Why Recognizing the Right to a Healthy Environment Would Strengthen the Environmental Human Rights Framework under the European Convention on Human Rights

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07.04.2025 doi: 10.59704/1fc1989caebfb3f6

While the UNGA has recognised the right to a healthy environment (R2HE) as a human right (see the previous post on this by Otto Spijkers here), the Council of Europe (CoE) has gone one step further, instituting a formal procedure that could lead to the adoption of such right in a "legal binding instrument". This political process appears, however, to have been disrupted by the landmark judgment adopted by the European Court of Human Rights (ECtHR, "Strasbourg Court", or "Court") in the climate change case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*. This ruling expands the doctrine of indirect protection of the environment based on the European Convention on Human Rights (ECHR), and, as a consequence, raises questions regarding the need and feasibility of the autonomous R2HE. Ultimately, the query is whether the recognition of the right to a healthy environment by means of a new Protocol to the ECHR would actually make a difference to the existing European framework of environmental human rights. Investigating this is important, especially given that on several past occasions, when a similar proposal was debated, the member States insisted that adopting a Protocol on the R2HE would be redundant on the basis that the ECHR system already indirectly contributed to the protection of the environment through existing civil and political rights and their evolutive interpretation in the case-law of the Strasbourg Court.

Strasbourg environmental human rights lack foreseeability and normative legitimacy

The ECHR framework has not originally been designed or subsequently amended to offer general protection of the environment or to guarantee an autonomous R2HE. Owing to judicial willingness, backed up by the principles of effectiveness and dynamic interpretation, the right to respect for private and family life and for home (ECHR, Article 8) has, over time, encompassed a right to effective protection from serious adverse effects of environmental harm or climate change on life, health, well-being or quality of life. The right to life (ECHR, Article 2) has, in principle, been extended to a serious risk of a significant decline in life expectancy owing to climate change. In the specific context of climate litigation, the norm regulating jurisdiction *ratione personae* (ECHR, Article 34), and firmly prohibiting *actio popularis*, has been interpreted to allow, under a series of conditions, legal standing for associations to complain of violations of substantive rights that would otherwise be attributable to natural persons only – even where the association's members would not have victim status if taken individually.

These and other incremental developments in the jurisprudence demonstrate that the ECHR framework has a degree of inherent flexibility, permitting the judicial willingness to resolve a case in a particular way to play (a sometimes significant) role in the adjudication process. Judicial willingness, however, is unpredictable due to the inherent procedural features of the ECtHR system. Moreover, this adjudication happens on the

"interpretative margins" of the framework, effectively filling an "open space in the law" created by the omission to include the R2HE. The process thus resembles the squaring of a circle, with the ensuing results often seen as controversial or normatively unjustified. Moreover, despite its flexibility in some areas, the ECHR framework has so far never been extended beyond the civil and political rights (except for the right to education), the purely subjective nature of the interference, and the primarily corrective and only secondarily preventive function of the mechanism. It appears that these fundamental features of the current framework restrict any true innovativeness and weaken the role of the Strasbourg Court in the field of environmental human rights. It has been argued, including by the ECtHR's own judges, that the limits of the current ECHR framework can only be altered through a political decision of the member States of the CoE to adopt a Protocol guaranteeing a self-standing right to a healthy environment.

The R2HE introduces a fundamentally new approach to environmental human rights

The R2HE includes, *inter alia*, both substantive elements – safe climate, clean air, healthy biodiversity and ecosystems, safe and sufficient water, healthy and sustainably produced food and non-toxic environments – and procedural elements – access to environmental information, public participation in decision-making and access to justice. It is considered dualistic in that it aims at ensuring the environment that is "healthful", in that it is conducive to healthy living for people (subjective dimension), and that is "healthy in itself" in that it is "free of diseases that hinder its ecological balance and sustainability" (objective dimension). It is a matter of fact that objective harm to the environment, unless prevented or undone, would inevitably – at some point down the road – produce impacts on humans, whether localised or diffuse, slow or rapid in onset. In this sense, a subjective personal harm is implicit in the objective harm. Deep interdependence between people and a healthy biosphere makes these two dimensions of the right inextricable and constitutes conceptual grounds for including the R2HE in the ECHR framework.

The current ECHR framework has at least six normative limitations in effectively safeguarding environmental human rights

Comparing the content and the features of the R2HE with the environmental human rights doctrine, as illustrated by the historic and most recent case law of the ECtHR, reveals at least six normative limits within the current ECHR framework, which could be alleviated by the legally binding recognition of the R2HE.

(1) Exclusion from the Court's jurisdiction of environmental harm that does not directly, imminently and severely affect the enjoyment of proxy rights

The Strasbourg Court only examines complaints regarding environmental harm where there is a causal connection between environmental harm and interference with the rights to private or family life, life, a fair hearing, property, etc.

The R2HE would make an instance of environmental degradation or deregulation the actual subject matter of human rights protection rather than, as it is now, a trigger for interference with proxy rights. Where the right is viewed in its subjective dimension, interference may stem from the loss of benefits derived from the environment by humans, possibly also leading to collateral interference with other rights guaranteed by the ECHR and its Protocols. Where the right is viewed in its objective dimension, interference may result from significant harm to elements or functions of ecosystems, even in the absence of impact on humans. While complaints regarding the subjective type of environmental damage may, to some extent, resemble grievances falling within the scope of existing indirect rights-based protection, complaints regarding the objective type of environmental damage are a novelty in this legal context.

The R2HE could thus offer judicial resolution of situations that are harmful to the environment and human rights, while preserving the proxy rights from, what may otherwise be, a risky and normatively unjustified deformation. In cases of serious objective ecological damage that has not (yet) materialised into

damage subjectively affecting humans, judicial reasoning would not need to push its way into the anthropocentrically limited scope of the existing civil and political rights.

(2) Exclusion of imminent environmental harm from interim measures procedure

The risk of imminent, irreparable harm to the environment as such is excluded from the Court's interim measures procedure (Rule 39, Rules of the Court). Injunctive relief measures are of crucial importance in an environmental context, owing to the risk of irreversibility and the need for precaution regarding environmental harm. The R2HE could extend interim measures to cover such risks, even without affecting a proxy right and irrespective of whether the request is brought by a natural or legal person. With the R2HE, therefore, the Court's preliminary intervention could occur earlier, namely before the harm to the environment transformed into harm to human well-being, health, or life. Through its interim measures procedure, the ECtHR could take up a more preventive role, for example, by ensuring a suspensive effect of planned activities that are arguably risky to the environment where, in the domestic system, development consent is granted prior to the completion of judicial proceedings related to the project.

(3) Exclusion of associations from relying on substantive proxy rights except for cases regarding climate change mitigation

Certain ECHR rights, for example, those enshrined in Articles 2 (right to life) and 8 (right to private life), can be exercised by natural persons only, meaning that legal persons, such as environmental associations, cannot, in principle, be granted victim status in the absence of a measure directly affecting them, even if their members' rights are at stake. In the recent *KlimaSeniorinnen* judgment, the Court relied on "special considerations" to circumvent this obstacle by granting *locus standi* to an association acting on behalf of individuals affected by climate change. While this new approach may facilitate the recourse to proxy rights regarding complaints about failure to mitigate adverse effects of climate change on life and health, in other areas of concern, indirect protection disqualifies associations or other legal entities by requiring personal and direct impact on natural persons. The R2HE, which encompasses a duty to protect the environment and to prevent environmental damage, could shift the focus from substantive to procedural-rights victimhood based on the public's participatory rights.

(4) Exclusion of domestic environmental public interest litigation from "fair hearing" and "access to a court" guarantees

The applicability of Article 6(1) (fair hearing) hinges, among others, on the requirement of a "directly decisive outcome" that, in the environmental context, is considered to exist where applicants demonstrate to be personally exposed to a "serious", "specific" and "imminent" danger linked to environmental harm. While Article 6(1) can apply to a wide range of domestic proceedings concerning human rights impacts of environmental harm or climate change, the current interpretation of this provision has created a blind spot in the sense that the guarantees of "access to a court" or "fairness" do not extend to environmental litigation conducted by individual applicants based on the right to a healthy environment and an *actio popularis*-type of legal standing recognised by domestic courts. The R2HE could extend these guarantees to individuals and environmental NGOs defending the substantive or procedural elements of the R2HE.

(5) Lack of "active transparency" obligation in Article 10 (freedom of expression) and self-standing procedural right to "environmental information" in Article 8 (right to private life)

The right to environmental information, under Article 10 (freedom of expression), while actionable by individuals and associations acting as environmental watchdogs, does not encompass the obligation of active transparency. Articles 2 (right to life) or 8 (right to private life) cover such obligation, excluding, however, information regarding risks to the environment as such. Moreover, this right is not actionable by legal persons and, arguably, neither by individuals who are not or who do not risk being affected materially by an environmentally dangerous activity. Overall, serious doubts arise as to whether the current ECHR framework effectively ensures the preventive function

of a right to environmental information. The R2HE could fill these gaps, enabling the realisation of the right holders' duty to protect the environment from decline.

(6) Absence of a mandate for general measures to redress or prevent environmental harm

The ECtHR lacks a mandate for general measures aimed at redressing or preventing environmental harm as such. Only the introduction of the environment as the object of human rights protection, through the R2HE, could trigger the necessary conceptual shift and legitimise the Court and the CoE Committee of Ministers to require member States to take measures such as mitigation of environmental risks and ecological redress.

Conclusion

While some incremental evolution towards ecological human rights without the Protocol on the right to a healthy environment is certainly possible, the adoption of such an instrument would make a real difference to the ECHR framework.

It has the potential to facilitate timely and forward-looking environmental adjudication and to help resolve a wider range of environmental and human rights issues (countering the "blind spot" predicament) whilst protecting civil and political rights from otherwise normatively dubious and over-expansive judicial interpretation (countering the "squaring the circle" predicament). A legally recognised R2HE could channel judicial creativity and evolutive interpretation, ensuring internally consistent and externally predictable and authoritative adjudication of environment-related cases, benefiting both applicants and respondent States (countering the "unforeseeability" predicament). This is especially important if the recent *KlimaSeniorinnen* judgment signals judicial activism or a new era of climate change litigation at the Strasbourg Court (countering the "judicial activism" predicament).

It would help ensure a more relevant subsidiary role for the Court, and align with the commitment of the CoE member States to strengthen human rights protection in response to the triple planetary crisis. Political reluctance to ratify the Protocol, and the resulting risk of ineffective operation of the R2HE among the Contracting States are admittedly issues of concern. Those are political matters, however. From a purely legal perspective, the ECHR regime, the CoE's member States, and private actors stand to benefit significantly from the adoption of the R2HE.

The post summarises the author's recent paper A World of Difference: Overcoming Normative Limits of the ECHR Framework through a Legally Binding Recognition of the Human Right to a Healthy Environment | Journal of Environmental Law | Oxford Academic (open access link available upon a request).

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SUGGESTED CITATION

Kobylarz, Natalia: Why Recognizing the Right to a Healthy Environment Would Strengthen the Environmental Human Rights Framework under the European Convention on Human Rights, Verfassungsblog, 07.04.2025, doi: 10.59704/1fc1989caebfb3f6.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250408-012130-0.