is unsatisfactory because it fails to recognise the intrinsic value of the environment.[5] Any environmental advances are only achieved as a "by-product of [the] primary goal of protecting individual human entitlements."[6] Aside from the ethical argument, this also reduces the scope of environmental protection available; any interests must not only be linked to those of an individual human, but also those interests must be so fundamental to that human as to be considered worth protecting under human rights law. There is therefore both a "categorical" obstacle and a "qualitative" one, which combine to exclude both non-human interests and those interests which are merely aesthetic or recreational.[7] These limitations were apparent in *Kyrtatos*, in which the European Court of Human Rights ("the Court") noted that "[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect."[8]

As Hayward emphasises, the anthropocentric approach is not presented as a "panacea", nor does it preclude other approaches.[9] Shelton reasons that there is no conflict between human and other environmental interests; we are not "separable members of the universe" but "interlinked and interdependent participants" and therefore protection of human environmental interests can only be a positive thing for the environment as a whole.[10] In fact, the development of an anthropocentric approach may indirectly enhance more eco-centric or bio-centric approaches by encouraging the development of "practical jurisprudence and wider social norms" to "support more ambitious aims",[11] and developing and defending "the moral standards of social justice in the world of human culture" which may then be extended to non-human spheres of interest.[12] As such, a movement which may begin solely

[5] Robert Traer, 'Doing Environmental Ethics' (Second Edition, Westview Press 2012) 12
[6] KL Morrow, 'The rights question: the initial impact of the Human Rights Act on domestic law relating to the environment' [2005] JPL 1010, 1010-1011
[7] Brennan Van Dyke, 'A Proposal to Introduce the Right to a Healthy Environment Into the European Convention Regime' [1993] 13 Va Envtl LJ 323, 334-335
[8] *Kyrtatos v Greece* App no 41666/98 (ECHR, 22 May 2003)
[9] Tim Hayward, 'Constitutional Environmental Rights: A Case for Political Analysis' [2000] 48 Political Studies 558, 559
[10] Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' [1991] 28 Stan J Intl L 103, 110
[11] Hayward (n9) 559-560
[12] Traer (n 5) 40

focused on the interests of humans could contribute to a culture of morality and awareness that may benefit all species.

B) **Individualist Focus**

Human rights instruments generally involve a strong focus on the individual; this is coherent with one of the prevailing rationales for the existence of human rights: the protection of individual in the face of the general interest. The ECHR is no exception in this regard, and is perhaps even more individualist than others in that it does not recognise the existence of specific group rights (such as the African Charter's focus on "peoples' rights"[13]). Article 34 (often referred to as "the victim requirement") allows for claims to be made by an individual, group of individuals or non-governmental organisation that has/have been directly (or, exceptionally, indirectly[14]) affected by the alleged violation.[15] There is currently no prospect for a claim to be made as an *actio popularis.*[16]

A primary criticism of such an individualist approach is that, once again, it limits the kinds of cases that can be brought to the European Court of Human Rights ("the Court"). Environmental degradation "rarely impact[s] solely upon individual litigants and their rights but usually involve broader public interests that are not easily addressed in a typical litigation context".[17] There is no opportunity under the ECHR for an individual or group to invoke a collective or shared environmental interest against a State; neither is there any scope for the implementation of the principle of intergenerational equity (the protection of the rights of future generations).[18] Nevertheless, these "collective" environmental rights do find some protection under the ECHR regime in opposition to other individual rights. Where an individual right, such as the right to protection of property under Article 1 of the first Protocol to the ECHR ("P1-1"), is in conflict with environmental objectives, a State may defend limitation of that right by reference to the protection of the environment as part of the "general" or "public interest". For example, in *Fägerskiöld v Sweden* the Court held that the State's interference with the applicants' rights under P1-1 by building windmills near their residence was "proportionate to the aims pursued" since "in relation to the interests of the community as a whole, […] wind power is a renewable source of energy which is beneficial for both the environment and society."[19] The downside to this form of protection is clearly that it cannot be invoked by individuals, and relies on the State to take action in favour of the environment. As such, it does little to promote the aims of environmental democracy except in that it decreases the legal barriers to environmental protection where there is sufficient effective political pressure for this to be an aim of the government.

On a more profound level, some might argue that the conceptual focus on the individual is essentially discordant with environmental aims. With the growing popularity of

[13] The African (Banjul) Charter on Human and Peoples' Rights 1981
[14] *Varnava and Others v Turkey* App no's 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR, 18 September 2009)
[15] European Convention on Human Rights and Fundamental Freedoms 1950, Article 34
[16] *Aksu v Turkey* App nos 4149/04 and 41029/04 (ECHR, 15 March 2012)
[17] Morrow (n6) 1011
[18] Edith Brown Weiss, 'In Fairness To Future Generations and Sustainable Development' [1992] 8 American University International Law Review 19
[19] *Fägerskiöld v Sweden* App no 376604/04 (ECHR, 26 February 2008) [2]

the idea that the source of many of the environmental crises that we are faced with today is a liberal, individualist culture that favours self-interest over the common good,[20] it may seem that trying to solve such problems with similarly individualist methods is at best insufficient and at worst counter-effective. Conversely, it is possible to argue that such an individualist approach is in fact welcome in the sphere in environmental protection. As DeMerieux points out,[21] existing environmental law (whether international, regional or domestic) tends to rely on states and other such bodies for enforcement, leaving the individual citizen far-removed from this process and with few or no legal options with which to challenge the decisions taken or their enforcement (or lack thereof). Douglas-Scott has documented such difficulties in the context of EU environmental law, noting that national *locus standi* criteria amongst other legal obstacles present "a barrier to the effective enforcement of environmental law".[22] In this sense, a human rights based approach not only allows individual citizens direct access to justice regarding environmental matters; it also re-orientates the nature of environmental law towards the individual and local issues. "The Environment" ceases to be an issue that is exclusively dealt with by men and women in suits at international conferences, full of abstract notions and references to distant future generations; it becomes a question of our relationship with the environment at a local level which has importance in our daily lives. It seems especially symbolic that the most notable development in environmental jurisprudence has been under Article 8: the link created between the environment and the idea of the home transforms the environment and its protection into an issue which is both intimate and personal. While the vindication of a single individual's rights in this way may not usually have any significant effect on a national or international scale, popular engagement with such issues is the essence of this new movement towards a more democratic and more participatory way of dealing with environmental challenges.

C) **Preventative Action**

Human rights litigation inevitably takes place after the alleged violation has occurred. This poses a particular problem in the sphere of environmental protection since meaningful reparation is often impossible – the effects of pollution can be felt for years, or even centuries, and may even be effectively irreversible. Such rights therefore require "proactive protection".[23] As was confirmed in *Tauria v France*, however, the exercise of the individual right to petition cannot be used to prevent a potential violation of the ECHR.[24] This would seem at first glance to deprive the human rights approach of much of its usefulness in terms of environmental protection.

Nonetheless, a number of jurisprudential developments would seem to have created the potential for a limited amount of preventative action. It has been held that Article 8 may be engaged when the risk posed by a dangerous activity is so high "as to establish a

[20] See for example: Naomi Klein, 'This Changes Everything' (Simon & Schuster 2014)
[21] DeMerieux (n4)
[22] Sionaidh Douglas-Scott 'Environmental Rights in the European Union – Participatory Democracy or Democratic Deficit?' in Alan E Boyle and Michael R Anderson, 'Human Rights Approaches to Environmental Protection' (Clarendon Press 1996) 113, 121
[23] Van Dyke (n7) 338
[24] *Tauria and Others v France* [1995] 83 D&R 112

sufficiently close link with private and family life".[25] The Court has also been seen to place emphasis on the importance of fundamental international norms like the precautionary principle,[26] arguably signalling a more proactive approach. These are important developments as they imply that the Court may, in limited cases, find a violation of the Convention before pollution has actually occurred.

Further, there are a number of indirect ways in which the ECHR may prevent future environmental harm. Clearly, the mere possibility of a future claim to the Court is likely to affect a State's actions. It also provides pressure groups with material with which to lobby governments against action which will harm the environment. For example, the Bianca Jagger report on hydraulic fracturing makes explicit reference to ECHR jurisprudence and highlights the possible non-compliance with the ECHR of the UK government's plans regarding hydraulic fracturing, calling for an investigation into human rights compliance before any further action is taken.[27] The effectiveness of such tactics will evidently depend on the political climate and government in question, but it is nevertheless undeniable that the prospect of condemnation by a regional human rights court with all the accompanying political embarrassment and reparation costs is a formidable weapon for campaigners. The power of the language of human rights should not be underestimated.

3. SUBSTANTIVE RIGHTS

The substantive rights protected by the Convention are numerous. Since the mid-1990s there has been a steady growth in the extent of protection of environmental interests: notably under Article 8 (Right to respect for private and family life),[28] but also Article 2 (Right to life)[29] and Article 1 of the first Protocol ("P1-1")[30]. Article 3 (Prohibition of torture) has been invoked unsuccessfully in a number of environmental cases[31] (although two recent successful such cases concerning passive smoking in prisons[32] could possibly provide a starting point for future environmental development).

The recognition of these rights is an essential step forward, although it remains to be fully examined whether the protection afforded to such rights is truly effective. This section will analyse two aspects of this question: the extent of the obligations of States and the effect of the margin of appreciation on the potential for States to be held to account for harm inflicted on the environment.

A) **Positive Obligations**

Given that a large extent of the threat posed to the environment comes from private actors rather than directly from the State itself, it is essential that the regime for the protection

[25] *Hardy and Maile v United Kingdom* App no 31965/07 (ECHR, 14 February 2012)
[26] *Tătar v Romania* App no 67021/01 (ECHR, 27 January 2009)
[27] The Bianca Jagger Human Rights Foundation, 'A Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom' (2014) <http://www.sas.ac.uk/sites/default/files/files/UK%20HRIA%20w%20appdx-hi%20res.pdf accessed: 15 February 2016>
[28] *López Ostra v Spain* App no 16798/90 (ECHR, 9 December 1994)
[29] *Öneryildiz v Turkey* App no 48939/99 (ECHR, 30 November 2004)
[30] *Zander v Sweden* App no 14282/88 (ECHR, 25 November 1993)
[31] *López Ostra* (n28)
[32] *Florea v Romania* App no 37186/03 (ECHR, 14 September 2010); *Elefteriadis v Romania* App no 38427/05 (ECHR, 25 January 2011)

of environmental human rights includes a means by which the State can be held accountable for the actions of non-public actors. Thankfully the Court has underlined that such rights implicate the existence of positive obligations as well as negative, therefore a State may be held responsible for its failure to take "the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8."[33] This obligation was extended to Article 2 cases in *Öneryildiz v Turkey*, in which the preventative nature of those obligations was emphasised: in the context of any activity in which the right to life may be endangered, there would be "a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction."[34] Indeed, so commonplace have they become that "the Court often declines to articulate whether positive or negative obligations are at issue in environmental cases,"[35] as in *Hatton* where the Court stated that it was not "required to decide whether the present case falls into the one category or the other."[36]

While the existence of such positive obligations is clearly an essential development, the extent of such obligations or exactly when a State will be considered by the Court to have taken "appropriate steps" will define their impact on the protection of environmental human rights. These obligations may be both substantive (such as the putting in place of "a legislative and administrative framework designed to provide effective deterrence against threats to the right to life"[37]) and procedural (for example, "to take regulatory measures and adequately inform the public about any life-threatening emergency" and to ensure the initiation of a judicial inquiry[38]). The application of such obligations by the Court, however, seems to be of varying strength from case to case. While, for example, in *Hatton* the Court judged that there had been no violation of the Convention because the UK government had taken "reasonable and appropriate measures" to protect the rights in question,[39] it later held in *Kolyadenko* that there had been a breach of a positive obligation because "the State officials and authorities failed to do everything in their power to protect the applicants' rights" under Article 8 and P1-1.[40]

This apparent inconsistency is in fact intricately linked with the application of the doctrine of the margin of appreciation: where the margin is wide, the Court will tend to be more forgiving in its analysis of the fulfilment or otherwise of a State's positive obligations. It is therefore to this doctrine that we now turn, with a specific focus on its application to Article 8 cases.

B) **Margin of Appreciation and Article 8**

The controversial doctrine of the "margin of appreciation" rears its mighty head during the "fair balance" or "proportionality" stages of Article 8 adjudication. The Court

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[33] *Guerra and Others v Italy* App no 14967/89 (ECHR, 19 February 1998) [58]
[34] *Öneryildiz* (n29) 71.
[35] Nicole Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' [2008] EHRLR 44, 66
[36] *Hatton and Others v United Kingdom* App no 36022/97 (ECHR, 8 July 2003) [119]
[37] *Budayeva v Russia* App no 15339/02 (ECHR, 20 March 2008) [129]
[38] Ibid 131-132.
[39] *Hatton* (n36)
[40] *Kolyadenko v Russia* App no 17423/05 (ECHR, 28 February 2012) [216]

generally affords States a wide margin of appreciation in environmental cases due to their political nature: national economic interests are inevitably raised as a justification for the interference with individual environmental rights. As was reiterated in *Hatton*, the role of the ECHR is a subsidiary one, and "[t]he national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions" and that "[i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight".[41] So wide is the margin in such cases that for one commentator, "acquiescence" is the "dominant feature" of the Court's environmental jurisprudence.[42]

Despite this, it is apparent from the growing number of successful applicants in such cases that the margin is not without limits. However, analysis of the case law presents an emerging pattern which suggests that those limits are not substantive; the Court repeatedly focuses on domestic irregularities, procedural issues and the measures taken by States to reduce the impact of an environmental interference rather than the substantive extent of the impact itself. This focus on procedural rather than substantial limits can be seen as a compromise that allows judicial protection of environmental rights and of the rule of law while remaining respectful of democratic values and systems by refraining from imposing substantive limits on the actions of popularly elected governments.

The importance of domestic irregularities was highlighted in *Hatton*, in which the Court noted that in previous "environmental" cases in which the applicants had been successful in claiming a violation of their rights, "the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime." As such, the Court noted that in *López Ostra*, the waste-treatment plant in question was operating "without the necessary licence" and in *Guerra*, "the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide"[43] Such irregularities have remained prominent in more recent jurisprudence: in *Fadeyeva*, for example, the Court "pays special attention" to the fact that the domestic Courts recognised the applicant's "right to be resettled" and that domestic legislation recognised the zone in which the applicant as "unfit for habitation".[44] It notes additionally that the levels of air toxicity were, "for a significant period of time", above legal maximum levels imposed by domestic legislation.[45] This focus on domestic irregularities allows the Court to go above and beyond simple recognition and respect of the democratically made decisions of national parliaments but also to reinforce and promote those same democratic systems; when a national government does not abide by the rules and regulations that it itself has set down, it is not undemocratic for a judicial body to hold it to account for such a failure.

As is discussed further in the section on procedural rights, there has been an increasing focus by the Court on the procedural obligations inherent in Article 8 in relation to

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[41] *Hatton* (n36) 97
[42] DeMerieux (n4) 550
[43] *Hatton* (n36) 120
[44] *Fadeyeva v Russia* App no 55723/00 (ECHR, 9 June 2005) [86]
[45] Ibid 49 and 87

environmental cases. It is worth noting here that the focus on procedural issues often eclipses the consideration of substantive ones in Article 8 litigation. In *Taşkin*, the Court held that the "material aspect of the case" had already been dealt with by the Supreme Administrative Court of Turkey and therefore it fell to the Court to consider only the procedural issues,[46] focusing on the fact that the executive's decision was not taken in public and therefore "deprived the procedural guarantees available to the applicants of any useful effect."[47] Similarly, in *Giacomelli* the Court focused on the delay in government action and the lack of effective procedural guarantees rather than on substantive issues.[48] These procedural requirements generally promote the principal three pillars of environmental democracy: free access to information on environmental matters, the right to participate meaningfully in environmental decision-making and the right to seek enforcement of environmental laws or compensation for harm.

San Jose has underlined the weight given to the measures taken by a State to reduce the impact on individual rights. He argues that the main difference between the first successful Article 8 environmental claim (*López Ostra v Spain*)[49] and a previous, unsuccessful case (*Powell and Rayner v UK*)[50] was that while the UK government had taken a number of measures to reduce the impact of the noise disturbance, "the Spanish authorities had proved notoriously reluctant to remedy the situation complained of,"[51] notably in that they not only failed to take steps to protect the applicants' rights but also that they resisted domestic judicial decisions which would have had such an effect.[52] This analysis may be thrown into doubt by the more recent case of *Deés v Hungary*, in which the applicant complained of a violation of his rights as a result of noise, vibration, pollution and odour caused by traffic on the road alongside his house: despite the fact that in that case the State had implemented extensive and costly measures to attempt to reduce the impact on the applicant, the Court found that there had been a violation of Article 8.[53] However, given that the enforcement of some of these measures was called into question, including the installation of speed limits and road signs prohibiting heavy vehicles and re-orientating traffic,[54] it is arguable that this is simply authority for the requirement that such measures be effective. This is supported by the fact that, despite these measures, the noise levels were still around 15% above statutory limits.[55] This case therefore combines the ineffectiveness of the measures taken and continuing domestic irregularity.

Increasingly therefore it seems that rather than imposing substantive limits on environmental harm, the Court will, on the one hand, enforce a number of procedural requirements which promote the informed participation of the public in environmental issues, and on the other, ensure that the relevant national law is applied fairly and effectively. It is

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[46] *Taşkin v Turkey* App no 46117/99 (ECHR, 10 November 2004) [117]
[47] Ibid 125
[48] *Giacomelli v Italy* App no 59909/00 (ECHR, 2 November 2006) [88] and [93]
[49] *López Ostra* (n28)
[50] *Powell and Rayner v United Kingdom* App no 9310/81 (ECHR, 21 February 1990)
[51] Daniel García San José, 'Environmental Protection and the European Convention on Human Rights' (Council of Europe Publishing 2005) 13-14
[52] *López Ostra* (n28) 56
[53] *Deés v Hungary* App no 2345/06 (ECHR, 9 November 2010) [24]
[54] Ibid 7 and 22
[55] Ibid 23

an approach of give and take, through which the Court steps back from substantive issues but imposes a strict control on the legality of State action and the effectiveness of democratic processes. The subsidiary role of the Court and the ECHR is therefore highlighted while simultaneously drawing attention to the primary role of popular political pressure and action.

4. PROCEDURAL RIGHTS

The ECHR protects a number of procedural rights which have relevance to environmental protection, some of which are procedural by their essential nature (Articles 6 and 13) and some of which have been derived from substantive rights, including Articles 8, 2, 3 and P1-1. As we have seen, procedural rights have come to play an important, even dominant role in the environmental jurisprudence of the ECHR. This section will consider the content and application of these rights, while posing the question as to the effectiveness and appropriateness of such procedural protection in the face of the environmental challenges of our time.

A) **Essential Procedural Rights**

I. Article 6: right to a fair trial

Article 6(1) has played an important role in guaranteeing access to justice in environmental matters. As DeMerieux notes, it essentially operates "to demand the putting in place of a coherent system to achieve a fair balance between the authorities' interest and that of the applicant."[56] It has so far been invoked in relation to (*inter alia*) the right to personal integrity (in relation to the risks posed to health by a nuclear station),[57] the right to enjoyment of property (in relation to water pollution which rendered the applicants ability to use water from a well on their property for drinking purposes impossible),[58] and a constitutional right to live in a healthy and balanced environment.[59]

Unfortunately however, some controversial case law has created new obstacles for the enforcement of Article 6(1) rights in environmental cases, especially in the context of nuclear energy. The issue first arose in *Balmer Schafroth v Switzerland* in 1997, in which the applicants complained that their Article 6(1) rights had been violated by the denial of a means to challenge the decision of the Federal Council to grant an operating licence to a nuclear power station in their area. It was held that the link between the "civil right" which they claimed fell to be determined (the right to physical integrity) and the Federal Council's decision was "too tenuous and remote" because the applicants "failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent."[60] The requirement that the risk posed must be "specific" and "imminent" was, according to DeMerieux, "a decidedly new and

[56] DeMerieux (n4) 550
[57] *Balmer-Schafroth and Others v Switzerland* App no 22110/93 (ECHR, 26 August 1997)
[58] *Zander* (n30)
[59] *Taşkin* (n42)
[60] *Balmer-Schafroth* (n57) 40

added fetter on access".[61] It seems possible that this decision was taken as a result of the Court's reluctance to deal with "the Nuclear Question" considering its strongly political dimension: as DeMerieux notes, "[c]learly, the Convention court was setting a near unreachable criterion where nuclear power and questions of 'high policy' were concerned."[62]

The Court saw the domestic decision that the applicants sought to challenge as one which lay squarely in the field of political decision-making and not one which was appropriate for a court to assess. However, as is highlighted in the strong dissenting opinion led by Judge Pettiti, this was not a case in which the question posed was whether or not nuclear energy should be used but a licencing decision which should not have escaped judicial scrutiny.[63] Nevertheless, the majority's decision was affirmed in an almost identical case 3 years later: in *Athanassoglu*, the Court held once again that "the connection between the Federal Council's decision and the domestic-law rights invoked by the applicants was too tenuous and remote."[64] It considered that "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6(1) cannot be read as dictating any one scheme rather than another."[65] However, this was not the question before the Court: it was simply being asked to rule as to whether the applicants' procedural rights to challenge the licencing of a specific station had been respected. These kinds of executive decisions are not open to the same democratic public debate. As Judge Pettiti reasoned in *Balmer-Schafroth*,

> What applies to the supervision of quarries, motorways and waste-disposal sites applies a fortiori to nuclear energy and the operation of power stations required to comply with safety standards. If there is a field in which blind trust cannot be placed in the executive, it is nuclear power[.][66]

This failure to exercise effective judicial scrutiny is unfortunate. The reluctance of the Court to deal with such questions of national policy certainly limits the scope of application of the environmental rights approach. It seems that such jurisprudence may be limited to cases similarly concerning nuclear energy: in *Taşkin*, which involved the operation of a gold mine, the Court did not mention the "imminence" criterion, despite the fact that it was raised in argument by the Turkish government.[67] This does not, however, alter the fact that these cases leave a significant gap in the protection of the right of access to justice, created in the name of preserving democratic legitimacy.

II. Article 13: right to an effective remedy

[61] DeMerieux (n4) 548
[62] Ibid 554
[63] *Balmer-Schafroth and Others* (n57) Dissenting Opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek 6
[64] *Athanassoglou and Others v Switzerland* App no 27644/95 (ECHR, 6 April 2000) [51]
[65] Ibid 54
[66] *Balmer-Schafroth* (n57) 6 (Judge Pettiti)
[67] *Taşkin* (n46) 107 and 128

Article 13 has been claimed successfully a number of times in relation to environmental cases, notably where domestic law does not allow for an effective remedy (for example, in *Hatton* it was held that judicial review was not an effective remedy because the scope of review was limited to English public law concepts like irrationality)[68] and where the remedy is rendered ineffective by the means in which it is discharged (in *Öneryildiz* the Court found a breach of Article 13 because the compensation that had been awarded had never been paid).[69]

The right to an effective remedy is important because it underlies all the other aspects of the Convention and is therefore an important aspect of the right of access to justice.

B) **Derived Procedural Rights**

Most discussion regarding such derived rights surrounds the application of Article 8, although they have been extended to other substantive rights as well (notably to Article 2 in *Öneryildiz*).[70] In general terms, these procedural obligations can be summarised as the existence of an informed decision-making process involving effective participation of the public, who in turn have a right to information concerning matters which may affect their rights. The Court has held that "[w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities" on the environment and the rights of individuals in order to "enable them to strike a fair balance between the various conflicting interests at stake."[71] As such, the Court bases the justification for such derived procedural rights on the ability of the national state to be able to assess the situation by taking both sides into account in order to make a decision as to the correct balance to be struck which is based on full information, thus forcing the State to engage effectively with the rights question at hand and giving a platform to those whose voices may otherwise have gone unheard.

Such rights and procedures have been emphasised in a number of cases, including *Giacomelli,* in which the importance of Environmental Impact Assessments was underlined,[72] and *Hardy*, in which the Court conducted a detailed appraisal of the various investigations and assessments carried out by the UK government in order to inform their decision.[73] The right to information enabling individuals to assess the risks to which they may be subject was first derived from Article 8 in *Guerra*.[74] Since then it has been highlighted numerous times, notably in *Taşkin* where the Court noted that "[t]he importance of public access to […] information which would enable members of the public to assess the danger to which they are exposed is beyond question."[75] The focus on public participation is a more recent development and is arguably a result of the impact of environmental democracy rights as set out in the Aarhus Convention. In *Taşkin*, the Court referred to a number of international

[68] *Hatton* (n36) 142
[69] *Öneryildiz* (n29) 149
[70] Ibid 141
[71] *Taşkin* (n46) 119
[72] *Giacomelli* (n48) 8
[73] *Hardy* (n25) 222-232
[74] *Guerra* (n33) 60
[75] *Taşkin* (n46) 119

documents including the Aarhus Convention and Principle 10 of the Rio Declaration and noted the importance of public participation.[76] It has since been highlighted, notably in *Flamenbaum.*[77]

The Court's approach to such derived rights recognises the fundamental tenet, deeply rooted in environmental democracy, that a decision cannot be truly informed unless it involves the participation of those whom it is likely to effect. This participation is unlikely to be effective without access to information; this information is unlikely to be available if there has not been a process of investigation and assessment. Additionally, a decision that cannot be challenged leaves far too much open to the risk of error, human or otherwise. As such, the Court has recognised and demonstrated that the three defining rights of environmental democracy – access to information, participation in decision-making processes and access to justice – are not simply attractive on their own merits but are inextricably linked with the engagement and balancing act that national states are required to carry out as part of their obligations relating to human rights law.

C) **The Effectiveness of Procedural Rights**

It falls now to consider whether these procedural rights are effective in promoting both protection of the environment and the values of democracy. This is especially pertinent given that, as we have seen, the Court, in applying the margin of appreciation, has avoided setting any real substantive limits to environmental impacts. Mason criticises the almost exclusive focus on procedural guarantees in the Aarhus Convention, arguing that the lack of substantial environmental standards is "a practical obstacle" since it "reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values."[78] He argues that "[i]nformation disclosure and public participation become more a means for legitimising rather than interrogating governance institutions and for benchmarking public institutions against procedural check-lists rather than substantive environmental standards."[79] He throws doubt on the assumption that procedural rights necessarily promote substantive ones;[80] that access to information necessarily empowers citizens to defend their rights and hold their governments to account.[81]

Mason's arguments are interesting to consider because they underline that the imposition of procedural guarantees, however strictly policed, is not a panacea. However, it must be underlined that there are important differences between the Aarhus Convention, the instrument at the receiving end of his critique, and the ECHR. There have been calls in the past for the introduction by protocol of an independent and substantive "right to a healthy environment" to the ECHR.[82] This proposal was taken up by the Council of Europe's Parliamentary Assembly in 2003 but rejected by the Committee of Ministers the following

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[76] Ibid 98-100
[77] *Flamenbaum and Others v France* App nos 3675/04 and 23264/04 (ECHR, 13 December 2012) 157-158
[78] Michael Mason, 'Information Disclosure and Environmental Rights: the Aarhus Convention' [2010] 10 Global Environmental Politics 10, 26
[79] Ibid 26
[80] Ibid 17
[81] Ibid 13-14
[82] Van Dyke (n7)

year.[83] It is unclear, however, how much more protection such a right would be able to offer in the human rights context. Were the Court to impose substantive limits on environmental harm it would most likely continue to allow a very wide margin of appreciation (as it currently does in relation to Article 8) given the political nature of the subject matter. It would also have to impose such judgments on a case-by-case basis which, given the variety of such cases which would be likely to arise and the constantly developing nature of environmental science, would be unlikely to provide effective guidelines for States and potential applicants. While specific, quantitative regulations and limitations may be negotiable in the context of international conventions with environmental objectives like the Aarhus Convention, the dynamic is completely different in a human rights instrument: terms are vaguer, the power of interpretation is much greater and the subsidiarity of the role of the Court is much more important.

Some criticisms still hold, however: "procedural checklists" may not necessarily directly promote the formation of substantive national norms for the protection of the environment; perhaps the focus on procedural over substantive issues does serve to "legitimise" government action in some circumstances. Nevertheless, although they may not be sufficient for the effective protection of the environment in general, such procedural guarantees are a necessary prerequisite for the effective enforcement and exercise by individuals of the obligations owed to them by the State and the rights to which they are entitled under human rights law; rights which, thanks to the conception of the ECHR as a "living instrument",[84] have the potential to expand and extend their reach with the passage of time. This role of facilitation is a highly important one, and one which the Court is able to play without posing a threat to democratic values and institutions.

5. CONCLUSION

Evidently the ECHR is not a cure-all: its scope of application is certainly limited; it shies away from the enforcement of substantive guarantees; it suffers still from a number of complex issues and hurdles to access to justice and the protection of the environment (for example, the imposition of the "imminence" criterion in *Balmer Schafroth*). However, it does play two essential roles in the promotion of environmental protection. Firstly, its focus on procedural rights, guarantees and obligations is fundamental in the facilitation of individuals' engagement with environmental questions and State policy which affects them. Secondly, in so enabling private citizens in this domain, it represents a new, re-orientated vision of environmental law and protection that has at its centre the individual and her relationship with the environment. This re-localisation will hopefully encourage greater engagement with environmental issues which is unlikely to remain entirely confined to human rights jurisprudence but may serve to reinvigorate wider environmental movements.

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[83] Council of Europe Committee of Ministers, 'Doc 10041 on Environment and Human Rights' (21 January 2004) <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10403&lang=en> accessed 20 November 2015

[84] *Tyrer v United Kingdom* App no 585672 (ECHR, 25 April 1978) [31]

The facilitation of political, civil and legal action through the increasing focus on procedural rights is largely complementary to this shift. The combination of renewed, reconnected engagement and stronger, enforceable access to information, participation and justice in the environmental context present the possibility of a reinvigorated movement with a dual focus: the preservation of the environment and the promotion of truly participatory democracy.

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