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Improving access to environmental justice:
Compliance with standards of the Aarhus Convention

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Унапредување на пристапот до еколошка правда: усогласување со стандардите на архуската конвенција

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Table of Contents

Abbreviations

EIA	Environmental Impact Assessment
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
APRFAPI	Agency for Protection of the Right to Free Access to Public Information
MESP	Ministry of Environment and Spatial Planning
CJEU	Court of Justice of the European Union

Introduction

Environment is the overall surrounding of people where they live, work, and develop, which gives special and great importance to protection thereof. Every living organism has a function within relevant ecosystems and therefore environmental protection cannot be solely understood as protection of water, air and land, but should have a much broader scope. Taking this as a starting point, the global society has designed a comprehensive international law protecting all aspects of the environment which, in turn, serves as baseline for development of national legislation in this area. Adoption of internation and national environmental protection law, however, cannot achieve the purpose of such legislation if it is not efficiently enforced.

It is exactly enforcement of environmental law, identification of shortcomings and establishment of the need to change the legislative and institutional framework that is the task of access to justice and activity of administrative or judicial authorities. Lack of review over law enforcement in general, but especially over enforcement of laws relating to the environment, may lead to irreparable and irreversible long-lasting harm.

The importance of access to justice in environmental matters is also mirrored in the fact that it comprises one of the three pillars enshrined in the exceedingly significant Aarhus Convention. In particular, Article 9 of the Convention underscores the need of access to justice in 1) procedures led for access to information on environmental matters; 2) public participation in decision-making relating to the environment; and 3) when the environmental law is infringed by an act or omission. On that account and having in mind that activities of individuals and civil society organizations in North Macedonia have underscored the shortcomings in access to justice and efficiency of review in environmental matters, this policy paper elaborates the access to justice standards derived from findings of the Aarhus Convention Committee and lays down actions to be taken with a view to improve relevant state-of-affairs.

Access to Justice Standards of the Aarhus Convention Committee

When evaluating compliance with Article 9 of the Convention, the Committee pays attention to the general picture on access to justice in the light of the objectives laid down in the preamble of the Convention, i.e. "effective judicial mechanisms mechanism should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced." The Committee looks at the legal framework in general and different possibilities for access to justice made available to the public and the organizations, in different stages of decision-making processes. When examining whether a decision may be challenged under Article 9, the Committee first ascertains the decision's legal function and effect, not its label under the national law.[1]

The "general picture" involves the state's legislative framework relating to access to justice in environmental matters and its application in practice by the courts. Moreover, the fact that an international agreement may be applied directly and prior to the national law should not excuse the state from transposing the Convention into a clear, transparent and consistent framework. The Committee does not only examine whether the state has literally transposed the Convention's wording into the national legislation, but also considers the practice through the relevant court caselaw. If national provisions could be interpreted as being in compliance with the Convention, the Committee then examines whether evidence presented to it demonstrates that the national courts' practice truly follows this approach. If that is not the case, the Committee may conclude that the state fails to comply with the Convention.[2]

These findings are indicative of the importance attributed to the practice when examining the state's compliance with provisions under the Convention, which means that second-instance administrative bodies deciding upon appeals, i.e. courts acting in cases relating to the environment must take into consideration the spirit and intention of the Convention.

1 Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, 11 January 2013, paragraphs 52-53

2 Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, paragraphs 64-65

Review procedures that should be established pursuant to Article 9, paragraph 1 of the Convention are intended to correct any failures relating to access to information proceedings at national level and, as general rule, only when the state has failed to do so within a reasonable period of time, the Committee may proceed to conclude non-compliance with the Convention.[3] The Committee founds that lengthy review procedure and denial of legal standing to civil society organizations in lawsuits relating to access to information in environmental matters is not in compliance with Article 9, paragraph 1 of the Convention.[4]

The Macedonian law has established a review mechanism relating to access to information in the form of appeal procedure led before the Agency for Protection of the Right to Free Access to Public Information and lawsuit led before the administrative courts. However, unlike decision-making in appeal procedures, the duration of which is capped at 15 days, the legislation does not stipulate clear and precise deadline for completion of administrative court proceedings, when such lawsuit is initiated. In the experience of the Macedonian Young Lawyers Association, these proceedings could sometimes last more than 2 years, which gives even greater importance to the Committee's finding on reasonable duration of review procedures in the national context.

Moldsilva had not complied with the final decision of the Civil Chamber of Chisinau Court of Appeal ruling that the applicant should be provided with copies of the information requested. If any entity has the possibility not to comply with the court's final decision under Article 9, paragraph 1 of the Convention, then the question is raised about the binding nature of the court's decision within that legal system. Having in mind that Article 9, paragraph 1 of the Convention refers to the fact that final decisions of courts or other independent or impartial bodies established by law are binding and must be complied with by all parties involved, failure to execute the final decision on the part of **Moldsilva** implies the state's non-compliance with Article 9, paragraph 1 of the Convention.[5]

3 European Community ACCC/C/2007/21; ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, paragraph 33

4 Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, paragraph 26

5 Moldavia ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011, paragraph 35

In 2022, the Macedonian Young Lawyers Association was addressed by a non-formal movement whose access to information request had not been responded and was followed by submission of an appeal before APRFAPI, which approved the appeal and tasked the municipality in question with disclosing the information requested. On the account of non-compliance with the Agency's decision, several appeals were submitted and approved, but the matter remained unsettled to the applicant's detriment.

Having in mind the circumstances of this case, initiation of an administrative dispute would have been futile because the second-instance decision was also taken in favour of the applicant, making it almost certain that a possible lawsuit would be rejected. However, in the light of the Committee's finding, it is reasonable to question the legal nature of APRFAPI's decisions, i.e. the state's compliance with the Aarhus Convention.

As regards access to justice, the communicants claimed they have been denied access to review procedure to challenge the substantive and procedural legality of the government's decrees, which should be guaranteed under Article 9, paragraph 2 of the Convention. Relevance of the provision under Article 9, paragraph 2 depends on the extent to which Article 6 is applicable, and therefore the Committee assumes the position that, while the decrees primarily concern decision-making under Article 7, certain elements fall within the scope of Article 6, thus allowing application of the provisions under Article 9, paragraph 2 of the Convention.[6] Further, the Committee finds that failure to ensure access to review procedure and provide the public concerned with adequate and effective legal remedies, the Government of Armenia has failed to comply Article 9, paragraphs 2 to 4 of the Convention.[7] While what constitutes sufficient interest and infringement of the right is determined in accordance with the national law, such determination must be made "with the objective of providing the public concerned with broad access to justice".[8]

6 Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, paragraph 35

7 Ibid, paragraph 44

8 Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, paragraph 33

As part of its work on providing primary legal aid, the Macedonian Young Lawyers Association was informed about review procedures relating to public participation initiated by members of the concerned public, as established under Article 6 of the Convention, on the grounds of failure to publish documents that are subject to submission of written comments and related to issuance of permits on use of water for electricity generation by small hydro power plant. The applicants have initiated the review procedure in 2023 by submitting an appeal before the second-instance body pursuant to the Law on General Administrative Procedure, but the same was denied as being inadmissible and untimely. This review procedure is currently pending decision by the Administrative Court.

The quoted finding of the Committee is of particular importance in this type of procedures and should be considered by all courts acting in such or similar matters.

According to Article 2, paragraph 5 of the Convention, civil society organizations "promoting environmental protection" are deemed to have an interest in environmental decision-making. Pursuant to Article 9, paragraph 2 of the Convention, a civil society organization meeting the requirements under Article 2, paragraph 5 of the Convention are deemed to have sufficient interest and are granted legal standing in review procedures. Hence, the conditions established under the national law that civil society organizations must work on promoting environmental protection to be granted legal standing are not inconsistent with the Convention. However, in order to upheld the spirit and principles of the Convention, such conditions should be determined and applied "with the objective of providing the public concerned with broad access to justice". This means that conditions imposed by the state should be clearly defined and should not cause excessive burden to environmental organizations nor should be applied in a way that significantly restricts access to justice for such civil society organizations.[9]

9 Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, paragraph 71

As regards the above-referred review procedures relating to public participation in decision-making for permits on use of water, one was initiated by an environmental organization and resulted in a decision rejecting the appeal wherein it had been noted that, inter alia, the appeal was submitted by an unauthorized entity. Having in mind the Committee's finding cited above, it is reasonable to question whether the state authorities are properly implementing the Convention, especially because the appeal was made by a civil society organization profiled in environmental protection, rendering the claim that the appeal in question had been made by an unauthorized entity ungrounded. It is undeniably possible that the appeal could be inadmissible or unfounded, depending on the specific circumstances of the case, but it is still reasonable to question whether the appeal could be deemed as being submitted by an unauthorized entity and therefore denied, knowing that it was made by an environmental organization.

The state may not, through its legislation or practice, define additional criteria that restrict access to review procedures, for example, by limiting the scope of arguments which the applicant can use to challenge a decision. While the Convention relates to environmental matters, decisions made under Article 6 of the Convention could also violate legal provisions that do not promote environmental protection, for example, legal provisions relating to construction or reconstruction, economic aspects of an investment, trade, finances, public procurement, etc. Thus, the procedures under Article 9, paragraph 2 of the Convention should not be limited only to alleged violation of the national law "serving the environment", "relating to the environment" or "promoting environmental protection", as there is no legal ground for such limitations in the Convention. The Committee finds that imposing the requirement that for an environmental organizations to be able to file an appeal under the EAA, it must assert that the decision challenged contravenes a legal provision "serving the environment" is non-compliant with Article 9, paragraph 2 of the Convention.[10]

In general, these findings of the Committee should be considered by all authorities (legislative, executive and judicial) when adopting or enforcing legislation relating to access to justice.

10 Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, paragraphs 78 and 80

The Committee recalls that Article 9, paragraph 2 of the Convention is directly linked to Article 6, which guarantees the right of the public concerned to participate in procedures on granting permits for specific activities. The states must ensure that the public concerned is able to fully exercise its procedural right to participation in such procedures, as granted under Article 6 of the Convention. Article 9, paragraph 2 in conjunction with Article 9, paragraph 4 of the Convention requires the states to provide the public concerned access to effective judicial protection when their procedural rights under Article 6 had been violated. Therefore, allowing the public concerned to challenge procedural legality of a decisions subject to Article 6 only in theory, when such action is systematically denied by the courts as inadmissible or ungrounded or on the grounds that procedural errors are of no importance for the decision (i.e. the decision would not have been different, even if procedural errors had not taken place), is not compatible with the Convention. The Committee raises concerns about the lack of clarity in the state's legal system on the matter whether a violation of procedural rights stipulated under Article 6 of the Convention constitutes fundamental error of procedure to allow exercise of the rights stipulated under Article 9 of the Convention. The Committee stresses that, in practice, if German courts deny review of appeals and/or arguments made by the public concerned, including civil society organizations, and relating to procedural legality of the decisions subject to Article 6, that would amount to non-compliance with Article 9, paragraph 2.[11]

Above-elaborated findings of the Committee hold great importance in respect to the procedure for granting permits on use of water for electricity generation mentioned earlier, and more generally, in respect to action taken by the institutions when deciding upon appeals, i.e. lawsuits relating to public participation in decision-making.

An EIA screening decision falls within the scope of Article 6, paragraph 1(b) of the Convention. Such decision is subject to the requirements under Article 9, paragraph 2 of the Convention. On that account, the public concerned, as defined in Article 9, paragraph 2 of the Convention, "shall have access to review procedure before court and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of a decision, act or omission subject to the provisions under Article 6".[12]

11 Ibid, paragraphs 82-83 and 90

12 United Kingdom ACCC/C/2010/45 and ACCC/C/2011/60; ECE/MP.PP/C.1/2013/12, 23 October 2013, paragraph 83

In July 2024, the Macedonian Young Lawyers Association and MilieuKontakt–Aarhus Centre Skopje lodged several appeals to challenge decisions on the need to conduct EIA procedures and the scope of the environmental protection study for construction of Corridors 8 and 10D, but these are still pending decisions. While the Macedonian law allows the right to appeal against such decisions, doubts are raised about efficiency of this legal remedy, which brings under question the state's compliance with the Convention, especially in respect to the previously elaborated and other findings of the Committee.

The determination whether a civil society organization promotes environmental protection can be in a variety of ways, including, but not limited to, provisions enlisted in its statute and its activities. The states may set requirements under their national laws, but such conditions should not be inconsistent with the principles of the Convention.[13]

Having in mind that, as part of procedures initiated before civil courts for establishment of human rights violation caused by air pollution and waste management, the Macedonian Young Lawyers Association had its legal standing contested, the above-elaborated finding of the Committee is of great importance for the courts, when deciding on such matters. Moreover, the above-cited findings is also important in respect to the procedure mentioned earlier in this document and initiated by a civil society organization to review legality of permits on use of water for electricity generation.

13 Armenia ACCC/C/2009/43; ECE/MP.PP/2011/11/Add.1, April 2011, paragraph 81

In defining legal standing under Article 9, paragraph 2, the Convention allows the state, under its national law, to determine whether the public has "sufficient interest" and whether it can maintain "infringement of the right" in cases where this is required as precondition in administrative procedural laws. In regard to civil society organizations, the Conventions provides further guidelines on how to interpret "sufficient interest", but in the case of persons, i.e. "individuals", the Convention requires "sufficient interest" and "infringement of the right" to be determined "in accordance with the national law". Therefore, the states retain some discretionary rights in determining the scope of the public entitled to legal standing in these matters; but the Convention further sets the limitation that such requirements must be consistent with "the objective to provide the public broad access to justice within the scope of the Convention". This means that the state, when exercising its discretionary rights, may not interpret these criteria in a way that significantly narrows the scope of persons entitled to legal standing and in a way that is contrary to the general obligations under Articles 1, 3 and 9 of the Convention.[14]

As regards the review procedure relating to permits on use of water, the applicant's legal standing was brought under question and the appeal was denied on the grounds of being submitted by an unauthorized entity. Having in mind that it is a matter of a person living in the area where the small hydro power plant is to be constructed, as well as the fact that the person's right to public participation had been violated, the public authorities should consider this finding of the Committee when determining the legal standing for submission of appeals in such cases.

The communicant claimed that it is meaningless to provide access to justice relating to public participation in decision-making after the start of construction. While the Committee does not accept the position that access to justice at that stage is meaningless, if there were no opportunities for access to justice relating to any procedure on issuing permits prior to the start of construction, that would definitely be incompatible with Article 9, paragraph 2 of the Convention. Access to justice must be secured when it is effectively possible to challenge a decision permitting performance of a specific activity.[15]

14 Austria ACCC/C/2010/48; ECE/MP.PP/C.1/2012/4, 17 April 2012, paragraph 61

15 European Commission ACCC/C/2006/17; ECE/MP.PP/2008/5/Add.10, 2 May 2008, paragraph 56

While access to justice was provided in the procedure initiated by the Macedonian Young Lawyers Association and MilieuKontakt-Aarhus Centre Skopje relating to construction of Corridors 8 and 10D, the above-quoted finding of the Committee refers to "effectiveness" of access to justice allowed. In this case, while the Macedonian legislation stipulates that submission of an appeal halts further actions in EIA processes, i.e. start of construction, the situation on the ground is quite different and it is therefore reasonable to question efficiency and effectiveness of access to justice in these cases and the state's compliance with the Convention.

While the Czech law may not be fully clear and consistent in all aspects relating to legal standing of civil society organizations, the Committee notes that such organizations are not allowed to participate throughout the entire decision-making procedure, as their legal standing against EIA's conclusion depends on the fact whether they have exercised the rights [for public participation] during the EIA procedure or during another procedure before the decision/authorization was made. The Committee finds that such position under the Czech law limits the right of access for civil society organizations to review procedure to challenge legality of the final decision that permits performance of a specific activity, such as, for example, construction permits. In that regard, the state is not compliant with Article 9, paragraph 2 of the Convention.[16]

In the procedures relating to permits on use of water, the decision taken by the second-instance body on rejecting the appeal based its arguments, inter alia, on the fact that the persons did not have legal standing as parties in the procedure as they had not participated therein. Decision-making in procedures that deny the public's right to participation in general would not be in compliance with the above-quoted finding of the Committee, notably because legal standing is tied solely to the fact whether the person had previously participated in the procedure or not, especially knowing that the person challenges the fact that it had access to such rights.

16 Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012, paragraph 78

As regards the communicator's allegation that the Czech law does not provide judicial review of EIA screening conclusions, Article 6, paragraph 1 (b) of the Convention requires the states to determine whether activities outside the scope of Annex I, which could have significant effect on the environment, should nevertheless be subject to the provisions under Article 6. Therefore, when determining this matter individually for each case, the authorities must take a decision that would create an obligation for public participation in accordance with Article 6 or would exempt such obligation for the activity in question. According to the Czech law, such decisions are not taken as part of the EIA screening conclusions, and therefore the Committee is of the opinion that the decision should fall under the provisions of Article 6, paragraph 1 (b). Article 9, paragraph 2 of the Convention requires the states to provide the public access to review procedure to challenge the substantive and procedure legality of a decision, act or omission that is subject to the provisions under Article 6, paragraph 1 (b). Thus, the Committee finds that, to the extent that the EIA screening process and the relevant criteria serve as decision required under Article 6, paragraph 1 (b), the public concerned must have access to review procedure to challenge legality of the decision made as part of the EIA screening process. Since this was not the case under Czech law, the Committee finds that the state failed to comply with Article 9, paragraph 2 of the Convention.[17]

17 Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012, paragraph 82

According to the decree on determining projects and the criteria to be used to establish the need for conducting an environmental impact assessment procedure, the projects enlisted in Annex 1 to the Convention are "categorized" as projects that necessitate EIA procedure (Appendix 1 to the Decree) and projects that require determination on case-to-case basis whether EIA is needed (Appendix 2 to the Decree). The determination whether a specific project necessitates EIA procedure or not is made by means of decision taken pursuant to Article 81 of the Law on Environment and should be made publicly available. The public concerned is entitled to contest such decisions.

While the Macedonian legislation is consistent with the above-quoted finding of the Committee, enforcement thereof still poses a major challenge. More specifically, if MESP determines that a project within the scope of Appendix 2 to the Decree does not necessitate EIA procedure, such decisions are not published on MESP's official website, thereby effectively preventing access to justice for the public concerned. Further confirmation of such practices is found in the fact that projects for hydro power plants, which would logically include small hydro power plants, fall within the scope of Appendix 2 to the Decree but, in practice, MESP decides that EIA procedure should not be conducted for these projects and that they require development and approval of environmental protection study pursuant to Article 24 of the Law on Environment, however, none of the decisions on determining the need to conduct EIA procedure are published on MESP's website.

An additional challenge is seen in conflicting provisions from the above-referenced decree and decrees determining the projects that necessitate development of environmental protection study pursuant to Article 24 of the Law on Environment, having in mind that decisions on approving these studies are not published and there are no acts regulating access to justice for the public concerned in relation to such decisions. More specifically, projects for construction of "motorways"' fall under the scope of Appendix 1 to the Decree on determining projects and the criteria to be used in determining the need to conduct environmental impact assessment procedure, i.e. projects that necessitate EIA procedure, but at the same time these projects are also found in the decree on activities and operations that necessitate development of environmental protection study, which are subject to approval by a competent body in the field of environmental protection. This confusion could create a situation wherein, taking into account that the Law on Environment does not anticipate public participation in decision-making or access to justice relating to approval of environmental studies, an environmental study for a specific motorway would be developed in the absence of previously conducted EIA screening procedure, and the public concerned would not have access to justice, which is contrary to the Convention and the Committee's finding.

Therefore, the state must consider the Committee's finding when amending its practice relating to enforcement of the Law on Environment, amending Article 24 of the Law on Environment with the objective of providing public participation and access to justice relating to approval of environmental protection studies, and when revising legal provisions on projects that necessitate EIA screening procedure or environmental protection study.

When determining how to categorize a decision under the Convention, the decision's label in the national law is not decisive, rather, the determination whether a decision can be challenged under Article 9, paragraph 2 or 3 is made on the basis of the decision's legal function or effect, i.e. whether the decision implies permit for start of a specific activity.[18] The provision under Article 9, paragraph 3 is intended to provide the public access to adequate legal remedies to challenge acts or omissions that are contrary to the environmental laws and to provide the public with means to have environmental laws enforced and make them effective. When assessing whether the Belgian criteria on access to justice for civil society organizations in the light of Article 9, paragraph 3, the provisions should be read in conjunction with Article 1, paragraph 3 of the Convention and in the light of the purpose reflected in the preamble, as follows: "effective judicial mechanisms should be made accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".[19]

In 2024, the environmental organization **Front 21 / 42** initiated a review procedure on the grounds of inadequate public participation in strategic environmental impact assessment procedure, specifically the failure to publish draft urban plan that was subject to strategic assessment. Publication of the draft urban plan as part of the strategic assessment procedure is an obligation under the Law on Environment, the essence of which is to ensure that the public has access to information that would allow meaningful engagement in decision-making. Due the municipality's failure to publish, the organization filed a complaint, the response to which, contrary to the Law on General Administrative Procedure, was made in the form of notification rejecting the complaint, instead of decision. The organization contested this notification by initiating an administrative dispute, which is still pending decision, but in its actions thus far the Administrative Court has denied the lawsuit on the grounds that a notification does not serve as individual legal act that can be challenged by means of administrative dispute.

Therefore, the Committee's finding quoted above is of great importance because, while it is indisputable that a notification does not amount to individual legal act, the use of this format to reject the complaint is indicative of its function and legal nature as decision. Therefore, when acting in such cases, the courts should apply the Committee's findings and consider the legal nature and function of the contested act, instead of focusing solely on the document's label.

18 Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, paragraph 29

19 Ibid, paragraph 34

The Committee acknowledges that Article 230, paragraph 4 of the Treaty on Establishing the European Community (TEC), on which the Court of Justice of the European Union based its strict position on legal standing, is phrased in a way that could be interpreted so as to provide legal standing for qualified individuals and civil society organizations in accordance with Article 9, paragraph 3 of the Convention. Nevertheless, the cases referred to by the communicant reveal that, according to CJEU, for a person to be individually concerned, his/her legal situation must be affected by a factual situation that differentiates him or her from all other persons. Therefore, persons cannot be individually concerned if a decision or regulation takes effect by virtue of an objective legal or factual situation. The consequences from applying the Plaumann test[20] in environmental and health matters is that, in effect, no member of the public would ever be able to challenge a decision or regulation in such case before CJEU.[21]

In 2021, a group of citizens supported by the Center for Legal Research and Analysis initiated several lawsuits before the administrative courts for protection of the right to healthy environment under Article 43 of the Constitution on the grounds of air pollution. The applicants put forward several proposals, all of which were rejected, with the Administrative Court, inter alia, finding that the lawsuits do not concern individual, but rather general interest, i.e. measures to be taken by the state institutions do not affect only the applicants, but would have a general positive effect.

On that account, the above-elaborated finding of the Committee should be considered when general determinations are made in lawsuits, especially because it refers to the burdensome standard on demonstrating individual interest as problematic in respect to compliance with the Convention.

20 In the Plaumann case, decided in 1963, CJEU interpreted Article 230 of TEC and found that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed [by the decision]".

21 European Union ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4/Add.1, May 2011, paragraph 86

The Convention does not refer to "environmental laws", but rather "laws relating to the environment". Article 9, paragraph 3 is not limited to "environmental laws", i.e. laws that decisively include the term "environment" in their title or legal provisions, but covers all laws relating to the environment, i.e. a law under any policy, including, but not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact the environment.[22] Laws relating to protection of wildlife and/or trade in endangered species (including marketing on the domestic marker, import and export) are also "laws relating to the environment" as they are not limited only to trading relations, but also include obligations on how to treat and protect the animals/species. Hence, these laws help to protect or otherwise impact the environment.[23]

This finding of the Committee holds an important place and must be considered in decision-making in cases that could be initiated before the courts or other administrative bodies with competences to decide upon appeals.

In the view of the Committee, outside the scope of EIA and IPPC procedures and environmental liability, conditions defined in the state's national law are so strict that they effectively prohibit civil society organizations to challenge acts and omissions that are contrary to national laws relating to the environment. The fact that there is a possibility for procedures established under sectoral environmental laws to be consolidated within the framework of EIA and IPPC procedures for large projects or the fact that, under certain circumstances, environmental liability and legal remedies under the civil law are applicable, does not compensate the failure to fulfil obligations under Article 9, paragraph 3 in respect to other acts and omissions.[24]

22 Austria ACCC/C/2011/63; ECE/MP.PP/C.1/2014/3, 13 January 2014, paragraph 52

23 Ibid, paragraph 55

24 Austria ACCC/C/2010/48; ECE/MP.PP/C.1/2012/4, 17 April 2012, paragraph 73

The Macedonian Young Lawyers Association initiated several lawsuits before the civil courts seeking establishment of human rights violation as a result of state-of-affairs in field of environment and failure to enforce legislation relating to air quality and waste management. These procedures are considered qualified under the scope of Article 9, paragraph 3 of the Convention. On the other hand, the Center for Legal Research and Analysis supported several lawsuits filed before the Administrative Court, requesting the court to establish violation of the right to healthy environment as a result of failure to enforce the Law on Air Quality. They also fall within the scope of Article 9, paragraph 3 of the Convention. All initiated procedures have been completed, although some of them are pending final decision after the decisions on rejecting the lawsuit were contested as well.

On that account, the quoted finding is of great importance for the courts and provides indirect guidelines on how the law should be interpreted and enforced in the light of the Convention.

The state underlined the importance of the Ombudsman on Environmental Matters and the possibility for the public, including civil society organizations, to address this institution to take action in relation to their claims. The Committee notes that, according to the table prepared by the communicant and agreed by the state concerned, the Ombudsman on Environmental Matters has limited competences on the account that it lacks legal standing in many sectoral laws relating to the environment, except for EIA and IPPC procedures, environmental liability, nature conservation and waste management. In addition, the Ombudsman has discretionary rights to decide whether the case would be brought before a court or not, irrespective of demands made by the public, including civil society organizations. The Committee finds that the state, by failing to provide legal standing for civil society organizations to challenge acts and omissions of public authorities or private entities that are contrary to provisions under the national law relating to the environment, is not compliant with Article 9, paragraph 3 of the Convention.[25]

25 Ibid, paragraphs 74 - 75

In the case of previously-elaborated procedures initiated by the Macedonian Young Lawyers Association and the Center for Legal Research and Analysis and the outcomes thereof, the quoted finding of the Committee is important in regard to the fact that the Ombudsman, which holds limited authorizations both in Austria and in North Macedonia, cannot compensate the lack of relevant caselaw, i.e. provision of legal standing for civil society organizations as required by Article 9, paragraph 3 of the Convention.

The state has adopted environmental laws at the federal level, giving the landern competences to implement and enforce the legislation. Access to justice in environmental matters is primarily regulated at federal level. According to the well-enshrined principles in the German procedural law derived from the "impairment of the right" doctrine, access to justice is granted on the basis whether the applicant claims infringement of his/her subjective rights. Strict application of this principle in access to justice under the Convention would imply non-compliance with Article 9, paragraph 3 of the Convention, given that many violations by public authorities could not be challenged unless it can be demonstrated that the action in question infringes a subjective right. In many cases, the requirement for infringement of subjective rights would deny civil society organizations access to review procedure, having in mind that they engage in public interest litigation. In its judgement from 5th September 2013, which follows CJEU's judgment in the "Slovak Brown Bear" case, the Federal Administrative Court expanded the interpretation of "infringement of the rights" criterion. However, that had been done for the purpose of ensuring adequate implementation of relevant EU legislation and does not imply that same interpretation would be applied by the courts to areas of the national law relevant to the Aarhus Convention, but not covered under EU law, nor does it guarantee that this interpretation would be widely followed in other decisions. The Federal Administrative Court has indicated that legislative changes are needed for Germany to fully comply with requirements under Article 9, paragraph 3 of the Convention. If the broad interpretation of the term "infringement of subjective rights" becomes general practice of German courts in all areas of the national law relevant to the Convention, that could amount to compliance with the Convention. However, in the absence of legislative guarantees for the public, including civil society organizations, to have access to review procedures to challenge acts and omissions by public authorities and private entities in areas of the national law relating to the environment beyond the scope of EEA, the Federal Nature Conservation Law and the Law on Environmental Damage, the Committee is of the opinion that conditions established by the state do not provide legal standing for environmental organizations to challenge acts and omissions that are contrary to national laws relating to the environment. For these reasons, the Committee found that, by failing to provide

legal standing for environmental organizations in many sectoral laws to challenge acts and omissions by public authorities or private entities that are contrary to provisions under the national law relating to the environment, the state failed to comply with Article 9, paragraph 3 of the Convention.[26]

This finding of the Committee is important in respect to procedures initiated by the Macedonian Young Lawyers Association and the Centre for Legal Research and Analysis, all of which resulted with decisions on rejecting the claims, especially because these procedures were pursued to challenge general enforcement, i.e. failure to take action towards enforcement of the laws and the impact thereof on human rights. The quoted finding is particularly important for procedures initiated by the Macedonian Young Lawyers Association where the organization appears as plaintiff and had its legal standing in the matter contested.

The Committee's finding referenced above is also important for procedures relating to permits for use of waters elaborated earlier in this paper, as it underlines the entrapping of interpreting "infringement of the rights" vis-à-vis broad access to justice.

26 Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, paragraphs 95, 98-100

Conclusions and Recommendations

The Macedonian legislation and practice are facing a large number of challenges relating to access to justice in environmental matters in the light of the Aarhus Convention and the standards upheld by the Convention's Committee.

Broad and expert debates are needed to improve access to justice in environmental matters, especially by amending and improving the legislation in effect.

The courts and administrative bodies deciding upon appeals lodged by citizens and civil society organizations need to be better informed of access to justice standards under the Aarhus Convention and Article 118 of the Constitution, and should adequately apply them in their decisions.