

EU National Judges and the Aarhus Convention – How the Judiciary can further the Implementation of the Third Pillar

Before national judges can apply an International Convention like the Aarhus Convention that Convention should be well known, not only by judges and other judicial officers, but also by other legal stakeholders. Indeed, in our system, judges cannot make their own cases. Cases must be brought before them by those who are entitled to do so. Generally these persons relay or are even obliged to relay for that on professional lawyers.

I believe the Convention is already well known by the larger environmental NGO's and a lot of information on the Convention is directed to them. Although the situation may be different from one Member State to another, I have the impression that lawyers, especially those who are dealing frequently with environmental cases, have a growing knowledge of the potentialities of the Aarhus Convention. In general, lawyers will try to build up a case in the first place on the basis of domestic law. If domestic law is not sufficient, they will in the EU Member States turn to European Union Law and they can build in doing so on the case law of the Court of Justice of the EU. The existence of that Court and its case law is very important to convince national judges to take European Union Environmental Law seriously, even when it is not properly implemented in a Member State. That is an essential difference with International Law. International Law in general and International Environmental Law in particular is often seen as "a far from my bed show", something for diplomats, without practical effect in daily life. So it is very important that legal stakeholders are becoming aware that the Aarhus Convention is giving in some respects a larger protection to the environmental rights of individuals and NGO's, than domestic or European Union Environmental law is doing and that the Convention provides for a relatively strong compliance mechanism. As the EU is also party to the Aarhus Convention this means that the Aarhus Convention is according to settled case law of the CJEU to be considered as EU Law too, so that national judges can or even are obliged in some instances to address questions of interpretation of the Convention for a preliminary ruling to the CJEU.

In my opinion, a first priority should indeed be the dissemination of adequate information towards all relevant legal stakeholders. Initiatives of different nature are necessary. Although in international environmental handbooks and journals there is relative high attention for the Aarhus Convention, the same is not always true for national environmental law handbooks and journals that form the basic reference materials for most of the legal profession. One should seek possibilities to fill that gap.

Secondly, the Aarhus Convention should be an important item in training activities for judges and other judicial officers. EUFJE may be cited as a good example as we discussed the Aarhus Convention already during our first Annual Conference in The Hague in December 2004 and in Vienna in December 2013. But the item should also be included in national training programmes as we do in Belgium in our periodical initial and advanced training courses in Environmental Law for judicial officers.

The next step is of course the application of the Aarhus Convention in relevant environmental cases. The way national judges can be confronted with Aarhus related cases can however be very different.

In most of the EU-countries – but not all – there is a Constitutional Court. Access to the Constitutional Court, however, is not always regulated in the same way. I believe that Constitutional Courts can play an important role in the enforcement of the Aarhus Convention. They generally can combine provisions of their national constitution with relevant provisions of international treaties and check not only the constitutionality of federal or regional Acts of parliament (or sometimes also regulations), but also their conformity with international provisions, such as those of the Aarhus Convention. There are already some Constitutional Courts that apply the Aarhus Convention in their case law. The Belgian Constitutional Court e.g. referred so far in 20 cases to the Aarhus Convention. The Constitutional Court of Slovenia, the Constitutional Court of the Czech Republic and the Constitutional Court of Latvia have also referred to the Convention in their case law¹.

It is noticeable in this respect that the CJEU in its Judgment of 18 October 2011 in *Boxus and Others* held that Article 9(2) of the Aarhus Convention must be interpreted as meaning that when a project falling within the ambit of those provision is adopted by a legislative act, it must be possible that the question whether that legislative act satisfies the conditions laid down in Article 2(2) of the Aarhus Convention to be submitted to a court of law or an independent and impartial body established by law. If no review procedure of such nature and scope were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the requested review and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

In the vast majority of the EU countries a dual judicial structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil and criminal cases, and on the other hand administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal matters, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It can be expected that administrative courts will be confronted in the first place with Aarhus-related cases as the decisions and acts referred to in article 9, paragraph 1, 2 and, as far as public acts are concerned, paragraph 3, will normally fall under the jurisdiction of administrative courts. It should be pointed out, however, that the powers of the administrative courts might differ from Member State to Member State. Due to the different legal history and legal culture, the various legal systems of Member States have taken different approaches for legal standing. In most of the countries the legislation uses a rather vague formula in describing the conditions to have standing.

These concepts can however be interpreted broadly or narrowly. As we look at the Belgium situation more or less the same criterion applies for the Supreme Administrative Court as for the Constitutional Court. Just by now, the Constitutional Court has nearly never declined an environmental NGO for lack of standing. As the Supreme Administrative Court is concerned there are some variations in time and even between the different Chambers. There were the Council of State developed a broad view on standing for NGO's in the eighties, there was later on some tendency to become stricter, maybe under influence of an ever growing case-

¹ www.codices.coe.int/

load. Were the Chambers dealing with environmental legislation generally continued to have a broad view, the Chambers dealing with land use planning legislation developed gradually a stricter view. The Aarhus Compliance Committee found in 2006 that if the jurisprudence of the Council of State would not have been altered in that respect, Belgium would fail to comply with article 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans². I have argued that the Council of State can reinterpret the existing national provisions on standing without any problem in conformity with Article 9, paragraph 2, 3 and 4, of the Aarhus Convention. Together with pressures from the ECtHR, the Constitutional Court and the Aarhus Compliance Committee, the Council is becoming more lenient again, so that its case law is becoming gradually in compliance with the Convention.

A convincing example of reinterpretation of standing rules in conformity with the Aarhus Convention has been delivered more recently by the Belgian Supreme Court.

In a judgment of 11 June 2013³ the Supreme Court has radically changed its case law concerning standing of Environmental NGOs in view of implementing Art 9 (3) of the Aarhus Convention. It follows from the ratification of the Aarhus Convention, according the Court, that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may however not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention. According Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belong to the victims. They shall demonstrate a direct and personal interest. And the Court to conclude, that when such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so.

As far I can see, in most of the Member States, such a solution is possible and I hope that the different judiciaries will take that view.

I think it is more than a possibility; there is a legal obligation for EU Member States to do so. I can refer to the Grand Chamber Judgment of 8 March 2011 of the CJEU (also known as the *Slovak Brown Bear* case) and to the Judgment of 12 May 2011 in Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (also known as the *Trianel* Case).

Finally, there is Article 9, paragraph 4, which sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

The requirements of Article 9, paragraph 4, are maybe the most difficult of all to fulfil. In a lot of Member States the judiciary is facing an important backlog. Waiting long time for a

² <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2005-11/ece.mp.pp.c.1.2006.4.add.2.e.pdf>

³ http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/Crim_standing/Belgium_2013_Criminal_standing.pdf

final decision, in some cases more than 5 years, is daily reality in more than one jurisdiction. In such circumstances only interim relief is an adequate solution, but unfortunately the conditions under which one can obtain interim measures are often very severe and not in accordance with the Treaty requirements. In other countries judicial procedures and lawyers fees are very costly.

In this respect we can refer to the CJEU's Judgment of 16 July 2009 in Case-427/07 (the so called *Irish Costs*-case) and to Case C-260/11 *Edwards and Pallikaropoulos* (Judgment of 11 April 2013). Sometimes the judiciary has some room of manoeuvre regarding cost allocation, so that it can avoid decisions that are infringing art. 9 (4) of the Aarhus Convention.

But I think these issues are most of the time difficult to solve by the judges themselves and raise more general questions of judicial management, clear cost allocation rules, state investment in the judiciary and appropriate legal aid schemes. I think we need long term work programs on the national level to solve these problems in an acceptable way. And off course these are cross cutting issues that exceeds largely the environmental sector, e.g. the fees shifting issues.

Although, as we have seen, judges themselves cannot solve all the implementation problems raised by article 9 of the Aarhus Convention, I hope I have convinced you that they can at least remove themselves the most striking obstacles for its proper implementation.