Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention and its Incorporation in the EU Legal Order.

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Abstract:

This article explores the multi-level governance of access to justice in environmental matters by analysing how the Aarhus Convention gains added force in the national legal order through its interpretation by the Court of Justice of the EU. In combination, the Aarhus Convention and its incorporation in the EU require national legal orders to grant wide access to justice, particularly to environmental non-governmental organizations. This article explores the interplay of the different levels of governance and analyzes their distinct contribution, with the Aarhus Convention setting the general legal requirements at the international level, EU law refining such requirements vertically in relation to Member State obligations, and national law potentially implementing wide access to justice on the ground. While in some Member States, such access is assumed and has led to the emergence of strategic litigation, in others standing requirements are still interpreted narrowly. Within this context, the article assesses the applicable legal framework in Cyprus, whose legal system provides interesting opportunities to realize the combination of the different levels of governance in light of the added force of supremacy of EU law over constitutional provisions that determine access to courts. The Cypriot case study exemplifies the potential of a combination of international, EU, and national requirements, to require a move away from an unduly restrictive interpretation of standing, which has been largely followed to date.

Keywords: access to justice, environment, non-governmental organizations, Aarhus, Cyprus, multi-level governance, CJEU, standing, locus standi, courts, European Union.

1. Introduction

Judicial review is crucial for ensuring procedural and substantive justice and constitutes an important accountability mechanism.[1] Delineating who has access to courts to challenge administrative action through standing requirements is thus important for the evolution of systems based on the rule of law. Access to courts has been conventionally safeguarded by national legislatures with national procedural rules determining who has a legitimate interest or a recognised right that they can litigate in court. This article demonstrates that in the environmental field in particular, while the starting point remains the procedural autonomy of states in determining access to their courts, the combination of the Aarhus Convention and its incorporation in the EU legal order limit this national autonomy with the aim of ensuring wide access to justice to defend environmental protection.

This article explores the multi-level governance of *access to justice*[2] by analysing how the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) gains added force in the national legal order through its implementation in the EU and its interpretation by the Court of Justice of the EU (CJEU). This paper illustrates how the different levels of governance interact and that each level adds a layer of requirements towards achieving access to justice that no one level could have contributed in isolation. It focuses on the implementation of the third pillar of the Convention and specifically Article 9(3) which governs access to national courts to challenge acts or omissions contravening environmental law.

The process of governing involves different functions, including rule-making, monitoring and enforcement, which are increasingly exercised at different levels.[3] Each of the levels governing access to justice in environmental matters contributes to all of these functions in different degrees. The international layer has primarily served a rule-making function through the adoption of a legal text embodying an obligation for signatory states to ensure access to justice, albeit subject to some discretionary leeway. It also performs a monitoring and enforcement

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[1] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) ch 11; Tom Bingham, *The Rule of Law* (Penguin 2011).

[2] Access to justice is used broadly to denote standing rules and possibilities for having access before a judicial review body to challenge instances of illegality or irregularity in the application of the law.

[3] David Levi-Faur, 'Introduction' in *The Oxford Handbook of Governance*, ed. David Levi-Faur (OUP 2012).

function through the Aarhus Convention Compliance Committee (ACCC). The incorporation of the Aarhus Convention in the EU legal order has enabled the CJEU to take these obligations a step further to require Member States to open the doors of national courts for environmental non-governmental organizations (ENGOs) to challenge violations of EU environmental law. The EU level can thus serve a monitoring and enforcement function together with the national level, which provides the potential for implementation of these requirements at the level where violations of environmental law are more likely to occur.

This article demonstrates how 'the dispersion of authoritative decision-making across multiple tiers', which characterizes multi-level governance,[4] strengthens and adds substance to broadly defined international obligations to require concrete changes in national procedural rules that determine access to justice in environmental matters. Indeed, the operation of the Aarhus requirements demonstrate how multi-level governance unfolds in practice. The 'multi-level' element, that is the increased vertical interactions between governments operating at different territorial levels,[5] is exemplified through the ever-increasing interaction among the Aarhus institutions, the EU institutions and the Member States to influence the procedural requirements that determine access to justice in environmental matters. The Aarhus Convention has been signed both by the EU itself and the Member States as a 'mixed' agreement on the basis of shared competences.[6] The incorporation of the Aarhus Convention in the EU legal order has implications for the obligations imposed not only on the EU institutions but also the Member States. The article highlights how the interpretation of the Aarhus Convention by the CJEU adds 'teeth' to the obligations stemming from the international agreement through the added force of EU law supremacy to limit the procedural autonomy of the Member States. The intensified interactions between governments and non-governmental actors giving rise to 'governance'[7] emerges through the important role of ENGOs in achieving effective judicial protection in environmental matters, a role recognized both legislatively in the Aarhus Convention and EU secondary legislation as well as judicially.

In some EU Member States, particularly those determining standing on the basis of a legitimate interest, wide access to national courts is assumed and has led to the emergence of

[4] Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, 2001) xi.
[5] Ian Bache, 'Multi-Level Governance in the European Union' in *The Oxford Handbook of Governance*, ed. David Levi-Faur (OUP 2012).
[6] TFEU, Articles 4(2), 191(4).
[7] Bache, *supra* n 5.

environmental strategic litigation. In other Member States the interpretation of standing is still restrictive, particularly if they delimit standing on the basis of a recognized right. Within this context, the article assesses the applicable legal framework for access to the national courts of Cyprus. The Cypriot legal system provides interesting opportunities to realize the combination of the different levels of governance for access to justice for environmental protection. This is particularly in light its interest-based approach to standing and the constitutionally recognized supremacy of EU law over national law, including over the Constitution. However, the Supreme Court's interpretation to date has effectively excluded members of the public and ENGOs from challenging violations of environmental law. The Cypriot case study exemplifies the potential of multi-level governance, through a combination of international, EU, and national requirements, to require a move away from an unduly restrictive interpretation of standing requirements.

The article is structured following the levels of governance that determine access to justice in environmental matters, demonstrating the supplementary function served by each of the levels. Section 2 starts by examining the rule-making function of the international realm, particularly focusing on Article 9(3) of the Aarhus Convention as clarified by the ACCC. Section 3 then analyzes the incorporation of the Aarhus Convention in the EU legal order which has refined the obligations of Member States for granting access to justice through the operation of EU constitutional principles, thereby concretizing the international obligations. Finally, Section 4 explores the potential role of the national level to deliver the combined effects of the international and EU levels through the implementation of access to justice requirements before national courts, particularly through an expanded interpretation of standing requirements. This section focuses on Cyprus as a case study that demonstrates both the potential of a Member State system to ensure access to justice on the ground as well as the resistance of national judiciaries to expand standing and realize the potential of multi-level governance so as to enable civil society to challenge violations of environmental law at the level where they are more likely to occur.

2. The International Level: The Aarhus Convention

The Aarhus Convention connects human rights of procedural nature with the protection of the environment by recognizing the right to the environment as a collective and participatory right. In combination, the three pillars of the Convention – access to information, public participation

in decision-making, and access to justice in environmental matters – aim to enhance transparency of decision-making and reinforce, or potentially create new, mechanisms of accountability.[8]

The three pillars are closely interlinked. To participate in a meaningful way you must have access to all the information relevant to the decision-making, and should your rights to participate be denied, you should have access to review procedures.[9] For this reason, Article 9(1) provides for access to justice to anyone who has made a request for access to environmental information to challenge a refusal or inadequate response to the request for environmental information. Article 9(2) provides the 'public concerned', subject to having either a sufficient interest or maintaining an impairment of a right, the right to challenge the legality of a decision, act or omission to permit a specific activity as provided under Article 6 of the Convention. Notably, the Convention recognizes the important role of ENGOs in representing collective interests and defending the environment. This is particularly evident in the definition of the 'public concerned', which constitutes a subset of the public at large who have a special relationship to a particular environmental decision-making procedure. Environmental organizations constituted in accordance with national requirements are recognized to be part of this subset,[10] and in certain situations have enhanced rights. Under Article 9(2), ENGOs meeting national requirements, are deemed to have a 'sufficient interest' or 'impairment of right' for access to justice to challenge the legality of activities falling within the scope of Article 6. The 'specific' access to justice rights under Articles 9(1) and 9(2) are implemented in a multi-level way through EU secondary legislation and transposed into national law as briefly seen below in Section 3.

The main focus of this article is on the 'general' right of access to justice established in Article 9(3) of the Aarhus Convention,[11] which provides for a 'general right of access to justice to enforce environmental law at the local level'.[12] In particular,

[8] Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Hart 2014) ch 12.
[9] *The Aarhus Convention, An Implementation Guide* (2nd edn, June 2014) www.unece.org/env/pp/implementation_guide.html.
[10] Aarhus Convention, Article 2(5).
[11] Article 9(3) does not establish a general right of access to justice in the sense that anyone with an interest in upholding the law must have access to a review procedure, amounting to an *actio popularis*. Instead, the reference to a 'general' right of access to justice is used to distinguish Article 9(3) from Articles 9(1) and 9(2), which specifically establish a right of access to justice in relation to access to information and public participation.
[12] Áine Ryall, 'Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention', Jean Monnet Working Paper Series 5/16, http://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf.

> ‘each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.’

Additionally, Article 9(4) requires access to justice procedures to provide ‘adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive’. While Article 9(3) is broader in scope than Article 9(2) as it creates a right for ‘members of the public’ and not only the ‘concerned public’, it provides discretion to signatory states in how to implement it by enabling them to lay down criteria for access to administrative or judicial procedures. The international layer of governance, under the auspices of the United Nations has enabled consensus among signatories to set the legal obligation in a way that is simultaneously demanding but which allows discretion to impose national criteria relating to standing. This discretion however should be viewed in light of the Convention’s objective of ensuring wide access to justice for the public concerned and the important role of ENGOs in collectively defending environmental protection.

The ACCC, which oversees the implementation of the Convention,[13] and before which members of the public (including NGOs), signatory parties, and the secretariat of the Convention may bring issues regarding a Party’s compliance,[14] has clarified that this discretion should not be abused.

> ‘On the one hand, the Parties are not obliged to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental

[13] This is meant to be ‘non-confrontational, non-judicial and consultative’, Aarhus Convention, Article 15.
[14] Decision I/7 on Review of Compliance, adopted by the Meeting of the Parties in October 2002, ECE/MP.PP/2/Add.8, 2 April 2004. The ACCC may also examine compliance by its own initiative.

organizations from challenging acts or omissions that contravene national law relating to the environment.'[15]

On this basis, the ACCC has also went a step further to interpret Article 9(3) as creating a presumption of access to justice, not allowing Parties to set too strict criteria that make it the exception.[16] A similar interpretation has been endorsed by the CJEU and the EU Commission as analyzed below in Section 3. While ACCC findings are not strictly legally binding, they can influence the implementation of the Convention by way of public and political pressure, thereby fulfilling an indirect, yet significant, monitoring and enforcement function of governance at the international level. Since its creation in 2002, the ACCC has issued significant findings on the interpretation and implementation of the Convention that have influenced national implementation,[17] including most recently findings on the failures of the EU to ensure access to justice at the EU level.[18] ACCC findings are usually adopted and endorsed by the meeting of the parties to the Aarhus Convention. Their potential to fulfill an enforcement function is thus dependent on a classic requirement of international law, that is consensus among the parties, which is not always easy to achieve.[19]

Overall, the 'general' right of access to justice under Article 9(3) leaves discretion to signatory parties to determine the conditions for access to justice, which usually translate to standing requirements for challenging administrative action contravening environmental law. This discretion reflects the conventional approach to procedural autonomy of states to determine access to national courts. Additionally, it exemplifies the operation of multi-level governance and the perceived normative superiority of multi-level dispersion of decision-making as more efficient than and normatively superior to central state dominance.[20] As Bache puts it, the rationale for its superiority is that 'governance should operate at multiple territorial levels to capture variations in the reach of policy externalities which vary from global to local levels: thus, only through scale flexibility in governance can such externalities be effectively

[15] ACCC Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)), para 35.
[16] *ibid.*, para 36.
[17] See https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Publication/ACCC_Case_Law_3rd_edition_eng.pdf
[18] Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union (adopted 14 April 2011); Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union (adopted 17 March 2017).
[19] The endorsement of the latest ACCC findings on the infringement of access to justice requirements by the EU has been stalled due to the EU's insistence to merely 'take note' of the ACCC findings. The decision has been deferred to the next MOP in 2021.
[20] Hooghe and Marks, *supra* n. 4.

internalized.'[21] Internalizing externalities in this context relates to determining who should bear the burden of enforcing environmental law and what role judicial review has in allocating this burden and grating a right of enforcement to civil society. At the international level, the Aarhus Convention emphasizes the need to internalize externalities relating to the enforcement of environmental protection obligations, but the practicalities and procedures for internalizing such externalities through access to national courts for challenging violations of environmental law are best determined at the local level. The flexibility provided at the international level is then restricted at EU and national levels in the ways and to the degrees most appropriate to reflect national variations. As demonstrated in the following section, this multi-level arrangement moves beyond the two levels of the international and the national to involve a critical role for the regional level in determining the extent of the discretion under Article 9(3).

3. The EU Level: Implementation and Interpretation of Article 9(3) in the EU legal Order

As mentioned in the introduction, the Aarhus Convention is a mixed agreement, signed both by the EU and the Member States. The implementation of the Aarhus access to justice provisions has been realized at the different levels of governance, relating both to EU institutions and bodies as well as Member State authorities. The Convention forms an integral part of the EU legal order and the CJEU has confirmed its jurisdiction to give preliminary rulings of interpretation, which are binding on the Member States.[22] Overall, according to the CJEU's interpretation, Article 9(3) has played a catalytic role in broadening access to justice for ENGOs through national courts. Conversely, such broadening has not occurred at the EU level where the CJEU insists on a restrictive approach to standing as regards direct access to challenge EU acts or omissions before it.

3.1 Access to Justice at the EU level

At the EU level, the requirements of Article 9(3) of the Aarhus Convention are partly determined by secondary legislation, that enables challenges of acts and omissions of EU institutions and bodies, and partly by constitutional law requirements regarding access to the CJEU both directly and indirectly. General access to justice in environmental matters is

[21] Bache, *supra* n. 5, 637.
[22] Case C-240/09 *Lesoochranárske zoskupenie* ('Slovak Brown Bears I'), EU:C:2011:125, para 30.

provided through three key avenues: a) direct access to the CJEU under Article 263(4) TFEU; b) the administrative review procedure under the Aarhus Regulation, which enables ENGOs to ask for an internal review of an EU administrative act or omission in relation to a violation of environmental law;[23] and c) the preliminary reference procedure on the validity of EU acts under Article 267 TFEU, which is dependent on the discretion of national courts to refer to the CJEU.

It is well-known that direct access to EU courts is governed strictly and the CJEU insists on a restrictive interpretation of the requirements of direct and individual concern under Article 263(4) TFEU. Particularly, the well-known *Plaumann* interpretation of 'individual concern'[24] has prevented access for ENGOs, which would rarely, if ever, meet the standing requirements in order to challenge EU acts and omissions.[25] In light of this, the European Commission has indicated that the appropriate avenue for access of ENGOs is instead the internal administrative review procedure under the Aarhus Regulation.[26] However, this Regulation has also been interpreted narrowly to exclude acts of general scope[27] and to limit the possibility to challenge the substance of the initial act or omission before the CJEU.[28]

The CJEU's restrictive approach to standing has been the subject of considerable criticism both by the judiciary[29] and in academic scholarship.[30] Together with the limited scope of the Aarhus Regulation, this approach has been condemned by the ACCC for failing to meet the EU's obligations as signatory to Aarhus under Articles 9(3) and 9(4).[31] In its response to the ACCC findings, the EU Commission has clarified that since it cannot indicate to the judiciary how to interpret Article 263(4) TFEU, bringing access to justice in line with Aarhus should be

[23] Parliament and Council Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies [2006] OJ L264/13 (Aarhus Regulation) Art 10.
[24] Case 26/52 *Plaumann & Co v Commission*, EU:C:1963:17, 107.
[25] Case T-585/93 *Greenpeace and others v Commission* EU:T:1995:147; Case C-321/95P *Greenpeace and others v Commission* EU:C:1998:153; Ludwig Krämer, 'Environmental Justice in the European Court of Justice' in J Ebbesson and PN Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009). For a more recent example of the restrictive approach excluding access to the CJEU in the climate change context see T-330/18 *Carvhalo*, EU:T:2019:324.
[26] European Commission, 'Report on EU implementation of the Aarhus Convention in the area of access to justice in Environmental Matters', SWD (2019) 378 final.
[27] Joined Cases C-404/12 P and C-405/12P *Council and Commission v Stichting Natuur en Milieu* EU:C:2015:5; Case T-12/17 *Mellifera v Commission* EU:T:2018:616**.**
[28] Case *T-177/13 Testbiotech v Commission***,** EU:T:2016:736; Case C-82/17 Testbiotech v Commission, EU:C:2019:719.
[29] Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* EU:C:2002:462; See also *UPA*, Opinion of AG Jacobs; Case T-177/01 *Jégo-Quéré et Cie SA* EU:T:2002:112, para 51.
[30] Anthony Arnull, 'Judicial Review in the European Union' in *The Oxford Handbook of European Union Law*, eds. Anthony Arnull and Damian Chalmers (OUP 2015); Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart 2005) ch 6.
[31] ACCC Findings concerning compliance by the EU, *supra* n. 18.

achieved by revising the Aarhus Regulation and by ensuring wide access at the national level.[32] It has put considerable emphasis on access to national courts and the preliminary reference route on the validity of EU acts as a significant avenue of access to justice, allegedly ignored by the ACCC.[33]

This follows the CJEU's approach which insists that the full system of remedies of the EU should be viewed holistically to include not only direct access to the CJEU but also indirect access through the preliminary reference procedure. In accordance with the principle established in *Foto-Frost*, national courts have to refer a case to the CJEU when there is a question regarding the validity of an EU act relevant in the case before them.[34] While national courts may declare an EU act valid themselves, they have to refer questions to the CJEU when the validity is questioned.[35] In light of this principle, arguably wide access to justice at the national level can reinforce access to justice at the EU level as well. This puts pressure on national courts to align their approaches to standing in environmental matters with the CJEU's case law considered below, so as to ensure access to justice operates effectively in a multi-level fashion. As demonstrated next, in contrast to its restrictive approach on direct access to EU courts, the CJEU indicates that even outside of areas where EU secondary legislation explicitly requires access to justice, access of ENGOs before national courts is required to ensure the effective protection of rights that derive from EU law. This divergent approach leads to double standards, which have been deemed 'unjustifiable',[36] particularly given that national courts constitute the bottom level of governance for judicial protection, not having the option to deflect responsibility to a lower level as effectively done by the CJEU.

3.2 Access to Justice in the Member States

The 'specific' access to justice rights under Articles 9(1) and 9(2) have been transposed in the Member States through amendments to EU environmental directives, such as the Directive on Environmental Impact Assessment (EIA).[37] The explicit provisions on access to justice in EU

[32] Commission Report, *supra* n. 26.
[33] It has however recognized that that validity references are very rare in practice, *ibid*., 15.
[34] Case 314/85 *Foto-Frost*, EU:C:1987:452.
[35] Case C-344/04 *IATA*, EU:C:2006:10, para 29.
[36] Edoardo Chiti, 'EU Administrative Law in an International Perspective' in *Research Handbook on EU Administrative Law*, eds. Harlow, Leino and della Cananea (Edward Elgard, 2017) 555.
[37] Parliament and Council Directive 2003/35/EC 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, [2003] OJ L 156/17.

secondary legislation have given the opportunity to the CJEU to determine these requirements through the preliminary reference procedure. The Court has applied a purposive interpretation in determining the discretion of Member States so as to ensure wide access to justice for ENGOs.[38] The extent to which the same is true in situations where there are no explicit provisions on access to justice is more complex.

In relation to the general right of access to justice, it has not been possible to date to implement Article 9(3) through EU legislation.[39] As AG Sharpston aptly puts it, 'The Commission's proposal for a directive to give effect to Article 9(3) in respect of Member State's obligations has fallen on stony ground.'[40] This demonstrates the added value of the external, international layer of the UNECE Aarhus Convention in the context of which it was possible to achieve consensus on the obligations on access to justice in the first place. The rule-making function of governance could not have been easily achieved in the EU's decision-making processes within the context of division of competences in the EU legal order.

In the absence of EU secondary legislation, the fleshing out of the international provision has been realized by the EU Commission through 'soft law' guidance[41] and through the interpretation of Article 9(3) by the CJEU. The EU level was able to build on the international text of the Aarhus Convention to add a layer of obligations that Aarhus itself would not have been able to achieve on its own, as demonstrated by its failure to date to instigate changes in the CJEU's interpretation of standing requirements. The added force of EU law supremacy in the vertical relationship of the EU with the Member States can thus significantly contribute to the effectiveness of international law.

Outside of areas where EU secondary legislation imposes specific requirements, the starting principle is that the Member States maintain procedural autonomy in setting the rules for access to national courts, albeit subject to the principles of effectiveness and equivalence. The CJEU has used these principles to review the restrictiveness of national standing rules and to require national courts to open up their doors for challenges on environmental matters.[42] Notably in *Bund für Umwelt*, a case concerning the implementation of Article 9(2) of the Aarhus

[38] Ryall *supra* n. 12.
[39] While there was a proposal for such legislation in 2003 (COM (2003) 0624 final), it has not moved forward due to insufficient support from the Member States and has been withdrawn.
[40] Opinion of AG Sharpston, C-240/09 *Slovak Brown Bears I*, EU:C:2010:436, para 76.
[41] Commission Notice on Access to Justice in Environmental Matters (2017/C 275/01).
[42] Ryall *supra* n. 12.

Convention in Germany, the CJEU reiterated that despite Member State autonomy in setting the rules for safeguarding rights deriving from EU law,[43]

> 'those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).'[44]

On this basis, Germany's implementation of the access to justice provisions of the EIA Directive had to ensure wide access to justice for ENGOs, which are considered to have sufficient interest.

While additional cases on Article 9(2) may indirectly determine the scope of access to justice in environmental matters more broadly,[45] the analysis focuses on two key cases that specifically deal with the application of Article 9(3) outside of areas where EU secondary legislation provides for access to justice. The analysis demonstrates how the CJEU has refined what is required by Article 9(3) and added a layer of obligations on the Member States to ensure the enforcement of EU environmental law and to abandon restrictive procedural rules on standing. This has been achieved through the use of well-established constitutional principles of EU law that determine the relationship between the EU legal order and the Member States.

The first case, known as *Slovak Brown Bears I,*[46] provided the opportunity to the CJEU to determine the reach of its jurisdiction in interpreting Article 9(3) as a provision of a mixed agreement that had partly been implemented in EU law. In the particular case, a Slovak ENGO challenged the way in which authorities were protecting the brown bear species under the Habitats Directive. The CJEU, contrary to AG Sharpston's opinion, took a broad and purposive approach in establishing its jurisdiction to determine whether Article 9(3) had direct effect despite the lack of its transposition in EU legislation as regards the Member States. It did so on the basis that the Aarhus Convention is a mixed agreement in an area of shared competence largely covered by EU law, and in light of the fact that the main proceedings concerned a dispute in relation to the Habitats Directive. A uniform interpretation was needed to 'forestall

[43] Case C-115/09 *Bund für Umwelt,* EU:C:2011:289.
[44] *ibid*., para 43.
[45] For example, Case C-243/15 *Lesoochranárske zoskupenie VLK* ('Slovak Brown Bears II), EU:C:2016:838.
[46] Case C-240/09 *Slovak Brown Bears I, supra* n 22.

future differences of interpretation'.[47] Establishing its jurisdiction to interpret Article 9(3) is remarkable and has enabled the CJEU to develop clear obligations for national courts that restrict the discretion inherent in Article 9(3) of the Aarhus Convention.

Although the CJEU concluded that Article 9(3) does not have direct effect in the EU legal order, by using the principle of effectiveness, the CJEU required that the discretion exercised by Member States must not 'make it in practice impossible or excessively difficult to exercise rights conferred by EU law.' Furthermore, it required the national court, in the fields covered by EU environmental law 'to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.'[48]

On this basis, an ENGO, lawfully constituted under national law, should have access to national courts to challenge an act liable to be contrary to EU environmental law. Despite the lack of EU legislation on Article 9(3), the CJEU 'responded forcefully to address this gap'[49] by requiring national courts to ensure wide access to justice to ENGOs, albeit within the limits of consistent interpretation. The CJEU played a key role in limiting the discretion embedded in Article 9(3), thereby determining the practical operation of multi-level governance. The principle of consistent interpretation is a forceful one, used by the CJEU to require Member States to ensure effective application of EU law in the national legal orders,[50] as well as being a key tool for giving legal effect to international agreements in the EU legal order.[51] However, it has its limitations, given that it is an obligation to interpret national law consistently as far as possible, and not in a way that would amount to *contra legem* interpretation.[52] The remaining question, was thus what would happen in cases where consistent interpretation was not possible.

The CJEU gave an answer to this in *Protect Natur*, a case brought by an Austrian NGO and subsequently referred to the CJEU, which decided it in December 2017.[53] This case primarily

[47] *ibid*., para 42.
[48] *ibid*., paras 49-50.
[49] Ryall *supra* n. 12.
[50] See for example Case C-106/89 *Marleasing SA v La Commercial*, EU:C:1990:395; Case C-441/4 *Dansk Industri*, EU:C:2016:278.
[51] For example, see Opinion of AG Kokott, Case C-366/10 *Air Transport Association of America*, EU:C:2011:637 para 163; Case C-266/16 *Western Sahara Campaign UK*, EU:C:2018:118.
[52] Case C-212/04 *Konstantinos Adeneler*, EU:C:2006:443, para 110.
[53] Case C-664/15 *Protect Natur*, EU:C:2017:987.

concerned the interpretation of Article 4 of the Water Framework Directive (WFD) regarding the obligation to prevent the deterioration of the status of bodies of water and whether it required access to justice in light of Article 9(3) of the Aarhus Convention, despite the absence of such a provision in the WFD and the activity not being subject to an EIA.

The CJEU developed familiar reasoning to EU lawyers when expanding the obligations of Member States for the effective enforcement of EU law. It referred to the binding nature of Directives in accordance with Article 288 TFEU,[54] the principle of sincere cooperation and the obligation of Member States to take any necessary measures to ensure fulfilment of EU obligations under Article 4(3) TEU,[55] and the obligation of Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law under Article 19(1) TEU.[56]

Furthermore, in an interesting move, the CJEU invoked the application of the Charter of Fundamental Rights. It held that a Member State is acting within the scope of EU law in accordance with Article 51(1) of the Charter when it lays down procedural rules applicable to matters referred in Article 9(3) concerning rights of ENGOs to challenge decisions that may contravene Article 4 of the WFD.[57] On this basis, Article 47 of the Charter on the right to an effective remedy, combined with Article 9(3) of the Aarhus Convention create obligations on Member States to ensure effective judicial protection of rights deriving from EU law and particularly the provisions of environmental law.[58] In reaching this conclusion, the CJEU stressed that despite the discretion embedded in Article 9(3), the criteria laid down in national law, cannot be so strict so as to effectively exclude environmental organizations from challenging possible contraventions of environmental law given their important role in defending environmental protection.[59] The *effet utile* of Article 4 of the WFD would be seriously undermined if ENGOs could not challenge its implementation.[60] In the AG's words, 'like a Ferrari with its doors locked shut, a system of protection is of little practical help if it is totally inaccessible for certain categories of action.'[61] Applying this rationale, the CJEU reiterated its decision in *Slovak Brown Bears I* and by analogy found that the national court is

[54] *ibid.*, para 34.
[55] *ibid.*, para 35.
[56] *ibid*.
[57] *ibid*., para 44.
[58] *ibid*., para 45.
[59] *ibid*., para 48.
[60] *ibid*., para 34.
[61] Opinion of AG Sharpston, Case C-664/15 *Protect Natur*, EU:C:2017:760, para 75.

to interpret national procedural rules, to the fullest extent possible, in light of Article 9(3) and the objective of effective judicial protection so as to enable an ENGO duly established under national law to challenge administrative acts that may contravene EU environmental law.[62]

Also, it went a step further and clarified that if such compliant interpretation is not possible, the national court is to disapply the national procedural rule limiting access to justice for an ENGO to challenge a permit for a project that may be contrary to the WFD.[63] It drew on the well-established principle of supremacy of EU law which requires the national judge, where necessary, to set aside conflicting national rules without having to wait for legislative amendment.[64] It is notable, that in examining what is required under an EU environmental directive and Article 9(3) of the Aarhus Convention, the CJEU indirectly examined national procedural rules and their compatibility with EU law based on a combined reading of Article 47 of the Charter and Article 9(3). Preliminary references on the interpretation of EU law may thus provide an avenue for the indirect examination of compatibility of Member State standing rules. Notably, the external, international requirements enabled the CJEU to require more of the Member States than it would have otherwise been able to.

The CJEU's case law has also been clarified by the European Commission through an interpretative notice. The Commission has recognized that while the Member States are not required to grant *actio popularis*, they cannot impose criteria 'so strict that they effectively bar all, or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment. Further, in accordance with the principle of effectiveness, Member States cannot adopt criteria which render it impossible or excessively difficult to exercise rights conferred by EU law.'[65] The Commission's insistence on wide access to justice through national courts reinforces the ACCC and the CJEU's approach and implies that in case of non-compliance with the CJEU's case law, Member States may be exposed to infringement proceedings by the Commission under Article 258 TFEU.

This section has brought to light the key role played by the CJEU in fleshing out what Article 9(3) requires in relation to the enforcement of EU environmental law at the national level. The EU level has thus reinforced the value of the international obligations under Aarhus through

[62] Case C-664/15 *Protect Natur*, *supra* n.53, para 54.
[63] *ibid.*, para 55.
[64] *ibid.*, paras 56 and 57.
[65] Commission Notice, *supra* n. 41, para 106.

the added force of supremacy and the principle of effective judicial protection. The case law on the requirements for access to justice at the national level can function as much needed external pressure to require procedural rules in certain Member States to develop in line with contemporary concerns on environmental issues.

To summarize, the EU level provides promising monitoring and enforcement possibilities through three key avenues. First, the principles of effectiveness and effective judicial protection, following the CJEU's interpretation, require national courts to interpret national procedural rules consistently with Article 9(3) of the Aarhus Convention to ensure wide access to justice. If this is not possible, the principle of supremacy requires that the national conflicting rule be set aside so as to ensure effective protection of rights deriving from EU law. This can be problematic at the national level, depending on the acceptance of supremacy over national law in the particular Member State, especially if the conflicting rule is of constitutional character. Second, the possibility of infringement proceedings by the Commission against a Member State that does not follow the CJEU's requirements on access to justice provides a promising monitoring and enforcement avenue. In light of the insistence of the Commission on the importance of the national route to enhance access to justice at the EU level as well, it is likely that such cases would be actively pursued, particularly following complaints by individuals and NGOs. Third, the CJEU has a crucial role to play by indirectly reviewing the compatibility of national rules on access to justice in preliminary rulings on the interpretation of EU legislation. This very much depends on the willingness of national courts to refer to the CJEU.

4. National Level: Case Study on Cyprus

The article has so far demonstrated the distinct function of the different layers of governance. The international realm has served a key *rule-making* function and enabled the adoption of a legal text that commits signatories to ensuring access to justice in environmental matters, an obligation which likely would not have been the subject of EU legislation as demonstrated by the failure to adopt an EU Directive on this issue. The international level has also fulfilled an *enforcement* function through oversight by the ACCC which has clarified the limits of the discretion in Article 9(3) and provides an external accountability avenue at the international level. The EU level provides the governance regime with more 'teeth' as the incorporation of Aarhus in the EU legal order is accompanied by the added force of supremacy of EU law and

the *enforcement* possibilities of the EU legal system which can oversee and monitor the implementation of access to justice requirements at the national level. This section focuses on the national level and demonstrates how it can provide opportunities for real *implementation* of wide access to justice in environmental matters at the Member State level where violations of environmental law are more likely to occur by administrative authorities.

As mentioned above, the starting point in determining access to national courts is procedural autonomy of the Member States. This has meant considerable variations in the national systems.[66] Most member states apply an interest-based approach to standing, while sometimes allowing for *actio popularis* under specified circumstances.[67] On the contrary, some Member States and most notably Germany and Austria, apply a traditional rights-based approach which limits standing to situations of impairment of individual rights. According to the 'protective norm theory', the applicant's individual rights must be infringed, enabling him to challenge the application of rules that aim to protect the individual right allegedly breached.[68] The requirements established by the CJEU arguably create greater problems for these jurisdictions than for systems where standing is dependent on establishing a legitimate interest.[69]

As shown by studies carried out on behalf of the European Commission and the European Parliament, the possibilities for access to national courts by members of the public or ENGOs have gradually improved in some countries, partly as a result of the CJEU's case law and pressure by the EU Commission and the ACCC. However, at the same time, in several Member States access to justice is subject to significant hurdles with the application of strict standing criteria or fees being introduced.[70] Within this context, Section 4 examines the legal system of Cyprus as a case study that provides interesting institutional opportunities to deliver the combined effect of the multiple levels of governance particularly in light of the CJEU's case law that demands an expansive interpretation of provisions that determine access to the national courts. At the same time, it highlights the reluctance of the Supreme Court to broaden the interpretation of the Constitution which determines standing on the basis of a 'legitimate

[66] Jan Darpö, 'Effective Justice? Synthesis report on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union' https://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf.
[67] Eliantonio et al, Study at the request of the European Parliament's Committee on Legal Affairs, 'Standing up for your right(s) in Europe, A Comparative Study on Legal Standing before the EU and Member States' Courts' https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf
[68] Synthesis Report, *supra* n. 66.
[69] European Parliament Study, *supra* n. 67.
[70] Synthesis Report, *supra* n. 66.

interest', demonstrating how the cooperation of relevant actors at different levels of governance determines the success of multi-level governance.

4.1 Hierarchy of Legal Sources and the Constitutional Potential for realizing Multi-Level Governance

As examined above in Section 3, the CJEU's case law requires national courts to interpret national law in line with Article 9(3) of the Aarhus Convention and Article 47 of the Charter so as to grant access to justice to ENGOs to challenge national administrative action. It is likely that for at least some of this administrative action, the national public authorities would be acting within the remit of EU legislation so as to trigger this obligation. Furthermore, according to *Protect Natur*, if consistent interpretation is not possible, the national court is to set aside any conflicting national rules so as to ensure effective protection of rights deriving from EU law. The effects of these obligations at the national level can be demonstrated if the rationale of *Protect Natur* is applied to a factual scenario of protecting nature, and particularly the peninsula of Akamas, in Cyprus. Parts of the Akamas area are recognized as a special protection area under the Birds Directive[71] and a site of Community importance under the Habitats Directive as implemented nationally.[72] In the process of authorizing construction licenses within or nearby the protected area of Akamas, Cyprus authorities would be acting within the scope of EU law, thereby triggering the obligations developed by the CJEU in situations where EU legislation does not specifically provide for access to justice.

The effect of EU law requirements in the national legal order are not only determined by the CJEU but are often dependent on national constitutional principles. Constitutional law principles determining the hierarchy of legal sources in the Cypriot legal order provide a unique opportunity to deliver the potential of multi-level governance on access to justice. Firstly, according to Article 179 of the Constitution, the Constitution holds a prominent position as the supreme law of the Republic. International law as well as EU law also hold a significant position. In particular, Article 169(3) provides that provisions of international agreements are superior to laws but not to the Constitution. Therefore, if it is an issue of hierarchy of Article 9(3) of the Aarhus Convention over Article 146(2) of the Constitution, which determines

[71] Ο Περί Προστασίας και Διαχείρισης Άγριων Πτηνών και Θηραμάτων Νόμος (Αρ. 152(Ι)2003).
[72] Ο Περί Προστασίας και Διαχείρισης της Φύσης και της Άγριας Ζωής Νόμου (Αρ. 153(Ι)/2003).

standing in annulment actions against administrative action, the former would not supersede. However, things are different when it comes to EU law.

Secondly, in contrast to most Member State Constitutions that merely include provisions enabling the membership and transfer of powers to international organizations such as the EU without determining the effects of EU law in the national legal order,[73] following the Fifth Constitutional Amendment in 2006, the Cypriot Constitution clearly determines the legal effects of EU law including in relation to Constitutional provisions. The constitutional amendment is partly attributed to the Supreme Court's decision in *Constantinou* where it deemed the execution of a European Arrest Warrant against a Cypriot national impossible as this would be contrary to what was then Article 11 of the Constitution.[74] It implicitly indicated that a revision of the Constitution recognizing the supremacy of EU law over Cypriot law, including over the Constitution, was necessary. Notably, the Supreme Court refrained from formulating limitations as to the acceptance of supremacy of EU law as its counterparts in other Member States had done.[75] Eventually the Fifth Amendment led to what is 'perhaps the most comprehensive accommodation of the principle of supremacy of EU law'.[76]

Article 1A of the Constitution, largely modelled on a provision of the Irish Constitution,[77] provides that no provision of the Constitution precludes the validity of acts necessary for fulfilling the obligations under the EC and the EU. Additionally, Article 179 clarifies that following article 1A no legislative or administrative action may be inconsistent with the Constitution or any obligations of the Republic as a result of its participation as a Member State of the EU. Cyprus and Ireland are the only Members to include such 'enabling' provisions[78] that unconditionally recognize the supremacy of EU law including over constitutional provisions.[79] This recognition bears significant potential for the realization of multi-level

[73] Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (OUP 2011).
[74] *Advocate General v Costa Constantinou* [2005] 1 CLR 1356.
[75] Constantinos Kombos and Stéphanie Laulhé Shaelou, 'The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation' in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. Anneli and Samo Bardutzky (Springer, 2019).
[76] Constantinos Kombos, *The Impact of EU Law on Cypriot Public Law* (Sakkoulas, 2015) 92.
[77] Constantinos Lycourgos, 'Cyprus Public Law as Affected by Accession to the EU' in *Studies in European Public Law*, ed. Constantinos Kombos (Sakkoulas 2010) 104-106.
[78] Patricia Popelier, *'Europe Clauses' and Constitutional Strategies in the Face of Multi-Level Governance* 21.2 Maastricht Journal of European and Comparative Law 300, (2014).
[79] Monica Claes, *Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology* 24.1 Yearbook of European Law 81 (2005). Note also that the Constitution of the Netherlands recognizes the primacy of self-executing international agreements over all sources of national law and Portugal recognizes supremacy over its Constitution subject to the conditions of democracy and the rule of law.

governance on access to justice, with EU law reinforcing the demands of international obligations and national law enabling such implementation. The supremacy of EU law is also usually confirmed in the case law of Cypriot courts.[80] Notably, apart from *Constantinou*, where the Supreme Court upheld the Constitution but implicitly indicated that a constitutional revision was required to resolve the conflict,[81] there has not been a case where a constitutional provision was disapplied by the Court for being contrary to EU law. Rather, in most cases either consistent interpretation has been deemed possible or a Constitutional Amendment has been introduced.[82]

Overall, the hierarchy of legal norms in Cyprus mandates that the incorporation of Article 9(3) in the EU legal order would supersede over Article 146(2) of the Constitution by requiring its consistent interpretation or its disapplication in particular cases. However, the Supreme Court has not to date demonstrated readiness to abide by these obligations either by interpreting Article 146(2) broadly or by setting it aside to enable access to ENGOs to challenge violations of EU environmental law.

4.2 Opportunities in the Cypriot Legal System

4.2[a] A Legitimate Interest under the Constitution of Cyprus

The 'general' right of access to justice in environmental matters in accordance with Article 9(3) of the Aarhus Convention is determined by the interpretation of Article 146 of the Constitution of the Republic of Cyprus. Article 146 establishes a right for any natural or legal person to challenge the legality of an act or omission of an authority or organ exercising administrative or executive authority contrary to the Constitution or of any relevant law, or which is made in excess or in abuse of powers vested in that authority or organ. Prior to 2015, the Supreme Court had exclusive jurisdiction both in cases at first instance – in single judge formation – and on appeal. Following the creation of the Administrative Court, cases under Article 146 are now decided by the Administrative Court at first instance and the Supreme Court hears cases on appeal.[83]

[80] Kombos, *supra* n. 76, 93-105.
[81] Kombos and Shaelou *supra* n. 75.
[82] *ibid*. An example of the latter is the further revision of Article 11 in 2013 to allow for a EAW of a Cypriot national in relation to events that took place prior to Cyprus' accession to the EU.
[83] See on the evolution of Article 146: Κώστας Παρασκευά, *Κυπριακό Διοικητικό Δίκαιο* (Νομική Βιβλιοθήκη 2017) 30-46.

An important condition of Article 146, set out in the second paragraph, requires that *an existing legitimate interest of the person is adversely, directly and personally affected by the decision, act or omission*. Article 146(2) has been interpreted to require that the legitimate interest be present (existing at the time of the challenge),[84] direct (directly related to the applicant) and personal (concerning the applicant specifically and personally).[85] A legitimate interest is established when there is a reasonable claim that damage is likely to occur from the contested act to the applicant in a capacity recognized by law. In other words, when there is a specific legal relationship between the applicant and the contested act.[86] In some respects, the interpretation of a legitimate interest has been broad, for example considering damage to include both financial and moral aspects.[87]

At the same time, the Court has clarified on numerous occasions that there is no *actio popularis* in the Cypriot legal order whereby any person interested in upholding the law would be granted access to the courts.[88] The main rationale is to avoid an abusive flow of cases that would threaten the effectiveness of the judicial system.[89] According to the Supreme Court, '[t]o be direct there must be an unbroken causative chain between the decision and the interest vindicated. There must be legitimatio ad causum in contrast to a general complaint of maladministration, to sustain a recourse.'[90] Following this approach, natural persons living or owning property in the vicinity of an opposed activity would likely have a legitimate interest.[91]

4.2[b] Collective Interest Representation and Environmental Protection

In relation to collective interest representation, some cases suggest that legal persons can have a legitimate interest under Article 146(2) to challenge an act or omission that affects the interests of all or of a substantial number of their members distinctly from influencing the rights of some individual members.[92] The Supreme Court has indicated that the *locus standi* of such organizations can be established 'to the extent that the protection of those interests falls within

[84] *Pitsillos v. C.B.C.* [1982] 3 CLR 208.
[85] *Άδωνης Παπαντωνίου κ.α. ν. Υπουργικού Συμβουλίου (Αρ.1) (1993) 4 CLR 399*. See Νίκος Χαραλάμπους, *Εγχειρίδιο Κυπριακού Διοικητικού Δικαίου* (3η εκδ. Σ. Λειβαδιώτη 2016) 137-150.
[86] *ibid*.
[87] Olymbios v. The Republic [1974] 3 CLR 17.
[88] *Pitsillos*, supra n. 84.
[89] *ibid*.; Χαραλάμπους, *supra* n. 85.
[90] *Pitsillos*, *supra* n. 84.
[91] *Άδωνης Παπαντωνίου*, *supra* n. 85.
[92] *Pitsillos*, *supra* n. 84. See also Demetriou as Chairman of C.B.C. Staff' Society v. The Republic, 1 R.S.C.C. 99, where it was clarified that affecting a single member of the organization cannot be enough to establish legitimate interest of the organization.

their objectives', following the interpretation of the Greek Council of State.[93] This has usually arisen in relation to professional associations or trade unions representing the interests of employee members.[94] Overall, this approach is not applied liberally, and while not explicitly set aside, the Supreme Court has not followed it in subsequent cases regarding ENGOs as demonstrated below in Section 4.3.

The notion of a 'legitimate interest' has been somewhat broadened in relation to local authorities. In *Community of Pyrga v Republic of Cyprus,* Supreme Court Judge Pikis at first instance recognized the legitimate interest of the local authority to challenge a mining permit in light of the direct effect of the mining operations on land use rights of the local community.[95] It was accepted as legitimate that these interests were being collectively represented by the local authority. In establishing the legitimate interest of the local authority, Judge Pikis interpreted Article 7(1) on the protection of the right to life and personal integrity to extend to 'the conditions of living of humans in the place where they live',[96] thus implicitly recognizing a right to the environment. The plenary of the Supreme Court on appeal, while not dealing directly with the issue of 'legitimate interest', confirmed the importance of environmental protection in the following terms,

> "the matter of the natural environment has become of colossal importance internationally, certainly in our country as well, because its preservation is directly linked to the good quality of human life. It is therefore imperative for the state to adopt an environmental policy expressed through relevant legislation."[97]

The recognition of a right to the environment through judicial interpretation is remarkable and could in theory provide the basis for a broad interpretation of the requirement for a 'legitimate interest' to challenge violations of environmental law. The right of local authorities to have recourse to the court to challenge planned activities in their area has been confirmed in multiple cases. For example, the local authority of Geri could challenge a permit for the operation of a brick factory. The rationale for the existence of a legitimate interest is that 'local authorities have an interest in the formation of planning policy for their area when the consequences are

[93] *The Bar Association of Nicosia and Others v. The Republic of Cyprus* (1975) C.L.R 24.
[94] *Cyprus Police Association & Others v. The Republic* (1974) 3 C.L.R. 152.
[95] *Κοινότητα Πυργών ν Κυπριακής Δημοκρατίας* (1991) 4 Α.Α.Δ. 33498.
[96] *ibid.*
[97] *Κυπριακή Δημοκρατία ν Κοινότητα Πυργών* (1996) 3 Α.Α.Δ 503.

potentially negative for the environment. This constitutes an *interest inherent in the nature of their mission, thus legitimate*…'.[98] In contrast, the Court has clarified that Article 146(2) cannot be relaxed or broadened and there is still the need to show direct prejudice to an existing personal legitimate interest. Therefore, while the local authority of Pyrga in the case above was found to have legitimate interest, the claims of other associations, including an environmental organization, were rejected as they did not have a special interest which they could legitimately defend through the court.[99]

4.2[c] Attempts to expand the interpretation of a legitimate interest

There have been two notable attempts, one judicial and one legislative, to broaden the interpretation of a 'legitimate interest' under Article 146(2) in relation to collective interest organizations beyond local authorities. The first attempt to recognize the interests of ENGOs arose in the case *Filoi tou Akama*.[100] At first instance, Supreme Court Judge Nicolaides developed progressive reasoning so as to expand the interpretation of Article 146(2) to recognize the legitimate interest of an ENGO challenging a permit for the construction of a hotel near the peninsula of Akamas, parts of which are now protected areas in the Natura 2000 network as indicated above in Section 4.1. The judge recognized the special nature of the environment so as to expand the right to life in the following terms,

> 'The evolution of technology and the way in which any detrimental change of the environment can affect our lives, even if the source of pollution is on the other end of the earth, expands the scope of this right… The concept of legal interest must be broadened when the contested goods are basic natural environmental goods belonging to the social community…'[101]

He did not ignore Article 146(2), but instead emphasized that,

> '…environmental intervention, with all of its adverse effects on a very wide range of people, gives the right and creates a legitimate interest in various persons, natural or legal, and in particular legal persons in public law with

[98] *Κυπριακή Δημοκρατία ν. Συμβούλιο Βελτιώσεως Γερίου* (1998) 3 Α.Α.Δ. 210.
[99] *Κοινότητα Πυργών ν Κυπριακής Δημοκρατίας supra* n. 95.
[100] *Φίλοι του Ακάμα ν. Κυπριακή Δημοκρατία* (1998) 4 Α.Α.Δ. 767.
[101] *ibid.*

relevant powers or associations of persons established to promote precisely those aims.'[102]

The collective form of representation was recognized as the 'most effective way of meeting environmental needs'. At the same time, it was considered necessary to control access to the court under Article 146(2), by examining whether environmental protection is identified as an objective of the organization in its statute. This requirement seems to be in accordance with earlier case law on the legitimate interest of representative associations. In the particular case, the organization 'Filoi tou Akama', a private NGO with extensive membership set up to promote environmental protection of the Akamas area, had not provided testimony including the text of their statute and therefore it could not be determined whether the protection of the area of Akamas was part of their objective. Despite being decided in 1998 before the ratification of the Aarhus Convention and Cyprus' accession to the EU, this reasoning demonstrates that a consistent interpretation of Article 146(2) as currently required by Aarhus and EU law would indeed be possible.

As will be discussed below in Section 4.3, the rationale developed in *Filoi tou Akama* was rejected on appeal by the plenary of the Supreme Court in *Thanos Club Hotels.*[103] Nonetheless, Judge Nicolaides, again in a single formation of the Supreme Court at first instance reiterated his reasoning in 2005 in *Community Council of Parekklisia v Republic of Cyprus* without once referring to the more restrictive approach of *Thanos Club Hotels*.[104] While this did not affect the outcome, as the applicants were local authorities and not ENGOs, it is notable that the judge reiterated the rationale of *Filoi tou Akama* and stressed the need for broadening legitimate interest in relation to environmental goods, demonstrating how a broader interpretation of Article 146(2) in line with contemporary environmental demands would be possible, at least in the eyes of some members of the judiciary.

The second attempt to expand the notion of legitimate interest to organizations and associations came from the legislature. With an amendment to the Law on the General Principles of Administrative Law in 2008 the House of Representatives sought to codify the case law on standing under Article 146.[105] The most relevant aspect of this amendment for the purposes of

[102] *ibid*.
[103] *Thanos Club Hotels* v ETEK (2000) 3 Α.Α.Δ 324.
[104] *Κοινοτικό Συμβούλιο Παρεκκλησιάς κ.α ν Κυπριακή Δημοκρατία,* Αρ. Αποφ. 1628/2005.
[105] Περί των Γενικών Αρχών του Διοικητικού Δικαίου (Τροποποιητικός) Νόμος του 2008 (Ν. 158(1)/1999).

the current article is the stipulation that legal persons including representative associations 'may challenge a decision, action, or omission that concerns them directly and personally or affects the interests of a significant part of its members, as well as decisions, acts and omissions that affects the interests protected by their stated objectives, provided that the protection of those interests forms part of the stated objectives of that entity'.[106] This legislative proposal in reality sought to codify the broad version of interpretation of Article 146(2) as developed in some cases of the Court. This interpretation however was not accepted by the Supreme Court as further discussed below.

4.3 Limitations: The Reluctance of the Supreme Court to broaden standing

Overall, while the Cypriot Constitution provides for an interest-based approach, its interpretation links access to courts to traditional property rights in a narrow manner.[107] In practice, as interpreted to date, members of the public and ENGOs would not easily satisfy the standing requirement of 'legitimate interest' and their access is substantively restricted. This is because the Supreme Court has adopted a literal interpretation of the requirement of 'directly' adversely affecting the person under Article 146(2),

> '… access must be as wide as the law may permit. But we cannot ignore the mandatory constitutional provisions laying down that a right to judicial review accrues only where the right vindicated is directly affected as a result of the decision challenged. *The antonym of "directly" is "indirectly". Indirect interference with a right does not confer a right to judicial review*.'[108]

Additionally, the requirement of being 'present' would only be satisfied where negative consequences are *certain* to occur.[109] This approach has distinctively restricted access to justice in environmental matters given that detrimental impacts are inherently likely to manifest in a long-term and indirect manner and usually affecting collective interests generally. The opportunities discussed in Section 4.2 particularly through the recognition of legitimate interest for ENGOs in *Filoi tou Akama* and the judicial recognition of a right to the environment, have

[106] Translation by Kombos in Constantinos Kombos, *The Supreme Court's of Cyprus and the CJEU's Approach to Standing for Judicial Review and to the Preliminary Reference Procedure* 16(3) European Public Law 327 (2010).

[107] Synthesis Report, *supra* n. 66.
[108] *Pitsillos*, *supra* n. 84.
[109] *Χαραλάμπους ν Δημοκρατία* (1996) 3 Α.Α.Δ 73. See Kombos, *supra* n.106, 341.

not been followed by the plenary of the Supreme Court which has significantly restricted access to collective interest organizations without a public law connection.

The judicial attempt of *Filoi tou Akama* by Judge Nicolaides to expand the interpretation of a 'legitimate interest' in the environmental field was not followed by the plenary of the Supreme Court in *Thanos Club Hotels v ETEK* concerning a group of appeals challenging development activities in Akamas.[110] The appeals included, among others, the aforementioned challenge by Filoi tou Akama[111] and a challenge brought by the Cyprus Scientific and Technical Chamber (ETEK), a public body acting as statutory technical advisor to the State and umbrella organization for all Cypriot engineers.

The Supreme Court limited the notion of a legitimate interest to natural persons living in the vicinity, whose property or other rights might be affected, and to local authorities representing the collective interests of the community. The Court clarified that while local authorities have a legitimate interest, this is inherent in the nature of their mission as local authorities responsible to challenge the acts of the central government and does not stem from Article 7(1) of the Constitution.[112] The Court emphasized the absence of a right to the environment in the Cypriot Constitution, in contrast with the Greek Constitution, where it is explicitly protected. According to the Supreme Court, a consistent interpretation in light of Aarhus and EU law requirements would thus not be possible unless a right to the environment is explicitly introduced.

On this basis, the Supreme Court held that a representative group cannot have a legal status greater than that of an individual in relation to environmental protection. The legitimate interest of an individual would be established only if that person was a resident of the area with property adjacent or in the immediate vicinity of the hotel under construction, thereby his living conditions or property rights potentially being directly affected. For the Court, neither the size of the organization's membership nor what it decides to include in its statute was relevant for establishing legitimate interest. According to the Court, 'in such situations where the individual applicant cannot have legitimate interest unless he is the owner of land adjacent, then the

[110] *Thanos Club Hotels* supra n. 103.
[111] While essentially departing from the reasoning developed in *Filoi tou Akama* by Judge Nicolaides, the plenary did not technically set aside the case which was referred to in later case law.
[112] The Court sought to justify its earlier approach in these terms, although this line of argument is not found explicitly in this earlier case law.

representative group cannot be treated more favourably than an individual applicant. A general acceptance of the existence of a legitimate interest would amount to an actio popularis'.[113]

This approach is more limiting than earlier cases on collective interest representation and indicates a restrictive understanding of an 'interest'. As Judge Pikis, writing extrajudicially, explains 'interest is distinguishable from a right', but for an interest to be considered legitimate so as to warrant access to the court it must be an 'interest originating or deriving from a person's rights'.[114] The approach adopted in *Thanos Club Hotels* thus adopts a restrictive understanding that comes close to a rights-based approach as applied in Germany for example.[115]

ETEK was also found not to have standing, because the law governing its operation did not refer to environmental protection, indicating that this criterion may be sometimes relevant, but only in relation to public law organizations. The Court's case law essentially creates a distinction between access to justice for bodies that have a connection with the state, such as local authorities, and organizations established under private law, such as environmental organizations.[116] As Kombos puts it, 'the use of the actio popularis argument as justification for adopting a stricter approach for private representative groups could be equally applicable for representative groups with a public element.'[117] This differentiation is not sufficiently justified by the Court, rendering the legal doctrine on standing uncertain and somewhat contradicting.

The Supreme Court, in a constitutionality review, also rejected the legislative attempt to codify standing rules in its Amendment Law of 2008 explained above in Section 4.2[c]. This was turned down by the Supreme Court as unconstitutional, holding that it did not amount to a codification of pre-existing case law but an attempt to broaden the meaning of legitimate interest in a way that would amount to *actio popularis.*[118] On the basis of preserving the principle of absolute separation of powers, the Court found that the legislature had exceeded its jurisdiction as it either sought to interpret Article 146(2), a responsibility that belonged exclusively to the judiciary, or implicitly to introduce a constitutional amendment.[119] The

[113] *Thanos Club Hotels, supra* n. 103.
[114] Georghios M. Pikis, *Constitutionalism – Human Rights – Separation of Powers, The Cyprus Precedent* (Martinus Nijhoff 2006) 137.
[115] Synthesis Report, *supra* n. 66.
[116] Kombos, *supra* n. 106.
[117] *ibid*., 344.
[118] *Πρόεδρος της Δημοκρατίας ν Βουλή των Αντιπροσώπων*, Αναφορά 1/2008 (2009) 3 Α.Α.Δ 23.
[119] Kombos, *supra* n. 106.

decision is very short, and the Court does not engage in examining the conformity of the proposed law with its previous case law or in a comparison as to its interpretation of legitimate interest with its definition in the proposed law.[120] The case law on the issue of standing for legal persons, including organizations, is not clear, with some case law suggesting the recognition of legitimate interest for collective interest representation so long as a substantial number of members are affected and these interests are protected by the objectives of the organization.[121] Also, the distinction between public law bodies and private law organizations in fulfilling these criteria is poorly justified. Therefore, the legislature in codifying the standing requirements had a choice to make among varying approaches.[122] This choice was clearly struck down by the Court, which insists on excluding public interest litigation and effectively precludes access to justice for ENGOs.

Overall, while there are some inconsistencies in the reasoning of the Supreme Court, *Thanos Club Hotels* has been considered the key authority for access to justice by ENGOs and has been followed in most subsequent cases with the result that ENGOs have been discouraged to bring cases under Article 146. Most subsequent cases were brought by local authorities and the reasoning for establishing a legitimate interest to local authorities, but not ENGOs, has been repeatedly confirmed.[123] Access to justice is thus restricted to persons in the vicinity or adjacent to the activity possibly affecting the environment, whose property rights or conditions of living in the area would be affected. However, as discussed in the following section, this approach is not legally inevitable, and the limitations of the system are not insuperable.

4.4 Overcoming the Limitations and Realizing Multi-Level Governance

It is noteworthy that the leading case followed to this day, *Thanos Club Hotels*, was decided in 2000, before the ratification of the Aarhus Convention and before the accession of Cyprus to the EU. Nonetheless, this restrictive approach has not significantly changed in light of contemporary requirements for wide access to justice in environmental matters. It is prime time for the opportunities offered by the Cypriot legal system discussed above to be harnessed so as to realize the potential of multi-level governance on access to justice in environmental matters.

[120] *ibid*.
[121] *Pitsillos*, *supra* n. 84; *The Bar Association of Nicosia supra* n. 93.
[122] Kombos, *supra* n. 106.
[123] See inter alia, Συνεκδικαζόμενες Υποθέσεις 1274/2010, 1275/2010, 1276/2010, 1277/2010 και 1278/2010 Δήμος Αγίας Νάπας κ.α v. Κυπριακή Δημοκρατία κ.α.; Υπόθεση 470/2009 *Σωματείο Συνδέσμου Αποδήμων και Φίλων της Αρχιμανδρίτας v. Κυπριακή Δημοκρατία*.

This section demonstrates various ways for the national level to implement the requirements of the international and EU governance layers so as to widen access to justice in environmental matters. The enforcement possibilities offered at the international and EU levels can go a long way in demanding a change in direction as to the interpretation of standing requirements and the opportunities offered at the national level in Cyprus can enable their implementation. The willingness and ability of national actors to deliver this potential is however critical, demonstrating the distinct function of the national level of governance.

From an international perspective, the current Cypriot approach is inconsistent with the ACCC findings, which establish a presumption of access to justice by ENGOs despite the discretion embedded in Article 9(3) of the Aarhus Convention.[124] Enforcement possibilities at the international level could take the form of a claim to the ACCC by an individual, an organization or a signatory to the Convention. This could possibly lead to a finding of incompatibility even though article 9(3) is formulated in discretionary terms. Such a move would likely create political pressure on Cyprus to change its approach.

More importantly, the incorporation and implementation of the Aarhus Convention in the EU legal order has created concrete legal obligations for the Member States. This is supported by the comprehensive enforcement system of the EU legal order. In situations involving implementation of EU law, the Supreme Court would be required to interpret Article 146(2) of the Constitution in line with Article 9(3) so as to expand the scope of 'legitimate interest' beyond situations where pre-existing rights of individuals may be detrimentally affected.

A consistent interpretation of Article 146(2) is possible so as to enable ENGOs established under national law to challenge administrative action that may contravene EU environmental law, albeit under certain conditions. It is unlikely that such interpretation would be considered *contra legem,* in light on the one hand of the CJEU's expansive approach towards the obligation of consistent interpretation[125] and on the other of the readiness of some members of the judiciary to interpret Article 146(2) broadly as seen in *Filoi tou Akama*. Additionally, such consistent interpretation has been proved possible by the Greek Council of State, which the Supreme Court seems to selectively follow. The Greek Council of State has gradually relaxed its interpretation of a present, direct and personal legitimate interest in relation to

[124] ACCC Findings and Recommendations with regard to compliance by Belgium, *supra* n. 15.
[125] Case C-441/4 *Dansk Industri*, *supra* n. 50.

environmental protection.[126] An important feature in the Greek context is the constitutional recognition that 'the protection of the natural and cultural environment is an obligation of the State and the right of everyone.'[127]

However, the argument that a consistent interpretation is not possible due to the absence of an explicit right to the environment is not entirely convincing. A right to the environment has arguably been recognized judicially as an individual and collective right stemming from the right to life under Article 7(1) of the Constitution.[128] On this basis, a consistent interpretation of Article 146 is possible, in line with Cyprus' international obligations under Aarhus and under EU law. In any case, given that Article 146(2) adopts an interest-based approach, an interference with a pre-existing right should not be seen as a prerequisite for fulfilling the standing requirement. Nonetheless, it is notable that there is currently a proposal before the House of Representatives to amend article 7(1) of the Constitution to recognize 'a right to health, the environment and biodiversity'.[129] While such a revision may not be absolutely necessary in order for the Court to interpret Article 146 in line with the requirements of Article 9(3), if such proposal moves forward, it would certainly give the necessary impetus to courts to change their approach by removing one of the key arguments against expanding Article 146(2). Even in the unlikely event that a consistent interpretation of Article 146(2) that would grant access to ENGOs to challenge violations of EU environmental law is deemed impossible, the national court would be required to set Article 146(2) aside in specific cases in accordance with *Protect Natur*. As demonstrated in Section 4.1 above, the national constitutional system of the hierarchy of legal norms clearly accommodates this possibility.

In light of CJEU case law and the renewed emphasis by the Commission on ensuring wide access to justice in environmental matters through *national* courts as a way of improving access at EU level as well, it is imperative for the Cypriot courts to be faced again with these questions through mobilization of local ENGOs. Since *Filoi tou Akama*, there have hardly been many cases brought by ENGOs under Article 146, even in relation to the situations where access for ENGOs is recognized explicitly in national law through implementation of EU legislation.[130]

[126] Γλυκερία Σιούτη, *Εγχειρίδιο Δικαίου Περιβάλλοντος* (3η εκδ. Σάκκουλας, 2018) 119-152.
[127] Greek Constitution, Article 24(1).
[128] *Κοινότητα Πυργών* (1991) *supra* n.95 and *Κοινότητα Πυργών* (1996) *supra* n. 97.
[129] Translation by author. Πρόταση Νόμου, Ο Περί της Εικοστής Έκτης Τροποποίησης του Συντάγματος Νόμος του 2019, http://www.cna.org.cy/pdf/ant/201909261543.pdf.
[130] For example, under Article 48 of Law N.127(I)/2018 on environmental impact assessment.

This may partly be explained by the lack of confidence in courts to provide the answers[131] and by the costs associated with litigation, particularly when ENGOs, with already limited resources, may be required to cover costs if the case is lost.[132] However, such cases would provide much-needed opportunities for national courts to send preliminary reference questions to the CJEU that may indirectly assess the compatibility of Article 146 of the Constitution with Article 9(3) of the Aarhus Convention in the context of interpreting the application of EU environmental directives. The CJEU has clarified on numerous occasions that even when a national provision of constitutional importance is at issue, the national court maintains its discretion to refer a case to the CJEU when it deems it appropriate and necessary.[133] Therefore, although the newly-created Administrative Court would likely be bound by *Thanos Club Hotels* as a decision of the plenary of the Supreme Court, it may send a preliminary reference question in relation to the interpretation of EU law. Additionally, if the case appears on appeal before the Supreme Court, it would be under an obligation under the *CILFIT* doctrine to send a reference to the CJEU given that the current interpretation of Article 146(2) can no longer be considered to be clearly in line with what EU law requires on access to justice when environmental legislation does not explicitly provide for it.

It is likely that certain courts in Member States, including in Cyprus, may refuse to make references to the CJEU and national provisions for access to justice will remain unchallenged. By 2016, only seven out of the 28 member states made preliminary references to the CJEU as regards Aarhus access to justice obligations.[134] This is where the alternative enforcement mechanisms of EU law, mainly the infringement proceedings under Article 258 TFEU, come into play. In this respect, ENGOs and members of the public have a crucial role to play in informing the European Commission of such infringements,[135] which in turn has a key role in following up with such complaints. Given the insistence of the Commission on the importance of ensuring wide access to justice through national courts, such conservative interpretative approaches of standing requirements that fail to reflect contemporary environmental concerns need to be revised.

[131] Amanda Perry-Kessaris, *Anemos-ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cypru*s 40(1) Journal of Law and Society 68, 86 (2013).
[132] This in itself may raise issues under the Aarhus Convention and CJEU case law. See for example, Case C-260/11 *Edwards*, EU:C:2013:221.
[133] C-416/10 *Križan*, EU:C:2013:8.
[134] Ryall, *supra* n. 12.
[135] The Commission has yet to receive a complaint on this issue. This seems to be partly due to the ignorance of local ENGOs about the requirements of EU law on this matter.

Furthermore, the argument against recognizing the legitimate interest for ENGOs so as to avoid an unreasonable burden on the courts is deficient at best. Realistically, given the small number of environmental organizations in Cyprus[136] and the small number of cases that have made their way before the courts, it is very unlikely that a relaxation of the standing requirements in environmental matters would result in an unworkable load of cases for the courts. This is even more so given that the creation of the Administrative Court in 2015 aims to reduce the workload of the Supreme Court. In any case, it would be possible to control which organizations can have access by examining whether environmental protection is identified as a key objective of the organization in its statute, requiring a minimum duration of activity and/or a minimum membership size. Such criteria often used to filter out cases brought by 'busybodies' that may seek to take advantage of the system.[137] Denying access to specific groups of litigants or in relation to specific matters altogether for the purpose of safeguarding administration of justice is not warranted and cannot be legitimately justified.

5. Conclusion

To conclude, as evident in many policy areas, international agreements often embody obligations using open-ended and discretionary language, whose legal force is determined at a lower level of governance through monitoring, enforcement and implementation. In this respect, the multi-level governance of access to justice for environmental protection is manifested through a four-fold accountability system of the Member States through the domestic courts, the ACCC, the European Commission and the CJEU.[138]

This article has analyzed the interplay among the multiple layers of governance and the distinct role of each layer in establishing a complete system of access to justice in environmental matters. First, the international tier of the Aarhus Convention has served primarily as the realm within which it was possible to formulate and agree on the legal obligation, thereby fulfilling a crucial *rule-making* function. Through the ACCC, the international tier has also contributed to *monitoring and enforcing* the obligations of the signatory parties to a certain extent.

[136] Only 17 appear currently on the Commissioner for the Environment Website. http://www.ec.gov.cy/environment/environment.nsf/envcom09_gr/envcom09_gr?OpenDocument
[137] European Parliament Study, *supra* n. 67.
[138] Chiti, *supra* n. 36, 555.

Second, the EU level has refined and strengthened the requirements of the international obligation. Despite the lack of transposition of Article 9(3) in the Member State legal orders through EU law, interpretation by the CJEU has functioned as a catalytic agent for the realization of multi-level governance. Aarhus obligations have enabled the CJEU to go a step further in limiting national procedural autonomy so as to require effective protection of rights stemming from EU environmental law, thereby also fulfilling a *rule-making* function through judicial interpretation. The added value of Aarhus obligations has regrettably only been realized in relation to access to national courts, while access to the CJEU remains largely restricted. Additionally, the principles governing the vertical relationship between the EU legal order and the Member States and particularly the principles of effectiveness, effective judicial protection and supremacy as well as the complete system of EU remedies, including preliminary references and infringement proceedings, bear considerable potential in *monitoring and enforcing* the requirements stemming from the Aarhus Convention.

Finally, the national level provides the institutional framework for delivering multi-level governance at the national level where cases are more likely to arise. The discussion of the case study of Cyprus has demonstrated both the great potential of legal systems that fully integrate EU law in national constitutional law to deliver the added value of EU law supremacy in concretizing international obligations and *implementing* multi-level requirements. At the same time, the Cyprus case study has demonstrated the significance of the willingness of national judicatures to cooperate and the specificities of the particular legal culture, with an underdeveloped civil society, to deliver the full potential of multi-level governance in practice. The participation and cooperation of the different relevant actors – NGOs, courts, legislature, enforcement bodies – at the different tiers of governance, from the global, to the regional, down to the local is crucial in realizing the multi-level governance of access to justice for environmental protection.