

THE RIGHT TO LIFE PASSES THROUGH THE RIGHT TO A HEALTHY ENVIRONMENT: JURISPRUDENCE IN COMPARISON

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I. INTRODUCTION

In this age, characterized by an economic crisis affecting western countries, we wonder: is this crisis leading to a change in the scale of protected interests? Can the general interest in the protection of the environment justify certain restrictions on economic and other individual interests by public authorities?

Since the 1960s, environmental damage caused by economic development has come increasingly under scrutiny and consequently, legal mechanisms have developed to tackle this.¹ As demonstrated by the evolution of European jurisprudence, a certain degree of protection has developed with regard to environmental questions relating to the protection of human rights. Particularly, as we shall see, the European Court of Human Rights (the Court) has increasingly examined complaints in which individuals have argued that a breach of their rights, ensured by the European Convention on Human Rights, resulted as a consequence of environmental damage.²

Indeed, under pressure from the European Union (EU), several European countries recognized and established the right to live in a healthy environment as a constitutional right or at least a constitutional objective. In other countries, including Italy, such a provision was not explicitly enshrined in its constitution, but developed through case law: the courts identified it as an implicit right with reference to other more traditional ones, such as the right to health and even the right to life.³

This article first aims at verifying the “status” of the fundamental right to health as right to a healthy environment in Europe. I shall more particularly examine the European jurisprudence and then that of Italy. I shall then concentrate on the issue of legal conflicts between the right to an adequate environment and industrial interests connected to political and economic power. In Italy, public authorities acted against the Constitutional Court’s decision in the “Ilva case,” which ordered a huge industrial complex in Taranto to shut down in order to protect the right to a healthy environment.⁴

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¹ David Vogel, *Environmental Regulation and Economic Integration*, 3 J. INT’L ECON. L. 265, 265 (2000).

² See *Budayeva and Others v. Russia*, 2008-II Eur. Ct. H.R. 267, 289 (2008).

³ Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, 83, ¶ 9 (It.), http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/85-2013.pdf.

⁴ Corte Cost., 4 settembre 2013, n. 85, ¶ 12.6.

Indeed, the public authorities approved a law—the “Save Ilva” —that allowed the continuation of industrial activity.⁵ Upon this law, as we shall see, the Constitutional Court intervened.⁶

Finally, I shall show how the scale of protected interests is presently changing. The conflict between the right to a healthy environment and the right to a job or to economic development is shifting towards solutions favorable to economic interest, prompting newly established constitutional rights and thus jeopardizing the Constitution itself.

II. HUMAN RIGHTS AND THE ENVIRONMENT UNDER INTERNATIONAL AND EUROPEAN LAW

Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR)⁷ establishes: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁸ Here and throughout this treaty there is no direct reference to the environment, whereas (public) health appears as a limitation, with regard to some rights, that can be protected by law.⁹ The same can be said about the protection of human rights under the European Convention on Human Rights (Convention)¹⁰, which was signed by both European Union member states and non-member states of the Council of Europe (COE). Thus, the COE consists of 47 European countries, including Russia, Bosnia, Herzegovina, Serbia and Montenegro,¹¹ that do not expressly guarantee a right to a healthy environment. The Convention contains, in principle, individual human rights relating to civil and political aspects, but not social rights,¹² and guarantees only, *inter alia*, the right to life through Article 2 § 1.¹³

These texts, however, have been interpreted as including obligations pertaining to the protection of the environment. All of the articles, particularly those of the Convention as interpreted by the Court, contain not

⁵ See Corte Cost., 4 settembre 2013, n. 85, ¶ 1.

⁶ See *id.* ¶ 12.6.

⁷ International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 172. The ICCPR was adopted and opened for signature, ratification, and accession on December 16, 1966 by General Assembly resolution 2200A (XXI) and entered into force March 23, 1976, in accordance with Article 49. See *id.* at 172 n.1.

⁸ *Id.* at 174.

⁹ *Id.* at 176 (Article 12(3) states: “The above-mentioned rights shall not be subject to any restrictions except those which are . . . necessary to protect . . . public health . . .”).

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (as amended by Protocol No. 14) [hereinafter Convention]. The Convention is a treaty open for signature by the member States of the Council of Europe on November 4, 1950 and entered into force on September 3, 1953. *Id.* at 222, 222 n.1.

¹¹ *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

¹² See generally Convention, *supra* note 10.

¹³ See *id.* at 224 (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”).

only a negative obligation for deaths caused directly by the state, but also establish a positive obligation that imposes on the state the responsibility to take appropriate measures to safeguard the lives of the people who fall within their jurisdiction. It is affirmed and accepted that human rights, particularly the right to life, and the environment are interrelated; for example, a particular activity endangering the environment may be so dangerous that it also threatens human life. A healthy environment appears to be essential to the realization of fundamental human rights, such as the right to life and personal integrity. Therefore, right to life passes through the right to a healthy environment, which is considered the resource base for all life.

The right to the protection of health is only present in the European Social Charter (“Social Charter”) of 1961, in Article 11, primarily in section 1.¹⁴ The Social Charter does not, however, provide a general protection of the environment and does not expressly guarantee a right to a healthy environment.¹⁵ The Social Charter contains, in 19 articles, the majority of social and economic rights¹⁶ and establishes a supervisory mechanism guaranteeing their respect by the states.¹⁷ The Social Charter is intended to complement the Convention and is binding,¹⁸ but it has less precise obligations than the individual rights under the Convention.¹⁹ Similar to the Convention, the Social Charter disallows states from invoking a material or legal inability to fulfill reason for noncompliance.²⁰ The European

¹⁴ See European Social Charter, art. 11, Oct. 18, 1961, 529 U.N.T.S. 89 [hereinafter Social Charter]. The Social Charter is a Council of Europe treaty which was adopted in 1961 and revised in 1996. *Details of Treaty No. 163: European Social Charter*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163> (last visited Feb. 1, 2016). The revised Social Charter came into force in 1999 and is gradually replacing the initial 1961 treaty. *Id.*

¹⁵ See Social Charter, *supra* note 14. Part I states: “11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.” *Id.* at 92. Part II, article 11 states:

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases.

Id. at 104.

¹⁶ See *id.* at 94-112.

¹⁷ *Id.* at 112.

¹⁸ *Id.* at 90.

¹⁹ *Id.* at 94-112.

²⁰ See Social Charter, *supra* note 14, at 120.

Committee of Social Rights (the Committee) ensures the conformity of national law with the obligations expressed in the Social Charter.²¹

Moreover, with the entry into force of the Lisbon Treaty, which amends the Treaty on European Union,²² European Union human rights protection has evolved into a new era. As Article 6 of the Treaty on European Union shows, the European Union Charter of Fundamental Rights (Charter of Fundamental Rights) binds only the European Union member states,²³ which is different than the Convention. The Charter of Fundamental Rights offers the protection of all the civil and political rights contained in the Convention, together with the existing economic, social, and cultural rights of the European Union.²⁴

In December 2009, the Charter of Fundamental Rights became legally binding despite the fact that it has not been incorporated into European law.²⁵ Therefore, the fundamental rights are placed into the general principles of European Union law. It is clear from Article 52(3) of the Charter of Fundamental Rights, which states that the scope of the rights guaranteed in this charter is the same as the corresponding rights guaranteed in the Convention, that the rights conferred by the Convention only offer minimum protection.²⁶ In Article 2 of the Charter of Fundamental Rights, you can read the same words that were used in the ICCPR: “Everyone has the right to life.”²⁷ It is also possible to find the specific rule about environmental protection in Article 37,²⁸ although it contains no right to a healthy environment explicitly, and about “health care” in Article 35, including the

²¹ See *European Committee of Social Rights (Committee)*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp (last visited Feb. 1, 2016). The Committee is composed of 15 independent members elected by the Committee of Ministers for a 6-year term of office, renewable once. *Id.*

²² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

²³ Consolidated Version of the Treaty on European Union, art. 6, Mar. 30, 2010, 2010 O.J. (C 83) 19 [hereinafter TEU]. The TEU states, “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.” *Id.* See also Treaty of Lisbon, art. 1(8) (amending Article 6 of the TEU).

²⁴ Charter of Fundamental Rights of the European Union pmbl., Oct. 26 2012, 2012 O.J. (C 326) 395 [hereinafter Charter of Fundamental Rights].

²⁵ The Charter of Fundamental Rights was “solemnly proclaimed” at the Nice European Council on Dec. 7, 2000, but “became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009.” *EU Charter of Fundamental Rights*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (last visited Feb. 1, 2016) (“For the first time, members of the College of Commissioners swore a solemn declaration to uphold the Charter as well as the Treaties in May 2010.”).

²⁶ Charter of Fundamental Rights, *supra* note 24, at art. 52(3).

²⁷ *Id.* at art. 2; see also Convention, *supra* note 10, at 224 (Article 2(1) states: “Everyone’s right to life shall be protected by law.”).

²⁸ Charter of Fundamental Rights, *supra* note 24, at art. 37 (“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”).

right “of access to preventive health care” and “to benefit from medical treatment.”²⁹ This article also references “a high level of human health protection,” but it is not ensured as a right.³⁰

Article 2 of the Convention, in accordance with Article 37 of the Charter of Fundamental Rights, might be interpreted as a rule that contains a positive obligation on public authorities to take all measures to guarantee the right to life when it is threatened by persons or activities not directly connected with the state and by damaging activities that can harm the environment and human life.³¹ The same may be true about the right to a healthy environment as the protection of health in Article 35 in accordance with the environmental protection of Article 37, which has been interpreted to include this right.³² However, as this charter entered into force only in 2009, currently no cases concerning these provisions and the right to a healthy environment have been brought before the European Court of Justice, which is responsible for their interpretation.

Instead, the Court has considered the implementation of the first sentence of Article 2(1) of the Convention and has identified some issues related to the environment that could infringe on the right to life in its case law. The Court reiterates that this article imposes an obligation on states “to take appropriate steps to safeguard the lives of those within its jurisdiction,” when the right to life is interrelated with the environment.³³ The Committee has also noted the complementary nature of the right to health under Article 11 of the Social Charter and Articles 2 and 3 of the European Convention on Human Rights.³⁴

Although neither the Convention nor the Social Charter explicitly afford protection of the environment, they offer a certain degree of protection with regard to environmental questions indirectly, as demonstrated by the evolving case law of the Court and decisions of the Committee in this area.

²⁹ Charter of Fundamental Rights, *supra* note 24, at art. 35.

³⁰ *Id.* (stating “[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.”).

³¹ *See id.* at art. 2, 37.

³² *See id.* at art. 35, 37.

³³ *See, e.g.,* Calvelli and Ciglio v. Italy 2002-I Eur. Ct. H.R. 25, 37 (2002); Öneriyildiz v. Turkey, 2004-XII Eur. Ct. H.R. 79, 109 (2002); L.C.B. v. United Kingdom, 1998-III Eur. Ct. H.R. 49, ¶ 36 (1998); *see also* Leray and Others v. France, App. No. 44617/98 (2001), <http://hudoc.echr.coe.int/eng?i=001-43930>; Eriksson v. Italy, App. No. 37900/97 (1999), <http://hudoc.echr.coe.int/eng?i=001-4817>.

³⁴ *See European Social Charter and European Convention on Human Rights*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/turin-european-social-charter/-european-social-charter-and-european-convention-on-human-rights> (last visited Feb. 1, 2016).

III. THE DEVELOPMENT OF THE RIGHT TO A HEALTHY ENVIRONMENT THROUGH CASE LAW

A. *The Case Law of the European Court of Human Rights*

So far, the Court has considered the issue of the violation of Article 2 of the Convention with regard to environmental matters, including in cases regarding chemical factories with toxic emissions or waste-collection sites, when carried out by both public authorities and by private companies, and, more simply, cases where the infringements on the right to life are related to dangerous activities or to natural disasters.³⁵ However, the Court has found a violation of Article 2 in environmental issues in only a few cases. In determining whether a state is in compliance with Article 2 in environmental cases, the Court follows two general criteria: one related to procedural requirements and the other related to substantive requirements.³⁶

Procedurally, the state has a duty to implement appropriate procedures to safeguard the right to life, “taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.”³⁷ This positive obligation requires that the responsible public authorities initiate appropriate controls and investigations in order to penalize those responsible for violating the right to life.³⁸

The substantive requirement imposes a duty on the state to make regulations which “entail[] above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”³⁹ The state then has a duty to take appropriate and practical action to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.⁴⁰ These preventive measures include supervising potentially dangerous situations and “provid[ing] information if authorities knew or should have known that a particular environmental hazard threatens lives.”⁴¹

In a 2008 judgment, *Budayeva and Others v. Russia*, the Court discussed these general principles and admitted that there was an infringement upon the right to life under Article 2 in reference to environmental issues.⁴² In this

³⁵ MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, COUNCIL OF EUROPE 36-37 (2012) http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf.

³⁶ JUSTICE AND ENVIRONMENT, HUMAN RIGHTS AND ENVIRONMENT: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ENVIRONMENTAL CASES 1-2 (2011), http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf.

³⁷ DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 450 (Cambridge Univ. Press, 2011).

³⁸ JUSTICE AND ENVIRONMENT, *supra* note 36, at 1.

³⁹ ANTON & SHELTON, *supra* note 37, at 450.

⁴⁰ *Id.*

⁴¹ JUSTICE AND ENVIRONMENT, *supra* note 36, at 2.

⁴² See *Budayeva and Others v. Russia*, 2008-II Eur. Ct. H.R. 267, 289 (2008). In this case, in July 2000, a mudslide swept through Tyrnauz, a town situated in a mountainous region in

case, the Court applied these principles in the context of natural disasters.⁴³ Less recently, in the *Öneryıldız v. Turkey* judgment in 1999, the Court found that dangerous activities constituted a violation of Article 2 when a state failed to take preventative measures to protect its citizens.⁴⁴

In both cases, the European Court of Human Rights found that states were in violation of their duty to protect life, having failed to take “preventive” measures as “necessary and sufficient” to protect the lives of people.⁴⁵ When the authorities “had known or ought to have known that there was a real or immediate risk” to people living near the dangerous activity, i.e., those living near a municipal rubbish tip shown to have a risk of exploding, they had an obligation under Article 2 of the Convention to take these measures, especially “as they themselves had set up the site and authorised its operation, which had given rise to the risk in question.”⁴⁶

B. The Decisions of the European Committee of Social Rights

As previously stated, the right to health in Article 11 of the Social Charter has been interpreted by the Committee as including the right to a healthy environment. In particular, the Committee, in a decision in 2006, outlined that “the growing link that states party to the [Social] Charter and other international bodies . . . make between the protection of health and of a healthy environment, and has interpreted . . . [the right to protection of health in Article 11 of the Social Charter] as including the right to a healthy environment.”⁴⁷ So, according to the Committee, the right to health in Article 11 of the Social Charter complements Articles 2 and 3 of the Convention, as interpreted by the European Court of Human Rights, “by imposing a range of positive obligations designed to secure its effective exercise.”⁴⁸ These

the central Caucasus, killing many people, including Vladimir Budayev, injuring others, and destroying many buildings. *Id.* at 276-77. The Court found that there was a “causal link between the serious administrative flaws [in land planning and emergency relief procedures] that impeded their implementation and the death of Vladimir Budayev and the injuries sustained by the first and the second applicants and the members of their family.” *Id.* at 295-96.

⁴³ *Budayeva*, 2008-II Eur. Ct. H.R. at 299.

⁴⁴ *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79, 125 (2002). In this case, an explosion occurred on a municipal rubbish tip, killing thirty-nine people who had illegally built their dwellings around it. *Id.* at 92-93. Nine members of the applicant’s family died in the accident. *Id.* at 108. Although an expert’s report had drawn the attention of the municipal authorities to the danger of a methane explosion at the tip two years before the accident, the authorities had taken no action. *Id.* at 91. The Court found that since the authorities knew or ought to have known that there was a real and immediate risk to the lives of people living near the rubbish tip, they had an obligation under Article 2 to take preventive measures to protect those people. *Id.* at 119.

⁴⁵ *Budayeva*, 2008-II Eur. Ct. H.R. at 282-83; *Öneryıldız*, 2004-XII Eur. Ct. H.R. at 125.

⁴⁶ *Budayeva*, 2008-II Eur. Ct. H.R. at 282-83, 291.

⁴⁷ *Marangopoulos Found. for Human Rights v. Greece*, Complaint No. 30/2005, ¶ 195 (2015), <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>.

⁴⁸ *Int’l. Fed’n. for Human Rights v. Greece*, Complaint No. 72/2011, ¶ 50 (2015), <https://wcd.coe.int/ViewDoc.jsp?id=2044363&Site=CM>.

objective, positive obligations and this “effective exercise”⁴⁹ are underscored by the Committee’s emphasis on “human dignity.”⁵⁰ The Committee considers that a violation of the Social Charter due to actions or omissions by regional and/or local authorities comes within the scope of the state’s responsibility for activities that are harmful to the environment, whether they are carried out by the public authorities themselves or by private companies.⁵¹ The measures taken by states to overcome harm to the environment, such as pollution, caused by public authorities and private companies, are assessed by the Committee with reference to the obligations imposed by the European Union and the United Nations, as well as the states’ national legislation as applied in practice.⁵²

In a more recent decision, the Committee recalled several previously established measures which may be implemented as an appropriate strategy to eliminate or reduce pollution and its negative effects on health.⁵³ In 2013, the Committee stated that “the national authorities must develop and regularly update sufficiently comprehensive environmental legislation and regulations”⁵⁴ and “must take specific steps, such as introducing threshold values for emissions” and establishing environmental quality standards.⁵⁵ Further, the national authorities must “ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery,”⁵⁶ inform the population about environmental risks,⁵⁷ and “take appropriate measures to provide advisory and educational facilities for the promotion of” good health practices.⁵⁸

In this decision, the Committee concluded that the state, Greece, had violated its obligations with respect to the right to protection of health under Article 11 sections 1 and 3 of the Social Charter because “the Government has not demonstrated that the relevant environmental rules have been fully

⁴⁹ Int’l. Movement ATD Fourth World v. France, Complaint No. 33/2006, ¶ 61 (2007), <http://hudoc.esc.coe.int/eng?i=cc-33-2006-dmerits-en> (“In connection with means of ensuring steady progress towards achieving the goals laid down by the Charter . . . the implementation of the Charter requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein.”).

⁵⁰ See Int’l Fed’n of Human Rights Leagues v. France, No. 14/2003, ¶ 193 (2004), <http://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en> (“[H]uman dignity is the fundamental value and indeed the core of positive European human rights law—whether under the European Social Charter or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity.”).

⁵¹ *Marangopoulos Found.*, *supra* note 47, ¶ 193.

⁵² *Id.* ¶ 204 (“The Committee assesses the efforts made by states with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations and in terms of how the relevant law is applied in practice.”) (internal citation omitted).

⁵³ See *Int’l. Fed’n. for Human Rights*, *supra* note 48, ¶¶ 133, 137, 146.

⁵⁴ *Id.* ¶ 137 (citing *Marangopoulos Found.*, *supra* note 47, ¶ 202).

⁵⁵ *Id.* ¶ 146 (citing *Marangopoulos Found.*, *supra* note 47, ¶ 203).

⁵⁶ *Id.* ¶ 133 (citing *Marangopoulos Found.*, *supra* note 47, ¶ 203).

⁵⁷ *Id.* ¶ 157.

⁵⁸ *Id.* ¶ 159.

respected in the areas concerned”⁵⁹ and “has failed to take appropriate measures to remove, as far as possible, the causes of ill-health and to prevent as far as possible diseases.”⁶⁰ The Committee further found a violation of Article 11 section 2 because “the Greek authorities did not take appropriate measures to provide advisory and educational facilities for the promotion of health in the present case.”⁶¹

C. The Case Law of the Constitutional Court in Italy

In 2013, in spite of an economic crisis, the Committee held that the deficiencies of Greek authorities constituted a violation of Article 11 of the Social Charter, under which “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.”⁶² At this same time, the courts in Italy solved the question of whether the right to a healthy environment exists by means of a “balance” between values, particularly between those related to industrial development and securing job opportunities and those related to a healthy environment.⁶³ The circumstances in Italy are different though. When the Italian Constitution came into force in 1947, it made no explicit mention of the term “environment.”⁶⁴ However, a constitutional provision ensuring a healthy environment has been developed through case law.⁶⁵

Indeed, the Convention, the Social Charter, and case law of the European Courts, particularly that of the Court of Human Rights, previously contributed to strengthening environmental protection at the national level, and the scale of protected interests is presently changing. In 1972 at the first UN Conference on the Human Environment, it was proclaimed that “[b]oth aspects of man’s environment, the natural and manmade, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”⁶⁶ Under pressure from European courts that have recognized a link between the protection of the rights and freedoms of individuals and the environment even though the Convention does not contain any explicit right to a clean and quiet environment, the national courts, particularly Italian

⁵⁹ *Int’l. Fed’n. for Human Rights*, *supra* note 48, ¶ 142.

⁶⁰ *Id.* ¶ 153.

⁶¹ *Id.* ¶ 159.

⁶² *Id.* ¶ 154.

⁶³ *See, e.g., See Corte Cost.*, 21 luglio 1995, n. 346, *Racc. uff. corte cost.* 1995, *Conclusions on Points of Law* ¶ 5 (It.); *Corte Cost.*, 4 settembre 2013, n. 85, *Racc. uff. corte cost.* 2013, *Conclusions on Points of Law* ¶ 10.2.

⁶⁴ Part I Costituzione [Cost.] (It.) (1947) (amended 2001).

⁶⁵ Following the Constitutional reform of 2001, a provision was added to the Italian Constitution which expressly gives the State exclusive legislative power in matters related to the protection of the environment, of the ecosystem, and of cultural heritage. *See* Art. 117 Costituzione [Cost.] (It.) (2001).

⁶⁶ U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, 3 (June 16, 1972).

courts, have adopted an evolutionary approach in favor of environmental protection.⁶⁷

The Italian Constitutional Court identified the right to a healthy environment as an implicit right with reference to other more traditional fundamental rights guaranteed in the Italian Constitution.⁶⁸ In several decisions, the Constitutional Court invoked different constitutional provisions when discussing the environment, such as the right to free development of personality under Article 2.⁶⁹ Article 2 recognizes and guarantees the inviolability of human rights of both the individual and within the society he lives, together with the associated irrevocable obligation of political, economic, and social solidarity.⁷⁰ The Constitutional Court also invoked the right to equality recognized in Article 3, section 2,⁷¹ and the right to protection of health under Article 32 in accordance with the protection of landscape and historic, artistic, and archaeological heritage in Article 9.⁷² In terms of development, the provisions providing for the right of free enterprise⁷³ and the right to private property⁷⁴ have also been invoked.

The starting point of constitutional jurisprudence is case no. 88/1979, where the Constitutional Court, when considering biological damage, stated that the right to the protection of health is “the primary and absolute right.”⁷⁵ However, the Constitutional Court did not definitively establish the nature of the subjective right to a healthy environment until 1987, in a case before an ordinary judge.⁷⁶ In this case, this court, considering “all of nature” as a legal and economic asset of constitutional importance, laid down that the environment is a “primary and absolute value.”⁷⁷

By introducing the right to a healthy environment through the interpretation of the constitutional provisions, such as Articles 9 and 32, the Constitutional Court is, in essence, forcing the constitutional provisions to contain such a right. In doing so, it is exceeding its powers by assuming the functions of a constitutional legislature. Therefore, the Constitutional Court

⁶⁷ See Art. 117 Costituzione [Cost.] (It.).

⁶⁸ See, e.g., Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 9 (It.); see also Art. 2, 117 Costituzione [Cost.] (It.).

⁶⁹ See Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 9 (It.).

⁷⁰ Art. 2 Costituzione [Cost.] (It.).

⁷¹ See Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 1 (It.).

⁷² See Corte Cost., 28 maggio 1987, n. 210, Racc. uff. corte cost. 1987, Conclusions on Points of Law, ¶ 4.2 (It.).

⁷³ See Art. 41 Costituzione [Cost.] (It.); Corte Cost., 21 luglio 1995, n. 346, Racc. uff. corte cost. 1995, Conclusions on Points of Law, ¶ 5 (It.).

⁷⁴ See Art. 42 Costituzione [Cost.] (It.); Corte Cost., 4 luglio 1989, n. 391, Racc. uff. corte cost. 1989, Conclusions on Points of Law, ¶ 3 (It.).

⁷⁵ Corte Cost., 25 luglio 1976, n. 88, Racc. uff. corte cost. 1979, Conclusions on Points of Law ¶ 2 (It.).

⁷⁶ See Corte Cost., 28 maggio 1987, n. 210, Racc. uff. corte cost. 1987, Conclusions on Points of Law ¶ 4 (It.).

⁷⁷ *Id.* ¶ 4.2.

assumed political functions by considering public policy with regard to the rights contained in the constitutional provisions and recognizing the necessity of “balancing” this environmental value with other constitutional values.⁷⁸ To achieve this aim, the Constitutional Court, over time, diminished the environmental right in comparison to the environmental value, thus changing the “right” to a healthy environment to a “primary and absolute value”

The Constitutional Court’s attention to public policy when considering the fundamental rights provided in the Constitution can be seen in its decision in 2013. In this case, known as the *Ilva* case, the textual “fundamental right” to the protection of health under Article 32 is changed extra-textually by the Constitutional Court to “primary value.”⁷⁹ In other words, the court, recalling its previous decisions, shifted the attention from the fundamental right to health in the provision laid down constitutionally to the primary value invoked in its precedent cases.⁸⁰ Particularly, by considering that health is a “fundamental value” instead of a right, the Constitutional Court could balance this “value” with other constitutional values, such as that of securing job opportunities. In this case, the Constitutional Court determined that the right to work outweighed the fundamental value of health and a healthy environment.⁸¹

The decision in the *Ilva* case shows that a right explicitly enshrined in the Italian constitutional text as “fundamental,” defined as a necessary and essential precondition for the enjoyment of all other rights guaranteed by the Constitution,⁸² is subject to a balancing of “principles and fundamental rights” by the Constitutional Court.⁸³

IV. CONCLUSION

In the areas near the ILVA plant, one out of every 18 inhabitants, or 4,328 people out of approximately 78,000 inhabitants, has cancer.⁸⁴ However, the European Court has only held admissible the appeal filed by the family of one woman in Taranto who passed away due to cancer.⁸⁵ Then, according to the Italian Court, the Italian Constitution and “contemporary democratic and pluralist constitutions” require a dynamic reading, with a “continuous and

⁷⁸ See Corte Cost., 21 luglio 1995, n. 346, Racc. uff. corte cost. 1995, Conclusions on Points of Law ¶ 5 (It.).

⁷⁹ See Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 9 (It.).

⁸⁰ *Id.*

⁸¹ *Id.* ¶ 4.

⁸² See, *inter alia*, ROBERTO BIN & GIOVANNI PITRUZZELLA, DIRITTO COSTITUZIONALE 571 (2015).

⁸³ See Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 9 (It.).

⁸⁴ See Domenico Paliotti, *Ilva, ambientalisti: a Taranto, nei rioni vicini agli impianti, un caso di cancro ogni 18 abitanti*, IL SOLE 24 ORE, Sept. 1, 2013, <http://www.ilssole24ore.com/art/notizie/2013-09-01/ambientalisti-taranto-rioni-vicini-190633.shtml?uuiid=AbtzaMSI>.

⁸⁵ Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 4 (It.).

reciprocal balancing” between “principles and fundamental rights.”⁸⁶ In its opinion, there are no rights that have the character of “absoluteness.”⁸⁷

Despite international and European texts as well as constitutions, which have laid down the “fundamental” character of the right to the protection of health and, above all, the right to life, the courts, in an age characterized by economic crisis, seem to assume an opposing attitude. Previously, the conventions and the case law contributed to the strengthening of environmental protection at the national level, but the scale of protected interests is changing. Since the proclamation of the necessity of the environment as a “basic human right” in the 1972 UN Conference on the Human Environment,⁸⁸ European and then national courts—particularly Italian—have recognized a link between the protection of the rights and freedoms of individuals and the environment, even though the Convention does not contain such a right.⁸⁹

However, the European courts’ decisions in which issues under Article 2 arise are truly exceptional, as these courts have already established, pursuant to the principle of subsidiarity,⁹⁰ that national authorities have more expertise in making decisions on difficult social and technical issues that arise in environmental disputes.⁹¹ Even when the Court has admitted the possibility of this violation, rarely has it found this to be the case. The Court, especially recently, tends to provide states with a wide margin of appreciation about, above all, the choice of practical means which they must make in terms of priorities and resources.⁹²

Constitutional courts are pronouncing in even more restrictive terms, as seen with the Italian Constitutional Court. The Italian Constitutional Court is not bound by its previous decisions,⁹³ and although it previously adopted an evolutionary approach to the environmental issues, this approach is now changing. While the interpretation of rights and freedoms does not vary depending on the social context and changes in society, constitutional interpretation is affected by public policy, and the policy choices are changing. In a society subject to more pollution now than when the Italian Constitution entered into force, the social requirements are more oriented toward favoring the right to a healthy environment. Yet, today, the tendency is to give relief to economic value, not to the value of health. This means, however, not guaranteeing relief to the human person and, therefore, not to life.

⁸⁶ Corte Cost., 4 settembre 2013, n. 85, Racc. uff. corte cost. 2013, Conclusions on Points of Law ¶ 9 (It.).

⁸⁷ *Id.*

⁸⁸ U.N. Conference on the Human Environment, *supra* note 66.

⁸⁹ *See supra* Part III.

⁹⁰ TEU, *supra* note 23, art. 5 ¶ 3.

⁹¹ *See* Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93) 545 final, at 7 (Nov. 1993).

⁹² *Budayeva and Others v. Russia*, 2008-II Eur. Ct. H.R. 267, 289-90 (2008).

⁹³ Art. 136 Costituzione [Cost.] (It.).