Volume 22, Issue 2
December 2024

ISSN 1731-8297, e-ISSN 6969-9696
http://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2024-07-04
accepted 2024-10-09
published online 2024-11-07

The substantive right to environment and the procedural environmental rights under the Aarhus Convention – Part II

Materialne prawo do środowiska a uprawnienia proceduralne według Konwencji z Aarhus – Część II

JERZY JENDROŚKA
Opole University
ORCID: 0000-0002-0436-099X, jjendroska@uni.opole.pl

Citation: Jendrośka, Jerzy. 2024. The substantive right to environment and the procedural environmental rights under the Aarhus Convention – Part II. *Opolskie Studia Administracyjno-Prawne* 22(2): 43–83. DOI: 10.25167/osap.5633.

Abstract: The current article provides Part II of the study presenting the mutual relations between substantive and procedural environmental rights against the background of the typology of the substantive rights to the environment and challenges encountered when designing the right to a healthy environment. While Part I was devoted to presenting the development of the respective legal provisions regarding substantive rights, including both human rights and Rights of Nature, the current Part II follows it by presenting the genesis and conceptual roots for the UNECE Aarhus Convention as an attempt to codify environmental procedural rights and foster participatory democracy in environmental matters. In this context a more detailed account is provided regarding the process of including a reference to a substantive right to environment in the Aarhus Convention and the final design of Article 1 addressing this issue. This is complemented with a brief overview of the scope and structure of the Convention and its links with Principle 10 of the Rio Declaration as well as with some comments regarding the design of the Convention which is commonly considered to employ a "rights based approach". The above analysis provides the basis for the remarks regarding the respective roles of the three types of legal schemes of access to justice as regulated by paragraphs 1, 2 and 3 of Article 9 of the Aarhus Convention in protecting environmental rights covered by the Convention and – more generally – in

participatory democracy. In this respect the conclusions of the study runs counter many of the conventional views.

First of all it shows that access to justice provisions under Article 9.1 cover only access to information rights under Article 4, while possibility to enforce provisions of Article 5 (commonly considered as also providing rights to the public) is not very clear under the Convention. Secondly, access to justice provisions under Article 9.2 only in case of environmental organizations can be treated as a remedy regarding participation rights, while in case of natural persons it may be treated only as a remedy regarding their subjective rights to a "private" environment while their possibility to enforce provisions of Article 6 (providing procedural participation rights to the public) is not very clear under the Convention. Thirdly, Article 9.3 cannot be treated as a remedy in relation to a substantive right to a healthy environment referred to in Article 1 of the Convention, and its role as a remedy regarding other procedural rights granted by the Convention is far from being clear as the Convention provides in this case quite a wide discretion to the Parties in establishing the criteria for standing. Finally, the results of the study underlines the need for interpreting Article 9.3 in light of the various conceptual roots of the Convention i.e. not only in relation to environmental rights but also in relation to its role in assuring the effectiveness of environmental protection and fostering participatory democracy and the rule of law.

Keywords: right to environment, Aarhus Convention, procedural environmental rights

Abstrakt: Niniejszy artykuł stanowi część II studium przedstawiającego wzajemne relacje między materialno-prawnymi i proceduralnymi uprawnieniami do środowiska na tle zróżnicowanego charakteru uprawnień o charakterze materialno-prawnym i wyzwań napotykanych przy projektowaniu prawa do zdrowego środowiska. Podczas gdy część I poświęcona była przedstawieniu rozwoju odpowiednich przepisów prawnych dotyczących uprawnień o charakterze materialno-prawnym, w tym zarówno praw człowieka, jak i praw przyrody (tzw. Rights of Nature – RoN), niniejsza część II stanowi ich kontynuację, przedstawiając genezę i koncepcyjne korzenie Konwencji EKG ONZ z Aarhus jako próby skodyfikowania środowiskowych praw proceduralnych i wspierania demokracji uczestniczącej w kwestiach środowiskowych. W tym kontekście przedstawiono też bardziej szczegółowy opis procesu włączania do Konwencji z Aarhus również odniesienia do materialnego prawa do środowiska oraz ostateczny kształt Artykułu 1 Konwencji odnoszącego się do tej kwestii. Uzupełnieniem tego jest krótki przegląd zakresu i struktury Konwencji oraz jej powiązań z Zasadą 10 Deklaracji z Rio de Janeiro, a także kilka uwag dotyczących struktury normatywnej Konwencji, powszechnie uważanej za bazującą na „podejściu opartym na uprawnieniach" (tzw. *rights-based approach*). Powyższa analiza stanowi podstawę dla uwag dotyczących odpowiedniej roli trzech rodzajów systemów prawnych uregulowanych w art. 9 ust. 1, 2 i 3 Konwencji z Aarhus w ochronie materialnych praw środowiskowych i demokracji uczestniczącej. W tym zakresie wnioski z badań odbiegają od konwencjonalnych poglądów.

Po pierwsze, wnioski z badań wskazują, że postanowienia art. 9 ust. 1 dotyczące dostępu do wymiaru sprawiedliwości obejmują jedynie dostęp do informacji na podstawie art. 4, podczas gdy możliwość egzekwowania postanowień art. 5 (powszechnie uważanego za zapewniający również prawa społeczeństwa) nie jest zbyt jasna na gruncie Konwencji. Po drugie, przepisy o dostępie do wymiaru sprawiedliwości z art. 9 ust. 2 tylko w przypadku organizacji ekologicznych mogą być traktowane jako środek odwoławczy dotyczący praw do udziału w postępowaniu, podczas gdy w przypadku osób fizycznych mogą być traktowane

jedynie jako środek odwoławczy dotyczący ich praw podmiotowych do „prywatnego" środowiska, a możliwość egzekwowania przez osoby fizyczne przepisów proceduralnych art. 6 (zapewniających społeczeństwu uprawnienia do udziału w postępowaniu) nie jest zbyt jasna w świetle Konwencji. Po trzecie, art. 9 ust. 3 nie może być traktowany jako środek odwoławczy w odniesieniu do materialnego prawa do zdrowego środowiska, o którym mowa w art. 1 Konwencji, a jego rola jako środka odwoławczego w odniesieniu do innych praw proceduralnych przyznanych przez Konwencję jest daleka od jasności, ponieważ Konwencja zapewnia w tym przypadku dość szeroką swobodę Stronom w ustalaniu kryteriów legitymacji procesowej. Wreszcie, wyniki badania podkreślają potrzebę interpretacji art. 9 ust. 3 w świetle różnych konceptualnych korzeni Konwencji, tj. nie tylko w odniesieniu do praw środowiskowych, ale też w odniesieniu do jej roli w zapewnianiu skuteczności ochrony środowiska oraz wspieraniu demokracji uczestniczącej i rządów prawa.

Słowa kluczowe: prawo do środowiska, Konwencja z Aarhus, uprawnienia proceduralne

1. Introduction

The current article provides Part II of the study presenting the mutual relations between substantive and procedural environmental rights under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark in 1998 ("Aarhus Convention"). While Part I was devoted to presenting the development of the respective legal provisions regarding substantive rights, including both human rights and Rights of Nature, the current Part II follows it by focusing on the role of the Aarhus Convention as an attempt to codify environmental procedural rights and foster participatory democracy in environmental matters. In this context Section 2 presents the genesis of the Convention and its various conceptual roots. As a background, subsection 2.1 provides a short overview of diverse practices and a need for establishing international standards in relation to procedural environmental rights while subsection 2.2 presents some remarks regarding the respective negotiations and their context. Both issues are extensively covered in the literature, including by the writings of the current author, thus the account in the current study is limited to some key issues, while referring the reader to other accounts.

Following the background in subsection 2.1, in subsection 2.3 a role of the conceptual roots in the interpretation of the objectives of the Convention is presented and their categorization is proposed, taking into account both the references in the Preamble to the Convention and aims of the study. Finally a brief account is provided of the three main conceptual roots of the Aarhus Convention, namely: protection of rights (subsection 2.4), effectiveness of environmental protection (subsection 2.5) and democratization/better governance (subsection 2.6).

Section 3 of Part II provides a brief analysis of the legal content and design of the Aarhus Convention as an attempt to codify environmental rights and foster participatory democracy in environmental matters. The analysis starts with presenting in subsection 3.1 the process of the negotiations regarding inclusion of a substantive right to environment, which includes some not well known information regarding legislative history of the negotiations. This is followed in subsection 3.2 by a brief overview regarding the final scope and structure of the Aarhus Convention, which – addressing the issue well covered in the literature, including by the writings of the current author – is limited to providing only a basic information of importance for further discussion. On this basis in subsection 3.3 the relations between the Convention and Principle 1 of the Stockholm Declaration and Principle 10 of the Rio Declaration are discussed. This discussion, in turn, provides a background for some comments in subsection 3.4 regarding the design of the Convention which is commonly considered to employ a "rights-based approach". In this context – and drawing heavily on the discussion in Part I regarding the legal nature of different types of environmental rights – some key research questions are posed concerning the possibilities offered by the Convention to protect such rights, ie the issue which is addressed in Section 4.

Section 4 presents in subsection 4.1 a short overview of the final structure of Article 9 of the Convention and the three different legal schemes regulated therein as well as some introductory remarks regarding their role in protecting the respective environmental procedural rights granted by the Convention. This is followed by presenting in subsection 4.2 the legal scheme in Article 9.1 and providing some comments regarding its role in relation to the rights granted by the first pillar of the Convention concerning access to information. Then subsection 4.3 presents the legal scheme in Article 9.2 and provides some comments regarding its role in relation to the rights granted by the second pillar of the Convention concerning public participation in environmental decision-making. Finally subsection 4.4 presents the legal scheme in Article 9.3 and its role in relation to both the substantive right to environment indicated in Article 1 of the Convention but also to the procedural rights granted by the Convention but not covered – as discussed in subsections 4.2 and 4.3 – by the respective provisions of Article 9.1 and Article 9.2 of the Convention.

Section 5 provides conclusions regarding the mutual relations between the various types of substantive right to the environment and procedural environmental rights as regulated by the Aarhus Convention. It is focused on discussing the role of access to justice under art. 9 of the Aarhus in protecting environmental rights and participatory democracy in environmental matters. In this respect the conclusions of the study runs counter the conventional views, and show that ac-

cess to justice provisions under the Aarhus Convention neither provide sufficient means to protect environmental rights nor – in light of the various conceptual roots of the Convention - should be treated as having only such a role.

The discussion regarding Aarhus Convention is often illustrated by, and sometimes even based on, the relevant opinions of the of the Aarhus Convention Compliance Committee (ACCC), which is a special body established to monitor compliance with the Convention[1], and which is considered to issue „rulings which interpret and clarify provisions of the convention" as a result of which „a body of case law is emerging" (Boyle 2015: 214).

2. Genesis and conceptual roots of the Aarhus Convention

2.1. Diverse practices and need for establishing international standards

As indicated in Part I, already in 1980s and early 1990s the procedural environmental rights started increasingly being acknowledged in legal frameworks at the international, supranational and national level. As a result of these processes access to environmental information and public participation in environmental decision-making were soon considered to be well established concepts in the international law, with virtually all binding environmental law instruments referring to the need to assure access to environmental information and public participation in environmental decision-making (Jendrośka and Stec 2001: 143). Also at the supranational level there were binding pieces of the Community law in these fields (Jendrośka 2005: passim). Quite a different was the situation with access to justice in environmental matters, which – as compared with access to information and public participation – was relatively rarely and only selectively addressed in the international environmental law and Community law (Jendrośka 2020a: 375-377). At the national level – in the absence of any international or Community standards – both legislation and practice were very diversified (Ebbesson 2002: passim and de Sadeleer, Roller and Dross 2005: passim).

Gradually, due to the impact of Principle 10 of the Rio Declaration and some geopolitical changes, the matters like transparency or public participation started to be perceived in the 90s differently as at the time of Stockholm Conference, when they were considered as "parts of states '*domaine reserve*' and essential attributes of state sovereignty, rather than subject to international treaty-making" (Ebbesson 2022: 83). In this context some commentators observed that while some other "environmental principles enshrined in the Rio Declaration prompted the adoption of general environmental international covenants… it is surprising

[1] About the origins, status and composition of ACCC see Jendrośka 2011: passim.

that no such global legal agreement was concluded with respect to such an essential principle as that contained in Principle 10" (Szabo 2014: 100). As in case of other environmental issues, also in this case the trace was blazed within the UNECE region[2]. Following the increased recognition of the role of the public in environmental protection and the importance of procedural environmental rights, it was widely recognised in Europe that mere general obligations, although binding but referring mostly only to national legislations, would not be sufficient for the purpose and that some details, based on good practices in this respect, should be standardized throughout Europe by way of adopting an international instrument specifically and exclusively devoted to citizens' procedural rights, and one that would regulate them in a possibly comprehensive manner.

Significant breakthrough in this respect was brought by the European environment ministers within the "Environment for Europe" Process[3], who elaborated the Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making. The idea of the Guidelines originated at the Second Ministerial Conference in Lucerne, Switzerland, in April 1993 and they were endorsed at the Third Ministerial Conference in Sofia, in October 1995 (Ebbesson 2022: 83).

The Guidelines reflected political will of Ministers to make standard rules concerning these issues throughout Europe but had only a non-binding nature of a "soft law". Therefore adoption of the Guidelines was paralleled by a mandate given to a Working Group to adopt an international legally binding instrument in form of a UN ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, a draft of which the Ministers requested to be ready at their IV "Environment for Europe" Conference to be held in June 1998 in Aarhus, Denmark[4].

2.2. Negotiations and their context

The Aarhus Convention negotiations were conducted between June 1996 and March 1998 and included ten negotiating sessions (nine in Geneva and

[2] UN Economic Commission for Europe (UNECE) is one of the regional commissions of the UN system. It covers all European countries, countries of Northern America (USA and Canada) and all countries of former Soviet Union (thus includes also Central Asian countries).

[3] „Environment for Europe" – is a process of co-operation on environmental issues initiated following the collapse of communism to gather ministers of environment protection from the entire UNECE region. They meet regularly in the Ministerial Conferences to discuss issues of common interest for the environment in the region (starting from Dobris, Czechoslovakia, 1991; Luzern, Switzerland, 1993; Sofia, Bulgaria, 1995; Aarhus, Denmark, 1998 and so on).

[4] For more about the mandate and respective political process see Jendrośka 2020-1: 379-380.

one in Rome) as it was originally scheduled. The basis for the negotiations was the draft text prepared by a small group of experts (so called "Friends of the Secretariat") convened by the UNECE Secretariat (Aarhus Implementation Guide 2014: 16).

It took two years to negotiate the Convention. It was a very difficult task despite of extremely co-operative approach of all partners. More than 40 Governments were involved in the negotiations together with representatives of various international organizations and representatives of the public. Worth mentioning in this context is the role of environmental organizations (NGOs).

General recognition of NGOs for their knowledge, expertise and representation of public opinion (Sharman 2023: 341), as well as appreciation for the role of NGOs in environmental protection, have resulted in granting some of them a formal status in international decision-making (Raustiala 1997: passim). Article 71 of the UN Charter allowed to extend to NGOs the so called "consultative status" which includes access to UN meetings and even the right to intervene orally and to submit written statements. Following this, NGOs were prominent during the Rio Conference with nearly 1500 NGOs being accredited and actively participating (Kiss and Shelton 2007: 69-70). While the scale, variety and sophistication of NGOs involvement in Rio Conference were considered to be unprecedented in the previous history of international environmental decision-making (Haas, Levy and Parson 1992: 29), a couple of years later the Aarhus Convention went even further regarding the degree of public participation in the negotiations[5]. Bearing in mind the concerns regarding weak internal participatory process within NGOs themselves and lack of accountability mechanism (Sherman 2023: 342), especially the process of selecting the representatives of the public to participate in the negotiations may be is considered as "significant contribution to the development of international law" (Jendrośka and Stec 2001: 147). The recent attempts during the Escazu Agreement negotiations to follow the example of Aarhus Convention negotiations regarding the involvement of civil society proved to be difficult (Jendrośka 2020b: 75-76), despite the fact that the subject matter of both treaties was quite similar and concerned the procedural environmental rights of the public, which itself was a matter where knowledge, expertise and representation of public opinion provided by NGOs was of utmost relevance.

As far as the Aarhus Convention negotiations are concerned, the negotiators represented countries with often extremely divergent traditions, religions and legal cultures, different levels of economic development and various political

[5] A very detailed account of the participation of civil society organizations in this negotiations is provided in the report written by M. Toth-Nagy (Toth-Nagy 2001: passim)..

systems. On the other hand the historical and political context had a significant impact on the negotiations[6]. The adoption of the Aarhus Convention coincided with the transition of a significant number of countries in the UNECE region from a centrally-controlled, communists' system with state-owned economy to multi-party, pluralistic societies with market economy (Jendrośka 2021: 346). Equally important was the fact that it was negotiated when the ideas of liberal democracy seemed to be prevailing in many parts of the world and the general mood in Europe was very favourable towards participatory democracy, including citizens' environmental rights (Jendrośka 2012:90).

2.3. Role and categorization of conceptual roots influencing Aarhus Convention

The view, as clearly expressed by Barrit, that „Aarhus Convention ought to be interpreted in light of its various stated and implied purposes" and that „understanding of its purposes can only be achieved by looking at the theoretical ideas that underpin them" (Barrit 2020: 16), while perhaps not always so clearly stated, has nevertheless been present in many of the academic accounts dealing with the Aarhus Convention ever since it was adopted[7]. While the importance of theoretical ideas providing conceptual roots for the Convention seems to be commonly shared, there is no common approach to the actual list of such theoretical ideas. The proposal of Barrit to differentiate in this respect the three concepts, namely environmental rights, environmental democracy and environmental stewardship (Barrit 2020: passim), does not seem to be appropriate for the current study, which seeks to examine the consequences of the founding concepts for the interpretation of the concrete provisions of the Convention. Much more appropriate for the purpose, though not sufficient, seems to be the views based on the practical experience from the participation in the negotiations, expressed already in 2001 and referring to dual foundations: rights and administrative efficiency (Jendrośka and Stec 2001: 141-142).

Before presenting the proposal for listing the theoretical concepts influencing the drafters and having impact on the concrete provisions of the Convention, one needs to draw attention to the fact that – unlike for example in case of the Escazu Agreement[8], which was adopted 20 years later – the Aarhus negotia-

[6] Some authors even claim „that Aarhus' propagation, under UNECE, would have been infeasible without the democratisation accompanying the Cold War's end (Weaver 2023: 72).

[7] See for example: Weaver 2023:passim or Bandi 2014: passim.

[8] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean adopted in 2018.

tions were not based on any systematic and comprehensive research regarding respective both international, supranational and national laws and practices (Jendrośka 2021: 347-348). Practically the only available research was done in relation to access to environmental information within a study commissioned by the European Commission and reflected in a book edited by Ralf Hallo (Hallo 1996: passim), but there were no comprehensive region-wide studies on public participation and not even any general overview of the situation regarding access to justice (Jendrośka 2005b: 64-67). Thus the negotiations were influenced either by well-known inspirations coming from the US (like for example the famous essay of Christopher Stone already mentioned in Part I) or some available studies dealing with specific issues in Europe[9].

For the purpose of the current study the most suitable method of finding the conceptual roots of the Convention seems to be the examination of the preambular paragraphs with a view to identify the concepts that did inspire the drafters significantly enough to be referred to in its Preamble. To this effect one needs to elaborate the above reference to the "dual foundations" and develop slightly the categorization of the conceptual roots for granting environmental information and participation rights in the Community law as proposed many years ago by the current author (Jendrośka 2005: 64-67).

Thus – again for the purpose of the current study – the following concepts may be identified as providing the conceptual roots and motivations for the Convention and the basis for some of its particular provisions:

1) Protection of various types of rights;
2) Effectiveness of environmental protection;
3) Democratization and good/better governance.

Generally, the ideas related to the above three conceptual roots of the Aarhus Convention provided the background for the Aarhus Convention and heavily inspired its content. They were being used often interchangeably or in parallel to provide justification or the context for certain concrete proposals submitted during the negotiations and the provisions of the Convention cannot be interpreted without bearing these concepts in mind. The above three conceptual roots of the Aarhus Convention will be further described in the below subsections by reference to the respective paragraphs in the Preamble to the Convention in light of both the relevant policy document and views in the literature and – where relevant – the previous discussion in Part I. This exercise should facilitate proper interpretation of the legal meaning and scope of application of some provisions of the Aarhus Convention, in particular those related to access to justice.

[9] See examples in Jendrośka 2020a: 377 and 385

2.4. Protection of rights

The Convention is commonly considered to employ a "rights-based approach" (see discussion in Section 3.4 below) and usually the concept of rights is considered to be the core idea behind the Convention – although, as sometimes indicated in the literature, the very term "right" is generally avoided in the Convention (Ebbesson 2002:12).

As far as the concept of rights is concerned, this is not a coincidence that the first two paragraphs of the Preamble to the Convention refer to principle 1 of the Stockholm Declaration (devoted to a substantive right to environment) and principle 10 of the Rio Declaration (devoted to procedural rights). Apart from these two general references, the Preamble to the Convention refers to the concept of rights in a number of other paragraphs. It refers both to the substantive right to a "healthy" (para 3) or "adequate" (para 7) environment and to procedural rights (paras 3 and 8). In case of substantive rights the Preamble refers to the general right to a healthy environment (paras 1 and 7) but also to "basic human rights" (para 6) and to "legitimate interests" (para 18), which no doubt cover the right to protect "private" environment as discussed in Part I. Furthermore, a reference to making "effective judicial mechanisms .. accessible.. to organizations" (para 18) together with a reference (para 22) to UNECE Sofia Guidelines (which indicates in its own Preamble "access to the courts… for individuals and public interest groups") makes it clear that the drafters of the Convention clearly wanted to address the shortcomings of the traditional approach to access to justice that in their view resulted in ruling out public interest litigation (as discussed in Part I).

The discussion about the various concepts of rights as conceptual roots of the Convention would not be complete without addressing the role of Rights of Nature (RoN) in this context. Most authors do not address this issue, and Barrit even clearly says that it is "outside of the scope of the Aarhus Convention" (Barrit 2020: 76). While "in relation to stewardship purpose" she sees "scope for more ecocentric approach to the Convention" she claims that the "language of Article 1 makes the rights purpose explicitly anthropocentric" (ibid: 43). This observation is indeed correct when it comes to Article 1 which is focused on the link between a substantive human right to environment and procedural environmental rights, but the rationale for granting procedural rights is by far more broad and includes also their potential role for implementing RoN. This is not without a reason that the Preamble to the Aarhus Convention (para 3) makes a reference to the already mentioned in Part I the UN World Charter for Nature (which provides a number of principles and rules to protect the Nature) because the key issue of RoN – as discussed in Part I of this study – shall be seen in the context of the need to provide legal possibilities to defend

the Nature. This must be taken into account when interpreting the concrete provisions of the Aarhus Convention, in particular those – as will be discussed below – related to the access to justice.

2.5. Effectiveness of environmental protection

Effectiveness of environmental protection has always been one of the concerns associated with adopting new legal instruments in this field, and – as it was mentioned in Part I – already in the 1970s the development of legal measures serving the civic activity of the public was seen as one of the measures to this end. As indicated in Part I of this study - in Stockholm Declaration it resulted in proclaiming a substantive right to the environment as one of the human rights, while in the Principle 10 of the Rio Declaration the stress was put on the procedural environmental rights of the public: access to information, participation in decision-making, and access to justice in environmental matters. They were all clearly indicated in the context of effectiveness of environmental protection ("Environmental issues are best handled…"). Thus this is not without a reason that the Preamble to the Convention (para 2) makes generally a clear reference to Principle 10 of the Rio Declaration and states in particular that "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions" (para 9) while "effective judicial mechanisms should be accessible to the public.. so that … the law is enforced" (para 18).

The above stress on procedural rights as tools for assuring effectiveness of environmental protection has always been particularly visible in the approach of Community (now EU) institutions towards the Convention. The declaration made by the European Community upon the signature of the Aarhus Convention in June 1998 clearly indicated already in the first sentence that it considers the Convention „as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/ECE region". This approach was reiterated in the Council Decision of February 2005 on the conclusion of the Aarhus Convention, which in the Preamble stated that „[I]mprovement of the public's access to information and a broader participation of the public in decision-making processes and access to justice are essential tools to ensure public awareness on environmental issues and to promote a better implementation and enforcement of environmental legislation. Thus, it contributes to strengthen and make more effective environmental protection policies" . It is quite characteristic that the academic account about developments of access to justice in environmental matters at EU level, written clearly from the EU insider's point of view, while marginally only referring to

access to justice in the context of rights[10], is focused on showing implementation of the access to justice provisions under Aarhus Convention as means to enforce the EU environmental law (Brakeland 2014: passim).

More recently this approach to environmental procedural rights was clearly and strongly indicated by the European Commission in its European Green Deal Communication of 2019, which is a fundamental document setting the principles and directions for a new environmental policy within sustainable development in the European Union and which included a number of statements regarding the importance of both public participation and possibilities for the public to enforce the law through access to justice as crucial factors for the success of the European Green Deal (Jendrośka, Reese and Squintani 2021:106-107)[11].

2.6. Democratization and good/better governance

The concepts of democratization and good/better governance have much wider application than just for environmental matters but the subject matter of the Convention and the timing of its adoption somehow naturally made the drafters consider it not only as an instrument to protect environmental rights and to assure effectiveness of environmental protection but also as an instrument to achieve these general goals.

The Preamble to the Convention states that "the implementation of this Convention will contribute to strengthening democracy in the region" (para 21), which is a general statement addressing various processes. The most commonly it is considered as referring to the transition of a significant number of countries in the UNECE region from a centrally-controlled, communists' system with state-owned economy to multi-party, pluralistic societies with market economy, which was "an important part of the historical landscape in the ECE during the 1990s" (Aarhus Implementation Guide 2014: 36). While the goal to assist emerging democracies played definitely a role in the drafting of the Convention, equally important was to reflect in the Convention the changes in administrative traditions and cultures of continental Europe towards so called "participatory democracy" and "open government" (Jendrośka and Stec 2001: 142-143). In this respect, according to Pallemaerts, "environmental policy has become a testing ground for efforts to transcend traditional models of representative democracy" and the Convention inspired the wider debate on participatory democracy in

[10] Following in this respect the conventional view on access to justice provisions under Article 9.1 and 9.2 as being designed to enforce the rights of access to information and public participation (Brakeland 2014: 4).

[11] Whether this general policy declaration has always been implemented in practice is a matter of doubts (see for example Jendrośka and Anapianova 2023: 2-3).

EU and the respective provisions of the Treaty on European Union as amended by the Lisbon Treaty (Pallemaerts 2011: 4).

The above understanding of democratization was, at least at that time, inseparably linked with the idea of good/better governance, although in itself – as opposed to democratization- the concept of good/better governance does not have any ideological connotations but is rather based on rational decision-making theories. The idea is rather simple - public administration should operate in a way that make it effective and efficient. One of tools to achieve this is assuring that the decision-making processes are transparent, more participatory and involve all those potentially affected and interested. During negotiations of the Convention this concept started to be quite popular as a rationale for many new initiatives within European Community and soon after the adoption of the Convention was associated with the need for democratization and merged somehow into the proposal for a "European Governance" (Pallemaerts 2011: 4), which generally required openness, participation, accountability, effectiveness and coherence from decision-making processes at European level[12].

The above processes and ideas regarding good/better governance at the European level heavily influenced the drafters of the Convention, which was reflected in a number of Preambular paragraphs referring to various aspects of good governance, including "accountability of and transparency in decision-making" (para 10) or role of the public in enforcement (para 18). This is not a coincidence then that the Aarhus Convention "is therefore not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness" (Lawrysen 2010: 653).

3. Aarhus Convention as an attempt to codify environmental rights and to foster participatory democracy in environmental matters

3.1. Towards inclusion of a substantive right to environment into the Convention

Original mandate for the Convention

When starting the negotiations towards the international treaty which become the Aarhus Convention, the original mandate was to prepare „a draft

[12] "Governance" means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence" (European Governance: 8).

convention on access to environmental information and public participation in environmental decision-making taking into account the corresponding ECE Guidelines and their implementation, relevant provisions of the recent ECE Conventions and of the Rio Declaration on Environment and Development" (CEP Report 1996 Annex 1 para 1), which in real terms meant that its aim was to codify procedural environmental rights of the public and not to address a substantive right to environment. Worth noting is the fact that the ECE Sofia Guidelines did not include any reference to a substantive right, in particular it mentions in the Preamble only Principle 10 of the Rio Declaration but not the Stockholm Declaration. Also the Draft Elements, prepared by a small group of experts in order to not start the negotiations from the scratch (Aarhus Implementation Guide 2014: 16), did not include any reference to a substantive right to environment nor to the Stockholm Declaration.

Proposal of Belgium and negotiations

The issue was raised at the first negotiating session when the delegation of Belgium suggested including a provision regarding the fundamental right to a healthy environment and submitted a proposal to this effect suggesting insertion of a new Preambular paragraph mentioning such a right[13], and a new substantive article preceding the General provisions and entitled „Objective", which would provide a link between procedural rights and a substantive right to environment [14]. This proposal was circulated and included in annex I to the report of the first session for discussion at a later stage. As indicated in this report, already at that stage some delegations supported the proposal and suggested further strengthening it, while others considered it inappropriate for the convention. The Working Group welcomed the offer of the Belgian delegation to prepare a background paper substantiating its proposal and to make it available to participants in advance of the next session (Report of the first session). Such a paper was indeed submitted and introduced by the delegation of Belgium at the second session. While the problems with designing a substantive right to environment resulted in a failure to reach consensus on including such a right in Rio Declaration (Shelton 2006: 133) and led to accepting the role of the public on the ground of efficiency and not by reference to human

[13] „Considering that every person has the right to live in a healthy Environment".

[14] „In order to protect the right of every person to live in a healthy environment, each Party shall guarantee the rights of public participation in environmental decision-making and access to environmental information in accordance with the provisions of the present Convention".

rights[15], the paper submitted by Belgium showed relevant developments at the global and regional level (Report of the second session: para 9). In this context the report of the second session indicates that „[m]ost delegations taking part in the ensuing discussion commended the delegation of Belgium for the work done and expressed their support for the proposal as submitted at the first session. Some delegations reserved their position in this regard. Other delegations opposed the Belgian proposal. The delegations that supported it held that this right as formulated in the proposal was a rule of conduct which meant that the Contracting Parties would have no further obligations than those laid down in the convention and would not be required to adopt specific provisions in domestic law recognizing this right as such. The Working Group decided to come back to this issue at a later stage in the light of possible future developments" (Report of the second session :para 9).

In the following sessions the proposal was hotly debated and heavily negotiated. At the sixth session a new wording was proposed to reflect progress in negotiations (in particular by adding a right of access to justice)[16]. This proposal was subject to some modifications (for example replacing "protect" with "contribute to protection", and adding "of present and future generations") . Worth noting is the fact that there was no enough support for the proposals made by the delegation of the Republic of Moldova, which considered the wording of article 1 too anthropocentric and proposed to insert the word "healthy" before the word "environment" in the first line of the article, and to delete the words "adequate to his health and well-being" following this word (Report of the eight session: para 11).

Wording of Article 1 and its significance

The final wording of Article 1 was accepted during the eight negotiating session. Article 1 makes it clear that the objective of the Convention is to contribute to the protection of the right of every person of this and future generations to live in an environment adequate to his or her health and well-being. It reflects careful compromise between the wish to reiterate and reinforce the substantive right to environment by clearly acknowledging existence of such right, and on the other hand – fears of establishing any binding and enforceable commitments

[15] Causing a question posed in the literature: „What Happened in Rio to Human Rights? (Shelton 1992).

[16] OBJECTIVE In order to protect the right of every person to live in an environment adequate to his health and well-being, each Party shall guarantee the rights of public participation in environmental decision-making, access to environmental information, and access to justice in accordance with the provisions of this Convention" (Report of the sixth session).

in this respect. It was probably the most that could be done at that time. The proposal of Moldova to make the wording less anthropocentric was clearly far too progressive as at that time the discussions regarding rights of nature (RoN) were at their infancy and – as opposed to the substantive right to a healthy environment – there was no any clear (even nonbinding) international recognition of such rights. This however – as already noted above – should not mean that the procedural rights under the Convention are not meant to serve for the purpose of protecting the rights of nature.

As far as the substantive right to environment is concerned, the significance of Article 1 is underlined by the fact that the United Kingdom felt it was necessary to make a declaration concerning this provision upon signature of the Convention. In that declaration the UK stated that it understands Article 1 to "express an aspiration," and that the legal rights guaranteed under the Convention are limited to the particular rights of access to information, public participation in decision-making and access to justice. This was deemed necessary because, in contrast to the Stockholm Declaration, the Aarhus Convention is legally binding (Jendrośka and Stec 2001: 141).

3.2. Final scope and structure of the Convention

The final scope, design and structure of the Aarhus Convention is a result of heavy negotiations and – against initial expectations of some of the participants – it is much more than just the Sofia Guidelines embedded into the binding language and much more than just transferring the relevant pieces of Community law into the international instrument binding within the entire UNECE Region (Jendrośka 2005a: 14). The Convention, except for being the first binding international instrument attempting to address comprehensively the issue of procedural environmental rights of the public, includes also a couple of specific features that might be considered precedential. The detailed descriptions of the scope, design and structure of the Aarhus Convention as well as many of the related interpretation dilemmas and the respective opinions of the Aarhus Compliance Committee have been included in the Aarhus Convention Implementation Guide 2014 as well as in numerous academic accounts (including by the current author) - therefore the current account is limited to present only some general issues from the point of view of its topic.

As underlined in the literature, the structure of the Aarhus Convention mirrors generally the structure of the Principle 10 of the Rio Declaration with its 3 pillars: access to environmental information, public participation in environmental decision-making, access to environmental justice and with the Preamble, Article 1 (Objective), Article 2 (Definitions), and Article 3 (General

Provisions) providing the background to the above three pillars (Jendrośka and Stec 2001: 148).

The Convention regulates the issue of access to environmental information in two separate Articles: Article 4 regulates so called "passive" disclosure of information while Article 5 addresses so called "active" disclosure of information. Article 4 follows the design of the EC Directive 90/313 on access to environmental information which is typical for the Freedom of Information legislation. It requires public authorities, in response to a request for environmental information, to make such information available to the public, establishes categories of information that might be exempted from disclosure, and sets forth procedures for disclosing the information. What is important is that Article 4 of the Convention provides "the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request" (Aarhus Convention Implementation Guide 2014:19).

As compared with the Directive 90/313, which only mentioned the obligation of active dissemination of the information about the state of the environment, the Convention includes attempts to develop comprehensive systems and capacities for gathering relevant environmental information, as well as establishing standards for the active dissemination of information to help to support an informed and participating public. These active information provisions in Article 5 include a requirement for authorities to possess and update environmental information which is relevant to their functions and regularly publish (e.g. in a written report or periodicals) up-to-date information not only on the state of the environment, but also on pressures on the environment. It requires establishing and maintaining practical arrangements (such as registers etc.) to facilitate access to information. It also requires that environmental information become progressively available in electronic databases which are easily accessible to the public through public telecommunications networks[17].

The Convention follows the conventional distinctions among public participation in specific decision-making, public participation in plan- and policy-making, and public participation in legislative drafting and rule-making (Jendrośka and Stec 2001: 150). Thus, the Convention covers public participation in environmental decision-making through three separate articles. The most detailed of these is Article 6, concerned with public participation in decision-making on specific activities which may have a significant effect on the environment.

[17] For a more detailed yet still a general description of the access to information pillar see Aarhus Convention Implementation Guide 2014: 75-117

Article 7 covers public participation concerning strategic decisions relating to the environment within two legal schemes: a binding legal scheme relate to public participation during the preparation of plans and programs, while in case of policies relating to the environment each Party is required to endeavour to provide opportunities for public participation in their preparation. Article 8 covers public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments[18].

The above indicated differences within the access to information and public participation pillars have not only consequences in the differentiated respective procedural details, but also with respect to the possibilities to enforce these provisions by means of access to justice. The more detailed account of the design of access to justice pillar and its relation to other provisions of the Convention is provided below in Section 4.

3.3. Aarhus Convention and Principle 10

The already indicated observation that the Convention follows the design of Principle 10 of the Rio Declaration (Jendrośka and Stec 2001:), while generally true, should not lead to considering the Aarhus Convention as a mere transformation of |Principle 10 into a binding legal instrument the sole purpose of which is codification of the procedural environmental rights.

First of all, as already noted, the Convention includes also a reference to the „right of every person of this and future generations to live in an environment adequate to his or her health and well-being" and makes a link between such a substantive right to environment and the procedural environmental rights. In this respect it goes further than the Principle 10 which – as already indicated in Part I and Section 3.1 above – considered procedural environmental rights solely in the context of effectiveness of environmental protection and not in the context of a right to environment.

Furthermore, it must be noted that while the wording of Article 1 is commonly understood to refer only to „the right to a clean, healthy and sustainable environment" recently recognized as a human right by the General Assembly in its resolution 76/300 (see Section 5.3 in Part I), it may - and probably should - be understood also as referring to the right to "private" environment construed under the "greening" of other human rights jurisprudence (as discussed in Section 4.2 of Part I). In practice, the reference in Article 9.2 to "sufficient" interest means that in case of natural persons access to justice in this respect

[18] For a more detailed yet still a general description of the public participation pillar see Aarhus Convention Implementation Guide 2014: 119-186.

is limited in many jurisdictions only to persons exercising their property or other subjective rights (see discussion in Section 4.3 below).

Generally, the title of Article 1 is a bit misleading as the „right of every person of this and future generations to live in an environment adequate to his or her health and well-being" should not be understood as the only objective for granting procedural environmental rights to the public. As already mentioned, there have been also other motivations for granting procedural environmental rights to the public, including for example protection of the nature under RoN, or increasing effectiveness of environmental protection and – last but not least – providing legal means to enhance democratization and good/better governance. They are all clearly indicated in the Preamble to the Convention and should be taken into account when interpreting the legal norms stemming from its particular provisions.

3.4. Rights-based approach

As far as the design of the wording of the Aarhus Convention is concerned, there is a commonly shared opinion that the „Convention adopts a rights-based approach" (Lawrysen 2010: 654), which is officially considered by the UNECE as its main general feature[19]. The fact that it somehow „links environmental rights and human rights" (Aarhus Convention Implementation Guide 2014: 15) prompts even the opinion that it „has a dual identity: it is both an environmental agreement and a human rights one" (Barrit 2020: 5), while Boyle goes even further to say that "Aarhus is a human rights treaty" (Boyle 2012:623). These opinions are definitely correct as far as the subject matter of the Convention is concerned. Whether however the design of the wording of Convention makes it more similar to the international human rights treaties rather than to the standard environmental treaties – may be debated.

It must be noted that only some provisions of the Convention refer generally to „rights" (Article 1 and paras 6 and 8 in Article 2) while a couple of others (para 1 in Article 4, para 7 in Article 6 or paras 1,2 and 3 in Article 9) are drafted in a way that without using the word „right" provide the public with a clear entitlements (respectively to submit a request for information, to submit comments and to have access to review procedures). All the other provisions are drafted in a way focusing on the obligations of the Parties to the Convention or directly on the obligations of the public authorities. Quite convincing however are the views of the authors who claim that, despite the above design, the

[19] https://unece.org/environment-policy/public-participation/aarhus-convention/content, accessed 28.08.2024.

Convention affords rights to the public and that claims to the contrary „would run counter to the object and purpose of the Convention" (Tanzi and Pitea 2011: 371). Yet, it must be admitted that the design of the most of its provisions (i.e. by putting obligations on the Parties or on public authorities rather than granting directly rights to the public) much more resembles a standard environmental treaty than a human rights instrument. Thus any reference to the „rights-based approach" in the Aarhus Convention must be understood within this context. Furthermore, the issue remains open if there are remedies for the rights derived solely from the obligations and – if yes - how they fit to the traditional system of the protection of subjective rights. Quite characteristic in this context are the views of Advocat General Bobek who, supporting his view by a reference to a number of CJEU judgments, clearly stated that "[u]nder the Aarhus Convention,…. or any legal system worth its name for that matter, *for there to be a right, there must[be] a remedy*. If there is no way of enforcing the correlating obligation from… the public authority, there is by definition no right" (Bobek 2020: point 85).

As already discussed in Part I, the latter approach - which is certainly true in case of traditional subjective rights – have created problems in case of the general substantive right to a healthy environment. The assumption was however – as was also discussed in Part I – that it should apply without any problems to procedural environmental rights.

In this context worth mentioning are the views of Majtényi, who – considering as real rights only „rights that can be enforced" (Majtényi 2013: 16) and treating Aarhus Convention as „not a self-executing international treaty" (Majtényi 2013: 22) – comes to the conclusion that its provisions cannot be directly referred to before domestic or international courts (Majtényi 2013: 22). This seems to be meaning (although it is not clearly stated) that in his views Aarhus Convention cannot be treated as granting any rights. Whether this view is accurate may be subject to debate bearing in mind that it is based on the assumption that Aarhus Convention is „not a self-executing international treaty" whereas the issue is much more complicated and a number of provisions of the Aarhus Convention were found by courts as having direct effect[20].

For the purpose of the current study, the key issue is not whether Aarhus Convention is a self-executing international treaty (or which of its provisions have such an effect) but rather whether it provides internally coherent system of remedies for the rights granted by it to the public. It must be underlined that the possibility to submit a communication to the Aarhus Compliance Committee,

[20] See a discussion about direct effect of Aarhus Convention in Jendrośka 2011-1: 107-111 or the examples from France in Betaille 2009:passim.

while it is granted to any members of the public and plays an important role in assuring compliance with the Convention, cannot be treated as a remedy for the rights granted by the Convention because „according to the Convention the compliance review mechanism is not a redress mechanism „ (Guide to ACCC 2019: 31). Bearing in mind that the rights granted by the Aarhus Convention cannot be directly protected by ECHtR (or any other international human rights court) the only way to enforce them is at the national courts, which provide a judicial review of the practical implementation of the applicable rules, including those stemming from the Aarhus Convention.

Bearing the above in mind, a closer look will be needed at the legal nature of provisions included in Article 5, 7 and 8 of the Convention. Not only that they do not grant clear rights to the public and provide only corresponding obligations of the Parties or public authorities, but also the Convention is not very clear about obligations of the Parties to establish possibilities to enforce these obligations and thus to protect the corresponding „rights" of the public by triggering the respective review procedures. This makes their legal status different than in case of rights under Article 4 (where there is a clear link to the review procedures under Article 9.1) and rights under Article 6 (which has a link - although not so clear – with the review procedure under Article 9.2). The issue will be examined in Section 4 below.

The above remarks of the „rights-based approach" must be complemented with mentioning the fact that often this term is used interchangeably – but not correctly – with the term „human rights-based approach". This practice does not seem to appreciate wider implications of this concept in relation to the scope of rights to be represented and protected – which should be construed broadly. One has to underline that the official documents related to the Aarhus Convention and most of the academic accounts rightly use the term „rights-based approach" which allows to cover also the mentioned above Rights of the Nature (RoN) and persons or groups representing them. Quite an opposite practice can be observed under the Escazu Agreement (already mentioned sister convention to the Aarhus Convention) whereby the official documents constantly refer to „human rights-based approach"[21], following probably the term "human rights defenders in environmental matters" used in this Agreement to define this institution[22]. Bearing in mind the role and status of the latter under the Escazu Agreement (which is comparable to the role and status

[21] See for example Escazu Implementation Guide… Available at: https://repositorio.cepal.org/bitstream/handle/11362/48495/3/S2200676_en.pdf

[22] For more on the Escazu Agreement and this novel institution see Stec and Jendrośka 2019: 540-541

of environmental NGOs under the Aarhus Convention[23]) and the discussed above widespread popularity of RoN in Latin America – there is a legitimate question whether the persons (individuals or NGOs) bringing cases on behalf of the Nature would benefit from the special status granted to "human rights defenders in environmental matters" under the Escazu Agreement? (Jendrośka 2021: 349-351). The Escazu Implementation Guide does not seem to clearly address this issue while providing guidance to the respective provisions of the Agreement (Escazu Implementation Guide 2023: 179-189).

4. Access to justice under art. 9 of the Aarhus Convention and its role in protecting environmental rights and participatory democracy in environmental matters

4.1. Introductory remarks: final design of Article 9 and its relation to other provisions of the Convention

The final design of Article 9 of the Aarhus Convention is a result of a long and difficult negotiations. It was discussed until quite late and many important issues were decided at the very last moment. Therefore the legal meaning of its provisions are not quite clear and are subject to a number of interpretation dilemmas (Jendrośka 2020-1: 399-400). They are listed and partially discussed by the current author in another account (Jendrośka 2020a: 400-408), while in this account only some of the issues relevant for its topic would be addressed.

Article 9 of the Convention in its final version consist of 5 paragraphs providing a legal framework for its third pillar on access to justice.

The first three paragraphs of Article 9 regulate access to justice in relation to three types of procedures:

a) review procedures with respect to information requests (Article 9.1),

b) review procedures with respect to specific (project-type) decisions which are subject to public participation requirements (Article 9.2), and

c) procedures to challenge acts and omissions of private persons or public authorities contravening national law relating to the environment (Article 9.3).

Article 9.4 obliges Parties to the Convention to provide, within the review procedures, for adequate and effective remedies, including injunctive relief. Moreover, it provides minimum requirements regarding these procedures, which all shall be fair, equitable, timely and not prohibitively expensive. Article 9.5 regulates practicalities, such as the obligation to provide the public

[23] For more on this see Jendrośka 2021:349-350.

with sufficient information on access to administrative and judicial review procedures.

The role of the first three paragraphs of Article 9 of the Aarhus Convention in protecting the respective environmental procedural rights was usually considered quite obvious but – as already indicated - the issue is not that clear as usually it seemed to be. As already discussed in Part I the assumption that procedural environmental rights are capable to be treated similar as traditional subjective rights and enforced before the courts has been usually considered as means to circumvent challenges related to establishing a substantive right to healthy environment. On the other hand, as discussed in Section 3.4 above. there is a well-established conventional view, which in relation to the procedural entitlements granted by the Aarhus Convention was convincingly invoked by AG Bobek, who considers that "[i]f there is no way of enforcing the correlating obligation from another party, here the public authority, there is by definition no right. It can be considered a gift, a favour, or even charity, but hardly a right" (Bobek 2020: point 85).

In this context the perception regarding the role of the respective provisions of Article 9 of the Aarhus Convention in relation to its other provisions must be carefully examined and possibly revised.

4.2. Article 9.1 and its role

The common view, shared for quite a long time also by the current author, was that paragraph 1 of Article 9 would serve as guarantee for the rights granted under the access to environmental information pillar. After more careful examination however, this view seems to be only partially correct.

Under Article 9.1 any person who considers that his or her request for information under article 4 has been ignored… has access to a review procedure". The legal structure of the provision is rather clear and fits well to the traditional system of the protection of subjective rights whereby every person having certain right has sufficient legal means to protect such right. Thus, there is no doubt that paragraph 1 in Article 9 serve as a guarantee for the right to environmental information in Article 4 which regulates so called "passive" disclosure of information.

It must be remembered however that the access to environmental information pillar consist also of a legal regime for so called "active" disclosure regulated by Article 5, which includes a number of obligations not only to make publicly available certain information but also to collect and maintain it in specific ways and to disseminate it actively in certain situations. These obligations – as already discussed in Section 3 above– are considered as constituting also rights granted

to the public. What is more, the assumption that both Article 4 and Article 5 of the convention grants to "every citizen and environmental organisation a set of procedural environmental rights, which aim to increase public access to the environmental information held by public authorities" leads some authors to propose a new right to be clearly granted to the public by the Convention – a "right to contribute environmental information", which they claim is implicitly "already foreseen in the letter of the Convention" (Suman 2024: 55-58). Regardless of the accuracy of the above assumptions[24], the proposal itself could be considered as manifestation of the approach towards the Convention as a set of enforceable rights.

In this context it must be noted that Article 9.1 does not cover the rights under Article 5 (i.e. those which goes beyond disclosure of information upon request) nor there is any other provision in Article 9 providing explicitly any legal means to protect these rights. The question then is whether these rights are not protected at all under the Convention. In case of Article 9.2 it is established view that its role as a judicial enforcement provision is confined to the public participation pillar (and not other pillars of the Convention), thus the only potential candidate is Article 9.3 which has a very broad scope of application. The issue will be discussed below, looking not only whether rights under Article 5 are covered by Article 9.3 but also – if yes - whether the protection under this provision fits to the traditional system of the protection of subjective rights.

4.3. Article 9.2 and its role

In case of Article 9.2, similarly to Article 9.1, the common view, shared for quite a long time also by the current author, was based on the original intentions behind introducing this provision - that it would serve as a guarantee for the rights granted under the public participation pillar. In this case however the situation is even more complicated because the final version of this provision reflects the changes in this respect introduced during the negotiations.

First of all it must be noted that the Convention requires it to be applied only in relation to activities under Article 6 while only "where so provided for under national law" in relation to activities under other provisions of the Convention. This wording is considered to mean that the Convention does not require it but merely "allow for it" (Brady 1998: 72). Therefore, for the purpose of the current account, they are not examined under Article 9.2. Quite specific

[24] Aarhus Convention, unlike for example the Escazu Agreement, grants rights and entitlements to the public regardless of the citizenship (see more on this Stec and Jendrośka 2019: 542-543).

in this respect is however the issue of application of Article 9.2 to plans and programs under Article 7 bearing in mind that under article 7 the Parties are bound to apply article 6, paragraphs 3, 4 and 8 for the purpose of public participation in their preparation? In this context quite legitimate is the question whether a reference to "any decision, act and omission subject to the provisions of article 6" means that plans and programs under article 7 of the Convention are subject to review procedures available under article 9, paragraph 2, of the Convention? (Jendrośka 2020a: 403). This question posed in the literature has never been addressed on substance by the Aarhus Convention Compliance Committee[25], which has constantly considered the issues of access to justice regarding plans and programs only under Article 9.3[26].

Regardless of the answer to the above question, for the purpose of the current account much more fundamental is another issue. This is, as already noted in the detailed account of the legislative history of access to justice under the Aarhus Convention, the fundamental shift of approach to standing in what finally become Article 9.2 of the Convention, which was made at the eight negotiating session (Jendrośka 2020a: 393-394).

First of all the term "members of the public" was replaced by the term "members of the public concerned"[27], but more importantly, standing is not granted anymore to "all persons/organizations that had the right to participate in the decision-making procedure itself" as it was in the previous versions of the text (heralded to be a consensus view[28]), nor to all members of the public concerned – but only to those members of the public concerned "having a sufficient interest" or alternatively "maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition" (Jendrośka 2020-1: 394). In this context it must be noted that the reference to the "impairment of a right" was meant to cover substantive rights and – as it was made clear during the negotiations for the Aarhus Convention - "the violation of rights to participate would not fulfil this pre-condition" (Brady 1998: footnote 23).

---

[25] Aarhus Convention Compliance Committee (ACCC) is a body established to monitor compliance with the Convention (about the origins, status and composition of ACCC see Jendrośka 2011-2) and which is considered to issue „rulings which interpret and clarify provisions of the convention" as a result of which „a body of case law is emerging" (Boyle 2015:214).

[26] This direction was initiated, although without any explanations, in the findings regarding Bulgaria (ACCC/C/2011/58: paras 56-58).

[27] Which reflected the fact that the term "public concerned" already in the third session started to appear in the draft proposals regarding provisions on public participation and finally was defined during the sixth session (Jendrośka 2020-1: 394).

[28] Report of the fifth session cep/ac.3/10 page 11 – Annex iii.

The text resulting from the eight session is almost identical with the final version of Article 9.2 of the Convention and the changes made in this session seem to create a number of interpretation problems. Without attempting to address all the problems listed in this context[29], some of them must be addressed as they have important consequences for the topic of the current account.

In this respect of key importance is the observation regarding the consequences of the fact that Article 2.5 refers to "interest" while Article 9.2 to "sufficient interest", which reflects some distinction between the two terms and must be understood as a deliberate attempt to limit the scope of members of the public concerned having standing under Article 9.2 (Jendrośka 2020a: 394). Thus it means a significant shift from the previously heralded "consensus" which assumed to provide standing to all persons and organizations having the right to participate in the decision-making procedure itself.

The above shift in the approach has been somehow overlooked by some commentators. In this context worth noting are the already quoted views of Advocate General Bobek who considers as „untenable" the idea that the Aarhus Convention would create „two classes of participants in the environmental decision-making procedure before an administrative authority. Those with enforceable rights and those with none", because – as already indicated earlier – he firmly believes that „for there to be a right, there must [be] a remedy" (Bobek 2020: points 84 and 85).[30]

Before drawing conclusions from the above observations one needs to note however that the above discussed limitations in standing envisaged in Article 9.2 apply only to natural persons being "members of the public concerned" and do not apply to organizations. Article 9.2 in its revised version states clearly, due to the pressure from some delegations (Brady 1998:footnote 23), that the interests of any non-governmental organization referred to in Article 2.5 "shall be deemed sufficient for the purpose" – which is commonly interpreted as providing standing under Article 9.2 to all organizations meeting the requirements stipulated in Article 2.5[31].

In light of the above observations regarding Article 9.2 of the Aarhus Convention one can conclude that the views claiming that "the AC defines the right to public participation as an enforceable right" (Schwerdfeger 2023:301) or that "Article 9 (2) deals with acts or omissions by public authorities regarding the

[29] As listed in Jendrośka 2020a: 393.

[30] Outside the scope of this account is the accuracy of views of AG Bobek regarding the question who is the subject of rights under Article 6 and whether people residing hundreds of kilometers away from the proposed activity may nevertheless have an interest in such activity.

[31] Outside the scope of this account are issues related to implementation of these requirements.

rights to public participation set out in Article 6" (Volferen 2018: 169) or that "applicants entitled to participate in decision-making will also have the right to seek administrative or judicial review of the legality of the resulting decision" (Boyle 2012: 622 and Boyle 2015: 213)[32] - are at most the far-fetched simplification. In light of the above discussion only in case of non-governmental organizations promoting environmental protection referred to in Article 2.5 the possibility regarding access to justice under Article 9.2 could potentially be treated as a remedy providing a sufficient guarantee of their right to participate under Article 6. In case of natural persons being "members of the public concerned" the situation is different as not all natural persons having the right to participate under Article 6 are granted standing under Article 9.2 - thus it does not serve for them as a guarantee of their right to participate. The question then is whether natural persons being "members of the public concerned" but not having "sufficient interest" or "maintaining impairment of a right" have under the Aarhus Convention any remedy providing a sufficient guarantee of their right to participate under Article 6[33]. The obvious, and in fact the only candidate, could be access to justice under Article 9.3 of the Convention. Whether Article 9.3 could serve for the purpose will be discussed below in the next subsection.

When discussing the role of Article 9.2 one needs to note that it covers both „the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6". It is clear that possibility to challenge substantive legality is much more than possibility to merely challenge whether due account was taken of the outcome of the public participation as required under Article 6.8 of the Convention. Thus it can be concluded that while Article 9.2 cannot be treated as a remedy providing a sufficient guarantee of the right to participate under Article 6 because it does not grant standing to all persons having such a right – on the other hand for those having standing it goes beyond just guaranteeing the procedural rights under Article 6 as it covers also their substantive interests. Bearing the above in mind, one can consider a reference to „sufficient interest" or "maintaining impairment of a right" in Article 9.2 as an indication to make it, at least in case of natural persons, a judicial enforcement provision for the protection of the „private environment" in relation to the traditional human rights (as described in Part I).

---

[32] Only noting here that Boyle, probably by mistake, addressed this statement to Article 9.3 instead of Article 9.2 and referred to „applicants" instead of the terms used by the Convention ("the public" or „public concerned").

[33] The situation is further complicated by the fact that some of the particular procedural rights under Article 6 are granted to „the public" and not only to the public concerned – but this issue, as already noted above, is outside the scope of this account.

Concluding all the above remarks regarding the role of Article 9.2 one cannot agree with the view that „it is clear that the judicial enforcement provision of Article 6 is Article 9(2), as much as Article 9(1) is for Article 4" (Bobek 2020: point 48). While the role of Article 9.1 in relation to access to information rights under Article 4 is – as discussed above – rather clear, the role of Article 9.2 in relation to participation under Article 6 is far from being clear. Much more accurate would be to consider it as playing various roles. Clearly it can be considered as playing a role of a "judicial enforcement provision" for the participation rights granted by Article 6 to environmental non-governmental organizations referred to in Article 2.5. It cannot be considered as playing such a role for all other subjects (in particular the individual members of the public concerned) who are entitled to participate under Article 6 of the Convention, since its application is limited only to a subset of such subjects, namely to those having „sufficient interest" or "maintaining impairment of a right" . On the other hand in case of the latter subjects and environmental non-governmental organizations, Article 9.2 goes beyond the role of a judicial enforcement provision for their right to participate as it requires possibility to challenge also a substantive legality of the decision. In this context it is worth noting also that the reference to „sufficient interest" or "maintaining impairment of a right" in Article 9.2 of the Convention is not limited only to interests or rights related to the environment. This is in line with the definition of the public concerned in Article 2.5 (which is not limited to cover only the public affected or likely to be affected by environmental consequences of the decision) and the procedural provisions of Article 6 which provides access to "all information relevant to the decision-making" (Article 6.6) and possibility to submit "any comments… relevant to the proposed activity" (Article 6.7).

4.4. Article 9.3 and its role

The role of paragraph 3 in Article in the Aarhus Convention has always been different than the role of paragraphs 1 and 2 which originally were considered to serve as judicial enforcement provisions for respectively access to environmental information under Article 4 and for public participation under Article 6. This difference is clearly visible in the wording of this paragraph. First of all, it refers to "access to administrative or judicial procedures"[34], which means that – unlike under paragraphs 1 and 2 of Article 9 – access to judicial procedures (usually before a court of law) is not mandatory and Parties may choose instead to offer an administrative procedure, providing it meets certain

[34] For more about these two concepts see Jendrośka 2020-1: 393.

criteria in order to be considered as means of access to justice under Article 9.3 (Aarhus Implementation Guide 2014: 197-199).

Secondly, Article 9.3 – as rightly observed by ACCC – "does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories. Rather, article 9, paragraph 3, applies to contraventions of any provision of national law relating to the environment"[35].

The discussion regarding Article 9.3 during the negotiation of the Aarhus Convention was heavily influenced by the experience with the "citizen suit" in the USA, meant to create possibilities for the public to initiate public interest enforcement actions against polluters (whether private entities or national authorities) either directly at courts or by forcing public authorities to do so (Jendrośka 2020a: 397-8 and 407). This was the reason why already in one of the first academic accounts regarding the Convention, the paragraphs 1 and 2 were considered as providing legal remedies in relation to access to information and public participation provisions of the Convention[36], while paragraph 3 was considered to provide the right to file genuine public interest law-suits (Jendrośka and Stec 2001:150).

Following this context there was even a view in the literature that Article 9.3 could be considered as yet another "redress" procedure to guarantee the right to environment indicated in Article 1 of the Convention (Jendrośka and Bar 2004: 70). This view has never been supported in the literature, and in fact there were also the opposite views claiming that the Aarhus Convention "stops short, however, of providing the means for citizens directly to invoke this right" (Hayward 2005:180). The issue has never been seriously examined so it is worthwhile to consider it in the context of the current study.

Thus the first research question regarding the role of Article 9.3 of the Aarhus Convention would be to examine if indeed it can be considered as a judicial enforcement provision for a substantive right to a healthy environment. The second research question would be whether it can be considered as a judicial enforcement provision for the rights granted under articles 5, 6, 7 and 8 of the Convention and not covered – as already discussed above – by access to justice under paragraphs 1 and 2 of Article 9.

The two key issues for examining the role of Article 9.3 as a judicial enforcement provision for the right to a healthy environment is its scope of application and who is entitled to a remedy.

---

[35] ACCC/C/2008/31, Germany, ECE/MP.PP/C.1/2014/8, para. 94; Findings of non-compliance, MOP Decision V/9h, ECE/MP.PP/2014/2/Add.1, para. 1.

[36] Which – in light of the discussion in subsections 4.2 and 4.3 above – has proven to be not fully accurate.

The scope of application of Article 9.3 is determined by the concept of "contraventions of national law relating to the environment". Thus, subject to a challenge is not a decent or adequate quality of the environment but an act or omission that contravenes provisions of national law relating to the environment. In relation to the scope of "contraventions", ACCC has made it crystal clear that "access to a review procedure must be provided for all contraventions of national law relating to the environment, and with the means to have existing environmental laws enforced and made effective"[37]. This particular feature of the wording of Article 9.3 has prompted some commentators to observe that "some higher-ranking law(s) within the national legal order must exist that creates sufficiently precise rights or obligations concerning climate protection that allow establishing a violation for the Convention to be applicable or invokable" (Eckes and Trap 2024:5). Furthermore, since „the Aarhus Convention generally excludes from its scope acts and omissions of public bodies or institutions that act in a "judicial or legislative capacity" (Article 2(2) AC)" the same commentators observe that the „Convention cannot be relied upon by litigants if they aim to challenge insufficient legislative acts, or the omission to adopt adequate and sufficient climate protection legislation (Eckes and Trap 2024:5). While these observations were made in relation to applicability of the Aarhus Convention to the climate litigation, the above limitations apply also to the general environmental litigation and – regardless of the suggested by these commentators ways to circumvent the above limitations - must be taken into account when considering the scope of application of Article 9.3 in the context of its role as a judicial enforcement provision for the right to a healthy environment.

Another question is whether all those having a right are entitled to a remedy. The right to a healthy environment is considered as a human right granted to "every person" , which means that "all individuals are entitled" (Rehbinder and Loperena 2001: 283). Following this approach Article 9.3 in order be considered as a judicial enforcement provision for the right to a healthy environment (considered as a traditional subjective right) would need to require establishment of the actio popularis.

However this is not the case as Article 9.3 provides the possibility that Parties may introduce certain criteria in its national law as a prerequisite for recourse to this remedy. The conclusion regarding this clause is obvious: „this mechanism can at most be said to only approach the notion of actio popularis" (Jendrośka and Stec 2001: 151). It was confirmed on several occasions by ACCC which made some ramifications regarding interpretation of Article 9.3 saying

[37] ACCC/C/2005/11, Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 34; Findings of no non-compliance, MOP decision III/6, ECE/MP.PP/2008/2/Add.8, para. 3

that „the Parties are not obliged to establish a system of popular action ("actio popularis") in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment[38]. Following this some authors say that Article 9.3 "is the closest that the Aarhus Convention comes to establishing environmental *actio popularis*, given its empowerment of the public *en masse* to challenge environmental illegalities" (Weaver 2023: 127).

Worth noting is the fact, that while the Aarhus Convention does not require actio popularis to be established, it does not mean that the authors of the Convention „rejected" it - as sometimes it is indicated (Bobek 2020: point 46). Furthermore, there are quite successful examples of functioning of the actio popularis in environmental matters in some countries (for example in Latvia)[39].

Concluding the above remarks one needs to state that Article 9.3 cannot be considered as a judicial enforcement provision for the right to a healthy environment if the latter is to be considered as a traditional subjective right. Much however depends on the legal nature of such a substantive right (see Conclusions). On the other hand much more convincing seems to be the conclusion, supported by the above quoted opinion of ACCC regarding the scope of "contraventions", that the role of Article 9.3 should be seen not so much in the context of protecting the right to a healthy environment but rather in the context of effectiveness of environmental protection i.e. as means to assure enforcement of respective laws by providing possibilities to trigger judicial control of the objective legality of acts or omissions.

As far as the second research question regarding Article 9.3 is concerned, there are different views concerning the role of Article 9.3 as a judicial enforcement provision for the rights granted under articles 5, 6, 7 and 8 of the Convention and not covered by access to justice under paragraphs 1 and 2 of Article 9. Some commentators say that Article 9.3 applies only to "laws other than those implementing the provisions of the Convention" (Brady 1998: 72), while some other claim that "Article 9(3) *is not supposed to govern* the enforcement of participation rights under Article 6, but other rights granted by other

[38] First time in case ACCC/C/2005/11, Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 35; Findings of no non-compliance, MOP decision III/6, ECE/MP.PP/2008/2/Add.8, para. 3.

[39] See more in Mikosa 2017: 39-57.

provisions of the Convention (or under national law)" (Bobek 2020: point 49). In light of the plain language of the Convention and hitherto jurisprudence of ACCC there is no reason to say that the broad discretion afforded to the Parties in establishing criteria for standing under Article 9.3 in case of acts or omissions which contravene the provisions of the national law implementing the provisions of Article 5, 6, 7 or 8 of the Convention could be limited as compared with acts or omissions which contravene other provisions of the national law relating to the environment – thus it is fair to say that under the Convention not all the members of the public that benefit from these provisions must be entitled to challenge acts or omissions in this respect. On the other hand worth noting is the opinion of CJEU which held - seemingly in the opposition to the views of AG Bobek in case C-826/18 – that „Article 9(3) of that convention precludes such persons from not being able to have access to justice for the purposes of relying on more extensive rights to participate in the decision-making procedure which may be conferred on them solely by the national environmental law of a Member State"[40]. It is not clear however if the above verdict clearly confirms that all members of the public concerned may challenge acts or omissions which contravene the provisions of its national law implementing Article 6 of the Aarhus Convention.

In the light of the above comments regarding the role of Article 9.3 it seems quite appropriate to consider it not so much as a judicial enforcement provision for the other provisions of the Convention but rather in the context of its other (than protection of rights) conceptual roots, namely effectiveness of environmental protection, democratization and good/better governance. In this context should be seen the different wording and formulations used in paragraph 3 as compared with paragraphs 1 and 2 of Article 9. This is however quite often totally overlooked. Article 9.3 refers generally to the public and not to the public concerned, thus it includes all legally existing associations, organizations and groups. While the focus during negotiations was on environmental organizations, which were granted a special role under Article 9.2 (Jendrośka 2020-1: 385-386), in Article 9.3 there is no special role for them as compared with other associations, organizations and groups. Quite telling is the approach taken in this respect in the official EU documents. On the one hand, clearly recognizing the difference in the respective wording the Commission - „considering the role of environmental NGOs in protecting general environmental interests" – calls Member States to provide standing to them (EC Notice on Access to Justice 2017: para 107). Furthermore, it recommends to apply the same approach to standing in relation to paragraphs 2 and 3 of Article 9, and

[40] Judgement of 14.1.2021 – case C-826/18 Stichting Varkens in Nood and Others 5 para 51.

considers criteria established for the purpose of Article 9.2 to be appropriate also for the purpose of Article 9.3 (EC Notice on Access to Justice 2017: para 107). While the former recommendation seems to be reasonable and fully within the discretion afforded to Parties by Article 9.3, the latter one clearly limits the scope of application of this provision by excluding standing for associations, organizations and groups other than those meeting the criteria established for environmental organizations. This approach seems to be not only at odds with the Article 9.3 of the Aarhus Convention but also with some provisions of the EU law, which – like for example Art.6.4 of SEA Directive – clearly include among relevant non-governmental organisations „those promoting environmental protection and other organisations concerned (SEA Directive 2001).

It goes without saying that for the purpose of democratization and good/better governance a certain role should be played also by associations, organizations and groups dealing with other than only environmental issues (like for example corruption, gender etc.) and that they should also be considered for the purposes of Article 9.3. While these functions of Article 9.3 are generally quite recognized, in concrete instances there is a tendency to forget about them. This is in particular visible in case of the approach to standing under Article 9.3 where there seems to be focus put on environmental organizations, while other organizations that could contribute to the enforcement of national laws relating to the environment are often not considered for the purpose. Furthermore, despite the already mentioned inspirations for Article 9.3 coming from "citizen suit" in USA (which includes possibilities for natural persons), the role of natural persons in this process is hardly even mentioned. This is in striking contrast to the situation in some countries in Latin America (like Equador or Bolivia) where any person – individually or collectively – can take action on behalf of nature (Villavicencio Calzadilla and Kotzé. 2023: 64-65).

5. Conclusions

As indicated in Part I, the challenges related to constructing a substantive right to a healthy environment have resulted in the move towards granting instead the procedural environmental rights to the publics. One of the reasons for this was the assumption that such rights could be enforced before the courts because claims based on the violation of individual legal interests could be constructed there. Bearing in mind the role of the UNECE Aarhus Convention, which was meant to codify procedural environmental rights, there is nothing strange that the commonly shared assumption is that legal framework provided by the Convention, in particular its access to justice provisions, would provide a solid basis as legal guarantees for the protection of the rights

of the public in environmental matters. The results of this study show that this is not always the case.

Before providing the conclusions from the analysis regarding the role of the legal schemes envisaged in paragraphs 1,2 and 3 of Article 9 of the Aarhus Convention as legal guarantees for the protection of the rights of the public in environmental matters it might be useful to address first the relations between the Aarhus Convention and human rights. While there is no doubt that the Convention provides a clear link between environmental protection and human rights, the analysis in this study shows that there is no clearcut answer to the question whether indeed itself it is a human rights treaty because it depends on the understanding of the word „right". If it is understood in a traditional way (meaning that a right requires a remedy available to the right holder – see Section 3.4 above) in light of the analysis in this study it is clear that the Convention provides remedies only to some of the procedural rights granted by it. On the other hand the Aarhus Convention has had an immense impact on the interpretation of the existing human rights, in particular on the jurisprudence of ECtHR. According to Boyle "the essential elements of the convention – access to information, public participation in environmental decision making, and access to justice – have all been incorporated into European human rights law through the jurisprudence of the ECtHR" and "the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights" (Boyle 2012: 623). Some commentators even say that ECtHR play a "second fiddle" to ACCC (Braig and Kutepova 2022: passim). These observations have been recently somehow confirmed in the Klima Seniorinnen verdict of ECtHR in which, according to some commentators, the "Aarhus Convention is mentioned no less than 51 times in the judgment" (Aarhus and ECHR Blog Part 2:1). The verdict has been already subject to numerous academic opinions and discussing all its precedential and/or controversial features would be far outside the scope of this account. Worth mentioning however here are two issues of certain importance for this study. First issue relates to the observations of ECtHR which confirmed being "mindful of the difference between the basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights" (Klima Seniorinnen verdict 2024: para 501). Second is the approach to standing of environmental organizations under article 6 of ECHR adopted in the verdict, in which the Court, referring to the provisions of ECHR, states "that on a strict reading, Article 6 would not be applicable to proceedings aimed at environmental protection as a public-interest value as there would not be a dispute over a civil right which the association itself

could claim. However…, the Court considered that such an approach would be at variance with the realities of today's civil society, where associations play an important role, inter alia by defending specific causes before the domestic authorities or courts, particularly in the environmental-protection sphere… In this connection, the Court has also relied on the principles flowing from the Aarhus Convention" (Klima Seniorinnen verdict 2024: para 602).

In light of the above opinions a couple of comments maybe proposed. First of all it seems reasonable to agree with the view that "without procedural rights, any human rights protection system could become inoperable, and the rights contained therein, too, could become victims of state despotism" (Majtenyi 2008: 27). On the other hand much more doubtful is the view that "procedural law cannot be applied if there is not a substantive right to be protected" (Rehbinder and Loperena 2001: 283). As already noted, the rationale for providing procedural rights in the Aarhus Convention has included not only the need to protect substantive environmental rights. Apart from this however it must be recalled that the very concept of rights is interpreted differently and much depends on what is to be understood under this term. In case of a substantive right to environment, as already discussed in Part I, there are different approaches in this respect.

Worth mentioning in this context is a proposal made by Boyle to develop a substantive right to environment („right to a decent environment" as he calls it) „not as a civil and political right, but within the context of economic and social rights" which would „address the environment as a public good" (Boyle 2015: 628). It is not clear however whether he sees it in the context of modern approach to economic, social and cultural rights which traditionally were "interpreted as being only collective in nature" but, according to more recent approach, they may have a collective dimension but they are also individual rights (ECS Rights Fact Sheet: 8).

According to Lambert "rights relating to environmental protection cannot be linked to either the civil and political rights ("freedoms from") or the social and economic rights ("rights to") recognised after the Second World War. They come under the "solidarity rights" identified by Karel Vasak in the late 1970s" (Lambert 2020: 27), who considered such rights as requiring "the combined efforts of everyone" (Vasak 1977: 29). In this context one should see the proposal of Lambert , that "it would be timely for the Council of Europe to promote recognition at the national and European levels of an autonomous individual and collective right to a decent environment embracing an intergenerational outlook and an ecocentric approach, backed up by the requisite duties and principles (Lambert 2020: 20).

The proposal of Boyle, even taking into account the modern approach to the social and economic rights, seems to be less well suited to the subject matter of the right to a decent environment than the proposal of Lambert to treat it as a solidarity right. On the other hand for example rights under Article 5 of the Aarhus Convention regarding active disclosure of information seems to be fitting better into the social and economic rights rather than into solidarity rights.

What seems to be common however for proposals of Boyle and of Lambert is that both proposals would assume active involvement of the state organs, and such involvement must be based on the law. And this would provide a link to the Aarhus Convention, in particular to its Article 9.3 which relates to acts and omissions of private persons or public authorities contravening national law relating to the environment.

What concerns the role of Article 9 as a guarantee for other rights provided in the Convention, the study shows that it provides such a role only in relation to the right of access to information under Article 4 regarding so called passive disclosure. Article 9.1 clearly serves as an enforcement provision in this respect. It does not cover however Article 5 regarding so called active disclosure. Possibility to enforce at national courts the provisions of Article 5 (commonly considered as also providing rights to the public) is not clearly regulated under the Convention and could be provided only under Article 9.3 (subject to limitations envisage therein).

Despite the common views that Article 9.2 is a judicial enforcement provision of Article 6 as much as Article 9.1 is for Article 4, only in case of environmental organizations access to justice provisions under Article 9.2 can be treated as a remedy regarding participation rights. In case of natural persons the reference to "sufficient interests" or "impairment of rights" results in treating it only as a remedy regarding the subjective rights to a "private" environment while the possibility to enforce at national courts the provisions of Article 6 (providing procedural participation rights) for other members of the public concerned is not clearly regulated under the Convention and could be provided only under Article 9.3 (subject to limitations envisage therein).

Finally, the design of Article 9.3 which provides a wide discretion to the Parties in establishing the criteria for standing results in the fact, that it cannot be treated as a remedy in relation to a substantive right to a healthy environment referred to in Article 1 of the Convention, if the latter is to be considered as a traditional subjective right. For the same reason its role as a remedy regarding other procedural rights granted by the Convention is rather doubtful.

Following the above conclusions regarding relations between the Aarhus Convention and human rights and the role of its Article 9 in this respect, the

results of the study shows beyond any doubt that the Aarhus Convention should be seen in the context of its all conceptual roots, that is not only in the context of human rights or Rights of Nature, but also in the context of the effectiveness of environmental protection, democratization and good/better governance. The views that „the emphasis on procedural rights in Articles 6–8 of Aarhus can be seen as a means of legitimizing decisions about sustainable development, rather than simply an exercise in extending participatory democracy or improving environmental governance" (Boyle 2012: 622 and Boyle 2015: 213) or views criticising the Convention for allowing only "a symbolic commitments" (Mason 2010:28) – seem to be rather isolated. Quite an opposite, a wider view of the role of the Aarhus Convention seems to be getting gradually accepted and there are even opinions that it has an important role in the making of a New European Legal Culture (Caranta, Gerbrandy and Mueller 2018: passim).

Abbreviations

ACCC – Aarhus Convention Compliance Committee
EU – European Union
CJEU – Court of Justice of the European Union
RoN – Rights of Nature
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights

Bibliography

I. Primary sources

A. Documents

Aarhus Implementation Guide 2014 – Ebbesson, Jonas, Helmut Gaugitsch, Jerzy Jendrośka, Stephen Stec, and Fiona Marshall. 2014. The Aarhus Convention. An Implementation Guide, second edition, United Nations.

CEP Report 1996 – The report of the special session 17 January 1996 ece/cep/18, Annex I.

Commission Notice on Access to Justice in Environmental Matters, C(2017) 2616 final, para 107.

Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (2005/370/EC) Official Journal of the European Union of 17.5.2005 L 124/1.

Draft elements for the convention on access to environmental information and public participation in environmental decision-making (cep/ac.3/R.1) http://www.unece.org/env/pp/adwg.html.

ECS Rights Fact Sheet – Office of the United Nations High Commissioner for Human Rights

European Governance. A White Paper, European Commission, COM (2001) 428 final, 25.7.2001.

Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33

Guide to ACCC 2019 - Guide to the Aarhus Convention Compliance Committee, Second edition, May 2019 https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee__second_edition__2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf

Reports of the Aarhus Convention negotiating sessions https://unece.org/environment-policy/public-participation/aarhus-convention/reports-negotiations-convention

Report of the first session CEP/AC.3/R.1 (11 April 1996).

Report of the second session CEP/AC.3/4 (11 November 1996).

Report of the second session CEP/AC.3/16 (17 December 1997).

Opinion of Advocate General (*AG*) in Stichting Varkens in Nood and Others (C-826/18).

B. Case law

ECtHR judgment of in Case Verein KlimaSeniorinnen Schweiz and Others vs Switzerland CJEU Judgement of 14.1.2021 – case C-826/18 Stichting Varkens in Nood and Others 5 para 51.

Findings of ACCC in Case ACCC/C/2005/11, Belgium, ECE/MP.PP/C.1/2006/4/Add.2.

II. Secondary sources

Bandi, Guyla. 2014. Right to Environment – Procedural Guarantees. In: *Environmental Democracy and Law*, (ed.) Guyla Bandi, 79-94. Groningen: Europa Law Publishing.

Barrit, Emily. 2020. *The Foundations of the Aarhus Convention. Environmental Democracy, Rights and Stewardship*, Oxford: Hart Publishing.

Betaille, Julien. 2009. The direct effect of the Aarhus Convention as seen by the French 'Conseild'Etat'. *Environmental Law Network International Review* 2: 63-73 https://www.elni.org/fileadmin/elni/dokumente/Archiv/2009/Heft_2/elni_Review_2009-2_Betaille.pdf.

Boyd, David. 2020. Introductory presentation. In: *High-level Conference on Environmental Protection and Human Rights*, Council of Europe, 27 II 2020: 17-21.

Boyle, Allan. 2006. Human Rights or Environmental Rights? A Reassessment. *Fordham Environmental Law Review* 18(3): 470-511.

Boyle, Allan. 2012. Human Rights and the Environment: Where Next? *The European Journal of International Law* 23 (3): 613–642.

Boyle, Allan. 2015. Human Rights and the Environment: Where Next? In: *Environmental Law Dimensions of Human Rights*, (ed.) Ben Boer, 201-239. Oxford University Press.

Brady, Kathy. 1998. New Convention on Access to Information and Public Participation in Environmental Matters. *Environmental Policy and Law* 28(2): 69-75.

Braig Katharina and Nadezhda Kutepova. 2022. Playing Second Fiddle to the Aarhus Convention: Why the ECtHR Can and Should Go Further. *Journal for European Environmental & Planning Law* 19(1-2): 74-102. DOI:10.1163/18760104-19010006.

Brakeland, Jean Francoise. 2014. Access to justice in environmental matters – developments at EU level. *Gyoseiho-kenkyu* 5: 1-24 http://greenaccess.law.osaka-u.ac.jp/wpcontent/uploads/2013/04/10pjp_brakeland.pdf

de Sadeleer Nicolas, Gerhard Roller and Miriam Dross. 2005. *Access to justice in environmental matters and the role of ngos; empirical findings and legal appraisal*. Groningen: Europa Law Publishing.

Ebbesson, Jonas. 2002. Comparative Introduction. In: *Access to Justice in Environmental Matters in the EU*, (ed.) Jonas Ebbesson, 1-47, Kluwer Law International

Ebbesson, Jonas, 2022. Getting it Right: Advances in Human Rights and the Environment from Stockholm 1972 to Stockholm 2022. *Environmental Policy and Law* 52 (2): 79-92

Eckes Christina and Tessa Trapp. 2024. The Aarhus Convention's Relevance for Climate Litigation Through the Lens of KlimaSeniorinnen. *European Law Blog*, https://www.europeanlawblog.eu/pub/xx9vrteu/release/1

Hallo, Ralph (ed.). 1996. *Access to environmental information in Europe,* Kluwer Law International.

Haas, Peter, Marc A. Levy and Edward A. Parson. 1992. Appraising the Earth Summit: How Should We Judge UNCED's Success?. *Environment* 34(8): 6-33.

Hayward, Tim. 2005. *Constitutional Environmental Rights*, Oxford: Oxford University Press.

Jendrośka, Jerzy. 2005a. Aarhus Convention and Community Law: the Interplay. *Journal for European Environmental & Planning Law* 2(1): 12-21.

Jendrośka, Jerzy. 2005b. Public Information and Participation in EC Environmental Law; Origins, Milestones and Trends. In *Reflections on 30 Years of EU Environmental Law; A High Level of Protection?*, (ed.) Richard Macrory, 63-84. Groningen: Europa Law Publishing.

Jendrośka, Jerzy. 2011a. Public Participation in Environmental Decision-Making. Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus convention Compliance Committee. In: *The Aarhus convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, (ed.) Marc Pallemaerts, 91-147. Groningen: Europa Law Publishing.

Jendrośka, Jerzy. 2011b. Aarhus Convention Compliance Committee: Origins, Status and Activities. *Journal for European Environmental & Planning Law* 8(4): 301-314.

Jendrośka, Jerzy. 2012. Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice. *Journal for European Environmental & Planning Law* 9(1): 71-90.

Jendrośka, Jerzy. 2020a. Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas. *Journal for European Environmental & Planning Law* 17(4): 372-408.

Jendrośka, Jerzy. 2020b. El Acuerdo de Escazú a la luz de la experiencia del Convenio de Aarhus. In: *Acuerdo de Escazú, Hacia la democracia ambiental en América Latina y el Caribe*, (eds) Michel Prieur, Gonzalo Sozzo and Andrés Nápoli, 71-83. Ediciones UNL.

Jendrośka, Jerzy. 2021. Procedural environmental rights: some observations on the Escazu Agreement as compared with the Aarhus Convention. In: *Grensoverstijgende rechtsbeoefening. Liber amicorum Jan Jans*, (ed.) Kars de Graaf, 345-353. Uitgeverij Paris.

Jendrośka, Jerzy and Alina Anapianova. 2023. Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis. *Environmental Law Network International Review* 23: 1-5. DOI: 10.46850/elni.2023.001.

Jendrośka, Jerzy, Moritz Reese and Lorenzo Squintani. 2021. Towards a new legal framework for sustainability under the European Green Deal. *The Opole Studies in Administration and Law* 19(2): 87-116.

Jendrośka, Jerzy and Stephen Stec. 2001. The Aarhus Convention: Towards a New Era in Environmental Democracy. *Environmental Liability* 9(3): 140-151.

Kiss, Alexandre and Dinah Shelton. 2007. *International Environmental Law,* 2nd ed. New York: 69-70.

Lambert, Elisabeth. 2020. *The Environment and Human Rights. Introductory Report to the High-Level Conference Environmental Protection and Human Rights, Strasbourg*, 27 February, available at https://rm.coe.int/report-e-lambert-en/16809c827f.

Lavrysen, Luc. 2010. The Aarhus Convention: Between Environmental Protection and Human Rights. In : *Liege, Strasbourg, Bruxelles: Parcours Des Droits de l'homme*, (ed.) Paul Martens, 647-671. Anthemis.

Majtenyi, Balazs. 2008. A right without a subject? *Fundamentum* 5: 22-35.

Mason, Michael. 2010. Information Disclosure and Environmental Rights: The Aarhus Convention. *Global Environmental Politics* 10(3): 10-28.

Mullerova, Hanna et al. 2013. *Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention*, Praha.

Pallemaerts, Marc. 2011. Introduction. In: *The Aarhus convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, (ed.) Marc Pallemaerts, 3-15. Groningen: Europa Law Publishing.

Raustiala, Kal. 1997. The "Participatory Revolution" in International Environmental Law. *Harvard Environmental Law Review* 21(2): 537-586.

Rehbinder, Eckard and Demetrio Loperena. 2001. Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation. *Environmental Policy and Law* 31(6): 282-293.

Sharman, Nicola. 2023. Objectives of Public Participation in Environmental Decision-Making. *International and Comparative Law Quarterly* 72: 333-360.

Scherdtfeger, Angela. 2023. The Human Rights Dimension. In: *Sustainability through Participation?*, (eds.) Birgit Peters and Eva Julia Lohse, 291-319. Brill/Nijhoff.

Shelton, Dinah. 1992. What Happened in Rio to Human Rights?, *Yearbook of International Environmental Law* 3(1): 75–93. DOI: 10.1093/yiel/3.1.75.

Shelton, Dinah. 2006. Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized. *Denver Journal of International Law & Policy* 35(1): 129-171.

Stone, Christopher. 1972. Should Trees Have Standing. Toward Legal Right for Natural Objects. *Southern California Law Review* 45: 450-501.

Suman, Anna Berti. 2024. *Civic Monitoring for Environmental Law Enforcement*. Edward Elgar Publishing.

Vasak, Karel. 1977. A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights. *The UNESCO Courier* 11: 29-32.

Villavicencio Calzadilla, Paola and Louis Kotzé. 2023, Re-imagining Participation in the Anthropocene: The Potential of the Rights of Nature Paradigm. In: *Sustainability through Participation?*, (eds.) Birgit Peters and Eva Julia Lohse, 51-72. Brill/Nijhoff.