

The legal framework on access to justice: the Aarhus Convention and the ECHR

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Legal framework

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (**Aarhus Convention**), 1998, Aarhus
- European Convention on Human Rights (**ECHR**), 1950, Rome



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Aarhus Convention vs. ECHR

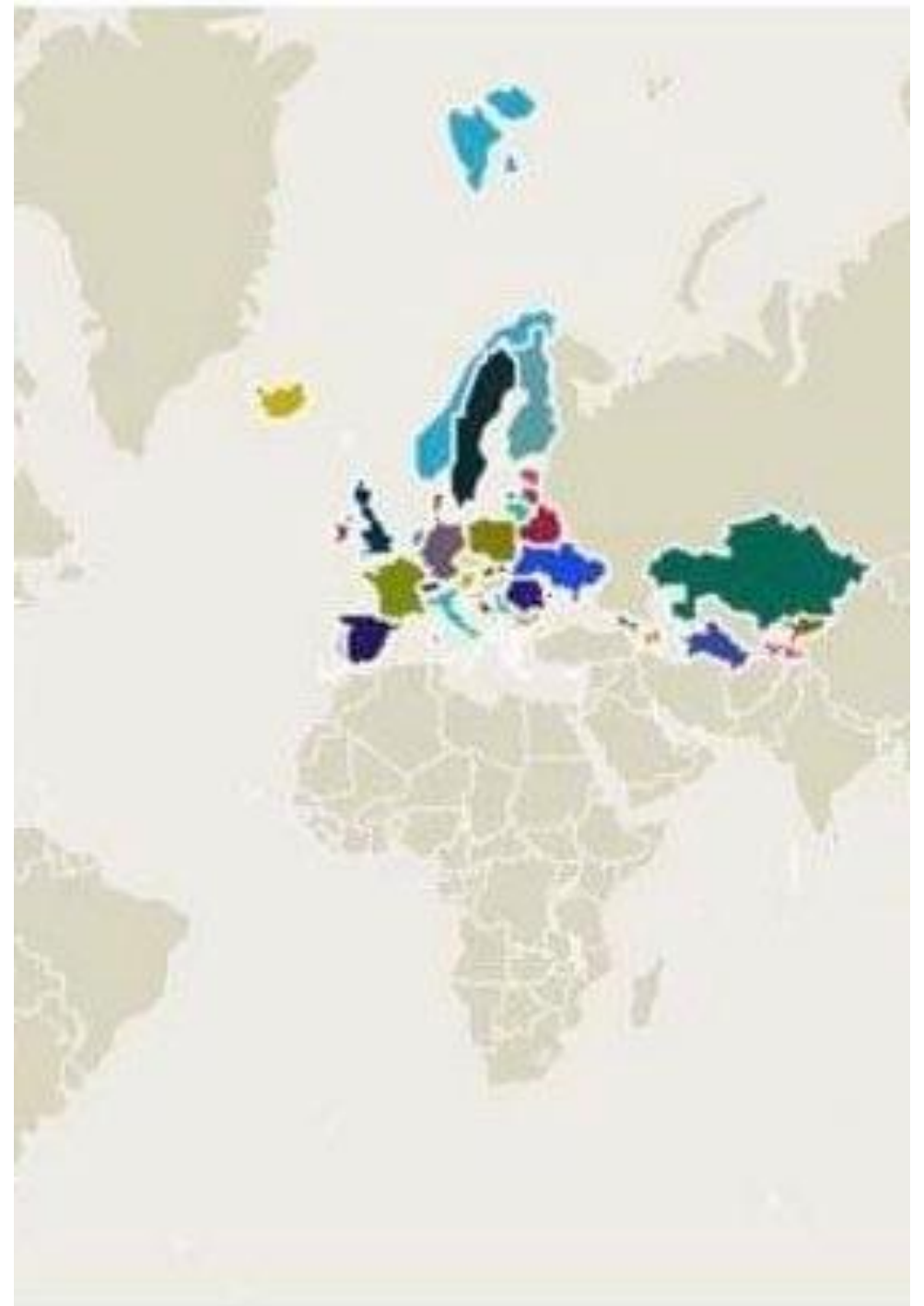
- Scope
- Objective
- Content
- Non-compliance mechanism



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Aarhus Convention: Scope

- 46 states belonging to the Economic Commission for Europe of the United Nations (UNECE)
- The European Union + its Member States
 - i. Regulation (EC) No. 1367/2006, Aarhus Regulation
 - ii. Directive 2003/4/EC, Access to Environmental Information Directive
 - iii. Directive 2014/52/EU, EIA Directive
 - iv. Directive 2010/75/EU, IED Directive
 - v. CJEU case law



Aarhus Convention: Objective

- Article 1:

In order to contribute to the protection of **the right of every person** of present and future generations **to live in an environment adequate to his or her health and well-being**, each Party shall guarantee the **rights of access to information, public participation in decision-making, and access to justice in environmental matters** in accordance with the provisions of this Convention



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Aarhus Convention: Content

- Objective of environmental protection:
- „(...) the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or nongovernmental organisations” (Advocate General opinion in case C-260/11)
- Three pillars (three procedural human rights in environmental matters):
 - i. Access to information
 - ii. Public participation
 - iii. Access to justice**



Aarhus Convention: Non-compliance mechanism

- Quasi-judicial mechanism: the Aarhus Convention Compliance Committee (ACCC)
- Consists of nine members (experts, not judges) that serve in a personal capacity without remuneration and do not represent the countries of which they are nationals
- Endorsement of ACCC findings by the Meeting of the Parties: political and legal pressure



European Convention on Human Rights: Scope

- 47 States that are members of the Council of Europe
- The European Union is not a party to the Convention, although there is ongoing discussing about this subject



European Convention on Human Rights: Objective

- Effective protection of the individual human rights enshrined in the ECHR



European Convention on Human Rights: Content

- Human rights
- *Inter alia*:
 - Article 2 – right to life,
 - Article 6 – right to fair trial,
 - Article 8 – right to private and family life,
 - Article 10 – right to information
 - Article 13 – right to an effective remedy
- A major European (thus regional) legal instrument to protect human rights.
- Convention as a „living instrument”



European Convention on Human Rights: non-compliance mechanism

- Judicial mechanism: the European Court of Human Rights
- Consists of 47 judges (equal to the number of contracting states), elected by majority vote in the Parliamentary Assembly of the Council of Europe from among three candidates nominated by each contracting state
- The mechanism of executions of judgments



Aarhus Convention vs. ECHR

	Aarhus Convention	EHCR
Scope	39 states of UNECE + the EU	47 states of the Council of Europe
Time	Signed in 1998	Signed in 1950
Content	Environmental agreement	Human rights treaty
Objective	Sefeguarding the (healthy) environment	Effective protection of the individual human rights
Non-compliance mechanism	Quasi-judicial mechanism: ACCC	Judicial mechanism: ECtHR
Implementation	EU law, national courts	Rarely directly applied by national courts



Access to justice under Aarhus Convention and ECHR

- Aarhus Convention: Article 9
- ECHR: Article 6 and Article 13
 - i. scope
 - ii. legal standing
 - iii. scope of review
 - iv. requirements of review:
 - a. equality of arms/costs of the proceedings;
 - b. impartial court/independent body established by law
 - c. length of the proceedings
 - d. effective remedy



Access to justice under Aarhus Convention: Scope

- Article 9 entitles the public to have access to domestic **review procedures** in respect of **all matters of environmental law**, including:
 - (i) refusals and inadequate handling of **requests for information** (Article 9(1));
 - (ii) **decisions, acts, or omissions related to permits subject to public participation** (Article 9(2)); and
 - (iii) **acts and omissions of private persons and public authorities that contravene national law related to the environment** (Article 9(3))



Access to justice under Aarhus Convention: Legal standing

- Article 9(1): anyone
- Article 9(2): „public concerned” + „a sufficient interest” OR „impairment of a right”
 - i. environmental NGO as „public concerned”
- Article 9(3): members of the public where they meet the criteria, if any, laid down in [...] national law”.



Access to justice under Aarhus Convention: Scope of review

- Article 9(4) and (5)
- Scope of review: right to “challenge the substantive or procedural legality of decision”
- Standard of review: left to procedural autonomy limited by mainly effectiveness – it must not made impossible in practice or excessively difficult to exercise rights
- Remedies: procedures shall provide “adequate and effective remedies”
- Costs: may neither be subjectively unreasonable nor objectively unreasonable



Access to justice under Aarhus Convention: Requirements for review procedures

- Remedies are adequate and effective
- Review made by a court of law or other independent and impartial body established by law
- Procedures are fair, equitable, timely and not prohibitively expensive
- Non-discrimination
- Information on administrative and judicial review is disseminated to the public
- Appropriate assistance to reduce financial and other barriers



Relation between Aarhus Convention and ECHR

- Growing nexus between environmental and human rights law
- Parallel systems, both part of international legal framework
- „(...) Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. **The importance of public access to the conclusions of such studies and to information** which would enable members of the public to assess the danger to which they are exposed is beyond question . **Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making proces**” (Taşkın and Others v. Turkey, no. 49517/99, § 119, 4 December 2003).



Thank you

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When can environmental lawyers use the European Convention on Human Rights

Selected aspects of access to justice in environmental matters

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11th January 2021



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Human rights & Environment

1. What access to justice means under the ECHR?
2. Environmental matter as a human right issue under the ECHR
3. Applicability of Article 6 to the environmental matters
4. Fair trial - general safeguards of Article 6 ECHR
5. Right to an effective remedy under Article 13 – definition and content
6. Who can complain to the European Court of Human Rights – brief introduction to major concepts



Access to justice under the ECHR

- guarantee right to go to court – to obtain a remedy if it is found that the individual's rights have been violated
- under the ECHR we discuss its two main components:

Access to justice

Right to a fair trial

Article 6 of the ECHR applies to criminal charges, disputes concerning civil rights, and obligations recognised in domestic law.

Right to an effective remedy

Article 13 of the ECHR applies to all ECHR rights. It requires provision of a remedy before a national authority.



Access to justice under the ECHR (2)

Core elements of these rights include:

- access to justice is a procedural framework that protects substantive rights (i) provided within domestic legal system (ii) protected by the Convention
- effective access to a dispute resolution body, that fairly and timely will resolve the matter, providing adequate redress
- the general application of the principles of efficiency and effectiveness to the delivery of justice



Environmental matter as a human right issue

Scope of the protection offered by Article 6 and Article 13

Article 6	Article 13
<ul style="list-style-type: none">➤ cases concerning criminal charges & civil rights and obligations➤ Environmental matters will fall under the civil rights and obligations	<ul style="list-style-type: none">➤ arguable violations of ECHR rights➤ No self standing; always with rights protected by the ECHR



Environmental matter as a human right issue (2)

- connection/link between environmental degradation, pollution and/or climate change and particular human right protected (show directly influence & impact)
- underline environmental human right recognised in domestic legal order (i.e. right to healthy environment)
- the most common substantive rights invoked ECHR are:
 - Article 2 right to life
 - Article 8 right to private and family life



Environmental matter as a human right issue (3)

“[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such (Kyrtatos v. Greece, § 52)

no right to nature preservation as such (Fadeyeva v. Russia, § 68)

an explicit right to a clean and quiet environment (Hatton and Others v. the United Kingdom [GC], § 96)

BUT

Explicit reference to a right to a healthy environment (Tatar v. Romania and Di Sarno and Others v. Italy)



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Environmental matter as a human right issue (4)

there is a right to protection against environmental hazards and the Court found violations of :

Article 8 ECHR :

- asbestos pollution (Brincat and Others v. Malta)
- industrial pollution (Băcilă v. Romanie or Fadeyeva v. Russia)
- waste pollution (López Ostra v. Spain, Giacomelli v. Italy)
- gold mining pollution (Tătar v. Romania)

Article 2 ECHR:

- Methan explosion on waste collection (Öneryıldız v. Turkey)
- Mudslide or water floods (Budayeva v. Russia, Kolyadenco v. Russia)



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Applicability of Article 6 to the environmental matters

Article 6 is applicable when

- civil rights/obligations are at stake
- there is a genuine and serious dispute
- result of the proceedings must be directly decisive for the right in question



Applicability of Article 6 – civil rights

- concept of “*civil rights and obligations*” is an “autonomous” under the Convention
- May be at stake irrespectively of
 - parties’ status
 - the nature of the legislation governing the “dispute” (civil, commercial, administrative law etc.)
 - the nature of the authority with jurisdiction in the matter (ordinary court, administrative authority)



Applicability of Article 6 – civil rights

- **Gorraiz Lizarraga and Others v. Spain**
 - intended to defend specific interests of the association's members, namely their lifestyle and properties in the valley
- **Zander v. Sweden**
 - ability to use the water in the well for drinking is one of the facet of the owners right thus it is clearly a "civil right"
- **Taşkın and Others v. Turkey**
 - domestically recognised right to healthy environment link to civil right



Applicability of Article 6 – civil rights

- **Collectif Stop Melox and Mox v. France** admissibility decision
 - the applicant association defended the general interest, Seen from this angle, the "challenge" did not concern a "right" of a civil nature **BUT**
 - such an approach would not be in the reality of today's civil society in which NGOs play important role in the field of environmental protection – the strong link with Aarhus was made



Applicability of Article 6 – genuine and serious dispute

- Substantive meaning to these terms and the Court will analyse the nature of dispute
- In proceedings relating solely to admissibility criteria, there is no “dispute” over “civil” rights and obligations (rather very well-known formal requirements)
- The situation is different where the domestic courts (which declined jurisdiction) were called upon for the first time to determine the legal issue raised



Applicability of Article 6 - directly decisive for the right

- **the Balmer test** – the connection between extension of nuclear power plant and the applicants (life, physical integrity, property) was too tenuous and remote. The applicants could not show a ‘serious, specific and imminent danger’ affecting them personally, but rather a general danger in relation to all nuclear power plants (*Balmer-Schafroth and Others v. Switzerland*)
- It cannot be argued that, as a result of disputed proceedings, the members of the applicant association were exposed to a threat not only serious but also specific or imminent to their life, health or property. In the absence of such a finding, the effects on the population remained hypothetical (*Sdružení Jihočeské Matky v. Czech Republic*)



Applicability of Article 6 - directly decisive for the right

- **Gorraiz Lizarraga and Others v. Spain**
 - particular circumstances of the case, and especially the fact that the applicant association had been set up for the specific purpose of defending its members' interests before the courts and that those members were directly concerned by the dam project
- **L'Érablière A.S.B.L. v. Belgium**
 - a local environmental-protection association; there was a sufficient link between the dispute and the right claimed by the legal entity, in particular in view of the status of the association and its founders, and the fact that the aim it pursued was limited in space and in substance



Fair trial - General safeguards of Article 6 ECHR

- Access to court be “practical and effective” for this reason the Court often analysed national procedural rules or substantive rules and decide if they are of the nature to bar access to court or they were applied with excessive formalism
- impartial tribunal establish by law
- right to reasonable length of the proceedings (*Krystatos v. Greece* - a violation of Article 6 § 1 with regards to the length of civil and administrative proceedings)



Fair trial - General safeguards of Article 6 ECHR

- Access to justice requires a hearing that is procedurally fair and public
 - whole proceedings, small errors does not make trial unfair
- the right to equality of arms - legal aid
 - *Steel and Morris v. the United Kingdom*
small NGO v. big corporation
 - *National Movement Ekoglasnost v. Bulgaria*
(A1P1) excessive costs of legal representation of opposite party based on the principle – the “loser pays”



Fair trial - General safeguards of Article 6 ECHR

- the right to adversarial proceedings - the right to have knowledge of, and comment on, all evidence filed to influence the court's decision; the right to have sufficient time to familiarise oneself with the evidence before the court; the right to produce evidence
- the right to a reasoned decision - a reasoned decision demonstrates that a case has been heard properly and permits the parties to bring an appropriate and effective appeal



Fair trial - General safeguards of Article 6 ECHR

- right to appeal - the ECHR does not guarantee a right of appeal in civil proceedings. The ECtHR has confirmed, however, that, if an appeals process is provided Art 6 applies
- the right to the execution of a final judgment (*Bursa Barosu Başkanlığı and Others v. Turkey*)



Fair trial - conclusion

No Fourth instance

- Guarantee “procedural” fairness
- No challenging the established facts
- No domestic law interpretation
- No admissibility and assessment of evidence

Unless flagrantly and manifestly arbitrary



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Effective remedy under the ECHR – Article 13

- No definition of the remedy
- Effective in law and in practice
 - be accessible
 - be capable of providing redress in respect of the applicant's complaints
 - offer reasonable prospects of success
- Relation between Art. 6 and Art. 13:
 - Art 6 is lex specialist to Art 13
 - Violation of Art 6 – no need for Art 13
 - Safeguards of Art 6 are stricter and absorb these under Art. 13



Effective remedy under the ECHR

- Apply to the rights protected by the Convention - provides a right to claim “an effective remedy before a national authority” for “arguable claims” of ECHR rights violations
- object is to provide a means for individuals to obtain appropriate relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court (*Öneryıldız v. Turkey*)



Effective remedy under the ECHR

Article 2

Öneryıldız v. Turkey violation of right to life and right to property - a violation of Art. 13 because there were remedies but the damages awarded to the applicant had never been paid to him and the proceedings had not been conducted with due diligence

Kolyadenko and Others v. Russia violation of Art. 2 and Art. 1 P1 BUT no separate issue under Art. 13 with regards to Art. 2 and no violation of Art. 13 with regards to Art. 1 P1 because effectiveness does not depend on favourable outcome



Effective remedy under the ECHR

Article 8

Hatton and Others v. the United Kingdom - no violation of Art. 8 because fair balance BUT violation Art. 13 in connection with Art. 8 because of the scope of judicial review the scope of review by the domestic courts was limited to the classic English public law concepts, and did not allow consideration of whether the increase in night flights represented a justifiable limitation on the right to respect for the private and family lives those who lived in the vicinity of Heathrow airport.

Cordella and Others v. Italy – violation of Art.13 for absence in the Italian legal system of effective remedies enabling them to secure cleaning of the polluted areas and compensation for the damage they had sustained



Effective remedy under the ECHR

Right to information

- Article 10 ECHR (*Magyar Helsinki Bizottság v. Hungary*)
- Often right to receive information is covered by the State positive obligation under Article 8 of the Convention or Article 2 of the Convention (*Vilnes and Others v. Norway* or *Roche v. the United Kingdom*)



Who can complain to the European Court of Human Rights

Article 34 of the Convention

The Court may receive applications from

any person

nongovernmental organisation or

group of individuals

claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto



Who can complain to the European Court of Human Rights

- No *actio popularis*
- Applicant's victim status
 - directly or indirectly affected by the alleged violation
 - Sufficient direct link between applicant and harm

Direct victim	Indirect victim	Potential victim
Directly affected Separate analysis under each of the Articles/rights Art. 6 – civil right Art. 8 - private & family life (minimum level) Art. 2 – right to life	Next of kin - related to the death or disappearance of his or her relative Exceptionally under other articles	Potential criminality of same sex intercourse/Mass surveillance Person that would be affected or is potentially affected by the environmental hazard – see Cordella and others v. Italy, paras 102-105



Who can complain to the European Court of Human Rights

NGOs/Associations

Standing given	No standing	Not clear/not decided
<p>1. Gorraiz Lizarraga and Others v. Spain - 62543/00, 2004</p> <p>2. Collectif Stop Melox and Mox v. France, no. 75218/01, 28 mars 2006 decision on admissibility</p> <p>3. L'Erablière A.S.B.L. v. Belgium</p>	<p>1. Bursa Barosu Başkanlığı and Others v. Turkey</p>	<p>1. Sdružení Jihočeské Matky v. Czech Republic (dec.)</p> <p>2. Greenpeace and others v. Germany (dec)</p>

