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ÅRHUS CONVENTION

There is currently a perceived lack of trust between people and their governments, especially where environmental matters are concerned. The Århus Convention[1] is seen as an important tool for improving this situation. It is founded on the belief that citizens' involvement can strengthen democracy and environmental protection. Kofi Annan described it as "the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations". Furthermore, it is the first Convention that aims to make these rights for enhanced democracy enforceable by the courts. This POSTnote looks at the progress of introducing the Århus principles into national legislation, the successes achieved and the difficulties encountered.

Background and current situation

Named after the Danish city of Århus (or Aarhus) where it was adopted under the auspices of the United Nations Economic Commission for Europe (UNECE[2]), the Convention was signed in 1998 by 39 of UNECE's 55 member countries and the European Community. 37 have ratified it; the UK did so in February 2005 (Box 1). The Convention is officially known as the "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", and contains – as the title suggests – three broad themes, also called pillars. Legislation resulting from these pillars has already started to take effect in the UK.

The Convention is essentially an elaboration of Principle 10 of the Rio Declaration (1992). This defines access to information, public participation and effective access to judicial and administrative proceedings as the basics of an inclusive approach to dealing with environmental issues. Even before Århus, European Union (EU) legislation already endorsed these principles in some areas of its law. With previously unprecedented participation by non-governmental organisations (NGOs), governments then developed these provisions further to form the three pillars of Århus.

Box 1. Implementation of the Convention

The Århus Convention has to be ratified by individual states before it becomes binding on them. It thereby gives its Signatories time to adjust their domestic legislation. This, for example, involves drawing up the legal instruments needed for compliance with the Convention. Once a Signatory is ready to ratify, it deposits its 'instruments of ratification' with the Secretary General of the UN. Typically, a treaty comes into force and becomes legally binding after a certain number of its Signatories have ratified it. Those Signatories then become Parties to the treaty.

Under the Århus Convention, Parties assess their own progress of implementation through national reports. These are regularly submitted to the Århus Convention Secretariat. Another measure to improve compliance by the Parties was introduced through the Compliance Committee. Parties or members of the public may contact this institution in connection with cases of non-compliance by other Parties. The Compliance Committee, which consists of eight independent experts, can then issue recommendations that are subsequently discussed at Meetings of the Parties.

Regional in its approach and scope, the significance of the Århus Convention could be global. Although the public in the UK remains largely unaware of it, the Convention is seen as having strengthened the procedural environmental rights of citizens in Europe and Central Asia[2,3]. Especially in countries with economies in transition, political leaders and NGOs regard it as a major incentive framework for the development of environmental democracy and civil society in general.

The three pillars of Århus

Access to information

Pillar I gives citizens the right to access environmental information held by public authorities (at national, regional and other levels), private companies providing public services, and institutions of the EU. It thereby aims to make the work and services of governments and public authorities more accountable and to increase transparency.

The definition of "environmental information" is intentionally kept broad. It includes information about elements of the environment (such as air, water, land, genetically modified organisms (GMOs) and biological diversity), as well as factors (noise, radiation), activities and measures that might affect them. The state and condition of human life, health and safety have also been classed as environmental information, insofar as they may be affected by any of the above specifications.

Dissemination of information
To improve public access to this information, the Århus Convention has made several provisions for its dissemination. Governments and public authorities are responsible for possessing and updating all information relevant to their functions. Moreover, they are under an obligation to disseminate this information using proactive and passive approaches. Being proactive includes, for example, making environmental information progressively available in electronic format and providing assistance for its use. Here, one of the ultimate aims is to establish nationwide schemes of pollution inventories on structured, computerised and publicly accessible databases (Box 2).

Box 2. Kiev Protocol on Pollutant Release and Transfer Registers (PRTRs)
International conventions usually allow for later additional protocols to amend, supplement or clarify provisions made in the original document. The Kiev Protocol to the Århus Convention, adopted in 2003 and signed by 36 States and the European Community, is an example. It aims to improve public access to information by putting its Parties under an obligation to establish coherent, nationwide PRTRs.

With an user-friendly and easy-to-access format, PRTRs can act as public inventories for a range of pollutants from industrial and other sources. While having a regulatory effect only on pollution information rather than pollution directly, Parties to the Convention envisage PRTRs will increase corporate accountability. The expectation is that PRTRs will ultimately reduce pollution levels as companies will not want to be exposed as significant polluters.

The passive approach requires public authorities to respond to requests for environmental information. These can be made by any person or organisation without having to justify the inquiry. Under the Convention, the request has to be handled within 1 month, unless the volume and complexity of the inquiry justify an extension up to 2 months. A "reasonable amount" may be charged for providing the information. If the authority does not hold the requested information, it has to inform the applicant or redirect the request to the authority which it believes to be appropriate.

Exceptions
Public authorities have a finite set of exceptions to justify refusal of a request. These are similar to those in the Freedom of Information Act (2000) and must be interpreted restrictively. For example, they may be applied only if sensitive issues such as international relations, public security, the confidentiality of commercial and industrial information (excluding emissions information), or the need to protect the environment, such as breeding sites of rare species, are affected. To prevent authorities from applying these exceptions excessively, they have to take the public interest in disclosure into account and show that they have done so if their decision is appealed.

Legal status
The first pillar has been implemented in EU legislation through Directive 2003/4/EC on Public Access to Environmental Information. This was transposed into UK legislation through the Environmental Information Regulations (EIR) 2004, with separate but similar arrangements for Scotland. Enquiries about matters covered by the Regulations are addressed to the relevant public authorities. If citizens feel that their requests for information have been unlawfully declined, they can contact the Information Commissioner (IC) office. The IC office acts as an impartial review body for public authority decisions and has the power to request the release of previously withheld information. Five of the first six decision notices on EIR provisions made by the IC regarded disputes over whether the fees charged by authorities for information were "reasonable".

Implementation
Friends of the Earth (FoE) has positively commented on the EIRs' success in transposing Århus' first pillar into UK legislation. The far-reaching definition of environmental information in the EIRs is seen as the cause of their effectiveness. Although the Department for the Environment, Food and Rural Affairs (Defra) and the IC have produced website guidance for the public about its new rights under Århus[4], FoE still feels that the task of informing the public about these rights is mainly left to NGOs. Countries outside the EU with economies in transition have taken a completely different approach to informing the public. Some governments have been strongly involved in the creation of 'Århus Centres' (Box 3), which offer citizens a wide range of information relating to the Convention.

Box 3. Århus Centres in EECCA[2] region
As part of implementing the Convention in the EECCA region, some Ministries of the Environment have created environmental information centres, also called 'Århus Centres'. These centres aim to provide a forum for dialogue between NGOs, the public and state officials. Rather than just giving free access to environmental information, their focus also extends to raising public awareness through public hearings on pending legislation, press conferences, and the offering of legal advice. Additionally, they hold environmental education initiatives for children.

The Århus Centre in Yerevan, Armenia, established in May 2002 shortly after the country ratified the Convention, became a model for the region. To encourage public participation and increase exposure of environmental issues in the media, the centre involved the public in the preparation of its national report on the Århus Convention and organised events specifically targeted at journalists. Many of the centre's outreach activities aim to extend beyond Armenia's borders, highlighting the cross-border relevance of environmental issues.

The result is a higher level of public awareness of Århus principles in these countries. In addition, many states from the EECCA[2] region were in the forefront of ratifying the Convention, often before signing up to other regional or international treaties[3]. While challenges in implementation undoubtedly remain, it appears that in countries with young democratic systems, the Convention has been particularly successful in its aim of promoting both environmental protection and more democratic principles in general.

Public participation in decision-making

Pillar II gives citizens and NGOs promoting environmental protection the right to participate in decision-making processes. To ensure their adequate involvement in these procedures, it provides for the early release and circulation of all "relevant information" before decisions are made. It also obliges governments and public authorities to take "due account" of the outcome of the public participation.

The main areas affected by provisions of the second pillar are proposed activities in the energy, industry, transport, waste and water management sectors. Plans, programmes, the preparation of legal instruments and policies relating to the environment are also included.

Legal status

Directive 2003/35/EC transposes the second pillar of the Århus Convention into Community legislation. First, it amends existing EU legislation by improving public participation provisions in the Environmental Impact Assessment (EIA) and the Integrated Pollution Prevention and Control (IPPC) Directives. Second, it introduces provisions for public participation in the preparation of environmental plans and programmes to six existing Directives on waste, air pollution and protection of waters against nitrate pollution. UK legislation translated the amendments to the EIA and IPPC Directives into the draft Town and Country Planning (2005) and the Pollution Prevention and Control (England and Wales, 2005) Regulations, respectively. It is expected that the draft Regulations will come into force early in 2006.

Implementation

Implementing the second pillar has been problematic. Given the many discrete policy areas involved and the need to meet EU time limits, the competence for public participation has been split between different legal instruments and thus different government departments. With public participation legislation mainly focusing on EIA, IPPC and planning, it provides insufficient coverage for other areas affected. For example, breaches of the Habitat or the Birds Directive that are not caused by an EIA or IPPC project are not covered under current legislation[5]. Additionally, no central point of reference in the public participation arena exists (unlike with the IC). Awareness of the Århus provisions is as a result very patchy and few practitioners in the biodiversity and conservation field, and even in planning, know of its existence. Practitioners broadly agree in their concern about a lack of guidance in this matter and have asked for government guidelines, for example on what would constitute a 'good' decision-making process. In the current situation, facilitators and consultants themselves are defining 'good practice'.

The need for public participation

Society today faces a whole range of high risk decisions, many of which are based on scientific models, for example climate change, biotechnology and GMOs (Box 4). Public participation is essential to give these decisions legitimacy, especially in cases where experts do not agree on risks and benefits. Consequently, there is no need for completely informed views at the onset of participatory processes. Rather, problems have to be highlighted early "when all options are open and effective participation can take place". At the moment, however, consultations, which do not have to take account of the opinions given, remain the key instrument used by decision makers. Since Directive 2003/35/EC has not achieved any real changes to this established practice, practitioners and FoE see it as a low level interpretation of the Århus principles, and as having failed to translate its ideas into legislation.

Box 4. Århus and genetically modified organisms

Initially, the Århus Convention to a certain extent exempted GMOs from its public participation obligations. It was only at the first Meeting of the Parties that a decision to address this exceptional situation was made. More than 2 years later, a legally binding amendment to the Convention was finally agreed. Parties now have to provide for "early and effective" public participation procedures before decisions on the deliberate release of GMOs into the environment or their placing on the market are made. The amendment will come into force only after three quarters of the Parties ratify it.

Although the amendment goes little if anything beyond requirements under current EU Directives, it initially faced serious resistance by some Member States (MS). It was argued that issues on GMOs were already covered by other more appropriate international agreements, such as the Cartagena Protocol on Biosafety. However, several EECAA[2] and SEE[2] countries felt that these agreements did not make sufficient provisions for public participation. The new amendment under Århus is therefore intended to help these countries to upgrade their standards to a level comparable with the EU.

The role of NGOs

NGOs have played a key role throughout the evolution of the Convention. Initially, the very idea for developing such a UNECE treaty was introduced by NGOs themselves[3].They were further involved in drawing up the original document and had a significant influence on the outcome of the negotiations. NGOs have since taken part in monitoring the Convention's implementation and continue to play an integral part in the process itself.

Access to justice in environmental matters

Pillar III aims to guarantee citizens and environmental NGOs the right of access to justice and enhance their involvement in environmental law enforcement. It seeks to achieve this by guaranteeing them access to review procedures when their rights to information, participation or environmental laws in general have been breached.

Environmental justice
Being the first environmental agreement that links environmental and human rights, the Århus Convention also addresses the rather philosophical question of what constitutes environmental justice. As outlined in Article 1 of the Convention, its objective is "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 wellbeing". Academics believe that this touches strongly on issues of environmental equity and sustainability. Research commissioned by Defra to identify key issues and problems in these areas in the UK is underway[6].

Access to justice
To guarantee citizens the right of access to justice in environmental matters, the Århus Convention makes several provisions on how this may be achieved. Yet, recent studies[5,7] suggest that some of the difficulties encountered by citizens exercising this right contravene the requirements made by the Convention:

- lack of visible and accessible advice centres for most affected communities;
- restrictions on the legal standing of NGOs before the courts in some Member States (MS);
- lack of civil penalties and interim relief measures (to maintain status quo during a trial);
- risk of high legal costs and lack of public funding for environmental cases serving public interest;
- low level of expertise of magistrates and judges in environmental law issues.

Overall, costs are seen as the most significant barrier to accessing justice. This is despite provisions under Article 9(4) and (5) of the Convention, which require Parties to ensure costs are not prohibitively expensive and to reduce or remove financial and other barriers.

Legal status
Provisions to challenge breaches of access to information and public participation rights have already been made by the two Directives (2003/4/EC, 2003/35/EC) dealing with these subjects. However, these did not address breaches of environmental law in general, covered by Article 9(3) of the Convention. The Århus provisions leave some room for discretion to the Parties as to how far they guarantee their citizens access to justice in this matter. To cover this area and to create a level playing field between MS, a European Directive on Access to Justice in Environmental Matters, backed by NGOs and some lawyers alike, was proposed in 2003. As it touches on sensitive issues concerning national jurisdiction, the proposal has triggered a fair amount of hostility from MS, greatly reducing its chances of adoption.

The UK Government believes that the current proposal merely reiterates the provisions made by the two previous Directives. It also regards any additional issues addressed by the proposal, such as the legal standing of NGOs, as already guaranteed under UK law. Opinions about the necessity of an Access to Justice Directive in general also differ at the UNECE level. While some officials regard its adoption as more a political than a legal requirement, others consider it a necessity for the EU and its MS to become compliant with the Convention. Normally, EU legislation aims to establish similar EU-wide standards in, for example, the areas of economy, transport and the environment. Some EU officials have argued that it would be paradoxical to uphold the national principle where matters of transboundary relevance, such as legal disputes relating to the environment, are concerned. Without the Access to Justice Directive in place, NGOs are currently debating a referral of the EU and its MS to the Compliance Committee in May 2006. As expressed by the European Eco Forum, a pan-European coalition of environmental NGOs, without effective provisions on access to justice, the Århus Convention "might be seen as consisting of two pillars and a broken stick".

Overview

- Overall, the Århus Convention has been seen as a big step forward in providing more rights to citizens and NGOs in environmental matters.
- Not surprisingly, the actual implementation of the ambitious aims laid out in the original document created some problems.
- The first pillar of the Århus Convention has been successfully transposed into EU and UK legislation.
- Implementation of the second pillar received some criticism. This centred mainly on the fact that legal provisions on public participation were split between the different areas affected. Practical guidance by the Government, specifically produced for practitioners in the UK, could help to overcome this.
- Opinions about the implementation progress of the third pillar diverge. The prevailing view was that with the EU proposal for an Access to Justice Directive still pending, the public are lacking measures for effective environmental law enforcement.

Endnotes

1 http://www.unece.org/env/pp/
2 The UNECE region includes Europe, Central Asia, Israel, Canada and the United States of America. The EECCA region includes countries in Eastern Europe, the Caucasus and Central Asia, and the SEE region South-Eastern Europe.
3 Jeremy Wates (2005) "The Århus Convention: a Driving Force for Environmental Democracy." *Journal for European Environmental & Planning Law* 2(1): 1-11
4 http://www.informationcommissioner.gov.uk/
5 de Sadeleer N. *et al.* (2002) Access to Justice in Environmental Matters, Final Report ENV.A.3/ETU/2002/0030.
6 Lucas K. *et al.* (2004) Environment and Social Justice: Rapid Research and Evidence Review. Policy Studies Institute.
7 http://www.defra.gov.uk/environment/justice/

POST is an office of both Houses of Parliament, charged with providing independent and balanced analysis of public policy issues that have a basis in science and technology.

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