

THE AARHUS CONVENTION AND ACCESS TO ENVIRONMENTAL JUSTICE IN THE EU AND SERBIA

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Abstract

Environmental protection has become one of the major global concerns that is addressed as an "environmental crisis" which is spreading not only to economy and politics, but also to law. This is the reason why it must be resolved through international environmental cooperation and organizational mechanisms. Consequently, this has resulted in growing demands for legal regulation ensuring efficient environmental protection, involving the concept of "access to environmental justice". Although the original EC/EU treaties only had indications of a European environmental policy, the Maastricht Treaty (1992) defines the aims of the new Union which include a common environmental protection policy. In this context, the Aarhus Convention (1998) focuses on access to information, public participation in decision-making and access to justice in environmental matters and is substantially linked to international human rights and basic constitutional rights and freedoms. Access to environmental justice, as defined by the Aarhus Convention rests on the basic human right to a fair trial. Serbia has not joined the Aarhus Convention, but once current political obstacles are surpassed, it is reasonable to assume that Serbia would ratify the Convention and ensure its citizens "access to environmental justice".

Keywords:

Aarhus Convention, Access to Environmental, EU Law, Serbia

I. Introduction

Environmental protection has become one of the major global concerns. Consequently, this has resulted in growing demands for legal regulation ensuring efficient environmental protection. At the core of the issue is the objective to achieve a new approach in legal response which would render efficient environmental protection by utilizing legal methods and instruments to give interested parties access to environmental justice. Within the world legal framework different forms of legal regulation have been put into effect that include international, regional and domestic systems of protection. Given the unprecedented nature of the many environmental issues, massive bodies of legislation have been created through international treaties, EU regulations and directives, as well as domestic laws and regulations (Salzman, Thompson Jr. 2006; Wolf, White, Stanley, 2002; Ferry 2001; Morand-Deville 1987). Following the rapid development of environmental issues, the problem of compliance with new rules necessarily arose, especially because quite a few of them had specific characteristics which created new situations for administration, for tribunals and for the public itself. Within the EU, as well as within its member

states the functioning of agencies and the possibilities for the public to have the new rules enforced was in need of being clarified (Kiss 2002, p. V).

From the international point of view, the UN Aarhus Convention (adopted in 1998) focused on access to information, public participation in decision-making and access to justice in environmental matters. The Convention penetrated into issues which have previously been perceived as *domaine réservé* of individual states, making them now issues of international law (Ebbeson 2002, p. IX).

II. Environmental Crisis and Sustainable Development

Throughout the ages, human society has been confronted with numerous challenges that have been noted as world matters and global issues. Today it is generally accepted that one of such issues is environmental protection. This is supported by the fact that in literature, as well as in everyday life, environmental issues are addressed as issues of an "environmental crisis", defining them as "...circumstances and influences which exist in the environment and which threaten the stability and

functioning of the processes in the biosphere and the society" (Todić, Vukasović 2002, p. 1).

Searching for the causes of this environmental crisis, researchers most decisively point to the activities of man and mankind. Historically speaking, human influence on nature has always been present. However, this presence has previously been of a local character. Since the time of the industrial revolution, this influence has changed. From mid 20th century, these issues caused raising concerns and efforts have been made to identify the causes and factors that have lead to this. Generally speaking, two factors have been the cause of alarming concern regarding environmental protection: a) the raising population of the planet and b) the existing production models. Both of these processes cause the decrease of natural recourses and disruption in the environmental balance. Apart from the growing population, the issue of unlevelled development of the developed and underdeveloped countries and regions of the world is linked to the matters of food supplies, poverty and hunger. The possibilities of the poor nations to cope with this problem are very limited and this, in turn, puts pressure on natural resources. In this context, the majority of international documents stress that poverty is the one of the main factors limiting the efficient solution to environmental issues (Beckerman 2003).

Apart from the factors causing the environmental crisis; we can also identify the major environmental issues the world is faced with today. They include:

- global warming and high concentration of damaging gases,
- damaging influence of UV radiation on animal and plant life,
- overexploitation of non-renewable natural recourses,
- excessive contamination of the air, water and soil,
- lack of drinking water,
- presence of heavy metals in the food chain.

The enumerated causes and factors indicate that the very existential model of modern mankind is in jeopardy. The environmental crisis is spreading not only to economy and politics, but also to law. What is indisputable, is that this a crisis of a global proportion and that it demand and global solution. This is the reason why this type of problems must be resolved through international environmental cooperation and international organizational frameworks and mechanisms.

The answer to the environmental crisis is contained in the concept of "sustainable development" in modern environmental policy and law as set out in the *Rio Declaration* (1992). This means that the existing economic and social models are basically respected, but provided that the needs of the future

generations is not deterred by the needs of the world today. From the point of view of organized society this involves the concept of the access to justice in environmental issues.

III. International Aspects and Origins of EU Environmental Policy

The seriousness of environmental protection has resulted in the conclusion that solutions need the participation of the world community. This is best illustrated by the fact that today there are over 250 international treaties in this area and many more on the bilateral level. Environmental issues are also dealt by many international organizations. This had the crucial role in resolving environmental issues and many of them have produced rules and principles for their regulation. The most important role is that of the United Nations which made a vital change in the perception of environmental policy and law issues at the UN Conference on the Human Environment held in Stockholm in 1972 (Stockholm Declaration). Also, the UN Environmental Protection Program was established (UNEP). In the period following the Conference, there is a growing number of international, regional and other organizations dealing with environmental protection, including the EU (EC). This is of consequence for Serbia, as one of the few remaining European countries that have aspirations toward joining the EU (Prokopijević 2005).

The origin of the European Union is linked to three treaties of the 50-ies (Treaty of the Coal and Steel Community 1951, the Treaty of Rome 1957 and the Euroatom Treaty 1958). At that time the issues of environmental protection was not in the focus of the existing agreements. with the notable exception being the EUROATOM Treaty (1957) which stipulated that it had authority of adopting mandatory standards for radioactive contamination.

The original treaties had as their main aim economic objectives. However, two articles of the Treaty Establishing the European Community, (Treaty of Rome 1957) had indications of the European environmental policy. Although in a very general manner, Article 2 of the Treaty of Rome called for minimal measures in regard to the quality of life within the framework of harmonized and balanced development of economic activities, while Article 46 focused on the justified prohibition of export and import with the aim of protecting health, human life, as well as animal and plant life.

The following years, however, would focus on new ideas that would result in a number of documents supporting EC/EU environmental awareness. The UN Stockholm Conference (1972) inspired the Paris Conference of the same year, a date that would be marked as the birth of the EC/EU environmental policy. The Paris Declaration stresses the main aim of

the EC/EU environmental policy as being the lowering of risks for living conditions, and in these endeavors due attention must be given to environmental issues. The recommendation of this Declaration was that the Communities adopt Action Plans in the area of environmental protection (as in others fields). There were a number of subsequent Action Plans adopted, of which the first Action Plan (1973-1976) was most significant because it defined the general principles, goals and action to be undertaken in the field of European environmental policy. At the time, the main instruments were resolutions, which represented general instructions, leaving to the member states the options of implementing measures in them. This first Action Plan on environmental policy basically had three divisions: some of the principles were to be realized on the Communities level, some on the member-state level. Finally, some of the measures were to be implemented within action plans in other respective fields.

The further development of the EU continues with the adoption of the Single European Act (1986) which amended the previous treaties, particularly the EEC Treaty adding a new chapter VII under the title of "Environment" with three new articles (130r, 130s and 130t) which, as the main goals of the Community, include "protection and development of the quality of the environment, the protection of human health and the rational use of natural resources. The Maastricht Treaty, by which the EC was transformed into the European Union (1992), defined several diverse aims of the new Union, including a common cultural policy, common policy for consumer protection, as well as a common environmental protection policy. Environmental protection is now one of the priority goals of the EU and the principle of subsidiarity incorporated into it.

The fundamental sources of EU Environmental Law are the already mentioned founding Treaties. They have set the framework for the legal regulation of this field. Apart from them, sources of EU Environmental Law are the legal documents adopted by the institutions and bodies of the Union, which include regulations, directives and decisions (www.europa.eu.int/eur-lex/en/about/pap/_process_and_players2.html). Regulation are directly applicable and obligatory for all member states of the Union, and thus do not need support from national legislation, as is the case with Regulation (EC) No 1655/2000 of the European Parliament and of the Council of 17 July 2000 concerning the Financial Instrument for the Environment. Directives are binding in respect of the aim to be achieved, but leave to the national legislation options for the means and mechanisms of their implementation, as is the case with Directive 2004/35/CE of the European Parliament and of the

Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Decisions are binding in respect of to who it may concern, including member-state, individuals or legal persons, as is the case with Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

Apart from these, there are other acts of the EU that are not legally binding, but which represent important documents in realizing the EU environmental policy. These include recommendations, opinions and environmental protection standards adopted by international organizations (as is the case with the Aarhus Convention).

The harmonization of legal documents of the member-states is regulated by Chapter VI of the EU Treaty and Sub-Chapter 3 that deals with the Approximation of Laws. These articles prescribe that Council may adopt directives for the approximation of statutes, by-laws and administrative regulations of the member-states which are vital for the functioning of the common market (Article 94 of the Treaty establishing the European Community - consolidated text). If the Commission concludes that there are discrepancies in the statutes or administrative acts in the national legislations that jeopardize common policies, it will consult with the member-states and if the consultations do not result in positive solutions, adopt recommendations with respective measures. In this way, by harmonizing legislation and adopting general acts which are directly implementable, an integrated and harmonized system of legal rules is established in the legal system of the Union, including the field of environmental protection.

Today, the legal system of the EU enables citizens and their association's participation in policy decision-making in environmental issues. Not only can the citizens directly take part in deciding environmental law issues, but also take respective action and initiate procedure in protecting environmental fundamental rights.

IV. The Aarhus Convention

In the Preamble of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, 1998) was adopted in Aarhus, Denmark in June of 1998, and entered into force on October 30 2001, the Parties to this Convention, *inter alia*, recalling principle 1 of the Stockholm Declaration on the Human Environment, recalling also principle 10 of the Rio Declaration on Environment and Development, recalling further General Assembly resolutions 37/7 of 28 October

1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals, recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989, affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development, recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself, recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations, considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their right and recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns, agreed that "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." (Art. 1)

The Convention further states that (Art. 3): "Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.(...) Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters. (...)"

In regard to access to environmental information, the Convention, *inter alia*, states that (Art. 4-5): Each

Party shall ensure that, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information: a) without an interest having to be stated; b) in the form requested unless: it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or the information is already publicly available in another form. The environmental information shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it. A request for environmental information may be refused, *inter alia*, if: a) the public authority to which the request is addressed does not hold the environmental information requested; b) the request is manifestly unreasonable or formulated in too general a manner; or c) the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

In regard to public participation in decisions on specific activities, the Convention, *inter alia*, states that (Art. 6-8): Each Party shall apply the provisions of this article with respect to decisions on whether to permit proposed activities (listed in annex I); shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defense purposes, if that Party deems that such application would have an adverse effect on these purposes. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of: a) the proposed activity and the application on which a decision will be taken; b) the nature of possible decisions or the draft decision; citizens) the public authority responsible for making the decision; d) the envisaged procedure, including, as and when this information can be provided. (...) Each Party shall make appropriate practical and/or other provisions for

the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. (...) Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

In regard to access to justice, the Convention, *inter alia*, states that (Art. 9): Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused. (...) These provisions shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. (...) In order to further the effectiveness of the provisions, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

IV. Access to Environmental Justice

Environmental justice "...Has developed as a movement and concept of social science, with focus on the "unfair" distribution of the negative impact of modern society, such as risk exposure, but it also pertains to the means available - or rather the lack of means available - for those affected to achieve acceptable decisions. [Note: For one example, R.J. Lazarus, "Pursuant Environmental Justice: the Distributional Effects of Environmental Protection", 87 *Northwest University Law Review* (1993) 787, identifies five means of pursuing environmental justice in the U.S.A., which include both rethinking the substance of environmental laws and litigating

civil rights associated with environmental protection.] From this perspective, it is quite clear that environmental and social justice, by whatever standard, presupposes effective access to the administrative and legal system, so that rights can be vindicated and existing laws on the protection of health and the environment can be evoked. [Note: Cf. Cappelletti and Garth, "Access to Justice: the Worldwide Movement to Make Rights More Effective" in Cappelletti and Garth (eds.), *Access to Justice, Vol. III, Emerging Issues and Perspectives (Sijthoff and Noordhoff, Alphen an den Rijn, 1979)*, page 6, where they argue that "access to justice" focuses on "two basic purposes of the legal system - the system by which people may vindicate their rights and/or resolve their disputes under general auspices of the state. First the system must be equally accessible to all, and second, it must lead to results that are individually and socially just. (...).]" (Ebbeson, 2002, p. 8).

Within the so-called "three pillars" of the Aarhus Convention - i.e. access to environmental information, participation in environmental issues decision-making and access to justice, the "access to environmental justice" segment can be defined as "a means of having erroneous administrative decisions on environmental issues corrected by a court or another independent and impartial body established by law." (Ebbeson 2002, p. 8). The right to access to justice deals with two basic situations. "First, any person who considers that his or hers request for environmental information has been ignored, refused or not dealt with in accordance with the Convention shall be ensured access to a review procedure before court or another independent body (Art. 9/1). Second, any member of the public having sufficient interest or maintaining impairment of a right shall be ensured 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 (Art. 9/2). Access to justice is not limited to cases where the participatory of informational rights of the Aarhus Convention are infringed, but must also be granted in order to challenge the substantive legality of the decision. In addition to decision concerning specific activities, the parties shall ensure access to justice in cases concerning other relevant provisions of the Convention (e.g. decisions on plans and programmes) "where so provided under national law (Art. 9/2). (...) It essentially remained a matter for national law to determine what constitutes a sufficient interest and an impairment of a right, this must be defined in consistency with the objective of the Convention, to give the public concerned "wide access to justice" (Art. 9/3)." (Ebbeson 2002, p. 14).

The Aarhus Convention is substantially linked to international human rights and basic constitutional rights and freedoms (Hayward 2005). Access to justice, as defined by the Aarhus Convention rests on the basic human right to a fair trial. This connection can be seen in relation between the Aarhus Convention and other international documents pertinent to the protection of human rights such as the Universal Declaration of Human Rights (1948), the International Covenant of Civil and Political Rights (1966), and particularly the European Convention of Human Rights (1950). The Aarhus Convention definition of access to justice as access to a review procedure before a court of law and/or another independent and impartial body established by law derives from the basic human right to a fair trial and public hearing as prescribe by the Universal Declaration of Human Rights (Hancock 2003).

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) states that: "In the determination of his/hers civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law (Art. 6/1). Although, the Aarhus Convention is not structurally and institutionally attached to the European Convention of Human Rights (the Aarhus Convention is also open to non EU states), the similarity of language suggests that, "despite the autonomy of the Aarhus Convention vis-à-vis the ECHR, the case-law of the European Court of Human Rights provides some indication on what may qualify as independent and impartial under the Aarhus Convention as well."

V. Environmental Justice in Serbia

Referring to the case of Serbia, which to this day has not joined the Aarhus Convention, it should be mentioned that at present the EU ascension process of this country is "on hold", pending fulfilling conditions related to the cooperation with the International Tribunal for War Crime for the Former Yugoslavia. However, once the obstacles are surpassed, it would be reasonable to conclude that Serbia would ratify the Aarhus Convention and ensure its citizens "access to environmental justice". As pointed out: "Serbia (and Montenegro) is not member of the Aarhus Convention. The previous Federal Republic of Yugoslavia, due to well-known circumstances regarding the position of the county, was not even included in the preparatory activities concerning the drafting and adoption of the Convention. FRY did not take part in the ministerial conference at which the Convention was adopted, although NGO representatives from FRY participated. The first initiatives linked to the Aarhus Convention in Serbia were initiated in 1999 by the Regional Environmental

Center for Central and Eastern Europe and its office in Belgrade. Since then a number of activities focused on creating conditions for the ratification and implementation of the Aarhus Convention have been realized. (...) All these activities have contributed to informing the general public, as well as to creating a favorable atmosphere and raising public awareness regarding not only the Aarhus Convention, but environmental issues in general as well. These activities also contributed to governmental preparation for the acceptance of the Aarhus Convention. On these grounds, one can expect that further activities regarding preparation for a more intensive acceptance of the Aarhus Convention. Basically, the preparations deal with further harmonization of the legislation, the creation of an institutional framework for implementing the Convention, securing technical equipment for institutions, education and further work on raising public awareness." (Đorđević, Katić, 2004, pp. 11-13).

On the other hand, it could be said that in the existing constitutional and statutory framework, the "spirit" of the Aarhus Convention, at least in regard to environmental information (if not so much in regard to access to environmental justice), can be detected. Thus, the new Constitution of Serbia (2006) states that: "Everyone is entitled to a healthy environment and due and full information as to its state." (Art. 74/1). Also, the Law on Free Access to Information of Public Significance (2004), *inter alia*, states that: "It is considered that a justified interest of the public to know (...) always exists when pertinent information that authorities poses relate to endangerment and protection of health or the environment (...)" (Art. 4).

VI. Conclusion

Concluding, we can highlight the four main features of access to justice in environmental law issues.

a) Environmental protection has become one of the major global concerns. Consequently, this has resulted in growing demands for legal regulation ensuring efficient environmental protection. Within the world legal framework different forms of legal regulation have been put into effect that include international, regional and domestic systems of protection. Given the unprecedented nature of the many environmental issues, massive bodies of legislation have been created through international treaties, EU regulations and directives, as well as domestic laws and regulations.

b) The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998, entered into force 2001), provides for "three pillars of environmental justice". They include access to environmental information, participation in

environmental issues decision-making and access to environmental justice. In the European Union, the Aarhus Convention will bind the member-states that ratify the Convention, but also all 27 member-states once the Convention is ratified by the EU. In this case, the Convention is binding in regard to the legislation of all member-states regardless of the fact if an individual member-state is party to the Convention or not.

c) The Aarhus Convention, *inter alia*, draws its substantial values from similar international and European human rights documents, including the European Convention on Human Rights, particularly in the field of "access to justice", as the Aarhus Convention provides for a review procedure before a court of law and/or another independent and impartial body established by law.

d) In the case of Serbia, once that this country ratifies the Aarhus Convention it will be a step closer in the harmonization of its human rights standards and its legislation and court standards of rendering environmental justice within the general framework of the EU legal system.

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