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Influence of Article 9 (3) of the Aarhus Convention on Legal Standing in Estonian Administrative Courts

Most countries of the world, including Estonia, declared in 1992 in Rio de Janeiro that the better resolution of environmental issues requires public participation in decision-making, provision of access to environmental information, and ensured access to justice.^{*1} Observance of the declaration helps not only to solve environmental issues but also to implement the principle of democratic rule of law. Environment-related procedural rights significantly contribute to the transparency of the authority of the state, increase the legitimacy of decisions, ensure better protection of persons' rights, and provide for more effective implementation of laws.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters^{*2} opened for signing on 25 June 1998 in Aarhus proceeds from the above principle of the Rio Declaration and has become the most important international agreement on environmental rights. Estonia ratified this convention on 6 June 2001^{*3}, and it entered into force on 30 October 2001. By the beginning of 2009, the convention had been ratified by the European Union and all of its member states, except Ireland.^{*4}

The provisions of the convention regarding access to justice have proved the most difficult to implement.^{*5} The most problematic of these provisions is perhaps Article 9 (3). The wording of the paragraph is vague, allowing radically divergent interpretations. The purpose of this paper is to explain the meaning of Article 9 (3) of the convention and to examine whether Estonian administrative court practice complies with this provision upon giving meaning to standing. The wording and interpretation of the convention provision are therefore analysed through examination of the practice of the committee reviewing the implementation of convention requirements, and the extent of the legal standing in Estonian administrative courts and the influence of the convention provision thereon are analysed. As a result of limitations of space, the article does not discuss the

¹ Rio Declaration on Environment and Development (Rio de Janeiro, 1992). Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163> (31.03.2009). Pursuant to § 1 (2) of the Sustainable Development Act (RT I 1995, 31, 384 (in Estonian)), the Estonian National Sustainable Development Strategy is based on the principles stipulated in the decisions of the UN Conference on Environment and Development.

² Available at <http://www.unece.org/env/pp/treatytext.htm> (31.03.2009).

³ RT II 2001, 18, 89.

⁴ The current status of the ratification is displayed on the web page of the Convention at <http://www.unece.org/env/pp/ratification.htm>.

⁵ Opening remarks of Mr. M. Belka, Executive Secretary of UN Economic Commission for Europe, at the Meeting of the Parties to the Aarhus Convention in June 2008 in Riga, pp. 2–3. Available at <http://www.unece.org/env/pp/mop3/web/speechBelkaRigafinal.pdf> (22.12.2008).

compliance of administrative court procedure with the minimum requirements of Article 9 (4), and the relation of Article 9 (3) to other Estonian administrative and court procedures.

1. Article 9 of the Aarhus Convention: Access to justice

Article 9 of the convention consists of five paragraphs. The first two are closely connected to certain aspects of the right of information and participation. Paragraph 1 of Article 9 sets forth an obligation to ensure access to justice upon violation of the right to request information, established in Article 4 of the Aarhus Convention. Paragraph 2 obliges the party to ensure access to justice upon violation of the right to participate in the procedure granting permission for projects with a significant effect on the environment, stipulated in Article 6. A more detailed specification of these projects is provided in Annex 1 to the convention. Both substantive and procedural aspects can be challenged. Filing a complaint pursuant to Article 9 (2), environmental associations are not required to prove either impairment of their rights or sufficient interest.

It must be noted that, proceeding from the practice of the Supreme Court, the scope of application of Article 9 (2) of the Aarhus Convention is broader in Estonia than the text implies.⁶ The convention enables reference to paragraph 2 not only upon the impairment of Article 6 but also upon infringement of other requirements of the convention if so provided in national law. In the interpretation of the Supreme Court, this means that there is no need for a special regulation that would provide such a possibility — it is sufficient if a decision, act, or omission mentioned in the Constitution is essentially challengeable in an administrative court. Not only compliance with the convention but also compliance with other relevant legislation can be subject to challenge. Therefore, if a decision, act, or omission belongs within the competence of an administrative court, the legality thereof can be checked because of infringement of both convention provisions and other relevant legislation.⁷

Article 9 (3) of the Aarhus Convention lacks direct association with the right of information and participation. The paragraph provides:

In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Article 9 (4) of the convention lays down the minimum requirements that the access-ensuring procedures (established in paragraphs 1 to 3) must meet. Procedure shall be fair, equitable, timely, and not prohibitively expensive. Also, the powers of the body conducting procedures shall be adequate and effective, and the final decision shall be rendered in writing.

Article 9 (5) obliges each party to provide information to the public about the possibilities of access to justice, and to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

2. Possible interpretations of Article 9 (3)

The vagueness of the wording of paragraph 3 is not incidental. The negotiations preceding the adoption of the convention featured heated discussions regarding the extent (if any) to which the public should be able to demand adherence to requirements of environmental law.⁸ The initial purpose of the provision was to allow the broadest possible access to justice, but during negotiations the wording was changed such that the requirements of national law obtained a focal position.⁹ The final wording of the provision seems to reflect a lack of consensus, allowing radically different interpretations.

⁶ ALCSCd, 29.01.2004, 3-3-1-81-03. – RT III 2004, 5, 47 (in Estonian).

⁷ *Ibid.*, subparagraphs 23–27.

⁸ J. Jendroška Aarhus Convention and Community Law: The Interplay. – *Journal of European Environmental & Planning Law* 2005/1, p. 19.

⁹ M. Zschiesche. The Aarhus Convention — More Citizens' Participation by Setting out Environmental Standards? – *ELNI Review* 2002/1, pp. 26–28.

According to one radical interpretation, the provision merely constitutes a plea to broaden access to justice and fails to directly bind the parties in any respect. According to another radical interpretation, the provision gives rise to anyone's right to initiate judicial or other, similar proceedings in private or public interests. There are, naturally, several other interpretations between these extremes. Most EU Member States tended to favour the first line, claiming during the negotiations that paragraph 3 does not presume changing of national law.^{*10} Positions close to the first extreme have also been expressed in academic discussion. These state that the parties enjoy great freedom in decision upon the determination of criteria. In order to implement the provision, it is enough to have the possibility to draw the attention of state supervisory bodies to the violations, and the right to challenge omission on the part of supervisory bodies, if they fail to take relevant measures on the basis of the information.^{*11}

In the Implementation Guide to the Convention, instructions regarding the implementation of paragraph 3 remain vague, but the guide seems to exclude extreme interpretations. According to the guide, the convention makes it abundantly clear that it is not only the province of the public authorities to enforce environmental law: the public also have a role to play. The purpose of Article 9 (3) of the convention is to provide certain persons with the right to enforce environmental requirements directly or indirectly. Indirect enforcement constitutes the possibility to participate in state-initiated procedures. A person must have official status in that procedure. The convention nonetheless limits the right of the parties to determine criteria the meeting of which is prerequisite for initiation of enforcement procedure or participation therein.^{*12}

At the same time, opinions supporting the other extreme can also be found in the literature. There are, e.g., references to the possibility of considering Article 9 (3) a means for the provision of "the right to a clean environment", established in Article 1.^{*13} According to another view, paragraph 3 presumes the right of environmental organisations to file altruistic challenges in respect of all environmental matters.^{*14}

The author of this article has no doubts that the purpose of the provision is to broaden access to justice. The preamble highlights that the purpose of procedural rights is to ensure the above-mentioned right to a clean environment, on the one hand, and to provide everyone with the obligation to protect and improve the environment, on the other. The preamble also indicates that access to effective judicial mechanisms is given to the public not only for the purpose of protecting their justified interests but also for ensuring the implementation of laws. The public are not able to protect their interests, or meet the expectations imposed on them in environmental protection, if access to justice rests on ordinary restrictive criteria. Reference to this can also be found in the language referring to the criteria, "if any", laid down in paragraph 3 — if requirements meant ordinary grounds for access, this phrasing would not make sense. On the other hand, it would be odd if, upon the violation of any environmental provision (Article 9 (3)), more extensive access should be provided to justice than with regard to activities with significant environmental effect (Article 9 (2)).

With all of this taken in sum, it can be said that the convention provision is contradictory, and that on the basis of the convention alone it is difficult to decide on the extent of the obligation established in Article 9 (3). Luckily, the past years have brought certain clarity to the content of the provision with a committee reviewing the implementation of convention requirements, having had to interpret Article 9 (3) within the context of specific cases.

¹⁰ J. Jendroška (Note 8), p. 19; M. Contiero. Special Report of the European Environmental Bureau (EEB). Your Rights Under the Environmental Legislation of the EU. – EEB. 2004/016, p. 35. Available at http://www.unece.org/env/pp/Media/Your_Rights_2004_e.pdf (22.12.2008).

¹¹ V. Rodenhoff. The Aarhus Convention and its Implications for the "Institutions" of the European Community. – Review of European Community & International Environmental Law 2002 (11) 3, p. 349; M. Lee, C. Abbot. The Usual Suspects? Public Participation Under the Aarhus Convention. – Modern Law Review 2003 (66) 1, p. 105.

¹² UNECE. The Aarhus Convention Implementation Guide, pp. 130–131. Available at <http://www.unece.org/env/pp/publications.htm> (22.12.2008).

¹³ J. Jendroška. Public Information and Participation in EC Environmental Law. – R. Macrory (ed.). Reflections on 30 Years of EU Environmental Law. The Avosetta Series (7). Europa Law Publishing 2006, p. 81.

¹⁴ German Advisory Council on the Environment. Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-Governmental Organisations. Statement. No. 5. February 2005, p. 12. Available at http://www.participate.org/index2.php?option=com_docman&task=doc_view&gid=40&Itemid=50 (22.12.2008).

3. Interpretation of Article 9 (3) in the practice of the committee reviewing compliance with convention requirements

Review of compliance with the requirements of the Aarhus Convention is discussed in Article 15. According to a more detailed regulation approved by the parties, reviewing compliance with requirements is the task of the Compliance Committee, consisting of nine members. One of the tasks of the Compliance Committee is to process communications from the public. The committee reports at the 'Meeting of the Parties', which decides on the implementation of appropriate measures upon contravention of convention requirements.^{*15} Possible measures include a declaration regarding the contravention of requirements, but also suspension of rights and privileges under the convention. In view of the generality of Article 15, it is surprising that agreement could be reached on a question such as provision of the right of communication to the public, which essentially means the rights to file challenges regarding the omissions of the convention. Committee Chairperson V. Koester explains this in terms of the countries most opposing the strong convention not becoming signatories to it at once, and thus not participating in the negotiations regarding the organisation of the next convention review.^{*16}

The mechanism for reviewing compliance with the requirements of the Aarhus Convention has proved to function well. The main reason for this success is the decision to allow the public to submit communications. In most environmental conventions, this right is granted to only the parties to the convention. As communications regarding contravention of the convention can be considered to be hostile acts, the parties shall submit such communications only if significant national interests are at stake — i.e., very rarely.^{*17} In 2004–2008, the Compliance Committee received 29 communications, 28 of them from members of the public.^{*18} Several of these cases are related to Article 9 (3), but, in order to clarify the contents of the provision, two cases are especially interesting, in which the committee more thoroughly addressed the meaning of Article 9 (3): the communication from the Belgian umbrella organisation for environmental organisations, the BBL, regarding Belgian planning law^{*19}, and the communication from a citizen of Denmark, Søren Wium-Andersen^{*20}, regarding nature conservation law.

The main subject of the communication submitted by the BBL in 2005 was the excessively narrow treatment of the legal standing of environmental organisations in courts. The BBL concluded that these criteria make it especially difficult for local organisations to file challenges, even more so on account of the relevant judicial practice being inconsistent.^{*21} The main content of the communication submitted by Søren Wium-Andersen in 2006 was the lack of possibility to challenge the culling of *Corvus frugilegus* in the local government of Hillerød. Pursuant to Danish law, the legal standing of both natural and legal persons is based on specific, significant, and individual interest. Although Danish judicial practice regarding the legal standing of environmental organisations is scant, it nevertheless follows that at least some national and local organisations dedicated to nature conservation have the legal standing in disputes related to nature conservation. Natural persons, however, usually lack a legal standing regarding nature conservation.^{*22}

Addressing the cases, the committee assumed the position that the purpose of Article 9 (3) of the convention is, firstly, to enable public access to adequate judicial mechanisms in the event of acts and omissions in contravention of environmental law and, secondly, to provide means for the enforcement of environmental law to ensure its effectiveness. According to the committee, Article 9 (3) should be given meaning in compliance with articles 1–3 of the convention, with regard to paragraph 18 of the preamble.^{*23} The committee sees Article

¹⁵ Decision 1/7 taken at the Meeting of the Parties; see also decisions 2/5 and 3/6. The Committee has itself also approved several administrative documents. Available at <http://www.unece.org/env/pp/> (22.12.2008).

¹⁶ V. Koester. Review of Compliance under Aarhus Convention: A Rather Unique Compliance Mechanism. – Journal of European Environmental & Planning Law 2005/1, p. 35.

¹⁷ Statement of Committee Chairperson V. Koester at the Meeting of the Parties to the Convention in June 2008 in Riga, p. 1. Available at http://www.unece.org/env/pp/mop3/web/Veit_Koester_HLS_Panel_1_MOP_3.pdf (22.12.2008).

¹⁸ The list of communications from the public is available at <http://www.unece.org/env/pp/pubcom.htm> (22.12.2008).

¹⁹ Observations and recommendations of the Committee with respect to the communication regarding Belgium. ECE/MP.PP/C.1/2006/4/Add.2. 28 June 2006. Available at <http://www.unece.org/env/pp/compliance.archives.htm> (22.12.2008) (hereinafter: Communication Belgium).

²⁰ Observations and recommendations of the Committee with respect to the communication regarding Denmark. ECE/MP.PP/2008/5/Add.4. 29 April 2008. Available at <http://www.unece.org/env/pp/compliance.archives.htm> (22.12.2008) (hereinafter: Communication Denmark).

²¹ Communication Belgium (Note 19), items 11–19.

²² Communication Denmark (Note 20), items 13–21.

²³ Article 1 words the purpose of the Convention, which is securing the right of every member of the present and future generations to live in an environment adequate to their health and well-being. Article 2 defines the key concepts. Article 3 stipulates the general provisions of the Convention, e.g., the establishment of a transparent, clear and consistent framework to implement the provisions of the Convention. Pursuant to paragraph 18 of the Preamble, effective judicial mechanisms should be accessible to the public so that its legitimate interests are protected and the law is enforced.

9 (3) as providing the parties with great flexibility.*²⁴ The opportunity for the public to address the state and draw attention to the violation of environmental law is nevertheless insufficient for the implementation of the provision. In addition, there must be a possibility to challenge acts or omissions that contravene environmental law in the event that the state fails to take measures in relation to that matter.*²⁵ On the one hand, a party is not obliged to allow general *actio popularis*; at the same time, a party cannot establish or maintain such strict requirements that almost no member of the public has access to justice. Potential access-restricting criteria may include those of being affected or having an interest, but these criteria cannot exclude access.*²⁶ At the same time, Article 9 (3) does not presume that every person should be able to protect public environmental interests. For the implementation of the convention it suffices if a member of the public has access to justice in respect of these issues.*²⁷

With respect to the BBL communication, the committee noted that exclusion of the legal standing of certain organizations (such as umbrella organisations) is essentially not in contravention of the convention. At the same time, it is unacceptable to create a situation wherein almost no organisation is able to meet the criteria for the legal standing. It appeared from Belgian judicial practice that, in planning disputes, most if not all environmental organisations lack the legal standing. The committee estimates that the continuation of such a situation would be in contravention of Article 9 (3).^{*28} Addressing the communication from the Danish citizen, the committee concluded that Danish law cannot be considered to be in contravention of Article 9 (3) on the basis of the information at hand. Although it is likely that the person who submitted the communication cannot challenge the culling of *Corvus frugilegus* in Denmark, it has not been proved that such activity could not have been challenged by an environmental organisation. Rather, the contrary could be presumed on the basis of the scant judicial practice.*²⁹

It seems that the committee favours neither of the extreme interpretations of Article 9 (3). The committee recognises the extensive right of discretion of the parties to the convention upon establishment of the access criteria but at the same time presumes that at least some element of the public shall be granted access to justice. It appears from committee practice that access to justice pursuant to Article 9 (3) should be distinguished in the case of private and public interests. From the convention text and committee practice, it is unclear to what extent access to justice should be granted for a person in protection of private interests in cases other than the infringement of the right of information and participation. In respect of protection of the public interest, it is important to note that the committee sees the enforcement of the environmental law as a goal of Article 9 (3). What should also be highlighted is the opinion of the committee that at least some members of the public must have the right to represent public environmental interests. Given the emphasis of the role of environmental organisations in respect of the convention, the role of ensuring appropriate environmental law seems best suited to environmental organisations.

4. Implementation of Article 9 (3) in Estonian administrative court practice

In Estonian law there is no special regulation for the implementation of Article 9 (3) of the convention. There are several relevant procedures, but among them the most pertinent is administrative court procedure. The first reason for this is that most environmental disputes are disputes in public law. Another important factor is limited access under other procedures or problems with the implementation of the requirements of Article 9 (4) of the convention in these procedures.

The Estonian administrative court system has three levels. The courts of first instance are the administrative courts of Tallinn and Tartu. The courts of appeal are the Administrative Chambers of the Circuit Courts of Tallinn and Tartu. The court of cassation is the Administrative Law Chamber of the Supreme Court, whose decisions have central importance for interpretation of the law in practice. The competence of administrative courts includes adjudication of disputes in public law, especially adjudication of appeals filed against administrative acts and measures. Review of legislative acts does not fall within the competence of administrative courts.*³⁰

²⁴ Communication Belgium (Note 19), items 34–35.

²⁵ Communication Denmark (Note 20), item 28.

²⁶ Communication Belgium (Note 19), item 36.

²⁷ Communication Denmark (Note 20), item 32.

²⁸ Communication Belgium (Note 19), items 39–40.

²⁹ Communication Denmark (Note 20), items 36–37.

³⁰ Halduskohtumenetluse seadustik (Code of Administrative Court Procedure) (RT I 1999, 31, 425; 2008, 59, 330 (in Estonian)) §§ 3 and 4 (hereinafter: CACP).

4.1. The basis for access to a review procedure before administrative courts and the interpretation thereof in judicial practice

The main grounds for the legal standing of natural and legal persons in Estonian administrative courts involve violation of a subjective public right^{*31}, although some exceptions are set forth in specific laws.^{*32} According to the Supreme Court, the violation of rights means direct contiguity.^{*33} On the basis of the purpose of the violated provision and the importance of the interest of the person, the court must decide whether the provision protects only public interests or that person's interests too. Only in the event that a provision protects or must protect a person's interests, that person's subjective right to request compliance with the provision shall stem from the provision.^{*34} The legal standing of associations of persons is essentially no different from that of natural persons. Proceeding from § 7 (3) of the Code of Administrative Court Procedure (or CACP), an association of persons may file an action in the interests of the members of the association or other persons if the corresponding right is granted to the association by law. The courts have interpreted the provision narrowly, assuming the position that such a right must proceed from law expressly. The fact that an association has been established for the protection of the interests of the members is not enough for the creation of the legal standing.^{*35}

As has appeared from committee practice, Article 9 (3) of the convention does not prohibit criteria restricting access to justice. At the same time, these criteria are not to result in a situation where almost no person has access to justice in environmental disputes. A strict implementation of the criterion of violation of subjective rights, however, yields exactly this kind of result. Negative environmental effects are dispersed and generally affect a large number of persons. Upon review before the courts, it is difficult for a person to show that the impact affects him especially and that his interest is different from public or collective interest. Therefore, the violation of a subjective right is considered a very restrictive basic criterion for access to justice in relation to environmental matters.^{*36}

Estonian administrative court practice initially seemed to confirm a tendency toward the narrow interpretation. In two decisions handed down in 1999, the Supreme Court noted that a person cannot rest on the violation of environmental protection requirements because this constitutes a violation of public interest.^{*37} Also, in 2000 a court of first instance assumed the position that the legal standing could not belong to a bird protection organisation with a long history and a large membership with regard to a project that allegedly would have had a significant impact on a bird site of international importance.^{*38}

In recent years, Estonian administrative court practice has nevertheless significantly broadened the legal standing in environmental matters. Two approaches serve as the basis for a more extensive legal standing: abandonment of the criterion of the violation of a subjective right and recognition of the 'right to a clean environment'. The first of the two proceeds from Supreme Court practice. Addressing the appeal of a local municipality regarding an environmental impact assessment for extraction of mineral resources, the Supreme Court thought it necessary to note the following:

In matters pertaining to decisions on environmental issues, the legal standing cannot be given meaning identically to in ordinary administrative cases through the violation of a subjective public right. Violation of a subjective right may or may not appear in environmental matters. Therefore, the basis for the right to address the court in respect of matters of environmental protection can be not only the violation of rights but also the contiguity of the complainant by the challengeable administrative act or measure. The complainant must show that the challengeable act concerns his interests. Contiguity does not merely mean the possibility that the activity or planned activity affects the person; such effect should be significant and real. The administrative court must check such contiguity of the complainant

³¹ CACP § 7 (1).

³² Section 26 (1) of the Planning Act (RT I 2002, 99, 579; 2009, 3, 15 (in Estonian)) allows public appeals. Section 23 (1) of the Environmental Liability Act (RT I 2007, 62, 396; 2009, 3, 15; in Estonian) establishes that appeals may also be filed by persons who are affected or may be affected by environmental damage. Also, Subsection 2 presumes the violation of rights and justified interest of environmental protection organisations. These two exceptions nevertheless by far cover all possible cases of the violation of national environmental law.

³³ ALCSd, 23.03.2005, 3-3-1-86-04. – RT III 2005, 11, 109 (in Estonian).

³⁴ SPSCd, 20.12. 2001, 3-3-1-15-01. – RT III 2002, 4, 34 (in Estonian).

³⁵ ACSr, 10.04.2001, 3-3-1-16-01. – RT III 2001, 12, 125 (in Estonian); see also Tallinn CCr, 7.12.2006, 3-06-2199.

³⁶ N. Sadeleer. Synthesis of the National Reports. – N. Sadeleer, G. Roller, M. Dross et al. Access to Justice in Environmental Matters and the Role of NGOs. Groningen: Europa Law Publishing 2005, p. 185.

³⁷ ALCSd, 7.06.1999, 3-3-1-26-99. – RT III 1999, 20, 189 (in Estonian); ALCSd, 25.05.1999, 3-3-1-23-99. – RT III 1999, 18, 171 (in Estonian).

³⁸ Saare County Court, 22.12.2000, 4-15/2-2000.

by the challengeable activity separately in every case. The requirement for significant and real contiguity excludes filing an appeal in public interests.^{*39}

The decision of the Supreme Court to abandon the criterion of the violation of a subjective right in relation to environmental matters seems revolutionary. The weight of the decision is, however, considerably decreased by the fact that the Supreme Court has remained very taciturn. The abandonment of the criterion of the violation of a subjective right was probably due to the wish to broaden the environment-related legal standing, but it is far from clear what kind of connection the requirement presumes to be shown. Possibilities include a very narrow interpretation, which fails to significantly broaden the legal standing as compared with the violation of subjective rights, as well as a very broad interpretation, which enables protecting any collective and dispersed interests that are associated with the person. The only clear instruction is the illegality of an appeal to be filed in public interests.

In some decisions of the courts of first instance and the courts of appeal, another way has been chosen for the broadening of the environmental legal standing, recognising the subjective right to a clean environment. This right is not expressly mentioned in the Constitution of Estonia. The right is most associated with § 53 of the Constitution, in the chapter on fundamental rights and duties, which lays down: "Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law." The Tallinn Circuit Court in particular has assumed the position that there is a fundamental environmental right stemming from the provision.^{*40} Closer attention should be paid to a decision of 2008 that highlights the content of this right and the relation thereof to the legal standing. In the case in question, the Ministry of the Environment had left part of a city park in the ownership of the state, determining its intended purpose to be residential land, and then had decided to sell it as unnecessary. The respective decisions were challenged by a resident of a building adjacent to the park. The court of first instance assumed the position that the subjective rights of the complainant had not been violated. The Circuit Court did not agree. The court concluded that, pursuant to § 53 of the Constitution, a person has a right to demand from the state the preservation of the environment at least in the event that it affects his or her living environment. According to the court, the judicial protection provided under § 53 of the Constitution nevertheless presumes significant and real contiguity. Contiguity cannot be confined to cases where a person's life, health, property, or other fundamental rights are damaged through environmental impact. The fundamental environmental right is directly aimed at the preservation of environmental values, not only at avoidance of violations of other fundamental rights through environmental damage. Environmental impact involves personal contiguity despite the impact on other fundamental rights if a person has used the ordinarily affected environmental resource, if the person often stays in said environment, or if the person has closer contact therewith than the rest of the public, or if the person's wellbeing significantly depends on the environmental impact in other ways. The court assumed the position that a person's living environment constitutes not only registered immovable or apartment ownership but also at least the public space immediately surrounding the place of residence, especially parks and green areas in the vicinity of the place of residence, and also areas where the person usually walks, engages in sports, plays with a child, or spends time in other ways. An appeal filed for the purpose of preserving a person's own living environment and ensuring the possibility of using it cannot be equated with an appeal filed in local government interests or public interests (a public appeal). The fundamental environmental right presumes that concerned persons have been effectively incorporated into making of decisions that can entail changes in their living environment, that such decisions have been motivated, and that damaging a living environment and restricting the use thereof only take place with significant reasons.^{*41}

The Circuit Court thus relates the right to a clean environment to significant and real contiguity highlighted by the Supreme Court and gives it meaning primarily with content related to actual usage of the environment. It is, however, impossible to say at present whether the Supreme Court considers this approach to be correct. The decision of the District Court undoubtedly significantly broadens the legal standing as compared with the interpretation of the violation of subjective rights, enabling filing of appeals also in protection of collective and dispersed interests. At the same time, the scope of the legal standing does not become entirely clear from the decision of the Circuit Court. For example, it needs to be specified which elements of a city environment are subject to the right and in which cases "the well-being of a person [may] depend on environmental impact in other ways".

The impact of Article 9 (3) of the convention on this decision is difficult to determine on the basis of the Supreme Court decision and the Circuit Court decision. The courts do not analyse this provision of the convention nor refer to it directly. The author of this article would still dare to suppose that the provision has been taken into consideration in both cases. In the above-mentioned case and other decisions^{*42}, the Supreme

³⁹ ALCS Cd, 28.02.2007, 3-3-1-86-06. – RT III 2007, 9, 78 (in Estonian).

⁴⁰ See, e.g., Tallinn CCd, 15.12.2004, 2-3/140/04; Tallinn CCr, 13.08.2007, 3-07-102; Tallinn CCd, 18.03.2008, 3-06-1136.

⁴¹ Tallinn CCd, 18.03.2008, 3-06-1136.

⁴² See, e.g., ALCS Cr, 7.05.2003, 3-3-1-31-03. – RT III 2003, 18, 167 (in Estonian); ALCS Cd, 29.01.2004, 3-3-1-81-03; ALCS Cd, 28.11.2006, 3-3-1-86-06.

Court has referred to the convention, and it is hard to believe that Article 9 (3) has been left without attention. In the decision of the Circuit Court, consideration of Article 9 (3) of the convention seems to have been even more likely, if one bears in mind that, while addressing the right to a clean environment, the court refers to Articles 1 and 9 of the convention, among other sources. Even if Article 9 (3) has not played a significant role in the deliberations of courts, it can be said that the broadening of the legal standing in administrative court practice is consistent with the purposes of the convention. Although final conclusions cannot be drawn on the basis of scant judicial practice, it seems that giving meaning to significant and real contiguity in the Circuit Court decision complies with Article 9 (3) of the convention and implements it at least on a minimum level.

4.2. Direct application of Article 9 (3)

Pursuant to § 123 (2) of the Constitution of the Republic of Estonia, the sufficiently appropriate provisions of ratified international treaties shall be directly applicable if they are in conflict with laws or other legislation. Courts have repeatedly applied Article 9 (2) of the convention directly with regard to appeals filed by organisations.^{*43}

The convention fails to specify the requirements an association of persons must meet such that violation of the rights of the association could be presumed pursuant to Article 9 (2). Pursuant to Article 2 (5) of the convention, the organisation must be non-governmental, promote environmental protection, and meet the requirements established by the parties to the convention. In other words, the convention provides parties with relatively great freedom of decision regarding which criteria an association of persons must meet in order to qualify as an environmental organisation. The applicable Estonian legislation lacks relevant detailed requirements.^{*44} The courts have nevertheless not been held back by the lack of criteria; they have recognised the appeals of several not-profit organisations, the legal standing of a foundation, and also the legal standing of a two-member non-legal-person *ad hoc* protest group on the condition of it representing the opinion of a significant proportion of local residents.^{*45}

Pursuant to Article 9 (3) of the convention, access must be granted for a member of the public who meets the requirements for the right of a party, if such requirements have been established. Considering that Estonian courts have not seen the lack of more precise national requirements as an obstacle in Article 9 (2), one could presume that this would not be a problem in the case of paragraph 3 either. However, Estonian courts have referred to the provision only in isolated cases. Paragraph 3 has been directly referred to in only two decisions of the Tartu Administrative Court.^{*46} In neither of these has that court recognised the legal standing on the basis of the provision, but in principle it did accept the possibility of recognition thereof. The court was of the view that Article 9 (3) can be relied on by a representative of the public upon protection of public environmental interest. It is possible that this situation was a consequence of the Estonian text of the convention, which misleadingly defines a 'member of the public' with a term that directly translates as 'representative of the public'. At the same time, it was considered possible in one of these decisions to apply the provision on the condition that the person was affected by the activity permitted by the challenged administrative act. Another curious example is a decision of the Tallinn Administrative Court^{*47} wherein Article 9 (2) is referred to but the text abstracted by the court adheres instead to the wording of paragraph 3. In this case, an environmental organisation had filed an appeal concerning failure of the Minister of the Environment to revoke the licence of an environmental impact assessment expert who had provided false assessments. The Ministry of the Environment pointed out that retention of the licence does not violate the rights of the environmental organisation and that the organisation cannot rely on Article 9 (2) of the convention, because the provisions of the convention do not regulate the issuing of licences. The court did not agree with the Ministry of the Environment. The court stated that due to its statutes the organisation has sufficient interest that the licence is given only to a person competent to assess environmental impact.

In summary, it is impossible to claim with confidence on the basis of individual decisions that the courts are ready for the direct application of Article 9 (3), although the decisions of the courts of first instance do seem to confirm this. At the same time, it should be stressed that no decision of a higher court that is central with

⁴³ ALCSCd, 28.11.2006, 3-3-1-86-06 (Seltsing Roheline Urveste); see also Pärnu AC, 24.11.2003, 3-119/2003 (MTÜ Eesti Ornitoloogiaühing), Tartu AC, 2.12.2002, 3-289/2002 (MTÜ Eesti Looduskaitse Selts), Tallinn AC 17.10.2003, 3-1398/203 (MTÜ Eesti Roheliste Liikumine), Tallinn AC, 11.09.2003, 3-1207/03 (MTÜ Nõmme Tee Selts), Pärnu AC, 24.11.2003, in the administrative case No. 3-119/2003 (SA Eestimaa Looduse Fond).

⁴⁴ An exception is the Environmental Liability Act, which defines the concept of an environmental organisation in the context of this Act (§ 24). Pursuant to the provision, a non-governmental environmental organisation means a non-profit association or a foundation which, pursuant to its statutes, promotes environmental protection, also an association promoting environmental protection which is not a legal person and which represents the opinions of a significant part of local residents.

⁴⁵ See Note 43.

⁴⁶ Tartu ACd, 24.04.2006, 3-06-271; Tartu ACd, 23.10.2008, 3-08-1199.

⁴⁷ Tallinn ACd, 17.10.2003, 3-1398/2003.

regard to the environmental legal standing has expressly relied on Article 9 (3). The author of this article believes that the courts' cautiousness in addressing the implementation of Article 9 (3) of the convention can be explained by the vagueness of the provision, poor translation into Estonian, and the radicalism with which the provision seems to change the bases for access to justice. Also, there is no need for direct application of the provision if broad meaning is given to the requirement of significant and real contiguity.

5. Conclusions

The most difficult aspect of implementation of the Aarhus Convention has turned out to be securing access to justice. Among the relevant convention provisions, the most problematic is Article 9 (3), regulating access to justice in the event of the violation of any provision of national environmental law. The paragraph allows radically different interpretations. According to one radical interpretation, the provision merely constitutes a plea to broaden access to justice and fails to directly bind the parties in any respect. According to another extreme interpretation, the provision allows public appeals on all environmental matters. From the text of the convention and related literature, arguments can be found in favour of either interpretation.

In analysis of the practice of the committee reviewing compliance with the convention's requirements, it appears that the committee favours neither of the extreme interpretations of Article 9 (3). The committee recognises the extensive right of discretion of the parties in establishment of the access criteria, but at the same time it presumes that at least some portion of the public, especially environmental organisations, shall be granted access to justice upon violation of any provision of national environmental law, in order to protect public environmental interests.

The main grounds for the legal standing in Estonian administrative courts is the violation of subjective public rights. The violation of a subjective right is considered a very restrictive criterion for access to justice in relation to environmental matters, because the ordinary interpretation of the criterion presumes direct and special contiguity. Estonian administrative court practice initially seemed to confirm a trend toward narrow interpretation, but in recent years the courts have considerably broadened the environmental legal standing. Two approaches serve as the basis for this more extensive legal standing: abandonment of the criterion of violation of subjective rights and replacement of it with the requirement of significant and real contiguity in the decisions of the Supreme Court, and the recognition of the right to a clean environment in the decisions of the Tallinn Circuit Court. On account of the brevity of the relevant Supreme Court decision, it is unclear how extensive a legal standing the criterion provides. It appears from Circuit Court decisions that the environmental legal standing is broad and follows Article 9 (3) of the convention at least on the minimum level. Neither Supreme Court nor Circuit Court decisions analyse or refer to Article 9 (3) of the convention, but it may be supposed that in both cases the provision has been taken into consideration. Pursuant to the Constitution, it would in principle be possible to apply the provision directly, and some courts of first instance seem to be rather accepting of this possibility. The cautiousness of the courts with respect to the implementation of Article 9 (3) of the convention can be explained by the vagueness of the provision, poor Estonian translation, and the radicalism with which the provision seems to change the bases for access to justice. Also, there is no need for direct application if one wishes to give a broad meaning to the requirement of significant and real contiguity.