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Standing of NGOs in Relation to Environmental Matters in Estonia*

1. Introduction

It has become increasingly evident that basic rights depend on the quality of our environment. This, in turn, has resulted in an understanding that everyone may have a personal interest in the state of the environment. It also has become clear that the implementation of environmental law by the state is not always flawless.^{*1} For these reasons, environmental protection based on private initiative has gained prominence in Europe. Non-governmental organisations have a special role in this form of environmental protection, as they are often considered to be the best candidates to further collective environmental interests. One of the prerequisites for fulfilment of this role is access to justice in respect of environmental matters.

Recently, a number of studies have been carried out on access to justice in relation to environmental matters in Europe. These reveal a great diversity among the regimes studied.^{*2} However, the studies are focused on Western European countries, leaving the picture of access to justice in the EU incomplete. The motive for writing the present article is a desire to contribute to filling this gap with respect to Estonia. The aim of the article is to examine access of NGOs to review procedures where environmental matters are concerned. The article focuses on the extent of standing in administrative court review because the administrative courts play a central role in adjudication of environment-related disputes in Estonia. For this purpose, firstly, the general framework for environmental standing in the European context is briefly examined; secondly, the basic criteria for environmental NGO action in Estonia are analysed; and, finally, the various developments that have expanded the standing of NGOs before the administrative court system are scrutinised.

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¹ See, e.g., the explanatory letter to the proposal on the Directive on Access to Justice in Environmental Matters. Available at <http://europa.eu.int/comm/environment/aarhus/index.htm>, p. 2 (31.05.2006).

² For instance, J. Ebbesson (ed.). *Access to Justice in Environmental Matters in the EU / Accès à la justice en matière d'environnement dans l'UE*. The Hague: Kluwer Law International 2002; N. Sadeleer, G. Roller, M. Dross, et al. *Access to Justice in Environmental Matters and the Role of NGOs*. Groningen: Europa Law Publishing 2005.

2. Theoretical framework for standing of NGOs

2.1. The distinction of private and public interest

The ideology of liberalism calls for the distinction of private and public interest. The first consists of the various personal interests of individuals and the latter collective interests that cannot be meaningfully attributed to any one specific individual. Interest in the good quality of the environment is generally considered to fall into the category of public interest. It is the task of state authorities to promote and protect public interests. The role of NGOs in protecting the public interest is limited. In liberal thinking, private associations are often regarded as peculiar individuals, no more suitable for a role in promoting public interests than any of their members are. The approach is well illustrated in an English court case concerning the protection of the site of the Elizabethan Rose Theatre. A pressure group was formed for the purpose of defending the theatre. Some of the members were locals, including a local member of the British Parliament, and many others had undoubted expertise and distinction in archaeology and historical preservation, as well as knowledge of the theatre, the literature, and other relevant matters. However, the court stated: "The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest. [...] The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest." Obviously, the group was denied standing in the case.³

The decision has been much criticised⁴, as has the liberal approach to interests in general.⁵ Nonetheless, as a basic concept the approach still seems to have force. The predominance of administrative court review in relation to environmental matters is, at least partly, a result of the liberal approach. Since protection of the environment is primarily the task and the privilege of public authorities, environmental disputes tend to focus on the adequacy of government actions. For instance, when a nature conservation society is not satisfied with construction by a private real estate developer, the focus of the dispute is, in most countries, on the consent of the authority to the building activity instead of the activity itself. Due to the role of public authorities in environmental protection, the extent of environmental standing largely depends on the access to the institutions that review government actions.

2.2. The models of standing

The requirements for standing before these reviewing institutions vary considerably. The actual approaches can be accommodated between two theoretical models: (1) the model that allows *actio popularis*, under which everyone has standing when it can be demonstrated that a certain public interest has been violated, and (2) the model of protection of subjective rights, under which the prerequisite for standing is violation of a norm that specifically protects the rights of a person who filed an action. Under the first system, the complaint is simply a means for commencing investigation of the misuse of power; in the other, the infringement of a person's subjective rights has central importance. Abuse of power by the government often encroaches on personal rights but not always: under the second model, the review procedure is terminated if and when it is established that the person's rights have not been infringed.

The choice of a model for standing is a legal-political question. Accordingly, the various rules on standing reflect the traditions and history of the country in question.⁶ For instance, the manner of administrative court control in France has evolved from self-control of the administration and therefore is oriented toward objective control of actions involving administrative entities.⁷ On the other hand, control of administration in the German court system focuses on the protection of subjective rights, as a reaction to the state fascism of the Nazi regime.⁸ As a third example, Denmark has relatively restrictive requirements concerning stand-

³ R. v. Secretary of State for the Environment ex parte Rose Theatre Trust, 1990. Referred to in J. Alder. Access to the Courts: A Conflict of Ideologies. – Journal of Environmental Law 1998 (10) 1, pp. 164–165.

⁴ *Ibid.*, p. 184.

⁵ For example, Mauro Cappelletti argued in the 1970s discourse on access to justice: "Today's reality [...] is much more complex and pluralistic than abstract dichotomy: between the individual and the state there are a numerous groups, communities, and collectives which forcefully claim the enjoyment and judicial protection of certain rights which are classified neither as 'public' nor 'private' in the traditional sense." M. Cappelletti. Vindicating the Public Interest through the Courts: A Comparativist's Contribution. M. Cappelletti, B. Grath (eds.). Access to Justice. Vol. III: Emerging Issues and Perspectives. Alphen aan den Rijn: Sijthoff and Noordhoff 1979, p. 513.

⁶ J. Ebbesson. The Notion of Public Participation in International Environmental Law. – Yearbook of International Environmental Law 1997 (8). Oxford: Clarendon Press 1998, p. 63.

⁷ G. Winter (ed.). German Environmental Law: Basic Texts and Introduction. Dordrecht: Martinus Nijhoff / Graham & Trotman 1994, p. 49.

⁸ R. Steinberg. Judicial Review of Environmentally-related Administrative Decision-making sine loca, sine anno, p. 61 (Reprint from Tel Aviv University Studies in Law. Vol. 11, Gega Institute for Comparative and Private International Law, Faculty of Law, Tel Aviv University 1992).

ing before the courts but rather lenient requirements for standing before quasi-judicial administrative appellate bodies, due to the context being a consensus-oriented society that does not offer an incentive for initiating court disputes.⁹ It should be noted as well that, in most countries, the standing requirements vary significantly depending on the object of the dispute. For instance, despite the country's generally restrictive standing criteria, most German federal states enable certain NGOs to file actions with administrative courts concerning matters of nature conservation — i.e., in the public interest.¹⁰

3. Basic criteria for standing of NGOs before Estonian administrative courts

3.1. Centrality of administrative court review

Administrative court review is practically the only type of effective review proceedings available to NGOs in relation to environmental matters in Estonia. Unlike in a number of other European countries¹¹, access to civil courts in Estonia is limited to cases of interference with a set of narrowly construed personal rights. Access to criminal courts for environmental protection is also barred. Although an association can draw the attention of a public authority to a violation, the authorities have a wide margin of discretion in deciding whether to start criminal proceedings.¹² There are some non-judicial procedures accessible to NGOs. An NGO can ask for review by the legal chancellor (the ombudsman); however, the number of cases the legal chancellor can take is limited and the final decision not binding. Finally, internal review by the administration, the so-called challenge procedure, is in theory a powerful tool for reviewing environmental decisions. In practice, the usefulness of such proceedings is limited due to the fact that in typical environmental cases the same authority that made the original decision is the reviewing body.

3.2. Protection of subjective public rights

The administrative court system was implemented in Estonia in 1993. In the same year, the Code of Administrative Court Procedure was adopted. The code was amended significantly in 1999. In similarity with many other areas of Estonian law, the administrative court procedure has been strongly influenced by the German model.¹³ The reliance on the model of protection of subjective rights is evident in the Code of Administrative Court Procedure¹⁴ (CACP), which sets out the basic criteria for standing. Subsection 7 (1) of the CACP stipulates that only a person who finds that his or her rights have been violated or his or her freedoms have been restricted by an administrative act or measure has the right to file an action with an administrative court.¹⁵

The theoretical point of departure is the classical one: only certain public authorities can bring actions for the protection of public interest; individuals and NGOs have standing only where their subjective rights under public law have been violated. The notion of the 'subjective public right' is understood in the context of the protective norm theory. According to this theory, violation of a provision of public law results in a violation of a person's subjective right(s) only when the violated provision aims to, besides protecting the public interest, protect the person's interest.¹⁶

⁹ N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 167.

¹⁰ E. Reh binder. Germany/Allemangne. J. Ebberrsson (ed.). Access to Justice in Environmental Matters in the EU / Accès à la justice en matière d'environnement dans l'UE. The Hague: Kluwer Law International 2002, p. 250.

¹¹ Direct access to civil courts is granted, e.g., in the Netherlands, Portugal, and France. See N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 180.

¹² In comparison, associations are regularly party to criminal proceedings in France. In Portugal, an association may become a private prosecutor, assisting or even contradicting the public prosecutor. *Ibid.*, p. 182.

¹³ For instance, in the initial phase of the administrative law reform, the best course of action was considered to be a literal reception of German administrative law — i.e., translation of key pieces of legislation, with some modifications. This approach was abandoned in 1999, but Estonian administrative law still bears a strong resemblance to German administrative law. See Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (About Underlying Ideas of Estonian Administrative Law Reform). — *Juridica* 2003/1, p. 39 (in Estonian).

¹⁴ Halduskohtumenetluse seadustik. — Riigi Teataja (State Gazette) I 1999, 31, 425; 2005, 39, 308 (in Estonian).

¹⁵ Under certain circumstances, standing can be based on legitimate interest. While the concept of legitimate interest appears to be wider than that of violation of subjective rights, the court's authority is more limited in adjudicating the case on the former basis: it may issue only declaratory judgements. For this reason, violation of subjective rights is the preferred basis for action.

¹⁶ See, e.g., decision of the Special Panel of the Supreme Court 3-3-1-15-01. Available at <http://www.riigikohus.ee/> (in Estonian).

3.3. Interest of an association in filing an action

The third paragraph of § 7 of the CACP stipulates a specific norm for the standing of associations. An association does not have the right to file an action in the interests of its members or other persons unless such a right is granted by law. While the norm does not formally restrict filing an action in the interests of the association, it appears that the norm calls for a restrictive interpretation of the notion of 'association interests'. The wording seems to imply that an association cannot file an action in its interest when the interest is in essence the shared interests of its members. It is likely that listing the interest as one of the objectives of the association in its key documents does not change this fact.^{*17}

The hypothesis of restrictive interpretation appears to be confirmed by a decision of the Supreme Court in 2001. In the case in question, the association of local municipalities had filed an action on the basis of the Local Government Organisation Act^{*18}, which stipulates that local governments may establish associations for articulation, representation, and protection of common interests and for filling common functions. The court ruled that the act did not grant the association standing. In the court's opinion, such a right would not contradict the nature of the association but neither is it an inevitable precondition for its functioning.^{*19}

To the knowledge of the author, there is no court practice as regards the application of this norm to standing of environmentally concerned NGOs. A court of first instance has, however, ruled on the extent of environmental NGOs' standing, in 2000 in the so-called *Undva Deep Harbour* case. The case concerned a proposal that had been made to build a deep harbour on the west coast of Estonia's largest island — Saaremaa. The proposed site was in close proximity to existing and potential avian sanctuary areas of international importance. The local municipality made a planning decision allowing the construction of the harbour. The Estonian Ornithological Society challenged the decision. The society, founded in 1921 and with a membership of several hundreds, is one of the oldest and largest Estonian environmental groups. It is among the society's purposes to promote the conservation, study, and propagation of Estonian birds, and the group has been very active in this field. Yet the court of first instance ruled that the society did not have standing in the case.^{*20} The society lodged an appeal but later withdrew it because the municipality concerned annulled the controversial planning decision on its own initiative.

It appears from the foregoing considerations that the basic criteria for standing of associations are stipulated and interpreted in a restrictive manner. However, in recent years, standing in relation to environmental matters has been expanded considerably through legislative action and court practice. In the following sections of this paper, these extensions are examined in detail.

4. Broadening of NGOs' standing concerning environmental matters

4.1. Extension of the competence of administrative courts

Due to the central role of the administrative court system, the extent of the competence of administrative courts is of crucial importance. Administrative courts may review administrative acts and measures taken by administrative entities — that is, by agencies, officials, or other persons who perform administrative functions under public law. Administrative acts are legal acts that regulate individual cases in public law relationships; measures are activities, omissions, and delays in public law relationships.^{*21} The courts can review the procedural and substantive aspects of discretionary decisions; however, the extent of the review is inherently limited, due to the separation of powers.^{*22} Administrative courts may not review legislation of

¹⁷ There are considerable differences within Europe as regards the concept of an association's interest. In some countries, such as Belgium and Germany, the restrictive approach is predominant. Only interests that are specific to the association (e.g., those that are 'personal and direct' in Belgium) are considered a valid basis for standing. On the other hand, in the Netherlands, the interests of a legal person are deemed to include the general and collective interests that it specially represents in accordance with its objectives and as evidenced by its actual activities. These criteria are, in general, applied in a rather lenient way. J. E. Bonine. *The Public's Right to Enforce Environmental Law* in S. Stec (ed.). *Handbook on Access to Justice under the Aarhus Convention*. Available at <http://www.unece.org/env/pp/publications.htm> (30.05.2006), p. 33; E. Reh binder (Note 10), p. 247; J. Verschuuren. Netherlands. See N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 103.

¹⁸ Kohaliku omavalitsuse korralduse seadus. – Riigi Teataja (State Gazette) I 1993, 37, 558; 2005, 32, 235 (in Estonian).

¹⁹ Administrative Law Chamber of the Supreme Court ruling 3-3-1-16-01. Available at <http://www.riigikohus.ee/> (in Estonian).

²⁰ Administrative Court of Pärnu (22.12.2000).

²¹ CACP, § 4.

²² K. Pikamäe. *Kaalutusvigadest* (About of Abuses of Discretion). – *Juridica* 2006/2, p. 82 (in Estonian).

general application issued by administrative entities, although they may refuse to apply such legislation in adjusting a case, on the grounds that it is in conflict with the Constitution. This refusal leads to commencement of constitutional review proceedings by the Supreme Court.^{*23}

When one considers the restriction of the competence to administrative acts and measures, it is important to distinguish between an administrative act regulating an individual case and an act that is generally applicable. In 2003, a dispute arose concerning whether a governmental regulation setting out rules for a landscape protection area may be challenged before the administrative courts. The rules had been amended in regard to a relatively small part of the protected area in question: the area situated within a city. Prior to the amendment, only buildings for business and social purposes were allowed in the protected area, but the amendment changed this to residential and social buildings. The amendment also abolished the maximum height restriction of eight meters for buildings. The decision on whether the act was reviewable was not based on the form of the act — a governmental regulation — because the Supreme Court has consistently held that the legal form is not a decisive criterion. Instead, the reviewability of an act has to be determined on the basis of its contents.^{*24} However, no clear line can be drawn on the basis of the contents of an act, given that the notion of ‘act regulating an individual case’ encompasses so-called general orders, which are directed at persons on the basis of general characteristics or at changing the status of things under public law. In the case, the Supreme Court took the view that the protection rules could be considered a general order directed at changing the public law status of things, at least insofar as the rules regulating building rights are concerned. In the opinion of the court, the possibility of review was desirable in order to better protect the rights of individuals and to ensure legal certainty.^{*25} While this extension of environmental standing may appear minor compared to other developments, it is illustrative of the court’s readiness to redefine the criteria for standing.

4.2. *Actio popularis* in spatial planning

Planning decisions are frequently relevant to environmental protection. Often the relationship is direct, such as in the case of planning of a new motorway. In other cases, the relation is indirect. For instance, the planning decisions may determine what is permissible in the air and thus influence the content of pollution permits. Spatial plans of all levels can be reviewed by the courts in Estonia. This encompasses the very abstract national plan covering the entire territory of the state and very concrete detailed plans that are the basis for building activities and other land use in the short term.

On 1 January 2003, a new Planning Act^{*26} came into force. Subsection 26 (1) of the act stipulates:

Every person who finds that a decision to adopt a plan is in conflict with an Act or other legislation or that his or her rights have been violated or freedoms restricted by the decision has the right to contest the decision in court within one month as of the day on which he or she became or should have become aware of the adoption of the plan.

Literal reading of the section appears to allow action in the public interest to every person. However, for some time, opinions differed as to whether the literal interpretation should be followed. Some argued for it^{*27}, while others were of the opinion that the wording is misleading and that the basic standard of the CACP — violation of a subjective right — also is applicable in planning cases.^{*28} Some courts took the latter position.^{*29} In 2004, the Supreme Court decided in favour of a literal reading of the section, thus affirming the possibility of *actio popularis* and significantly expanding environmental standing.^{*30}

²³ CACP, § 25 (5–6).

²⁴ See, e.g., Constitutional Review Chamber of the Supreme Court decision 3-4-1-4-02. Available at <http://www.riigikohus.ee/> (in Estonian).

²⁵ Administrative Law Chamber of the Supreme Court ruling 3-3-1-31-03. Available at <http://www.riigikohus.ee/> (in Estonian).

²⁶ Planeerimiseseadus. – Riigi Teataja (State Gazette) I 2002, 99, 579; 2006, 14, 111 (in Estonian).

²⁷ K. Relve. Füüsiliste isikute subjektiivne avalik õigus ja põhjendatud huvi keskkonnaasjades (Subjective Public Law of Physical Persons and Grounded Interest in Environmental Matters). – *Juridica* 2004/1, p. 25 (in Estonian).

²⁸ H. Veinla. Artikkel 9 lg 2. – H. Veinla, K. Relve. Juurdepääs õigusemõistmisele keskkonnaasjus. Diskussioonimaterjal (teine seminar) (Access to Administration of Justice in Environmental Matters. Material for Discussion (Second Seminar)). Available at <http://www.envir.ee/orb.aw/class=file/action=preview/id=3615/Diskussioonimaterjal+teine+seminar%3A+Juurdep%E4%E4s+%F5igum%F5istmisele+keskkonnaasjus.pdf>, p. 28 (30.05.2006) (in Estonian).

²⁹ Circuit Court of Tartu 2-3-8/2004 (30.01.2004) (in Estonian).

³⁰ Administrative Law Chamber of the Supreme Court decision 3-3-1-28-04. Available at <http://www.riigikohus.ee/> (in Estonian).

4.3. Standing on the basis of article 9 (2) of the Aarhus Convention

The Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention) was signed in Aarhus, Denmark, on 25 June 1998.^{*31} Estonia ratified the convention on 6 June 2001.^{*32} The convention came into force on 30 October of the same year. As its title suggests, the convention entitles the public to certain procedural rights where environmental matters are concerned.

Article 9 (2) is the key provision for standing of NGOs under the convention and has had vast effect on the extent of standing concerning environmental matters.^{*33} The provision provides access to justice to challenge any decision, act, or omission subject to the provisions of article 6. The latter article regulates participation in decision-making relating to activities that may have a significant impact on the environment — e.g., construction of large industrial facilities. The article does not cover preparation of plans, programmes, policies, executive regulations, and generally applicable legally binding normative instruments, which are regulated instead in articles 7 and 8 of the convention. Although the requirements under article 6 are procedural in nature, both substantive and procedural legality of the decision, act, or omission may be challenged.^{*34} Standing under article 9 (2) is differentiated as follows. For the general public, standing is based on traditional criteria — i.e., sufficient interests or impairment of a right. By contrast, NGOs enjoy a special status under article 9 (2): their interest is deemed sufficient, and they are deemed to have rights capable of being abridged. It should be noted, however, that parties to the convention may establish requirements that an NGO must satisfy in order to have recourse to article 9 (2).^{*35}

Although Estonia has ratified the convention, no special effort has been made by the legislature to implement the requirements under article 9 (2). This has not been an obstacle to the application of article 9 (2). Sufficiently precise provisions of ratified international agreements are directly applicable in Estonia, and these provisions prevail when in conflict with national laws.^{*36} In practice, NGOs have used the opportunity and have frequently relied directly on article 9 (2).

Article 9 (2) would in itself result in broadening of standing of NGOs in relation to environmental matters by requiring re-evaluation of the concept of an association's interests and rights under the CACP. However, practice in the application of the article has resulted in much broader standing: the practice seems to have gone far beyond the minimum required by the article. First, the scope of the standing has been indirectly expanded by the legislature. Secondly, the scope has been considerably expanded in the court practice of its application. Finally, the courts have been very generous in recognising associations as environmental NGOs.

4.3.1. The scope of article 9 (2) in law

Article 9 (2) applies, in principle, to the activities listed in Annex I to the convention.^{*37} The annex largely mirrors the respective lists under the Espoo Convention^{*38}, EIA Directive^{*39}, and IPPC Directive.^{*40} How-

³¹ UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark; 23–25 June 1998). Available at <http://www.unep.org/env/pp/documents/cep43e.pdf> (31.05.2006).

³² Keskkonnainfo kättesaadavuse ja keskkonnaasjade otsustamises üldsuse osalemise ning neis asjus kohtu poole pöördumise konventsiooni ratifitseerimise seadus (Act Ratifying the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). – Riigi Teataja (State Gazette) II 2001, 18, 89 (in Estonian).

³³ Article 2 (3) is the other section with a potentially large impact on the standing of associations. It regulates the enforcement of national environmental law by the public. However, the significance of the article is not clear. Also, the provision seems to have had no impact on Estonian practice: the author is not aware of any action based on it.

³⁴ M. Lee, C. Abbot. The Usual Suspects? Public Participation under the Aarhus Convention. – *The Modern Law Review*, January 2003 (66), p. 103.

³⁵ Article 2 (5) of the convention.

³⁶ Section 123 of the Constitution of the Republic of Estonia.

³⁷ In addition, article 6 is applicable to procedures for deciding on proposed activities not listed in Annex I but that may, nevertheless, have a significant effect on the environment. Also, each party must, within the framework of its national law, apply, to the extent feasible and appropriate, the provisions of article 6 to decisions on whether to permit the deliberate release of genetically modified organisms into the environment (paragraphs 1 (b) and 11 of article 6 of the convention).

³⁸ UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland; 25 February 1991). Available at <http://www.unep.org/env/eia/documents/conventiontextenglish.pdf> (31.05.2006).

³⁹ Council Directive 85/337/EEC of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment. Consolidated version published on the Internet available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1985/L/01985L0337-19970403-en.pdf> (31.05.2006).

⁴⁰ Council Directive 96/61/EC of 24 September 1996, concerning integrated pollution prevention and control. Consolidated version published on the Internet available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1996/L/01996L0061-20031120-en.pdf> (31.05.2006).

ever, according to paragraph 20 of Annex I, the list is open-ended: in addition to the activities listed, it covers all other activities where public participation is provided for under an environmental impact assessment (EIA) procedure in accordance with national legislation.

On 3 April 2005, a new national environmental impact assessment act entered into force.^{*41} In addition to activities covered by the convention, the act made mandatory use of an EIA when activities are proposed that alone or in conjunction with other activities may potentially have significant effect on a Natura 2000 site.^{*42} The provision of national law is designed to transpose article 6 of the Habitats Directive^{*43}, which requires ‘appropriate assessment’. The latter is not necessarily the same as the general EIA procedure, although the assessment can be carried out in the framework of the EIA procedure. In view of the narrow discretion under article 6 of the Habitats Directive^{*44} and the number of Natura sites^{*45}, it is clear that by requiring the assessment to be carried out through the EIA procedure, the national law has a much wider scope than is set forth in the convention. Consequently, the extent of NGOs’ standing under article 9 (2) is much wider as well.

4.3.2. The scope of article 9 (2) in court practice

The Supreme Court has insisted on particularly broad interpretation of standing under article 9 (2). According to the convention, it is possible to challenge decisions other than those subject to the provisions of article 6, “where so provided for under national law”. The wording seems to imply that it is within the competence of national authorities to decide whether to extend standing further under article 9 (2).^{*46} However, in January 2004, the Supreme Court took a different view. The court stated that standing beyond article 6 decisions does not depend on special regulation enabling more extensive standing. In the court’s opinion, the phrasing ‘where so provided for under national law’ means that every decision can be challenged when the decision has characteristics that make court review possible. For example, once it is established that an energy policy document may result in specific implementing actions (i.e., the programme has an ‘external effect’), the policy can be challenged on the basis of article 9 (2) regardless of the fact that the preparation of the programme is subject to article 7 of the convention. In the court’s view, any decision, action, or omission covered by the convention can be challenged on the basis of article 9 (2).^{*47}

The court extended the scope of article 9 (2) even further. The court has ruled that standing under article 9 (2) is available regardless of whether the unlawfulness of the decision stems from the convention or from a national provision. In other words, standing is limited to decisions, acts, and omissions falling within the scope of the convention but is not limited to violation of the provisions of the convention.^{*48}

4.3.3. Subjects of article 9 (2) — the criteria for environmental NGOs

The convention does not specify precisely which associations should have broader standing under article 9 (2). It only sets out three general criteria:

⁴¹ Keskkonnamõju hindamise ja keskkonna juhtimissüsteemi seadus (Environmental Impact Assessment and Environmental Management System Act). – Riigi Teataja (State Gazette) I 2005, 15, 87.

⁴² Natura 2000 is a European network of protected sites representing areas of the highest value for natural habitats and species of plants and animals that are rare, endangered, or vulnerable in the European Community. The network is based on two directives: Council Directive 92/43/EEC of 21.05.1992, on the conservation of natural habitats and of wild fauna and flora, and Council Directive 79/409/EEC of 2. 04.1979, on the conservation of wild birds.

⁴³ Explanatory letter to the Environmental Impact Assessment and Environmental Management System Act. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=042930021&login=proov&password=&system=ems&server=ragne11> (31.05.2006).

⁴⁴ The margin of discretion left to authorities in deciding whether to carry out the ‘appropriate assessment’ under the Habitats Directive is rather limited. In the Waddenzee judgement, the European Court of Justice came to the conclusion that the assessment has to be undertaken if it cannot be excluded, on the basis of objective information, that an activity is going to have a significant effect on the site, either individually or in combination with other plans or projects. Case C-127/02, 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels (Waddenzee case), paragraph 45. Available on the Internet at the ECJ homepage <http://www.curia.eu.int/>.

⁴⁵ There are 471 sites on the pre-selection list according to the Natura Web page of the Ministry of the Environment, <http://www.envir.ee/natura2000/?nodeid=127&lang=et> (30.05.2006).

⁴⁶ See for instance, V. Rodenhoff. The Aarhus Convention and its Implications for the “Institutions” of the European Community. – RECIEL 2002 (11) 3, p. 349; UNECE. The Aarhus Convention Implementation Guide. Available at <http://www.unece.org/env/pp/publications.htm>, p. 128 (30.05.2006).

⁴⁷ Administrative Law Chamber of the Supreme Court decision 3-3-1-81-03. Available at <http://www.riigikohus.ee/> (in Estonian). Therefore, it appears that, in principle, it is possible to challenge actions of administrative entities in collection and dissemination of environmental information (article 5); preparation of plans, programmes, and policies (article 7); preparation of executive regulations and generally applicable legally binding normative instruments (article 8); and, theoretically, actions under all other articles of the convention.

⁴⁸ *Ibid.*

- 1) the association must be an NGO,
- 2) it must promote environmental protection, and
- 3) it has to meet any requirements set forth under national law.^{*49}

Essentially, the convention leaves it to its parties to determine what associations should have standing. No special criteria have been set forth in Estonian law. It could be argued that the existing standard criteria for standing of associations are applicable. However, it is difficult to accept this line of argument under article 9 (2). The general aim of the convention is to broaden access to participation and justice in relation to environmental matters. Environmental organisations have special participatory rights under article 6. Moreover, article 9 (2) emphasises the role of NGOs in challenging decisions relating to participation in environmental decision-making. Therefore, it seems impossible to maintain that in Estonia the general restrictive standing criteria for associations are the 'requirements under national law' envisaged by the convention.

Although the criteria have not been laid out in law, there has been some discussion on the appropriate criteria. It seems to be a matter of general understanding that the criteria should be flexible and avoid excessively formal requirements, such as a fixed minimum number of members or a minimum time of having been active. Opinions differ on the question of whether foundations should qualify. Although the majority of Estonian NGOs active in the field of environmental protection are not-for-profit associations, a few are foundations. It has been suggested that, as foundations, unlike non-profit associations, do not have open membership, it is thus not suitable for them to have standing under article 9 (2).^{*50} Unsurprisingly, the environmental foundations were of the opinion that they should qualify. Somewhat more surprisingly, the environmental NGOs considered it necessary to restrict standing to associations that have a legal personality.^{*51}

Since there are no criteria laid down in Estonian national law, the courts have been forced to decide on an *ad hoc* basis which environmental organisations have standing under article 9 (2). Given the restrictive interpretation of an association's standing, one would have expected the courts to be conservative in recognising environmental NGOs. Intriguingly, exactly the opposite has taken place. The courts have accepted the standing of several not-for-profit organisations,^{*52} the standing of a foundation^{*53}, and even that of an informal group.^{*54} In fact, the authors of this article do not know of any decision where an administrative court has denied standing to an association on the basis that it is not an environmental NGO within the meaning of the convention. It seems that the courts have acknowledged the widest possible standing under article 9 (2). Especially noteworthy is the decision concerning the standing of the informal group. The association (a so-called fellowship) does not have a legal personality and was formed as an *ad hoc* local protest group. Yet an administrative court of first instance did not hesitate to consider it an environmental organisation capable of relying on article 9 (2) of the Aarhus Convention.^{*55}

In deciding whether an association has standing, the courts have typically relied on the statutes of the association: if the statutes list environmental protection as an aim, the NGO qualifies. The exact wording of the statutes does not seem to have much relevance. Also, it appears that courts have not considered it necessary to scrutinise the activities of an organisation, even though doing so could be another basis for deciding whether said NGO promotes environmental protection. The lack of emphasis on actual activities can be explained, perhaps, by the fact that the majority of organisations that have filed actions are well-known NGOs.

⁴⁹ Article 2 (5) reads: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

⁵⁰ H. Veinla, K. Relve. A Conception on the Implementation of the Third Pillar of the Aarhus Convention in Estonia. Ministry of the Environment 2003. Available at <http://www.envir.ee/orb.aw/class=file/action=preview/id=3601/Arhusi+konventsiooni+III+samba+l%F5ppkontseptsiooni+t%F5lge+inglise+keelde.pdf>, p. 46 (31.05.2006).

⁵¹ A letter (13.02.2003) signed by nine prominent Estonian environmental protection NGOs.

⁵² The Estonian Ornithological Society by the Administrative Court of Pärnu (24.11.2003), No. 3-119/2003; Estonian Society for Nature Conservation by the Administrative Court of Tartu (2.12.2002), No. 3-289/2002; Estonian Green Movement by the Supreme Court (29.01.2004) Administrative Law Chamber of the Supreme Court decision 3-3-1-81-03; Fellowship of Nõmme Road by the Administrative Court of Tallinn (11.09.2003), No. 3-1207/03.

⁵³ The Estonian Fund for Nature by the Administrative Court of Pärnu (24.11.2003), No. 3-119/2003.

⁵⁴ The Fellowship of Green Urvaste by the Administrative Court of Tartu (4.03.2005), No. 3-596/04. It should be noted, however, that the case is currently — in May 2006 — pending before the Supreme Court.

⁵⁵ However, it should be pointed out that the court's willingness to accept the standing of the fellowship may have been influenced by the fact that the group had been given standing in a preceding internal administrative review procedure. It should also be noted that the case is currently — in May 2006 — pending before the Supreme Court.

5. Conclusions

The basic approach to standing of environmentally concerned NGOs in Estonia is the standard one. It is based on the assumption that the protection of the environment lies within the exclusive competence of the state. Access to justice for private persons concerning environmental matters is limited. While the court practice is not extensive, it appears that standing of NGOs is, in principle, even narrower. However, the criteria for standing before administrative court have evolved rapidly in recent years. This development is in keeping with the wider trend in Europe — broadening of access to justice related to environmental matters for NGOs⁵⁶ — but appears to surpass it in speed and extent. Within a short time, the regime based on protection of narrowly construed subjective rights has evolved into a system wherein *actio popularis* is the norm for environmental matters. Much of the development is the result of judicial activism by the Supreme Court, although radical changes in legislation also play a role. However, the change is confined to administrative court review, and access to other branches of judicature still remains very narrow. Consequently, the NGOs can, provided that they have the resources, play the role of an effective watchdog over governmental action but lack the means to truly fulfil the function of the protectors of collective interest in environmental protection.

⁵⁶ N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 3.