

# ENNHRI calls on Council of Europe Member States to adopt a binding instrument on the right to a healthy environment

ENNHRI statement ahead of the 100th meeting of the Council of Europe Steering Committee for Human Rights and the 10th meeting of the Council of Europe Drafting Group on Human Rights and Environment (CDDH-ENV)

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ENNHRI calls on the Council of Europe Member States to adopt an instrument recognising a right to a healthy environment on the European level. The domestic experience shows that such a recognition brings substantive benefits, while its judicial enforcement neither creates unmanageable tasks for the courts, nor unduly restricts the policy discretion of States. ENNHRI urges States to opt for a binding instrument, coupled with an effective oversight mechanism to ensure adequate access to justice for affected individuals and communities.

## 1. Introduction

The European Network of National Human Rights Institutions (ENNHRI) represents more than 40 independent National Human Rights Institutions (NHRIs), established by constitution or law to protect and promote human rights in accordance with the [United Nations Paris Principles](#) and the [Council of Europe Committee of Ministers Recommendation 2021/1](#). Under the umbrella of ENNHRI, all European NHRIs come together to address the most pressing human rights challenges.

With this statement, ENNHRI provides information on what could be the implications, at the national level, of the recognition and enforcement of the right to a healthy environment, to support Council of Europe Member States in making their decisions on the need for a binding instrument recognising this right in Europe. Adopting such an instrument would ensure that the right is recognized in all Council of Europe Member States and harmonize the minimum standards of the right across the Council of Europe region.

Recognizing the right to a healthy environment is an evolution – not a revolution – of the existing legal order, because its realization is a precondition for the enjoyment of every other human right. As examples from national practice illustrate, the recognition of the right brings substantial

benefits for societies (**Section 2**). At the same time, its application and judicial enforcement neither cause unmanageable tasks for the judiciary, nor jeopardize the policy discretion of States in setting their environmental and other policies (**Section 3**). Based on national experiences, ENNHRI calls on the Member States of the Council of Europe to decide to adopt a binding instrument recognising a standalone right to a healthy environment in Europe (**Section 4**).

## 2. Need for, and benefits of, recognising a standalone right to a healthy environment

One of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights is the triple planetary crisis of climate change, biodiversity loss, and pollution. With the growing public awareness that a healthy environment is a prerequisite for human survival, well-being and the full enjoyment of all rights, recognising the right to a healthy environment as an enforceable human right at the Council of Europe level would be an appropriate step.

Such a step would follow the recognition of the right at the UN level.<sup>1</sup> The African and Inter-American human rights systems have recognised such a standalone right, as have 31 Member States of the Council of Europe in their domestic laws.<sup>2</sup> In jurisdictions where the right is currently not guaranteed, such as in Ireland, there is a strong popular support for its recognition.<sup>3</sup>

A high-level political commitment to human rights-based protection of the environment for the benefit of present and future generations has already been confirmed by Council of Europe Member States in the [Reykjavik Declaration](#). The future relevance of the Council of Europe as the key human rights organisation in Europe and globally will be greatly enhanced if Member States demonstrate that it can effectively protect its 675 million citizens' right to live in a clean, healthy and sustainable environment.

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<sup>1</sup> UN General Assembly Resolution [76/300](#), adopted on 28.7.2022, and UN Human Rights Council Resolution [48/13](#) adopted on 8.11.2021.

<sup>2</sup> Parliamentary Assembly of Council of Europe, *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, Recommendation 2211 (2021) 29.9.2021.

<sup>3</sup> In 2023, a Citizens' Assembly, comprised of a representative sample of 99 members of the public and an independent Chairperson, recommended that the State should introduce a proposal to amend the Irish Constitution to recognise substantive environmental rights (including a right to a clean, healthy and safe environment and a right to a stable and healthy climate) and procedural environmental rights. See *Report of the Citizens' Assembly on Biodiversity Loss*, March 2023, at page 16, available [here](#).

Existing international and national practices clearly show that providing an explicit legal basis for this right brings significant benefits to citizens of Council of Europe Member States.

*Firstly*, it would address the *protection gap* that exists under the existing human rights law. Currently, applicants have to provide evidence that environmental harm adversely impacts, or threatens to impact, their enjoyment of other human rights. This places a high evidentiary burden on applicants in environmental matters, because such impacts are often difficult to prove with a sufficient degree of scientific certainty.<sup>4</sup>

*Secondly*, a standalone right at the European level would further enable domestic legal systems to *give an effective response to the triple planetary crisis*. It could (i) provide a basis for adopting national environmental legislation, (ii) be a source of specific obligations, and (iii) secure an environmentally conscious application of other existing obligations. For instance, in **Norway**, the right to a healthy environment serves as a guideline for legislative and administrative decisions, where other laws are interpreted in light of the overall objective of protecting the right to a healthy environment.<sup>5</sup> The right also obliges the authorities to ensure that potential effects of suggested interferences in the natural environment are identified and assessed before deciding on whether to accept it.<sup>6</sup>

*Thirdly*, the recognition of a binding right at the Council of Europe level would allow the European Court of European Rights or another oversight mechanism to *sanction damage* inflicted upon the natural environment in a more effective way.

*Fourthly*, the recognition would provide *a clear legal basis* for national judges and plaintiffs to enforce better protection for human rights and the environment. This could *build upon* and *harmonize* the longstanding and successful experience with the recognition and enforcement of the right in several countries.

For instance, in **France**, the right to a healthy environment is enshrined in the Charter for the Environment (Charte de l'Environnement) which is part of the constitutionality bloc – constitutional rights with binding value. According to the Charter's first article, "Everyone has the right to live in a balanced environment that respects health." In a decision of September 20, 2022,

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<sup>4</sup> See for example ECtHR, 27 January 2009, *Tătar v. Romania*, App. No. 67021/01, paras. 104-106.

<sup>5</sup> Greenpeace Nordic et al. v. Norway, HR-2020-2472-P (Plenary of the Supreme Court of Norway), 22.12.2020 para 138.

<sup>6</sup> HR-2020-2472-P para 182-184.

the French Council of State considers that this right constitutes a fundamental freedom which could be protected by the administrative judge as part of an emergency procedure.<sup>7</sup>

In **Belgium**, the right to a healthy environment was introduced in the Constitution in 1994 with a view to providing a direction to governmental policies in this area. It imposes obligations on the state to put in place a legislative and regulatory framework, which guarantees the enjoyment of such a right. The object of this right thus relates to the statutory protection ensured by the regulatory framework, rather than the actual state of the environment. It encompasses both a substantive dimension (i.e. the substantive quality standards) and a procedural dimension (e.g. the mechanisms in place to enforce substantive environmental law, to allow for public participation, and for the prior assessment of environmental risks).

In **Hungary**, the right to a healthy environment is enshrined in the constitution since 1989 and ensures a holistic, cross-sectoral protection for the environment. It obliges the legislature not to step back from already provided levels of statutory protection<sup>8</sup> and also obliges state authorities not to override environmental protection goals in their discretionary administrative decisions.<sup>9</sup> The courts treat the principles of prevention and the precaution as inherent part of the right.

**Croatia** has had the constitutional right to a healthy life since 1990. The state ensures citizens' right to a healthy environment, while citizens, state, public and economic bodies and associations are obliged, as part of their powers and activities, to devote special care to the protection of human health, nature and the human environment.

In **Slovakia**, the constitutional right to a healthy environment enjoys the protection of supreme legal force. It imposes an obligation on everyone to protect and improve the environment and a prohibition to endanger or damage the environment beyond the limits prescribed by law. The right to a healthy environment was interpreted by the Supreme Court as a permanent collective interest which, especially in relation to citizens, is a direct obligation of the state.<sup>10</sup>

In **Austria**, a “comprehensive environmental protection” has been constitutionally enshrined and defined as a national goal since 1984.<sup>11</sup> It commits the federal government, federal provinces, and

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<sup>7</sup> Conseil d'État, 2ème - 7ème chambres réunies, 20/09/2022, 451129.

<sup>8</sup> Decision No. 28/1994 (V.20.) AB, Hungarian Constitutional Court, Decision No. 16/2015. (VI. 5.) AB, Hungarian Constitutional Court.

<sup>9</sup> Decision No. 3223/2017. (IX.25.) AB, Hungarian Constitutional Court, para. 29.

<sup>10</sup> Decision No. 5Sžp/41/2009, Supreme Court of the Slovak Republic.

<sup>11</sup> [Constitutional Act on sustainability, animal protection, comprehensive environmental protection, on water and food security as well as research](#); Federal Law Gazette I No. 111/2023 as amended.

municipalities to the principle of sustainability in the utilisation of national resources in order to ensure the best possible quality of life for future generations.

The Constitution of **Azerbaijan** recognizes the right to live in a healthy environment, including granting everyone's access to information about the ecological situation and getting compensation for damage to their health and property due to the adverse ecological consequences. The state is obligated to preserve ecological balance and protect biodiversity.<sup>12</sup>

In **Georgia**, environmental protection has been recognized in the Constitution since 1995.<sup>13</sup> Article 29 guarantees the right to live in a healthy environment and enjoy the natural environment and public space. The Constitution also enshrines two procedural rights; the right to receive full information about the state of the environment in a timely manner and the right to participate in the adoption of decisions related to the environment, which shall be secured by law.

The **Portuguese** Constitution has since 1976 established the right to a healthy environment. In its negative dimension, it consists of the right to refrain, on the part of the state and third parties, from environmentally harmful actions. In its positive dimension, it consists of the right to a performance by the state, aimed at protecting the environment and preventing its degradation, namely, by repressing harmful behaviour. However, no landmark ruling has yet been issued on any emblematic environmental issue or on the rights of future generations by the Portuguese Constitutional Court.

In **Romania**, the right to a healthy environment is enshrined in the Constitution and it is directed both to the state and legal entities. As such, the state shall acknowledge the right to a healthy, well preserved and balanced environment, and it shall provide the legislative framework to exercise such a right.<sup>14</sup> The Romanian Constitution also provides that natural and legal entities are bound to protect and improve the environment.

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<sup>12</sup> Article 39, [the Constitution of Azerbaijan](#), 1995.

<sup>13</sup> Article 29, the Constitution of Georgia, 1995.

<sup>14</sup> Article 35, Romanian Constitution, Official Journal no. 767/2003.

### 3. The domestic experience of NHRIs with the functioning of the right to a healthy environment: judicial case-law and practice

Arguments against the recognition of the right to a healthy environment typically relate to:

- 1) the inherent ambiguities surrounding the content of the right,
- 2) the possibility to open the floodgate of litigation, and
- 3) the possibility for judicial organs to encroach on states' discretion in setting their environmental and environmentally relevant policies.

But domestic experience and national judicial case-law, brought by NHRIs from across the Council of Europe region, clearly suggest that the enforcement of this right places a reasonable obligation on duty bearers and is a manageable task for the courts.

#### 3.1 The content of the right is sufficiently clear

Human rights are often formulated in general terms because they are intended to apply over time and in different societies. Through enforcement in courts and other oversight bodies, the content of human rights is further defined and adapted to changing societal conditions. In an environmental context, international experts have already offered several definitions for a scope of the right to a healthy environment. Like the UN Special Rapporteur,<sup>15</sup> national laws and domestic courts have also defined the scope and normative content of the right in a clear and unambiguous way. As observed by the **Irish High Court**: "Once concretised into specific duties and obligations, its enforcement is entirely practicable."<sup>16</sup>

In **Belgium**, the right to a healthy environment does not enjoy direct effect, i.e. it does not give rise to subjective rights that individuals can invoke to demand a higher level of environmental protection. Instead, it requires a constitution-compliant and thus environmentally friendly interpretation of existing legislation by ordinary courts. The right gives rise to a so-called standstill (or non-regression) obligation, as is evident from the case law of the Constitutional Court and the Council of State.<sup>17</sup> This guards against significant regressions of the existing legislative and

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<sup>15</sup> Report of John H. Knox UN Special Rapporteur for Human Rights and the Environment identifying several framework principles on human rights and the environment, see: *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/37/59, 24.1.2018.

<sup>16</sup> *Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695.

<sup>17</sup> See also: Revision of Title II of the Constitution by inserting an article 24bis on economic and social rights, developments, Parl. St., Senate, Extraordinary session, 1991-1992, n° 100-2/3, p.13.

regulatory protection level. In case a significant regression does take place, it must be reasonably justified by reasons related to the public interest.

Somewhat similarly, a non-regression obligation also applies under **Hungarian** constitutional law. The Hungarian Constitutional Court deems the right applicable if environmental standards are watered down by the state to make them less effective,<sup>18</sup> which puts natural assets at risk of irreversible harm.<sup>19</sup> The Court relies on objective benchmarks to ascertain the existence of such a risk, such as the position of scientific expert organisations or soft law documents concerning the environmental protective measures deemed necessary.<sup>20</sup>

Under the case-law of the Supreme Court of the **Slovak** Republic, the environment means everything on Earth that surrounds us, in particular air, water, rocks, soil, and living organisms.<sup>21</sup>

In **France**, the Constitutional Council ruled that it follows from Article 1 of the Charter for the Environment, that when “adopting measures likely to have a serious and lasting effect on a balanced environment that shows due respect for health, the legislator must ensure that the choices made to meet current needs do not compromise the ability of future generations and other peoples to meet their own needs, while preserving their freedom of choice in this respect.”<sup>22</sup>

In **Austria**, the national goal of a “comprehensive environmental protection” does not give rise to an individual fundamental right to a healthy environment. National goals are legally binding; they oblige state bodies to act in a particular way. Therefore, they must be considered when new laws are enacted and when courts and administrative bodies are interpreting existing laws. As part of the Constitution, national goals define the framework for political actions. However, they do not give rise to subjective rights, which can be asserted by individuals.

The Constitutional Court of **Georgia** declared that the right entails positive and negative obligations for the state. It is obliged to minimize as much as possible the negative environmental consequences of economic, infrastructural and other projects, and must protect the environment from damage by private individuals.<sup>23</sup>

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<sup>18</sup> 28/1994. (V.20.) AB Decision.

<sup>19</sup> 16/2015 (VI.5.) AB Decision.

<sup>20</sup> 14/2020 (VII.9.) AB Decision, 13/2018 (IX. 4.) AB Decision.

<sup>21</sup> Decision No. 5Sžp/41/2009, Supreme Court of the Slovak Republic.

<sup>22</sup> Décision n° 2023-1066, QPC, 27.10.2023.

<sup>23</sup> The Constitutional Court of Georgia, Decision No. 2/1/524, 10/04/2013, II.6.

### 3.2 The right has not led to an excessive increase of environmental or climate litigation

Courts are not overwhelmed with rights-based environmental complaints. Plaintiffs must satisfy applicable rules on standing to bring their claims concerning the violation of the right to environment to courts. Should the right to a healthy environment be recognised in a protocol giving jurisdiction for the European Court of Human Rights to enforce the right, the same will likely be true for complaints brought before it.

For instance, in **Hungary**, there is no *actio popularis*, and a handful of environmental cases reach the Constitutional Court annually. In **Norway**, the right to a healthy environment was first included in the Constitution in 1992. Nevertheless, only 0,4 percent of all civil cases concerned the environment between 1996-2005, whereas cases concerning environmental law constituted less than 1 percent of the cases between 2008 and 2018.<sup>24</sup> In **Belgium**, since it was introduced in the Constitution in 1994, the Constitutional Court examined compliance of legislation with the right to a healthy environment in around 50 cases, finding a violation in 10 of them. In the **Slovak Republic**, the Constitutional Court has received 108 applications concerning the right to healthy environment since 1993,<sup>25</sup> including cases on procedural rights to information and participation. Considering that the Constitutional Court receives over 2 000 applications annually,<sup>26</sup> the cases referring to the right comprise just a fraction of the workload. While the **Czech law** also does not recognize *actio popularis*, a recent shift in the case law of the Constitutional Court has enabled environmental NGOs or municipalities to assert the right to a favourable environment.

### 3.3 The codification of the right would still leave decision-makers with a margin of appreciation to design their environmental policy choices

Practice shows that domestic courts do not intend to take the place of policymakers, but they step in where policymakers have failed to duly consider the need to protect the right to a healthy environment. Domestic courts have carefully defined the applicable legal tests marking the depth and intensity of their judicial review, respecting the state discretion to design avenues for environmental protection.

In **Hungary**, for instance, the right only protects against backsliding on environmental protection standards that were designed and set voluntarily by the legislature.<sup>27</sup> Moreover, a step back from

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<sup>24</sup> Fauchald, "Environmental Justice in Courts – a Case Study from Norway" *Nordisk miljørettslig tidsskrift*, (2010) s. 54; NOU 2020:11, *Den tredje statsmakt – Domstolene i endring*, p. 66.

<sup>25</sup> Number of applications referring to Article 44 of the Constitution. Data available [here](#).

<sup>26</sup> Annual Report of the Supreme Court of the Slovak Republic (2022), available [here](#).

<sup>27</sup> 28/1994. (V. 20.) AB Decision.



the level of statutory protection is only lawful if it is strictly necessary and proportionate to another constitutional right. Similarly, in **Belgium**, there must be reasonable justification based on reasons related to the public interest for significant regressions in the statutory protection. This analysis allows for the balancing of the relevant interests at stake. In the **Slovak** Constitutional Court, the limits of fundamental rights and freedoms may be specified only by law, thus they remain at the discretion of the legislature. In **Norway**, courts can only set aside a legislative decision from the Parliament where the latter has “grossly neglected” its duties under the right to a healthy environment, meaning that the threshold for the judicial review of the Parliament is very high. The courts show deference toward elected bodies with respect to balancing different interests and broader priorities, while also protecting the rule of law by ensuring that courts can set limits on the political majority when it comes to protecting constitutionalised values.<sup>28</sup>

In the Convention system, there are mechanisms to strike a balance between the need to protect human rights and to give decision-makers leeway to balance different interests. This includes established interpretative principles like the European consensus and margin of appreciation. Moreover, the existing environmental case law of the European Court of Human Rights already demonstrates a readiness to apply human rights standards in such a way as to avoid imposing an impossible or disproportionate burden on state authorities.<sup>29</sup> Rather, it allows the state to decide the choice of means to protect against environmental harm.<sup>30</sup>

#### 4. An effective instrument must be binding and have an effective enforcement mechanism

To conclude, ENNHRI submits that the Member States of the Council of Europe should decide to adopt a *binding instrument* recognising the right to a healthy environment. This is needed to:

- Make the political commitment made in Reykjavik a reality,
- Strengthen the Council of Europe’s and its Member States’ protection of human rights and the environment,
- Ensure that the Council of Europe maintains its leading role in developing global human rights standards.

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<sup>28</sup> HR-2020-2472-P para 142 and 141. However, the Supreme Court did elaborate further on how thoroughly administrative decision the Parliament had not been involved in should be reviewed.

<sup>29</sup> See for example ECtHR (Grand Chamber), 30 November 2004, *Öneriyildiz v. Turkey*, App. No. 48939/99, para. 107.

<sup>30</sup> See for example ECtHR, 9 June 2005, *Fadeyeva v. Russia*, App. No. 55723/00, para. 96.

It is ENNHRI's view that such an instrument would need to, at a minimum, provide an effective oversight mechanism and ensure meaningful access to justice for possible victims. A key to an effective enforcement of the right would be ensuring the standing rights of affected or likely to be affected individuals and of NGOs promoting environmental protection. Such a binding instrument would complement the *procedural* rights under the system of the Aarhus Convention by providing an effective access to justice mechanism for the individuals and groups whose *substantive* right to a healthy environment has been violated. Our view is that these requirements could be fulfilled by adopting:

1. A binding protocol to the European Convention on Human Rights;
2. An additional protocol to the European Social Charter or
3. A standalone Convention on Human Rights and the Environment.

ENNHRI submits that an **Additional Protocol to the European Convention on Human Rights** would establish the strongest and the most effective legal protection of the right to a healthy environment.<sup>31</sup> This is because victims of violations could access the complaints procedure before the European Court of Human Rights, which renders legally binding judgments, thereby allowing judges to sanction damage inflicted upon nature more effectively.<sup>32</sup> It would also allow the European Court of Human Rights to further develop the human rights protection it has already provided in its previous environmental case-law by judicially enforcing the newly recognised right.

This form of protection could be complemented by adopting an **Additional Protocol to the European Social Charter**. The strength of such a form of recognition lies in ensuring a collective complaint mechanism, which could secure strong access to justice for NGOs.

A standalone **Convention on Human Rights and the Environment** is also an alternative avenue for recognising the right with a binding force. The strength of this instrument would be to elaborate on the normative safeguards flowing from the right. This could clarify the scope of protection in important respects, such as those provided for environmental defenders and vulnerable groups. It is vital that this instrument also be vested with an effective compliance mechanism, such as a judicial or an expert-led complaint mechanism.

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<sup>31</sup> ENNHRI calls on the Council of Europe to adopt a binding instrument on the right to a healthy environment, 19.11.2021, available [here](#).

<sup>32</sup> This should be established without prejudice to the level of environmental protection afforded under already existing human rights obligations, as interpreted dynamically by the European Court of Human Rights.

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## ENNHRI's work on climate change and human rights

Climate change poses one of the gravest challenges to the effective protection of the rights enshrined under the European Convention for Human Rights (ECHR). To respond to this challenge, ENNHRI has established a Working Group on Climate Crisis and Human Rights; [published a position paper on Climate Change and Human Rights in the European Context](#); submitted [third-party interventions](#) to the ECtHR in a series of landmark climate cases<sup>33</sup> and takes an active part in the work of the Council of Europe CDDH Drafting Group on Human Rights and Environment ([CDDH-ENV](#)) as an observer. [Read more](#) on ENNHRI's work on climate change and human rights.

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<sup>33</sup> ENNHRI has so far [intervened](#) in the ECtHR's cases of [Greenpeace Nordic and others v. Norway](#), [Duarte Agostinho and Others v. Portugal and Others](#), [Verein KlimaSeniorinnen Schweiz and others v. Switzerland](#), and [Carême v. France](#).