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Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment

Report[1]
Committee on the Environment, Agriculture and Local and Regional Affairs
Rapporteur: Mr José MENDES BOTA, Portugal, Group of the European People's Party

Summary

The Parliamentary Assembly notes the close relationship that exists between human rights and quality of the environment and observes that enjoyment of these rights is often jeopardised by degradation of the environment.

This interconnection between the environment and human rights clearly highlights their interdependence and indivisibility and so requires us to recognise that people have a right to a healthy environment.

The Assembly points out that the right to a healthy environment has already been recognised to a greater or lesser extent in numerous national constitutions and regional charters and that the European Court of Human Rights has itself indirectly upheld the right to a healthy environment through its case-law.

The Assembly also emphasises the need for society as a whole and each individual in particular to pass on a healthy and viable environment to future generations, according to the principle of solidarity between generations.

Accordingly, the Assembly invites the Committee of Ministers to draft an additional protocol to the European Convention on Human Rights recognising the right to a healthy and viable environment.

1. Reference to committee: Doc. 11729, Reference No. 3497 of 28 November 2008.

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A. Draft recommendation

1. The Parliamentary Assembly reaffirms its commitment to issues regarding the environment, and considers it not only a fundamental right of citizens, but also a duty, to live in a healthy environment. It further points out that some environmental assets are unfortunately non-renewable and that environmental degradation is often irreversible.

2. The Assembly notes and regrets, however, that in spite of the political and legal initiatives taken both nationally and internationally, environmental protection is still very inadequately guaranteed.

3. In this context, the Assembly recalls the Council of Europe's commitment to environmental protection, which in particular has produced the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention, ETS No. 194), the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150) and the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172).

4. The Assembly also recalls its Recommendation 1614 (2003) on environment and human rights and its Recommendation 1431 (1999) on future action to be taken by the Council of Europe in the field of environment protection, which already proposed adding an environmental component to the European Convention on Human Rights.

5. The Assembly also wishes to refer to Principle 1 of the 1972 Stockholm Declaration which stipulated that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", and to the various constitutional texts in Council of Europe member states which embody provisions on environmental protection.

6. The Assembly lastly refers to the case-law in the environmental field developed by the European Court of Human Rights, which has on some occasions afforded protection for the right to a healthy environment through a "knock-on effect" by upholding the individual rights in Articles 2 and 8 of the European Convention on Human Rights, which demonstrates that to include this right in the Convention would simply be to set down a material right which already exists.

7. The Assembly recalls that setting down this right is consistent both with the concern to adapt to the development of society and with the logical extension of the role performed by the Council of Europe in the field of environmental protection.

8. The Assembly is also anxious about the escalating environmental degradation whose effects reach far beyond national boundaries and underline the need for states to display co-operation and share responsibility in the event of damage to the environment.

9. Bearing in mind that society as a whole and each individual in particular must pass on a healthy and viable environment to future generations, in accordance with the principle of solidarity between generations, the Assembly invites the governments of member states to:

9.1. provide adequate protection for the life, health, bodily integrity and property of the individual as guaranteed by Articles 2, 3 and 8 of the European Convention on Human Rights;

9.2. establish information systems concerning the environment and, wherever possible, foster public participation in decision-making processes;

9.3. co-operate and share responsibility in the event of damage to the environment;

10. The Assembly recommends to the Committee of Ministers to:

10.1. draw up an additional protocol to the European Convention on Human Rights, recognising the right to a healthy and viable environment;

10.2. include Assembly representatives in the group of experts that would deal with the matter.

B. Explanatory memorandum by Mr José Mendes Bota, Rapporteur

1. Introduction

1. The close relationship between fundamental human rights and the quality of the environment is now well established, as the enjoyment of some of these rights may be jeopardised by degradation of the environment. Environmental protection is a necessary requirement for the realisation of these rights. This is true, in particular, of the right to life, the right to health, property rights and the right to respect for private and family life. The potential links between environmental protection and other human rights such as the right to information and the right of access to justice should also be underlined.

2. This interconnection between the environment and human rights clearly highlights their interdependence and indivisibility. The recognition of a real individual right to an environment of a reasonable standard is both the obvious consequence of this relationship and also involves confirmation of the emergence of a new generation of rights. Mr Lluís Maria de Puig, President of the Parliamentary Assembly, recently described "protecting the environment" as "a fundamental right" and said that "the right to live in a healthy environment, is not just a matter of applying principles [but] concerns the protection of a fundamental right for the citizens of our continent."

2. The gradual recognition of the right to a healthy environment

2.1. At global level

3. It was the Stockholm Declaration, adopted by the United Nations Conference on the Human Environment in 1972, which first explicitly recognised the link between environmental protection and human rights. Principle 1 of the declaration provides that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being (…)", while the preamble states that environmental protection is "essential to […] well-being and to the enjoyment of basic human rights – even the right to life itself." In addition to the link established between the quality of the environment and "conventional" human rights, the declaration can be seen to involve indirect recognition of the right to a healthy environment. Since its adoption, the idea has been taken up with varying degrees of explicitness in a number of texts and declarations, although the new right has not been granted binding legal force at United Nations level, however.

2.2. At national level

4. Many national constitutions cover environmental protection and establish it as a constitutional objective, an individual right, or both. For example, outside Europe, the countries concerned include South Africa, Brazil, Peru, Ecuador, South Korea and the Philippines. Among Council of Europe member countries, the constitutions of Belgium, Hungary, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey acknowledge a fundamental individual right to environmental protection, while those of Austria, Finland, France, Germany, Greece, the Netherlands, Sweden and Switzerland enshrine environmental protection as a constitutional objective.

2.3. At regional level

5. Two regional human rights protection instruments which set out a right to an environment of a reasonable standard: the African Charter on Human and Peoples' Rights, Article 24 of which provides that "All peoples shall have the right to a general satisfactory environment favourable to their development", and the Additional Protocol to the American Convention on Human Rights (San Salvador Protocol), Article 11 of which establishes the "right to a healthy environment".

6. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed in Aarhus on 25 June 1998, to which many Council of Europe member countries and the European Community are parties, should also be mentioned, in particular Article 1, which reads as follows: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

3. Clear need for an additional protocol to the European Convention on Human Rights on the right to a healthy environment

3.1. Lack of recognition of a right to a healthy environment in the European Convention on Human Rights

7. In its current form, the Convention does not set out the right to a healthy environment. The Council of Europe has, however, already considered the issue and attention should be drawn here to P. Staes' motion for a recommendation of 12 April 1999 on "Recognition of the right to a healthy and viable environment in the European Convention on Human Rights" (Doc. 8369), L. Rise's report (Doc. 8560), Recommendation 1431 (4 November 1999) and the reply by the Committee of Ministers (Doc. 8892) on "Future action to be taken by the Council of Europe in the field of environment protection" and C. Agudo's extremely detailed report on "Environment and human rights" of 16 April 2003 (Doc. 9791), the opinion of the Committee on Legal Affairs and Human Rights on the report (Doc. 9833), Recommendation 1614 (27 June 2003) and the reply by the Committee of Ministers of 24 January 2004 (Doc. 10041).

3.2. Indirect and incomplete environmental protection through the case-law of the European Court of Human Rights

8. Although the European Convention on Human Rights does not include any provisions on the environment, the Court has upheld the right to a healthy environment in an indirect manner. In its *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, it acknowledged the potential link between certain forms of environmental pollution and the human rights enshrined in the Convention, in particular with regard to the right to respect for people's homes (Article 8). It has confirmed this position in several subsequent rulings. One could mention the judgments in *López Ostra v. Spain* of 9 December 1994, *Guerra and others v. Italy* of 19 February 1998 (which put forward the theory of "positive obligations" of states), *Hatton and others v. the United Kingdom* of 8 July 2003 (in which the Grand Chamber employed the term "*environmental* human rights") and *Öneryildiz v. Turkey* of 30 November 2004 (for an approach to environmental degradation from the angle of Article 2 of the Convention enshrining the right to life).

9. However ambitious and dynamic the European Court of Human Rights' case-law on environmental protection has been, it should nevertheless be noted that it necessarily remains incomplete in terms of guaranteeing a right to a healthy environment. While the Court sometimes has to interpret the provisions of the Convention, it is not able to alter its content. It is therefore only in the strict case of the violation of a right expressly set out in the Convention that the environment would be protected.

3.3. An explicit basis to ensure genuine effectiveness

10. Specifically including the right to a healthy environment in the European Convention on Human Rights would enable individuals to appeal on the basis of that right irrespective of the other human rights already enshrined in the Convention. The Court would then have to rule directly on violations of that right, so the protection would no longer be incomplete. It is also possible that the recognition of such a right in the Convention could play a part in leading the states parties to take greater account of environmental issues (in particular, strengthening of the protection of the right to a healthy environment already recognised in many national constitutions through the possibility of appeals to the European Court, encouragement of compliance with international commitments made by states in the field of the environment).

3.4. A natural extension of the Council of Europe's role in environmental protection

11. The Council of Europe has worked hard to protect the environment. Rather than going through the impressive list of its contributions here, it should simply be noted that it was behind the adoption of the Bern Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats, the Lugano Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Strasbourg Convention of 4 November 1998 on the Protection of the Environment through Criminal Law, which introduced the 'polluter-pays' principle. The adoption of an additional protocol to the European Convention on Human Rights establishing the right to a healthy environment could be the crowning feature of the Council's relentless commitment to environmental protection and would also include the latter in its core field of activity of defending human rights.

3.5. An additional protocol to the European Convention on Human Rights as a debt owed to future generations

12. At present, we are witnessing what could be called a fourth generation of fundamental rights, or a generation of rights and duties for the society of the future. Society as a whole and each individual in particular must pass on a healthy and viable environment to future generations. That is quite simply the principle of solidarity between generations.

3.6. Bringing the European Convention on Human Rights into line with changes in our societies and in the concept of "human rights"

13. Setting out the individual right to a healthy environment in an additional protocol to the European Convention on Human Rights would also be an appropriate way of bringing the content of the rights protected into line with the changes in society and in the concept of "human rights" (in accordance with Article 1(b) of the Statute of the Council of Europe). As it is now very widely recognised as a fundamental human right, both nationally and internationally, and especially at European level, the human right to a healthy environment should naturally be included in the Convention.

4. Content of the right to a healthy environment

4.1. An enforceable right

14. It has often been argued that the right to a healthy environment cannot be established as a genuine subjective right for a whole series of reasons, none of which seems really justified.

15. As it is essentially collective in nature, it is claimed that it cannot be an individual right. However, establishing it as an individual right does seem entirely possible.

16. Under the Convention system, it is clear that it is the states parties which must be responsible for guaranteeing such a right.

17. With regard to the risk of the Court being overloaded, past experience suggests that it would be able to filter applications sufficiently and restrict their admissibility through an appropriate definition of the interest in proceeding.

18. However, it is the allegedly vague content of the right to a healthy environment which its critics claim is the main obstacle to establishing it as an individual right enforceable in law. By converse implication, it can nevertheless be said that applying precise criteria and defining the right to a healthy environment more clearly would make it possible to do so.

4.2. Procedural and material aspects of the right to a healthy environment

19. It does seem possible to define the human right to a healthy environment with precision for it to be submitted to the scrutiny of the courts, in particular the European Court of Human Rights. It is now generally accepted that the right to a healthy environment includes two complementary dimensions: a procedural and a material or substantive dimension.

20. The former is divided into three procedural rights: the right to information, the right to participate in decision-making and the right of access to justice in environmental matters. This dimension is not usually challenged and it should be possible for it to be taken into consideration without too much difficulty by the Court, which is used to procedural rights of this kind (except perhaps the individual right to participation, cf above-mentioned opinion of the Committee on Legal Affairs and Human Rights, Doc. 9833, paragraph 8).

21. The second dimension, ie that of the material right to a healthy environment, is harder to define. This is demonstrated, first of all, by the range of terms that may be employed to describe the human right to an environment of a reasonable standard: for instance, the terms used for the environmental right concerned have included healthy, viable, decent, sustainable, balanced, favourable to health and/or well-being, or respecting the health/well-being/rights of future generations. It should be noted here that, while the expression 'right to a healthy environment' has been used so far in this report, the scope of the individual right concerned is generally broader than just the health protection aspects. Admittedly, there is still discussion about the various aspects of the environment and the degree of protection they should be granted in order to ensure respect for an environmental human right. However, that would not seem to be an insurmountable obstacle to the recognition of the right to a healthy environment in the European Convention on Human Rights, as there is

no need at all for the Convention to specify these different points in detail or in advance. In the course of dealing with practical cases brought before it, the Court will gradually clarify the substance of the right, drawing together the approaches of the states parties in this area. In this connection, a number of key principles shared by most member states in the field of environmental protection can already be indicated: the precautionary principle, the principles of prevention and compensation (often in the form of the polluter-pays principle), the principle of sustainability and respect for the rights of future generations.

5. Conclusions

22. The Assembly has always reaffirmed the importance it attaches to issues relating to the environment and believes that living in a healthy environment is a fundamental right of all citizens as laid down in Principle 1 of the 1972 Stockholm Declaration, Article 1 of the 1998 Aarhus Convention and in the various constitutional texts of Council of Europe member states which include provisions on environmental protection.

23. However, in spite of the many political and legal initiatives taken both nationally and internationally for the purpose of protecting the environment, this fundamental right is still not properly guaranteed. In addition, some environmental assets are not renewable and some environmental degradation is irreversible.

24. For its part, the European Court of Human Rights, by its case-law developed in the environmental field, has on some occasions indirectly protected the right to a healthy environment by upholding the individual rights set out in Articles 2 and 8 of the European Convention on Human Rights.

25. The Assembly therefore recommends that the Committee of Ministers:

– draw up an additional protocol to the European Convention on Human Rights recognising the right to a healthy and viable environment;

– include Assembly representatives in the group of experts dealing with the matter.

26. The Assembly also wishes to encourage the governments of Council of Europe member states to co-operate and, in the event of damage and where appropriate, share responsibility and to establish information systems concerning the environment and, wherever possible, foster public participation in decision-making.

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Reporting committee: Committee on the Environment, Agriculture and Local and Regional Affairs

*Reference to committee:*Doc. 11729, Reference No. 3497 of 28 November 2008

Draft recommendation adopted unanimously by the committee on 4 September 2009

Members of the Committee: Mr Alan **Meale** (Chairman), Mrs Maria Manuela de **Melo** (1st Vice-Chairperson), Mr Juha Korkeaoja (2nd Vice-Chairman), Mr Cezar Florin Preda (3rd Vice-Chairman), Mr Remigijus Ačas, Mr Ruhi **Açikgöz**, Mr Artsruni **Aghajanyan**, Mr Miloš Aligrudić, Mr Alejandro Alonso Nùñez (alternate: Mr Gabino **Puche Rodriguez Acosta**), Mr Gerolf **Annemans**, Mr Miguel Arias Cañete, Mr Alexander Babakov, Mr Ivan Brajović, Mrs Elvira **Cortajarena Iturrioz**, Mr Veleriu Cosarciuc, Mr Vladimiro Crisafulli, Mr Taulant Dedja, Mr Hubert **Deittert**, Mr Karl Donabauer, Mr Miljenko **Dorić**, Mr Gianpaolo Dozzo, Mr Tomasz **Dudziński**, Mr József Ékes, Mr Savo Erić, Mr Bill **Etherington**, Mr Nigel **Evans**, Mr Joseph **Falzon**, Mr Relu Fenechiu, Mr Zahari Georgiev, Mr Peter Götz, Mr Rafael **Huseynov**, Mr Jean Huss, Mr Fazail Ibrahimli, Mr Ivan Ivanov, Mr Igor **Ivanovski**, Mr Bjørn Jacobsen, Mrs Danuta Jazłowiecka, Mr Birkir Jon Jonsson, Mr Stanisław Kalemba, Mr Guiorgui Kandelaki, Mr Haluk **Koç**, Mr Bojan Kostres, Mr Pavol Kubovic, Mr Paul Lempens, Mr Anastosios Liaskos, Mr François Loncle, Mr Aleksei Lotman, Mrs Kerstin Lundgren (alternate: Mr Kent **Olsson**), Mr Theo Maissen, Mrs Christine **Marin**, Mr Yevhen **Marmazov**, Mr Bernard **Marquet**, Mr José **Mendes Bota**, Mr Peter Mitterrer, Mr Pier Marino Mularoni, Mr Adrian Năstase, Mr Pasquale Nessa, Mr Tomislav Nikolić, Mrs Carina Ohlsson, Mr Joe **O'Reilly**, Mr Germinal Peiro (alternate: Mr Alain **Cousin**), Mr Ivan Popescu, Mr René **Rouquet**, Mrs Anta Rugāte, Mr Giacento Russo, Mr Fidias Sarikas, Mr Leander Schädler, Mr Herman Scheer, Mr Mykola Shershun, Mr Hans Kristian Skibby, Mr Ladislav Skopal, Mr Rainder **Steenblock**, Mr Valerij **Sudarenkov**, Mr Laszlo Szakacs, Mr Vyacheslav Timchenko, Mr Bruno Tobback (alternate: Mr Daniel **Ducarme**), Mr Dragan Todorovic, Mr Nikolay Tulaev, Mr Tomas **Ulehla**, Mr Mustafa Ünal, Mr Peter Verlič, Mr Rudolf **Vis**, Mr Harm Evert Waalkens, Mr Hansjörg Walter, Mrs Roudoula Zissi

N.B. The names of those members present at the meeting are printed in **bold**

Secretariat to the Committee: Mrs Agnès Nollinger, Mr Bogdan Torcătoriu and Mrs Dana Karanjac