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Substantive environmental right in Estonia – Basis for citizens' enforcement

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Abstract

Estonia has become one of the countries which have recognized environmental substantive right in a statutory law. Estonia's new General Part of Environmental Code Act provides for every person's right to an environment adequate to his or her health and well-being, if they have a significant exposure to that environment. This right should be considered as an additional, potentially highly important basis for ensuring compliance with environmental laws, both in member state and EU contexts. It now provides more individuals with the right to demand action from authorities and challenge decisions and omissions in courts. However, it does not essentially create an "actio popularis" standing: to assert this right, a range of conditions must be met. In addition to the presence of special relationship with affected environment, the scope of this right is further defined by the concept of "environment", the essence of health and in particular well-being needs and the criteria for non-adequacy of the environment. As the right is worded in a rather abstract way, its enforcement will depend on the dominant interpretation patterns in future legal practice.

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1. Introduction

After the restoration of Estonian independence in 1991, a new legal system was established in all major sectors of environmental law in a very short period of time during the first half of 1990-s. In most cases, these new regulatory instruments were prepared hurriedly and without proper analysis. In 2004, Estonia became a member of EU. Regrettably, the transposition of EU law into the Estonian legal system was also done in a formalistic way and unsystematically, resulting in a considerable degree of disorder. This disorder was one of the main reasons for the subsequent reform of Estonian environmental law, labelled as the codification of environmental law, with the final aim of establishing the Environmental Code[1]. This process was started in 2007, and has not been fully completed yet. On 16th of February 2011, the Parliament (*Riigikogu*) adopted the General Part of the Environmental Code Act[2] (hereinafter GPECA), which establishes the fundamental concepts and definitions in environmental law. In addition, GPECA provides the principles of environmental protection and the basic environmental obligations as well as fundamental provisions protecting environmental substantial and procedural rights. However, the immediate entry into force of GPECA was not possible. Entry into force occurred three years later,

[1] H. Veinla. *Basic structures of the draft general part of environmental code act.* Juridica International. 2010, Vol 1, pp. 128–137.

[2] Passed 16.02.201, RT I, 28.02.2011, 1

in 2014. Considering the previous disorganised state of Estonian environmental law, GPECA is rather innovative development. It also contains many provisions, which will lead to a number of substantial changes in national environmental law and implementation of EU law. One of such provisions is Article 23 of GPECA which stipulates the substantive right to an environment adequate to a person's health and well-being.

Sections of the GPECA that are related to rights are phrased in a fairly abstract way and the implementation practice of the substantive environmental right is so far almost non-existent. This is what makes a dogmatic analysis of the right essential. This article examines the rationale behind the right, the legal definition of the right, its relationship with other basic structures of GPECA, brings up its sources and different models and analyses its main elements.

2. Prime rationale behind the right

The prime rationale behind the environmental substantive right is to involve citizens more effectively in the implementation and enforcement of environmental laws as well as reaching environmental policy goals, such as the high level of environmental protection. Such involvement is undoubtedly an important additional resource for achieving environmental compliance, which is still largely untapped.

Traditionally, procedural rights (especially participation in decision-making) were seen as the key mechanism for involving citizens in enforcement of environmental laws.[3] Solely relying on procedural rights, however, may not be effective enough to ensure a high level of environmental protection in practice. Execution of procedural environmental rights might not be sufficient to safeguard the achievement or retention of a level of environmental quality which actually corresponds to health and well-being needs[4].

Procedural rights are traditionally divided in three pillars: access to information, participation in decision-making, and access to justice. This division and contents of the rights follow the template set in the "UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (hereafter, "the Aarhus Convention"). The purpose of procedural rights is to ensure the protection of the rights of persons by creating a uniform procedure, which allows participation in decision-making and judicial control. One of the key elements of procedural rights is the obligation of the administrative authority to grant a participant in a permit or planning procedure a possibility to provide his or her opinion and objections in a written, oral or any other suitable form. The right to participate, however, does not automatically guarantee a decision that a person expects. Procedural rights are meant to ensure fair treatment in the "due process" but do not directly affect the outcome of such a process.[5]

The substantive environmental right, on the other hand, relates to the content, the required level of environmental protection required. Enforcement patterns of the substantive environmental right are manifold. Citizens can use it to contribute to the government's enforcement efforts. Public authorities can rely upon the collaboration of citizens that together with the authority are demanding that other actors, e.g. industrial operators respect and/or achieve

[3] D. Shelton. *Human Rights and the Environment. What Specific Environmental Rights have been Recognised.* Denver Journal of International Law and Policy. 2008, Vol 35:1, pp. 129–133.

[4] D. Shelton. *Developing substantive environmental rights*. Journal of Human Rights and the Environment. 2010, Vol, No 1, pp. 89–120.

[5] G. Winter. *Theoretical foundations of public participation and administrative decision –making*. Environmental Democracy and Law (ed. G. Bandy). (Europa Law Publishing, Groningen 2014)

a particular quality of environment. However, citizens can also require action from the government and spur the administration to actively work for a particular protection level, which in reality guarantees an adequate environmental quality for persons. It is therefore important that this right is accompanied by access to justice and effective remedies.

The characteristic feature of judicial control is the fact that court does not begin to exercise control on their own initiative but only on the basis of an action. It is natural that in different jurisdictions certain limits have been laid down with regard to bringing actions against the executive. Regarding possible models of the right of initiative in administrative court procedure – four action categories can be distinguished abstractly: actions for the protection of rights, actions based on interests, popular actions and association actions[6]. Under Estonian law, a person is entitled to request revision of administrative acts or omissions from the court only if his or her subjective rights have been violated by an administrative body. The main reason for the Estonia restrictive system lies in the historical roots of the Estonian legal system, which was always modelled along the lines of a German model, where the violation of subjective rights is interpreted in the context of the protective norm theory. Under this theory, the infringement of the provision of public law leads to the violation of a subjective right only in case the violated provision directly protects the person's legal interest. According to this model, the essence of subjective rights is the legal entitlement of a person to require certain behaviour from another person, the omission or tolerance of his or her interests. Since environmental impact often affects a large number of persons generally, the application of protective norm theory is very problematic.

The Aarhus Convention strives to offer some solutions to such problems. The Convention defines obligations that parties have to perform before their citizens, rather than obligations between the parties. This feature makes the Aarhus Convention similar to human rights treaties. According to the convention, each Party should ensure, within the framework of its national law, access to a review procedure before a court of law or another independent and impartial body established by law. The Parties to the Convention still retain broad discretion regarding the implementation of their obligations under the Convention. In many cases the Convention leaves the choice of implementation means and methods to the Parties. Despite the fact that the particularities of access to justice shall be governed by Party's legislation, the convention still encourages wide assess. What is more, the Party should also establish appropriate assistance mechanisms to remove other barriers to access to justice. In defining appropriate means and methods of implementation Parties have to take into account the general objective of the Convention, which is to guarantee representatives of the public broad, simple and effective access to information, decision-making process, and justice in environmental matters. The Convention reflects the need to make certain rearrangements in the ruling doctrine of administrative law, which in the first place concerns the elements that are related to the openness of the society, public participation and a broader and easier access to justice. Substantive environmental right stipulated under Estonian law generally meets these basic principles and expands the possibilities for citizen's enforcement considerably[7].

[6] I. Pilving. *Right of action in Estonian administrative procedure.* Juridica International. Vol. IV, 1999, pp. 53–56.

[7] On the influence of Aarhus Convention on Estonian law see. H. Veinla, K. Relve. *Influence of the Aarhus Con-*

Regarding standing requirements as a rule distinction can be made between a "right-based" and an "interest-based". The latter mentioned countries have usually more liberal approach to standing.[8] In principle Estonia belongs to the first group. The primary purpose of the procedure in administrative courts in Estonia is to protect the rights of individuals (including environmental rights) against unlawful actions performed in the course of the exercise of executive authority. This principle has remained unchanged, but the new substantive right expands citizens' opportunities to defend the environment to a broader geographical area outside their property and also enables to contest situations where "merely" their well-being is affected. According to the Estonian Code of Administrative Court Procedure, the court has in fact a considerably wide competence once it has established the violation of an individual's right. Citizens' actions may seek different remedies. As an example, when granting an action, the court may, in the judgement annul the administrative act in part or in full, order that an administrative act be made or an administrative measure be taken, prohibit the making of an administrative act or the taking of an administrative measure or even award compensation for harm caused in a public law relationship.

To exemplify the way in which the new substantive environmental right expands access to justice for citizens, one could think of a case where a passionate recreational fisherman would be concerned about the environmental impacts of a plan to build wind turbines and connecting power lines in a bay which he has been regularly using for fishing. Before the acknowledgement of the substantive right such a fisherman would have had the opportunity to voice his concerns during public consultation of permits needed to build the turbines and power lines. However, he would in all likelihood not have had legal standing to challenge the permits in a court of law, as he could not have shown any infringement of his rights, despite the clear effect they may have on his well-being. After the recognition of the new substantive right, however, he now has a chance to rely on that right to defend his legitimate interests also in administrative courts.

The substantive environmental right, in this context, is also relevant to ensuring the application of EU environmental directives. Such directives generally oblige member states to attain objectives of the directives.[9] Certain articles of EU directives are capable of providing individuals with specific rights. The Court of Justice has repeatedly confirmed this doctrine.[10] Violations of those rights have to be contestable in the national court. However, not all provisions of environmental directives are enforceable in accordance with this principle. As a matter of principle, a citizen should be able to force authorities to take reasonable measures to contribute to achievement of environmental directives objectives and fulfilling of specific requirements. However, the actual opportunities of citizens to claim remedies in case of breaches of environmental laws is dependent on the peculiarities of the Member State's legal system. The substantive environmental right, as provided in Estonian law is accompanied by legal remedies and therefore considerably expands citizens' ability to contrib-

vention on Access to justice in environmental matters in Estonia. European Environmental Law Review. 2005, Vol 14, No 12, pp. 327–330.

[8] See Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union (ed. J. Darpö). 2012-11-11/Final. Pp. 12–15. Available: http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf

[9] S. Perchal, *Directives in EC Law*, II edition, 4 (Oxford University Press 2004)

[10] E. g. *Commission v. Germany* (C – 361/88): (1991) E.C.R. I-2567.

ute to better implementation of environmental requirements and objectives of EU origin. As a "rule of thumb", an activity breaching EU rules on environment is probably liable to breach the substantive right of a person who has a special relationship with the environment affected by the breach.

3. EU initiatives related to environmental rights

An evolving trend towards recognising rights to effective remedies in environmental matters has been observed not only in the case law of European Court of Human Rights[11], but also in EU context. Important impetus to rights-based approach regarding implementation of EU environmental requirements was Aarhus Convention, which has been ratified by the EU and all its Member States. In broader political context this convention relates also to the more effective implementation of EU's harmonised legislation, which is essential for maintaining a high level of protection of environment and human health. In 2003, the Commission adopted a proposal for a horizontal, comprehensive Directive on access to justice in environmental matters[12]. The idea behind the proposal was to grant access to justice for individuals concerned insofar as they maintain impairment of a right. The Court of Justice in its case-law, in particular in the Janecek and Slovak Brown Bear cases[13], has taken some steps forward confirming the right to access to legal protection at different levels.

Because of several reasons, the adoption of this horizontal directive has failed. Most of the Member States opposed the proposal, arguing it unjustifiably interferes with the systems of administration of justice in the Member States. Nevertheless, the recognition of the idea of providing more comprehensive and effective access to justice in environmental matters is widespread. This trend is at least partly based on EU law and international treaties that form part of the EU legal order. The EU has in fact adopted various legislative initiatives to ensure the implementation of the Aarhus Convention not merely at Member State level[14] but also at the Union level.

4. Origins and role models of the right

The idea that healthy environment could be connected with personal rights in itself is nothing new. It has been emphasised that damage to the environment can impair and undermine all the human rights spoken of in the human rights instruments.[15] At the same time, for a long period, it was considered a mere prerequisite to different personal rights (most notably, the right to life and the protection of health, as well as full enjoyment of property rights). A right to healthy envi-

[11] See e.g. J. van de Venis. *A Human Right to a Clean and Healthy Environment: Dream or Reality in Europe.* ELNI review. 2011, No 1. pp. 27–35.

[12] COM(2003) 624 final – 2003/246/COD. 2 OJ C 103E, 29.04.2004, p. 451–626.

[13] Case C-237/07, "Janecek", where the Court recognised a citizen's entitlement to challenge the inadequacy of an air quality management plan and Case C-240/09, Slovak Bears, where the Court ruled that Article 9(3) of Aarhus had no direct effect but that national courts must anyway promote access by NGOs.

[14] E.g. 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, 14.2.2003, p. 26), 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, 25.6.2003, p. 17), Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56) etc.

[15] See e.g. Gabçikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92 (Sept. 27) (separate opinion of Judge Weeramantry).

ronment as a separate right has entered the legal thought in rather recent times. The first international document that hints at a possibility of such a right is the UN 1972 Stockholm Declaration. According to Principle 1 of this document "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, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

The next milestone in the history of a right to healthy environment on the international level was reached 20 years later, in the 1992 UN Rio Declaration. Although it emphasises the need to provide individuals with the so-called access rights (access to environmental information, public participation and access to justice), its Principle 1 also claims, "They [human beings] are entitled to a healthy and productive life in harmony with nature". Here too, the Declaration falls short of recognising the right to healthy environment *per se*.

Undoubtedly case law of the European Court of Human Rights has played prominent role regarding environmental rights. Referred case law reflects quite clearly the idea that environmental law and human rights law are mutually reinforcing. Though no right to environment has been directly included in the European Human Rights Convention the case law of the Court has shown the growing understanding about the close links between the protection of rights of individuals and the environment.[16]

For Estonia, the Aarhus Convention was probably the most important source of inspiration for establishing the right to healthy environment as a separate individual right. According to the 7th point of the preamble as well as Article 1 of the Convention, the parties acknowledge the inherent right of individuals to live in an environment that corresponds to the needs of their health and well-being. Although the Convention does not explicitly require its members to provide such a right in their national legal order, the Parties do admit that such a right exists.

Unlike a number of constitutions elsewhere, the Estonian Constitution does not include a specific right to healthy environment. The Constitution however does provide that the protection of environment is everyone's duty (Art 53)[17].

Even before the right to healthy environment was clearly recognised in the Estonian legislation, there was substantial case-law on this issue. This firstly developed in lower tiers of the court system. The right to an environment with a certain quality as it has been established in the GPECA has been largely inspired by the case law of the Tallinn Circuit Court in the years 2007–2008. In at least two cases the court ruled that legal standing should also be granted to persons in cases where the person has regularly used a certain natural resource, he/she often spends time in the area impacted by some administrative decision, if they have a more intense relationship with the environment impacted or their well-being depends otherwise on environmental impacts related to the challenged decision. The court ruled that the environment this basis for legal standing is related to may be wider that a person's property and may include, *inter alia*, public spaces surrounding their property.[18]

In 2010, however, the Supreme Court ruled that as of that time, a separate right to clean envi-

[16] Manual of Human Rights and the Environment. Principles Emerging from the Case Law of the European Court of Human rights. (Council of Europe Publishing 2006), p. 8

[17] K. Relve. *The subjective right to environment in the general part of environmental code act.* Juridica International. 2016, No 1, p. 34–36.

[18] *Case No 3-07-102,* TlnRingKm 13.08.2007; *Case No 3-06-1136*, TlnRnKo 18.03.2008; *Case No 3-06-188,* TlnRnKo 26.06.2008.

ronment did not exist, even if an interest in living in a clean and healthy environment could be indirectly protected by relying on other rights, e.g. procedural rights, the right to health and property rights[19]. According to the court, a right to clean environment could not be directly derived from the constitutional provisions. Case-law of the Supreme Court was not fully coherent though, as at the same time, the Supreme Court did give legal standing in the field of environment already in cases where the person could demonstrate that the challenged decision had a significant influence on its interests.[20]

5. Legal definition of the right and its links with the other basic structures of GPECA

5.1 Legal definition of the right in GPECA

Wording of the right is obviously modelled on the basis of Article 1 of the Aarhus Convention, which also provides that every person of present and future generations has the right to live in an environment adequate to his or her health and well-being. Under Estonian law, every person enjoys such right if they have a special relationship with the affected environment. The wording of the right takes into account the precautionary principle and a certain degree of uncertainty inherent to environmental impacts and stipulates that the "affected environment" in this context also includes the environment that is likely to be affected by some activity or omission. To assert this right, a whole range of additional conditions must be met. In addition to the presence of special relationship with the affected environment, the scope of the right is further narrowed by the concept of "environment", the essence of health and in particular well-being needs and criteria of non-adequacy of the environment. These aspects of the right will be dealt with more thoroughly below.

5.2 Links with other basic concepts and fundamental principles of GPECA

The substantive right to an environment adequate to a person's health and well-being has strong links with many other basic structures of GPECA. In particular, it is linked with some basic concepts and fundamental principles of Estonian environmental law – first of all the concepts of "environmental hazard" and "environmental risk" and hence with preventive and precautionary principles. Estonian law distinguishes between these two concepts and principles quite strictly.

The right to an environment adequate to a person's health and well-being is meant to protect persons not against all negative environmental impacts, but first and foremost against environmental hazards – such impacts which the Estonian law defines as at least highly probable and which would bring about negative consequences so serious that they should be avoided at all costs. An environmental risk differs from the concept of a hazard mostly by the fact that one or both characteristics (high probability and/or significant nuisance) of a hazard are absent. Unlike environmental hazards, environmental risks should be reduced by reasonable precautionary measures. Consequently, in case of environmental risks, reliance on the substantive environmental right is not completely ruled out, but still much less likely than in case of environmental hazards.

The concept of an environmental hazard thus contains of two key elements, which characterise the likelihood of the occurrence of a negative environmental effect and the significance of the effect. Under GPECA the occurrence of

[19] *Case No 3-3-1-101-09,* RKHKm 18.06.2010 (p 13).

[20] *Case No 3-3-1-86-06,* RKHKo 28.02.2007; *Case No 3-3-1-68-11,* RKHKo 12.01.2012; *Case No 3-3-1-87-11,* RKHKm 19.03.2012.

a significant environmental nuisance must be prevented[21]. GPECA provides that, unless prescribed otherwise in the law, an occurrence of a significant environmental nuisance shall be presumed in the following cases:

- Upon exceeding the environmental quality limit;
- Upon causing a pollution i.e. significant unfavourable change in the quality of air, water or soil, caused by polluting;
- Upon causing environmental damage, i.e. a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly in the environment;
- Upon causing a significant environmental impact as defined by environmental impact assessment rules;
- Upon causing significant adverse effects to a Natura 2000 site.

In all aforementioned cases, a strong relationship between a significant environmental nuisance and a violation of the right to an adequate environment can be observed, except for the last item in the preceding list. Significant adverse effects to a Natura 2000 site in essence mean negative impacts to reaching or maintaining the favourable conservation status of protected habitats or species. Although human health and well-being are therefore not directly addressed by rules related to impacts on Natura 2000 sites, the needs of human beings regarding their health and well-being may in many cases overlap with needs of protected species and habitats.

Differentiation between environmental hazards, which should be prevented and environmental risks that ought to be reduced is also relevant in the context of legal remedies. For enforcement purposes of the substantive right, Article 23(5) of GPECA enables an affected person to claim certain remedies. If environmental quality is inadequate, the exposed person can request an administrative authority to sustain the environment, i.e. to avoid the deterioration of environmental quality. An administrative authority may also be requested to take reasonable measures for ensuring the adequacy of the environment to health and well-being. In assessing the reasonableness of these potential measures, the benefits gained from the improvement of the environment and the burden imposed by the measures should be taken into consideration. This means in essence that when assessing the reasonableness of measures, the test of proportionality is decisively important. In case of environmental hazards, measures that should be taken by the authority may be far more burdensome than in case of risks.

5.3 Links with environmental fundamental obligations and permit procedures.

Articles 16–22 of GPECA provide the fundamental environmental obligations of an operator. First and foremost, these obligations impose a duty to apply the necessary measures for preventing environmental hazards and to take reasonable precautionary measures for reducing environmental risks. Fundamental obligations are particularly relevant in the context of issuing environmental permits. Fulfilling of these obligations is a prerequisite for the issuance of a permit and the basis for determining permit conditions. Failure to comply with these obligations can be the basis for amending the conditions of

[21] An environmental hazard or a significant environmental nuisance must be tolerated in exceptional cases – if the relevant activity is necessary for securing a dominant interest, there is no reasonable alternative, and the necessary measures have been taken in order to reduce the environmental threat or the significant environmental nuisance

the permit or even its revocation. A permit issuer is authorised to exercise supervision over the legality of the activities authorized under the permit. As mentioned above, Article 23(5) of GPECA enables the affected person to request a permit authority to take reasonable measures for ensuring the adequacy of the environment. In case of such a request, if an authority identifies a failure to comply with the obligations of an operator, it can be the basis for amending the conditions of the permit or even its revocation to ensure the protection of the right to environment that complies with person's health and well-being needs.

6. Key elements of the substantive right

6.1 The concept of environment

The term "environment" is not clearly defined in most of the jurisdictions[22] as well as in GPECA or any other national law in Estonia. The same applies to EU environmental law, where different Directives and Regulations have also refrained from defining what makes up the "environment". Taking into account the abstract nature of the term and its many uses, any attempt to provide a comprehensive legal definition would also be rather unrealistic. In practice this will still be an important question, however, as the object or the "value protected by" the right in question is the environment.

The word "environment" is sometimes used both in Estonian as well as English as a very wide term, covering not only the natural environment but also concepts such as social, cultural, economic "environments". It is clear from different provisions of GPECA as well as other national laws that a narrower concept is meant here. Indirectly, the term "environment" could be interpreted with the help of the concept of "environmental information", which logically can also be interpreted as information on the "environment". In the definition of the environmental information, found both in GPECA as well as Access to Environmental Information Directive (both are in turn based on Aarhus Convention), a non-exhaustive list of elements of the environment is provided. This list includes air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components etc. It is important to note that the Court of Justice has taken a broad view of what constitutes "environmental information". In case C-266/09 the Court of Justice, for example, found that environmental information includes information submitted for authorisation of a plant protection product.

Another hint as to what is meant by environment in the context of the substantial right is found in the term "environmental protection "which as an activity defining the environmental NGOs is provided in Article 31 of GPECA. In this context, both the protection of the natural environment as well as the research and introduction of nature and natural heritage are included. As natural heritage is also included, then for example the coastal meadows, as semi-natural grasslands are included under the concept of the "environment".

"Environment" in the context of the substantive right should be interpreted as physical environment, primarily the natural environment. Natural environment in this sense should not be limited to only "pristine", "wild" natural environment but should also include the natural environment in built up areas (parks etc.). It would also be a mistake to limit it to the living organisms (plants, animals, birds). As the right is related to environmental quality standards, then water bodies, air, soil etc. must also be considered "environment" to which the substantive right relates. In some cases, when this forms a part of the natural heritage, also valuable land-

[22] See, e.g., F. Fracchia. *The legal definition of environment: From rights to duties*. Bocconi Legal Studies Research Paper No. 06–09. 2005. – http://dx.doi.org/10. 2139/850448.

scape and its elements (hills, forest cover etc.) can be included under this notion.

To open the content of the term "environmental" the case law of the European Court of Human may also be useful. The Court has demonstrated very anthropocentric approach of rights guaranteed by European Human Rights Convention. In order to define how person should be affected to become a victim in the sense of human rights different categories of environment could potentially distinguished. Some authors have pointed out that different categories of "environment" like forests, are more important for humans than others, like wetlands. Individuals have legitimate interest in certain types of environmental resourced, if this resource has objective (use) value for individual, such as a forest. The other resourced are more widely shared and thus cannot be protected by European Court of Human rights.[23] Such anthropocentrism can be at least partly explained by lack of the direct reference to environment in European Human Rights Convention[24]

6.2 Special relationship with the environment

The key qualifier for the spatial scope of the right is the criteria of a special relationship. In practice, it means that not everyone is entitled to claim to have a right to any part of the Estonian territory – such an interpretation would in essence result in an "actio popularis". Rather, individuals have the right to an environment that is adequate to their health and well-being on a limited territory. It is obvious that this limited territory must be wider than the areas owned by a person itself, as this way, little added value would have been provided to pre-existing ownership rights.

Two of the most obvious cases of such a special relationship are provided in Article 23(2) of GPECA, namely a) if a person often stays in the environment or b) uses the affected natural resource. Therefore, a person leasing a house would be able to invoke this right in relation to its garden similarly to a person who spends a considerable amount of its working hours in a given area. The same applies to fishermen using a lake for their professional or private use as well as anyone using water from a ground water body.

What constitutes "staying often" and to what extent should a person use affected natural resource to have a right towards it will have to be further defined by the future case-law. However, it can be argued, that use of the resource does not have to be exclusive to give rise to holding the substantive right.

An even bigger need for precedents relates to all cases of "otherwise" special relationships referred to in Article 23(2) of GPECA. The guiding principle should be that the environment, the quality of which is causally linked to a person's well-being, should be included. It will have to be determined in the future, how strong and long-lasting the impact of the quality of the environment on the person's health and well-being must be in order for the right to exist. As an example, such a special relationship may exist towards a public water body in a case a person has acquired a plot of land for building a residential house nearby this water body and intends to use it in the future, but hasn't actually started either construction or use of the water body.

6.3 Health and well-being

According to GPECA, everyone has a right to environment that is adequate to their health and well-being. The World Health Organization

[23] See C. Schall. P*ublic Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?* Journal of Environmental Law (Oxford 2008). Vol 20, No 3, pp. 428–429

[24] A. Gouritine. EU Environmental Law, International Environmental Law and Human Rights Law. (Brill Nijhoff, Leiden, Boston 2016) p. 33

(WHO) defines health as the state of full physical, social and mental well-being. Therefore, it seems that the concept of "health" is narrower in GPECA, because it is distinguished from well-being. In practical terms, this does not result in a big difference, as both aspects are covered by the right in a similar manner, at least theoretically.

The distinction is mainly important due to the peculiarities of Estonian national legislation. The right to protection of health is already provided in the Constitution (Article 28(1)). According to the commentary to the Constitution, this right covers measures necessary to ensure a healthy and safe living environment, e.g. safe noise levels, protection from asbestos, food safety rules etc. Therefore, it can be deducted that in the national laws, "health" is rather perceived as a condition without physical injury. "Well-being" is a wider term, covering also annoyances and disturbances that may lower the quality of life without directly harming the physical health of the person. This may be the case with, for example, light pollution (flickering) created by wind farms when the sun is shining at a low angle or small number of intensive noise events (e.g. shots at a firing range) that do not cross the threshold considered to be liable for causing permanent damage to health. However, it is important to note that not every situation where the environment is not adequate for a person's health and well-being is considered to be a violation of the substantive right (see p 6.4 for details).

6.4 Infringement and violation of the substantive right

In the Estonian legal order, similarly to many continental legal systems, a distinction is made between infringements and violations of rights. A right may be infringed in a lawful way, i.e. in cases where there are overriding public interests or other rights. Violation of a right is an infringement that is considered unlawful, i.e. it is not justified by the need to protect other right-holders or public interests.

The aforementioned distinction also applies to the substantive environmental right. Any action or omission that reduces the adequacy of some part of environment for human health and well-being (e.g. raises the level of pollutants in a water body, increases noise levels) would be considered to be an infringement of the right of persons who have a special relationship with a given part of the environment. Not every such infringement would, however, be considered a violation of the right.

Article 23(4) of GPECA correspondingly provides key criteria to be taken into account when deciding whether an infringement of the substantial environmental right amounts to the violation of it: other person's rights, public interests and characteristics of the region. The first two considerations highlight the fact that some basic duty of tolerance applies to the exercise of this right. The third criterion makes it clear that also regional differences play a role in that respect. It is obvious that justified and legally protectable expectations towards the quality of the environment (i.e. noise, smell, air pollution) are different in sparsely populated rural areas as opposed to industrial areas or city centres. Therefore, a better quality of environment may be asked for in some areas than others.

According to Article 23(4) of GPECA, environment is presumed to be inadequate for health and well-being (and the right therefore violated) if an environmental quality limit value has been exceeded. According to Article 7(3) of GPECA, an environmental quality limit value means a limit value prescribed for a chemical, physical or biological characteristic of the environment, which must not be exceeded in order to protect human health and the environment. The relevant quality limit values are, as a rule, transposed from EU environmental directives and are to be specified

in the Special Part of Environmental Code (sectoral acts), which are, as said above, mostly still in the draft stage. In EU law, the primary aim of such values is exactly the protection of human health[25]. This is why GPECA sets environmental quality limit values as one of the main thresholds for violation of the substantive right. In Estonian as well as in EU environmental law different types of environmental quality standards are in use. Some of these are not strictly legally binding and could be in certain circumstances legitimately exceeded. However, there are a number of quality standards the non-observance of which is illegal. Article 23 and 7(3) of GPECA refer to the latter category.

Breach of the above-mentioned quality standards, however, only creates a presumption of non-adequacy. This presumption may not hold true in different ways. Firstly, in some cases, an environment may not be adequate even if the environmental nuisance stays below the quality standards (e.g. a persistent noise pollution that is just below the limit value or on the contrary, intermittent loud noise that averaged over a longer period stays below limits). In other cases, the nuisance may be of the type for which no limit values have been set (e.g. smell, changes in landscape). Secondly, in some cases the environment quality standards may be exceeded without it resulting in the breach of the right. The latter case should of course, be more exceptional and such a situation may still lead to claims of breaches of other rights (e.g. property rights).

According to the principle of prevention, an environmental hazard (including exceeding of quality limit values) must be tolerated if the activity is required due to overriding public reasons, there is no reasonable alternative and required measures have been taken to reduce hazards and significant nuisances. For example, if a central heating plant is found to cause breaches of air quality standards, but no alternative means are found to heat the homes in the area and all reasonable measures have been taken to reduce the air pollution, this must be tolerated. In such cases, right to environment that meets health and well-being needs would also not be considered to be violated.

7. New substantive right vs "traditional substantive rights"

The above analysis of the key elements of this new substantive right sets out a good basis for analysing the conceptual differences between this and the more traditional substantive rights. In the Estonian context, the main right that has been invoked in the past by individuals to protect themselves from unwanted nuisances, has been the right to property. Partly due to historical reasons (non-recognition of land ownership in the Soviet time and the following "reprivatisation" of real estate), this right has enjoyed a strong protection in the case law.

The use of right to property by individuals to protect one's living environment and the wide interpretation and recognition of this right by the judiciary reached its apex just shortly before the entry into force of GPECA. In the case No 3-3-1-56-12[26] (*E. Maripuu vs Salme Municipality*), the Supreme Court of Estonia ruled that the planned construction of a drainage system may be considered an infringement of neighbours' property rights due to the potential damage to plant species on her property. The Court based its reasoning on Article 54 of the General Part of the Civil Code Act, according to which vegetation permanently attached to an immovable (real estate) is its essential part and covered by property rights. The Court went on to declare that the neighbour therefore had the right to challenge the alleged

[25] See Case C-237/07, "Janecek"

[26] *Case No 3-3-1-56-12*, RKHKo 6.12.2012.

infringement of the rules on "appropriate assessment" (Art 6(3) of the Habitats Directive) in courts. The Supreme Court ruled in the landowner's favour, annulling the permit granted for construction of the drainage system. Read in the light of Supreme Court's denial of existence of a constitutional right to healthy environment, it appears that before GPECA the Supreme Court considered environmental protection by individuals' rights to be possible, but only as part of property rights. Reliance on property rights as individuals' main recourse to protecting their living environment is not unique to Estonia, but rather a widespread phenomenon in legal systems, which has been repeatedly pointed out in legal literature[27].

Even despite this very broad interpretation of property rights by the Estonian Supreme Court, there is still one crucial aspect that sets the new right apart from property rights. The range of persons entitled to relying on or invoking the new right is far greater than the number of the holders of property rights. The right to environment of certain quality can also be relied on by the tenant of a property to fend off nuisances from sources nearby. The new substantive right does not require any legal ties between the environment and a holder of the right. Therefore, this right can also be invoked as regards public lands or, in more extreme cases, even publicly accessible private land. The new right is thus a much more effective tool in supporting public authorities' efforts for environmental protection.

Another "traditional right" which has also been used as a means to protect one's living environment in the past is the right to the protection of one's health. This right has its basis in the Article 28 of the Constitution of Estonia. As the commentary to the Constitution explains, this right is mirrored by the obligation of the state to take legislative measures to ensure a healthy and safe environment (e.g. requirements to water quality). Special attention needs to be paid to the effectiveness of state supervision[28]. However, the new substantive right requires that the environment corresponds not only to the needs of a person's health, but also their well-being. Limit values enacted by the government (mostly for the protection of health) are only indicative, as their exceedance merely creates the presumption that the right has been infringed. Therefore, the new right has a wider scope of application when compared with the right to the protection of health.

As a conclusion, the new substantive right may have some overlaps with the more traditional rights (right to property, protection of health). However, due to its much wider scope, it enables a whole new range of persons to claim that the nuisances infringe their rights. From the point of view of the enforcement of environmental law and policy, this can be seen as a positive development, providing potential additional esources to the task.

8. Practical applications of the new right

Finally, the question of situations where a person might invoke the new substantive right deserves attention. In principle, the right can be used in two situations. Firstly, as mentioned in section 5.3, the new right can be used in environmental permit procedures. The same holds true for procedures for drafting plans or programs that may affect the environment, e.g. spatial plans and other permits, such as building or use and occupancy permits. The second field of application is related to situations where the nuisances infringing the right occur after a permit has been

[27] See eg., B. van Dyke. *Proposal to introduce the right to a healthy environment into the European Convention regime*. Virginia Environmental Law Journal, 1994/2, p.330

[28] Ü. Madise *et al, Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (*Juura, 2012), § 28, p 6.2.1.

issued or result from activities that do not require a permit at all. This is explicitly provided in the Art 23(5) of GPECA, according to which a person has the right to demand that public authorities take reasonable measures to ensure the required quality of environment.

If the authorities fail to act in accordance with the Art 23(5), this would give standing to the person who has demanded action from the authority. Clear links to Aarhus Convention can also be seen in this provision, as the Article 9(3) of the Convention requires access to justice to challenge both illegal acts as well as illegal omissions of public authorities.

In its case law the Supreme Court of Estonia has only quite recently (from 2010) recognised the right to challenge wrongful omissions related to state supervision. In the landmark case No 3-3-1-44-10, *OÜ Neckman Invest vs Technical Regulatory Authority*[29], the Court ruled that there is a possibility to challenge maladministration by state supervisory bodies. The court found that no person has a subjective right to the initiation of supervisory proceedings nor subjective right to require certain measures to be taken by the supervisory authority in case these are discretionary decisions. However, the persons whose legal rights are protected by the provisions on supervision, have the right to require that due attention is paid to these rights when the authority exercises its discretion.

Although this case law could have been relied on even without Art 23(5) of GPECA, its wording makes it explicit that a right to demand action by the authorities exists in environmental matters. In case of supervisory activities of public authorities, which are discretionary, the wording of Art 23(5) of GPECA also clarifies limits to that discretion. In case the environment does not correspond to the needs of health and well-being of persons having a special relationship, the authority's discretion is limited to deciding which measures are reasonable to take, but not whether to take measures at all. Therefore, in this respect the new substantive right also broadens the horizon for the enforcement of environmental laws by citizens.

9. Conclusions

A general trend towards recognising the substantive environmental right has been observed globally. Estonian environmental law is one of such examples. For Estonia, the Aarhus Convention was the most important source of inspiration for establishing the right to an environment with a certain quality as an enforceable subjective right. Although the Convention does not require its parties to establish such a right in their national legal framework, according to the preamble and notably Article 1 of the Convention, the parties nevertheless admit its existence.

Estonia is among the countries, which have acknowledged the existence of a substantive environmental right in primary law. This right may play a prominent role not only on the national level but in the EU legal framework as well. The Court of Justice of EU has developed the doctrine according to which certain articles of EU environmental directives are capable of creating substantive rights to individuals. Violations of those rights have to be contestable in the national courts. A substantive environmental right amplifies such possibilities considerably and thereby potentially contributes to the more effective and uniform application of EU law in environmental matters.

The right to environment adequate to a person's health and well-being is meant to protect persons not against all negative environmental impacts, but primarily against significant environmental impacts (hazards) – such impacts that are at least highly probable and would bring

[29] *Case No 3-3-1-44-10,* RKHKo 13.10.2010.

about negative consequences so serious that they should be avoided.

There are several mechanisms for the implementation of the environmental substantive right. One of them is related to environmental permit systems and fundamental environmental obligations. An authority issuing the permit is required to exercise supervision over the legality of the activities authorised under the permit and to safeguard the substantive environmental rights of affected parties when considering the refusal to grant an environmental permit, the amending of its terms or revocation. However, a special provision also emphasises the right to demand "reasonable" action by authorities in cases where the activity causing nuisances does not require an environmental permit.

The scope of the substantive right is determined by some key aspects. The first of them is the scope of the term "environment". Although this term has not been clearly defined in the legislation, it is apparent from the related provisions that it includes mainly physical, natural environment (including, for example, city parks). Persons have a subjective right also not to any part of the environment, but only to the parts they have a special relationship with. This relationship can be based on use of an affected natural resource or staying in it often. Finally, it is important to note that as regards the substantive right, the standard for quality of environment is not related only to (physical) health, but it must also be adequate to a person's well-being.

Compared to more "traditional" rights such as property rights and the right to protection of health, the new right has a wider scope and may be used by a wider circle of persons. This means that, as an auxiliary mechanism for environmental law enforcement, the new right is more effective.

From a practical point of view, one of the most important questions that needs to be answered by future practice is in which cases would the infringement of this right amount to the (unlawful) violation of it. Although the exact answer to that question is yet unknown, the provisions make it clear that a certain "duty of tolerance" exists, i.e. not every infringement of the substantive right is unlawful. This duty of tolerance depends on a number of external factors, e.g. the rights of other persons, public interests and the characteristics of the region.