

Views Prof. Kees Bastmeijer

Tilburg University, The Netherlands

DRAFT, PLEASE DO NOT QUOTE

Tilburg, 28 September 2016

Introduction

I have been asked to provide my views on the recent bill before the Icelandic Parliament relating to above ground power lines to be established in Northern Iceland, Krafla Line 4 and Þeistareykir line 1.

To start with, I would like to stress that, although I have visited Iceland many times, I am not an Icelander, which means that I am reluctant to provide advice on what to do or not to do.

However, I was informed about the bill and requested to provide my views and I am certainly willing to provide an international perspective.

After having studied the information that I got, I would advice the Committee to consider and discuss two questions:

- I) Does the bill create risks of violations of international law?
- II) Does the bill create risks for the international reputation of Iceland regarding environmental protection and particularly wilderness protection?

I) Does the bill create risks of violations of international law?

This question may be discussed from several perspectives, but one of the most important questions relates to internationally recognized rights of citizens and NGOs to go to an independent court in environmental disputes. The history and content of the bill makes clear that it aims to ensure that a project with impacts on the environment can be carried out, while the project was the subject of legal procedures. The consequence is that the legislature intervenes in a legal procedure where decisions of authorities are challenged. This raises the question how this bill relates to particularly Article 6(1) of the European Convention on Human Rights and Article 9(2)(3) of the Aarhus Convention.

Fair trial under the European Convention on Human Rights

In relation to international law issues, one of the considerations for your parliamentary debates may be that the bill can be criticized in view of the rights of a fair trial, laid down in Article 6, paragraph 1, of the European Convention on Human Rights¹ (implemented by Icelandic law by Act No. 62/1994):

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Particularly the last decade, case law of the Court has made clear that the scope of the right may also include certain environmental disputes. While Article 6 does not guarantee an *actio popularis* regarding environmental issues, the Court has made clear that particularly local NGOs may have the right of a fair hearing before a court under Article 6 in certain environmental disputes. In the Case of L’Erablière A.S.B.L. v. Belgium, 24 February 2009, the Court notes:²

28. “[...] that the applicant association’s articles of association showed that its aim is limited in space and in substance, consisting in protecting the environment in the Marche-Nassogne region, a region essentially covering five small municipalities in a limited area. Moreover, all the founding members and administrators of the applicant association reside in the municipalities concerned, and can therefore be regarded as local residents directly affected by the plans to expand the landfill site. Increasing the capacity of the landfill site by more than one-fifth of its initial capacity was likely to have a considerable impact on their private life, because of the nuisance it would generate for their everyday quality of life and, in turn, on the market value of their properties in the municipalities concerned, which would be at risk of depreciation as a result.

29. The reason why the Convention does not allow an *actio popularis* is to avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not party [...] The Court considers, however, in view of the circumstances of the present case, and in particular the nature of the impugned measure, the status of the applicant association and its founders and the fact that the aim it pursued was limited in space and in substance, that the general interest defended by the applicant association in its application for judicial review cannot be regarded as an *actio popularis*.

30. The Court concludes that the “dispute” raised by the applicant association had a sufficient link to a “right” to which it could claim to be entitled as a legal entity for Article 6 of the Convention to be applicable.”

Also in relation to this project in Northern Iceland, a local NGO has been involved in the legal procedures in which the authorisations of the project have been challenged, which NGO in fact

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Council of Europe Treaty Series No. 5.

² European Court of Human Rights (ECHR), Case of L’Erablière A.S.B.L. v. Belgium, 24 February 2009 (Final 24 May 2009), available at <http://hudoc.echr.coe.int/eng?i=001-91492>, paragraphs 28-29. See also Jonathan Verschuuren, ‘Contribution of the case law of the European Court of Human Rights to sustainable development in Europe’, in: W. Scholtz, J. Verschuuren (ed.), *Regional integration and sustainable development in a globalised world* (Edward Elgar Publishers, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321663. Verschuuren refers to the case ‘Gorraiz Lizarraja and others v Spain’, Application No. 62543/00, 27 April 2004.

has similar characteristics as the NGO in the ECHM-case. The information I have indicates that the local Icelandic NGO relates to only one municipality and about 25% of the local inhabitants are member of this NGO. As the project are likely to have impacts on rights of the local inhabitants (e.g., living conditions, property rights),³ there are good reasons to believe that Article 6 of the ECHR applies to this case.

This raises the important question whether the bill may constitute a violation of this Article 6. The main question in this respect is whether the right of a fair trial is violated if the legislature explicitly enables a project that has been the subject of legal procedures. In the past, the Court has developed case law on this question. In 2008, Anna Jasiak has researched this case law and she concludes (translation by Kees Bastmeijer):

“The fact that an act has *de facto* been adopted for one specific situation, like in the Stran Greek Refineries case, will, according to the ECHR, faster justify the conclusion that the right to a fair trial has been violated.”⁴

One of the Court cases that the author discusses, is the case relating to ‘Stran Greek Refineries and Stratis Andreadis v. Greece’ of 9 December 1994. In para. 49, the ECHR concludes:

“The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of Article 12 taken together excluded any meaningful examination of the case.”^{5 6}

Arhus Convention

Probably with even less discussion the bill is in contrast with Article 9(2) and 9(3) of the Aarhus Convention.⁷ Article 9(2) states:

³ See ECtHR, *Boulois v. Luxembourg*, No. 37575/04, 3 April 2012, para. 90: “The Court reiterates that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute (“contestation” in the French text) over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention.”

⁴ Anna Jasiak, ‘Gelegenheidswetgeving en beïnvloeding van rechterlijke procedures in het licht van het EVRM’, in: *Europa en de toekomst van de nationale wetgever*, 2008, (in Dutch only): <https://pure.uvt.nl/ws/files/1072940/gelegenheid.pdf>, p. 108-109: “Het feit dat een wet de facto voor één specifiek geval werd aangenomen, zoals in de Stran Greek Refineries zaak, zal, volgens het EHRM, eerder de conclusie rechtvaardigen dat het recht op een fair trial werd geschonden.”

⁵ Case ‘Stran Greek Refineries and Stratis Andreadis v. Greece’, ECHR 9 December 1994, ECHR Series A, no. 301-B. In para. 49. Also more recently and even in domestic Court cases, this decision has been used. For a relatively recent example, see <https://www.judiciary.gov.uk/wp-content/uploads/2014/07/r-oao-reilly-others-v-sswp.pdf>. For further discussions, see also http://www.menschenrechte.ac.at/orig/95_1/Stran_Greek.pdf.

⁶ Also in other case law, the Court has underlined the importance of the separation of powers. See ECtHR, *A. v. the United Kingdom*, No. 35373/97, 17 December 2002, para. 77.

⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, (1998) 38 ILM 517.

“2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- (a) Having a sufficient interest or, alternatively,
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.”

Findings of the Compliance Committee of the convention make clear that the threshold to have access must be low to ensure a “wide access to justice”.⁸

In addition, Paragraph 3 requires that “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.”⁹ Also this

⁸ See Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, para. 71 (see for all documents relating to the case: <http://www.unece.org/env/pp/compliance/Compliancecommittee/31TableGermany.html>):

“It follows from article 2, paragraph 5, that NGOs “promoting environmental protection” shall be deemed to have an interest in environmental decision-making. According to article 9, paragraph 2 of the Convention, any NGO meeting the requirements referred to in article 2, paragraph 5 of the Convention should be deemed to have sufficient interest and thus granted standing in the review procedure. Hence, a criterion in national law that NGOs, to have standing for judicial review, must promote the protection of the environment is not inconsistent with the Convention per se. However, in order to be in accordance with the spirit and principles of the Convention, such requirements should be decided and applied “with the objective of giving the public concerned wide access to justice” (see findings on communication ACCC/C/2006/11 Belgium, para. 27 and ACCC/C/2009/43 Armenia para. 81). This means that any requirements introduced by a Party should be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.”

⁹ See Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 34-36 (see for all documents relating to the case: <http://www.unece.org/env/pp/compliance/Compliancecommittee/11TableBelgium.html>): “34. [...] This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. When assessing the Belgian criteria for access to justice for environmental organizations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and

provision appears to apply to the project that is the subject of the Icelandic bill as one of the observations of the Judiciary Committee is that (translated in English):¹⁰ “The scheduled construction is imminent and would irreversibly damage Leirhnjúkshraun”. According to the Judiciary Committee this might violate Article 61 of the Act on Nature Conservation, which brings the case within the scope of Article 9(3) of the Aarhus Convention.

Preliminary conclusion

Consequently, there are strong arguments for the view that the bill constitutes an intervention of the legislature in a concrete environmental dispute, that also may involve the violation of Icelandic nature conservation law, which blocks the rights under both the European Convention on Human Rights (Art. 6(1) and the Aarhus Convention (Art. 9(2)(3)) of citizens and NGOs to go to an independent tribunal or court.

II) Does the bill create risks for the international reputation of Iceland regarding environmental protection and particularly wilderness protection?

Also from a less legal perspective there might be arguments for not adopting the bill. These include arguments relating to the reputation of the government. For instance, in the Netherlands a very similar initiative was taken by the central government in 1998 to ensure that the project of the deepening a waterway, the Westerschelde, would be ensured while the project was the subject of legal review procedures. This case has been intensively criticized and generally such practices were not considered to fall within “good governance”.

From a reputation perspective, the position of Iceland in relation to wilderness protection also seems to be a relevant issue. I had the pleasure to edit a large 2016-volume for Cambridge University Press on the extent to which wilderness is receiving protection under domestic legal systems and Iceland clearly is one of the most impressive legal systems. However, this special

in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”

35. While referring to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.

36. Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.”

¹⁰ Judiciary Committee, Case number 46/2016, appeal to the decision of the municipal authority of Skútustaðahreppur to approve the building permit for Krafla line 4, was considered, Decision on the appeal of the plaintiff to suspend construction, 30 June 2016 (English translation of the Icelandic original).

position is hard to uphold if environmental law can easily be set aside by individual legislative actions.

Consequently, my view would be that adopting this bill would involve risks from an international law as well as a reputational perspective. Of course this is a fast and preliminary assessment and I am not an insider of the discussions, but based on the information that I have received, I would advice the Standing Committee to take the time to study these aspects before adopting the bill.

Kees Bastmeijer
Professor in Nature Conservation and Water Law
Tilburg Law School, The Netherlands