



**Declassified<sup>1</sup>**

AS/Soc (2020) 43rev

1 December 2020

Asocdoc43rev\_2020

## **Committee on Social Affairs, Health and Sustainable Development**

# **Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe**

Rapporteur: Mr Simon Moutquin, Belgium, SOC

### **Revised introductory memorandum**

#### **1. Introduction**

1. In May 2020, the Committee on Social Affairs, Health and Sustainable Development tabled a motion for a resolution on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe.”<sup>2</sup> Whilst environmental degradation escalates, the scientific evidence is mounting of its detrimental effects on the health of Europeans, but the explicit recognition of the right to a healthy environment is lacking as a basis for more resolute action at both European and national levels. To address this concern, the motion stresses the importance of building the case for more ambitious action by the Council of Europe in this field. The motion was subsequently referred to our Committee for report, and I was appointed rapporteur on 6 July 2020 (including as regards another motion for a resolution on “Artificial intelligence and climate change”<sup>3</sup> which will be taken into account in this context, but which will no longer figure in the title).

2. In response to the threats to climate and biodiversity, the Georgian Presidency of the Committee of Ministers of the Council of Europe (27 November 2019 - 15 May 2020) made human rights and environmental protection its overriding priority. This objective has stayed prominent during the current Presidency of Greece and is expected to remain so with the following one of Germany. The President of the Parliamentary Assembly, Mr Rik Daems, has made this a priority of the Assembly since his election. The strong political will in the field thus offers unique momentum for launching preparatory work on a legally binding instrument to protect the human right to a healthy environment. This European initiative could pave the way to building a global consensus on the need for enhanced international co-operation on the protection of the environment and “green” human rights. Europe should keep its leadership in championing fundamental rights with a “green perspective”.

3. In February 2020, the Georgian Presidency organised a high-level conference in Strasbourg on the protection of the environment from a human rights perspective.<sup>4</sup> The conference examined the potential of the Council of Europe to work in the human rights field to tackle the environmental emergency and identify ways of helping European governments to address the challenge. The introductory report of the conference<sup>5</sup> called for the Council of Europe to act as a leader in the field of fundamental rights protection. Failing to do so, piecemeal initiatives would eventually be taken at national level, and the legitimacy of the Council of Europe would be seriously affected as a result.<sup>6</sup> The European vision of contemporary human rights protection should become a benchmark for ecological human rights in the 21<sup>st</sup> century. In this context, we are greatly encouraged by a landmark ruling of the Dutch Supreme Court that upheld an earlier ruling in the Urgenda Climate Case against the country’s government asking it to do much more to cut greenhouse gas emissions. The Supreme Court

<sup>1</sup> Introductory memorandum declassified by the Committee on Social Affairs, Health and Sustainable Development at its meeting held by videoconference on 1 December 2020.

<sup>2</sup> [See Doc. 15108.](#)

<sup>3</sup> [See Doc. 15068.](#)

<sup>4</sup> [High-level Conference on Environmental Protection and Human Rights](#), held on 27 February 2020 in Strasbourg (France).

<sup>5</sup> [Elizabeth Lambert: Introductory Report to the High-Level Conference on Environment Protection and Human Rights](#)

<sup>6</sup> [Elizabeth Lambert: Introductory Report to the High-Level Conference on Environment Protection and Human Rights](#),

p. 30

notably referred to individual nations' direct obligations under articles 2 and 8 of the European Convention on Human Rights (covering the right to life and the right to private and family life).<sup>7</sup>

4. During the past decades, the Assembly has issued numerous recommendations on matters related to the right to a healthy environment. It notably stressed that every person has the fundamental right to an environment and living conditions conducive to their good health, well-being and full development of the human personality. It stated, already in 2003, that in view of developments in the international law on both the environment and human rights, as well as in European case law (especially that of the European Court of Human Rights), the time had come to consider legal ways in which the human rights protection system could contribute to the protection of the environment.<sup>8</sup>

5. In 2009, the Assembly recommended that the Committee of Ministers draw up an additional protocol to the European Convention on Human Rights, explicitly recognising "the right to a healthy and viable environment"<sup>9</sup>, based on similar initiatives that had already occurred in the past. In the Recommendation, the Assembly reaffirmed its commitment to issues regarding the environment and considered "it not only a fundamental right of citizens to live in a healthy environment but [also] a duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations".

6. However, despite the political and legal initiatives taken both nationally and internationally, environmental protection is still very inadequately guaranteed to this day. The most commonly adduced counterargument at the time was the uncertainty as to the actual existence of a right conferred on individuals, or, at the very least, a right that was not adequately defined. That does not make environmental threats to the full enjoyment of human rights any less severe; rather, it is a matter of defining the terms in question and carefully preparing a legal instrument granting the rights.

7. The "healthy" environment can be described as a "good-quality" one. The right to a "good-quality" environment is to be understood as embracing, amongst other things, the right to live in a pollution-free environment which addresses directly the alarming fact that poor air quality leads to over half a million deaths in Europe every year<sup>10</sup>. In the light of this, the right to clean air could be seen just as legitimate as the right to clean water, since both are essential to life, health, dignity and well-being.<sup>11</sup> In her study, professor E. Lambert insists on the need to recognise an individualised right, both personal and collective, to a "decent" or "ecologically viable" environment – a broader concept than that of the right to a "healthy environment" and one that embraces an eco-centric view and an intergenerational approach. According to her, the term "right to a healthy environment" is restrictive and covers only environmental damage affecting human health or well-being. The right to a "decent" environment, however, as recognised also by the Committee of Ministers in 2004<sup>12</sup>, means understanding the link between fundamental rights, our environment and sustainable development, and it also covers protection of the natural environment in line with today's ecological outlook.

8. The extent to which environmental human rights are recognised has a whole range of practical consequences. Whether it is a "good-quality" one, "viable" or "healthy", at least, the explicit inclusion of this right has had the positive effect of strengthening the legislative and judicial arsenal at national level in the about half the countries of the world that at present recognise the right to a healthy environment.

## 2. Evolving understanding of human rights

9. The European Convention on Human Rights (ECHR) was drafted in 1950 and entered into force in 1953. It was created after the Second World War, as the world united to agree on minimum standards of dignity to be afforded to all human beings, and thus granted protection of individual civil liberties against violations by the State. The Convention sets out in detail civil and political rights, such as the prohibition of torture, or the right to a fair trial. In the most established way of classifying human rights, these rights based mostly on political concerns are categorised as first-generation human rights. Economic, social and cultural rights were frequently mislabelled as "benefits", meaning individuals had no basic claims to essentials like food and shelter. During the Cold War, however, the European and global (through the UN Covenants) human rights standards

---

<sup>7</sup> See <https://www.urgenda.nl/en/themas/climate-case/> and the article on "[Dutch supreme court upholds landmark ruling demanding climate action](#)", 20 December 2019, *The Guardian*.

<sup>8</sup> [Recommendation 1614 \(2003\) – Environment and human rights](#)

<sup>9</sup> [Recommendation 1885 \(2009\) – Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment](#)

<sup>10</sup> See also Resolution 2286 (2019) on Air pollution: a challenge for public health in Europe.

<sup>11</sup> [Elizabeth Lambert: Introductory Report to the High-Level Conference on Environment Protection and Human Rights](#), p. 17

<sup>12</sup> Environment and human rights, reply to Parliamentary Assembly Recommendation 1614 (2003) CM/AS(2004)Rec1614-final, 23 January 2004.

developed in accordance with the spirit of their time. Socio-economic rights became increasingly a subject of international recognition. New demands and ideas about the meaning of a life of dignity evolved, as people realised that human dignity required more than the minimal lack of interference from the State (as guaranteed by civil and political rights). The European Social Charter (“the Charter”) of the Council of Europe was opened for signature in 1961 and took effect in 1965. It was established to support the ECHR and to broaden the scope of protected fundamental rights to include social and economic rights, the so-called second-generation human rights.

10. The state of the world when the ECHR was drafted was very different from what it is now. Conditions such as extreme poverty, war, ecological and natural disasters have meant that there has been only very limited progress in respect of human rights in many parts of the world. The idea at the basis of the third generation of human rights is that of solidarity, and the rights embrace also collective rights of society or peoples. The right to a healthy environment is one of them and is for the benefit of present and future generations. Besides the intergenerational aspects of such rights, currently living generations already face serious environmental and social crises at this very moment, making the threats the environmental issues are causing to the enjoyment of human rights very real. According to WHO (the World Health Organization), 24% of all global deaths are linked to the environment, which means roughly 13.7 million deaths a year.<sup>13</sup> For that reason, the recognition of this new generation of human rights is necessary – since without ensuring the appropriate conditions for societies, different types of obstacles will continue to stand in the way of realising the already recognised first- and second-generation human rights.

11. A pivotal aspect for the legal recognition of the interaction between human rights and the environment is in the 1972 Stockholm Declaration and Conference on the Human Environment, as well as 1992 Rio Declaration on Environment and Development<sup>14</sup>. Although there is a clearly acknowledged link between human dignity and the protection of the environment, neither the ECHR nor the Charter are designed to provide a general protection of the environment as such, and they do not expressly guarantee a right to a healthy environment. The ECHR and the Charter indirectly offer a certain degree of protection with regard to environmental matters through the case-law developed by the European Court of Human Rights, and the recognition of the right to health in the Charter.<sup>15</sup> However, as the ECHR does not make any specific reference to the protection of the environment, the Court cannot deal effectively with several so-called new generation human rights, including the right to a healthy environment. The Court should have a clearer basis on which to work when ruling on the basis of connecting human rights to environmental issues. Nowadays the right to a healthy environment is recognised in both international and regional conventions, and over 100 countries worldwide now have a constitutional right to a healthy environment, including many Council of Europe member states. The incorporation of the right to a healthy environment in their laws and constitutions expresses these countries’ desire to give greater legal recognition to environmental rights.

### 3. Towards a new legal instrument?

12. If it was undisputable already in 2009 that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living, such a claim is even more valid at present. Climate change is having a profound effect on the enjoyment of human rights by individuals and communities across the planet. Because neither the European Social Charter nor the ECHR explicitly recognise the right to a healthy environment, this makes the European human rights instruments less satisfactory than all the other regional instruments.<sup>16</sup> An explicit recognition of a right to a healthy environment would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court. It would make it easier for victims to lodge applications for remedies. It would also act as a preventive mechanism (whereas the case law is rather reactive). Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right.

<sup>13</sup> [WHO \(2018\): Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks.](#)

<sup>14</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972 and Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992 – see <https://legal.un.org/avl/ha/dunche/dunche.html>.

<sup>15</sup> [Council of Europe \(2012\): Manual on Human Rights and the Environment.](#) The Council’s major legal instruments and the Court’s jurisprudence indirectly recognize the obligation and responsibility of member States to defend the right to life against environmental harms. The Court has indicated it has had to develop its case-law where environmental issues undermine the exercise of rights in the Convention such as right to life (Article 2), prohibition of inhuman or degrading treatment (Article 3), right to liberty and security (Article 5), right to a fair trial (Article 6), right to respect for private and family life and home (Article 8), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to an effective remedy (Article 13) and protection of property (Protocol No. 1).

<sup>16</sup> [Elizabeth Lambert: Introductory Report to the High-Level Conference on Environment Protection and Human Rights.](#)

13. Currently, environmental harms by large, multinational corporations have become major issues of concern and have broad negative implications. These corporations may, due to their huge monetary assets, even defeat the monetary capacities of some countries. There is a need to prepare a mandatory instrument binding on states and businesses with a European compliance or monitoring mechanism and legally enforceable rights for individuals. Many governments and corporations are now providing strategies for environmental protection and economic growth in joint attempts. Public-private partnerships for sustainable development that have been in operation for several decades from the local to the international level are gaining importance with the implementation of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. However, to make the right to a healthy environment effective, the rules of the game should not be set by free markets, corporations' self-regulation, soft recommendations or general guidelines. Such rights should be granted to be binding and justiciable.

14. Drafting an **Additional Protocol** to the ECHR is the strongest option for building the case for more ambitious action by the Council of Europe in the field of environmental human rights. Embracing this option would be in line with the Assembly's earlier recommendations, as well as recent proposals by the Commissioner for Human Rights and the current President of the Assembly. The additional protocol could build on the principles of what is seen as a "healthy", "good-quality" and/or "viable" environment, with a view to protecting human rights and dignity in the field of different threats environmental challenges are causing. An additional protocol would complete the terms on the right to a healthy environment and draw inspiration, for instance, from the Framework Principles on Human Rights and environment.<sup>17</sup> It would make the right to a healthy environment binding on States and justiciable, including for individuals.

15. Given the complex and interconnected nature of the threats to human rights caused by environmental harm, the legal instrument addressing these issues should have a holistic approach. This would also make a so-called "**4P**" **convention** a valid option for consideration. By **preventing, protecting and prosecuting** violations of the right to a healthy environment, the contracting states would adopt and implement state-wide "integrated policies" that are effective and offer a comprehensive response to the environmental threats.<sup>18</sup> With a holistic approach, the 4P convention could look not only at a healthy environment but also at other issues that are beyond the control of an individual; it essentially comes down to the right to life and human dignity. These issues could include, for instance, threats stemming from artificial intelligence, genetic manipulation and nano technology.

16. At the same time, it might also be necessary to revise the existing Convention on the Protection of Environment through Criminal Law aiming to improve the protection of the environment at European level by using the solution of last resort - criminal law. This Convention of 1998 includes adequate elements such as liability of legal persons, the standard of "likely to cause damage" (differing from the simpler "causing damage") and a tool to involve citizens and NGOs in environmental trials. However, it lacks many other vital elements and to this day, has only been ratified by a single member State, Estonia. Among the most essential elements that environmental criminal law should cover are an explicit definition of a transnational environmental crime and clear definitions of the basic environmental concepts, effective and proportionate sanctioning and addressing transboundary matters such as defining when and how an offence is considered to have been committed in a State's territory. Additionally, the liability of legal persons should be broadened, and sanctions stretched to apply to companies, to make corporate environmental responsibility more effective. A criminal law convention could complete the Council of Europe's legal framework aimed at protecting both human rights and the environment within a holistic approach. The Committee on Legal Affairs and Human Rights has been tasked with drawing up a report on this issue<sup>19</sup>.

#### **4. Aim and scope of the report**

17. This report will examine the different options for adopting a Council of Europe legal instrument granting the right to a healthy environment. The urgency of the problem cannot be overstated anymore: Various types of environmental degradation are resulting in violations of substantive, first generation human rights, such as the right to life, to private and family life, the prohibition of inhuman and degrading treatment, and the peaceful enjoyment of the home, as clearly established by the European Convention of Human Rights, and the violation of the second generation right to health, as enshrined in the European Social Charter. The Council of Europe as the European continent's leading human rights and rule of law organisation should stay proactive in the evolution of human rights and adapt its legal framework accordingly. A legally binding and enforceable

---

<sup>17</sup> [United Nations Framework Principles on Human Rights and environment](#), 2018.

<sup>18</sup> '4P convention' described as a global tool by [the Council of Europe in the case of the Convention on preventing and combating violence against women and domestic violence \(Istanbul convention\)](#).

<sup>19</sup> "Addressing issues of criminal and civil liability in the context of climate change", reference No. 4530 (decision of the Bureau, ratified by the Standing Committee on 15 September 2020).

instrument, such as an additional protocol to the ECHR, would finally give the Court a fundamental base for rulings concerning these issues.

18. Moreover, considering proposals contained in the motion for a resolution on “Artificial intelligence and climate change”<sup>20</sup>, this report should also address the threat that climate change will become the biggest challenge facing the planet and humanity, with new technologies such as artificial intelligence representing both a significant part of the aggravation of the problem and a possible solution. The Assembly could explore these questions and contribute proposals for solutions arising from the national and European context if deciding to propose the preparation of a 4P convention.

## 5. Work programme envisaged

<b>Date</b>	<b>Action</b>
<i>9 October 2020, Committee meeting</i>	Consideration of an introductory memorandum
<i>1 December 2020, Committee meeting</i>	Hearing with experts
<i>January 2021, Committee meeting</i>	Consideration of a preliminary draft report
<i>March 2021, Committee meeting</i>	Consideration of a draft report and adoption of a draft recommendation

The deadline for the adoption of this report is 26 December 2022. A joint debate on environmental matters is provisionally foreseen during the April 2021 part-session.

<sup>20</sup> [Motion for a resolution, Doc. 15068.](#)