EUROPEAN COURT OF HUMAN RIGHTS ON ADDRESSING ENVIRONMENTAL DISCRIMINATION AGAINST COLLECTIVITIES

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Abstract: *Environmental degradation is not distributed equally among various groups of people. There is a vast amount of social studies, scientific reports and current legal cases which reveal the disproportionate burden placed on certain populations by the pollution of the natural environment. This paper is based on the idea that equal wellbeing of each individual is better protected when their status as collectivities is taken into account with regard to environmental issues. In this respect, the paper attempts to explore how the principle of equality and non-discrimination, Article 14 of the European Convention on Human Rights, helps defending rights of collectivities through an individual rights-based legal institution, namely European Court of Human Rights.*

Keywords: *collective rights, human rights law, environment, discrimination law, young generations*

INTRODUCTION

Human rights litigation appears as a trending avenue to challenge the authorities who are causing environmental damage or failing to prevent individuals from the negative effects of environmental degradation. The invocation of human rights such as "right to life", "right to private and family life", "right to property", "right to health" and "right to a healthy environment" is widely acknowledged by the domestic and international tribunals. Recently, in the Dutch Urgenda case against climate change, Hague Court of Appeals ruled that the government's climate inaction violates the right to life and right to family life, namely Article 2 and Article 8 of the European Convention on Human Rights (ECHR).[1]

Although it is not widely recognized, *"right to equality and non-discrimination"* can also be invoked when environmental degradation affects certain vulnerable groups, such as

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[1] *The State Of The Netherlands v. Urgenda Foundation*, ECLI:NL:GHDHA:2018:2610, 9 October 2018, parag.40–43. See: GOSSERIES, A., KAYA, R. K. L'Arrêt Urgenda, un Espoir Face à L'Inertie des Politiques Climatiques. In: *The Conversation* [online]. 30. 10. 2018 [2019-10-15]. Available at: < http://theconversation.com/larret-urgenda-un-espoir-face-a-linertie-des-politiques-climatiques-105869>.

young generations, indigenous people, Romani people, more than others.[2] The environmental vulnerabilities stemming from membership to a particular collectivity is increasingly emphasized. Litigation as part of the environmental justice movement in the United States (U.S.) and some recent climate change cases are examples of this sort.[3] For example, the People's Climate Case before the Court of Justice of the European Union (CJEU) invokes the principle of equality and non-discrimination, age discrimination, to emphasize the fact that climate change will affect younger generations more than older generations.[4]

The paper asks whether the use of the right to equality and non-discrimination can strengthen the environmental claims of vulnerable collectivities before the European Court of Human Rights (ECtHR). The first part explores whether human rights, which are perceived as rights of individual human beings, can be used to defend the rights of collectivities. The second part presents how ECtHR disregards the rights of collectivities in environmental cases. The third part demonstrates that ECtHR actually considers the rights of collectives in various non-environmental cases, for example in gender discrimination cases where the right to equality and non-discrimination principle is invoked. The last part discusses whether it is possible and needed to extend the use of this right to environmental cases, especially for the sake of defending the environmental interests of young generations through the ECtHR.

1. INDIVIDUAL VERSUS COLLECTIVE HUMAN RIGHTS

Human rights are defined as moral principles or norms inherent to all *individual* human beings for the sake of freedom, justice, and peace in the world.[5] It is universally accepted that human individuals hold these rights regardless of their *collective* status, e.g. nationality, ethnicity, religion, gender, etc.[6] Therefore, although humans hold these rights by virtue of being a member of the human race, the value is not placed in other group memberships than "humankind". This means, for example, human rights cannot be granted only to white people since being a member of the white group should not have

[2] GOSSERIES, A. Environmental Degradation as Age Discrimination. *e-Pública. Revista electronica de Direito Pública*. 2015, No. 2, p. 25; GOSSERIES, A., KAYA, R. K. *L'Arrêt Urgenda, un Espoir Face à L'Inertie des Politiques Climatiques*; KAYA, R. Environmental Vulnerability, Age and the Promises of Anti Age Discrimination Law. *RECIEL*. 2019, Vol. 28, No. 2, pp. 162–174.

[3] Examples of the environmental justice movement cases: *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); *East Bibb Twiggs v. MACON-BIBB CTY. P. & Z. COM'N*, 706 F. Supp. 880 (M.D. Ga. 1989); *RISE, Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991); *Boyd v. Browner*, 897 F. Supp. 590 (D.C. 1995); *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996); *Miller v. City of Dallas*, 2002 U.S. Dist. L.E.X.I.S. 2341 (2002); *Cox v. City of Dallas, Tex.*, 430 F.3d 734 (5th Cir. 2005). Examples of the climate cases: *Juliana, et al. v United States of America*, et al. No: 6:15-cv-01517 (D.Or. 2018) proceeding. The People's Climate Case: *Armonda Ferrao Carvalho and others v. The European Parliament, The Council* (2018).

[4] Armonda Ferrao Carvalho and others v. The European Parliament, The Council. In: *The People's Climate Case* [online]. 2. 7. 2018 [2019-10-15]. Available at: <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf>. See p.27.

[5] See the Preamble and the Article 1 of UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

[6] Ibid.

a special status. People of color should also be able to hold these rights since they are humans, too. However, what if certain groups, e.g. people of color, are suppressed and they need recognition as groups to make sure their individual members are not worse-off? What if certain rights, e.g. right to self-determination, can only be exercised collectively? In such cases, can human rights take a collective as well as an individual form? This has been widely debated in human rights literature.

Certain academicians defend that human rights are the rights of individual human beings and they cannot be borne collectively by groups.[7] Others claim that human rights can take both collective and individual form.[8] This section aims to answer two questions: What exactly does it mean a human right being in individual form and collective form? What is the significance of differentiating them? There are at least two prominent approaches.[9]

The first approach stems from the interest theory of rights which develops that an individual should have a sufficient interest in something to have a right that imposes duties upon others.[10] Joseph Raz is the most influential developer of this view which I will refer as *interest account*. According to interest account, the crucial point that separates individual rights from collective rights (or group rights) manifests from the *interest* of the subject who holds the rights.[11] One reason that collective rights should exist is sometimes the interest of one individual is not "sufficient by itself to justify holding another person to be subject to a duty" while a group of individuals can jointly hold a right that could justify imposing a duty on others.[12] For example, Romani people exist as a cultural minority in some parts of Europe. Their particular standing as travelers is central to their lives. Therefore, European states usually have an obligation to accommodate traveler lifestyle, unless Romani people's interest conflict with the interest of a greater majority.[13] Romani people could collectively hold the right to be accommodated as a group, i.e. the cost of protecting the Roman lifestyle could only be justified by considering the joint interest of all the members of Roma. In such cases, the collective rights appear as the individual rights being applied to the individual members of a vulnerable community, i.e. individual rights that are jointly held by a group is considered as collective rights.

Human rights treaties which are special to vulnerable collectivities, such as the disabled, minorities, women, children, and indigenous people, prove the relevancy of Raz's

[7] DONNELLY, J. Human Rights, Individual Rights and Collective Rights. In: Jan Berting (ed.). *Human rights in a Pluralist World: Individuals and Collectivities*. Meckler, 1990, p. 39; GALENKAMP, M. Individualism Versus Collectivism: The Concept of Collective Rights. *Tijdschrift Voor Filosofie*. 1994, Vol. 56, No. 4, p. 805.

[8] VAN DYKE, V. *Human rights, Ethnicity, and Discrimination*. Greenwood, 1985; FREEMAN, M. Are There Collective Human Rights?, *Political Studies*. 1995, Vol. 43, p. 25; FELICE, William F. The Case for Collective Human Rights: The Reality of Group Suffering. *Ethics & International Affairs*. 1996, Vol.10, pp. 47–61; PREDA, A. Group Rights and Shared Interests. *Political Studies*. 2013, Vol. 61, No. 2, pp. 250–266.

[9] BUCHANAN, A. E. *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law*. Oxford University Press on Demand, 2007, pp. 410–415.

[10] RAZ, J. *The Morality of Freedom*. Clarendon Press, 1986, pp. 183-186; KRAMER, M. H.; SIMMONDS, N. E. STEINER, H. *A Debate Over Rights: Philosophical Enquiries*. Oxford University Press, 2000, pp. 195–211.

[11] RAZ, J. *The Morality of Freedom*. p. 208. supra 10; NINE, C. *Global justice and territory*. Oxford University Press, 2012. p. 47; KRAMER, M.H. Some Doubts About Alternatives to the Interest Theory of Rights. *Ethics*, 2013, Vol. 123, No. 2, pp. 245–247.

[12] RAZ, J. *The Morality of Freedom*. p. 208. supra 10.

[13] *Chapman v United Kingdom*. Application No. 27238/95. ECtHR. 18 January 2001.

interest account.[14] For example, even if every individual should be protected from violence, the violation against women is especially condemned in the Convention on the Elimination of All Forms of Discrimination against Women.[15] Similarly, although each individual has a right to education, the right to education of the disabled is underlined in the Convention on the Rights of Persons with Disabilities.[16] Such conventions substantiate the value in emphasizing the collective interests of individuals who have a particular disadvantage as a bearer of social identity. In this regard, differentiating individual rights from collective rights matter for the sake of taking the group dimension of suffering into account.[17]

The moral structure of a collective right is also the same for other groups of people who do not reveal a strong common identity as groups like women and the disabled. For example, a group of people who lives close to a factory can also hold collective rights as Peter Jones illustrates by asking: Do people who live in a vicinity of a factory, which gives of polluting fumes, have a 'right to stop the factory from engaging in the polluting activity'?[18] Following the interest account, he answers that just one individual's interest may not be enough to compensate the high cost of stopping the factory emissions if these emissions do not constitute a significant threat to that individual's health or quality of life. However, the collective interest of all individuals who live in the polluted neighborhood could justify imposing a duty to the factory's owner since these individuals "jointly possess a right that none of them possesses individually."[19] Therefore, such a right can be considered as a collective right.

The second account on differentiating individual rights from collective rights do not consider rights that are held by group members severally as collective rights. Collective rights are explained as rights that are held by a *group qua group*.[20] The group is seen as a separate unit, i.e. entity separate from its members rather than a collection of individu-

[14] See: UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3; UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

[15] See the Preamble of UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*.

[16] See the Preamble, Article 8, Article 16 of UN General Assembly, *Convention on the Rights of Persons with Disabilities*.

[17] FELICE, W. F. *Taking Suffering Seriously: The Importance of Collective Human Rights*. SUNY Press, 1996.

[18] JONES, P. Human Rights, Group Rights, and Peoples' Rights. *Human Rights Quarterly*. 1999, Vol. 21, No. 1, pp. 80–107.

[19] Ibid.

[20] KYMLICKA, W. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Clarendon Press, 1995. Kymlica argues that collective rights are rights that are held by a group qua group. He coined the term "group-differentiated rights" for the rights that are given to groups but can be exercised individually by the individual group members. See pp.45-48. NEWMAN, D. *Community and Collective rights: A Theoretical Framework for Rights Held by Groups*. Bloomsbury Publishing, 2011.

als.[21] Moreover, the group members should have legally identifiable connections, e.g. a strong common identity, such as being a member of the same cultural minority.[22]A random group like people living in the vicinity of the same factory cannot be considered as a collectivity.[23] In this regard, the right to self-determination is a collective right because it can only be enjoyed jointly with all the members of an identifiable group, for example, an indigenous community.[24] This approach is referred as the *corporate conception* of group rights.[25]

Rather than classifying an individual or a collective right by interest, this account differentiates between rights that are naturally exercised individually and collectively.[26] For example, the right to access to natural resources, rights as the protection of culture, rights of minorities qualify as collective rights.[27] Such an approach brings along three generations of human rights.[28] First and second generations represent individual rights, namely civil-political rights and socio-economic rights.[29] The third generation represents collective rights which cannot be reduced to the individual level, such as the right to self-determination, right to a healthy environment and intergenerational planetary rights.[30]

The skeptics of collective rights would object to both accounts, interest account and corporate conception of group rights, that differentiate individual rights from collective rights since they believe that nobody should be referred in virtue of her membership to a group.[31] To my mind, in some cases, individual rights cannot be fully respected without respecting the communities in which the individuals are embedded. In other words, there are situations in which we need to see individuals through their collectivity in order to make sure we can protect their individual rights. Individual rights and collective rights complement each other.

For the aim of this article, I will differentiate individual rights from collective rights through the perspective of interest account. The first reason is that most of the clauses of the ECHR only concern the rights of individual human beings, e.g. the right to respect private and family life, not corporate entities. While the corporate conception does not ground status in the rights of human beings, the interest account concerns the rights held by individuals, although jointly. The second reason is, as I will develop in the next part,

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21 APPIAH, K. A. *The Ethics of Identity*. Princeton University Press, 2005, pp. 72–73.

22 Ibid.

23 PREDA, A. *Group Rights and Shared Interests*. Supra 8.

24 BAEHR, P. *Human Rights: Universality in Practice*. Springer, 2016.

25 JONES, P. *Human Rights, Group Rights, and Peoples' Rights*. p. 86. Supra 18; Appiah refers this kind of group rights, which are exercised collectively, as collective rights. He refers group rights which can be exercised individually as membership rights. APPIAH, K. A. *The Ethics of Identity*. p.72. Supra 21.

26 TRIGGS, G. The Rights of 'Peoples' and Individual Rights: Conflict or Harmony? In: James Crawford (ed.). *The Rights of Peoples*. Oxford: Clarendon Press, 1988, p. 156.

27 BAEHR, P. *Human Rights: Universality in Practice*. Supra 24.

28 VASAK, K. Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights. *UNESCO Courier*. 1977, No. 10, p. 28–32. DONNELLY, J. Third Generation Rights. In: Catherine Broelmann, et al. (ed.). *Peoples and Minorities in International Law*. Brill, 1993, p. 119.

29 Ibid.

30 Ibid.

31 MAURICE, C. Human Rights: Real and Supposed. In: D. D. Raphael (ed.). *Political Theory and the Rights of Man*. Bloomington: Indiana University Press, 1967, pp. 43–51; APPIAH, K. A. *The Ethics of Identity*. p.72. Supra 21.

the concept of interest is usually referred in the ECtHR's environmental cases. In this regard, the *individualistic approach* refers to the situations in which the Court only assesses the interest of the applicants. On the contrary, the *collectivistic approach* is relevant when the Court recognizes the interest of the individual applicants and also the collectivity that these individuals belong, e.g. when the Court takes group dimension of the violation into account. In the following parts, I will identify the limits of individualistic approach and explore whether the collectivistic approach can help to overcome those limits.

2. THE INDIVIDUALISTIC APPROACH OF THE ECTHR IN ENVIRONMENTAL CASES

The ECHR does not distinctively involve a right to a healthy environment. Therefore, the Court has been developing its own case law in environmental issues by invoking other rights in the Convention which are considered to be violated by environmental harm. The rights which have been invoked so far in the Court's environmental case law include the right to life (Article 2), right to property (Article 1 Protocol 1) and most commonly right to respect for private and family life (Article 8).[32]

The right to life and the right to property are invoked in exceptional situations, namely when somebody's life or property is exposed to severe damage or when there is direct evidence to show the high probability of a severe damage. To exemplify the use of these articles, I will briefly introduce the ECtHR case of *Oneryildiz v. Turkey*.[33] The case concerns a methane explosion which occurred at a rubbish tip surrounded by slums and killed the applicant's nine relatives. The applicant complained that the authorities had taken no measures to prevent this catastrophe despite of an expert report which suggested to the authorities to be precautious about a possible explosion. The Court found that:

"the government authorities had failed to comply with their duty to inform the inhabitants of the…area of the risks they were taking by continuing to live near a rubbish tip." Therefore, *"…there was a causal link between, on the one hand, the negligent omissions attributable to the Turkish authorities and, on the other, the occurrence of the accident"*.[34]

Consequently, the Court held that there had been a violation of "right to life" (Article 2) and also "right to property" (Article 1 Protocol 1).

The Court has been developing an extensive environmental precedent based upon the right to respect for private and family life (Article 8) since environmental complaints before the Court mostly concern life quality or health rather than a direct threat to life or property. Various types of environmental cases have been examined under this article, including human exposition to the factory emissions or chemicals, airport construction, mining activities and industrial wastes close to a human settlement. The ECtHR case of *Brincat and others v. Malta* illustrates the use of Article 8. This case concerns asbestos ex-

[32] COUNCIL OF EUROPE. Manual on Human Rights and the Environment. In: *Council of Europe* [online]. 2012 [2019-10-15]. Available at: <https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf>. See p.8.

[33] *Oneryildiz v.Turkey*. Application No. 48939/99. ECtHR. 30 November 2004.

[34] Ibid., par. 75.

posure of the shipyard workers who were exposed to this chemical from the 1950s to 2000s until the authorities took positive steps in 2003. The Court found that:

"…the legislation was deficient in so far as it neither adequately regulated the operation of the asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees whose lives might have been endangered by the inherent risk of exposure to asbestos."[35]

The Court held that there had been a violation of Article 2 for those who were died and a violation of Article 8 concerning the remaining applicants. Hence, if a direct threat to life and property is identified, right to life and right to property clauses of the Convention are invoked. If the environmental issue does not pose a direct threat to life or property but affects the course of everyday life or causes health problems, then right to private and family life clause is relevant.

On the application of all these rights, the Court is only concerned with the effects of the environmental degradation on the individual applicants and does not raise awareness about the environmental injustices in general. For example, in *Oneryildiz v Turkey* case, the Court does not show regard to the fact that municipal rubbish tips are posing a threat to the community of socio-economically disadvantaged people. Such deliberation was not needed in this case since the violation towards the applicants was significant enough. Yet, in certain environmental complaints, individual applicants should be considered together with the community that they belong to in order to have a stronger interest against environmental harm. Otherwise, individual applicants can be unsuccessful as it is seen in the ECtHR case of *Kyrtatos v. Greece*.[36] This case concerns an urban development which had let the destruction of the natural environment, a forest with various animal species, in the neighborhood of the applicant. The applicant claimed the violation of his right to privacy and family life because of the construction process. The Court found that there had been no violation as:

"the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment."[37]

The Court also held that:

"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."[38]

The Court is criticized for this decision because of the individualistic approach that it adopts by focusing solely on the individualistic dimension of environmental degradation rather than valuing the right to private and family life of the community as a whole.[39] Moreover, this case also reveals that one individual's interest in protecting the forest from

[35] *Brincat And Others v. Malta*. Application No. 60908/11. ECtHR. 24 July 2014. parag.111.
[36] *Kyrtatos v. Greece*. Application No. 41666/98. ECtHR. 22 May 2003.
[37] Ibid., par. 52.
[38] Ibid., par. 54.
[39] FRANCIONI, F. International Human Rights in an Environmental Horizon. *European Journal of International Law*. 2010, Vol. 21, No. 41, pp. 50–51.

urbanization was not seen sufficient to stop the construction process, i.e. the negative effects of the urban development on the applicant were not considered serious enough. Therefore, the applicant's interest does not transform into a right. The conclusion of the Court could be different if the community's interest in the protection of forest was taken into account.

The interest-based assessment of the Court is seen more clearly in the ECtHR case of *Jugheli and others v. Georgia.*[40] The applicants had been suffering from the air pollution caused by a thermal power plant which was located only four meters away from their apartment.

The Court reiterated that *"the respondent State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life…"*[41] and held that there has been a violation of Article 8.

Even if the Court's approach resulted in favor of the applicants, it needs to be criticized. How would the Court react if the state had introduced documents with regard to the cost and benefit analysis revealing the importance of the thermal power plant for the economic welfare of the country? Whose environmental health interest would be placed counter to the community's energy interest: only the individual applicants' interest or the interest of all the groups (especially vulnerable people like young generations) who will be directly or indirectly affected by the thermal power plant?

A clear answer for these questions is non-existent in the Convention. The Convention only clarifies that the second paragraph of Article 8 requires an assessment of competing interests. The exercise of the right to respect for private and family life is restricted when there is a public interest in the breach of this right:

"There shall be no interference by a public authority with the exercise of this right [right to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society in the ***interests of*** *national security, public safety or* ***the economic well-being of the country****, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*[42]

Yet, the Convention does not clarify whose interests should be placed counter to the public interest.[43] In this respect, the Court's interpretation plays an important role, but the Court seems cautious about adopting a collectivistic approach in environmental cases. For example, the case law of the Court with regard to Romani people reveals that the individual applicant's interest is considered irrespective of her community, as in *Chapman v. UK* case.[44] This case concerns the applicant of Romani origin who com-

[40] *Jugheli and others v. Georgia.* Application No. 38342/05. ECtHR. 13 July 2017.

[41] Ibid., par. 78.

[42] The Article 8 of 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. Bolds are mine.

[43] MCHARG, A. Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights. *The Modern Law Review.* 1999, Vol. 62, No. 5, pp. 671–696.

[44] *Buckley v. the United Kingdom.* Application No. 20348/92. ECtHR. 25 September 1996. parag, 74–84; *Chapman v United Kingdom.* parag. 113–120. *Coster and Coster v United Kingdom.* App No. 24876/94. ECtHR. 18 January 2011. par. 122–128.

plained about the restrictions placed upon the accommodations available to Romani people. The applicant urged Court to take into account international obligations to protect the security, identity, and lifestyle of minorities. The Court recognized such obligations but held that:

"the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court's role a strictly supervisory one."[45]

Hence, the Court decided not to consider the interest of the minority group, which the individual applicant is a member of, and leave the judgment to the political authorities. Seven judges disagreed by this opinion and expressed that:

"There is an emerging consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (…in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but also in order to preserve a cultural diversity of value to the whole community. We cannot therefore agree with the majority's…conclusion that the complexity of the competing interests renders the Court's role a strictly supervisory one."[46]

In this regard, the dissenting opinion indicates that the Court should be taking the collective interest of the applicant's collectivity into account while assessing the competing interests between the applicant and public. Therefore, the Court should not be adopting an individualist approach in the present case. The individualistic approach of the ECtHR seems ill-suited for likewise environmental human rights cases, such as climate change litigation, which raises collective interest rather than solely individual.[47]

One can claim that the Court has to adopt an individualistic approach due to the strict admissibility rules, namely Article 34, of the Convention regulating:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation…"[48]

According to the Court's interpretation, the victim of a violation should prove that she was directly affected, i.e. the person submitting the application must be able to substantiate the conduct in question.[49] People who are indirectly affected are allowed to make a claim as well, but only if they had close relations, like a family bond, with the direct victim.[50] The Court also develops that the Convention does not envisage bringing of an *actio*

[45] *Chapman v. United Kingdom.* par. 93.

[46] *Chapman v. United Kingdom.* Joint Dissenting Opinion. par. 3.

[47] FRANCIONI, F. *International Human Rights in an Environmental Horizon.* Supra 39.

[48] The Article 34 of Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms.*

[49] *Burden v. the United Kingdom.* Application No. 13378/05. ECtHR. 29 April 2008. par. 33; *Tanase v. Moldova.* Application No. 7/08. ECtHR. 27 April 2010. par. 104.

[50] *Varnava and Others v. Turkey.* Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90. ECtHR. par. 112; EUROPEAN COURT OF HUMAN RIGHTS. Practical Guide on Admissibility Criteria. In: *European Court of Human Rights* [online]. 31. 8. 2019 [2019-10-15]. Available at: <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf>. p.11.

popularis for having the compliance of law examined abstractly without applicant(s) being directly affected by it.[51]

However, the Court allows a violation claim in the absence of an individual measure of implementation of the law in complaint if the applicant is "a member of a class of people who risk being directly affected by the legislation."[52] Therefore, a collectivistic approach is allowed. In the next section, I will show that the Court has been adopting a collectivistic approach in non-environmental cases, namely in discrimination cases, unlike the environmental cases.

3. THE COLLECTIVISTIC APPROACH OF THE ECTHR IN NON-ENVIRONMENTAL CASES

In non-environmental cases before the ECtHR, the status of collectivities is mostly referred through right to equality and non-discrimination (Article 14 of the Convention) since discrimination claims are usually related to identity, i.e. a group membership. Such practice develops a relationship between discrimination law and collectivistic approach.[53] For example, when a woman claims to earn less than men for doing the same job, the women as a group are compared to men to determine if there is statistical discrimination against women. By this way, the group interests of the people in a vulnerable position, i.e. the group suffering, inevitably becomes apparent. This situation is especially explicit in gender discrimination cases before the ECtHR. For example, *Opuz v. Turkey* case concerns domestic violence to the applicant and her mother. Even the applicant did not prove direct discrimination, the Court held that *"the applicant has been able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women."*[54]

The Court referred to the positive obligation of the state to protect women against domestic violence based on the Article 2 (right to life) in conjunction with the Article 14 (right to equality and non-discrimination).[55] It appears that the given suffering is considered as more problematic when it systematically affects a group. Identity-based disadvantage constitutes an added harm, and it concerns not only one individual applicant but all the individuals who hold the same identity of being potential victims. In this regard, while governments have a responsibility to ensure that nobody is exposed to violence, such group references by the courts may promote the sense of responsibility to protect, for example, women as a collectivity from violence. The Court stresses such responsibility further in the 2012 case of *Konstantin Markin v. Russia* by stating:

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[51] *Aksu v. Turkey*. Applications Nos. 4149/04 and 41029/04. ECtHR. 15 March 2012. par. 50. EUROPEAN COURT OF HUMAN RIGHTS. *Practical Guide on Admissibility Criteria*. p. 13.

[52] *Michaud v. France*. Application No. 12323/11. ECtHR. 6 December 2012. par. 51–52. EUROPEAN COURT OF HUMAN RIGHTS. *Practical Guide on Admissibility Criteria*. p. 13.

[53] FARKAS, L. Collective Actions under European Anti-Discrimination Law. *European Anti-Discrimination Law Review*. 2014, No. 19, pp. 25–40. DONDERS, Y. *Foundations of Collective Cultural Rights in International Human Rights Law*. Leiden: Brill Nijhoff, 2016, p. 103.

[54] *Opuz v. Turkey*. Application No. 33401/02. ECtHR. 9 June 2009. par. 198.

[55] Ibid.

"... the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ..."[56]

When the Court refers to the great importance of achieving gender equality, the group dimension of the individual right to equality and non-discrimination becomes apparent. This strengthens the case of an individual applicant who is claiming her right to equality and non-discrimination.

The collectivistic approach of the Court is not only seen in gender discrimination but also in race discrimination cases. Contrary to cases of Romani people in the domain of *environment*, the Court adopts a collectivistic approach in the cases of Romani peoples concerning *public education*, as in the ECtHR case of *D.H. and others v. Czech Republic*. This case concerns legislation about the assignment to public schools. The related language criteria caused the placement of the Romani origin applicants to the special schools for children with learning difficulties. The Court held that:

"... since it has been established that the relevant legislation ... had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases."[57]

The Court condemns the legislation by considering the interest of the Romani community rather than the individual applicants. The Court's formulation of the problem reveals why the collectivistic approach is helpful to protect the rights of individuals. The Court's stance contributes to the following assumption which this paper is based:

If one person is discriminated because of x trait, other people with x trait are disadvantaged because they become potential victims of discrimination. Therefore, without addressing the general problem which collectivities with x trait are exposed, an individual holder of the x trait is not fully protected from discrimination.

Even if a discriminative act looks like an individual problem, the victim usually suffers in virtue of her membership to a collectivity. In this regard, Article 14 of the Convention constitutes a fertile ground to challenge the individualistic approach of the ECtHR in environmental cases. The recognition of environmentally vulnerable groups by invoking Article 14 may later transform the Court's environmental policy into a more collectivistic one. The next part will assess whether such an extension is plausible and needed.

4. EXTENDING THE COLLECTIVISTIC APPROACH TO ENVIRONMENTAL CASES

4.1. The Plausibility to Extend: Invoking Article 14 in Combination with Article 8

Right to equality and non-discrimination was firstly used in environmental cases in the U.S. after two national landmark studies revealed that the vast majority of the hazardous

[56] *Konstantin Martin v. Russia.* Application No. 30078/06. ECtHR. 22 March 2012. par.127.
[57] *D.H. and others v. Czech Republic.* Application No. 57325/00. ECtHR. 13 November 2007. par. 209.

landfills were located in the vicinity of the black and Hispanic neighborhood.[58] These studies documented both racial and socioeconomic demographic patterns associated with the setting of the waste sites. This issue has transformed into a significant social justice movement, named the environmental justice movement, by the end of the 1970s in the U.S., following the civil activism dominated by women and people of color. Many legal cases followed which did not use the classical tools of environmental law but rather discrimination law for emphasizing the collectivistic dimension of suffering, namely the specific disadvantage of African-Americans and Hispanics. Therefore, the first time that discrimination law appeared in environmental cases was for the sake of defending the rights of certain environmentally vulnerable groups.

There are several reasons to believe why a similar strategy, of using discrimination law in an environmental context, could be effective before the ECtHR. First, the ECtHR has been taking a strong position with regard to the principle of equality and non-discrimination. Typically, Article 14 is a secondary right, i.e. it does not have an independent existence but complements other substantive provision in the Convention. Yet, the Court has been widening the threshold of Article 14.[59] Article 14 can be invoked if a case can be considered within the ambit of a substantial right in the Convention without proving the breach of that particular right.[60] According to the Court:

"Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols."[61]

The advantage of this development is very precise in certain cases, e.g. *Konstantin Markin v. Russia*. This case raises the issue of whether a state can refuse parental leave for military servicemen while allowing such leave for servicewomen. The applicant alleged the violation of Article 14 and Article 8. The Court held that "*Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances.*"[62] Yet, according to the Court, *"Parental leave and parental allowances… affect the way in which it (family) is organised…therefore come within the scope of Article*

[58] 1983 study of the U.S. General Accounting Office revealed that people of color comprised the majority of the population in three of the four communities where landfills were located: GAO. Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities. In: *U. S. Government Accountability Office* [online]. 1. 7. 1983 [2019-10-15]. Available at: <http://archive.gao.gov/d48t13/121648.pdf>; 1987 study of the United Church of Christ Commission for Racial Justice found that three out of every five blacks and Hispanics lived in communities with uncontrolled hazardous waste sites: UCC. Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites. Public Data Access, 1987.

[59] FREDMAN, S. Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights. *Human Rights Law Review*. 2016, Vol. 16, No. 2, pp. 275–277.

[60] KAYA, R. *Environmental Vulnerability, Age and the Promises of Anti–Age Discrimination Law*. p.12. Supra 2.

[61] *Thlimmenos v. Greece*. Application No. 34369/97. ECtHR. 6 April 2000. par.40.

[62] *Konstantin Markin v. Russia*. par. 130.

8 of the Convention."[63] The Court concluded that Article 14, taken together with Article 8, is applicable and held that there has been a violation since parental leave exists for women but not for men.

From the Court's assessment it seems that if the applicant solely claimed that the state breaches servicemen's right to family life under the Article 8 by refusing to provide them time to devote to their newborns, his case would be rejected. Because the Court accepted that, restrictions on the parental leave allowances of the military personnel could be justifiable for the protection of national security. The present case felt outside the state's margin of appreciation of parental allowance because of the double standard which disadvantaged one gender but not the other. The Court explicitly points out that the applicant is a victim of the difference in treatment rather than the right to family life.

The autonomous character of Article 14 can be useful in environmental cases as well. The Court notes that the positive obligation embedded in the Article 8 is also relevant in environmental cases such as the failure of the state to regulate pollution caused by non-state entities. Such application can be seen in the above-mentioned case of *Jugheli and Others v. Georgia* where the state was held liable for the pollution caused by a power plant operated by private actors.[64]

On the other hand, in several environmental cases, The Court also points out that *"the State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life."*[65] Accordingly, it is not easy to convince the Court about the state's responsibility under the Article 8 on several environmental degradations which indirectly affect the collective wellbeing of certain communities. Moreover, the state's margin of appreciation plays a significant role. Therefore, in cases which lacks a strong link to prove the breach of Article 8, it could be plausible to use Article 14 if that particular case can be reinterpreted as an environmental discrimination issue. Moreover, we would be able to claim the state's obligation to protect environmentally vulnerable groups, as starting from *Opuz v. Turkey* case, the Court demonstrated positive obligations of the state under Article 14.[66]

The second reason to believe the plausibility of using Article 14 in environmental cases is that the ECtHR recognized the environmental vulnerability of Romani people through its case law. For example, *Moldovan v. Romania* case concerns the degrading circumstances in which the Romani people were forced to live after their houses were burned by a racists group. Although it is not directly an environmental law case, the Court recognizes *"the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being…"*[67]

The Court concluded the violation of Article 14 in conjunction with Article 8. This case is of significant importance because it involves a particular recognition of environmental injustice towards a community, Romani people. There are other collectivities in Europe who faces the

[63] Ibid.

[64] *Jugheli and Others v. Georgia.*

[65] *Ivan Atanasov v. Bulgaria.* Application No. 12853/03. ECtHR. 11 April 2011.

[66] *Opuz v. Turkey.* EDEL, F. *The Prohibition of Discrimination under the European Convention on Human Rights.* Council of Europe, 2010, pp. 79–80.

[67] *Moldovan v. Romania.* Applications Nos. 41138/98 and 64320/01. ECtHR. 30 November 2005. par. 110.

risk of environmental hazards and Article 14 can be useful to defend their interests. The next part will especially mention young generations, as they are a collectivity who are increasingly debated in terms of their interests in living in a healthy environment. By this way, the paper will develop why it is necessary to extend the use of Article 14 to environmental cases.

4.2. The Necessity to Extend: Implications for Young Generations

This paper has been emphasizing the necessity of taking the collectivistic dimension of environmental suffering into account based on the idea that individuals as a group hold stronger interests to challenge environmental problems. For example, one individual person with a traveler lifestyle would not have a strong interest to stop a city planning project. Yet, if that person is perceived as a member of a collectivity, e.g. Romani people, her case interests a large number of individuals. This being recognized by the Court as a discrimination issue would help her claim, as I have been developing in the previous part.

In this regard, looking at environmental cases from the perspective of discrimination law is important. Moreover, it is possible to reframe several environmental cases as discrimination issues. Consider the two cases that were exemplified in the second part about the individualistic approach of the ECtHR. *Oner Yildiz v. Turkey* case could be interpreted as a case which represents the evidence that socio-economically vulnerable people are differentially exposed to waste by residential segregation.[68] The other example, *Brincat and others v. Malta* case illustrates that a specific birth cohort, only workers who were active between the 1950s to 2000s, were adversely affected by the previous allowance for using asbestos. Hence, this indicates the injustice towards certain generations who are more disadvantaged than others in terms of being exposed to a particular chemical.

Disregarding the collectivistic dimension of an environmental problem makes is hard to defend the collective interest of environmentally vulnerable groups, including indigenous people, Romani people and, perhaps most significantly, young generations. In fact, there are regional human rights bodies to reveal that the human rights law can actually be useful to defend the collective interest of environmentally vulnerable groups. In this respect, the case law of the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights involve significant examples of minority communities. In one case against a logging activity, the Inter-American Court refers to the collective property rights of an Afro-descendant community to protect them.[69] In another case concerning a petroleum extraction, the African Commission defends indigenous people's collective right to a healthy environment.[70]

There is rich background legislation in Europe which adopts a collectivistic approach for defending a healthy environment for young generations, who are already existing or

[68] MARTUZZI, M. et al. Inequalities, Inequities, Environmental Justice in Waste Management and Health. *European Journal of Public Health*. 2010, Vol. 20, No. 1, pp. 6–21.

[69] *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, CC 88, 93-95, 99-103, November 28, 2007. In: *Inter-American Court of Human Rights* [online]. 28. 11. 2007 [2019-10-15]. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf>.

[70] *Soc. and Econ. Rights Action Centre v. Nigeria*. Case No. ACHPR/COMM/AO44/ 1,OAUDoc.CAB/LEG/67/3, 50-53. 2001.

soon to exist children and young people.[71] The ECtHR, as the regional human rights body of the region, should take this potential into account. To exemplify, Article 3 of the Treaty on European Union regulates that:

"(The union) shall work for high level of protection and improvement of the quality of the environment…" and *"It shall combat social exclusion and discrimination… solidarity between generations and protection of the rights of the child."*[72]

This article raises a collectivistic concern rather than individualistic by referring to solidarity between generations as collectivities. Edith Brown Weiss puts forward that "*intergenerational planetary rights may be regarded as group rights, as distinct from individual rights, in the sense that generations hold these rights as groups in relation to other generations.*"[73] These indicate the collectivistic dimension of the environmental rights of young generations. Their environmental interest can bring stronger responsibilities to governments if they are recognized as a part of such a large collectivity in the legal arena.

In the current Dutch Urgenda case against climate change, the Court of Appeal recognized the particular disadvantage of young generations by stating that *"…it is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the **younger individuals** in this group, will have to deal with the adverse effects of climate change **in their lifetime** if global emissions of greenhouse gases are not adequately reduced."*[74]

Here, younger individuals are not considered as a collectivity independent from its individual members. Rather, they are considered as a part of a collectivity, so their individual rights strengthen by the collectivistic dimension of being a member of a particular disadvantaged generation. Emphasizing such a collectivistic dimension is important, because younger individuals do not only have an individual interest in the environment but also a collective interest as a generation.

The current People's Climate Case before the CJEU directly framed the particular vulnerable status of young generations as an equality and non-discrimination issue. The plaintiffs argued that *"…principle of equal treatment should clearly be applicable in respect of equality between children and young people, and older people, and requires broader intergenerational justice."*[75]

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[71] ZWARTHOED, D. Political Representation of Future Generations. In: M. Düwell – G. Bos – N. Van Steenbergen (eds.). *Towards the Ethics of a Green Future*: *The Theory and Practice of Human Rights for Future People*. Routledge, 2018, p.79. Old age is also a disadvantage but considering that young generations are disadvantaged from the negligence of environmental problems during their lifetime, their case is more valued. See: KAYA, R. *Environmental Vulnerability, Age and the Promises of Anti Age Discrimination Law*. Supra 2.

[72] The Article 3 of European Union. *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

[73] WEISS, E. B. Our Rights and Obligations to Future Generations for the Environment. *American Journal of International Law*. 1990, Vol. 84, No. 1, pp. 198–207, p. 203.

[74] *The State of The Netherlands v. Urgenda Foundation*. par. 37. Bolds are mine.

[75] *Armonda Ferrao Carvalho and others v.The European Parliement, The Council*. par. 125. The case currently have been found inadmissible because of procedural concerns of the Court. See: GENERAL COURT OF THE EUROPEAN UNION. Order of the General Court (Second Chamber). In: *People's Climate Case* [online]. 8. 5. 2019 [2019-10-15]. Available at: <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2019/05/european-general-courts-order-_15.05.2019.pdf>.

In this regard, the collectivistic approach is particularly necessary for explaining in which respect young generations are disadvantaged, especially in climate change issues. The individualistic dimension of the problem should be recognized together with the collectivistic dimension as the collectivistic approach supports individual claims. This is a strategy of using individual human rights for defending the rights of a collectivity, and supporting individual claims through individuals' collective status. The current climate change litigation may need such an alternative approach.

Especially, if one desires to bring a climate change-related claim before the ECtHR, the use of Article 8 together with Article 14 can be helpful. Because it is legally more problematic to claim the violation of an individual right due to climate change when a young individual cannot explicitly prove that she will be a victim. Yet, young generations are already the victims of discrimination, since each careless environmental policy raises an injustice problem based on inequalities between generations. This is exactly why it would be helpful to use Article 14 in conjunction with Article 8.

CONCLUSION

In environmental cases, the ECtHR has been assessing only the interest of the individual applicant, this was referred as an individualistic approach. Yet, many environmental problems require the consideration of collective interests in order to strengthen the claims of individuals, this was referred as a collectivistic approach. Individualistic approach disadvantages the applicants in environmental cases. Because, an individual's environmental interest cannot compete with the state's economic interest in many situations, for example with regard to an environmentally destructive city planning project.

The paper developed that the ECtHR adopts a collectivistic approach in non-environmental cases where the principle of equality and non-discrimination is invoked. In such cases, the individual applicant's interest is considered together with her interest in being a member of a group. It has been argued that a similar approach should be adopted with regard to environmental cases. The use of the right to equality and non-discrimination can strengthen the environmental claims of vulnerable collectivities before the ECtHR, as the ECtHR currently has widened the scope of Article 14. This strategy has important implications for defending the environmental rights of young generations, who are disparately the victims of inattentive environmental policies.