EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Conference on Human Rights for the Planet

Should the European Court of Human Rights become Europe's environmental and climate change court?

Speech by Robert Spano
President of the European Court of Human Rights

Strasbourg, 5 October 2020

Dear fellow panellists,
Dear colleagues and guests,

The theme of our last panel is climate change and the protection of the environment. My fellow panellists, who I thank warmly for their thought-provoking interventions, have addressed the question whether protecting the planet and its inhabitants from climate change a matter of State policy or a question of human rights law.

Allow me to begin my own intervention by making the classic extra-judicial caveat of a serving judge and also the current President of the Court. As much as I would like to engage with all of the very salient and timely issues in this debate that have been raised today, I am restrained by the natural confines of my judicial role and the duty of impartiality which comes with it. So, please do not understand my silence on some of these very important issues as in any shape or form conveying a lack of interest or, indeed, understanding of the immense and grave challenges raised by climate change.

The caveat expressed above does not however preclude me from, firstly, elaborating, albeit briefly and in a general manner, on the current position of the Court in relation to environmental disputes and then, in my second part, reflect on some arguments for and against a positive answer to the question posed, admittedly broadly and quite provocatively, whether the European Court of Human Rights should become, and I quote, "Europe's environmental and climate change court".

I. An environmental court for Europe?

So, to my first part, the current position of the Court. It is important to appreciate that the European Court is already to some extent an international environmental court in the field of human rights. To be clear, no direct and specific right to a healthy environment, environmental protection or nature conservation exists as such in the Convention nor was any contemplated at a time when environmental issues were not yet considered topical or a priority. The European Convention differs in this respective from some of the other regional human rights instruments Of course, the Convention's focus is on protecting the rights of individual persons. It is true that it is in this sense anthropocentric. In other words, it does not in terms protect biodiversity (including endangered species and irreplaceable habitats), protected landscapes or built heritage.

However, two elements, in particular, have permitted the Court to develop its current environmental case-law in a manner which to some extent has already accepted that the human rights of the individual person, as protected by the substantive provisions of the Convention, cannot be completely divorced from his ecological surroundings. These two elements are the living instrument doctrine and developments in international law as analysed through the principle of harmonious interpretation.
Allow me to briefly explain further these two elements, because when coming to the question of what, if any, may be the role of the Court in this area in the future, both of these elements will, I venture to argue, play a crucial role.

So firstly, the **living instrument doctrine and its emphasis on present day conditions**. No-one would deny that environmental concerns have become more important nationally and internationally since 1950. As the Court stated in a judgment against Sweden already in 1991: "*In today's society the protection of the environment is an increasingly important consideration*".[1] Indeed, since the 1990s the Court has interpreted the rights enshrined in the Convention so as to take into account environmental issues. As I stated just a moment ago, it is now been accepted that human rights and the environment are interrelated.

The Court has thus developed quite a rich case-law on environmental issues under certain articles of the Convention, most importantly, the right to life; the right to private and family life; access to court; the right to property and freedom of information, which I am not going to rehearse here as you have already been presented with an overview in the first panel this morning.

However, I would like to mention one recent judgment as a further important example. In *Cordella and Others v. Italy*, from January 2019, 180 applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto. In considering whether Article 8 was applicable, in relation to the rights to a home and private life, the Court made clear that when environmental risks reach a certain level of gravity significantly limiting an applicant's ability to enjoy these rights, then an arguable claim could be made under this provision. This reasoning is important for present purposes, as I will revert to in a moment. The Court then went on to find a violation of Articles 8 and 13 of the Convention. Under Article 46 the Court stressed that the work to clean up the factory and the region affected by the environmental pollution was essential and urgent. Thus, the environmental plan approved by the national authorities, which indicated the necessary measures and actions to provide environmental and health protection to the population, ought to be implemented as rapidly as possible.

Secondly, as I mentioned a moment ago, **developments at the international level** have enabled the Court to strengthen its reasoning in protecting individuals affected by environmental issues. The

[1] *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192

Court has relied on a selection of international instruments in its judgments over the years.[2]
As the Court has stated on many occasions, the Convention cannot be construed in a vacuum and must thus be interpreted in harmony with other rules of international law, of which it forms part. It is worth noting, however, that many of these references are somewhat dated and that the Court has not, as yet, mentioned more recent climate change texts such as the United Nations Framework Convention on Climate Change nor the Paris Agreement. On this issue, I note the argument presented this morning by Professor Christina Voigt pleading for the Court to interpret the States positive obligations under Articles 2 and 8 consistently with provisions of the Paris Agreement.

As we have seen, the Court has already developed an environmental human rights jurisprudence. This is an important starting-point when I now turn to my second part and reflect on some of the arguments for and against a positive answer to the question posed whether courts, and in particular the European Court of Human Rights, should become "Europe's environmental and climate change court".

II. Arguments for and Against Active Judicial Engagement with Climate Change Litigation

Climate-induced dangers such as heat-waves, the rise in sea-levels, desertification and wildfires pose a risk to human rights according to five UN Human Rights Treaty bodies who issued a joint statement on human rights and climate change in September 2019.[3] They welcomed the fact that national judiciary and human rights institutions are increasingly engaged in ensuring that States comply with their duties under existing human rights instruments to combat climate change.

The global trend of climate change litigation has seen actions brought against State actors and private companies, both at the national and international level and seems to be growing in momentum. In the so-called *Urgenda* case, which has been cited repeatedly today, the Dutch Supreme Court, upholding the judgment of the national Court of Appeal and relying on the Convention, ordered the Dutch government to reduce greenhouse gas emissions by 25% by the end of 2020 in line with its human rights obligations.

In July this year, the Supreme Court of Ireland in the 'Climate Case Ireland' quashed the government's National Mitigation Plan and ordered the Irish government to take more aggressive action on climate change**.**

Other examples of climate change actions include the complaint launched by 16 young people, including Greta Thunberg, before the United Nations Committee on the Rights of the Child in September 2019 and the very recently lodged complaint before the Strasbourg Court by 6 children and young adults against 33 Member States which is now pending.

So what are broadly the arguments for and against the Court's engagement with climate change issues.

Firstly, it is argued that climate change is damaging our full enjoyment of human rights and that States have legally binding obligations, based on human rights law, to take preventive and precautionary measures. In this regard, it is claimed that classical civil and political rights, such as some of the ones found in the European Convention, as well as some economic, social and cultural rights are already amenable to being interpreted so as to grant effective protections in climate change related disputes through the use of evolutionary or living instrument type approaches.

[2] The Rio Declaration on Environment and Development (1992), the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (1993), the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (1998), the Convention on the Protection of the Environment through Criminal Law (1998), as well as various EC directives.
[3] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E

Secondly, emphasis has been placed on States not being on track to meet their global or regional targets and the political challenges faced with securing lasting policy solutions, for example in reducing greenhouse gas emissions and that climate change denial is growing.

Thirdly, given what is at stake if we do not act, or if we hesitate for too long, some claim that every avenue for achieving change must be explored. They say that the urgency of the situation requires the courts to step in.

On the other hand, arguments have been addressed against an active role of courts as well as the European Court in this area.

Firstly, it has been argued that the principle of the separation of powers requires that it is up to elected politicians and administrators to decide on environmental policy and budgetary details, and not the courts.

Secondly, some argue that in a healthy democracy, the judicial branch should work in partnership with the other branches, rather than seek to impose the last word; that judges do not have the technical knowledge, resources nor expertise to adjudicate climate change cases and that in any event States should have a wide margin of appreciation in this area;
also it is emphasised that implementing court judgments requires political will and non-enforcement of court judgments would risk undermining the Convention system.

Finally, more provocatively, it is argued by some that judicial activism should not spill over into judicial adventurism because this could be damaging to the trust which citizens place in the court system.

All of these arguments for and against active engagement by courts in this issue require sustained reflection and debate. I would only say this: To the extent that climate change implicates already existing norms of a binding nature in the field of human rights, amenable to judicial enforcement, it is the province and duty of judges to interpret and apply such norms. Courts are regularly faced with new phenomena. The novelty of the issue and or its complex characteristics cannot therefore, as such, be dispositive in this regard.

When we consider potential climate change litigation before the Court, there are a number of further, more technical, elements which may fall for discussion. I raise one, without prejudice to any particular case.

As has already been demonstrated today the European Court of Human Rights has consistently held that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Therefore, to succeed before the Court applicants must show that they have been directly affected by the alleged violation.

Therefore, since there is no right to nature preservation as such under the Convention, in order to fall within the scope of private and family life, complaints relating to environmental issues have to show that there was an actual interference with the applicant's private sphere, and that a level of severity was attained.[4] Therefore, by its very nature, and due to requirements of causality and harm, the adjudication of climate change disputes poses some challenges for the traditional way these legal doctrines have been construed in practice.

[4] *Fadeyeva v. Russia*, no. 55723/00, § 70, ECHR 2005-IV

Here again, before concluding, allow me to recall that it is not the first time that the Court has been faced with challenges of this nature.
Moreover, the already established case-law in environmental cases before the Court demonstrates a certain conceptual trajectory, the logical extension of which remains to be determined by the Court using its traditional methodological approaches. The outcome of the Court's deliberations in this field will come soon, I am sure. In this regard it bears reiterating that the Council of Europe is at this very moment reflecting on what role it should play to give a new impulse to protecting the environment. The path taken will be very important for the way in which the law will eventually develop.

III. Conclusion

Dear Guests,
Allow me then to conclude.

As I stated in my opening remarks this morning, we are present in a transformative moment in human history, a moment of planetary impact and importance. No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the European Court of Human Rights will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory.

Thank you for your attention.