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The Right to the Protection of a Healthy Environment[1]

Prof. Dr. Luc Lavrysen
Judge at the Belgian Constitutional Court
President EU Forum of Judges for the Environment
Director Centre for Environmental & Energy Law, Ghent University

I. A Comparative Perspective

The incorporation of a right to (the protection of) a healthy environment in the Constitution or an obligation for the government to protect the environment or to make careful use of the country's natural resources has become a very popular notion over the last few decades. The constitutions of over a hundred countries presently contain such a provision in some form or other[2]. Some authors hold the view that states which have not yet incorporated such a provision in their Constitution should do so as soon as possible. Hayward[3], who made an in-depth study of this subject, puts it this way: *"A human right to an environment adequate for one's health and well-being is not a luxury. Moral consistency dictates it should apply equally to all"*.

[1] The first part of this paper is based on L. Lavrysen & J. Theunis, "The right to the protection of a healthy environment in the Belgian Constitution: retrospect and international perspective", in: I. Larmuseau (ed.), *Constitutional rights to an ecologically balanced environment*, (V.V.O.R.-Report; 2007/2), Gent, Vlaamse Vereniging voor Omgevingsrecht, 2007, 9-29. The second part is based on L. Lavrysen, "The Aarhus Convention: Between Environmental Protection and Human Rights", in: X., *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber amicorum Michel Melchior*, Limal, Anthémis, 2010, 647-671.

[2] Shelton and Kiss list the following countries in which that is the case: Angola, Argentina, Azerbaijan, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Chile, China, Colombia, Congo, Costa Rica, Cuba, Germany, Ecuador, El Salvador, Eritrea, Ethiopia, Equatorial Guinea, Philippines, Finland, Georgia, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Yugoslavia, Cape Verde, Cameroon, Kazakhstan, Kuwait, Croatia, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Netherlands, Nepal, Nicaragua, Niger, Palau, Panama, Papua New Guinea, Uganda, Ukraine, Uzbekistan, Paraguay, Peru, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Suriname, Tajikistan, Taiwan, Tanzania, Chechnya, Thailand, Togo, Chad, Turkmenistan, Turkey, Venezuela, Vietnam, Byelorussia, Zambia, South Africa, South Korea, Switzerland (D. Shelton and A. Kiss, *Judicial Handbook on Environmental Law*, United Nations Environment Programme, Nairobi, 2005, p. 7). France has recently joined this list. See M. Prieur, "L'importance de la réforme constitutionnelle", *Revue juridique de l'environnement*, 2003, special issue, pp. 7-11; Y. Jegouzo, "La genèse de la charte constitutionnelle de l'environnement", *Revue juridique de l' environnement*, 2003, special issue, pp. 23-34; Ph. Billet, "La constitutionnalisation du droit de l'homme à l'environnement: regard critique sur le projet de loi constitutionnelle relative à la charte de l'environnement", *Revue juridique de l'environnement*, 2003, special issue, pp. 35-43; R. Romi, "Les principes du droit de l'environnement dans la 'charte constitutionnelle': 'jouer le jeu' ou mettre les principes 'hors jeu'?", *Revue juridique de l'environnement*, 2003, special issue, pp. 45-49; D. Perben, "Ouverture des travaux", *Conférence des Présidents des Cours suprêmes des états francophones d'Afrique sur la contribution du droit au développement durable*, Conference Proceedings of 3 and 4 February 2005, Court of Cassation, Paris, 2005, pp. 33-35.

[3] T. Hayward, *Constitutional Environmental Rights*, Oxford University Press, 2005, p. 210.

Even more important than the inclusion of a clause in the Constitution is of course the question how such a clause can be enforced in practice. To use Hayward's words, *"It will only apply to all if it is enforced, and, in a world still divided into states, it has to be enforced in the present epoch by states. That is why I have maintained in this book that the right ought to figure among the most fundamental commitments of a state as a fundamental right of the constitution. This will not be sufficient to guarantee effective enjoyment of the substance of the right for all people, but I believe that on balance the arguments show it would be wrong to deny that it is necessary"*.

In some countries this constitutional right is treated as a *subjective right*. In Argentina, for example, it is considered a subjective right which enables any person to institute legal proceedings to protect the environment. In the case of *Irazu Margarita v Copetro SA,* the Camara Civil y Commercial de la Plata ruled, "The right to live in a healthy and balanced environment is a fundamental right for the people. Any damage to the environment eventually results in damage to life itself and to the mental and physical integrity of the person"[4]. Similar case-law came about in Colombia and Chile. In the case of *Fundepublico v Mayor of Bugalagrande y otros,* the Juzgado Primero Superior of Tulua (Colombia) held that "it should be acknowledged that a healthy environment is a conditio sine qua non for life itself and that no right can be exercised in a greatly damaged environment"[5]. The Colombian Constitutional Court ruled that the right to a healthy environment is better protected by so-called *class actions* when special circumstances threaten to infringe the constitutional and legal rights of an unspecified number of persons[6]. In a case of unauthorized intensive pig farming in a residential area, the Court found that there was sufficient evidence that the stench and pollution that was caused infringed the petitioner's right to a healthy environment[7]. The Supreme Court of Chile accepted the interest of a number of petitioners in protesting against a large-scale deforestation project, saying that the Constitution does not require that the directly affected local residents themselves institute the action for the protection of constitutional rights[8]. The Supreme Court of Uganda ruled that Article 50 of the Constitution, which enshrines the right to a healthy environment, entitles the petitioners to take legal action in the public interest since the importance of fundamental rights outweighs technical procedural

[4] Judgment of 10 May 1993, cited in D. Shelton and A. Kiss, *o.c.*, p. 7. This case-law was upheld in Camara Federal de Apelaciones de la Plata, Sala 2a, 8 July 2003, *Asociacion Para la Proteccion del Medio Ambiente y Educacion Ecologica "18 De Octubre" v Aguas Argentinas SA, y.o., Compendium of Summaries of Judicial Decisions in Environment-Related Cases,* United Nations Environment Programme, Nairobi, 2005, p. 65.

[5] Judgment of 19 December 1991, cited in D. Shelton and A. Kiss, *o.c.*, p. 7.

[6] Constitutional Court of Colombia, *José Cuesta Novoa and Milciades Ramirez Melo v the Secretary of Public Health of Bogota,* 17 May 2005, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 77.

[7] Constitutional Court of Colombia, *Maria Elena Burgos v Municipality of Campoalegre (Huila)*, 27 February 1997, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 79.

[8] Supreme Court of Chile, *Antonio Horvath Kiss and others v National Commission for the Environment*, 19 March 1997, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 72. The action was founded on the infringement of the equality principle, the right to a healthy environment, the right to engage in economic activities that are not contrary to good morals, public order and national security, and right of ownership. Another Chilean court ordered the remediation and closure of an unhealthy public dumping site for infringement of the right to a healthy environment for the local residents: Corte Suprema, *Aurelio Vargas and others v Municipalidad de Santiago and others (The Lo Errazuriz Case)*, 27 May 1987, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 74. A Court of Appeal ordered the discontinuation of large-scale water collection from Lake Chungara, which was liable to cause serious salinization of farmland, for infringement of the right to a healthy environment: Corte de Apelaciones, *CODEFF v Minister of Public Works and others*, 21 August 1985, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 75.

conditions[9]. The Supreme Court of the Philippines ruled that the circumstance that the right to a balanced and healthy environment is enshrined in Article 16 of the Constitution, which forms part of the *Declaration of Principles and State Policies* and not of the *Bill of Rights*, does not imply that this right is less important. According to the Court, this right entails, among other things, the obligation of a prudent and rational management of the national woodland stock. The Court recognized the right of a group of children to protest, in the interest of future generations, against a large number of deforestation licenses which had been delivered and which would cause very serious damage to the rainforest[10].

Attempts to *derive* a right to a healthy environment *from other constitutional rights* have been more successful in certain countries than in others. The Constitution of Bangladesh protects the right to life, but does not contain an explicit right to a healthy environment. In a case in which the Secretary-General of the Association of Environmental Lawyers of Bangladesh challenged a water management plan which posed a serious threat to a particular population group, the Supreme Court nevertheless held that Articles 31 and 32, which protect the right to life, entail that the environment and the ecological balance must be protected and maintained, without pollution of air and water, without which enjoyment of life is hardly possible. Any act or omission contrary to that infringes the right to life. Consequently, the right of action of the association in question was recognized and its action was allowed[11]. The Indian Supreme Court, for its part, ruled that Article 21 of the Constitution, which guarantees the right to life, comprises the right to the enjoyment of an unpolluted environment, in particular clean water and air, and that therefore Article 32 of the Constitution, which provides for actions in the public interest to protect the fundamental rights, can be relied upon[12]. This ruling was upheld by the Indian Supreme Court[13]. Similar case-law has been established in Pakistan[14] and Kenya[15]. In Costa Rica, too, the Supreme Court ruled that the right to health and the protection of the environment are essential to be able to fully enjoy the right to life[16]. In the United States of America, on the other hand, it was held that the right to a healthy and clean environment, which according to the petitioners constitutes the foundation of the nation and is

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[9] High Court of Uganda at Kampala, *The Environment Action Network Ltd v The Attorney General and the National Environment Management Authority*, Misc. Appl. N° 39 of 2001, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 35.

[10] Supreme Court, *Juan Antonio Oposa and others v The Honourable Fulgencio S. Factoran and others*, G.R. N° 101083, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, pp. 143-144.

[11] Supreme Court of Bangladesh, Appellate Division (Civil), *Dr Mohiuddin Farooque v Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others*, 45 Dlr 1996, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, pp. 90-91; see also: Supreme Court of Bangladesh, High Court Division, *Dr Mohiuddin Farooque v Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 others*, Writ Petition N° 300 of 1995, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 92.

[12] *Subash Kumar v State of Bihar*, AIR 1991 SC 420, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 104; *M.C. Mehta v Union of India and others*, Air 1988 Supreme Court 1115, *ibid.*, p. 114; *Bandhua Mukti Morcha v Union of India*, 3 SCC 161 (1984).

[13] Supreme Court of India, *M.C. Mehta v Kamal Nath and others* (1997), *1 Supreme Courts Cases*, 388, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 96.

[14] Supreme Court, *General Secretary, West Pakistan Salt Miners Labour Union (Cba) Khewra, Khelum v The Director, Industries and Mineral Development, Punjab Lahore*, 1996 Sc Mr 2061, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, p. 139; Supreme Court, *Ms Shehla Zia and others v Wapda*, Human Rights Case N° 15-K of 1992, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.*, pp. 141-142.

[15] High Court of Kenya at Nairobi, *Peter K. Waweru v Republic of Kenya*, Misc. Civil Application N° 118 of 2004, 2 March 2006, *n.y.r.*

[16] Sala Constitucional de la Corte Supreme de Justicia, Decision N° 6918/94, 25 November 1994, *Presidente de la sociedad Marlene SA v Municipalidad de Tibas.*

guaranteed by the laws and the Constitution of the United States of America, cannot be inferred from the Fourteenth Amendment, nor from any other provision of the Constitution[17].

The Spanish Constitution of 1978 contains a detailed Article 45 on environmental protection[18]. It provides[19]:

"*1. Every person has the right to enjoy an environment that is appropriate to his development and the duty to conserve it.*

2. The public authorities shall see to the rational use of all the natural resources in order to protect and improve the quality of life, to defend and restore the environment, by relying on the essential collective solidarity.

3. Those who infringe the provisions of the foregoing paragraph shall be liable, under the terms to be established by law, for criminal penalties or, where appropriate, for administrative penalties, and shall be obliged to repair the damage caused."

The article in question figures in the third chapter of Title I of the Constitution on the guiding principles of social and economic policy. Those principles, while appearing under Title I of the Constitution, which deals with fundamental rights, benefit from a lesser degree of protection than those contained in the first chapter of the same title, which deals with fundamental rights and public liberties, and those contained in the second chapter of the same title, which concerns rights and freedoms. According to Article 53(3) of the Constitution, those principles serve as guidelines for the legislature, for legal practice and for the activities of the various public authorities. However, they can only be invoked in a court of law under the conditions laid down in the laws that implement those principles[20]. Nevertheless, the Spanish Supreme Court held that they are not merely simple rules whose effectiveness is confined to the field of rhetoric and semantics. On the contrary, they are vital and living principles which steer and restrict the way in which the authorities exercise their powers. The Court considered that Article 45 of the Constitution, although it does not establish a subjective right, is actually a directly applicable rule that must be enforced by the public authorities. As a consequence of the place of Article 45 in the Constitution, the provision does not suffice to support a constitutional appeal (the so-called *amparo*) or the special procedure to protect the fundamental rights (procedure pursuant to Act n° 62/1978). Partly under the influence of the case-law of the European Court of Human Rights, certain forms of environmental disruption now come under the heading of the constitutional right to physical and moral integrity and the inviolability of the home, constitutional rights which are enforceable before the Constitutional Court. This is in particular the case with serious forms of noise pollution. Since 2001, the Constitutional Court has gradually come to recognize the right to silence as being part of those constitutional rights[21].

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[17] US District Court, Southern District, Texas, *Tanner v Armco Steel Corporation,* 8 March 1972, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases, o.c.,* p. 57.

[18] The Greek Constitution, too, has a similarly well-elaborated Article 24, which plays an important role in the case-law of the Greek Council of State: J. Iliopoulos-Strangas and G. Leventis, "La Protection des droits sociaux fondamentaux dans l'ordre juridique de la Grèce", in J. Iliopoulos-Strangas (Ed.), *La protection des droits sociaux fondamentaux dans les Etats membres de l'Union européenne,* Athens – Brussels – Baden-Baden, Ant. N. Sakkoulas – Bruylant – Nomos Verlagsgesellschaft, 2000, pp. 432-434.

[19] Translated into French by L. Oliveira Porto Silvero, in: M. Consuelo Alonso Garcia, "La protection juridique contre le bruit dans la jurisprudence du Tribunal Constitutionnel espagnol", *Revue européenne de droit de l'environnement,* 2006, p. 38.

[20] M. Rodriguez-Pinero, "La Protection des droits sociaux fondamentaux dans l'ordre juridique de l'Espagne", in J. Iliopoulos-Strangas (Ed.), *La protection des droits sociaux fondamentaux dans les Etats membres de l'Union européenne,* Athens – Brussels – Baden-Baden, Ant. N. Sakkoulas – Bruylant – Nomos Verlagsgesellschaft, 2000, p. 263.

[21] Constitutional Court, Plenary Chamber, N° 119/2001, 24 May 2001, N° 16/2004, 23 February 2004. For an analysis of this case-law, see: M. Consuelo Alonso Garcia, *l.c.*, pp. 48-56.

II. What the Belgian Constitution Says

The right to the protection of a healthy environment forms part of the economic, social and cultural rights which have been enshrined in the Belgian Constitution since 1994. They are formulated as follows:

"Everyone has the right to lead a life in conformity with human dignity. To this end, the laws, decrees and rulings alluded to in Article 134 guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.

These rights include notably: […]

1° the right to employment and to the free choice of a professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;

2° the right to social security, to health care and to social, medical and legal aid;

3° the right to have decent accommodation;

4° the right to enjoy the protection of a healthy environment;

5° the right to enjoy cultural and social fulfillment"

This article of the Constitution was extensively debated by the constitutional legislator[22], yet the right to the protection of a healthy environment was given relatively little thought[23]. What is certain, though, is that the term "healthy environment" is broadly interpreted[24]. As appears from the parliamentary preparations, every person has "the right to a decent, healthy and ecologically balanced environment"[25], and "The government has a special responsibility to ensure that future generations still have a livable environment. Its task in this respect is a very broad one. It not only covers conservation, but also the controlling of water, air and soil pollution, a proper planning of the available space and of farming and stockbreeding activities, and the promotion of environmentally-friendly technologies in industry and communications"[26].

So although "healthy environment" is a broad concept, the most pressing question for the citizen, and especially for the practicing lawyer, concerns the enforceability – and therefore the practicability – of the right to the protection of a healthy environment. As is often the case, the parliamentary preparations give little to go on: "Once the constitutional legislator has issued a constitution, the politicians have no more control over it, and the rules are allowed to lead a life of their own in legal practice. This also applies to rules deriving from ordinary laws, yet the problem is even greater for the rules of a constitution, because such rules serve

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[22] For a detailed discussion, see G. Maes, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, pp. 393-485.

[23] For a brief discussion of the relevant passages from the parliamentary preparations, see J. Theunis and B. Hubeau, "Het grondwettelijk recht op de bescherming van een gezond leefmilieu. Artikel 23, derde lid, 4°, van de grondwet: draagwijdte en belang voor een goede ordening van de ruimte", *T.R.O.S.* 1997, pp. 329-345.

[24] L. Lavrysen, *o.c.*, p. 664.

[25] *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/3°, p. 20; *Parl. St.* House of Representatives, B.Z. 1991-1992, n° 391/1, p. 12. According to certain case-law, protection may even cover the aesthetic aspect of the environment: Marche-en-Famenne, Justice of the Peace, 21 February 1995, *J.L.M.B.*, 1995, p. 1301, note by M.C. Coppieters. Cf. Council of State, *Schweren*, no. 75.557, 6 August 1998, and Council of State, *Dossogne*, no. 77.497, 9 December 1998.

[26] *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/1°, p. 10.

in a broad sense as guiding principles for law and society"[27]. Furthermore, the parliamentary preparation of Article 23 of the Constitution is – to put it mildly – hardly an example of clarity. It was repeatedly – *mille fois répétée*[28] - emphasized that since the rights mentioned in that article have no direct effect, no subjective rights can be derived from them[29]. They are primarily meant to serve as guiding principles for government policy and to instruct the legislature[30]. However, the more it is stressed that something is not meant to have a particular attribute, the more the impression is given that it really is supposed to have that attribute[31]. Unwittingly, the constitutional legislator concedes this. Although it wishes to deny the socioeconomic rights any direct effect, it nevertheless believes that in several respects they have a "real import in positive law"[32]. In fact an academic voice[33] in the parliamentary debate pointed out that "a text can be said to have indirect effect, but irrespective of what the legislature has to say about it, the legal doctrine and case-law will subsequently decide whether or not that text has direct effect"[34], yet this suggestion was not taken seriously[35]. Maes concludes, "It is very difficult, if not virtually impossible, to infer the exact intention of the constitutional legislator from the parliamentary preparations, since it is hard to escape the impression that the constitutional legislator adopted an ambiguous stance during the preparations"[36].

Firstly, the parliamentary preparation of Article 23 of the Constitution suggests that the fundamental economic, social and cultural rights are supposed to produce a *standstill* effect[37]. Environmental policy should pursue not only a healthy environment, but also an environment with a standard of health not lower than the existing one. The *standstill* protection is an intrinsic element of fundamental social rights[38]. However, it is nothing more than a special

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[27] J. Verschuuren, *Het grondrecht op bescherming van het leefmilieu*, Zwolle, Tjeenk Willink, 1993, p. 339. See also on the concept of "life in conformity with human dignity" in Article 23 of the Constitution, P. Martens, *Théories du droit et pensée juridique contemporaine*, Collection de la Faculté de droit de l'Université de Liège, Brussels, Larcier, 2003, p. 73: "The concept is so vague, its substance so indiscernible, that by incorporating it in a statute, the constitutional legislator in effect delegates constitutional powers to the courts".

[28] P. Martens, "L'insertion des droits économiques, sociaux et culturels dans la Constitution", *R.B.D.C.* 1995, p. 7.

[29] See *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/1°, p. 4, n° 100-2/3°, pp. 4 and 11, and n° 100-2/4°, pp. 5, 14, 20, 70-74, e.g. last p. 5: "The fundamental social rights, on the other hand, must not have direct effect, and the working party felt that this had to emerge unequivocally and explicitly from the text of the proposal, and it will be repeated whenever necessary."

[30] *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/3°, p. 13. See also *Parl. St.*, Senate, n° 100-2/4°, pp. 13 and 41, and *Parl. St.*, House of Representatives, B.Z. 1991-1992, n° 381/1, p. 9.

[31] See in the same sense G. Maes, *o.c.*, p. 441: "The energy which the constitutional legislator displayed during the discussions to indicate that this provision has no direct effect leads us to maintain on the contrary that, as a rule, the fundamental rights enshrined in the Constitution really do have direct effect."

[32] *Parl. St.*, Senate, n° 100-2/4°, p. 5

[33] Professor D. Pieters, who was heard by a subcommittee of the House of Representatives

[34] *Parl. St.*, Senate, n° 100-2/4°, p. 71

[35] *Ibid.*: "He appears to insinuate that even if the constitutional legislator expressly decides that a particular text has indirect effect, case-law can subsequently contend, against the legislator's will, that the text does have direct effect. The Chairman does not agree with this."

[36] G. Maes, *o.c.*, p. 440

[37] *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/3°, p. 13. See also *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/4°, pp. 85-87 and *Parl. St.*, House of Representatives, B.Z. 1991-1992, n° 381/1, p. 8. On *standstill*, see I. Hachez, "L'effet de *standstill*: le pari des droits économiques, sociaux et culturels", *A.P.T.*, 2000, pp. 30-57, and G. Maes, *o.c.*, pp. 109-140 and 460-476 and "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *R.W.*, 2005-2006, pp. 1081-1094.

[38] G. Maes, *o.c.*, p. 464

form of direct effect[39]. The government has a wide margin of appreciation, though only in a certain direction. An impairment of the existing level of protection can be penalized by the courts. We will discuss this further below. A second *meaning in positive law*, to a certain extent similar to the *standstill* effect, lies in a combination of the economic, social and cultural rights with the principles of equality and non-discrimination, which are guaranteed by Articles 10 and 11 of the Constitution. Under those articles, the recognition of socioeconomic rights must be ensured without discrimination. According to the parliamentary preparation, an infringement of these provisions by a legislative rule qualifies for review by the Constitutional Court[40]. Even though the rule protects a healthy environment for two distinct categories of persons, it must not unwarrantedly offer a lesser degree of protection to one category than to the other. In this way, too, a *lower limit* is set to the government's margin of appreciation. A *third legal meaning* of the economic, social and cultural rights, according to the parliamentary preparation, lies in a Constitution-compliant interpretation of laws, decrees and other rules. Where they are open to several interpretations, a court of law is obliged to follow the interpretation that is compatible with the Constitution[41]. That means that, in case of doubt, an environmentally-friendly interpretation is recommended in principle: *in dubio pro natura*[42]. According to Jadot, this rule of interpretation is also capable of reducing the public authorities' margin of appreciation in the granting of licenses for activities that are a potential threat to the environment. A license ought to be refused if human or environmental health will be affected. The same author also holds the view that the right of action should, in the light of Article 23 of the Constitution, be broadly interpreted when the protection of the environment is at stake. A right (to the protection of a healthy environment) without a right of action would be pointless[43]. So, by and large, a threefold meaning in positive law can be gathered from the parliamentary preparation which, contrary to what the constitutional legislator claims, amounts in certain cases to a kind of direct effect of the provision in question. But what the constitutional legislator seems to fear most of all – and that is the reason why it stubbornly insists that Article 23 of the Constitution has no direct effect – is that a fully-fledged *subjective right* would be derived from Article 23 of the Constitution.

What is left, after twelve years of case-law, of the constitutional legislator's intentions, and how practicable is the constitutional right to the protection of a healthy environment at this moment?

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[39] A. Alen, *Handboek van het Belgisch Staatsrecht*, Deurne, Kluwer, 1995, n° 660, p. 641. On the concept of "direct effect", see A. Alen and W. Pas, "De directe werking van het VN-Verdrag inzake de rechten van het kind", in *Kinderrechtengids*, Ghent, Mys & Breesch, pp. 1-25.

[40] *Parl. St.*, House of Representatives, B.Z. 1991-1992, n° 381/1, p. 9. See also *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/4°, p. 39 and *Parl. St.*, B.Z. 1991-1992, n° 218/3, p. 18. E.g. Constitutional Court, nos. 50 and 51/2003, 30 April 2003, and comments by E. Brems, "Grondwettelijke bescherming tegen geluidshinder", *T.M.R.*, 2003, pp. 385-389.

[41] *Parl. St.*, Senate, B.Z. 1991-1992, n° 100-2/3°, p. 13, and *Parl. St.*, House of Representatives, B.Z. 1991-1992, n° 381/1, p. 9, with reference to Cass., 20 April 1950, *Arr. Cass.*, 1950, 517, *Pas.*, 1950, I, p. 560, with conclusion by L. Cornil.

[42] B. Jadot, "Le droit à l'environnement », in *Les droits économiques, sociaux et culturels dans la Constitution*, R. Ergec (Ed.), Brussels, Bruylant, 1995, (p. 257) p. 263.

[43] *Ibid.*, pp. 264-267. See also P. Martens, *o.c.*, p. 124: "Doesn't this provision (Article 23 of the Constitution), at the risk of being pointless, involve putting in place effective procedures and, consequently, nurturing the concept of interest?" See, however, Council of State, *Non-profit organization Réserves naturelles*, n° 133.834, 13 July 2004, and Council of State, *Non-profit organization Grez-Doiceau, Urbanisme et environnement*, n° 135.408, 24 September 2004, *J.T.*, 2005, pp. 117 and 119, note by B. Jadot. See also on this subject T. Hazeur, "L'intérêt à agir des associations de défense de l'environnement devant le Conseil d'Etat: quelle liberté pour le juge et quel rapport à la nature ? », *Amén.*, 2006, pp. 105-114.

The development in the case-law is essentially influenced by a twofold catalyst: the special legislator on the one hand and the European Court of Human Rights on the other.

By the Special Act of 9 March 2003, the special legislator extended the powers of review of the Constitutional Court[44]. As a result, Article 23 has become one of the constitutional provisions against which the Constitutional Court can review legislative acts. As a result, indirect review via the equality principle is no longer necessary, so that one of the meanings in positive law of Article 23 referred to in the parliamentary preparations has become to a large extent superfluous. The review by the Constitutional Court is chiefly carried out on the basis of the *standstill* obligation. Since the state of the environment is very much dependent on policy-exogenous factors, we asked ourselves from the outset whether an absolute *standstill* obligation is at all times practicable for the government and whether the courts shouldn't review environmental policy against the proportionality principle rather than simply penalize an infringement of the *standstill* obligation[45]. In a judgment of 29 April 1999, the Council of State already ruled that the constitutional right to the protection of a healthy environment "appears to imply, among other things, that a relaxation of current environmental standards can only be deemed compatible with the Constitution if there are compelling reasons to do so"[46]. In other words, the prohibition of impairing the existing environmental protection is not absolute, but must be weighed against other values in society. The case-law of the Constitutional Court has developed along the same lines. Initially, the Court refused to expressly rule on the question whether Article 23, third paragraph, 4° of the Constitution implies a *standstill* obligation[47], but in a number of more recent judgments it has expressly acknowledged this obligation[48]. As was already mentioned, what is usually meant by the *standstill* effect is that the level of protection of the guaranteed rights as acquired in the legal system must not be reduced; in practice, however, this definition did not solve all the problems. Certain questions soon came up.

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[44] Special Act of 9 March 2003 amending the Special Act of 6 January 1989 on the Constitutional Court, *B.S.* 11 April 2003 (effective date: 21 April 2003). See on this subject B. Renauld, "La Cour D'Arbitrage depuis 2003: confirmation de competences, nouveautés de procedure", in *La Cour d'arbitrage: un juge comme les autres?*, Liège, Editions du Jeune Barreau de Liège, 2004, pp. 27-51, J. Theunis, "Het Arbitragehof : bevoegdheidsuitbreiding en andere wijzigingen ingevolge de bijzondere wet van 9 maart 2003", *A.J.T.*, 2003, 954-960, P. Vanden Heede and G. Goedertier, "Eindelijk een volwaardig Grondwettelijk Hof? Een commentaar op de Bijzondere Wet van 9 maart 2003 op het Arbitragehof", *T.B.P.*, 2003, pp. 458-479, and J. Velaers, "Het Arbitragehof 'derde fase': de bijzondere wet van 9 maart 2003", *R.W.*, 2003-2004, pp. 1401-1416.

[45] J. Theunis, "Het grondrecht op de bescherming van een gezond leefmilieu", *l.c.*, p. 6

[46] Council of State, *Jacobs*, n° 80.018, 29 April 1999. See S. Wyckaert, "Het 'standstill'-effect in de milieurechtspraak van de Raad van State", *A.J.T.*, 1999-2000, pp. 413-419.

[47] Constitutional Court, n° 50/2003, 30 April 2003, B.19; Constitutional Court, n° 130/2004, 14 July 2004, B.5; Constitutional Court, n° 150/2004, 15 September 2004, B.12; Constitutional Court, n° 14/2005, 19 January 2005, B.17; Constitutional Court, n° 59/2005, 16 March 2005, B.7.2; Constitutional Court, n° 189/2005, 14 December 2005, B.9; . Whereas the Court expressly recognized the standstill obligation in connection with the right to social security (Article 23, third paragraph, 2° of the Constitution), see Constitutional Court, n° 169/2002, 27 November 2002, B.6.5; Constitutional Court, n° 5/2004, 14 January 2004, B.25.3; Constitutional Court, n° 123/2006, 28 July 2006, B.14.3. See on this subject I. Hachez, "La Cour d'arbitrage et l'article 23 de la Constitution: "Cachez ce *standstill* que je ne saurais voir ! », note under the aforementioned judgment n° 150/2004, *Amén.*, 2005, pp. 132-140.

[48] Constitutional Court, n° 135/2006, 14 September 2006, B.10; Constitutional Court, n° 137/2006, 14 September 2006, B.7.1; Constitutional Court, n° 145/2006, 28 September 2006, B.5.1; Constitutional Court, n° 67/2007, 20 June 2007, B.5; Constitutional Court, n° 114/2008, 31 July 2008, B.3; Constitutional Court, n° 114/2009, 9 July 2009, B.5.2; Constitutional Court, n° 90/2010, 29 July 2010, B.6.2; Constitutional Court, n° 113/2010, 14 October 2010, B.3.2; Constitutional Court, n° 133/2010, 25 November 2010, B.7.1; Constitutional Court, n° 2/2011, 13 January 2011, B.6.2; Constitutional Court, n° 22/2011, 3 February 2011, B.3.2; Constitutional Court, n° 75/2011, 18 May 2011, B.3.1; Constitutional Court, n° 102/2011, 31 May 2011, B.3.2; Constitutional Court, n° 58/2012, 3 May 2012, B.2.2.

The first question was whether the prohibition of impairing the existing protection is absolute, in other words, whether the Constitutional Court needs to nullify the slightest weakening of a legislative act for infringement of Article 23 of the Constitution. In the light of the case-law of the Court, the answer to this question clearly has to be no. A non-significant weakening is permitted. In connection with the protection of a healthy environment, even a significant weakening does not automatically result in an infringement of Article 23 of the Constitution; this is only the case in the absence of reasons connected with the public interest[49].

The second question that arose was: What is the "existing" level of protection? Does this mean the level of protection that was in effect in 1994, when Article 23 was incorporated in the Constitution, or does it mean the most recent level of protection? The Court takes as its point of reference the level of protection offered by the "applicable legislation"[50], in other words, the level of protection in effect before the last change in the law. This means that we have a moving reference point instead of a fixed reference point. Consequently, the progress that has been made in the meantime is protected. However, it also means that there is room for stealthy decline: after all, a step backwards from time to time is still in keeping with the *standstill* obligation[51].

In the same year that Article 23 of the Constitution came into effect, at a time when the constitutional legislator had only just finished its work, the European Court of Human Rights delivered a judgment which plainly says that, in certain circumstances, every person has a subjective right to a healthy environment. The European Convention on Human Rights (ECHR) does not as such contain a right to a healthy environment. Nevertheless, the environment can influence the interpretation of the traditional rights and freedoms. The government can invoke considerations of environmental protection to justify the restriction of a conventional right[52], while conversely considerations of environmental protection can also influence the judgment of a court of law, more particularly when an impairment of the environment also means an impairment of a right that is protected by the ECHR. In the *Lopez Ostra* judgment of the European Court of Human Rights, environmental pollution was involved in the interpretation of Article 8 of the ECHR. The nuisance was caused by a waste processing plant that had been built twelve meters from the home of Gregoria Lopez Ostra, on municipal land and with municipal subsidies but without the requisite license. The gases and smells that were produced during the waste processing caused health problems among local residents virtually right from the outset, to such an extent even that they had to be evacuated. The local authorities ordered a partial closure of the plant, yet despite the absence of a license they are opposed to the idea of a total closure. In a judgment of 9 December 1994, the European Court of Human Rights decided that the Spanish government had not succeeded in striking a fair balance "between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect

[49] Constitutional Court, n° 130/2004, 14 July 2004, B.5; Constitutional Court, n° 150/2004, 15 September 2004, B.12; Constitutional Court, n° 59/2005, 16 March 2005, B.7.2; Constitutional Court, n° 189/2005, 14 December 2005, B.9. See J. Theunis, "Het recht op de bescherming van een gezond leefmilieu. Even stilstaan bij de standstill", in *Feestbundel milieurecht*, Milieurechtstandpunten n° 20, Bruges, die Keure, 2005, pp. 87-90. See also Liège, 29 June 2004, *N.J.W.*, 2004, p. 987.

[50] Constitutional Court, n° 130/2004, 14 July 2004, B.5; Constitutional Court, n° 150/2004, 15 September 2004, B.12; Constitutional Court, n° 59/2005, 16 March 2005, B.7.2; Constitutional Court, n° 189/2005, 14 December 2005, B.9.

[51] J. Theunis, "Het recht op de bescherming van een gezond leefmilieu. Even stilstaan bij de standstill", *l.c.*, p. 90.

[52] E.g. ECtHR, 18 February 1991, *Fredin*, *ECR*, Series A, vol. 192, §48.

for her home and her private and family life"[53]. In this case, given the seriousness of the circumstances, the government had failed to respect the balance between the public interest and the effective enjoyment by Mrs Lopez Ostra of her home and of her private and family life[54]. Along a similar line of reasoning, the government's failure to provide information about the polluting activities of a factory was found in the *Guerra* judgment to be contrary to Article 8 ECHR[55].

The best known example from the case-law of the European Court of Human Rights is probably the Hatton case, which addressed the issue of the noise from night flights around London-Heathrow[56]. In the first judgment delivered by the ordinary chamber of 7 judges on 2 October 2001, the European Court ruled that Article 8 of the ECHR had been infringed. In the particularly sensitive field of environmental protection, says the Court, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. States are required to minimize, as far as possible, the interference with these rights by all means possible, including a full impact study. Since this did not happen, the State failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives[57].Although in the second and final judgment by the Grand Chamber of 17 judges on 8 July 2003 the European Court confirmed the applicability of Article 8 of the ECHR in environmental cases, it stopped short of awarding special status to the fundamental environmental rights. The Grand Chamber took more elements into consideration and, unlike the ordinary chamber, eventually tipped the balance in favor of the public (economic) interest. A wide margin of appreciation is left to the public authorities[58]. Meanwhile this case-law has been conformed many times[59]

The case-law of the European Court of Human Rights is also echoed in the Belgian case-law, primarily in that of the Constitutional Court. In a number of judgments concerning the Walloon noise standards around the airfields of Bierset and Charleroi, implicit or explicit reference is made to the Hatton case. In one of those cases, some local residents living near the airfield of Bierset derived their argument from the infringement of Articles 22 and 23 of

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[53] ECtHR, 9 December 1994, *Lopez Ostra*, *ECR*, Series A, vol. 303-C, §58. See the comments by Y. Haeck, "Straatsburg zet het licht (voorzichtig) op 'groen' – over het Europees verdrag voor de rechten van de mens en het recht op een gezond leefmilieu", *T.M.R.*, 1995, pp. 297-303, and J. Theunis, "Het recht op een gezond leefmilieu ook in het EVRM? Een situering van het arrest *Lopez Ostra* van het Europees Hof voor de Rechten van de Mens", *Milieurecht – Info*, 1995, n° 6-7, pp. 24-28.

[54] In the same sense, but this time in the case of a private polluting plant, see ECtHR, 9 June 2005, *Fadeyeva*; ECtHR, 26 October 2006, *Ledyayeva and others*; ECtHR, 2 November 2006, *Giacomell*i.

[55] ECtHR, 19 February 1998, *Guerra*, *Reports of Judgments and Decisions*, 1998-I, p. 210. For a similar assessment in the light of Article 2 ECHR (right to life), see ECtHR, 18 June 2002 (Ordinary Chamber) and 30 November 2004 (Grand Chamber*), Öneryildiz*. See also Constitutional Court, n° 150/2004, 15 September 2004.

[56] For a case about noise from nightclubs, see ECtHR, 16 November 2004, *Moreno Gomez*.

[57] ECtHR, 2 October 2001, *Hatton and others*. See the comments by E. Brems, "Geluidshinder op Heathrow schendt de mensenrechten. Kleurt het Europees Hof voor de Rechten van de Mens grasgroen?", *T.M.R.*, 2001, pp. 153-157, and R. Van Gestel and J. Verschuuren, "Nachtvluchten aan banden door artikel 8 EVRM", *NJCM-Bulletin*, 2002, pp. 154-162. See also the reference to this judgment in Constitutional Court, nos. 50 and 51/2003, 30 April 2003, in Brussels, 17 March 2005, *Amén.* 2005, p. 308, and in EHRM, 20 January 2004, Ashworth and others.

[58] ECtHR, Grand Chamber, 8 July 2003, *Hatton and others*, *Reports of Judgments and Decisions*, 2003-VIII, p. 189. See the comment by V. Staelens, "Geluidshinder door nachtvluchten versus mensenrechten", *N.J.W.*, 2004, pp. 218-227.

[59] ECtHR, 10 November 2004, *Taskin;* ECtHR, 26 February 2008, *Fägerskiöld*; ECtHR, 7 April 2009, *Brândue;* ECtHR, 9 November 2010, *Deés*; ECtHR, 10 February 2011, *Dubetska and others*; ECtHR, 3 May 2011, *Apanasewicz*; ECtHR, 21 July 2011, *Grimskovskaya*.

the Constitution. According to the Court, it appears from the parliamentary preparation of Article 22 of the Constitution, which guarantees the right to respect for private and family life, that the constitutional legislator sought the greatest possible concordance with Article 8 of the European Convention on Human Rights. Briefly, the challenged decree of the Walloon Region was based on the principle that the noise thresholds that were set could be exceeded for up to ten times over a 24-hour period and that under those circumstances the upper noise limit in the main nighttime rooms would not have to be guaranteed. The Constitutional Court considered that such a measure is likely to have disproportionate consequences that constitute a serious infringement of the residents' right to respect for their private and family life, as guaranteed by Article 22 of the Constitution. Since the argument derived from a breach of Article 22 of the Constitution is considered well-founded, the argument, insofar as it is also derived from a breach of Article 23 of the Constitution, needs no further examination[60]. This judgment shows that the debate surrounding the "direct effect" of the constitutional right to the protection of a healthy environment has to a large extent become irrelevant. As a result of the case-law of the European Court of Human Rights on Article 8 of the European Convention on Human Rights and the case-law of the Constitutional Court on Article 22 of the Constitution, that right has become enshrined in the aforementioned provisions, the direct effect of which is beyond dispute. Consequently, there appears to be no reason why Article 23 of the Constitution should be denied the same effect.

The case-law of the Council of State also offers an apposite illustration. While a judgment of 18 December 2003 confirmed that the economic and social rights contained in Article 23 of the Constitution do not "in principle" have direct effect[61], the following day an argument was found valid that was derived from Article 23 of the Constitution, in conjunction with Article 8 of the European Convention on Human Rights, since the challenged decision on flying routes disproportionately and without compelling reason infringed the right to health and to a healthy environment[62]. In a subsequent judgment, the Council of State ruled that the government has the obligation to "guarantee the right to health and the right to the protection of a healthy environment equally for all citizens, as enacted in Article 23, third paragraph, 2° and 4°, of the Constitution"[63]. Furthermore, in the judgment of 19 December 2003, the increase in noise pollution is regarded as a serious detriment which is difficult to remedy, and this detriment is "all the more serious since it infringes fundamental rights that are protected by the Constitution, namely the right to a healthy environment and the right to respect for family life, which in turn is protected by Article 8.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms"[64]. In this and in earlier judgments[65], the Council of State thus invokes the right to the protection of a healthy environment in a curious way in the suspension proceedings. For the suspension of an administrative act of government, it is required that a serious ground is adduced and that the immediate implementation of the challenged act is liable to cause a serious detriment which is difficult to remedy. The Council of State clearly considers that the latter condition is fulfilled if the detriment concerns the fundamental right to the protection of a healthy environment. This leads to the paradoxical

[60] Constitutional Court, n° 101/2005, 1 June 2005, B.2.4-B.5.
[61] Council of State, *Raemaekers*, n° 126.555, 18 December 2003.
[62] Council of State, *Municipality of Sint-Pieters-Woluwe and others*, n° 126.669, 19 December 2003, *J.L.M.B.*, 2004, p. 465, note by B. Hendrickx.
[63] Council of State, *De Becker and others*, n° 145.837, 13 June 2005.
[64] Council of State, *Municipality of Sint-Pieters-Woluwe and others*, n° 126.669, 19 December 2003.
[65] E.g. Council of State, *Grégoire*, 5 October 1994, n° 49.440; Council of State, *nv Royal Building*, n° 75.048, 10 July 1998; Council of State, *Salesse and Bonmassar*, n° 79.736, 1 April 1999; Council of State, *Halleux and Lejeune*, n° 81.001, 16 June 1999; Council of State, *Venter*, n° 82.130, 20 August 1999; Council of State, *Baeten and Moreale*, n° 85.836, 6 March 2000, *J.L.M.B.*, 2000, p. 670, with the opinion by J.-F. Neuray.

situation that, in the absence of direct effect, no argument can be derived from a breach of Article 23 of the Constitution, whereas the risk of such a breach is accepted to conclude that there is a serious detriment which is difficult to remedy. Furthermore, as was said earlier, the Council of State does accept the *standstill* effect of Article 23 of the Constitution, which is nothing other than a special form of direct effect.

The (constitutional) right to (the protection of) a healthy environment also featured prominently in a number of judgments and rulings of the ordinary courts and tribunals. Despite objections raised in the legal doctrine[66] and a few contrary court judgments[67], it should be observed here, too, that the constitutional right to the protection of a healthy environment can essentially have the same practical meaning as Article 8 of the European Convention on Human Rights. A number of judgments and rulings expressly refer to a subjective right to (the protection of) a healthy environment[68]. Obviously the issue is not primarily the right to a healthy general environment but the right to respect for one's own small piece of healthy environment *(NIMBY – Not In My Back Yard!).*

What is noteworthy in the case-law of the European legal institutions is that the public interest which is weighed against the individual interest is usually the public *economic* interest. The former European Commission of Human Rights had already made the rights of Article 8 of the ECHR subordinate to the construction of a dam for a hydroelectric power station[69] and to the public benefit of a nuclear power station[70]. The European authorities do not interfere in the energy or environmental policy of the Member States, except where the latter exceed their (wide) margin of appreciation and, as in the *Lopez Ostra*, *Guerra* and *Fadeyeva* cases, infringe a fundamental right in the process[71]. What is also remarkable is that the domestic courts, too, often weigh economic interests against the right to a healthy environment. Such case-law need not surprise us. Understood in this way, the fundamental right to a healthy environment is an alternative to the right to respect for private and family life and for the home, through which, as described above, an environmentally detrimental measure can be reviewed against the European Convention on Human Rights and against the Constitution. This is aptly illustrated in a judgment of the Court of Appeal in Brussels on night flights at Zaventem, in which the Court first denies direct effect to Article 23, third paragraph, 4°, of the Constitution and then goes on, in the light of Article 8 of the European Convention on Human Rights, to weigh the noise nuisance for the local residents against the economic interests of the country[72].

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[66] See A. Carette, "Een subjectief recht op een volwaardig leefmilieu?", *T.P.R.*, 1998, (p. 821) pp. 850-866, and B. Jadot, "Le droit à la conservation de l'environnement", *Amén.*, 1996 (special issue), pp. 229-236.

[67] E.g. Brussels, 24 January 1997, *J.L.M.B.*, 1997, p. 332; Brussels, 15 May 1997, *Amén.*, 1997, p. 321; Liège, 9 February 2001, *Amén.*, 2001, p. 247; Antwerp, 28 June 2005, *T.M.R.*, 2006, p. 349.

[68] E.g. Liège, 29 January 1998, *J.L.M.B.*, 1998, p. 470; Brussels, 15 January 1998, *J.L.M.B.*, 1998, p. 268; President of the Court of Verviers, 11 July 1996, *J.L.M.B.*, 1996, p. 1094; President of the Court of Namur, 31 July 2000, *J.L.M.B.*, 2000, p. 1225; Justice of the Peace of Marche-en-Famenne, 21 February 1995, *J.L.M.B.*, 1995, p. 1301, note by M.C. Coppieters. See also, already before Article 23 of the Constitution came into effect, Brussels, 2 November 1989, *T.M.R.*, 1994, p. 42, *J.L.M.B.*, 1989, p. 1475, *J.P.*, 1989, n° 161, p. 30, note by B. Jadot and F. Ost, *Amén.*, 1990, p. 42, note by A. Lebrun; Corr. Ghent, 5 December 1991, *T.M.R.*, 1992, p. 100; Liège, 21 May 1992, *J.L.M.B.*, 1993, p. 446, and *J.T.*, 1994, p. 125.

[69] European Commission of Human Rights, 3 October 1983, G. and E., *D.R.*, vol. 35, p. 36.

[70] European Commission of Human Rights, 17 May 1990, S., *D.R.*, vol. 65, p. 250.

[71] On the limits of the European Convention on Human Rights in this connection, see ECHR, 22 May 2003, Kyrtatos, §53.

[72] Brussels, 24 January 1997, *J.L.M.B.*, 1997, p. 332. Cf. Brussels, 10 June 2003, *R.A.B.G.*, 2004, p. 63, note by T. De Gendt, partly quashed by Cass., 4 March 2004, *T.M.R.*, 2004, p. 435, note by V. Staelens; Liège, 29 June 2004, *N.J.W.*, 2004, p. 987; Brussels, 17 March 2005, *Amén.*, 2005, p. 308, and Brussels, 9 June 2005, *Amén.*,

Following on from that, a recent judgment by the same Court of Appeal should not be left unmentioned. This judgment features several aspects of the "meaning in positive law" of Article 23 of the Constitution. No fewer than 3200 residents of the North of Brussels challenged the different federal government measures to spread the noise nuisance in and around the airport of Zaventem. The Court of Appeal established that "the subjective rights of the residents of the North and East of Brussels to health, to the protection of their family life and to a healthy environment are seriously impaired by the operating practice of aircraft flying over their living environment to an excessive degree due to the high frequency of flight movements and to the number of flight movements that cause noise peaks above a certain dB level". Firstly, the Court of Appeal refrains from applying the decree of the Brussels-Capital Government of 27 May 1999 on the control of noise nuisance from air traffic on account of an exceeding of authority. The Court ruled that it is beyond dispute that if the governments of all the regions were to enact the same regulations, any normal operation of the national airport would become totally impossible. The Court also refers to the obligation to comply with the proportionality principle in the exercise of powers, and observes that the regulations for controlling noise pollution from aircraft as contained in the Brussels government decree must necessarily lead to the disappearance of an economically viable national airport[73]. What is also interesting is the consideration that the federal government is not troubled by the *standstill* rule. It is certain, according to the Court, that if the existing operating level is maintained – which may be a legitimate choice of the government – a reduction in the noise nuisance for the residents of one area will cause an increase in that kind of nuisance for the residents of another area. The interests of one group are neither more nor less worthy of consideration than those of the other individuals who have to contend with noise pollution. Maximum infringement of the subjective rights of a smaller group can therefore never be the norm. The Court of Appeal decided on the basis of the equality principle that the appellants are entitled, on pain of a periodic penalty payment, not to have to tolerate more noise nuisance than all the other residents of the zones being flown over[74].

In this context, we must not lose sight of the fact that the actual circumstances play an important part in the assessment, and that an infringement of a fundamental right can only be pronounced in the case of an *excessive* interference with an individual fundamental right or of a shortcoming in an obligation of best intents on the part of the public authorities.The

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2005, p. 309. See also, more generally, V. Staelens, "Geluidshinder door (nacht)vluchten", *N.J.W.*, 2004, pp. 974-982, and F. Tulkens, "Nuisances sonores, droits fondamentaux et constitutionnels belges: développements récents », *Rev. trim. D.H.*, 2005, pp. 279-298.

[73] See in this sense also Constitutional Court, n° 3/2006, 11 January 2006, B.4.1: "The challenged provisions are limited to providing for the granting of an operating license to the operator of Brussels National Airport, to establish in general terms some of the operator's obligations which must be stated in the license, and to authorize the King to provide for extensions or relocations of the airport. As such, they do not have the intention or the effect of imposing a development of Brussels-National Airport that is in breach of the powers that have been granted to the regions by Article 6, §1, II, 1°, of the Special Act of 8 August 1980 on institutional reform for the protection of the environment and in particular for the control of noise pollution. In particular, they do not have the intention or the effect of imposing a manner of operating the national airport that is in breach of the *environmental standards which the regions may prescribe in accordance with the proportionality principle according to which no authority, and therefore neither the regional authority, may exercise its powers in such a way that, by so doing, it makes it extremely difficult or even impossible for the other authorities to exercise their respective powers.* It will be for the King, when establishing the conditions for granting the operating license and when exercising the power that He has been given under the aforementioned Article 37, to ensure that the operating and development conditions which He will impose on the holder of the operating license do not prevent the latter from fulfilling the requirements which the Region may impose in connection with environmental matters in accordance with the proportionality principle."

[74] Brussels, 21 March 2006, *T.M.R.*, 2006, p. 353, note by V. Staelens.

European theory of *fair balance* is essentially an application of the *proportionality principle* and as such is similar to what in Germany is called the *Sozialadäquanz*. This means that certain polluting activities must be tolerated because otherwise a proper functioning of society would be impossible. Verschuuren cites the example of road traffic: "Everyone knows that road traffic represents a significant health hazard, yet it is accepted because of its importance to society (motoring is therefore "socially acceptable"). Only when a particular threat becomes so great that it is no longer acceptable does the protective effect of the fundamental rights come into play"[75]. Thus the fear of the existence of a *subjective right* to (the protection of) a healthy environment and the commensurate fear of an excessive control of the judiciary over (environmental) policy can be removed by regarding the judiciary's supervision as a *marginal* review.

III. The Aarhus Convention: Between Environmental Protection and Human Rights

3.1. Introduction

International environmental law and international human rights law have to a great extent developed separately. Dinah SHELTON, a well known scholar working in both fields of international law, observed in this connection: "*The international community has adopted a considerable array of international legal instruments, and created specialized organs and agencies at the global and regional levels to respond to identified problems in human rights and environmental protection, although often addressing the two topics in isolation from one another.*"[76] On the international level there is recognition in non-binding declarations that there is a clear link between human rights and the protection of the environment. According to the Preamble of the Stockholm Declaration of the United Nations Conference on the Human Environment of 16 June 1972 "*Both aspects of man's environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself*". Principle 1 of this Declaration states: "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*". In a few more recent International Human Rights Instruments there is some attention to environmental protection. The International Covenant on Economic, Social and Cultural Rights contains a right to health in article 12 that expressly calls on states parties to take steps "for the improvement of all aspects of environmental and industrial hygiene". The Convention on the Rights of the Child refers to aspects of environmental protection in Article 24, which provides that States Parties shall take appropriate measures to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution".

The United Nations has, so far, not approved any general normative instrument on environmental rights, although the UN Human Rights Commission has had under

[75] J. Verschuuren, *o.c.*, p. 76.

[76] D. SHELTON, "Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration", paper presented on the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November- 1 December 2009, p. 2.

consideration since 1994 a draft declaration on human rights and the environment[77] and has appointed a Special Rapporteur on a particular environmental problem, the *Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*[78] . The UN Human Rights Council, in its turn, adopted on 25 March 2009 Resolution 10/4 on human rights and climate change in which it notes that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation. The Resolution recognizes that while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability[79].

Some regional human rights treaties contain specific provisions on the right to a healthy environment. That is the case with the African Charter on Human and Peoples' Rights[80] and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights[81,82]. As far as Europe is concerned, there is no

[77] The Commission adopted several resolutions linking human rights and the environment, such as Resolution 2005/60 entitled *Human Rights and the environment as part of sustainable development.* It called on States "*to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development and reaffirms, in this context, that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.*" It stresses "*the importance for States, when developing their environmental policies, to take into account how environmental degradation may affect all members of society, and in particular women, children, indigenous people or disadvantaged members of society, including individuals and groups of individuals who are victims of or subject to racism, as reflected in the Durban Declaration and Program of Action adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*". It "*encourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy*".

[78] The Special Rapporteur was appointed by Resolution 1995/81 (E/CN.4/RES/1995/81). In this Resolution one can read: *"Affirming that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to the human rights to life and health of individuals, particularly in developing countries that do not have the technologies to process them."* Similar language can be found in subsequent resolutions whereby the mandate was renewed: e.g. Resolution 2001/35 on the Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (E/CN.4/RES/2001/35) and Resolution 2004/17 "A*ffirming that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work, particularly of individual developing countries that do not have the technologies to process them*" (E/CN.4/RES/2004/17). See on this issue: S. SENSI, "Background note on: Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights" and "The Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights", papers presented at the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November- 1 December 2009.

[79] http://www2.ohchr.org/english/issues/climatechange/index.htm. See on this issue: M. LIMON, "Linking Human Rights and the Environment. Key Issues Arising from Human Rights Council Resolution 10/4 and the June 2009 Council Debate on the Relationship between Human Rights and Climate Change", paper presented at the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November- 1 December 2009.

[80] Article 24: "*All peoples shall have the right to a general satisfactory environment favorable to their development*".

[81] Article 11: "*Right to a Healthy Environment*

explicit recognition in the European Convention on Human Rights of a right to a healthy environment, but, as has been explained above, serious harm to the environment, may according to the case law of the European Court of Human Rights[83] constitute a violation of Article 8 (right to respect for private and family life) and, in particular circumstances, of Article 2 (right to life).

A particular link between the protection of human rights and environmental protection is, as far as the UNECE Region[84] is concerned, laid down in het so-called Aarhus Convention, which we will discuss in this contribution.

3.2. From the Rio Declaration to the Aarhus Convention

Rio Declaration and Sofia Guidelines

The origin of the Aarhus Convention goes back to Principle 10 of the Rio Declaration on Environment and Development, adopted during the United Nations Conference on Environment and Development (Rio de Janeiro, 3 - 14 June 1992), which reads as follows: "*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*"

This principle was further developed for the UNECE Region[85] in the so-called Sofia Guidelines[86], endorsed at the Third Ministerial Conference "Environment for Europe" in

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1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment."
Only 15 out of the 25 Parties to the American Convention on Human Rights have ratified this Additional Protocol. The USA has not ratified this Protocol. See on this issue: J.D. TAILLANT, "Environmental Advocacy and the Inter-American Human Rights System" in R. PICOLOTTI & J.D. TAILLANT (eds.), *Linking Human Rights and the Environment*, Tucson, The University of Arizona Press, 2003, 149-153.

[82] D. SHELTON, *l.c.*, 2-4; C. REDGWELL, "Access to Environmental Justice" in F. FRANCIONI (ed.), *Access to Justice as a Human Right*, Oxford University Press, 2007, 156-157; D. SHELTON, "The Environmental Jurisprudence of International Human Rights Tribunals" in R. PICOLOTTI & J.D. TAILLANT, *o.c.*, 1-30.

[83] C. SCHALL, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?", *J.Env.L.* 2008, 417-453.

[84] The UNECE (United Nations Economic Commission for Europe) region covers more than 47 million square kilometres. Its member States include the countries of Europe, but also countries in North America (Canada and United States), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Western Asia (Israel). Today, UNECE has 56 member States.

[85] On the global level the UNEP Secretariat recently developed "Draft guidelines for the development of *national legislation* on access to information, public participation and access to justice in environmental matters" (UNEP/GCSS.CI/8 – 3 December 2009), which were presented to the Eleventh special session of the Governing Council/Global Ministerial Environment Forum (Bali, Indonesia, 26-26 February 2010). By Decision 25/11, the Governing Council/Global Ministerial Environment Forum *took note* of the draft guidelines and requested the secretariat to carry out further work on the guidelines with a view to adoption by the GC/GMF at its next special session.

Sofia, Bulgaria, 1995. At its special session on 17 January 1996, the Economic Commission for Europe Committee on Environmental Policy (CEP) decided to establish an Ad Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making. After two years of negotiations, final agreement on the text of the Convention could be reached.

The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process, in the framework of the United Nations Economic Commission for Europe (Geneva). The Convention, which entered into force on 30 October 2001, has now been ratified by 44 Parties, including the European Union and, with the exception of Ireland, all Member States of the European Union. The GMO Amendment to the Convention, which is not yet in force, has been ratified by 25 Parties, including the European Union and 21 of its Member States. The PRTR Protocol, which entered into force on 8 October 2009, has been ratified by 25 Parties, including the European Union and 21 of its Member States.

The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements. The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is therefore not only an environmental agreement; it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice[87].

As the Convention has been ratified by the European Union[88] it has taken some implementing measures that complement the Aarhus Convention within the European Union. For the member states of the EU, the Convention and the related EU legislation constitutes a complex whole, so that we will discuss the content of the Convention along with the related EU provisions[89].

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[86] Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making, submitted by the ECE Working Group of Senior Government Officials "Environment for Europe", Ministerial Conference Environment for Europe, Sofia, Bulgaria, 23-25 October 1995, ECE/CEP/24.

[87] *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 12; C. REDGWEL, *l.c.*, 153-154.

[88] Council Decision 2005/370/EC 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, *OJ* L 124, 17 May 2005.

[89] J. JENDROSKA, "Public Information and Participation in EC Environmental Law", in R. MACRORY (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?"*, Groningen, Europa Law Publishing, 2006, 61-84; CH. PIROTTE, "L'accès à la justice en matière d'environnement en Europe: État des lieux et perspectives d'avenir », *Amén.*, 2010, 27-28.

3.3. The substance of the Aarhus Convention and related EU law

Introduction

As its title suggests, the Convention contains three broad themes or 'pillars': access to information, public participation and access to justice in environmental maters. These three pillars are discussed below. However, the Convention also contains a number of important general features that should be addressed first.

General Features

The preamble to the Aarhus Convention connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment[90]. It then concludes that to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. The preamble recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public. When governments make environmental information publicly accessible and enable the public to participate in decision-making, they help meet society's goal of sustainable and environmentally sound development.

The first three articles of the Convention comprise the objective, the definitions and the general provisions. The Convention adopts a rights-based approach. Article 1, setting out the objective of the Convention, requires Parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. It also refers to the *goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being*. These rights underlie the various procedural requirements in the Convention.

The Convention establishes *minimum standards* to be achieved but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice (Art. 3.5 and 3.6). The Convention prohibits *discrimination* on the basis of citizenship, nationality, domicile, registered seat or effective centre of its activities against natural or legal persons seeking to exercise their rights under the Convention (Art. 3.9).

The main thrust of the obligations contained in the Convention is towards public authorities, which are defined so as to cover governmental bodies from all sectors and at all levels (national, regional, local, etc.), and bodies performing public administrative functions. Although the Convention is not primarily focused on the private sector, privatised bodies having public responsibilities in relation to the environment and which are under the control of the aforementioned types of public authorities are also covered by the definition. However,

[90] In the initial draft there was no explicit link with human rights and the right to a healthy environment. In an early stage of the negotiations the delegation of Belgium proposed to include such a link (see CEP/AC.3/2, Annex I). This proposal was replaced in a later stage of the negotiations by a common proposal of the delegations of Belgium, Denmark and Italy (see CEP/AC.3/12, Annex II). The latter proposal found its way into a slightly adapted version to the Convention.

according to Article 2.2 *in fine*, the definition of "public authority" contained in the Convention does not include bodies or *institutions acting in a judicial or legislative capacity*. This has given rise to the question whether decisions that are normally taken by administrative bodies, but are taken exceptionally by Parliament on the basis of a specific Act of Parliament, such as permitting decisions for activities covered by the Convention, are excluded from the scope of the Convention or not[91].

The Meeting of the Parties to the Convention is, according to Article 15, required to establish, on a consensus basis, optional arrangements for reviewing compliance with the provisions of the Convention. At their first meeting in October 2002, the Parties adopted decision I/7 on review of compliance[92] and elected the first Compliance Committee. The Compliance Committee consists of 9 members who serve in a personal capacity and do not represent the countries of which they are nationals. The compliance mechanism may be triggered in four ways: (1) a Party may make a submission about compliance by another Party; (2) a Party may make a submission concerning its own compliance; (3) the secretariat may make a referral to the Committee; (4) members of the public may make communications concerning a Party's compliance with the convention[93]. In addition, the Committee may examine compliance issues on its own initiative and make recommendations, prepare reports on compliance with or implementation of the provisions of the Convention at the request of

[91] See questions 2a en 2b contained in the reference for a preliminary ruling to the Court of Justice of the EU by the Belgian Constitutional Court in its judgment No. 30/210 of 30 March 2010 concerning a Walloon Decree of 17 July 2008 "concerning some permits for which there are urgent reasons of public interest". Similar questions (2c en 2d) were raised in relation to Art. 1.5 of Directive 85/337/EEC according to which "*This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process*." In the *Aarhus Convention Implementation Guide* one can read in respect to this discussion: "*Bodies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the fundamentally different character of decision making either in a legislative capacity, where elected representatives are more directly accountable to the public through the election process, or in a judicial capacity, where tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention should not apply to bodies acting in a judicial capacity in order to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings. (…)*
This exception applies not only to parliaments, courts or local councils, but also to executive branch authorities, when they perform legislative or judicial functions. An example of the former can be found in municipal councils, which sometimes serve in both legislative and executive capacities. Where they are acting in an executive capacity they are covered by the Convention; where they are acting in a legislative capacity they are not.
The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognized in Article 8. As the activities of public authorities in drafting regulations, laws and normative acts are expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention.
Conversely, if legislative branch authorities engage in activities outside their legislative capacity, they might fall under the definition of "public authority" under the Convention. For example, when the European Parliament adopts resolutions on environmental questions or in relation to international environmental agreements, it is possibly not acting in a legislative capacity, and some provisions of the Convention might apply.
It should be mentioned that there is nothing in the Convention that would prevent parliaments or other legislative bodies from applying the rules of the Convention mutatis mutandis *to their own proceedings. At the same time as legislative activities are excluded from the scope of the Convention, the preamble, in its eleventh paragraph, invites legislative bodies to implement the Convention's principles."*

[92] Amended since by Decision II/5

[93] In practice nearly all the submissions to the Compliance Committee are introduced by members of the public, mainly environmental NGOs. In early 2010 there was 1 submission by a party about compliance by another party versus 48 submissions from the public. The other possibilities of submission have not been used so far. See: http://www.unece.org/env/pp/pubcom.htm

the Meeting of the Parties and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under Article 10.2 of the Convention. Since its establishment, the Committee has reached a number of findings with regard to compliance by individual Parties.

The Meeting of the Parties may, upon consideration of a report and any recommendations of the Compliance Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures: a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention; b) Make recommendations to the Party concerned; c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public; e) Issue declarations of non-compliance; f) Issue cautions; g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Finally, it should be mentioned that the Convention is open to accession by non-ECE countries, subject to approval of the Meeting of the Parties (Art. 19.3).

The First Pillar: Access to Information

The information pillar – Articles 4 and 5 of the Convention - covers both the 'passive' or reactive aspect of access to information, i.e. the obligation on public authorities to respond to public requests for information, and the 'active' aspect dealing with other obligations relating to providing environmental information, such as collection, updating, public dissemination and so on[94].

Environmental information is defined in a broad sense. Environmental information means, according to Article 2.3, any information in written, visual, aural, electronic or any other material form on:

"(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

[94] See on this issue: CH. LARSSEN, "L'accès aux informations sur l'environnement en droit international: la convention d'Aarhus", in Ch. LARSSEN (ed.), *Ten years of access to environmental information in international, European and Belgian law: Stock-taking and perspectives*, Brussels, Bruylant, 2003, 25-38; J. JENDROSKA, *l.c.*, 73-74; R. HALLO, "Access to Environmental Information in Europe: an Ongoing Story" in TH. ORMOND, M. FÜHR & R. BARTH (eds.), *Environmental Law and Policy at the Turn to the 21ste Century*, Berlin, Lexxion Verlagsgesellschaft, 2006, 51-61.

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above".

The *reactive* aspect is addressed in Article 4, which contains the main essential elements of a system for securing the public's right to obtain information on request from public authorities. There is a presumption in favour of access. Any environmental information *held by a public authority*[95] must be provided when requested by a member of the public, unless it can be shown to fall within a finite list of exempt categories. The right of access extends to any person, without his or her having to prove or state an interest or a reason for requesting the information. The information must be provided as soon as possible, and at the latest within one month after submission of the request. However, this period may be extended by a further month where the volume and complexity of the information justify this. The requester must be notified of any such extension and the reasons for it. There is a qualified requirement on public authorities to provide it in the form specified by the requester. Public authorities may impose a charge for supplying information provided the charge does not exceed a 'reasonable' amount.

There are exemptions to the rule that environmental information must be provided. Public authorities *may* withhold information where disclosure would adversely affect various interests, e.g. national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, the confidentiality of the proceedings of public authorities; or where the information requested has been supplied voluntarily or consists of internal communications or material in the course of completion. There are, however, some restrictions on these exemptions, e.g. the commercial confidentiality exemption may not be invoked to withhold information on emissions which is relevant for the protection of the environment.

To prevent abuse of the exemptions by over-secretive public authorities, the Convention stipulates that the aforementioned exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account. Refusals, and the reasons for them, are to be issued in writing where requested. A similar time limit applies as for the supply of information: one month from the date of the request, with provision for extending this by a further month where the complexity of the information justifies this. Where a public authority does not hold the information requested, it should either direct the requester to another public authority which it believes might have the information, or transfer the request to that public authority and notify the requester of this.

The Convention also imposes *active information duties* on Parties (Article 5). These include quite general obligations on public authorities to be in possession of up to date environmental information which is relevant to their functions, and to make information 'effectively accessible' to the public by providing information on the type and scope of information held and the process by which it can be obtained. The Convention also contains several more specific provisions. Parties are required to 'progressively' make environmental

[95] "Public authority" means (Art. 2.2):
(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity."

information publicly available in electronic databases which can easily be accessed through public telecommunications networks. The Convention specifies certain categories of information (e.g. state of the environment reports, texts of legislation related to the environment) which should be made available in this form.

Public authorities are also required to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.

As far as the European Union is concerned, the original Directive 90/313/EEC on the subject was replaced by Directive 2003/4/EC[96], to bring EU law into line with the requirements of the Aarhus Convention. The Directive, based on Article 175 (1) of the EC Treaty, contains minimum requirements for the Member States, so that they may maintain or introduce legislation that is more favourable to access to information. Although the Directive in general closely follows the Aarhus Convention, it in some respects provides more details, restricts even more the conditions under which access to information may be refused, or imposes extra obligations on the Member States. The definitions of environmental information (Art. 2.1) and of "public authority" (Art. 2.2), for instance, are slightly more detailed than those of the Aarhus Convention. The Directive is not only applicable to environmental information held by public authorities, but also to information held by others "for" such authorities. The Directive contains a specific provision on how public authorities should act in a case they believe that a request is formulated in too general a manner (Art. 3.3) and imposes on Member States a series of practical arrangements to make access to information provisions work (Art. 3.5). It specifies that some of the grounds for refusal may not be invoked when the request relates to information on emissions into the environment (Art. 4.2). The Directive also goes a little more into detail with respect to the dissemination of environmental information (Art. 7 and 9).

As far as the EU institutions and bodies themselves are concerned, access to environmental information held by such institutions and bodies is regulated by Title II of Regulation (EC) No 1367/2006[97].

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[96] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ* L 41, 14 February 2003. This Directive should be implemented by the Member States by 14 February 2005 at the latest; J. JENDROSKA, *l.c.*, 73-74; J.H. JANS & H.H.B. VEDDER, *European Environmental Law, 3rd edition*, Groningen, Europa Law Publishing, 2008, 327-330; CH. PIROTTE, *l.c.*, 28.

[97] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* L 264, 25 September 2006; J.H. JANS & H.H.B. VEDDER, *o.c.*, 331-332. The Commission has adopted two decisions to implement the Regulation further. Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts, specifies the evidence to be provided by NGOs, the calculation of time-limits for reply to applications and cooperation between EU institutions and bodies. Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies, ensures that the general principles and minimum standards for consultation of interested parties by the Commission [COM(2002) 704] apply to public participation concerning plans and programs relating to the environment. It also assigns clear responsibilities and decision-making powers to the appropriate bodies or persons within the Commission with respect to the provisions of the Regulation concerning requests for internal review.

The Aarhus Convention sets out minimum requirements for public participation in various categories of environmental decision-making (Articles 6 to 8)[98].

Article 6 of the Convention establishes certain public participation requirements for decision-making on whether *to license or permit certain types of activity which may have a significant effect on the environment.* Article 6, paragraph 1 (*a*) requires in the first place that each Party *shall* apply the provisions of this article with respect to decisions on whether to permit proposed activities *listed in annex I*. This list is similar to the list of activities for which an Environmental Impact Assessment[99] or Integrated Pollution Prevention and Control licence[100] is required under the relevant EU legislation. It should be noted that according to paragraph 20 of Annex I to the Convention "any activity not covered by paragraphs 1-19 above *where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation*" is subject to the obligation of Article 6. Similarly, according to paragraph 22 of the same annex "any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to Article 6, paragraph 1 (*a)* of this Convention". Secondly (Article 6, paragraph 1 (*b)*), each party shall also apply, *in accordance with its national law*, the provisions of this article to decisions on proposed activities not listed in annex I *which may have a significant effect on the environment*. To this end, Parties shall determine whether such a proposed activity is subject to these provisions. Finally, Parties may decide, on a case-by-case basis if so provided under national law, *not* to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

The public participation requirements include timely and effective notification of the public concerned, reasonable timeframes for participation, including provision for participation at an early stage, a right for the public concerned to inspect information which is relevant to the decision-making free of charge, an obligation on the decision-making body to take due account of the outcome of the public participation, and prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible. The 'public concerned' is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making', and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law. So, Parties to the Convention may set requirements for NGOs under national law, but these requirements should be consistent with the Convention's principles, such as non-discrimination and avoidance of technical and financial barriers to registration. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary[101].

Article 7 requires Parties to make "appropriate practical and/or other provisions for the public to participate during the preparation of *plans and programmes relating to the environment*". It can be argued that the term 'relating to the environment' is quite broad,

[98] J. JENDROSKA, *l.c.*, 75-77.

[99] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *OJ* L 175, 5 July 1985.

[100] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), *OJ* L 24, 29 January 2008, replacing Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, *OJ* L 257, 10 October 1996.

[101] *The Aarhus Convention: An Implementation Guide*, United Nations, New-York and Geneva, 2000, 41

covering not just plans or programmes prepared by an environment ministry, but also sectoral plans (transport, energy, tourism etc.) where these have significant environmental implications. Though the Convention is less prescriptive with respect to public participation in decision-making on plans or programmes than in the case of projects or activities, the provisions of Article 6 relating to reasonable timeframes for participation, opportunities for early participation (while options are still open) and the obligation to ensure that "due account" is taken of the outcome of the participation are to be applied in respect of such plans and programmes. Article 7 also applies, in more recommendatory form, to decision-making on *policies relating to the environment*.

Article 8 applies to public participation during the preparation by public authorities of *executive regulations and other generally applicable legally binding rules* that may have a significant effect on the environment. Although the Convention does not apply to bodies acting in a legislative capacity, this article clearly would apply to the executive stage of preparing rules and regulations even if they are later to be adopted by parliament[102].

The EU took several legal initiatives to implement the second pillar of the Aarhus Convention. Provisions for public participation consistent with the requirements of Article 6 of the Aarhus Convention in environmental decision-making concerning concrete activities (projects and installations) that could have adverse environmental impacts were introduced in both the EIA and the IPPC Directive[103]. As far as Article 7 is concerned, public participation requirements can be found in Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. Furthermore, similar provisions can be found in a number of other environmental directives, such as Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy. As far as the EU institutions and bodies themselves are concerned, public participation requirements were laid down in Title III of Regulation (EC) No 1367/2006[104].

The Third Pillar: Access to Justice

The third pillar of the Convention (Article 9) aims to provide access to justice in three different contexts: a) review procedures with respect to information requests, b) review procedures with respect to specific (project-type) decisions which are subject to public

[102] *Ibid.*, 119.

[103] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ* L 156, 25 June 2003. See especially Articles 6, 8 and 9 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and Article 15 of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, replacing Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

[104] J. JENDROSKA, *l.c.*, 77-79; C. REDGWEL, *l.c.*, 166-172; J.H. JANS & H.H.B. VEDDER, *o.c.*, 332-334; CH. PIROTTE, *l.c.*, 28.

participation requirements, and c) challenges to breaches of environmental law in general. Thus the inclusion of an 'access to justice' pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law[105].

Access to Justice in relation to Access to Environmental Information

Article 9.1 of the Aarhus Convention deals with Access to Justice concerning *information* appeals. A person whose request for information has not been dealt with to his satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law. The latter option was included to accommodate those countries which have a well-functioning office of Ombudsperson that – and this is an explicit requirement – takes decisions that are "binding on the public authority holding the information". If such an office can only mediate or issue non-binding opinions, such an option is not sufficient. The Convention attempts to ensure a low threshold for such appeals by requiring that where review before a court of law is provided for (which can involve high costs), there should be also, before it comes to a court case, access to an expeditious review procedure "for reconsideration by a public authority or review by an independent and impartial body other than a court of law" which is *free of charge or inexpensive*. Final decisions must, as has been said, be binding on the public authority holding the information, and the reasons must be stated in writing where information is refused. Standing must, under this provision, be granted to "any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with under the provisions of that article". No additional standing requirements may be imposed[106].

A very similar provision is contained in Article 6 of Directive 2003/4/EC. Art. 6.2 adds that Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

Access to Justice in relation to Environmental Permitting Decisions

Article 9.2 of the Aarhus Convention deals with Access to Justice concerning *environmental decision-making with regard to activities that may have a significant effect on the environment*. The Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6 (*supra* n° 8). The review procedure should be organized before a court of law and/or another independent and impartial body established by law and make it possible "to challenge the *substantive* and *procedural* legality of any *decision*, *act* or *omission* subject to the provisions of Article 6". So, the review procedure should not be restricted to the question whether the public participation requirements of Article 6 were observed in preparation of permits for activities that fall under that provision, but should extend to all questions of legality, both of substance and of

[105] See on this issue: CH. LARSSEN & B. JADOT, "L'accès à la justice en matière d'environnement au regard de la convention d'Aarhus", in CH. LARSSEN & M. PALLEMAERTS (ed.), L'accès à la justice en matière d'environnement, Brussels, Bruylant, 2005, 195-261; J. JENDROSKA, *l.c.*, 80-82.
[106] *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 126.

procedure. The decisions may be reviewed against all binding law, be it international, European or domestic law. The review procedure should also encompass material "acts" connected to those activities and omissions. Where so provided for under national law, this review procedure is also applicable to decisions, acts and omissions subject to other relevant provisions of the Convention. Parties may apply the review procedure to other provisions of the Convention by providing for review in those cases. Those may include decisions covered by Article 7 (plans, programmes and policies relating to the environment) or Article 8 (executive regulations and generally applicable legally binding normative instruments).

The review procedure should be open to "members of the public", that is to say "the public affected or likely to be affected, or having an interest in the environmental decision making", including environmental NGOs "meeting any requirements under national law" (Art. 2.5) in so far as they have "a sufficient interest" (notion often used in the legal systems inspired by those of France) or "maintain impairment of a right, where administrative procedural law of a Party requires this as a precondition" (concept used in the legal systems inspired by German law). So, State Parties may impose certain standing requirements for members of the public and environmental NGOs, but their room for manoeuvre in this respect is not unlimited. Article 9.2, subparagraph 2, states: "[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and *consistent with the objective of giving the public concerned wide access to justice within the scope of this Convention*. To this end *the interest of any non-governmental organization* meeting the requirements referred to in Article 2, paragraph 5, *shall be deemed sufficient* for the purpose of subparagraph (*a*) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (*b*) above". While it is clear that State Parties are not obliged to introduce the *actio popularis*, they may not introduce strict standing requirements for natural or legal persons who may be affected or likely to be affected by decisions, acts or omissions concerning such activities, and, as the case may be, plans, programmes, policies and regulations. The same holds true for environmental NGOs. The Aarhus Compliance Committee was, in this connection, of the opinion that the criteria that have been applied by the Belgian Council of State with respect to the right of environmental organizations to challenge Walloon town planning permits would not comply with Article 9, paragraph 2. The Compliance Committee noted in particular: "*As stated, in these cases environmental organizations are deemed to have a sufficient interest to be granted access to a review procedure before a court or an independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention. As shown by the cases submitted by the Communicant with respect to town planning permits this is not reflected in the jurisprudence of the Council of State. Thus, if the jurisprudence is maintained, Belgium would fail to comply with Article 9, paragraph 2, of the Convention*"[107].

Finally, according to Article 9.2, third subparagraph, this provision on access to justice shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. The administrative appeal system is not intended to replace the opportunity of appeal to the courts, but it may in many cases resolve the matter expeditiously and avoid the need to go to court[108].

Very similar provisions were laid down in Article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as

[107] *Belgium ACCC/2005/11; ECE/MP.PP.1/C.1/2006/4, Add.2, 28 July 2006, para 33.*
[108] *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 130.

amended by Directive 2003/35/EC, as regards public and private projects that are subject to environmental impact assessment in view of that Directive[109], and in Article 15a of Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the present Art. 16 of Directive 2008/1/EC concerning integrated pollution prevention and control), as regards installations that fall within the scope of that Directive[110].

The Court of Justice of the European Union has ruled that members of the public concerned within the meaning of Article 1(2) and 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, *regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.* The right of access to a review procedure within that meaning does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law[111], and participation in an environmental decision-making procedure under Directive 85/337/EEC is distinct and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure. Furthermore, the Court ruled that Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, *precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2 000 members.* The Court is indeed of the opinion that while it is true that article 10a leaves to national legislatures the task of determining the conditions which may be required in order for a non‑governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337/EEC on judicial remedies. Accordingly, those national rules must not be liable to nullify EU provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts. From that point of view, a national law may require that such an association has as its object the protection of nature and the environment. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337/EEC and in particular the objective of facilitating judicial review of projects which fall within its scope. Furthermore, Directive 85/337/EEC does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with[112].

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[109] The only difference being that Article 10a provides also that Member States shall determine at what stage the decisions, acts or omissions may be challenged.

[110] *Idem.*

[111] In Sweden, development consents are delivered in first instance by Environmental Tribunals. The decisions of the Environmental Tribunals may be appealed before the Environmental Appeal Court whose judgments may in turn be subject to appeal before the *Högsta domstolen* (Supreme Court).

[112] CJEU, 15 October 2009, C‑263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*; confirmed in CJEU, 11 March 2010, C-24/09, *Djurgården-Lilla Värtans Miljöskyddsförening*. The Belgian Constitutional Court referred in its judgment No. 30/210 of 30 March 2010 some questions (questions 3a and 3b) concerning this provision in relation to a Walloon Decree of 17 July 2008 "concerning some permits for which there are urgent reasons of public interest" for a preliminary ruling to the CJEU.

Article 9.3 concerns violations of environmental law in general. The Convention requires Parties to provide access to administrative or judicial procedures to challenge *acts and omissions* by *private persons* and *public authorities* which *breach laws relating to the environment*. The Convention introduces in so doing a form of direct citizen enforcement which can be used not only against administrative acts, but also against material acts and omissions. Omissions include the failure to implement or enforce environmental law with respect to other public authorities or private entities[113]. The Convention uses the terms "which contravene provisions of its national law relating to the environment." In the absence of a specific definition of "national law", it includes not only domestic law (both federal and regional), but also European and International law that is binding on the Member States, in particular those provisions of international or European law that have direct effect. Such access is to be provided to members of the public 'where they meet the criteria, if any, laid down in national law' - in other words, the issue of standing is primarily to be determined at the national level, as is the question of whether the procedures are judicial or administrative. Members of the public include natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups (Art. 2.4). The Aarhus Compliance Committee has observed that while referring to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. "*On the one hand, 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 the other 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 acts or omissions that contravene national law relating to the environment. Accordingly, the phrase "the criteria, if any, laid down in national law" indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (*"actio popularis*") in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of Article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of Decision II/2 (promoting effective access*

[113] *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 131; *Kazakhstan ACCC/2004/6; ECE/MP.PP.1/C.1/2006/4, Add.1, 28 July 2006, para. 30.* The Aarhus Compliance Committee acknowledged in a case concerning Armenia that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to Articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of Convention (*Armenia ACCC/2004/8; ECE/MP.PP.1/C.1/2006/2, Add.1, 10 May 2006, para. 38).*

to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under Article 9, paragraph 3, "to take fully into account the objective of the Convention to guarantee access to justice."[114]

The European Commission tabled on 24 October 2003 a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters[115]. The proposal aims to establish a framework of minimum requirements for access to the judicial and administrative proceedings in environmental matters in order to achieve a better implementation and application of environmental law in the European Union, and to implement Art. 9.3 of the Aarhus Convention. The proposed directive grants legal standing to certain members of the public, enabling them to have access to judicial or administrative proceedings against the actions and omissions of public authorities which contravene environmental law. The proposal met resistance from various member states and for the time being no qualified majority could be found within the Council, despite the fact that the Parliament endorsed the proposal in the first reading on 18 March 2004, subject to certain amendments designed in particular to recall the objective of the Aarhus Convention, to extend the right to institute legal proceedings to local organisations and/or to organisations promoting sustainable development, to clarify the mechanisms for access to justice in transboundary environmental cases and to make it easier to exercise the right to go to court, and the European Economic and Social Committee delivered a positive opinion.

As far as the EU institutions and bodies themselves are concerned, some provisions concerning internal review and access to justice were laid down in Title IV of Regulation (EC) No 1367/2006 in an attempt to overcome the strict standing requirements used in the case law of the Court of Justice and the General Court while reviewing the legality of acts adopted by EU institutions and bodies on the basis of Article 263 TFEU (ex. Art. 230 EC) (actions for annulment)[116]. Any non-governmental organisation which meets the criteria set out in Article 11[117] is entitled to make a request for *internal review* to the EU institution or body that has adopted an administrative act[118] under environmental law or, in case of an alleged administrative omission, should have adopted such an act. Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged

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[114] *Belgium ACCC/2005/11; ECE/MP.PP.1/C.1/2006/4, Add.2, 28 July 2006, paras. 35-36.*

[115] COM(2003) 624; B. DETTE, "Access to Justice in Environmental Matters: the Aarhus Convention and Legislative Initiatives for its Implementation", in TH. ORMOND, M. FÜHR & R. BARTH (eds.), *o.c.* , 63-80; CH. PIROTTE, *l.c.*, 28-31

[116] J.H. JANS & H.H.B. VEDDER, *European Environmental Law, 3rd edition*, Groningen, Europa Law Publishing, 2008, 209-214; J.H. JANS, "Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies" in R. MACRORY (ed.), *Reflections on 30 Years of EU Environmental Law*, *o.c.*, 477-489; M. PALLEMAERTS, *Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention*, An IEEP Report for WWF-UK, London – Brussels, June 2009.

[117] According to Article 11, a non-governmental organization shall be entitled to make a request for internal review provided that: (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of those criteria.

[118] Regulations and directives are thus excluded from this review procedure. Only decisions, except those mentioned in Article 2(2) of the Regulation, fall within the scope of the review procedure. Article 2(2) states: "Administrative acts and administrative omissions shall not include measures taken or omissions by Community institution or body in its capacity as an administrative review body, such as under: (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules); (b) Articles 226 and 228 of the Treaty (infringement proceedings); (c) Article 195 of the Treaty (Ombudsman proceedings); (d) Article 280 of the Treaty (OLAF proceedings)."

omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review. The EU institution or body shall consider any such request, unless it is clearly unsubstantiated. The EU institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request. Where the EU institution or body is unable, despite exercising due diligence, to act in accordance with said obligation, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the aforementioned period of the reasons for its failure to act and when it intends to do so. In any event, the Community institution or body shall act within 18 weeks from receipt of the request. Article 12 of the Regulation provides that the non-governmental organisation which made the request for internal review may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty. Where the EU institution or body fails to act in accordance with Article 10(2) or (3) of the Regulation the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty[119]. It is, however, doubtful that the actual standing requirements used by the Court of Justice and the provisions of the aforementioned Regulation are in line with the requirements of the Aarhus Convention[120].

Minimum requirements concerning Access to Justice

Art. 9.4 and 9.5 set minimum requirements concerning access to justice which should be provided for under Art. 9.1, 9.2 and 9.3 of the Aarhus Convention. Article 9.4 stipulates that these procedures should 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. Injunctive relief is a remedy to prevent or remedy injury. The Convention requires injunctive relief and other remedies to be "adequate and effective". Adequacy requires the relief to fully compensate past damage, prevent future damage, and may require it to provide restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement[121]. Article 9.5 prescribes that in order to further the effectiveness of the provisions of Article 9, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial an other barriers to access to justice.

The requirements of Art. 9.4 and 9.5 are partially relayed by Article 10a of Directive 85/337 and Article 16 of Directive 2008/1/EC where they require that the procedures "shall be fair, equitable, timely and not prohibitively expensive" and that "Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures". For the moment, there is no requirement in the European Directives issued for the implementation of the Aarhus Convention concerning the remedies that should be provided for by those procedures, or for the establishment of appropriate

[119] See for a critical analysis of the Regulation: J.H. JANS & H.H.B. VEDDER, *o.c.*, 214-219.
[120] M. PALLEMAERTS, *Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention*, o.c. This author also explores the solutions to overcome the shortcomings. Note that the Aarhus Compliance Committee is investigating a communication by Client Earth about non-compliance of the EU with Art. 9.2, 9.3, 9.4 and 9.5 of the Aarhus Convention (ACCC/C/2008/32- European Community).
[121] *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 133.

assistance mechanisms to remove financial and other barriers to access to justice. Therefore, for those important requirements one should refer directly to the Aarhus Convention.

IV. The Aarhus Convention and national judiciaries

Art. 9 of the Aarhus Convention is of particular relevance for the national judiciaries[122]. In most EU countries – but not all – there is a Constitutional Court. Access to the Constitutional Court, however, is not always regulated in the same way. The right to lodge an appeal directly with the Constitutional Court is usually only open to political authorities, sometimes with diversification according to the nature of the regulation against which the appeal is lodged (e.g. Poland: the President; Germany: the government; France: the Prime Minister; Portugal: the House of Representatives, etc). Direct access for natural and legal persons to the Constitutional Court exists only in the minority of EU countries. But in most of the countries ordinary courts can refer constitutional questions to the Constitutional Court or a constitutional complaint can be lodged against a judicial decision in the last instance. Constitutional Courts can play an important role in the enforcement of the Aarhus Convention. They generally can combine provisions of their national constitution with relevant provisions of international treaties and review not only the constitutionality of federal or regional Acts of Parliament (or sometimes also regulations), but also their conformity with international provisions, such as those of the Aarhus Convention. Several Constitutional Courts have already been confronted with the application of the Aarhus Convention. The Belgian Constitutional Court partially annulled by Judgement N° 137/2006 of 14 September 2006 an Act of the Walloon Parliament for violation of Article 23 of the Constitution in conjunction with Directive 2001/42/EC and Article 7 of the Aarhus Convention. The Constitutional Court of Slovenia also found an Act (the Act Amending the *Lipica Stud* Farm Act) inconsistent with the Aarhus Convention as its prevents the public from participating in the development of a detailed plan of national importance[123].

In the vast majority of the EU member states a dual judicial structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil and criminal cases, and on the other hand administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal matters, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It can be expected that administrative courts will be confronted in the first place with Aarhus-related cases as the decisions and acts referred to in Article 9.1 and 9.2 and, as far as acts of public authorities are concerned, Article 9.3, will normally fall under the jurisdiction of administrative courts[124]. It should be pointed out, however, that the powers of the administrative courts might differ from Member State to Member State[125]. Due to the different legal history and legal culture, the various legal systems of Member States have

[122] L. LAVRYSEN, "National Judges and the Convention – How the Judiciary can further the Implementation of the Third Pillar", paper presented at the Conference: *The Aarhus Convention: how are its access to justice provisions being implemented?,* Brussels, 2 June 2008, http://ec.europa.eu/environment/aarhus/conf2.htm

[123] Constitutional Court, U-I-406/06-21, March 29th 2007. See also: U-I386/06, March 13th 2008. The Constitutional Court of the Republic of Latvia annulled by its judgment of 17 January 2008 in case N° 2007-11-03 the Riga Land Use Plan 2006-2018 Covering the Territory of the Freeport of Riga for violation of Art 115 of the Constitution (right to a healthy environment), linking this article to *inter alia* the Aarhus Convention.

[124] A search in the database of the case law of the Belgian Council of State revealed that already in 62 cases there was some reference to the Aarhus Convention.

[125] L. LAVRYSEN, "The Role of National Judges in Environmental Law", in Th. ORMOND/M. FÜHR (eds.), *Environmental Law and Policy at the Turn to the 21ste Century,* Lexxion, Berlin, 2006, 85.

taken different approaches to legal standing. They range from an extensive approach where standing is broadly recognised by way of an "*actio popularis*", to a very restrictive approach allowing standing only in cases where the impairment of an individual legally granted right can be shown[126]. In most of the countries the legislation uses a rather vague formula in describing the conditions to have standing. E.g. in Belgium a natural or legal person who requests suspension or annulment of an administrative act or a regulation by the Council of State must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be directly and unfavourably affected by the challenged act or regulation. This concept can however be interpreted broadly or narrowly. As we look at the Belgian situation, more or less the same criterion applies for the Council of State as for the Constitutional Court. So far, the Constitutional Court has almost never declined an environmental NGO for lack of standing. As far as the Supreme Administrative Court is concerned, there are some variations in time and even between the different Chambers. Where the Council of State developed a broad view on standing for NGOs in the eighties, there was a tendency later on to become stricter, maybe in view of an ever growing case load. Where the Chambers dealing with environmental legislation generally continued to have a broad view, the Chambers dealing with land use planning legislation gradually developed a stricter view[127]. In my opinion, the Council of State may reinterpret the existing national provisions on standing without any problem in conformity with Article 9 of the Aarhus Convention. To overcome possible further resistance from the Council of State, some Members of Parliament introduced, with reference to the Aarhus Convention and the Findings and Recommendations of the Aarhus Compliance Committee, a bill to clarify under which conditions environmental NGOs have standing before the Council of State[128]. The proposal was adopted by the Senate in an amended form and is still pending in the House of Representatives[129]. The Legislation Section of the Council of State has, meanwhile, delivered an opinion in which it suggests different amendments to the text adopted by the Senate[130].

As we have seen, according to Article 9.3 of the Aarhus Convention, Member States must also ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of its national law relating to the environment. If one opts for judicial procedures, such procedures will in most Member States be the competence of the ordinary judiciary. Here we face similar problems of standing and the views taken by ordinary courts are often even narrower than those of the administrative courts. In some of our jurisdictions there is a wide access to civil courts, while in others (e.g. the Netherlands, Belgium and France) the legislator introduced special provisions to allow Environmental NGOs to ask for injunctions or even damages. But the impression remains that in the majority of the Member States the situation is far from satisfactory and that a legislative intervention is necessary if the courts cannot or are not willing to review their jurisprudence on standing[131].

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[126] See on this subject: MILIEU ENVIRONMENTAL LAW & POLICY, *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, September 2007, 6-11; CH. PIROTTE, *l.c.*, 16-19.

[127] L. LAVRYSEN, "Chapter 2. Belgium" in J. KOTZÉ & A.R. PATERSON (eds.), *The Role of the Judiciary in Environmental Governance. Comparative Perspectives*, Kluwer Law International, Alphen aan den Rijn, 2009, 108-110.

[128] *Doc.* Belgian Senate, 2006-2007, N° 3-1953/1.

[129] *Doc.* Belgian Senate, 2006-2007, N° 3-1953/7.

[129] *Doc.* Belgian House of Representatives, 2008-2009, N° 52 1939/001.

[130] Opinion of the Council of State, N° 46.643/AG-AV, 9 March 2010, *Doc.* Belgian House of Representatives, 2009-2010, N° 52 1939/001.

[131] See: MILIEU ENVIRONMENTAL LAW & POLICY, *o.c.*, 11-16.

Finally, there is Article 9.4 and 9.5 which sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. These requirements are perhaps the most difficult of all to fulfil. In many Member States the judiciary faces a large backlog of cases. Waiting a long time for a final decision, in some cases more than 5 years, is an everyday reality in more than one jurisdiction. In such circumstances only interim relief is an adequate solution, but unfortunately the conditions under which one can obtain interim measures are often very severe and not in accordance with the Treaty requirements. In other countries judicial procedures and lawyer's fees are very costly. These issues are difficult to solve by the courts themselves and raise more general questions of judicial management, state investment in the judiciary and appropriate legal aid schemes. A long-term work program seems necessary to solve these problems in an acceptable way. And of course these are cross-cutting issues that go far beyond the environmental sector.