AARHUS CONVENTION – MOP 3

RIGA, 11 to 13 June 2008

Two questions have been put to me: first, to identify the provisions of the Convention that in some way have priority for the judge; second, to define the actions that could help give the judge a key role in the implementation of the Aarhus Convention.

As regards the first question, it seems to me that priority should at present be given to guaranteeing public access to full information as early as possible in the decision-making process. This is a key point which is crucial to effective public participation in the decision-making process, by allowing NGOs to intervene effectively in order to incorporate social and environmental concerns in the methodology and criteria of choice, thereby preventing decisions being made solely on the basis of technical or scientific data.[1]

In this respect, the court may, by emergency proceedings (interim injunction) and by imposing coercive measures (penalty), ensure communication of all information relating to human health and the environment, without the public service or the industry requesting authorization for a product or a new technology being able to hide behind the concept of industrial secret or defence secret. All that is required is to conceal the part of the document containing this particular information or to restrict the communication to the environmental and health data.[2]

This action by the courts would be perfectly in keeping with the direct application of Article 6 of the Convention in domestic law, as was ruled in French law by the Council of State.[3]

The court can also offer guarantees in the matter of the choice of experts, at least as regards their independence vis-à-vis the submitters of the project, whether those experts be private persons or public agencies.

The court can also monitor and guarantee the rights granted to civil society by the Aarhus Convention in procedures of participation in the decision-making process.[4]

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[1] One of the criticisms levelled at the French procedure of public inquiry (provided for by Article L.300-2 of the Town Planning Code which organizes consultation for planning operations, as part of the implementation of Article 6 of the Aarhus Convention) is that it does not allow the fundamental options of a given project to be called into question (Second report of France of 17 December 2007, page 18)

[2] As regards the French system: it may be pointed out that CADA (Commission for Access to Public Records), an independent administrative authority composed of members of the Council of State, the Supreme Court, the Audit Office, the University, the national Parliament, and qualified persons or local councillors merely delivers opinions that are not binding on the public authorities, which means that the applicant has to subsequently challenge the decision on grounds of excess of authority.

[3] Council of State, 28 July 2004, Application nos. 254944 and 255050, *Comité de réflexion, d'information et de lutte anti-nucléaire* (CRILAN), the *Sortir du Nucléaire* Network and Greenpeace: Environment n°12 December 2004 comm. 121; this direct application only concerns paragraphs 1, 2, 3 and 7 of Article 6. The provisions of paragraphs 4, 6, 8 and 9 of Article 6 and those of Articles 7, 8 and paragraphs 3 and 5 of Article 9 merely establish obligations between the State Parties to the Convention.

However, for there to be effective action on this point, like on the determination of responsibilities or the compensation for damage, the court has to be effectively seized of the case, which presupposes an extension of the conditions for access to justice and assumption of the financial cost of a lawsuit.
On the first point there are several possibilities:
- Presumption of an interest in taking action on the part of approved environmental organizations. Here the criteria of approval need to be defined first: besides the organization's purpose in connection with the environment, there is also the age of the organization, or the effectiveness of its action.
Another criterion may also be the size of the organization's membership. However, a Swedish colleague at the Forum considers that reserving a right of action free of charge exclusively for NGOs with more than 2,000 members, as is the case in that country, is rather too strict.
- Extending the admissibility of associative action from the moment that the collective damage caused by environmental impairment is begun to be recognized, and no longer making this right conditional on an approval or on the existence of a criminal offence, which is in line with the American system or with that in Brazil and Portugal.
The general trend in the case-law is towards a relaxation of the conditions of access[5], which is a good thing, yet which does not resolve the matter of the cost.
The national systems of legal aid, which have not been developed in the perspective of this type of collective legal action, do not really seem adapted to this type of lawsuit, as we have seen in Sweden, but is also true for France.
Apart from recourse to funds that are specifically dedicated to such lawsuits, it may also be worth considering that, in cases relating to information and participation, the submitter of the project or product should bear the costs, whatever the outcome of the proceedings, to the extent that it is in the submitter's interest to secure the realization of the project or the marketing of the product with the broadest possible consensus.

Environmental lawsuits will inevitably proliferate on account of the acuteness and seriousness of the problems, the general awareness that this is a major challenge of the 21st century, and the very fact of the implementation of the Aarhus Convention gathering momentum, involving as it does informed citizens in the decision-making process.

However, the complexity of this law stems from its transverse (matters and disputes involved) and international dimension, which is also the very guarantee of its effectiveness. The great principles which underlie it and which are represented at the different levels of competence (international, Community, national) are universal in scope: the right to a healthy environment, sustainable development, interests of present and future generations, general interest of humanity.

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[4] Nevertheless, the French administrative court considers that the different measures taken by the National Commission on Public Debate after its decision to open the debate (which constitutes a challengeable decision, like a refusal) cannot give rise to a legality review, whether those measures concern its terms, timetable or procedural conditions: CE 5 April 2004 AJDA 2004)

[5] In France, the recent case-law of the Supreme Court is favourable to this extension: an organization can take legal action in the name of collective interests from the moment that those interests fall within the scope of its purpose, without reference to the requirement of approval.

Consequently, information and training of judges is the essential key to effective action: national law (for some countries, like Belgium, the national laws), European law and international law should be reconciled while respecting the legal mechanisms proper to each of those levels of legislation (direct application, transposition of a directive *a minima* or with incorporation of more protective rules), and with an extended vision incorporating the principles recalled above and developing the conventional legal concepts, in interaction with the Court of Justice of the European Communities.

The administrative courts should also be brought closer to the civil and criminal courts, which for many States is new. All this calls for training (together with the other actors in the process and with university-trained people, whose work is essential to the development of the case-law) and exchanges between all the national judges, at all decision levels, and between judges of the different States.

The Forum is one place where judges from the different Member States of the European Union who are seized of environmental lawsuits can compare, on the basis of practical cases, their interpretations and applications of supranational law texts to common issues, with answers that also take into account the sensitivities and specificities of each State.

Its Internet site also allows spontaneous exchanges of views at the request of any of its members, a wide dissemination of information that might be of interest to the other States, and the conference that is organized each year allows a more in-depth study of a current topic and an exchange of views with the European Commission on final or draft directives. [6]

In the context of the French presidency of the European Union, a colloquium will be organized by the European Commission and the Council of State, in partnership with the Forum, on the training of judges in Community environmental law, with the participation of four judges per member country, from both administrative and civil courts, and including Court of First Instance judges.

Access to justice is twofold in that it also calls for action on the part of the judge to invest in this particular lawsuit and to direct the appropriate files along that way by using his prerogatives during the investigation of the case, including in the civil proceedings.

Some are in favour of a mixed court in terms of its competences (court covering civil, administrative and penal law) and the composition of an environmental court which would include a judicial officer, a scientist, a representative of industry (as well as, in my opinion, an NGO[7]), supported by an environment pool[8] after the example of the investigation units that exist in France and according to the Swedish model.

It also seems essential, bearing in mind the technical, scientific and economic aspects of this law, that judicial officers should be able to adopt practical approaches on-site to the issue to be resolved, in particular on industrial sites.

Finally, as far as the judges are concerned, and more generally the actors involved in environmental law, as among the public authorities, economic actors and citizens,

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[6] Themes of the EUFJE conferences since its inception in 2004: the Aarhus Convention (The Hague 2004), European Law on Waste (London 2005), Natura 2000 (Helsinki 2006), Protection of the Environment by Penal Law (Luxembourg 2007), Soil Pollution (Paris, October 2008).

[7] Françoise Thonet, counsellor at the Court of Appeal in Mons, in *Pour un juge de l'environnement en Belgique,* Journal des Tibunaux Larcier 19/04/2008.

[8] Composed of prosecution officers specializing in environmental cases (civil, investigation, District Attorney's office), supported by specialized police teams and scientific experts.

protection of the environment and the implementation of sustainable development involve, above all, transparency, commitment and collective vigilance.

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