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Commentary on Strasbourg Principle no. 9 : right to a healthy environment

The Constitution of the Portuguese Republic was a pioneer in recognizing the constitutional value of nature. In 1976, it became the first to establish a fundamental right to a healthy environment (“R2HE”) (Art. 66-1), specifying that this right encompasses a (i) human, (ii) healthy, and (iii) ecologically balanced living environment. Under this right, the Constitution also establishes a general duty to protect the environment and sets out specific obligations, including the prevention of pollution, the conservation of nature, and the safeguarding of ecological stability for the benefit of future generations (Art. 66-2). Additionally, the Constitution guarantees a fundamental right to *actio popularis* for environmental protection (Art. 52-3). It can thus be concluded that the R2HE enjoys comprehensive legal protection under the Portuguese Constitution – both substantively and procedurally – and reflects multiple dimensions, both ecocentric and anthropocentric.

The Portuguese Constitutional Court (“CC”) has adjudicated over 100 cases referring to the R2HE, and relevant conclusions can be drawn from some of these decisions regarding the scope of this fundamental right. While most cases involve balancing public interests and fundamental rights, it becomes apparent that it is under the R2HE that restrictions on fundamental rights are often justified for the protection of shorelines and protected areas, prevention of wildfires and excessive noise, and water sustainable use. The CC has maintained that the Constitution has conferred dual protection in favor of a healthy living environment, including duties to protect nature.

A case concerning the protection of the Iberian wolf allowed the CC to adopt a notable Ruling no. 83/2022, recapitulating and making explicit what had already been established through consistent prior case law.

The constitutionality review was requested by the Attorney General of the Portuguese Republic. It concerned norms on compensation for damages caused by the Iberian wolf as enshrined in Decree-Law no. 54/2016, of 25 August.

One of the main questions of constitutionality raised by the Attorney General concerned the fact that, under this Decree-Law –specifically intended for producers who lost their animals as a result an Iberian wolf attack – State compensation was only granted if

those producers met a set of legal requirements. However, even when these requirements were met, the Decree-Law did not cover all direct and consequential damages resulting from losses caused by the Iberian wolf. Moreover, part of the financial support that producers had already received from the State could still be deducted from the compensation to be awarded. According to the Attorney General, this legal framework was in breach of a number of constitutional principles, such as proportionality – by imposing an excessive burden on producers – and equality – by applying this burden exclusively to them.

The CC, through a close dialogue with international and European Union legal acts and case law, reaffirmed (and reinforced) a set of obligations that the Portuguese State has under the R2HE. In particular, the CC has set out a duty to promote a balanced, harmonious and, above all, sustainable relationship between human species and the environment which is endangered by the decline in biodiversity. This duty is a consequence of the constitutionally protected R2HE. The CC has also found that there is a constitutional need to guarantee nature conservation.

The CC concluded from the above that, by fulfilling the constitutional guarantee in question and thus prohibiting the killing of Iberian wolves, the State did not cause the damage to producers where they lost their animals as a result of an attack by Iberian wolves. In light of this, and although it acknowledged that the damage was 'particular', since it affected a specific group – the producers – the CC concluded that the constitutional principles invoked by the Attorney General were not violated. This conclusion stemmed from the fact that the damage could not be considered 'abnormal': it was a normal risk of loss inherent in any activity carried out in close proximity to the natural environment. Consequently, the State was not required to compensate all damage suffered by producers due to the attacks, but only for the part provided for in the Decree-Law. Therefore, since the producers did not suffer excessive burden, the CC decided not to declare unconstitutional the norms on compensation for damage caused by the Iberian wolf.

By contrast, the CC has consistently refused to include the protection of domestic animals within the scope of the right to a healthy environment. This reveals a clear distinction between, on the one hand, species protection understood as a fundamental component of nature conservation, and, on the other hand, protection against suffering caused by animal abuse, which, while ethically crucial, is a distinct issue that does not pertain to ecological balance.

We can therefore conclude that the Portuguese Constitution, as consistently interpreted and applied by the CC, acknowledges the intrinsic value of nature beyond its instrumental benefit to humans, enshrining both anthropocentric and ecocentric dimensions. Particularly, it explicitly results from the *Iberian wolf* case that wildlife, endangered species and ecosystem balance are legally protected under the R2HE, even in the absence of a direct impact over human well-being.

Acknowledgement: The database with the complete analysis of the case law of the Portuguese Constitutional Court is an open science research output of the Lisbon Environmental Law cluster at the Lisbon Public Law Research Centre, funded by FCT – Fundação para a Ciência e a Tecnologia, I.P. through national funds under UIDB/04310/2020.