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## CONFERENCE PAPERS

# The Community Environmental Policy as a contribution to intergenerational justice

by Pedro Barbosa

Environmental issues nowadays play a central role in European policy formulation and implementation. A well consolidated body of legislation covers areas as diverse as climate, air quality, chemicals, land use, industrial installations, noise, nature and biodiversity protection, waste management, water, soil, etc. Common to all activities in these fields is an over-arching principle of sustainable development with a strong intergenerational dimension: our societies must be able to satisfy their needs without jeopardising the ability of future generations to satisfy their own needs.

*This speaker was not able to provide us with a summary of his presentation. This text corresponds to the abstract published on the website of the conference [www.futuregenerations-law-conference.com](http://www.futuregenerations-law-conference.com)*

### Biography:

Pedro Barbosa has been working on European affairs for the last 12 years, as a consultant and then as a European civil servant. Within the European Commission he has worked for the Employment and Fisheries departments before joining the Environment department in 2004.



Currently on mission at the Commission's Representation in Portugal, he deals with the implementation of community environmental legislation.

Pedro studied economics at the University of Porto and European Affairs at the College of Europe in Bruges.

*Second Panel: "Intergenerational Justice in European Law": Dr. Maja Göpel, Abel de Campos, Pedro Barbosa and Prof. Dr. Axel Gosseries*

## CONFERENCE PAPERS

# The European Convention on Human Rights and the Right to a Healthy Environment

by Abel de Campos<sup>1</sup>

One cannot find the right to a healthy environment in the European Convention of Human Rights (ECHR). Furthermore, it cannot be found in its additional protocols, which have added other rights to the original text, such as the protection of property, the right to education or freedom of movement. Nevertheless, there is indirect judicial enforceability for the human right to a healthy environment,

as I will illustrate.

### Human rights as enforceable rights

It is widely known that the main contribution of the European system of protection of human rights lies in the then unprecedented judicial machinery that it has created. More than a 'simple' human rights catalogue, the European Convention created a system of judicial enforcement of human

rights at the international level. In 1950, this idea was indeed a revolution: for the first time, the individual was put at the heart of international law; he was no longer a mere object of international law, which dealt with States rather than individuals.

The ECHR is not designed to protect collective rights. It is by the protection of individual rights of European citizens that the European Convention system fulfils its fun-

damental aim: to improve the standard protection of human rights across all of the 47 member States of the Council of Europe who are Parties to the ECHR.

Moreover, it is the judicial character of the European system that makes it so rich. As society has evolved, the European Court of Human Rights (hereafter: European Court), which is competent to examine the individual complaints submitted for violations of a Convention right, has adopted a dynamic interpretation of the catalogue of the rights enshrined in the ECHR. In other words, when we speak of the ECHR we are mainly referring to European Court case-law; how the European Court has interpreted and applied those rights in specific cases.

### European Court case law

We can turn to specific European Court case law to see how the human right to a healthy environment has been protected in an indirect way. We will focus on examples around Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life).<sup>2</sup>

#### *Right to Life*

Article 2, as well as providing protection for the right to life resulting from actions of State agents, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. The European Court has found that this obligation may apply in the context of dangerous activities related to environmental issues, such as nuclear tests (*L.C.B. v United Kingdom*, 1998) and the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities or by private companies (*Öneryıldız v. Turkey*, 2004).

The European Court has said, in relation to these obligations, that particular emphasis should be placed on the public's right to information, as established in its case law. The Grand Chamber stated that this right, which has already been recognised under Article 8, may also, in principle, be relied on to protect the right to life. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, to identify shortcomings in the processes concerned and any errors committed by those responsible at different levels.

As well as this requirement to regulate and inform the public about dangerous activities, there is also an obligation on the State to provide an adequate response, judicial or

otherwise, to a potential infringement of the right to life. This includes the duty to promptly initiate an independent and impartial investigation, which must be capable of ascertaining the circumstances in which the incident took place, and identify shortcomings in the operation of the regulatory system.

In the leading case of *Öneryıldız v. Turkey*, the European Court found a violation of Article 2. In this case, an explosion occurred on a municipal rubbish tip, killing 39 people who had illegally built their dwellings around it. Nine members of the applicant's family died in the accident. Although an expert report had drawn the attention of the municipal authorities to the danger of a methane explosion at the tip two years before the accident, the authorities had taken no action. The European Court found that since the authorities knew, or ought to have known, that there was a real and immediate risk to the lives of people living near the rubbish tip, they had an obligation under Article 2 to take preventive measures to protect those people. The European Court also criticised the authorities for not informing those living next to the tip of the risks they were running by living there.

#### *Private and Family Life*

The European Court has held that "where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."<sup>3</sup> Furthermore, the European Court has stated that "Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly."<sup>4</sup> Therefore, there are two issues relating to the environment that could potentially arise under Article 8: the State's responsibility not to subject citizens to an unclean environment, and the positive obligation of the State to ensure a clean environment through proper regulation.

These issues have been examined in a number of cases. The European Court has given clear confirmation that Article 8 of the Convention can be used to guarantee the right to a healthy environment. It found, unanimously, violations of Article 8 in two cases. *López Ostra v. Spain* (1994) concerned nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home which had affected her daughter's health. Secondly, *Guerra and Others v. Italy* (1998) concerned harmful

emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

Further elaboration of the European Court's approach to this issue occurred in *Fadeyeva v. Russia* (2005). Here, the European Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to show, firstly, that there has been an actual interference with the individual's 'private sphere', and, secondly, that these nuisances have reached a certain level of severity. Moreover, the nature of the State's positive obligation was examined by the European Court in *Hatton and Others v. the United Kingdom* (2001), which concerned aircraft noise generated by an international airport (Heathrow). The European Court considered that whilst the activity was carried on by private parties, Article 8 nonetheless applied on the grounds that the State was responsible for properly regulating private industry in order to avoid or reduce noise pollution. However, in this case the Grand Chamber did not find a violation of Article 8, stating that the State could not be said to have overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals impacted upon by those regulations to respect their private life and home, and the conflicting interests of others and of the community as a whole.

Most recently, the case of *Tatar v. Romania* (2009) concerned serious pollution in the year 2000 in Romania with the discharge of approximately 100,000 cubic meters of cyanide-contaminated tailings water into the environment. In holding a unanimous violation of Article 8, the European Court referred to the precautionary principle in its judgement. As such, they stated that the lack of scientific consensus was not a sufficient justification for inaction following recommendations of a 1993 preliminary impact assessment carried out by the Romanian Ministry of the Environment.

Interpretations of Article 2 and Article 8 can also be considered in light of Recommendation 1885(2009) of the 30th September 2009 which has urged the Committee of Ministers (the political organ of the Council of Europe) to "draw up an additional protocol to the ECHR, recognising the right to a healthy and viable environment."<sup>5</sup> In its Recommendation, the Council of Europe Parliamentary Assembly (PACE) underlines that it is a "duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations."<sup>6</sup>

## Fair balance

There remains the question of how can we reconcile the inevitable tension between the complaint of an actual individual who claims to be victim, here and now, of a violation of his human rights and the rights of future generations? Furthermore, where should governments stand with regard to their obligation to provide the greatest good to the greatest number?

The difficulty is shown in *Hatton and Others v. the United Kingdom* (2001), concerning complaints of nuisances caused by the increase of night flights in Heathrow airport in London. The European Court stated in its judgment that “*the State can be said to have struck a fair balance between [the interests of the economic well-being of the country] and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by States acting within their margin of appreciation and by the European Court in its review of that margin, but it would not be appropriate for the European Court to adopt a special approach in this respect by reference to a special status of environmental human rights.*” Taking into account the measures taken by the domestic authorities to mitigate the effects of aircraft noise and the fairness and transparency of the decision-making process, the European Court concluded that there was no violation of Article 8. However, a minority of five judges (against twelve) considered on the contrary that “*reasons based on economic arguments referring to ‘the country as a whole’*

*without any ‘specific indications of the economic cost of eliminating specific night flights’ are not sufficient. Moreover, it has not been demonstrated by the respondent State how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.*” The minority pointed out that “*concern for environmental protection shares common ground with the general concern for human rights*” and concluded that there was a violation of Article 8 of the ECHR.

## Conclusion

While the right to a healthy environment is, as such, not protected by the ECHR, it is possible to protect it indirectly if an individual (not *actio popularis*) alleges that another ECHR right was violated. The right to a healthy environment is therefore a judicially enforceable right, at least in some of its aspects. Nevertheless, it has to be compatible with the general interests of the community: a fair balance between all competing interests has to be found.

## Notes:

1. The views presented here are the author’s and do not represent the position of the European Court of Human Rights.
2. ECHR Article 1 of Protocol No. 1, regarding the protection of private property, and ECHR Article 10, concerning freedom of information, could be seen to further support such a environmental human right but we are limited by space to these two.

3. *Hatton and Others v. the United Kingdom*, Application No. 36022/97, judgement of 8 July 2003 [GC], paragraph 96.

4. *Hatton and Others v. the United Kingdom*, Application No. 36022/97, judgement of 8 July 2003 [GC], paragraph 98.

5. Parliamentary Assembly of the Council of Europe (Bota, José Mendes) (2009): Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, Doc. 12003 11 September 2009.

6. Parliamentary Assembly of the Council of Europe (Bota, José Mendes) (2009): Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, Doc. 12003 11 September 2009.

## Biography:

Abel Campos has a degree in Law and in Economic and Legal Sciences from the University of Coimbra. After a period in the European Commission in Brussels, he worked for a law firm in Lisbon. Since 1991 he has been in Strasbourg, first with the then European Commission of Human Rights and from 1998 with the European Court of Human Rights, where he is currently Senior Lawyer and Head of Legal Division. He has published various articles and lectured on European Convention themes, particularly in the University of Coimbra and in the Institut des Hautes Etudes Européennes (University of Strasbourg).

## CONFERENCE PAPERS

### Implementing intergenerational justice: Children at the heart of policy making

by Lucy Stone

Focusing on children and their future is a powerful way to transform the confused attempts to tackle climate change into renewed implementation of sustainable development. Protecting children’s rights to health and education for example, and planning ahead for children’s future, is not a hugely controversial idea. But when applied to climate change it renews efforts to focus decision making not on the short

term but on long term, more sustainable decisions.

Climate science indicates that even the most conservative predictions will have considerable impacts on children, particularly those in countries least responsible but most at risk; the least developed nations. The window of opportunity to prevent the worst scenarios of climate change is fast closing and many of the potential environmental

impacts are likely to be irreversible. Therefore, the current generation of adults alive today will decide the fate of many generations to come. UNICEF UK explored how focusing on child rights provides an opportunity to implement intergenerational justice in the context of climate change.

The United Nations Convention of the Rights of the Child (CRC) is the most widely ratified international human rights