ERA Workshop:
Participatory and Procedural Rights in Environmental Matters

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ACCESS TO JUSTICE IN GENERAL:

Article 9 (3) Aarhus Convention
Programme

- 12:00  Access to justice: Article 9 (3) Aarhus Convention
- 13:00  Lunch Break
- 14:00  Case study on access to justice - Article 9 (3) AC -:
         Introduction to the facts of the case & working groups
- 14:45  Case study: Discussion of the results
- 15:30  Coffee Break
The promise of Article 9 (3) Aarhus Convention:
Access to justice in all (other) environmental matters!

Why?
Problem: The fish cannot go to court ...“
(AG Sharpston in the Trianel-case C-115/0) ...in Germany

... neither can the polluted air of Paris ...

... nor the hunted Slovak Brown Bear.

Credit:
ImaginAIR: Atmospheric pollution by NO2 Image © Jean-Jacques Poirault

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The answer of the Aarhus Convention is:
(Cf. Preamble, para. 18)

"... effective judicial mechanisms should be accessible to the public, including organisations,

so that

legitimate interests are protected and the law is enforced."

Discussion: "Public interest litigation" meaning law enforcement by citizens and NGOs

What is your opinion on this approach? Experiences? Pros and cons?
Art. 9 Aarhus Convention puts it into concrete terms by providing **comprehensive access to justice** in para. 1, 2, 3:

- Para. 1: relates to **environmental information** (cf. Art. 4 AC).
- Para. 2: covers **specific activities** (cf. Art. 6 AC / public participation).

**Article 9 para. 3 AC:**

All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.

**Ergo:**

Environmental disputes stemming from **all branches of law** (private, criminal and administrative) are covered!
The exact wording of Art. 9 (3) AC:

“(...) each Party shall ensure that ...

where they meet the criteria, if any, laid down in its national law,

members of the public have access to administrative or judicial procedures
to challenge acts and omissions by private persons and public authorities

which contravene provisions of its national law relating to the environment.”
Understanding Art. 9 (3) AC:

“... meet the criteria, if any, laid down in its national law...”

- Art. 9 (3) AC has a very broad scope.

- Accordingly, the Parties of the Convention have a rather broad discretion on how to ensure procedures to challenge acts and omissions contravening provisions of national law relating to the environment. (cf. ACCC/C/2006/18 (Denmark)).

- Examples of enforcement rights can be found in the EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage.
Understanding Art. 9 (3) AC:

“... meet the criteria, if any, laid down in its national law...”

- Using their discretion to transpose Art. 9(3) AC the Parties must take account of the main objective which is “**wide access to challenging procedures**” within a “due process” Art. 9 (4) AC.

- **Problem in Germany:**
  There is no comprehensive transposition of Art. 9(3) AC by the legislator. More and more the judiciary tries to fill this gap by a **broad interpretation** of the relevant national rules of procedure in the light of Aarhus. Thus the German notion of “**possible impairment of rights**” as being the traditional requirement for standing is broadened.

Example: NGO-standing to challenge an air quality plan.
Implemented procedures under Art. 9 (3) AC have to provide - so to say - „due process“

Art. 9 (4) AC:

“(…) the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”
Understanding Art. 9 (3) AC:
Who can bring a challenge? „The public“!

- „The public“ (Art. 2 para. 4 AC)
  means one or more natural or legal persons,
  and, in accordance with national legislation or practice,
  their associations, organizations or groups.

- „The public concerned“ (Art. 2 para. 5 AC)
  means the public affected or likely to be affected by,
  or having an interest in, the environmental decision-making;

  [- and as to NGOs -]
  for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Aarhus Compliance Committee:
An actio popularis is not required, standing requirements are possible. A “subjective public right doctrine” (Germany) seems to be too strict.
Understanding Art. 9 (3) AC:

What can be challenged?

„Private and public handling!“

“... acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

Notes: Private and criminal law enforcement is covered. The exercise of administrative powers is covered. The exercise of parliamentary and judicial powers is NOT covered.
Understanding Art 9 (3) AC:

Who reviews the challenge?

„Administrative or judicial bodies!“

... administrative “ or “ judicial ...?

What does it mean for the EU Member States?

In principle, the Parties have a free discretion to choose and establish their procedures to ensure the enforcement of environmental law („citizen enforcement“) as long as the objectives and „due process“ are guaranteed.

Additional EU requirements?
If the law to be enforced is a national and EU norm (e.g. Habitat- Directive) a judicial procedure may be necessary in order to fulfill EU requirements:
- Principle of equivalence and effectiveness
- Right to an effective remedy (cf. Art. 47 EU Charter of Fundamental Rights)
Art. 9 (3) AC and the ongoing story of EU (non) implementation:

NO (!) implementation of Art. 9 (3) for the Member States by the European Union:

Incomplete (!) implementation for the European Union:
EU-Regulation 1367/2006: EU-recognised NGOs can only bring challenges against individual (not general) administrative acts.

Legal proceedings against EU-Regulation 1367/2006:
AG Jääskinen, Opinion from 8 May 2014 saw a violation of Art. 9 (3) AC which - „insofar“ - has direct effect.

But: Court of Justice (Grand Chamber), two Judgments of 13 January 2015, (C-401/12 P to C-403/12 P “air quality” and C-404/12 P to C-405/12 P “pesticides”), disagreed:

“Art. 9 (3) AC is not „unconditional and sufficiently precise“ and therefore has no direct effect !“
How to deal with Art. 9 (3) AC in practice?

The Slovak Brown Bear ([C-240/09](http://www.flickr.com/photos/tmarschner/2728816091))
What happened?

The Ministry of the Environment of the Slovak Republic started administrative proceedings to allow the hunting of the brown bear by a derogation under Habitat Directive.

VLK, an environmental NGO, requested participation in the proceedings.

The Ministry rejected this request and VLK appealed to the Supreme Court, which stayed the proceedings and referred a number of question to the CJEU.

The CJEU issued its landmark decision on Art. 9 (3) AC.

Result: The Supreme Court revised its previous case law and granted VLK standing and quashed the decision of the Ministry and remitted the case back for further deliberation.
Why did that happen?

Background: **Strict species protection**


- Article 12 (1) of the Habitats Directive provides that Member States establish a system of strict protection prohibiting:
  - (a) all forms of deliberate capture or killing of specimens of these species in the wild.

- The requirements for granting a derogation pursuant to Art. 16 (1) Habitats Directive do not seem to be given.
More Background:
The „Spirit of Aarhus“ (Preamble, para. 18):

„... effective judicial mechanisms should be accessible to the public, including organisations, so that legitimate interests are protected and the law is enforced.“

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The case is covered by Article 9 (3) AC:

- Art. 9 (1) AC:
  Refusals and inadequate handling by public authorities of requests for environmental information.

- Art. 9 (2) AC:
  Decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities.

- Art. 9 (3) AC
  All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.

Serious legal problems arise because Art. 9 (3) AC is part of international law!

Jurisdiction of the CJEU?

The Aarhus Convention is a mixed agreement (EU and MS) and the Court of Justice had to justify its jurisdiction.

„Self-executing“ / „direct effect“?

No, Art. 9 (3) relies on additional domestic legislation to implement the far-reaching review procedure under Art. 9 (3) AC!
Confirmed recently by two judgments of 13 January 2015 (C-401/12 P to C-403/12 P “air quality” and C-404/12 P to C-405/12 P “pesticides”) rendered by the Court of Justice (Grand Chamber!).
In the Brown Bear Judgement (C-240/09) CJEU decided as follows:

- EU Aquis

**Per se Art. 9 (3) AC does not have a direct effect in EU law**

but

the Aarhus Convention has become a part of the EU Aquis by approval.
Brown Bear Judgement (C-240/09): The CJEU split the gordian knot by stating:

The national court has to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Art. 9 (3) AC and the objective of effective judicial protection of the rights conferred by European Union law in order to enable an environmental protection organisation, such as VLT, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.
Discussion:

- Have you had some practical experience with the reasoning of the CJEU in the „Brown Bear Judgement“?

- If so, in which contexts?

- What did it mean to interpret a domestic procedural provision „to the fullest extent possible“ in order to grant access to justice in environmental matters?