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BACKGROUND PAPER No. 5

Information, Participation and Access to Justice: the Model of the Aarhus Convention

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Background

Principle 10 of the 1992 Rio Declaration was of great importance for the developments that led to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) . [1] Yet the issues covered by the Convention had been addressed prior to the Rio Conference by the 1990 UNECE Draft Charter on Environmental Rights and Duties. The Charter, adopted later that year, focused on just about the same issues as Principle 10 of the Rio Declaration, but in a more concrete way. In 1995 the Sofia Guidelines on Public Participation in Decision-making were adopted, and in January 1996 the UNECE Committee on Environmental Policy decided to establish a working group with the task of developing a draft convention. The negotiations started in June 1996 and the Aarhus Convention was signed in June 1998 by some 35 states and the European Community. It entered into force on 30 October 2001.

Involving the public

The Aarhus Convention covers the three themes indicated by its title. Rather than using rights-oriented language, the Convention requires the parties to "ensure" that members of the public have access to information, are allowed to participate and have access to judicial review. Although the term "right" is generally avoided, [2] the objective, structure and context of the Aarhus Convention are rights-oriented. In part, the Convention draws on notions of international human rights law. It is intended to provide for participatory, informational and procedural rights in environmental matters, and a failure to do so implies a breach of the treaty.

Instead of defining who may participate in environmental decision-making in terms of "private" and "public" interest, the Convention refers to "the public concerned", meaning:

"the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." [3]

The provision establishes a broad class of persons concerned, and it presumes that environmental NGOs are concerned in a legal sense. The parties to the Convention are also required to generally provide for the recognition of and support to environmental NGOs. [4] Moreover, drawing on earlier

European conventions as well as the OECD recommendations on pollution policies, the Aarhus Convention prohibits discrimination with respect to the person's citizenship, nationality, domicile and, in the case of a legal person, the place of its registered seat or effective centre. [5] This applies to access to information, participation in decision-making, and access to justice.

Access to environmental information

The obligations related to environmental information in the Aarhus Convention consist of two parts: ensuring public access, and establishing certain means for collection and dissemination. Taken jointly, the two parts go further than previous treaties in requiring systems and structures for information dissemination and in specifying the obligation of states. Yet the Aarhus Convention fails to establish a firm basis for an "environmental right-to-know".

The Convention sets out a general right of access to "environmental information" held by public authorities for individuals and NGOs without their having to show a particular interest in the case. Environmental information is broadly defined and includes (i) "the state of elements of the environment" (air, water, soil, landscape, diversity etc); (ii) "factors" (e.g. substances, energy, noise and radiation), activities, measures, environmental agreements, policies, and legislation affecting or likely to affect the elements under (i); and (iii) the state of human health and safety, conditions of human life and cultural sites. [6] Such information shall be made available "as soon as possible", and no later than one month after a request unless the volume or complexity of the information requested justifies an extension of the time-frames. [7]

Access to information can be denied on formal and substantive grounds – the latter if certain listed interests are "adversely" affected. Some of these interests are so generally defined that the risk of self-serving auto-interpretation is apparent. The risk for misused discretion in order to avoid disclosure is not done away with by the requirement of the Convention that the grounds for refusal set out in the Convention "shall be interpreted in a restrictive way taking into account the public interest served by disclosure". [8] If access to information is denied, the authority in question must make its decision within a short period of time, stating the reasons for the refusal.

As regards the second part of the obligation regarding environmental information, the Aarhus Convention requires the parties to keep and update such information as defined above through "an adequate flow" of information. [9] This includes making information available in transparent ways by public lists, electronic databases, active support from officials, national reports and explanatory materials. Not only information on the state of the environment but also legislation, international treaties and other significant documents should be disseminated through electronic databases. In addition, each party shall "take steps to progressively establish" a coherent nationwide system of pollution inventories or registers on a structured computorized and publicly accessible database, completed through standardized reporting. This comes close to the notion of an "environmental right-to-know", but the obligation is set out in language that allows some loopholes for the parties. Instead of requiring the establishment of such a system, the Convention requires them to take steps to progressively establish the system, which makes the time-frame unclear. Even more importantly, the Convention does not state any minimum or mandatory elements to be included in the system, only that it "may" include inputs, releases and transfers of substances and products from a specific range of activities to environmental media etc. [10]

The establishment of such a register requires regular reporting from the activities concerned. The Convention does not say much about this aspect, merely requiring the parties to "encourage" operators whose activities have a significant impact on the environment to "inform the public regularly on the environmental impact of their activities and products". This soft language is manifestly inappropriate for the establishment of a pollution register, which is supposed to contain information on activities and measures affecting or likely to affect the elements of the environment. [11] Pending the entry into force of the Convention and the first Meeting of the Parties, there have

been some discussions (and requests from the NGO community) on the adoption of a protocol on such a register.

Public participation

The Aarhus Convention distinguishes between public participation in decision-making and access to justice, although the two elements are linked. To differing degrees, public participation in three kinds of decision-making procedures are covered by the Convention; i.e. procedures concerning (i) specific activities, (ii) plans, programmes and policies, and (iii) executive regulations and generally applicable rules.

The most detailed provisions apply to permit procedures for specific activities. In such procedures, related either to the great number of activities listed in the annex to the Convention or to any non-listed activity that may have a significant effect on the environment, the parties are obliged to provide for public participation. [12] An essential question in this context is how to prevent such participation from being merely *pro forma*. Can it be ensured that the participation of the public influences decision-making? Without being able to fully ensure this, the Convention sets out five means for enhancing participation.

First, it requires the parties to provide for "*early* public participation, when *all* options are open and effective public participation can take place". [13] This is essential, since the later the public gets involved, the more difficult it is to influence the decision. Second, early in these decision-making procedures, each party must *inform* the public concerned, by public notice or individually, about the proposed activity, the nature of possible decisions, the envisaged procedure and possibility of participating, the time-frames, and the place where information is being held. Third, the public is to be allowed to *submit comments*, either in writing or at hearings or inquiries, that it finds relevant to the proposed activity. Fourth, each party is to ensure that in the decision *due account* is taken of the outcome of the public participation. This is a critical moment in the decision-making process, since "due account" is not very precise and thus provides leeway for the decision-making authority. Even though it does not amount to a veto of the public, the decision-making authority cannot simply do away with the comments and opinions without considering them seriously. Moreover, the decision must state the reasons and considerations upon which it is based.

The right to participate in decision-making procedures other than concerning specific activities is more generally defined and provides more loopholes for the state parties. [14] Even so, the preparation of plans, programmes and policies relating to the environment should be transparent and allow for early participation. In these procedures, too, due account should be taken of the outcome of the participatory procedures.

Access to justice

The fifth means of avoiding mere *pro forma* participation in cases concerning specific activities is provided by the right to have the decision legally reviewed. [15] Basically, access to justice, as defined by the Aarhus Convention, is a means of having erroneous administrative decisions on environmental issues corrected by a court or another independent and impartial body established by law. The right to access to justice pertains to two kinds of situations. First, any person who considers that his or her *request for environmental information* has been ignored, refused or not dealt with in accordance with the Convention must be ensured access to a review procedure before a court or another independent and impartial body. [16] Second, any member of the public having a sufficient interest or maintaining impairment of a right must be ensured access to a review procedure before a court of law or another independent and impartial body, to *challenge the substantive and procedural legality* of any decision, act or omission concerning specific activities, which may affect the environment. [17] Hence, access to justice is not limited to cases where the participatory or informational rights of the Aarhus Convention are infringed, but must also be granted in order to

challenge the substantive legality of a decision. In addition to decisions concerning specific activities, the parties are required ensure access to justice in cases concerning other relevant provisions of the Convention (e.g. decisions on plans and programmes) "where so provided for under national law". [18]

The vague language and the fact that it essentially remains a matter for national law to determine what constitutes a sufficient interest and an impairment of a right, indicate the difficulties in drafting this part. Nevertheless, what is a sufficient interest and an impairment of a right should be defined in a manner consistent with the objective of the Convention, namely to give the public concerned "wide access to justice". [19] More specific criteria may also be adopted by Meetings of the Parties (MoPs) to the Convention in order to reduce the scope of discretion enjoyed by the parties.

Two things should be observed in this regard. First, according to the Convention, environmental organizations are deemed to have an interest in environmental decision-making and in the judicial review procedure sufficient to grant standing. Second, contrary to the principles established on access to the European Community Judicature, the Aarhus Convention does not require the persons "concerned" to be more affected or more likely to be affected than the public in general. If the entire population in an area is likely to be affected, then all persons may participate and bring the case to court for review.

The Convention remains vague also in prescribing the remedies that should be available. The parties must provide "adequate and effective remedies, including injunctive relief as appropriate", but this is also an issue that may be further developed and specified by MoPs. A related issue is that of costs. The Aarhus Convention stipulates that in addition to providing effective remedies, the procedures shall be fair, equitable, timely and not prohibitively expensive. The costs of procedure have an inhibitive impact on peoples' willingness to bring proceedings for judicial review, and access to justice may be an illusion if the costs are too high. Therefore, the costs are a decisive factor for the effectiveness of this part of the Convention.

Even though the Aarhus Convention, like the European Convention on Human Rights, remains silent on substantive rights to environment protection, its Article 9 on access to justice, seen in the general context of the Convention, is more readily available for diffuse, collective and fragmentary rights concerning the protection of the environment than Article 6(1) of the ECHR. Contrary to the ECHR, the Aarhus Convention defines a broad category of members of the public as being concerned by environmental decision-making. [20] It also states that the determination of what constitutes a sufficient interest and impairment of a right to give standing, must be consistent with the objective of giving the public concerned wide access to justice within the scope of the Convention. [21]

Another obvious difference between the Aarhus Convention and the ECHR concerns the right for environmental interest groups to challenge decisions concerning specific activities. Under the Aarhus Convention these organizations are deemed to have an interest sufficient for standing. [22] Under established human rights law, on the other hand, environmental associations have access to judicial proceedings only if their civil rights are affected, but there is no presumption that public environmental interests are equivalent to a civil right, subject to Article 6(1) of the ECHR.

International compliance control

During the negotiations for the Aarhus Convention, the issue was raised of establishing an international body for compliance control, which would also be available for communications from non-state actors. After strong resistance from some states, the provision on compliance review was formulated only in the following terms:

”The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of consideration of communications from members of the public on matters related to this Convention.” [23]

Pending the entry into force and the first MoP, however, meetings of experts and intergovernmental working groups have been held in order to prepare for an MoP decision on a Compliance Committee, and a draft decision has been submitted. [24] The draft provides for two alternative bodies; either a Committee comprising only the parties or a Committee comprising independent members. At the last meeting of the intergovernmental working group (Nov. 2001), a majority supported the latter approach. The draft states that parties should be able to submit “reservations” about another party’s compliance. It is of greater interest in this context that members of the public should also be able to bring “communications” before the Committee. It is not yet clear whether a party will be able to opt out of this particular kind of submission and, if so, for how long. The Committee will not be able to make binding decisions but recommendations to the MoP.

Despite shortcomings and ambiguities, a Compliance Committee of independent members such as that proposed in the draft decision would further the development of international environmental law by possibly making the Committee independent, and by allowing members of the public to trigger the compliance mechanism.

Future developments

One of the rationales for involving the public is that it may improve the implementation of environmental laws. In different ways, public involvement may also affect the degree of compliance with international environmental agreements. Thus, expanding the notions of the Aarhus Convention beyond Europe may add to the implementation of various global and regional environmental agreements. The possible Compliance Committee may also provide a model for other parts of the world, despite the indicated weaknesses, as it will function as a forum for complaints outside the state in question.

The Aarhus Convention was negotiated by states of highly different political and economic systems. This reveals that the issue of public participation in environmental matters is not limited to Western European states. In fact, several countries that previously formed part of the Soviet Union were among the first to ratify the Convention. Some NGOs from Eastern Europe saw the Convention as a general vehicle for furthering democracy and making their society more transparent. One should not be so naïve as to assume that public participation solves all environmental problems. Participatory instruments cannot replace norms providing for certain fundamental substantive entitlements. Moreover, the risk remains that public participation is only *pro forma*, without a serious chance for members of the public to influence the decision-making. It will be an important task of the Compliance Committee to assess the procedures of the parties for involving the public.

The Aarhus Convention is unique among UNECE environmental conventions in making it possible for not only UNECE member states to accede but also *for states outside the region* to do so if approved by the MoP. [25] An alternative to joining the Aarhus Convention is to establish new regimes in other regions.

Either way, the Aarhus Convention is of interest to the Rio + 10 Summit in Johannesburg, and it would be unfortunate not to make use of it in the drafting of political and/or legal instruments. It is far from the only convention adopted after the Rio Conference that provides for public participation or access to environmental information. But no other convention furthers the different elements of Principle 10 of the Rio Declaration to such an extent.

[1] 38 *International Legal Materials* (ILM) (1999) 515. For presentations of the Aarhus Convention, see K. Brady, '*New Convention on Access to Information and Public Participation in Environmental Matters*', 28 EPL (1998) 69; and Economic Commission for Europe, *The Aarhus Convention: an Implementation Guide* (UN, New York and Geneva, 2000); and [1999] *Revue juridique de l'environnement*, la Convention d'Aarhus, numéro spécial. For an analysis of the Aarhus Convention in the context of general developments in international law, see J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997) 51.

[2] The term "right" is not completely avoided in the Aarhus Convention. Article 1 refers to "rights" of access to information, public participation in decision-making and access to justice in environmental matters. References to rights are also made in the preamble, para. 5, which links the protection of the environment to basic human rights, and paras. 7 and 8 in which participation and access to courts and information are related to these rights.

[3] Article 2(5).

[4] Article 3(4).

[5] Article 3(9).

[6] Article 2(3).

[7] Article 4(2).

[8] Article 4(4).

[9] Article 5(1).

[10] Article 5(9). Cf. *Guerra and Others v. Italy*, 116/1996/735/932 (19 Feb. 1998), where the European Court of Human Rights held that by failing to provide "essential information [to the applicants] that would have enabled them to assess the risks they and their families might run", Italy failed to secure the applicants' right to respect for their private and family life.

[11] Cf. the definition of environmental information in Article 2(3).

[12] Article 6 and annex I. The scope of activities listed in annex I is greater than that of the 1991 Espoo Convention, with regard to EIAs.

[13] Article 6(4).

[14] Articles 7 and 8.

[15] Article 9.

[16] Article 9(1).

[17] Article 9(2) refers to Article 6, which applies to public participation in decisions on specific activities.

[18] Aarhus Convention, Article 9(2). According to Article 9(3), each party is also requested to 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 or omissions by private parties and public authorities which contravenes provisions of its national law relating to the environment."

[19] Article 9(2).

[20] Article 2(5). Cf. *Zander v Sweden*, 45/1992/390/468, Judgement of 25 October 1993, paras 24-27, where the European Court of Human Rights noted that the complainants, who owned land near the permitted harmful activity, had standing under national law in the administrative procedure. They were also able to appeal within the administrative system. The complainants' claim was directly concerned with their ability to use the water in their well for drinking purposes. The Court held that this was a facet of their right as land owner, and that such property rights are clearly a civil right within the meaning of Article 6(1). In this case, the issue of environment protection and third party rights was connected to private property and the right to land, which is clearly covered by the ECHR. It is less clear how far the Convention reaches outside the scope of private property, in terms of the rights to healthy air, nature conservation, etc.

[21] Article 9(2).

[22] Ibid.

[23] Article 15.

[24] For documentation, see http://www.unece.org/env/pp/compliance.htm.

[25] Article 19(3).