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THEORIZING A HUMAN RIGHT-BASED APPROACH TO SUSTAINABLE URBAN DEVELOPMENT IN EUROPE

Abstract: This study explores the approach to sustainable urban development adopted by the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) in their respective case law. Both Courts have developed interesting views and have provided judicial protection in relation to environmental quality in the city, consistently with their specific competences. From this perspective, this paper aims to analyse how the ECtHR and the ECJ are concurring to define an interesting regional judicial approach to sustainable urban development, and also suggests some viable paths that may help to enhance the results achieved, especially through a human rights-based approach and, to some extent, through judicial dialogue.

1. — *Introduction.*

Sustainable urban development is at the top of the legal and scientific agenda of the international community. This is not surprising when one thinks of the proportions of urbanization: in fact, despite cities occupy approximately the 2% of the Earth's land, they are responsible for the 70% of greenhouse gas emissions and of the global waste, as well as for over the 60% of global energy consumption. However, at the same time, they generate up to the 70% of gross domestic product(1).

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(1) See: *The New Urban Agenda*, available at *habitat3.org*.

Currently, at the global level, around 55% of all people live in urban areas [2] and 5 billion people are projected to live in cities by 2030; according to the UN, 70% of world population is expected to live in cities by 2050. All these factors are capable of having a huge impact on the environment and on the human beings, from many viewpoints, including human health: in this sense, it is significant to recall that, as of 2016, 90% of urban dwellers were breathing unsafe air, which resulted in 4.2 million premature deaths due to ambient air pollution, and that «more than a half of the global urban population were exposed to air pollution levels at least 2.5 times higher than the safety standard» [3].

Focusing on Europe, figures are not less eloquent: over two-thirds of the EU's population live in urban areas, and they are responsible for about 80 % of energy use and for up to 85 % of European gross domestic product (GDP) [4].

It goes without saying that this scenario affects urban living conditions from many viewpoints. As recalled above, air quality is a clear example, as well as noise pollution [5]; they pose major threats to the quality of urban dwellers' living conditions and may affect human health [6].

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[2] United Nations, Department of Economic and Social Affairs, *68% of the world population projected to live in urban areas by 2050, says UN*, 16 May 2018, New York, available at *un.org*.

[3] See United Nations, Department of Economic and Social Affairs, Statistics Division, *Sustainable Development Goal 11, Make cities and human settlements inclusive, safe, resilient and sustainable*, available at *unstats.un.org*.

[4] European Commission, EU Regional and Urban Development, Urban Development, available at *ec.europa.eu*.

[5] K.M. de Paiva Vianna, M.R. Alves Cardoso, R.M. Calejo Rodrigues, *Noise pollution and annoyance: An urban soundscapes study*, in *Noise & Health*, 2015, pp. 125-133, available at *ncbi.nlm.nih.gov*. Also see: J.M. Barrigón Morillas, G. Rey Gozalo, D. Montes González, P. Atanasio Moraga, R. Vílchez-Gómez, *Noise Pollution and Urban Planning*, in *Current Pollution Report*, 2018, pp. 208-219.

[6] Moreover, under those circumstances, inequalities and discrimination may preclude or hamper the access to some basic services and resources, like housing and clean water. X. Bai, I. Nath, A. Capon, N. Hasan, D. Jaron, *Health and wellbeing in the changing urban environment: complex challenges, scientific responses, and the way forward*, in *Current Opinion in Environmental*

What is more, since urban areas represent the productive and economic core of our modern society, they often result to be overpopulated. Their uncontrolled and unplanned growth may lead to undesirable consequences, as the rapid, unregulated peri-urban growth and urban sprawl[7], which may cause the reduction or the loss of rural areas as well as of wildlife and biodiversity[8], and, under some circumstances, wildlife-livestock-human interfaces[9].

Sustainability, 2012, pp. 465-472, available at *sciencedirect.com*. The quality of life in urban area might be negatively affected by various other factors too, as the shortcomings related to convenient public transport (which, as of 2019, is available for only half of the world population) as well as the difficulties in accessing open public spaces (only 47% of the urban population live within easy walking distance, approximately 400 metres, form them). In this respect, see: United Nations, Department of Economic and Social Affairs Sustainable Development, Sustainable Development, *Sustainable Development Goal 11*, *Make cities and human settlements inclusive, safe, resilient and sustainable*, *Overview*, available at *sdgs.un.org*. It goes without saying that living conditions are particularly poor in slums, where up to 24% of urban population lived, as of 2018. J.A. McGee, C. Ergas, P.T. Greiner, M.T. Clement, *How do slums change the relationship between urbanization and the carbon intensity of well-being?*, in *Plos One*, 8 December 2017, *journals.plos.org*.

[7] "Urban sprawl" happens when cities and towns rapidly extend to the surrounding areas, often due to the expansion of the suburbs, with a dispersion of the urban population. This phenomenon determines an increase in the reliance on private vehicles for transportation and has been linked to increased energy use, pollution and traffic congestion. J.P. Rafferty, *Urban Sprawl*, in *Britannica*, available at *britannica.com*.

[8] World Economic Forum, K. Randall, *How urban expansion threatens wildlife and assists climate change*, 28 November 2018, available at *weforum.org*; J. Rafferty, *The problem of urban sprawl*, in *Encyclopaedia Britannica*, *Saving Earth*, available at *www.britannica.com*. A. Caetano Romero, T. Martins Issii, E.F. Lopes Pereira-Silva, E. Hardt, *Effects of urban sprawl on forest conservation in a metropolitan water source area*, in *Revista Árvore*, 2018, available at *www.scielo.br*. F. Mutuga, *The effect of urbanization on protected areas. The impact of urban growth on a wildlife protected area: a case study of Nairobi National Park*, IIIEE Theses 2009:15, Supervisor M. Backmann, Thesis for the fulfilment of the Master of Science in Environmental Sciences, Policy & Management Lund, Sweden, June 2009 MESPOM Programme: Lund University – University of Manchester – University of the Aegean – Central European, available at *core.ac.uk*. R. Ewing, J. Kostyack, with D. Chen, B. Stein, M. Ernst, *Endangered by Sprawl. How runaway development threatens America's wildlife*, National Wildlife Federation, Smart Growth America, and NatureServe, Washington, D.C., January 2005, available at *www.nwf.org*.

[9] J.M. Hassell, M. Begon, M.J. Ward, E.M. Fèvre, *Urbanization and Disease Emergence: Dynamics at the Wildlife-Livestock-Human Interface*, in *Trends in Ecology and Evolution*, 2017, pp. 55-67, available at *www.sciencedirect.com*. It seems interesting to recall that some studies have dealt

Importantly, scholarship has stressed that tackling urbanization is going to be a major challenge in the post-COVID-19 era[10]; in this sense, it cannot be overlooked how urban areas are severely affected by the current pandemic, more intensely than rural areas. In fact, over 90% of COVID-19 cases are in urban areas.[11]

In light of this complex scenario, this paper argues that the language of sustainability and a human rights-based approach may represent viable ways to tackle the challenges posed by urbanization.

For this purpose, an overview of the conceptualization of the right to the city and of the theorization of sustainable urban development from the perspective of international law is provided in paragraph 2. The efforts made to conceptualize "the right to the city" and the responses provided in the framework of the United Nations are explored in this paragraph, for the purpose of assessing the definition of a globally concerted human rights-based approach to sustainable urban development.

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with the connection between rapid urbanization in the global South and some epidemiological risks that it is posing as, for example, in relation to zoonosis. A. Sohel, J.D. Dávila, A. Allen, M.M. Haklay, C. Tacoli; E.M. Fèvre, *Does urbanization make emergence of zoonosis more likely? Evidence, myths and gaps*, in *Environment and Urbanization*, 2019, available at *journals.sagepub.com*. Aso see: L. Waldman, *Urbanisation, the Peri-urban Growth and Zoonotic Disease*, Institute of Development Studies, IDS Practice Paper in Brief 22, Brighton, 2015, available *at www.ids.ac.uk*.

[10] A. Rastandeh, M. Jarchow, *Urbanization and biodiversity loss in the post-COVID-19 era: complex challenges and possible solutions*, in *Cities Health*, 2020, available at *www.tandfonline.com*. M. van Staden, *What now for cities?*, UNA-UK, SDGs: building back better, 23 October 2020, available at *www.sustainablegoals.org.uk*. UN News, *Sustainable urbanization critical to COVID-19 recovery, better quality of life*, 31 October 2020, available at *news.un.org*.

[11] See: United Nations, Department of Economic and Social Affairs Sustainable Development, Sustainable Development, *Sustainable Development Goal 11*, *Make cities and human settlements inclusive, safe, resilient and sustainable*, *Overview*, cit.; United Nations, Department of Economic and Social Affairs, Sustainable Development Goal 11, Statistics Division, *Make cities and human settlements inclusive, safe, resilient and sustainable*, cit. It was also suggested that the adverse conditions related to urbanization might have created the "perfect storm" for the current pandemic. In this respect, R. Keil, M. Kaika, T. Mandler, Y. Tzaninis, *Global urbanization created the conditions for the current coronavirus pandemic*, *The Conversation*, 18 June 2020, available at *https://theconversation.com/global-urbanization-created-the-conditions-for-the-current-coronavirus-pandemic-137738*, last accessed 24 February 2021.

Subsequently, in paragraph 3, the focus is put on the European system of human rights protection, namely, the system of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR), in the framework of the Council of Europe (COE).

This system, in fact, stands out for the interesting and proactive approach developed by the ECtHR in its case-law with regard to the human rights dimension of urbanization, including some aspects concerning sustainable development. Indeed, so far, the Court has adopted several interesting decisions in relation to the urban context, by relying on the environmental potential of the European Convention on Human Rights (ECHR) and the "greening" of the catalogue of human rights it embodies, especially the right to private and family life, the right to an effective remedy and the right to property, respectively protected under Article 8 and Article 13 of the ECHR and under Article 1 of Protocol No. 1 to the Convention.

In paragraph 4, the focus is put on the results achieved by the other European major Court, that is the European Court of Justice (ECJ). The reflection is contextualized by analysing the relevant primary and secondary EU law sources.

From this perspective, the paper explores viable ways of judicial dialogue between the ECtHR and the CJEU, especially consistently with the provisions enshrined in Article 6(3) of the Treaty on the European Union and Article 52(3) of the CFR.

Finally, some conclusions are drawn.

2. — *The conceptualization of the right to the city and a human rights-based approach to sustainable urban development.*

It was 1968 when Henri Lefebvre first elaborated the conception of the right to the city in his major work "Le droit à la ville"[(12)]. Back then, in that context, the "right to the city" built upon the interconnection of economic

[(12)] H. Lefebvre, *Le droit à la ville*, Paris, 1968.

and productive forces and factors within the city, and had primarily a philosophical core. Nevertheless, this conception already encompassed some of the components of sustainable urban development, insofar as it captured the tension between economic factors and living conditions in the city. In fact, Henri Lefebvre – who addressed this conflict from a Marxist viewpoint – drew the line between inhabiting the urban society and the urban habitat, as the latter is defined according to «the rational conceits of planners" and the "commercial ambitions of developers»[13].

Only few years later, in the early 1970s, also the international community began to move its first steps towards the dimension of sustainability from a legal, globally concerted perspective[14].

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[13] The starting point of Lefebvre's view was influenced by his Marxist background, insofar as he argued that «rights appear and become customs and prescriptions, usually followed by enactments», which reflected the idea of "rights" as «an historical moment, a contradiction of the late capitalism». L.A. King, *Henri Lefebvre and the Right to the City*, in S. Meagher, S. Noll, J. Biehl, *Philosophy of the City Handbook*, London, 2020, p. 81. However, the right to the city was not quickly dismissed by Lefebvre as a "pseudo-right", as the right to nature, but it was seen as something more valuable than a mere bourgeoise instrument or a bourgeoise negative right, which was capable of providing appropriate recognition and a suitable reference paradigm to the needs of the inhabitants of the city. To Lefebvre, in this sense, the right to the city was a moral right, as scholarship interestingly stressed. See the same reference at p. 90.

[14] In order to contextualize the reflection in its wider landscape, it is significant to recall the concept of environmental justice, due to its interconnection with the urban context. Environmental justice is closely linked to the issues of socioeconomic vulnerability, environmental health and exposure to environmental hazards related to industrial development, especially in the urban framework. This concept is focused on the idea that all people deserve to live in a clean and safe environment, free from industrial waste and pollution, and addresses and explores the inequitable distribution of environmental hazards and burdens, that often affect disproportionately minorities and vulnerable groups. Since the early days, the movement of environmental justice has been characterized by the connection with racial discrimination, the environmental movement and the Civil Rights movement of the 1960s, where the roots of environmental justice are to be sought and where the language of socio-environmental justice began to appear. In this regard, this early stage, in the United States of America, was marked by the passing of the Civil Rights Act of 1964 and of some environmental legislation of crucial relevance. Subsequently, in the 1980s, environmental justice started as a grassroot movement. In particular, the movement was galvanized by the protest of 1982, in Warren County, in

In fact, the most recent achievements of the United Nations (UN) in the elaboration of a human rights-based approach to sustainable urban development are the outcome of a long process that began in 1972, at the Stockholm Conference. On that occasion, the important concept of "human environment" was affirmed, and the Stockholm Declaration on the UN Conference on the Human Environment (Stockholm Declaration) recognized the interaction between human rights and the environment[15]. Therefore, in this sense, the Stockholm Declaration can be seen as «the starting point of a rights-based approach to environmental protection»[16], as it affirms the principle that «Man [should] have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations»[17], a conception that ech-

North Carolina, where the predominantly Afro-American community was selected to host a hazardous waste landfill. In light of these considerations, the protection of human rights in the city may be an effective way for promoting both distributive and procedural environmental justice, which respectively concern equitable environmental protection and the participation in the decision-making process related to the environment. In this respect, see S. Hawkins, *Plural Understandings of Social-Environmental Justice*, in D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández, *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, cit., pp. 26 ff. For an in-depth analysis of the concept of environmental justice, see: I. Beretta, *Some Highlights on the Concept of Environmental Justice and its Use*, in *e-cadernos CES*, 2012, available at *http://journals.openedition.org/eces/1135,* last accessed 1 April 2021. Also see: J. Arney, *Environmental Justice – social movement*, in *Encyclopaedia Britannica*, available at *https://www.britannica.com/topic/environmental-justice*, last accessed 1 April 2021. The reader might also find interesting to see: G. Haughton, *Environmental Justice and the Sustainable City*, in *Journal of Planning Education and Research*, 1999, pp. 233-243.

[15] *Ibid.*, p. 81.

[16] See: Council of Europe, *Compass: Manual for human rights education with young people*, *Environment*, *Human Rights and the Environment*, available at *coe.int.*

[17] See Council of Europe, *Compass: Manual for human rights education with young people*, *Environment*, *Human Rights and the Environment*, cit. Importantly, the Stockholm Declaration also stated that «Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity».

oes the core of sustainable development with respect to intergenerational equity[18].

Three years later, in 1975, the General Assembly of the United Nations created the Habitat and Human Settlements Foundation (UNHHSF)[19], the first official UN body dedicated to urbanization[20], and, in 1976, at the Habitat I Conference, the first United Nations Conference on Human Settlements, expressly shone the spotlight on urban settlements, while also addressing accessibility, equality, participation and accountability. In particular, the Vancouver Declaration, adopted at the Habitat I Conference, provided a

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[18] For an in-depth analysis of the concept of intergenerational equity, see E. Brown Weiss, *Intergenerational Equity*, in *Max Planck Encyclopedia of Public International Law*, Oxford, last updated February 2013. It seems interesting to recall that, in the 1970s, the concept of sustainable development had not yet been explicitly elaborated. Nevertheless, the core of this idea was not overlooked at the Stockholm Conference, where the participants had taken into account «development as the main strategy for developing nations to combat environmental degradation». D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández, *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, Cambridge, 2018, Preface. However, it was not until 1987, when the Brundtland Commission published Our Common Future, also known as the Brundtland Report, that the conceptualization of sustainable development was provided for the first time. In particular, sustainable development is described as the «development that meets the needs of the present without compromising the ability of future generations to meet their own needs». The elaboration of this concept was achieved by mediating a compromise between «the contradictions present in the interactions of the rapidly deteriorating environmental health of the planet and the continued desired for sustained economic growth». That resulted in the incorporation of three components, namely «economic development, social development and environmental protection». See, again, D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández, *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, cit., p. 74. Interestingly enough, in scholarship it was argued that «Speaking of sustainable development is an exercise in ambiguity». D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández, *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, cit., Preface.

[19] See: UN Habitat – For a better urban future, *History mandate role in the UN system*, available at *unhabitat.org*. The web page recalls that «Then under the umbrella of the United Nations Environment Programme (UNEP), its task was to assist national programmes relating to human settlements through the provision of capital and technical assistance, particularly in developing countries». The UNHHSF was only given an initial budget of 4 million US dollars for a total period of four years.

[20] See UN Habitat – For a better urban future, *History mandate role in the UN system*, cit.

definition of "adequate shelter" and, importantly, the Guidelines for Action of the Declaration of Principles of the Vancouver Declaration affirmed that «adequate shelter and services are a basic human right which places an obligation on Governments to ensure their attainment by all people», framing the discourse on urbanization in human rights terms [21]. Furthermore, under the impulse of Habitat I Conference, the United Nations Commission on Human Settlements, an intergovernmental body, and its executive secretariat, the United Nations Centre for Human Settlements were created in 1977, setting the stage for the future creation of UN-Habitat [22].

It is remarkable that, despite in those times urban growth was not as prominent in the international agenda as it is today, since two-thirds of world population was still rural, the UN captured the need to address the «rapid and often uncontrolled growth of cities» [23].

In 1996, Habitat II Conference on Human Settlements was convened in Istanbul, for the purpose of assessing the progress made after Habitat I Conference, and for setting new goals for the new Millennium [24]. The spotlight was shone on accessible urban services, infrastructure and the right to housing, and special emphasis was put on equality [25]. The Habitat II Conference stressed the centrality of human rights, especially the progres-

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[21] For an overview, see: United Nations, Conferences, Habitat, *United Nations Conference on Human Settlements - Habitat I Vancouver, Canada, 31 May-11 June 1976, Background – Adequate shelter as a basic human right*, available at *un.org*.

[22] UN Habitat – For a better urban future, *History mandate role in the UN system*, cit. The process culminated in the adoption of UN AG Res. A/56/206, in 2002, which strengthened Habitat's mandate and elevated its status to a fully-fledged UN Programme.

[23] See, again, UN Habitat – For a better urban future, *History mandate role in the UN system*, cit. The UN had captured the need to "think global but act local". For an analysis of this interesting concept, see R.C. Groom, *From the Editor. Think Global and Act Local*, in *The Journal of Extra Corporeal Technology*, 2012, available at *ncbi.nlm.nih.gov*.

[24] See, again, UN Habitat – For a better urban future, *History mandate role in the UN system*, cit.

[25] In particular, special emphasis was put on the obstacles that women and vulnerable groups encounter, that affect the quality of their lives and prevent them from participating in development, without overlooking that, generally, exclusion goes hand in hand with poverty.

sive realization of the right to housing in human settlements[26], and adopted the Habitat Agenda[27], which «provid[ed] a practical roadmap to an urbanising world»[28], while defining approaches and strategies for the achievement of sustainable development in urban areas all over the world[29].

In 2016, consistently with the tradition launched at the Habitat I Conference, Habitat III Conference on Housing and Sustainable Urban Development[30] was convened by the UN General Assembly, for the purpose of «reinvigorat[ing] the global commitment to sustainable urbanization that should focus on the implementation of a New Urban Agenda»[31]. Besides «incorporat[ing] a new recognition of the correlation between good urbanization and development»[32], the New Urban Agenda[33] is a basic instrument for the «implemen-

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[26] It should also be stressed that the Habitat II Conference recognized the principles of good governance in balanced rural and urban development. The achievements of the Conference were incorporated into the Istanbul Declaration on Human Settlements and the adoption of the Habitat Agenda was another important achievement during the Conference. Housing and Land Rights Network, Habitat International Coalition, *A Tool for Evaluative Habitat III Reporting: Responding to the Need for Implementation Reports*, available at *www.hlrn.org*.

[27] The Habitat Agenda is a political document that contains over 100 commitments and 600 recommendations.

[28] European Environment Agency, Glossary, *Habitat Agenda*, available at *eea.europa.eu*.

[29] European Environment Agency, Glossary, *Habitat Agenda*, cit. Also see this page for further information on the achievements of Habitat II: United Nations, *Outcomes on Human Settlements*, available at *un.org*.

[30] The Habitat III Conference – which followed the adoption of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals - was a unique forum for hosting the reflection and the debate on appropriate urban planning and management, that are crucial so that cities, towns and villages can play their role as «drivers of sustainable development and, hence, shape the implementation of new global development and climate change goals». For further information, see the *Habitat III* web page, available at *habitat3.org*.

[31] UNAG Resolution 66/207, adopted by the General Assembly on 22 December 2011, at the Sixty-sixth Session, A/RES/66/207, 14 March 2012, para. 2. available at *undocs.org*. The New Urban Agenda had to draw inspiration from several relevant instruments, especially the Habitat Agenda.

[32] European Commission, *Urban Policy*, available at *knowledge4policy.ec.europa.eu*.

[33] The New Urban Agenda lays out standards and principles for the planning, construction, development, management, and improvement of urban areas along its five main pillars

tation and localization […] in an integrated manner»[34] of the 2030 Agenda for Sustainable Development and for the implementation of the Sustainable Development Goals and targets, which is particularly significant since Sustainable Development Goal 11 specifically enshrines the aim of «mak[ing] cities and human settlements inclusive, safe, resilient and sustainable».

Interestingly enough, the Habitat Programme has offered a conceptualization of the right to the city, which is defined as «the right of all inhabitants present and future, to occupy, use and produce just, inclusive and sustainable cities, defined as a common good essential to the quality of life»[35].

This conception represents an interesting reference for the promotion of a human rights-based approach to sustainable urban development. This is all the more true because, so far, no human rights instrument of hard law has enshrined the right to the city or the right to sustainable urban development.

Some soft law tools as, for example, the Global Charter – Agenda for Human Rights in the City and the European Charter for the Safeguarding of the Human Rights in the City, contemplate right to the city or the right to sustainable urban development, but these instruments were not adopted in the framework of an intergovernmental *forum*.

However, despite a specific binding provision on sustainable urban development is still lacking, the experience of the UN has recognized its interconnection with human rights.

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of implementation, namely, national urban policies, urban legislation and regulations, urban planning and design, local economy and municipal finance, and local implementation. See: United Nations, *New Urban Agenda*, adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, on 20 October 2016, endorsed by the United Nations General Assembly at its sixty-eighth plenary meeting of the seventy-first session on 23 December 2016, A/RES/71/25, available at *unhabitat.org*.

[34] UN Habitat – For a better urban future, *Guidelines for Reporting on the Implementation of the New Urban Agenda*, available at *unhabitat.org*.

[35] It seems interesting to recall that the concept of "common good" as a component of the right to the city has also been explored in scholarship by Margaret Kohn, who has put emphasis on the «solidaristic conception of social property that takes rights claims to be internal to, rather than constraining, the politics of the urban commonwealth». L.A. King, *Henri Lefebvre and the Right to the City*, cit., pp. 80 ff. M. Kohn, *The Death and Life of the Urban Commonwealth*, Oxford, 2016.

What is more, human rights can offer a suitable paradigm for addressing sustainable urban development and for identifying specific States' obligations; the experience of the European Court of Human Rights, which is explored in the next paragraph, is evidence for that.

3. — *Issues of sustainable urban development in the jurisprudence of the European Court of Human Rights.*

When the European Convention on Human Rights (hereinafter, ECHR or "the Convention")[36] was adopted in 1950, environmental issues were not as prominent on the human rights agenda as they are now[37]. The Convention is a catalogue of civil and political rights, which was progressively extended during the decades through the adoption of its Additional Protocols, that encompassed also economic, social and cultural rights. Nevertheless, specific environmental rights have never been included, at least so far, in the ECHR, even if the possibility of including a provision on the right to a healthy environment was considered several times[38], similarly to other regional human rights instruments[39].

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[36] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at *echr.coe.int*.

[37] On this issue, see Council of Europe, *Manual on Human Rights and the Environment*, Strasbourg, 2012.

[38] Council of Europe, *Compass: Manual for human rights education with young people*, *Environment*, *Human Rights and the Environment*, cit. With respect to the recent evolution of the debate on the right to a healthy environment, see Council of Europe, Presidency of the Committee of Ministers, Newsroom, *Environment and human rights: towards a right to a healthy environment?*, Strasbourg, 20 February 2020, available at *coe.int*.

[39] In this respect, we can mention some important examples of provisions of this kind in human rights treaties, as Article 11 of the Protocol of San Salvador, which is the Additional Protocol to The American Convention on Human Rights in the area of Economic, Social and Cultural Rights, that has expressly introduced the right to a healthy environment into the Inter-American system for the protection of human rights. In a similar fashion, the African Charter on Human and Peoples' Rights protects the "right to a

Despite the ECHR does not explicitly contemplate environmental rights, the ECtHR and, in the past, the European Commission of Human Rights (ECommHR[40]) have progressively promoted the "greening" of the Convention, relying on its nature of "living instrument"[41], capable of proactively incorporating into its scope issues[42] and rights that were not

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general satisfactory environment" under Article 24. It seems interesting to recall that the African Charter on Human and Peoples' Rights also contains another significant right at Article 21, namely "Right to Free Disposal of Wealth and Natural Resources", while Article 22 protects "Right to Economic, Social and Cultural Development", which appears particularly interesting where it addresses «the equal enjoyment of the common heritage of mankind», that may related to the intergenerational equity inherent to sustainable development, including in the urban framework. For a deeper analysis of the African system, it may be interesting to explore also the view expressed by the African Commission on Human and Peoples' Rights in the *Ogoni* case. In this regard, see *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96), available at: *escr-net.org*.

[40] The European Commission of Human Rights played an important role in assisting the European Court of Human Rights from 1953 to 1998. In particular, it used to assess whether petitions were admissible to the Court and would launch well-founded cases in the Court on individuals' behalf. For an in-depth analysis, see: L. Mikaelsen, *European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States*, Alphen aan Olen Rijn, 1980; T. Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht, 1994.

[41] European Court of Human Rights, *Tyrer v. United Kingdom*, (Appl. No. 5856/72) Judgment of 25 April 1978, para. 31; European Court of Human Rights, Grand Chamber, *Goodwin v United Kingdom* (Appl. No. 17488/90) Judgment of 27 March 1996, Reports 1996-II, para. 74; European Court of Human Rights, Grand Chamber, *Demir and Baykara v Turkey* (Appl. No. 34503/97) Judgment of 12 November 2008, Reports of Judgments and Decisions 2008, paras. 68 and 146. In the sensitive field of bioethics, a remarkable example is European Court of Human Rights, Grand Chamber, *Vo. v. France*, (Appl. No. 53924/00) Judgment of 8 July 2004, Reports of Judgments and Decisions 2004-VIII, para. 82 and the Dissenting Opinion of Judge Mularoni, Joined by Judge Strá nická. G. Letsas, *The ECHR as a living instrument: Its meaning and legitimacy*, in A. Føllesdal, B. Peters, G. Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, 2010, pp. 106-141.

[42] Interestingly enough, a similar approach was adopted by the ECtHR in the field of biolaw. Such rulings as *Vo v. France*, cit., European Court of Human Rights, Grand Chamber, *Evans v. the United Kingdom*, (Appl. No. 6339/05) Judgment of 10 April 2007,

originally encompassed[43]. This is true also with respect to sustainable urban development, that has been addressed in various ways by the Council of Europe[44], for example through its contribution and its financial support to the 2030 Agenda for Sustainable Development – one could recall the Cooperation Programmes and the Council of Europe's new Project Management Methodology (PMM)[45].

The earliest environmental cases concerning the urban dimension were tackled by the ECommHR in the late 1960s. Unsurprisingly, the ECommHR rejected the first applications as inadmissible, because they were incompatible *ratione materiae* with the Convention. The reason was clear: the ECHR does not explicitly contemplate environmental rights. Such cases as *Dr S. v. the Federal Republic of Germany* and *X and Y v. the Federal Republic of Germany*[46] are paradigmatic examples of this approach.

Reports of Judgments and Decisions 2007-I and European Court of Human Rights, *Costa and Pavan v. Italy*, (Appl. No. 54279/10) Judgment of 28 August 2012, just to mention few of them, are paradigmatic examples of the Court's proactive approach also in the field of science. For an overview and an in-depth analysis, see European Court of Human Rights, *Research Report – Bioethics and the case-law of the Court*, Strasbourg, 2016, available at *echr.coe.int*.

[43] In this sense, the recent communication in the Duarte Agostinho case, the first climate change case in Strasbourg, is clear evidence for the Court's capacity - and willingness - to address environmental issues in a proactive manner. See C. Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?*, in *EJIL:Talk! - Blog of the European Journal of International Law*, 22 December 2020, available at *ejiltalk.org*.

[44] The early experience of the Council of Europe (COE) in the field of environmental protection dates back to the 1960s, when the COE Environment Programme was launched. Since then, environment, sustainable development and climate change have been at the top of the COE's agenda.

[45] For more information about the Cooperation Programmes and the Council of Europe's new Project Management Methodology (PMM), see: Council of Europe, *Project Management Methodology*, available at *coe.int*, and Council of Europe, *Project Management Methodology*, *News, Cooperation programmes supporting the UN 2030 Agenda for sustainable development*, Strasbourg, 20 March 2018, available at *coe.int*.

[46] *Dr S. v. the Federal Republic of Germany*, (Appl. No. 715/60, Decision of inadmissibility of 5 August 1969 (unpublished); *X and Y v.the Federal Republic of Germany*, (Appl. No. 7407/76), Decision of inadmissibility of 13 May 1976, Decisions and Reports ("DR") No. 5, p. 161.

Subsequently, the Commission began to develop a different approach, which granted indirect protection *par ricochet* to a right to the environment[47]. The protection was granted in two different ways: either ensuring the enjoyment of individual rights by means of safeguarding an environment of quality; or affirming the existence of a prevailing public interest to protect the environment which justified State's interference, when the Commission carried out the test of proportionality of the competing interests at stake[48]. By so doing, the Commission started to develop an "incorporation of environmental values" within the scope of application of the ECHR but, necessarily, only insofar as environmental issues were interrelated with a right protected under the Convention[49]. The cases of *Arrondelle v. the United Kingdom*, *G. and Y. v. Norway*, *Baggs v. the United Kingdom* and *Powell and Rayner v. the United Kingdom* are emblematic in this sense[50]. All these cases dealt with issues related to noise. In particular, in the *Arrondelle* case, the Commission recognized that «bad environmental conditions could sometimes interfere with the effective enjoyment of the individual's rights and freedoms guaranteed in the Convention»[51].

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[47] See D. García San José, *Environmental Protection and the European Convention on Human Rights*, Strasbourg, 2005. Also see: Council of Europe, *Manual on Human Rights and the Environment*, cit.

[48] D. García San José, *Environmental Protection and the European Convention on Human Rights*, cit., pp. 8 ff.

[49] For an in-depth analysis, see D. García San José, *Environmental Protection and the European Convention on Human Rights*, cit.; also see M. Dejeant-Pons, M. Pallemaerts, S. Fioravanti, Council of Europe, Belgium. Ministère des affaires sociales, de la santé publique et de l'environnement, *Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework*, Strasbourg, 2012.

[50] *Arrondelle v. the United Kingdom*, (Appl. No. 7889/77), Decision of 15 July 1980, DR 19, p. 186; *Baggs v. the United Kingdom*, (Appl. No. 9310/81), Decision of 19 January 1985, DR 44, p. 13; *Powell and Rayner v. the United Kingdom*, (Appl. No. 9310/81), Decision of 16 July 1986, DR 47, p. 22.

[51] D. García San José, *Environmental Protection and the European Convention on Human Rights*, cit.

The European Court of Human Rights (ECtHR) took up the Commission's approach in its case law[52], when, in the early 1990s, adopted such decisions as *Powell and Rayner v. the United Kingdom* and *López Ostra v. Spain*[53], respectively concerning air traffic and aircraft noise, and industrial pollution.

Article 8 of the ECHR, which protects the right to private and family life, has often provided a suitable legal basis, under both its substantive and its procedural limb, that allowed the Court to protect people's health and well-being in the urban context.

In this respect, the Court «has found that severe environmental pollution can affect people's well-being and prevent them from enjoying their homes to such an extent that their rights under Article 8 are violated»[54]. When dealing with aircraft noise, in the *Powell and Rayner* case, the ECtHR said that «the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport»[55]. However, a minimum threshold has to be reached, as the Court clarified in the *López Ostra* case, where it found that «severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect adversely their private and family life, even though it does not seriously endanger their health»[56]. Under such circumstances, a violation of Article 8 of the ECHR was found.

More recently, in January 2019, when it handed down its judgment in the

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[52] The reader might find interesting to see: I.R. Fechete, *Study of the case-law of the European Court for Human Rights applicable to the Environment Law*, in *Social and Behavioural Sciences*, 2012, pp. 1072-1077; R. Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, in *American Journal of International Law*, 1995, pp. 263-294.

[53] European Court of Human Rights, *Powell and Rayner v. the United Kingdom*, (Appl. No. 9310/81) Judgment of 21 February 1990; *López Ostra v. Spain*, (Appl. No. 16798/90) Judgment of 9 December 1994.

[54] Council of Europe, *Manual on Human Rights and the Environment*, p. 45.

[55] *Powell and Rayner v. the United Kingdom*, cit., para. 40.

[56] *López Ostra v. Spain*, cit., para. 50.

Cordella and Others v. Italy case[57], the Court found a violation of Article 8 of the ECHR because of the persistence of a situation of environmental pollution that endangered the applicants' health, due the toxic emissions form the *Ilva steelworks* in Taranto[58].

In the *Kyrtatos v. Greece* case, where the applicants had made express reference to urban development, the Court has also clarified that general environmental deterioration is not sufficient to find a breach of private and family life, unless it interferes with the enjoyment of one of the rights contemplated by Article 8(1) of the Convention, whilst severe environmental pollution might affect individuals' well-being[59].

In fact, the ECtHR, not only has to ascertain «whether a causal link exists between the activity and the negative impact on the individual», but also has to consider «whether the adverse have attained a certain threshold of harm»[60]. This requires a comprehensive assessment of «all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context»[61].

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[57] European Court of Human Rights, *Cordella and Others v. Italy*, (Appl. Nos. 54414/13 and 54264/15) Judgment of 24 January 2019; for an in-depth analysis, see: A. Longo, *Cordella et al. v. Italy: Industrial Emissions and Italian Omissions Under Scrutiny*, in *European Papers*, 2019, available at *europeanpapers.eu*.

[58] *Cordella and Others v. Italy*, cit., paras. 172-174.

[59] European Court of Human Rights, *Kyrtatos v. Greece*, (Appl. No. 41666/98) Judgment of 22 May 2003, Reports of Judgments and Decisions 2003-VI (extracts). In this case, the applicants complained that urban development had led to the destruction of the environment in the place where they owned a property, which also included a swamp by the coast. In particular, the applicants alleged that the interference with the conditions of animal life in the swamp led to a violation of their right to private and family life. However, the ECtHR the Court did not find a breach of Article 8, since «the disturbances coming from the applicants' neighbourhood as a result of the urban development of the area (noises, night-lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8». *Kyrtatos v. Greece*, cit., para. 54.

[60] Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 45.

[61] *Ibid.*

The Court has provided some important guidance with regard to the definition of States' obligations under Article 8 of the ECHR, which, basically, aims at protecting individuals from public authorities' interference. In particular, it has clarified that when the decisions of public authorities in the environmental field constitute an interference with private life or home, they must accord with the conditions provided by Article 8(2) of the Convention[62]. However, the Court has not overlooked that environmental harm can be the result of private sector activities as well, and that States have a positive obligation to ensure the protection of the rights enshrined in Article 8 of the Convention in those cases too[63]. It implies that public authorities must adopt positive measure and make sure that they are implemented, so that the rights protected by the ECHR under Article 8 are guaranteed[64]. For example, States have to control the emissions of industrial activities, in order to protect the residents from the exposure, for example, to fumes or noise produced by factories.

The *Guerra v. Italy* case[65], that concerned the environmental risks related to a chemical factory producing fertilizers, is an interesting example in this regard, and also offers the opportunity to observe the approach of the ECtHR in relation to the definition of States' obligations under the procedural limb of Article 8 of the Convention. The Court clarified that States may have an

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[62] See, e.g., European Court of Human Rights, Grand Chamber, *Hatton and Others v. the United Kingdom*, (Appl. No. 36022/97) Judgment of 8 July 2003, Reports of Judgments and Decisions 2003-VIII.

[63] As the Court stated, Article 8 of the ECHR «does not only apply in cases where environmental harm is directly caused by State activities but also when it results from private sector activities». Council of Europe, *Manual on Human Rights and the Environment*, cit. p. 51. *Hatton and Others v. the United Kingdom* [GC], cit., para. 98. For an in-depth analysis, see H. Post, *The Judgment of the Grand Chamber in Hatton and Others v. the United Kingdom or: What Is Left of the 'Indirect' Right to a Healthy Environment?*, in *Non-State Actors and International Law*, 2004.

[64] Council of Europe, *Manual on Human Rights and the Environment*, cit. p. 51.

[65] European Court of Human Rights, Grand Chamber, *Guerra and Others v. Italy*, (Appl. No. 14967/89) Judgment of 19 February 1998, Reports 1998-I.

obligation to inform the public about environmental risks[66]; from this viewpoint, in the *Guerra* case, the ECtHR found a violation of Article 8 of the Convention since the public authorities had failed to provide to the applicants the essential information that would have enabled them to assess the risks that they would run by continuing to live in the area near the factory[67]. Under the specific circumstances of the case, the chemical factory had been classified as high-risk and, moreover, some accidents that had occurred in the past had resulted in the hospitalization of many people who lived nearby.

The *Guerra* case is not the only significant example of the efforts of the Strasbourg Court to ensure thorough protection to procedural rights in the environmental field, in the urban context[68]. On some occasions, when addressing issues of urban sustainability, the ECtHR relied on the Aarhus Convention[69], which helped it to clarify the scope and the content of the States' obligations under the procedural limb of Article 8 of the ECHR, as ensuring participation in the decision-making process and access to information. In the *Grimkovskaya v. Ukraine* case, where the ECtHR found a violation of Article 8 of the ECHR, the Court stated that the respondent State had failed to strike a fair balance since the applicant had not had «a meaningful opportunity to contribute to the related decision-making processes, including by challenging the municipal policies before an independent authority», which is also at odds with the Aarhus Convention[70].

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[66] Council of Europe, *Manual on Human Rights and the Environment*, cit. p. 51. *Guerra and Others v. Italy* [GC], para. 60.

[67] Council of Europe, *Manual on Human Rights and the Environment*, cit. p. 52. *Guerra and Others v. Italy* [GC], para. 60.

[68] Also see, e.g., *Hatton and Others v. the United Kingdom* [GC], cit., and *Cordella and Others v. Italy*, cit.

[69] Consistently with Article 31(3)(c) of the Vienna Convention on the Law of the Treaties. See, for example, European Court of Human Rights, *Tătar v. Romania*, (Appl. No. 67021/01), Judgment of 27 January 2009, para. 118. Quite recently, the case of *Cordella and Others v. Italy*, cit., has represented a missed opportunity for the Court to use the Aarhus Convention as a support to the interpretation of the ECHR.

[70] European Court of Human Rights, *Grimkovskaya v. Ukraine*, (Appl. 38182/03) Judgment of 21 July 2011, para. 72. The Aarhus Convention (the "UNECE Convention

In general, States enjoy a wide margin of appreciation when dealing with environmental issues, including urban sustainability, due to the sensitive and political nature of the interests at stake, and also because the Court considers that domestic authorities can better assess such social and technical issues. Significantly, for example, in the *Powell and Rayner* case, it was stressed that «[i]t is certainly not for […] the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere»[71].

It follows that, despite States' obligation not to interfere with private and family life or the home is not absolute, the measures adopted by the public authorities must pursue a legitimate aim and must be provided by law.

The Court has clarified that the interests of the community, such as the economic well-being of the country, can represent a legitimate aim. Nevertheless, States have to strike a fair balance between the competing interests, and the measures adopted by the public authorities have to be proportionate to the legitimate aim pursued. In the *Hatton and Others v. the United Kingdom* judgment[72], the Court has stated clearly that economic well-being is not sufficient to outweigh the rights of others.[73] However, the ECtHR did not find a violation of Article 8 of the Convention in this case, since the United Kingdom had «sufficiently balance[d] the environmental impact of the extension of Heathrow Airport against its economic gains»[74]. In par-

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on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters") was adopted on 25th June 1998 at the Fourth Ministerial Conference in the 'Environment for Europe' process. Together with its Protocol on Pollutant Release and Transfer Registers, «it protects every person's right to live in an environment adequate to his or her health and well-being». The Aarhus Convention is an innovative instrument from many viewpoints, for example because it links environmental rights and human rights as well as government accountability and environmental protection. For further information, see: UNECE, *Aarhus Convention*, *unece.org*.

[71] *Powell and Rayner v. the United Kingdom*, cit., para. 44.

[72] *Hatton and Others v. the United Kingdom* [GC], cit.

[73] *Hatton and Others v. the United Kingdom* [GC], cit, para. 86. Also see paras. 121 ff. of the Judgment.

[74] Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 57

ticular, the frequency of the additional night flight had been regulated, and the public authorities, after carrying out an assessment of the environmental impact, had taken several measures for tackling it, for example sound-proofing houses[75]. Otherwise, in the above-mentioned case of *López Ostra,* the Court found that the State had failed to strike a fair balance between the town's economic interest in having a waste-treatment plant and the applicant's effective enjoyment of her right to respect for her home and her private and family life[76].

From a different perspective, the Court has considered that environmental protection can represent a legitimate aim which can justify certain restrictions by public authorities on the right to private and family life and the home. So far, the ECtHR has not had the chance to apply this view to urban sustainability and Article 8 of the Convention, but one could expect it to follow the path that can be found in some environmental rulings, such as the case of *Chapman v. the United Kingdom*[77]. This seems quite likely because the Court has adopted a similar approach when addressing the right

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[75] Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 57; *Hatton and Others v. the United Kingdom* [GC], cit., see, in particular, paras. 74 and 127.

[76] *Lopez Ostra v. Spain*, cit., para. 58; also see paras. 56-57. In fact, the Court noted that «the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. They moved only when it became apparent that the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so». *Lopez Ostra v. Spain*, cit., para. 57.

[77] European Court of Human Rights, Grand Chamber, *Chapman v. the United Kingdom*, (Appl. No. 27238/95) Judgment of 18 January 2001, Reports of Judgments and Decisions 2001-I. In that case, the public authorities had refused to allow the applicant to remain in a caravan on land in a plot that the applicant owned. Mrs. Chapman is of Romani ethnicity, and nomadic life has remained one of the characteristics of the lifestyle of the majority of the Roma people in the United Kingdom. The main point of the case is that, despite the applicant had sought to obtain the necessary permission from the competent public authorities, they had refused. The reason was that the plot was located in an area that had to protected, according to the planning policies in force, thus dwellings were prohibited. That being said, the ECtHR did not a find a violation of the right to private and family life and home because the United Kingdom pursued a legitimate aim, namely, to protect the rights of others through environmental preservation, and the measures adopted to pursue it were not disproportionate.

to property protected under Article 1 of Protocol I to the ECHR. For instance, in the case of *Pine Valley Developments Ltd and Others v. Ireland*[78], the ECtHR found that the annulment of the building permission could not be considered disproportionate to the legitimate aim of preservation of the environment[79]; from this perspective, States become custodians of environmental protection when competing private interests are invoked in relation to the right to property.

Town-planning policy represents a particularly interesting aspect of urban sustainability and the Strasbourg Court had the chance to clarify the content and the scope of some States' obligations when, again, dealing with the rights protected under Article 8 of the ECHR. This implies the adoption of the necessary measures aimed at reducing the impact or the harmful effects of given activities or infrastructures. In practice, the Court has taken into consideration such aspects as the adoption of urban planning or the fact that environmental feasibility studies had been carried out. In this sense, in the case of *Grimkovskaya v. Ukraine*, the Court observed that the Ukrainian Government had not carried out a feasibility study before turning the road into a motorway, nor the Government had made sufficient efforts to mitigate the motorway's harmful effects[80]. It was stated that «Article 8 cannot be constructed as requiring States to ensure that every individual en-

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[78] European Court of Human Rights, *Pine Valley Developments Ltd and Others v. Ireland*, (Appl. No. 12742/87) Judgment of 29 November 2011.

[79] In fact, under the circumstances of the case, State's interference aimed at ensuring that «the relevant planning legislation was correctly applied by the Minister for Local Government not simply in the applicants' case but across the board. The decision of the Supreme Court, the result of which had been to prevent building in an area zoned for the further development of agriculture so as to preserve a green belt, was therefore to be regarded as a proper way – if not the only way – of achieving that aim. Furthermore, the applicants were engaged on a commercial venture which, by its very nature, involved an element of risk, and they were aware not only of the zoning plan but also of the opposition of the local authority, to any departure from it». European Court of Human Rights, Press Unit, *Factsheet – Environment and the ECHR*, February 2021, available at *echr.coe.int*.

[80] European Court of Human Rights, Press Unit, *Factsheet – Environment and the ECHR*, cit., p. 19. *Grimkovskaya v. Ukraine*, cit., paras. 66-69; 72.

joys housing that meets particular environmental standards»[81], thus, for instance, States cannot be held responsible for the mere fact of allowing heavy traffic to pass through populated residential town areas[82]. By converse, a violation of Article 8 of the Convention can be found in case «the authorities failed in their duty to stop the third-party breaches of the right relied on by the applicant, since the measures taken consistently proved to be insufficient and, consequently, the applicant was consistently exposed to excessive noise disturbance over a substantial period of time. The Court held that this created a disproportionate individual burden for the applicant»[83]. However, for the assessment made by the ECtHR in the *Grimkovskaya* judgment, a crucial aspect was the «Government's failure to show that the decision […] was preceded by an adequate environmental feasibility study and followed by the enactment of a reasonable environmental management policy»[84].

The precautionary principle may play a very important role when assessing States' compliance with their obligations under the Convention with regard to town-planning, especially when their planning policies and the fact that environmental feasibility studies are carried out are taken into consideration.

From this perspective, despite issues of urban sustainability were not involved in the case, an interesting reference concerning the approach of the ECtHR to the precautionary principle[85] can be found in the *Luginbühl v.*

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[81] *Grimkovskaya v. Ukraine*, cit., para. 65; Council of Europe, *Manual on Human Rights and the Environment*, cit, p. 54.

[82] Nor it could be established the applicants' «right to free, new housing at the State's expense», especially since the applicant had not proven that she could not relocate without the State's help. *Grimkovskaya v. Ukraine*, cit., para. 65. Also seeCouncil of Europe, *Manual on Human Rights and the Environment*, cit., p. 54.

[83] Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 54. European Court of Human Rights, *Deés v. Hungary*, (Appl. No. 2345/06) Judgment of 9 November 2010, where the ECtHR dealt with noise disturbance, pollution and smell caused by the traffic in a motorway in an urban area, similarly to *Grimkovskaya v. Ukraine*, cit.

[84] *Grimkovskaya v. Ukraine*, cit., para. 72.

[85] Another significant example of how the Strasbourg Court dealt the precautionary principle can be found in the case of *Tătar v. Romania*, cit., the ECtHR clarified that the purpose of the precautionary principle was to ensure a high level of protection for the

Switzerland judgment. That ruling offered the opportunity to clarify that the precautionary principle does not protect against every potential harm that is conceivable, since the Court requires that «at least some scientific validity of the claim that a certain activity is dangerous to the environment and/or health»[86].

That being said, it seems important to stress that the Court has rarely found a violation of the right to life due to the risks of urbanization; in this respect, one of the greatest hurdles is that it is quite hard for the applicants to meet the burden of proof. However, the case of *Öneryildiz v. Turkey*[87] is a relevant exception. The ECtHR found a violation of Article 2 of the Convention, under both the substantive and the procedural limb of the pro-

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health and the safety «of consumers and the environment in all activities» (*Tătar v. Romania*, cit., para. 120). Significantly, the Court held that the national authorities had «positive obligations to ensure respect for private and family life applied with even more force to the period after the accident of 2000» (Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 50, with reference to *Tătar v. Romania*, cit., para. 121) that had occurred in the gold ore extraction plant, close to where the applicants lived. In this respect, the fact that the applicant, since then, must have lived in «a state of anxiety and uncertainty, accentuated by the passive approach of the national authorities and compounded by the fear stemming from the continuation of the activity and the possibility that the accident might occur again». Therefore, the Court found a violation of Article 8 of the ECHR. See (*Tătar v. Romania*, cit., para. 121; Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 50). See European Court of Human Rights, *Press Release issued by the Registrar*, *Chamber Judgment Tătar v. Romania*, 27 January 2009, available at *hudoc.echr.coe.int*: «The Court observed that a preliminary impact assessment conducted in 1993 by the Romanian Ministry of the Environment had highlighted the risks entailed by the activity for the environment and human health and that the operating conditions laid down by the Romanian authorities had been insufficient to preclude the possibility of serious harm. The Court further noted that the company had been able to continue its industrial operations after the January 2000 accident, in breach of the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures».

[86] Council of Europe, *Manual on Human Rights and the Environment*, cit., p. 50. European Court of Human Rights, *Luginbühl v. Switzerland*, (Appl. No. 42756/02) Judgment of 17 January 2006.

[87] European Court of Human Rights, Grand Chamber, *Öneryildiz v. Turkey*, (Appl. No. 48939/99) Judgment of 30 November 2004, Recueil des arrêts et décisions 2004-XII.

vision, because Turkey had not taken adequate steps to prevent the victims' death. In fact, States not only are responsible for the deaths caused by their agents but also have a positive obligation to adopt the appropriate steps to protect the lives of those within their jurisdiction[88], including when the violation may be caused by dangerous activities. In this respect, in order to assess the scope of State's obligations, the Court took into the consideration such factors as the harmfulness of the dangerous activities and the foreseeability of the risks posed to life[89]. Interestingly, the Court also found that the regulatory framework was defective, as it allowed the tip to open and start operating without a coherent supervisory system[90]. Moreover, under the procedural limb of Article 2 of the ECHR, the ECtHR found a violation since Turkey had failed to provide the appropriate information about the risks connected to living in the slum near the rubbish tip[91].

In any case, according to Article 13 of the Convention, States have to ensure an effective remedy in case the rights protected under the ECHR are violated in the urban dimension. In the *Hatton* case, the Court had found a violation of Article 13 since the United Kingdom had not provided any judicial remedy, at the national level, to enforce the rights protected under the ECHR. Again, in the more recent above-mentioned *Cordella* case, the ECtHR found a breach of Article 13 of the Convention since the applicants

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[88] For an interesting analysis and an overview of some relevant Court's judgments see: Council of Europe, *Manual on Human Rights and the Environment*, cit., pp. 35 ff.

[89] *Öneryildiz v. Turkey* [GC], cit., para. 73. For a wider overview of the Strasbourg Court's case law, Council of Europe, *Manual on Human Rights and the Environment*, cit., pp. 36 ff.

[90] *Öneryildiz v. Turkey* [GC], cit., para. 90, where the Court stated that: «This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. […]».

[91] *Öneryildiz v. Turkey* [GC], cit., para. 90.

could not effectively complain to the national authorities concerning the measures to secure decontamination of the relevant areas[92].

The Strasbourg Court has proven capable of adopting a proactive approach to the issues related to sustainable urban development, framing several important aspects in human rights term. Without overlooking the primary role that States play in defining appropriate responses and striking the balance between the interests at stake, due to the social, political and technical nature of matters involved, the promotion of regional standards of protection appears to be crucial for some harmonization of domestic standards. Also the other European major Court, the European Court of Justice (ECJ),[93] has tackled issues related to urban sustainability, consistently with the competence of the EU and the specific characteristics of its legal order. The next paragraph focuses on this framework.

4. — *Sustainable urban development in the case law of the European Court of Justice.*

Sustainable development is at the top of the EU agenda and at the core of EU policy-making, being mainstreamed in a number of key projects, sectoral policies and initiatives, and being a basic component of both EU internal and external action. Especially with the adoption, in the framework of the United Nations, of the 2030 Agenda for Sustainable Development and the adoption of the Sustainable Development Goals, the EU has kept increasing its engagement with this field, and the European Green Deal[94], the EU growth strategy and a plan for making European economy sustain-

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[92] *Cordella and Others v. Italy*, cit., paras. 123-126.

[93] It seems relevant to recall that the Court of Justice of the European Union is the judicial branch of the European Union, and consists of the Court of Justice, also known as the European Court of Justice, on which this paper focuses except for the reference to the *Carvalho* case, and the General Court.

[94] For further information on the European Green Deal, see: European Commission, *A European Green Deal - Striving to be the first climate-neutral continent*, available at *ec.europa.eu*.

able presented by the European Commission in December 2019, is clear evidence for that[95].

Consistently, the EU has adopted important initiatives that specifically address the urban dimension: in this respect, the Urban Agenda for the European Union[96], launched in May 2016 with the Pact of Amsterdam, stands out. Also URBACT[97] stands out as an interesting example of EU's approach to sustainable urban development, especially through multilevel cooperation. Importantly, the EU has taken up the approach of the 2014-2020 Cohesion Policy, that had placed the urban dimension at its core, in the Cohesion Policy beyond 2020, which has strengthened the support ensured to the urban dimension, with 6% of the European Regional Development Fund dedicated to sustainable urban development strategies[98]. All these initiatives are of crucial importance in order to achieve the urban goals of Europe 2020 Strategy, that aims at a "smart, sustainable, inclusive society".

Delving more in-depth into the EU legal order, environmental issues are enshrined in the architecture of the Treaty on the European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU). In particu-

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[95] EUROSTAT, *Sustainable development in the European Union. Monitoring Report on Progress towards the SDGs in an EU Context*, Edition 2020, available at *ec.europa.eu*, p. 9.

[96] It consists in a net of multilevel cooperation, which also provides financial support to relevant initiatives, but without widening EU's competences. The goal is improving the quality of life in urban areas, focusing on three pillars of policy-making and implementation, namely "Better regulation; Better funding; Better knowledge". See: European Commission, *Urban Agenda for the EU*, available at *ec.europa.eu*. For further information about the European Urban Agenda, see: European Commission, *Futurium*, *What is the Urban Agenda for the EU?*, available at *ec.europa.eu*.

[97] In particular, URBACT is a «European exchange and learning programme promoting sustainable urban development», for the purpose of developing solutions to the major urban challenges and the complex societal changes that our current reality urges cities to tackle. In this framework, cities have the opportunity to share their respective experience and their good practices, by establishing a virtuous interaction. See: European Union, European Regional Development Fund*, URBACT – Driving change for better cities*, available at *urbact.eu*.

[98] European Commission, *Policy*, *Urban Development*, available at *ec.europa.eu*. In this regard, the approach is comprehensive, and addresses, for example, such critical issues as creating job opportunities and tackling climate change.

lar, ensuring a "high level of protection" and the "improvement of the quality of the environment" are set as goals in Article 3(3) of the TEU and Article 191 of the TFEU, which also aims at protecting human health. Moreover, Article 11 of the TFEU, provides the integration of the requirements of environmental protection in the definition and in the implementation of EU's policies and activities, also for the particular purpose of promoting sustainable development. Therefore, sustainable development, as contemplated by this provision, through the codification in the environmental integration rule[(99)], is an objective, a principle and a rule for the EU, which is particularly significant when one considers that interpretation of EU law is based on a teleological criterion, with noteworthy practical implications[(100)]. In particular, with regard to the ECJ[(101)], this means that the principle of sustainable development enshrined in Article 11 of the TFEU is a parameter for assessing the validity and a standard for the interpretation of EU acts. It is significant to mention that, on some occasions, the ECJ has recalled *ex officio* the principle of sustainable development as, for example, in the *Concordia Bus* case[(102)].

From a human rights perspective, importantly, environmental protection is enshrined in the Charter of Fundamental Rights of the European Union (CFREU or 'the Charter')[(103)], that has become a source of primary EU law

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(99) B. Sjåfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States* (November 24, 2014), in B. Sjåfjell, A. Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, London, 2015, pp. 51-72, 53; *University of Oslo Faculty of Law Research Paper No. 2014-38*; *Nordic & European Company Law Working Paper No. 14*.

(100) B. Sjåfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, cit., pp. 52 ff.

(101) B. Sjåfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, pp. 62 ff.

(102) B. Sjåfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, p. 63. European Court of Justice, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, Judgment of the Court of 17 September 2002, C-513/99, Reports of Cases 2002 I-07213.

(103) European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, OJ C 326, 26.10.2012, pp. 391-407, available at *eur-lex.europa.eu*. The reader might find interesting to visit the following website ('*Charterpedia*'): FRA – European

in the post-Lisbon framework. Article 37 expressly recalls the principle of sustainable development, when requiring the integration of a high level of environmental protection and the improvement of the quality of the environment into Union's policies. This provision does not foresee a specific right but provides principles and programmatic requirements with which the EU and Member States must comply[104].

The Luxembourg Court's case law has addressed several issues related to sustainable urban development. In particular, a well-established jurisprudence exists, as the Commission has launched various infringement proceedings[105] in relation to Council Directive 91/271/EEC[106], concerning urban waste-water treatment, Directive 2002/49/EC[107] relating to the as-

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Union Agency for Fundamental Rights, Charter of Fundamental Rights of the European Union, available at *fra.europa.eu*.

[104] N.M. DE SADELEER, *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*, in *Nordic Journal of International Law*, 2012, p. 44. According to Article 51(1) of the Charter, its provisions «are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law». The ECJ has developed a wide case law on the concept of "implementation" of EU law by Member States, since it adopted its decision in the *Åkerberg Fransson* case. European Court of Justice, Grand Chamber, *Åklagaren v Hans Åkerberg Fransson*, Judgment of 26 February 2013, C-617/10, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general).

[105] For information and statistics about infringement proceedings, see European Commission, *Infringement proceedings*, available at *ec.europa.eu*.

[106] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ L 135, 30.5.1991, pp. 40-52, available at *eur-lex.europa.eu*.

[107] Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise – Declaration by the Commission in the Conciliation Committee on the Directive relating to the assessment and management of environmental noise, OJ L 189, 18.7.2002, pp. 12-25, available at *eur-lex.europa.eu*. EUROSTAT, *Sustainable development in the European Union. Monitoring Report on Progress towards the SDGs in an EU Context*, cit., p. 206: «The Environmental Noise Directive is the main EU instrument for identifying and combating noise pollution. It focuses on three areas: (a) determining exposure to environmental noise; (b) ensuring that information on environmental noise and its effects is made available to the public; and (c) preventing and reducing environmental noise where necessary, particularly where exposure levels can induce harmful effects on human health, and preserving environmental noise quality where it is good».

sessment and management of environmental noise and Directive 2008/50/EC[108], on ambient air quality and cleaner air for Europe[109].

The case law of the ECJ has clarified some important issues related to the implementation of these instruments as wells as the content of Member States' obligations in the urban dimension[110].

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[108] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, pp. 1-44, available at *eur-lex.europa.eu*.

[109] In particular, Council Directive 91/271/EEC aims at ensuring that agglomerations and urban settlements properly collect and treat wastewater and sets the requirements to be met to this end; Directive 2002/49/EC addresses the noise to which humans are exposed, «particularly in built-up areas, in public parks or other quiet areas in an agglomeration, in quiet areas in open country, near schools, hospitals and other noise-sensitive buildings and areas»; (see: European Commission, *The Environmental Noise Directive (2002/49/EC)*, available at *ec.europa.eu*); Directive 2008/50/EC sets some limit and target values on specific pollutants in the ambient air, and Member States identify the zones and agglomerations where these values need to be respected; monitoring has to be made according to standards specified in EU law.

[110] It seems interesting to recall that, in practice, the implementation of the above-mentioned Directives has helped, so far, to improve the quality of urban living conditions. Indeed, as the 2020 Edition of the EU "Monitoring Report on Progress towards the SDGs in an EU Context" (EUROSTAT, *Sustainable development in the European Union. Monitoring Report on Progress towards the SDGs in an EU Context*, cit.) stressed, «in 2018, 18.2% of the EU population said their household suffered from noise disturbance, compared with 20.6% in 2010», while «the population-weighted annual mean concentration of fine particulate matter (PM2.5) in urban areas dropped from 17.5 μg/m3 in 2012 to 15.0 μg/m3 in 2017». EUROSTAT, *Sustainable development in the European Union. Monitoring Report on Progress towards the SDGs in an EU Context*, cit., p. 203, which also stated that: «While 15.0 μg/m3 is below the limit set by the EU from 2015 onward (25 μg/m3 annual mean), substantial air-pollution hotspots remain. According to recent EEA estimates, 8% of the EU urban population were exposed to levels above the EU PM2.5 limit value in 2017. If the more stringent WHO air-quality guideline is considered (10 μg/m3 annual mean), approximately 77% of people living in EU cities were estimated to be exposed to PM2.5 concentration levels deemed harmful to human health». For further analysis on Directive 2008/50/EC also see: Commission (EU), 'Fitness Check of the Ambient Air Quality Directives Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air and Directive 2008/50/EC on ambient air quality and cleaner air for Europe'. *Staff Working Document*, SWD(2019) 427 final, 28 November 2019, available at *ec.europa.eu*.

In particular, the ECJ has clarified that Member States' obligations in this framework are obligations of result. The *European Commission v. Republic of Bulgaria* judgment is emblematic in this sense, as the ECJ has explained that «[e]xceeding the limit values is, therefore, sufficient for a finding to be made that there has been an infringement»[(111)] of Directive 2008/50/EC. Moreover, «[t]hat directive aims to protect human health and, to this end, provides for measures to combat emissions of pollutants at source. In accordance with that objective, it is necessary to determine the actual air pollution to which the population or part of it is exposed and to ensure that appropriate measures are taken to combat the sources of such pollution. Consequently, the fact that a limit value has been exceeded at a single sampling point is sufficient to trigger the obligation to draw up an air quality plan, in accordance with Article 23(1) of Directive 2008/50»[(112)]. Again, in its case law on Directive 91/271/EEC, the Court has clarified that «Article 4(1) of Directive 91/271 lays down an obligation of result so far as concerns treatment of the urban waste water by a treatment plant»[(113)].

In the *European Commission v. United Kingdom of Great Britain and Northern Ireland* judgment[(114)], the Court has elucidated that the concept of "sufficient performance" in relation to usual climatic conditions and considering seasonal variations, «although not defined numerically, must be understood as

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[(111)] European Court of Justice, *European Commission v Republic of Bulgaria*, Judgment of the Court (Third Chamber) of 5 April 2017, C-488/15, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general), para. 69.

[(112)] European Court of Justice, *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, Judgment of the Court (First Chamber) of 26 June 2019, Case C-723/17, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general), para. 67.

[(113)] European Court of Justice, *European Commission v Ireland*, Judgment of the Court (Tenth Chamber) of 28 March 2019, C-427/17, Reports of Cases – Not yet published (General Report – Section Information on unpublished decisions), para. 170.

[(114)] European Court of Justice, *European Commission v United Kingdom of Great Britain and Northern Ireland*, Judgment of the Court (First Chamber), 18 October 2012, C-301/10, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general), para. 61.

meaning that […] all urban waste water must be collected and treated» «in order to meet the objective of protecting the environment»[115]. The *Janecek* judgment[116] – which was delivered in relation to a reference for a preliminary ruling – offered to the ECJ the opportunity to provide some guidance with respect to the measures that States adopted to implement the then Directive 96/62/EC – that preceded Directive 2008/50/EC – and, therefore, to comply with the obligations of result that arise from that legislative act. In particular, the Luxembourg Court gave some important indications on the protection of individuals and their health, especially on the means that are available against Member States in case of their non-compliance with EU legislation aimed at ensuring air and water quality. In this respect, the ECJ stated that «whenever the failure to observe the measures regarded by the directives which relate to air quality and drinking water and which are designed to protect public health could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives»[117].

One can easily observe that the human rights language was not incorporated into the legal reasoning of the ECJ in the judgments recalled; especially the *Janecek* judgment may be considered a "missed opportunity" to frame the Court's approach to urban sustainability in human rights terms, when providing its interpretive guidance to Member States.

An interesting example of how the Court's approach might have incorporated – and, of course, might incorporate – the "rights talk"[118] in its legal reasoning can be found in the Advocate General Kokott's Opinion

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[115] *European Commission v United Kingdom of Great Britain and Northern Ireland*, cit., para. 53.

[116] European Court of Justice, *Dieter Janecek v Freistaat Bayern*, Judgment of the Court (Second Chamber) of 25 July 2008, C-237/07, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general).

[117] *Dieter Janecek v Freistaat Bayern*, cit., para. 38.

[118] In this regard, see the interesting views expressed by D. Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science*, in *RECIEL – Review of European, Comparative & International Environmental Law*, 2020, available at *onlinelibrary.wiley.com*.

in the *Craeynest* case[119]. Moving from the premise that «Directive 2008/50 is based on the assumption that exceedance of the limit values leads to a large number of premature deaths», the Advocate General affirmed that «[t]he rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU»[120]. Then, to clarify further the consequences of this view, Advocate General Kokott stressed that the «[m]easures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with the serious interference with fundamental rights on the basis of which the Court made the rules on the retention of call data subject to strict review»[121].

A possible explanation of the lack of the "rights talk" in the Court's case law considered may be sought in the fact that, in some fields that EU law addresses, «the language of protection rather than the language of rights is commonly used, while concerning issues of importance within general human rights discourse»[122], as it is the case for the environment[123]. However, at the same time, «[t]here is a context of rights, and even fundamental rights, that characterizes the issue of air quality legislation [which is] due to

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[119] Opinion of Advocate General Kokott delivered on 28 February 2019. *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*. C-723/17.

[120] Opinion of Advocate General Kokott, *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, cit., para. 53.

[121] Opinion of Advocate General Kokott, *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, cit., para. 53.

[122] D. Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science*, cit., p. 4; G. De Bùrca, *The Language of Rights in European Integration*, in G. More, J. Shaw, *New Legal Dynamics of European Union*, Oxford, 1995.

[123] The approach that De Bùrca describes relates to the evolution of the protection of human rights in the framework of the EU that, initially, was affirmed in the case law of the ECJ, by considering human rights as general principles of EU law. Such decisions as the *Stauder* judgment, the *Nold* judgment and the *Internationale Handelsgesellschaft* judgment are landmark rulings in this sense.

the tight connection that exists between ambient air legislation and health protection»[124], an idea that is consistent also with the fields of protection against noise and the treatment of urban waste water[125].

That being said, the ECJ could enhance the protection ensured to human rights in the urban context relying on various provisions enshrined in the CFREU.

In this sense, for instance, some emphasis can be put especially on Article 7, on the right to respect for private and family life, Article 2(1), on the right to life, and, possibly, Article 35, on health care, where it provides that «[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities», despite it enshrines principles and programmatic requirements, in a similar fashion as Article 37 of the Charter. From this viewpoint, some considerations should be made,

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[124] D. Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science*, cit., p. 4. Interestingly enough, even the idea that a right to clean air may exist under EU law, on the grounds of the Directive 2008/50/EC was suggested by that paper, at p. 4.

[125] This idea was advanced in scholarship by De Bùrca with regard to Directive 2008/50/EC. In that sense, it should be recalled that this Directive, in Recital 30, expressly incorporates the language of human rights, where it states that it «respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union», and where it affirms that it «seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development as laid down in Article 37 of the Charter of Fundamental Rights of the European Union».

The view recalled may be extended also to Directive 2002/49/EC, whose Recital 1 states that «[i]t is part of Community policy to achieve a high level of health and environmental protection, and one of the objectives to be pursued is protection against noise», and to Council Directive 91/271/EEC, which does not expressly mention health but often recalls the purpose of protecting the environment from the adverse impact of waste-water management. The lack of reference to the CFREU in these instruments may be explained by the fact that both Directive 2002/49/EC and Council Directive 91/271/EEC were adopted in the pre-Lisbon framework. Back then, the Nice Charter, was not a primary source of EU law; however human rights had long been recognized as general principles of EU law. In this respect, we may suggest that Council Directive 91/271/EEC and Directive 2002/49/EC are an example of the idea expressed by De Bùrca.

since the idea that Article 37 – which could be a helpful reference – is progressively «moving out of the weak category of principles under the Charter to join the category of rights»[126] is gaining ground. Interestingly enough, also the ECJ affirmed that «Article 52(2) provides that rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. Such is the case with Article 37 of the Charter»[127]. In the same vein, Attorney General Cruz Villalón had affirmed that «Article 37 expressly recognises the right to environmental protection»[128]. So far, the ECJ has not taken up these recommendations of the Advocates General, and its reluctancy is probably due to the fact that the view that Article 37 of the CFREU enshrines a right is still in evolution; in this sense, the Court might not have yet felt eager to endorse this approach and to empower this provision in this way[129].

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[126] D. Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science*, cit. p. 12.

[127] Then the ECJ added: «which is essentially based on Article 3(3) TEU and Articles 11 and 191 TFEU».

See European Court of Justice, *Associazione Italia Nostra Onlus v Comune di Venezia and Others*, Judgment of the Court (Third Chamber) of 21 December 2016, Caso C-444/15, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general), para. 62, and European Court of Justice, *Republic of Poland v European Parliament and Council of the European Union*, Judgment of 13 March 2019, Case C-128/17, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general), para 130. On this issue, see D. Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science*, cit. p. 12.

[128] Subsequently, Advocate General Cruz Villalón clarified that «[t]he latter right is expressed as a principle and, moreover, does not arise in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment, in which the constitutional traditions of the Member States have played a part». Opinion of Mr Advocate General Cruz Villalón delivered on 17 February 2011, *European Air Transport SA v Collège d'Environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale*, C-120/10, para. 78.

[129] Z. Kaiser, *Article 37 Charter of Fundamental Rights of the European Union: On the way to a fundamental right upgrade?*, JAEM 01 Master Thesis, Supervisor X. Groussot, Lund University Library, European Business Law 15 higher education credits, Lund, 2016, pp. 48-49.

That being said, the incorporation of a human rights-based approach into the Luxembourg jurisprudence on urban sustainability is desirable for the promotion of sustainable urban development, and some examples of how it may be feasible in practice can be suggested.

For instance, the relevant provisions of the Charter may be recalled *ex officio* by the ECJ, consistently with the *iura novit curia* principle.

Again, the ECJ could make some reference to the case law of the ECtHR on urban sustainability. This kind of judicial dialogue would be consistent with the interconnection that exists between the EU legal order and the ECHR system. In fact, not only the rights enshrined in the ECHR "shall constitute" general principles of EU law, pursuant to Article 6(3) of the TEU as amended by the Treaty of Lisbon but, moreover, Article 52(3) of the CFR provides that the minimum scope and meaning of the human rights enshrined in the Charter is identified by making reference to the ECHR, as interpreted by the ECtHR. Of course, a higher level of protection can be ensured in the legal framework of the EU[130].

For instance, reference to the Strasbourg case law might be helpful when the ECJ has to strike the balance between economic interests and economic well-being, on the one hand, and the protection of human rights, on the other; in this sense, some inspiration may be drawn from the view of the ECtHR that economic well-being «is not sufficient to outweigh the rights of others»[131]. In this sense, it seems interesting to recall the view expressed by Advocate General Bot in his Opinion in the *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* case, where he affirmed that «[a]lthough that principle [of integration] does not require that priority should always be given to environmental protection, it does mean that the environmental objective may be routinely balanced against the European Union's other fundamental objectives»[132], as, for instance, the "four free-

[130] See the Explanations relating to the Charter of Fundamental Rights of the European Union, Article 52(3), available at *fra.europa.eu*.

[131] *Hatton and Others v. the United Kingdom* [GC], cit, para. 86. Also see paras. 121 ff. of the Judgment.

[132] Opinion of Advocate General Bot delivered on 8 May 2013, *Essent Belgium NV*

doms"[133]. What is more, interestingly enough, in scholarship, it has been suggested that «the usage of the word "fundamental objective" can be viewed as creating a connection to the human rights discussion»[134].

It is also interesting to recall that Attorney General Villalón, in his Opinion in the *European Air Transport SA v. Collège d'Environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale* case, suggested in a hypothetical fashion how the ECHR might be successfully invoked at the domestic level for ensuring the protection in the urban context against Member States' non-compliance with EU law. In particular, the Advocate General suggested that whether the «Court of Justice reject[ed] an interpretation whereby Directive 2002/30 is construed as effecting maximum harmonisation […] such an effect would oblige individuals to bring proceedings against their States on the basis of Article 8 of the Convention, as interpreted by the ECHR – and in many cases those individuals could well be successful»[135].

That being said, the incorporation of a human rights-approach in the framework of infringement proceedings has been encouraged in scholar-

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v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, Joined Cases C-204/12 to C-208/12, para. 97: «it seems to me, be found in the principle of integration, according to which environmental objectives, the transverse and fundamental nature of which have been noted by the Court, […] should be taken into account in the definition and implementation of European Union policies. Although that principle does not require that priority should always be given to environmental protection, it does mean that the environmental objective may be routinely balanced against the European Union's other fundamental objectives».

[133] The "Four Freedoms" are the free movement of goods, the free movement of capital, the freedom to establish and provide services, the free movement of persons. See: European Commission, *The European Single Market*, at *ec.europa.eu*. See the approach of the ECJ in European Court of Justice, Grand Chamber, *Ålands vindkraft AB v Energimyndigheten,* Judgment of 1 July 2014, C- 573/12, Reports of Cases – published in the electronic Reports of Cases (Court Reports – general).

[134] Z. Kaiser, *Article 37 Charter of Fundamental Rights of the European Union: On the way to a fundamental right upgrade?*, cit., p. 40.

[135] Opinion of Mr Advocate General Cruz Villalón delivered on 17 February 2011, *European Air Transport SA v Collège d'Environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale*, cit., para. 81.

ship and has been explored by EU institutions[136]. In fact, it would help to improve the protection of human rights against Member States' violations of EU law, especially when one also considers that not all violations reach the threshold for the pre-alarm procedure provided by Article 7 of the TEU[137].

Finally, the approach of the Luxembourg Court to sustainable urban development may be enhanced also through the incorporation, in its legal reasoning, of the environmental integration rule enshrined in Article 11 of the TFEU. Indeed, the ECJ may raise issues *motu proprio* on the grounds of that provision, as it did in *the Concordia Bus* case. This kind of approach would help an interpretation of States' obligations under EU law consistent with the environmental integration rule. Since, as stated above, sustainable development is an objective, a principle and a rule[138] for the EU, this kind of approach would also be consistent with the conception that the interpretation of EU law is based on a teleological criterion. In fact, as Advocate General Jacobs stressed, Article 11 of the TFEU «is not merely programmatic [but] imposes legal obligations»[139].

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[136] European Parliament, Fact Sheets on the European Union, *The protection of fundamental rights in the EU*, available at *europarl.europa.eu*; O. De Schutter, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*, commissioned by the Open Society European Policy Institute, October 2017, available at *www.opensocietyfoundations.org*. Also see: K.L. Scheppele, D.V. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 2021, pp. 1-121.

[137] *Ibid.*

[138] B. Sjåfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, cit.

[139] Opinion of Advocate General Jacobs, delivered on 26 October 2000, *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein.*, C-379/98, para. 231. G. Marín Durán, E. Morgera *Commentary on Article 37 of the EU Charter of Fundamental Rights - Environmental Protection*, *Edinburgh School of Law Research Paper No. 2013/20*, *Europa Working Paper No. 2013/2*, 2013.

5. — *Conclusions.*

Sustainable urban development is at the top of the international agenda, and the approach developed by the international community has progressively emphasised its interconnection with human rights, since the intertwinement between human rights and the environment was recognized at the Stockholm Conference, in the early 1970s.

The two major European Courts, the European Court of Human Rights and the European Court of Justice, have proven capable of providing noteworthy responses when dealing with urban sustainability.

Their approach is unquestionably different, but it is not surprising when one considers their respective nature and competence: the ECtHR is a human rights body, whilst the ECJ is not, besides recalling the unique nature of the European Union as a supranational organization and the characteristics of its legal order. Of course, the EU has increasingly incorporated the protection of human rights into its legal framework, a process that culminated in the inclusion into the category of the primary sources of EU law of the CFREU, which, differently from the ECHR, has also enshrined a specific provision on the environment at Article 37.

Both Courts have proven capable of giving appropriate consideration to environmental protection in the urban context, consistently with their competence, especially when it was necessary to strike the balance with competing economic interests. In this regard, however, the ECJ has not used the human rights-paradigm as much as it was possible, notwithstanding the Advocates General, in their Opinions, have often suggested this path.

However, as the paper argues, an enhanced human rights-based approach in the case law of the ECJ is not only desirable, but also viable, for example when providing interpretive guidance on EU law in the context of preliminary rulings as well as when an infringement proceeding is launched – in this sense, as the paper stressed above, a wider reference to human rights was expressly encouraged in scholarship and at the institutional level in the EU.

Nevertheless, it would not be reasonable to expect the ECJ to develop an *Urgenda*-style environmental jurisprudence, which would require important

changes in relation to its well-established position on the *Plaumann* test and the view which is constantly restated by the Luxembourg Court with regard to the legal standing of legal and natural persons with respect to annulment proceedings and actions for failure to act[(140)]. In this sense, in fact, as the General Court has recently affirmed in the *Carvalho* case, «the claim that […] an act infringes those rules or rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless, as long as that alleged infringement does not distinguish the applicant individually»[(141)].

Therefore, it would not be likely to expect the ECJ to change this view in the environmental field, and we cannot reasonably expect any change of this kind when sustainable urban development is specifically at stake either.

Otherwise, the ECtHR appears to be progressively enhancing its proactive environmental approach. The recent *Duarte Agostinho* case is clear evidence for that, as the Court was quite flexible with regard to the application of the requirements of admissibility and also recalled *motu proprio* Article 3 of the ECHR in its communication to the respondent States. It will be interesting to see how the ECtHR will develop its view in relation to that provision, on which the Court has not relied, so far, with regard to the urban dimension[(142)]. In this sense, the Strasbourg case law on issues related to urban sustainability may be a suitable field for elaborating the kind of approach that, at least for now, has underlain the *Duarte Agostinho* case, especially when one considers how it valorised the importance of intergenerational equality,

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(140) An in-depth, interesting analysis is made by M. Pagano, *Overcoming Plaumann in EU environmental litigation. An analysis of ENGOs legal arguments in actions for annulment*, in this *Review*, 2019, pp. 311-360, available at *rivistadirittoeprocesso.eu*.

(141) M. Pagano, *Climate change litigation before EU Courts and the 'butterfly effect'*, in *Blog Droit Européen*, 16 October 2019, available at *blogdroiteuropeen.com*. Order of the General Court (Second Chamber) of 8 May 2019, *Armando Carvalho and Others v European Parliament and Council of the European Union*, T-330/18, para. 48.

(142) So far, indeed, the ECtHR has not found a violation of Article 3 of the ECHR in relation to sustainable urban development. An interesting example is the above-mentioned case of *López Ostra v. Spain*, cit.

which is part of the very core of sustainable development. In this sense, the ECtHR seems eager to address climate change and to protect future generations; unquestionably, it will be necessary to wait until the *Duarte Agostinho* judgment is handed down in order to better assess its approach, and it will take time. But the premise is promising, and it sounds like good news also for the protection to be granted to the urban dimension. Moreover, consistently with its well-established hermeneutic approach, the ECtHR could also use the European Social Charter as a support to interpretation of the ECHR, for providing a more targeted response to urban sustainability. For instance, the Court could use Article 31, on the right to housing, which requires that appropriate standards are met in this respect, and it could be a helpful reference in practice. It could be a viable way for better defining adequate and sustainable urban living conditions.

Striking the balance between the environmental and the economic interests was a basic issue in the jurisprudence of both Courts, and developing further this approach will be crucial if the ECtHR and the ECJ want to ensure justiciability to sustainable urban development, consistently with the efforts made by the COE and the EU as strategic actors both at the regional and the global level in this field. Justiciability is an essential factor for the success of the initiatives and policies that both Organizations support in the framework of the UN, and it is necessary for achieving the objectives enshrined in the SDG 11. Judicial dialogue between the ECtHR and the ECJ may help to share and strengthen the results achieved, without overlooking that the protection granted in Strasbourg case law defines the minimum threshold of the protection to be ensured by the ECJ, according to Article 52(3) of the CFREU and as clarified by the "Explanations" on this provision.

In conclusion, we can observe that the ECtHR appears eager to push forward with its proactive approach; the ECJ is not likely to adopt a *Urgenda*-style approach in its jurisprudence, but wider use of a human rights paradigm in the urban dimension is desirable and the time looks ripe. In this sense, the idea that Article 37 of the CFREU might contemplate a specific right may help to achieve stronger results. Nonetheless, Article 37 may have

a meaningful impact also in case it "only" contained principles and programmatic requirements, as they «shall be judicially cognisable […] in the interpretation of [EU and Member States' environmental policies] and in the ruling on their legality»[(143)], consistently with Article 52(5) of the CFREU.

Some steps forward still have to be taken; however, both Courts are on a good track for building – possibly, also through judicial dialogue – a European human rights-consistent environmental framework for sustainable urban development.

[(143)] Article 52(5) Charter of Fundamental Rights of the European Union. See: Z. KAISER, *Article 37 Charter of Fundamental Rights of the European Union: On the way to a fundamental right upgrade?*, cit., p. 48.