15 The Aarhus Convention Model

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15.1 Introduction

In recent decades it has become a matter of common sense that the protection of the environment represents a fundamental societal need. Environmental protection is a matter of public or common concern, environmental degradation and deterioration have an impact on the general quality of life. Consequently, environmental policies and legal rules directly affect every individual, group and organisation, and environmental interests are collective, diffuse and fragmented to a large extent.

Public participation is an important theme of contemporary environmental policy and law at all levels. Individuals and their organisations acting in the public interest, such as in relation to the environment, contribute to the improvement of the level of environmental protection. Recognition of the public interest in environmental matters is especially important since there are many cases where the interests of particular individuals are not affected or are affected only peripherally. Legal protection in environmental matters generally serves not only the individual interests of the citizens, but also, or even exclusively, the public.

Participatory democracy is a pre-requisite for the realisation of sustainable development,[1] and participatory mechanisms establish a reliable basis for making better decisions that benefit all stakeholders, since it is generally supposed that a wider range of considerations can be taken into account.[2] Additionally, public participation methods improve the legitimacy of decision-making as, *inter alia*, the participation of citizens can potentially make

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1 Agenda 21 also stated that "one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making". See J. Cameron and R. MacKenzie: 'Access to Environmental Justice and Procedural Rights in International Institutions', in: A.E. Boyle and M.R. Anderson (Eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, p. 151.

2 B.J. Richardson and J. Razzaque, 'Public Participation in Environmental Decision-Making', in: B.J. Richardson and S. Wood (Eds.): *Environmental Law for Sustainability*, Hart Publishing, Oxford, 2006, p. 165 *et seq.*

decisions more democratic.[3] It can make people possible to feel that they can have a positive effect on the concrete decisions in their countries.[4]

Public participation was a prominent part of the "environmental justice" movement has originated in the USA in the 1970s. The rationale behind the movement was the realisation of the fact that certain groups were more vulnerable than others to problems related to hazardous activities, and that those often had a limited role in decision-making.[5]

Until now, the concept of a healthy environment in general is not linked to a corresponding direct individual right to a healthy environment that can be enforced in court.[6] Principle 1 of the Stockholm Declaration[7] has inspired many national constitutional provisions since the early 1970s recognizing the right to environment as a fundamental right under domestic law, but that right has not to date been transposed into a binding rule of international law of universal application.[8]

As regards Europe, discussions took place in the 1970s under the auspices of the Council of Europe to complete the European Convention on Human Rights (ECHR) on the right to a clean environment. Despite of the fact that there was a consensus that such a right existed, these efforts failed. Subsequently, efforts at international (and national) level concentrated on procedural rights of the public.[9] Procedural rights have deep roots in human rights instruments, although not specifically in the environmental context. The emergence of environmental rights marks perhaps the most significant shift in the focus of international environmental law.[10]

15.2 The Significance of the Aarhus Convention

A substantive human right to the environment is currently lacking on the international level, but the promotion of procedural and participation rights can be an effective means of securing environmental protection. Although public participation *per se* is a "bottom

3 J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997), pp. 75-81.

4 In general, the participation of the public includes several opportunities to have an influence on decision-making procedures, but the public does not have the right to make the final decision.

5 See, J. Ebbesson, 'Introduction: Dimensions of Justice in Environmental Law', in: J. Ebbesson and P. Okowa (Eds.): *Environmental Law and Justice in Context*, 1st edn., Cambridge University Press, Cambridge, 2009, p. 2.

6 L. Krämer, 'The Citizen and the Environment: Access to Justice', 7 *Resource Management Journal* (November 1999), p. 4. Available at: <www.rmla.org.nz/upload/files/rm_journal_nov_99.pdf>.

7 Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1.

8 For a more detailed discussion of this question, see M. Déjéant-Pons and M. Pallemaerts, *Human Rights and the Environment*, Council of Europe Publishing, Strasbourg, 2002.

9 Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters, Milieu Ltd., September 2007, p. 21.

10 P. Birnie et al., *International Law and the Environment*, Oxford University Press, 2009, p. 266.

up" process, its promotion seems to be a "top-down" process given that the demands to boost public involvement decision-making processes have obviously come from the highest levels of administration.[11]

Developed under the auspices of the United Nations Economic Commission for Europe (UNECE), the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention)[12] is widely viewed as the foremost legally binding instrument laying down the basic rules to promote citizen's involvement in environmental matters. The entire preparatory period demonstrated a great openness for NGO involvement; a coalition of environmental NGOs participated in the drafting and in all negotiating sessions organizes by the UNCE. In drafting the Convention, the UN Economic and Social Council took into account the views of several environmental NGOs,[13] commending them in the Resolution for their "active and constructive participation in the development of the Convention".

The Convention was adopted on 25 June 1998 by representatives of 35 UNECE member countries and the European Community (EC)[14] at a UNECE-sponsored pan-European Ministerial Conference of the "Environment for Europe" process.[15] The Convention came into force on 30 October 2001, and it has 47 Parties.[16] Some authors emphasize that the adoption of the Aarhus Convention in 1998 was the last important stage of the codification of international environmental law, and the scenario that international environmental law can give a normative response to the global challenges is less and less realistic.[17]

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11 Making Participation Work, Danube Watch, ICPDR, Vienna, No. 2/2003, p. 7.

12 UN Doc. ECE/CEP/43 (1998); see the full text of the Aarhus Convention at: www.unece.org/env/pp/treatytext.html.

13 See, for example, the Report of the First Session (CEP/AC.3/2, p. 1).

14 By signing the Convention and formally adopting it on 17 February 2005 the EC (EU) obliged itself to present adequate legal instruments for implementing the provisions of the Convention (see Council Decision 2005/370/EC, OJ 2005 L 124, p. 1); see L. Krämer, 'The Aarhus Convention and the European Union', in: Ch. Banner (Ed.), *The Aarhus Convention, A Guide for UK Lawyers*, Hart Publishing, 2015, pp. 79-95. The Convention was concluded by the EC and all its Member States as a matter of shared competence, the Convention being a mixed agreement. EU Member States that are Parties to the Convention are bound to implement both the Convention and the EU acts intended to implement the Convention. For an overview of EU activities taking place to allow ratification of the Convention, see: http://ec.europea.eu/environment/aarhus.

15 The "Environment for Europe" process is a UN ECE-wide cooperation on environmental issues, punctuated by a series of Ministerial Conferences (Dobřis, Czechoslovakia, 1991; Lucerne, Switzerland, 1993; Sofia, Bulgaria, 1995; Aarhus, Denmark, 1998; Kiev, Ukraine, 2003; Belgrade, Serbia, 2007; Astana, Kazakhstan, 2011).

16 As of 16 January 2015, there were 47 Parties to the Convention, 33 Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) and 28 Parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs). See the official site of the Convention at: www.unece.org/env/pp/ratification.html.

17 See for example B. Majtényi, 'Signpost on the Road? The Aarhus Convention as a Link Between International Environmental Law and International Human Rights Law', in: H. Müllerová et al. (Eds.), *Public Participation*

The provisions of the Convention are intended to ensure effective environmental protection, but it is not based on reciprocal and mutually advantageous arrangements, and it is not a technical example of an agreement in the field of the environment. Furthermore, the Convention is not only a multilateral environmental agreement (MEA); it is also a Convention about government accountability, transparency and responsiveness.

The Convention is usually considered to be a ground breaking environmental instrument mainly because it awards extensive rights to individual members of the public and NGOs, without discrimination as to citizenship, nationality or domicile.[18] Since it confers rights relating to objectives of environmental protection, the Aarhus Convention is, by its nature, a procedural instrument, and does not stipulate any substantial environmental standards.

Article 1 of the Convention sets out its objective:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.[19]

The seventh and eighth recitals in the preamble confirm that aim and supplement it with the duty of every person to protect and improve the environment for the benefit of present and future generations. While not the first international legal instrument to recognize the right to a healthy environment, the Aarhus Convention does appear to be the first hard-law text to recognize the rights of future generations.[20]

Whereas most multilateral environmental agreements establish obligations in an international context, the Aarhus Convention entails obligations on the relevant national authorities, towards the public.[21] Under Article 2(2) of the Convention "public authority" means:

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in Environmental Decision-Making: Implementation of the Aarhus Convention, Institute of State and Law of the Academy of Sciences of the Czech Republic, v.v.i., Praha, 2013, pp. 27-28.

18 See Art. 3(9).

19 During the preparatory stages of the Convention, the Belgian delegation suggested specifically linking the environment and human health (see the *travaux préparatoires* detailing the first session of the Economic and Social Council's Working Group: CEP/AC.3/2, p. 2). This proved controversial (see the details of the second session: CEP/A.C3/4, p. 2). By the eighth session (CEP/AC.3/16, p. 2) the text of the Convention contained what would become the final draft of Art. 1.

20 J. Ebbesson et al., *The Aarhus Convention: An Implementation Guide*, 2nd edn., UNECE, 2013, p. 19.

21 This is apparent from the reference to the framework of national legislation in for example Art. 4(1).

(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law,[22] including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services relating to the environment under the control of a body or person falling within [points] (a) or (b) above;
(d) The institutions of any regional economic integration organisation referred to in Article 17 which is a Party to this Convention.

Article 3 provides that each Party is to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Nevertheless, the Convention "is a floor, not a ceiling".[23] Existing provisions of the Parties that go beyond the requirements of the Convention can be preserved, and the Parties may introduce national measures for extensive public participation than required by the Convention.

15.3 The Pillars of the Aarhus Convention

Public participation requires the availability of appropriate and relevant information, the ability of all citizens to participate in environmental decisions that affect them, and access to justice in cases where these rights have been violated. The Convention guarantees environmental rights by implementing Principle 10 of the Rio Declaration on Environment and Development (the "environmental democracy principle") and establishes a set of obligations (and corresponding rights for the public) organised around three main ideas or 'pillars', namely: (i) access to environmental information, (ii) public participation in decision-making regarding the environment, and (iii) access to justice in environmental matters.

There are important links between these three environmental access rights. To participate in decision-making procedures relating to the environment it is necessary to have access to all the relevant information. The elaboration of the right of access to justice also requires a well-informed public. Moreover, both access to information and participation in decision-making mean little if there are no review mechanisms in place when such rights are denied.

The first pillar of the Convention is covered by Articles 4 and 5.

22 What is considered a public administrative function under national law may differ from country to country.
23 www.unece.org/env/pp/contentofaarhus.html.

The definition of "environmental information" in Article 2(3) is as broad in its scope as possible, and encompasses only a non-exhaustive list of elements of the environment. The Convention enables the Parties to establish even a broader scope of "environmental information" in their national legislation.[24] Article 4(1) states that each Party to the Convention is to ensure that public authorities make available to the public, within the framework of their national legislation, the environmental information requested from them.

The Convention does not intend to give a general and unlimited right of access to all information held by public authorities, which has a connection, however minimal, with an environmental factor. Article 4(3) and (4) provide for a number of grounds for refusal of requests for environmental information. The grounds for refusal must be interpreted in a restrictive way taking into account the public interest served by disclosure of the information requested and whether or not the information relates to emissions into the environment.[25] In the event of ambiguity, these provisions should be interpreted so as to favour transparency and access to information, and any provision limiting their scope should be interpreted strictly.

Further, it follows from reading Article 4(1) and (4) together that all Parties have a wide discretion in respect of how to organise the ways in which environmental information requested from public authorities is made available to the public. Nevertheless, Parties should direct their officials to apply a presumption of maximum disclosure when information on emissions into the environment was requested.

The general principle is that the public should be able to access information without charge or restriction. Article 4 of the Convention authorises restrictions of the freedom of access to environmental information only in accordance with the criteria and the cases expressly defined therein. If costs are allowed to be set at high levels,[26] persons may therefore be dissuaded from submitting requests for environmental information.

The Convention distinguishes the obligation to make available information to an applicant who requests it in a particular form from the obligation to disseminate information (and update as appropriate). Article 5 provides for "active" dissemination of environmental information.[27] This provision of the Convention is particularly general and vague leaving a large margin of discretion to the Parties.

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24 The "floor, not a ceiling" principle applies as a general rule to all the requirements of the Convention.

25 See Art. 4(4) in accordance with the second subparagraph of that provision. For example, where the confidential business information (CBI) may be regarded as environmental information or as information relating to emissions into the environment, access to information has to be governed by the disclosure regime of the Convention.

26 Nevertheless, Art. 4(8) of the Convention does not define "reasonable amount".

27 The Implementation Guide of the Convention (at p. 75) refers to this right as "the active right of access". From the perspective of the beneficiaries of this access, this right might more logically be called passive; see the Opinion of Advocate General Sharpston in Case C-71/14 (ECLI:EU:C:2015:234, point 52).

The second pillar of the Convention is divided into three main categories. Article 6 addresses public participation in decisions on certain specific activities (as listed in Annex I), or other activities likely to significantly impact the environment, as determined by the Parties to the Convention. Article 7 discusses public participation "concerning plans, programmes and policies relating to the environment"; and Article 8 applies to public participation "during the preparation of executive regulations and/or generally applicable legally binding normative instruments." Of the three articles, Article 6 is by far the most detailed in its public participatory requirements. Article 7 is a pared-down version of Article 6, while Article 8 operates as a set of guidelines only for implementing public participation mechanisms.[28]

The third pillar of the Convention is closely tied to the other two pillars; access to justice encourages the ability of the members of the public to enforce their right to be informed and to participate. Article 9 requires the Parties to ensure access to justice in three contexts:

1. in cases of information requests under Article 4,[29]
2. in cases of specific decisions under Article 6,
3. in cases of challenging breaches of environmental law in general.

Articles 9(1) and 9(2) have direct ties to the first two pillars of the Convention, while Article 9(3) concerns access to justice with the aim of enforcing national environmental legislation. There is a great variation in the extent to which countries grant access to justice. While some states strictly limit the access to a judicial review to those having an interest or an impaired right and some allow anyone to challenge environmental decisions. In other words, the issue of standing is primarily determined at national level, as is the question of whether the procedures are judicial or administrative.[30] But the right of access to a review procedure cannot depend on whether the authority, which adopted the decision or act at issue, is an administrative body or a court of law.

According to Article 9(1), any person who alleges that their request for information under Article 4 has not been respected, is entitled to access a review procedure before a court or other similar body of law, and shall be given a chance of reconsideration by a public authority or other independent and impartial body. Article 9(2) covers access to justice for challenges to the procedural and substantive legality of decisions, acts and omissions, corresponding to Articles 6, 7 and 8 of the Convention.

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28 V. Rodenhoff, 'The Aarhus Convention and its Implications for the "Institutions" of the European Community, 11 *RECIEL* (2002), p. 354.

29 The Convention excluded legislative acts from its scope of application for the reason that the provision of information to the public is, in this respect, ensured by the legislative process itself.

30 J. Wates, 'The Aarhus Convention: A New Instrument Promoting Environmental Democracy', in: M.-C. Cordonier Segger and Judge C. Weeramantry (Eds.), *Sustainable Justice – Reconciling Economic, Social and Environmental Law*, Martinus Nijhoff Publishers, 2005, pp. 401-402.

Article 9(2) and (4) of the Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6. Participation rights in environmental law are part and parcel not only of legitimising decisions but also of improving environmental protection.[31] That is why Article 9(2) refers to the review of substantive and procedural legality at one and the same time.

The second paragraph of Article 9(2) of the Convention provides that a sufficient interest or impairment of a right is to be determined according to the provisions of domestic law and in accordance with the objective of giving the public concerned wide access to justice. In compliance with this objective, the implementation of that condition of admissibility is a matter of national law.[32] Article 9(2) was framed in order to accommodate the two different systems under which legal standing (*locus standi*) is commonly assessed amongst the Parties.

While Articles 9(1) and 9(2) are used to enforce the first two pillars, Article 9(3) is of a different nature. Article 9(3) covers other kinds of acts and omissions than those regulated in Articles 4 and 6 that contravene national environmental law. Here actions by both private persons and public authorities are included.[33] This provision appears to be the most complicated element of the Convention. It is not entirely clear to what extent states can delimit access to justice with reference to Article 9(3) and there seems to be a great variation in implementation among the Parties to the Convention.[34] Difficulties arise regarding the interpretation of the provision, and the diversity of systems where this provision is supposed to apply. Parties have a broad margin of discretion when defining the rules for implementing the "administrative or judicial procedures" referred to in Article 9(3), subject to observance of the requirements set out in Article 9(4). The scope of the provision is made clear in Paragraph 4 of that same article, which requires, *inter alia*, that the procedures referred to in Paragraph 3 must provide effective and adequate remedies, including injunctive relief as appropriate, and be fair, equitable and timely and not prohibitively expensive.

Incidentally, Article 9(2) refers to members of the "public concerned", and the access to a review procedure under Article 9(3) is restricted to members of the public "where

31 J. Ebbesson, 'Public Participation', in: D. Bodansky et al. (Eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, p. 681.

32 That discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned.

33 Art. 9(3) provides that "without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public 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".

34 See J. Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Article 9, paras. 3 and 4, of the Aarhus Convention in Seventeen of the Member States of the European Union', 2012-11-11/Final (available at: www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2012_A2J_Synthesis_report_Final_edit.pdf).

they meet the criteria, if any, laid down in its national law". The "public concerned" is defined in Article 2(5) as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making". For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. Such organisations are put in a privileged position inasmuch as they have an "automatic" right of access to justice.

The distinct role for NGOs is perhaps the most significant innovation of the Convention,[35] and provided a counter-balance to the decision not to introduce a mandatory *actio popularis* for environmental matters. The Convention grants them wider access to the courts than individuals, although it does not view environmental protection as a function specific to NGOs created for that purpose.[36] Citizens are also guaranteed access to justice in order to enable them to exercise their right to a healthy environment and to fulfil their duty to protect and improve the environment for the benefit of present and future generations.

15.4 The Aarhus Convention as a Regional Model

The adoption of the Aarhus Convention in 1998 marked a milestone in the development of procedural environmental rights. The Convention has penetrated into issues previously perceived as parts of the national *domain réservé*, and has led to greater transparency and accountability in a wide range of international bodies and processes dealing with environmental issues.

The Aarhus Convention model is based on an essential idea: the participation of the public in environmental decision-making contributes to sustainable development. There is no single international instrument which affords a general right to public participation under international law. The only international instrument to address such matters is the Aarhus Convention, which does so from the perspective of states parties affording such rights in national law. To date all of its Parties are from the region covered by the UNECE, but Parties have expressed particular encouragement to countries from other regions to ratify. The Convention has potential for global application since, if a subsequent Meeting of the Parties so agrees, the Convention may be open to signature by any other state which is a member of the United Nations.[37] The greatest challenge is usually to ensure political support among countries for the adoption of a legally binding instrument.

35 M. Lee and C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention', 66 *The Modern Law Review* (2003), p. 86.

36 See Recitals 7 and 8 in the preamble to the Convention.

37 See Art. 19(3).

The experiences of the Aarhus Convention process and the "three-pillar model" can provide guidance for other global, regional and national initiatives around the world. A substantial number of countries have adopted new legal frameworks on environmental rights, have included access provisions in general environmental protection laws, especially relating to access to information. Although the Convention focuses on public participation at the (sub)national level, it has also served as a catalyst for the democratisation of supranational and international decision-making processes.[38] However, much work remains to set out a comprehensive legal framework that provides for environmental rights to be effectively available. The lack of financial and human resources, and insufficient capacity building also raise problems. The risk remains that public participation is only *pro forma*, without a serious chance for the citizens to influence environmental decision-making.

International institutions have also not fully adopted environmental rights into their practices. There has been somewhat more progress with the global financial institutions, especially the World Bank. Moreover, numerous regional UN bodies and Special Rapporteurs emphasized the links between environmental protection and the rights to development, health and water, and the rights of indigenous people.

In 2005, Parties to the Aarhus Convention adopted the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.[39] These guidelines encourage the introduction of balanced and equitable processes for public participation in international forums as well as the design of mechanisms to promote transparency, minimize inequality, avoid the exercise of undue economic or political influence, and facilitate the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support. In 2010 a Task Force on Public Participation in Decision-making[40] was established to facilitate the sharing of expertise and good practices and to provide recommendations on strengthening civil society participation and building the capacity of public authorities and other stakeholders.

The Aarhus Convention influenced the provisions of the 2010 UNEP Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines)[41] and the draft Commentaries to the Bali Guidelines.[42] Despite many efforts made by the Parties to the Convention, public participation in international environmental decision-making faces serious challenges and

38 M. Pallemaerts, 'Introduction', in: M. Pallemaerts (Ed.), *The Aarhus Convention at Ten, Interactions between Conventional International Law and EU Environmental Law*, The Avosetta Series (9), Europa Law Publishing, Groningen, 2009, p. 5.

39 www.unece.org/env/pp/ppif.html.

40 Decision EMP.II/1 is available at: www.unece.org/env/pp/ppdm.html.

41 UN Doc. UNEP/GCSS.XI/11, Decision SS.XI/5, Part A, 26 February 2010.

42 Available at: www.unep.org/civil-society/Portals/24105/documents/Guidelines/Commentary-to-the-guidelines-for-thedevelopment-of-national-legislation.pdf.

progress is controversial. There has been an unprecedented level of stakeholder engagement in shaping and developing sustainable development goals (SDGs) and the post-2015 agenda, and progress has been made with regard to implementing the Aarhus Convention's principles in international climate change negotiations, but there are widespread concerns over lack of transparency in international trade negotiations.

The Aarhus Convention is a regional model that should be widely followed and adopted elsewhere. Other UN regional bodies should also begin negotiations on a similar instrument. The promotion of environmental democracy through the extension of the Aarhus Convention can lead to negotiations on other regional conventions or a new global convention. This would be an important step in advancing environmental rights across other regions in the same manner that the Aarhus Convention did for the pan-European region.