



INTRODUCING THE AARHUS CONVENTION (25 June 1998)

*UNFOLDING THE PRINCIPLE OF PUBLIC
PARTICIPATION IN ENV'L MATTERS
Setting the General Legal Frame for Participatory
Rights*

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PRESENTATION'S OVERVIEW

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I.- GENERAL INTRODUCTION

II.- THE TREATY : REVIEW OF THE MAIN
DISPOSITIONS AND THE COMPLIANCE
REGIME

III.- IMPLEMENTATION OF THE AARHUS
OBLIGATIONS : EU and NATIONAL
Legal Orders



I.- INTRODUCTION : ***Aarhus in perspective***



1. Normative foundations: the “recent” sources of public participation rights
2. The Principle 10
3. The 1995 Sofia Guidelines
4. Drafting the Convention

1. Normative Foundations for a New International Treaty



1.- North-American Inspirations

- 1946 Administrative Procedure Act
- 1969 New Environmental Policy Act

2.- International Law

- Human Rights instruments (UDHR 1948, ECHR 1951..)
- Multiplication of Declaratory Instruments (70s & 80s)
- Principle 10 - UN Declaration on Environment and Development

3.- (Slow & Piecemeal) Progress in national law

4.- European Milestones

- Council of Europe's discrete contribution (70's & 80's)
- 1985/337/EEC Directive on EIA
- 1990/313/EC Directive on Environmental Information
- Procedural dimension of the Human-Rights (Case-law of the ECtHR)
- Development of Participation Rights within the EEC (ECSC, Competition Field)

PRINCIPLE 10

Declaration on Environ't and Development

(Rio de Janeiro, 3-14 June 1992)



«Environmental issues are best handled with participation of all concerned citizens, at the relevant level.

At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.

States shall facilitate and encourage public awareness and participation by making information widely available.

Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. »

2. The Sofia Guidelines (21-23 October 1995)



Adopted at the 3rd Pan-European
Conference of Environmental Ministers
(CoE & UN/ECE)

- Soft Law Instrument
- Legal approach & normative potential
- Political agreement on the Guidelines as the basis for the negotiation for a future binding instrument
- Tripartite structure: Access to information, "Public Participation", Access to Justice

3. Drafting the Convention

- Ad Hoc Drafting Working Group set-up within the UNECE Committee for Environmental Policy (10 meetings)
- Open negotiation (participation of NGOs)
- European negotiation (Absence of Canada & USA) => EU law-centered
- Acceptance of the 3rd pillar
- Inclusion of Strategic decision-making
- Stumbling stones: GMOs, PRTRs
- In the end: strong correlation with EU Law

II. TREATY DISPOSITIONS

1. Nature and current state of the Convention
2. Structure and Scope of the Aarhus Convention: an unbalanced agreement
3. Institutional setting
4. Developments & Areas of substantial work

1. Brief about the Aarhus Convention



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- TITLE: Convention on Access to Information, Public participation in Decision-Making and Access to Justice in Environmental Matters
 - International Treaty
 - Signed : 25 June 1998
 - Entered into Force : 31 October 2001
 - 41 parties: 40 States & the EC (accepted the 21 February 2006)

2. Architecture of the Convention



- Preamble
- General Dispositions (art.1-3)
- Access to information (art.4 &5)
- Participation in Decision-making (art.6-8)
- Access to Justice (art.9)
- Administration of the Convention
- Final Dispositions

The Preamble and the General dispositions



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- Preamble : captures the “spirit” of the Convention, its sources & future aspirations (sustainable development)
 - The General dispositions (Art. 1-3)
 - Objective (art.1)
 - Definitions(Art.2): environmental information, public, and public concerned Public authority.
 - General Provisions (Art.3): principles that inform the rest of the treaty’s provisions

Article 1 – 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 objective»

What is so remarkable about it?



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- Linkage Human Rights-Environmental Rights
 - The right to a healthy environment = "fait accompli"
 - Its primary scope: Procedural rights
 - "Jeffersonian" Convention: Civil Society becomes the key player
 - States are facilitators to participation (linkages with State theories and Governance theories)
 - " States acts as a sort of referee in a process involving larger societal forces, leading to a more home.grown and complete result. This notion of the role of the state is increasingly replacing th discredited notion that society's problems can be solved through engineering by experts" The Implementation Guide
 - An environment agreement, an admistrative agreement or a good governance treaty?
(accountability, transparency, responsiveness, participation)

Art. 2 - Definitions: “legal tricks”



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- Important role in the interpretation and implementation of an international treaty
 - Aim of the convention: contributing to develop international standards for domestic legal systems => definitions are important
- “in the framework/in accordance with national legislation”: not defined... open interpretation:
- a) Is it a moderating clause?
 - b) A flexibility clause in the means of implementation? Or also in the scope?
 - c) Is then the convention a “floor” or a “ceiling”

General Dispositions (Art.3)



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- Compatibility requirement & Proper enforcement (art. 3.1)
 - Best efforts from the Public authorities (art.3.2.)
 - Environmental Education
 - NGOs Role
 - The convention is a “floor” and not a ceiling : maintaining or introducing more positive measures
 - Promoting PP in international fora
 - Anti-harrassment & non discrimination clauses

Remarkable but not perfect An unbalanced agreement



The 3
Pillars
of the
Convention

PRINCIPLE 10

ACCESS TO
INFORMATION
(Strongest)

RIGHT TO
PARTICIPATE IN
THE DECISION-
MAKING

ACCESS TO
JUSTICE

FIRST PILLAR

The Right(s) to Access to Environ'l Information



- Art. 4 : "Passive" Disclosure of environmental Information
 - Right to request information from public authorities (without justifying any interest)
 - Large definition of environ'l information
 - Restrictive approach to the exemptions
 - Obligation to motivate refusal (explicit answer)
 - Procedures for disclosing information: delays, format, price.

Access to information

Article 5.- “Active” divulgation of environmental information / Organization of the public system of environmental information

- Obligation for authorities to “possess” the information (sufficient and updated) and to disseminate it
- Obligation to inform the public in cases of emergency
- The different types of information about the environment (Reports, legislation, plans, policies, consumer information....)
- “Meta-information” : information about the information
- Obligations for civil servants

Access to information

- Information is the dimension by which public participation has been first conceptualized in the legal literature: most administration had the “secret” rule as point of departure
- Dimension that is really “mature” (subjective rights of the individual & State obligations to provide the structure to make them effective)
- Yet it is a dimension that is still evolving
(information in the hands of private companies, organization of the systems of information, such as for example, regarding the water resource, the whole “WISE” Water Information System for Europe)

SECOND PILLAR

The Right to Participate to Decision-making



- ☞ Second Pillar = public participation
- ☞ Public participation is not defined :
Indications from the Preamble about the function of public participation
 - Improving quality of decisions
 - Increasing legitimacy of decisions (and facilitates implementation)
 - Reinforces democratic systems
 - Increases environmental awareness
- ☞ Classical distinction of 3 categories of decision-making:
 - Specific Activities (Art. 6)
 - Strategic Decisions (Art. 7)
 - Rule-making (Art. 8)



Participation in Decisions on specific activities (Art.6)



- Decision making by public authorities on whether to permit certain activities (having an impact on the env't)
- Scope of the Convention (// EIA & IPPC Directives)
 - Large industrial/energetical/waste facilities
 - Transport infrastructures (Highways & Express Roads, Ports, Railways, Waterways)
 - Groundwater abstraction > 10 million m³
 - Works for Transfer of Water resources
 - Waste-water treatment plants
 - Agro-alimentary sector (intensive rearing, food processing)
 - Activities where public participation is provided under an EIA procedure according to national legislation
 - Does not require establishment of permitting procedures, but that if and once they exist, public participation requirements be met

General requirements under article 6



- Conduct public participation early in decisions (when options are open)
- Give notice to the public concerned (= affected or likely to be affected, environmental NGOs)
- Establish reasonable time-frames for phases of public participation
- Provide all relevant information, free of charge, including information about the procedure, and the opportunities and modalities to participate
- Art.6 precises the minimum information to provide
- Procedures for public participation (writing, public hearing)
- Take due account of the outcome
- Prompt Information to the public of the final decision
- Motivate the final decision

Participation in Strategic Decision-making (art.7)



- Short Article
- Relies partly on Art.6 (6.3, 6.4., 6.8) => Much more limited
- Obligations are nonetheless clearly stated:
 - Make appropriate provisions for the public to participate during the preparation of plans, programmes and policies
 - Obligation to define a clear framework for that participation:
 - a) identification of the public,
 - b) reasonable time-frames,
 - c) provide for early public participation (when all options are open, when effective participation can take place)

Some insight can be gained from the Implementation guide

- Develop clear rules for participation
- Develop mechanisms for notification
- Guidelines and standards for the quality of the information
- Implicit prerequisite to develop procedures of strategic environmental evaluation
- Develop tools for identifying the public

Supervise how public authorities take comments into account

Participation in Rule-making (Art.8)



“public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.”

- Recognizes that members of the public have a role to play in the developments of laws and normative acts.
- Light obligations: measurable on the basis of the efforts produced

General requirements under art.8

- Sufficient time-frames
- Publication/Public availability of draft rules
- Right to make comments
- Public participation should be taken into account “as far as possible”

THIRD PILLAR

Access to Justice



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- “ex-post” participation
 - Ensures consistent and effective implementation of the participatory rights
 - Access to justice in general (national fundamental right, european and International HR)
 - Access to justice in the Aarhus Convention= members of the public must have legal mechanisms that they can use to gain review of potential violations of:
 - Access to information Rights (9.1.)
 - Participation Rights (9.2.)
 - Environmental law (Art. 9.3)
 - Legal mechanisms : 2 types to justice:
 - a) Judiciary procedures: Administrative, Civil, Criminal
 - b) non-judiciary mechanisms (Denmark)

The need for strengthening rights to access to justice in environmental matters



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- Benefits of an enlarged access to courts
NGO's law suits - Enforcement of national law and community law
(France and the Natura 2000 directive)

Reinforces Culture of Participation

- Many obstacles to environmental justice of different nature in the Parties to Aarhus Convention
 - Issues of standing ("right to stand" in court and demand judiciary review of decisions)
 - Administrative > Civil > Criminal
 - "recognized" associations
 - The difficult "interest" tests to stand (legitimate, sufficient, direct...)
 - Limited Access to judicial remedies
(damages award, injunctions, penalties & fines...)
 - Problems of length and costs of judiciary procedures
 - Training in environmental issues for the judiciary bodies
 - Capacity of NGOs
 - Judiciary Culture
 - Difficulty of showing the link between the cause and the effect

Access to Justice

- Relatively weak pillar of the Convention
- “(...)Access to justice is the one “pillar” supporting the whole environmental rights structure which reminds us most spectacularly that the Aarhus Convention does not provide all the answers. It is not just that the convention is relatively weak in handling access to justice. Beyond that is the knowledge that even this minimal level of achievement required difficult struggle. The very incompleteness of the pillar itself emphasizes the failure of the drafting parties to accept on a political level that environmental protection is intertwined with democratization and fundamental notions of justice

3. Institutional Setting and Compliance Regime



CONVENTION BODIES

Meeting of the Parties (Lucca 2002, Almaty 2005)

Bureau of the meeting of the Parties

Secretariat

SUBSIDIARY BODIES

Working Group of the Parties

Compliance Committee

Working Group on Genetically Modified Organisms

Working Group on Pollutant Release and Transfer Registers

Task Force on Access to Justice

Task Force on Electronic Information Tools

Task Force on Financial Arrangements

Task Force on Public Participation in International Forums

Long Term Strategic Planning

Compliance Regime

- COMPLIANCE
“state of conformity or identity between an actor’s behaviour and a specified rule”
- Art. 15 Aarhus Convention, Art. 22 Kiev Protocol to the Aarhus Convention
 - Non confrontational
 - Non Judicial
 - Consultative nature
- Compliance Committee
 - Submissions by another parties (Romania v/ Ukraine on a water canal regarding the Danube: violation of the right to inform and consult the public at an early stage, art. 6.2.e)
 - Submissions by the parties themselves
 - Submissions by NGOs/Public (18 so far, Hungary, Poland, Albania, Armenia, Romania, Ukraine, Lithuania, Kazakhstan Denmark, Belgium, EC- violation of 9.2 by IPPC Directive)
 - Submissions by the Secretariat

4. SUBSTANTIAL DEVELOPMENTS



- Pollutant Release and Transfert Registers : Adoption of a Protocol to the Convention (Kiev, 2003)
- Genetically Modified Organisms Amendment to the Convention (Almaty, May 2005)

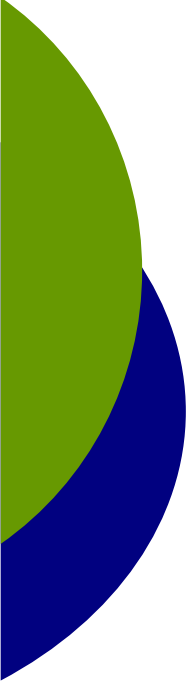
4.1. The Kiev Protocol

- Objective (Art.1):
«enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (...), which could facilitate public participation in environmental decision-making as well as contribute to the reduction of pollution of the environment.»

The Kiev Protocol

Defines the “core” elements of a PRTR:

- Publicly accessible & user-friendly
- Reports on point sources of pollution, but also diffuse sources information
- Multimedia (air, land, water)
- includes transfers of pollutants
- Allows for public participation in its developments and modification
- Information has to be identified according to different criteria (location, activity, companies, type of pollutant, media)

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- Obligations bear on
 - a) The State to organize such an information system
 - b) The owner or the operator of each individual facility to

4.2. The “Almaty” Amendment

- Light provision in the Convention (Art. 6.11)
- Guidelines with respect to GMOs, (Decision I/4, May 2002)
- Amendment adopted at the Almaty Meeting of the Parties (Decision II/1, October 2005)

New Article 6.11: article 6 does not apply to decisions concerning the deliberate release of GMOS into the environment or decisions related to placing GMOs on the market

Article 6 Bis applies in those cases

- + Complete article regarding the public participation requirements
- + Establishes clearly what cannot be “confidential” information
- Provides for the possibility of exceptions to public participation



III. Implementation in the EU



Implementation = the process of putting commitments into practice

1. ADOPTED INSTRUMENTS

2. PENDING ISSUES

1. Adopted instruments

- Directive 85/337/as amended by Directive 97/
- Directive 2000/60/EC on Water Policy
- Directive 2001/42/EC on Strategic Environmental Assessment
- Directive 2003/4 on Access on Information (repeals and replaces 90/313/EC)
- Directive 2003/35 providing for public participation in respect of drawing up certain plans and programs, and amending Directives 85/337 & 96/61
- European Pollutant Emission Register (17/7/2000) implements the Kiev Protocol

Participation in strategic decision-making in the EU



- Aim of the 2001 SEA Directive : To ensure that environmental consequences of Plans and programmes are identified and assessed before adoption
- Scope of the SEA Directive
 - Transport
 - Energy
 - Waste
 - Water
 - Industry
 - Telecommunications,
 - Tourism
 - Town and Country Planning
 - Land Use
- Defines the procedure

Participation in general rule-making



- Participation in advisory bodies (Social and Economic Committee, Committee of the Regions)
- White paper on European Governance (2000)
- Open Method of Coordination
- Communication on Interactive Policy-Making COM (2001) 1014
- Extended Consultation procedures

Communication from the Commission "Towards a reinforced culture of consultation and dialogue- General Principles and minimum standards for consultation of interested parties by the Commission" COM (2002)704

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2. Pending issues

- Proposal for a directive of the European Parliament and of the Council on Access to justice in Environmental Matters [COM (2003) 624]
- Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to EC institutions and Bodies [COM (2003) 625]

The problem of Access to Justice in the EU



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- The issue of standing to redress general norms (action for annulment based on Art. 230 EC)
 - Institutional actors (EU Bodies, Member States) : privileged applicants
 - Individuals' position: more delicate
 - Regulation 1049/2001
 - a) provides for an "appeal", right to ask the body that took the decision to revisit the decision
 - b) Right to take action before the Ombudsman or the CFI
- Art. 230.4 : direct and individual interest
- Difficult to bring cases relating to diffuse interest under this article
 - Restrictive approach of the EU courts
 - *Plaumann v Commission*, C- 35/62 (Plaumann test), *Codorniu v 309/89*, *Pfizer Animal Health v Council* 2002. (T-13/99)
 - *GreenPeace v Ministère de l'Agriculture et de la Pêche* (C-6/99)
- Yet, some rethinking is happening (Advocates' general opinions)
- *Union de Pequenos Agricultores v. Council*
 - *Jego-Queré and Cie v Commission*

IV. National Implementation

Implementation of the Aarhus Convention in France

- Overall : compatible (1976-EIA; system of public hearings for environmental issues since 1983; system of public national debate for since 1995, recognition of the principle of public participation of environmental matters in the Constitution "Charte de l'environnement" 2005
- Generally done within EU implementation deadlines
- Implementation takes places through minor adjustments
- Legislation slightly modified after proceedings by the EU Commission against France on the ground of Directive 90/313/EC (explicit notification of refusing information, with motivation of the decision)
- Law n° 2002-76 du 27/02 relative to local democracy
- Ordonnance 2004 transposing directive 2001/42
- Law 26/10/2005 transposing directives 2003/4 and 2003/35
- Direct applicability of the Aarhus Convention recognized by the national courts

National Implementation

- Implementation of the Aarhus Convention in Spain/Italy
- National background: Constitution, general administrative law & legal doctrine
- Environmental Law: fragmented, disparate regional laws
- Compatibility? Medium-low
- Late implementation & mostly stimulated by EU laws enforcement procedures
- Mostly understood through the first pillar

Law 38/1995 on Access to environmental information (Spain); Regulation 27/02/1997

Law n°27/2006 of 18 July 2006 on the rights to access information, participate to decision-making and access to justice in the environmental matters; Decree n°152/2006 reorganizing the laws on the environment and transposing EU directives

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