Aarhus Convention and Community Law: the Interplay

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I. Introduction

This article will examine the interrelationship of the Aarhus Convention and European Community law. The main thesis is that while the Convention is based on experience gained from the implementation of earlier pieces of relevant Community legislation and the desire to transfer them "Eastward", the final outcome has outgrown the original intention of the Convention and it now appears to be a breakthrough and a driving force for the development of enhanced Community legislation in the respective fields. However, this development is rather patchy, for while in relation to access to information, the first pillar of the Convention, there seems to be a willingness to go a step further than required, the approach in relation to the two other pillars is rather more cautious, not to say restrictive.

This article focuses on selected topics without attempting to provide a comprehensive coverage of all the potential issues involved. In particular it does not intend to provide a detailed analysis of the Convention and the relevant pieces of Community law nor all the legal issues related to their interrelationship.

II. Background

The Aarhus Convention represents the first binding international instrument that attempts to address, comprehensively and exclusively, the issues of citizens' environmental rights. The Convention rests on three pillars, each of which finds its precedent in Principle 10 of the 1992 Rio Declaration, and these are: access to information (Articles 4 and 5), public participation in decision-making (Articles 6–8), and access to justice (Article 9).

In many European countries issues like transparency, public participation and the possibility of filing law suits in the public interest are still relatively unknown and therefore seen as new ideas. They reflect a concept of 'open' government that is strange to many European administrative cultures with their traditions of secrecy and aversion to public involvement.

It is no secret that Community law was for a long time heavily influenced by the administrative traditions and cultures of continental Europe, most of which still reflect traditional 19th century conceptions concerning the relationship of the state and its citizens. According to these conceptions, the role of citizens in the administration of their country was limited to voting once in a while in order to give the authorities their democratic mandate. This approach coincided with the emergence of scientific expertise and its increasing role as a determiner of fact and policy, even in respect of social life, and which reached its zenith with the experiment of scientific socialism in the 20th century. It was only in the 1940s that the U.S. underwent administrative reforms which heralded a departure from the traditional understanding of the so-called "thin democracy" and a move towards a more open government and participatory democracy. These reforms, which were, significantly perhaps, an outgrowth of the Progressive Movement rooted in the Scandinavian settlements of the U.S. Midwest, were then followed by changes in administrative law and procedure which reflected the growing role of laymen in the decision-making process.

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A major difference between the traditional European and American approaches is that most European societies are not accustomed to considering the relationship between the state and its citizens in contractual terms where administrative procedures are concerned. Europe tends to the view that the state is a structure which creates and expresses the unity of the nation rather than a forum for different, competing interests of individuals, social groups and organizations. Thus, the law is not perceived in terms of rules expressing social compromise (the compromise between the interests of different groups) but as rules expressing the common interest which is conceived to be the interest of society as a whole. As a result traditional administrative procedures in much of Europe express a dichotomy where, on the one side, the administrative authority represents the public interest, while, on the other, parties to a procedure represents their own individual interest.

Consequently, this model prefers "cabinet" proceedings in which only experts are invited to participate. It is difficult to introduce public rights of participation to such decision-making processes. The public hearing, which originates from a system where participation is treated as an individual right, often has a formal character due to the administrative authorities apply strict procedures and is especially ill-suited to this form of decision-making. But more fundamentally, many European authorities are reluctant even to hold public hearings because little value is placed on information contributed by the public, whilst there is heavy reliance on "qualified experts" and their opinions, something which is especially noticeable in environmental decision-making. Moreover, withholding information helps to perpetuate the image of the public as ill-informed.

In recent years the complexity of environmental issues and the severity of the global environmental threat have required new solutions, among them public participation and access to information. The above-mentioned administrative reforms in the U.S. gave rise to - among other mechanisms - environmental impact assessment, the core of which is access to information and public participation. It is commonly acknowledged as well that the successful experience with these new instruments has had a major influence on how these issues have been addressed in Community law.

III. Substantive roots of the Convention

In 1985, following several years of controversial debates, the European Community adopted Directive 85/337 on EIA, an important part of which were the provisions on public participation in decision-making. In fact this was the first piece of Community environmental legislation which set out such clear and relatively elaborate requirements for public participation in decision making. The Directive, however, as opposed to the archetype of EIA introduced by the US National Environmental Policy Act of 1969, limited the application of EIA to certain projects only. Thus, strategic documents such as plans, programmes, policies and legislative proposals were neither made subject to EIA nor were there any requirements to provide for public participation in their preparation.

Another milestone in Community legislation that addresses "environmental rights" was the adoption, in 1990, of Directive 90/313 on access to environmental information. This directive introduced the concept of openness into Community legislation. Following its American predecessor (Freedom of Information Act of 1966) it focuses, however, merely on the passive dissemination of information (i.e access to information upon request), while insufficiently addressing the issue of the active dissemination of information by public authorities.

Studies conducted to examine the implementation of both Directives showed a number of issues where improvement was needed in relation to both public participation and access to information. In the area of public participation some improvement was brought about by Directive 96/61 on