The Public Participation Principle: Effective Implementation of Aarhus Participation Rights by the European Union Legal Framework

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A. Introduction

This paper considers the principle of Public Participation as envisaged by the Aarhus Convention. It addresses the academic debate regarding the true nature of public participation as a civil and political right and the lack of consensus regarding the limits and definition of the right. An examination of the manner in which the European Union Law framework implements the right is then carried out, seeking to establish the extent to which the Public Participation Principle is fully vindicated by the European Union Legal Framework. In doing so this paper focuses on the areas of Environmental Impact Assessment and the Industrial Emissions regimes.

B. A Brief History of Public Participation Rights

The idea of Public Participation as a right originates in the post-war Human Rights tradition that began with the European Convention on Human Rights[1]. It was quickly recognised that in order for human rights to have effective protection, they needed to be accompanied by civil and political rights. This manifested in the International Covenant on Civil and Political Rights[2] which was ratified and adopted in 1966. While not focussed on environmental rights specifically, Article 19 mentions the right of access to information, and also Article 25 mentions the right to take part in public affairs directly or through representation. The Covenant also had many features later seen in the Aarhus Convention – the obligation to pass laws to give effect to the provisions in the Covenant, and the right to a remedy for breach.

This link to the human rights tradition can be seen in the Stockholm Declaration 1972[3] which explicitly references human rights in an environmental context and in turn was explicitly referenced in the Aarhus Convention. Principle 1 of the Stockholm Declaration **o**f Principles states that:

> "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.*"

The ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted at Espoo, Finland, on 25 February 1991[4]. The Espoo Convention shows the link between public participation and environmental impact assessment. Its article 2, paragraphs 2 and 6, and article 4, paragraph 2, require that the assessment of proposed activities with a potential significant transboundary environmental impact should take place with the participation of the public in the areas likely to be affected.

Our Common Future: Report by the World Commission on Environment and Development[5] (Brundtland Report) in 1987, was a catalyst for the 1992

1 European Convention on Human Rights, 1950 http://www.echr.coe.int/Documents/Convention_ENG.pdf .

2 International Covenant on Civil and Political Rights, 1966 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

3 Declaration of the United Nations Conference on the Human Environment, from Report of the United Nations Conference on the Human Environment, Stockholm, June 1972 http://www.un-documents.net/unchedec.htm

4 The ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), adopted at Espoo, Finland, on 25 February 1991, http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf

5 Our Common Future: by the World Commission on Environment and Development Report, 1987, http://www.un-documents.net/our-common-future.pdf .

United Nations Conference on Environment and Development (UNCED) and its Rio Declaration on Environment and Development.

In 1992 Principle 10 of the Rio Declaration on Environment and Development[6] (Rio Declaration), laid the foundations for the Aarhus Convention, making express reference to what were subsequently to become the three "pillars" of the Convention concerning information, participation and access to justice. Principle 10 states:

> "*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*."

At the Rio Earth Summit, Agenda 21[7] was also adopted, calling for specific action on environmental issues and recognising the civil and political aspects to environmental rights, mandating inclusivity for women and minorities and participation rights and access to information.

In 1995 the "Sofia Guidelines" (the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making) expanded upon Principle 10 of the Rio Declaration. The 26 articles in the Sofia Guidelines deal with all three pillars of the Aarhus Convention.

Finally in 1998 the Aarhus Convention (the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) was adopted on 25 June 1998 in the Danish city of Aarhus (Århus) at the Fourth Ministerial Conference as part of the "Environment for Europe" process. It entered into force on 30 October 2001.

EU Law pre-Aarhus already recognised certain participation rights. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive) contained some public participation provision. Also Council Directive 90/313/EEC of 7 June 1990 provided for freedom of access to information on the environment.

6 Rio Declaration on Environment and Development, Annex 1 to the Report of the United Nations Conference on Environment and Development, 3 – 14th June 1992, Rio De Janeiro, http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm .

7 Agenda 21, United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf .

C. The Rationale for the Public Participation Principle

As highlighted above the rationale for including participatory procedural rights in the various international and domestic legal frameworks where they are found are many and varied.

There is widespread acknowledgement that Public Participation it is a good thing. However there is widespread disagreement as to what it is and why it is there.

The Preamble to the Aarhus Convention sets out the following rationales in relation to both access to information and public participation:

- To enhance the quality and the implementation of decisions,
- To contribute to public awareness of environmental issues,
- To give the public the opportunity to express its concerns and
- To enable public authorities to take due account of such concerns.

These cover both what are described in EU Governance theory as "input legitimacy" and "output legitimacy"[8]

Lee and Abbott in 2003 highlight a broad spread of rationales for public participation such as improving quality of decision making, accountability of decision making bodies, and introducing an element of value judgments into environmental decision making that are often not captured by the technical and scientific criteria for the decision. They also refer to legitimacy and acceptability of decision making, by potentially strengthening public support for decision making.[9]

The OECD Handbook on citizen engagement "Citizens as Partners" [10] states that public participation structures are about regulating the interaction of the citizen and the State so that it is fairer and more inclusive. The reasons they offer for public participation are the improvement of the quality of decision making, legitimacy of decision making, and public trust in government (pg. 18).

8 Lee, EU Environmental Law, Governance and Decision-Making, 2nd Ed., Vol 43 Modern Studies in European Law, Hart Publishing, Oxford & Portland Oregon, 2014.

9 Lee and Abbott, Public Participation Under the Aarhus Convention, The Modern Law Review 2003. The Modern Law Review Limited 2003. (MLR 66:1, January). Published by Blackwell Publishing Ltd.,809600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA.

10 Citizens as Partners, OECD Handbook on Information, Consultation and Public Participation In Policy-Making. Marc Gramberger, 2001. http://www.internationalbudget.org/wp-content/uploads/Citizens-as-Partners-OECD-Handbook.pdf .

The UN publication "Participatory Governance and the Millennium Development Goals (MDG's)"[11], United Nations, New York 2008, carries out an in depth analysis of the rationales for public participation and citizen engagement, including a fairer and more equitable society (pg. 3), improving decision making quality by overcoming the "hidden information" problem encountered when top-down decision makers do not have the knowledge of on the ground conditions (pg. 4), the synergy effect of enhancing social capital and empowerment (pg. 8), and more efficient decision making (pg. 14). The ultimate aim is a more cohesive society (pg.1) (i.e. integration).

Glucker et al, (2013)[12] give an excellent summary of the rationales for public participation in the context of environmental impact assessment, listing them under three headings: the Normative Rationale; the Substantive Rationale; and Instrumental Rationale. The Normative Rationale covers influencing decisions, enhancing democracy, social learning, and empowering marginalised individuals and groups. The Substantive Rationale covers harnessing local information and knowledge, incorporating experimental and value-based knowledge and testing the robustness of information from other sources. The Instrumental Rationale covers generating legitimacy, resolving conflict, and reflection.

The Report of the Working Group on Citizen Engagement with Local Government[13] (published in 2014) emphasises consensus building and acceptability/legitimacy of Government Decision making (pg. 15). They also suggest that direct democracy is a central part of citizenship rights. (pg. 17). This extends the concept of formal citizenship and democratic society from one of basic civil, political and social, environmental and economic rights, to one of direct democratic participation and responsibility. This connects the concept of public participation firmly back into the human rights tradition of civil and political rights.

Marsden[14] (pg. 245, 2012) describes how public participation has become an integral part of the discourse of sustainable development. He is of the opinion the term is synonymous with empowerment of those usually ignored by the decision making process. This resonates with O'Faircheallaigh's[15] (2010) analysis of the multiple purposes of public participation, which can be used as an instrument of greater social equity and inclusion, or a means of exclusion. The analysis of these writers is in line with the original statement of purpose of public participation from the much cited work of Sherry R. Arnstein (1969),[16] who stated that participation is:

> "*a categorical term for citizen power. It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future*" (p. 216)

While Marsden and O'Faircheallaigh touch on the issue of the inclusion of the disempowered, the drift away from the human rights tradition is evident in the academic discourse around public participation in environmental decision making. There is very little evidence in the literature regarding attempts to control for, or build in, inclusivity on the "equality" grounds from human rights law. This is despite the fact that the concept of public participation arose out of the need to create enforceable civil and political rights in the human rights arena. Inclusion of women, minorities, and the disabled were an explicit part of the roadmap created by Agenda 21, but there is little evidence of this being translated into practice.

A UN Publication[17] from 2008 (Participatory Governance and the Millennium Development Goals), sounded a note of scepticism about the idea of public participation as a cure-all for a fairer and more inclusive society. It pointed out at pg. 1 that:

> *"A huge burden of expectation is thus being placed on the slender shoulders of participation, which almost inevitably has begun to produce a backlash; so much so that some have even begun to speak of the 'tyranny' of participation (e.g., Cooke and Kothari, 2001). Yet the fact remains that for all the enthusiasm being shown in its support, examples of genuinely effective participation by all the relevant stakeholders, especially by the marginalised, socially excluded and disadvantaged groups, are still more of an exception than the rule".*

11 "Participatory Governance and the Millennium Development Goals (MDG's)", United Nations, New York 2008, http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN028359.pdf .

12 Anne N. Glucker, Peter P.J. Driessen, Arend Kolhoff, Hens A.C. Runhaar, Public participation in environmental impact assessment: why, who and how?, Environmental Impact Assessment Review 43 (2013) 104–111.

13 The Report of the Working Group on Citizen Engagement with Local Government published by the Department of the Environment, Community & Local Government February 2014, http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/Community/CommunityVoluntarySupports/FileDownLoad%2C36779%2Cen.pdf .

14 Simon Marsden "Public Participation in Transboundary EIA" pg. 243 in Chapter 10, Environmental Discourses in Public and International Law edited by Brad Jessup and Kim Rubenstein, Cambridge University Press 2012. Cambridge UK.

15 "Public participation and environmental impact assessment: Purposes, implications and lessons for public policy making", Ciaran O'Faircheallaigh, Environmental Impact Assessment Review 30 (2010) 19 – 27.

16 Arnstein SR. A ladder of public participation. J Am Inst Plan 1969;35(4):216–24. http://www.participatorymethods.org/sites/participatorymethods.org/files/Arnstein%20ladder%201969.pdf .

17 "Participatory Governance and the Millennium Development Goals (MDG's)", United Nations, New York 2008, http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN028359.pdf

D. What form does public participation take?

Lee and Abbot[18] (2003) refer to the growing trend to proceduralisation in Environmental Law. They define public participation as:

> "*mechanisms that allow the public to evaluate, comment on or influence regulatory decisions, at a broad policy level or in respect of individual projects*".

Glucker et al. (2013)[19], focussing on public participation in EIA, state that public participation is an integral part of the assessment procedure, and this is echoed by other writers e.g. Hartely & Wood (2005). They state that there is a clear consensus that public participation is key to effective environmental assessment.

However, like Lee and Abbot, Glucker et al acknowledge that there is little consensus regarding what exactly public participation is. They comment on the confusion in the literature

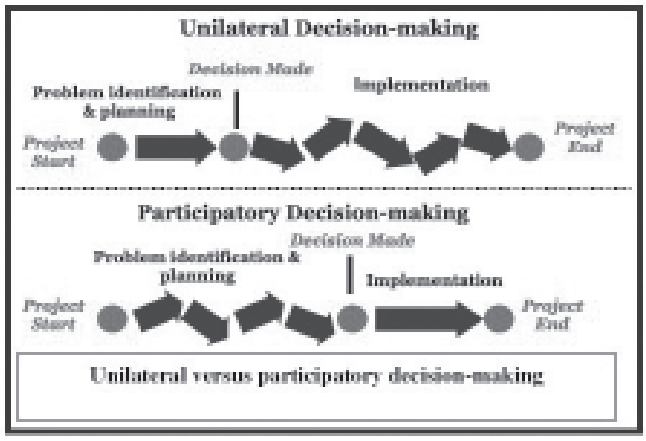
> "*Reflecting disagreement on the meaning of public participation, there seems to be great confusion in the use of the terms 'participation' and 'consultation' in the EIA literature. Several authors perceive 'public participation' as a catch-all phrase for different types of involvement techniques regardless of the scope and purpose and, consequently, use the terms 'participation' and 'consultation' interchangeably*".

The OECD Handbook[20], Citizens as Partners pg. 15, distinguishes between three forms of citizen engagement: information (Government provides information regarding their decision making in a one-way process); consultation (Government takes views from public in a two-way process); and active engagement (a stronger two-way involvement).

Lee[21] (pg. 159, 2014) highlights the ambiguity in the term public participation and what is meant by it, and that it can mean anything from simple consultation, or a more ambitious shared problem solving, a targeted and narrow grouping, or a completely open process.

The below image from the HarmoniCOP Handbook[22], attempts to illustrate the difference between participatory decision making and traditional decision making. They comment:

> *"Participatory decision-making processes usually takes much more time than unilateral decision-making by water managers. However, as illustrated in this figure, this is usually more than offset by time gains (and, by implication, effectiveness) in the implementation phase."*



This diagram clearly shows that in order for there to be true participatory decision making the public consultation must be carried out before the final decision is made.

E. Aarhus Public Participation

The framework for public participation under Aarhus is in places quite vague, and in others extremely prescriptive.

Art 6 sets the framework for public participation in environmental decision making relating to projects which will affect the environment due to their scale or the nature of their processes, many of which come under the Environmental Impact Assessment (EIA) regime. The article does not frame an explicit structure for public participation in environmental decision making processes, but rather identifies certain elements that must to be present in such procedures.

Article 6 requires a process whereby the public will be notified of an application, and be invited to comment on it in writing or in some cases at oral hearing. These comments ought to be taken into account and reasoned decisions issued, presumably showing how the comments have been used to inform the decision, although this is not explicit either. The public also have a right to participate in environmental decision

18 Lee and Abbott, Public Participation Under the Aarhus Convention, The Modern Law Review 2003. The Modern Law Review Limited 2003. (MLR 66:1, January). Published by Blackwell Publishing Ltd.,809600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA.

19 Anne N. Glucker, Peter P.J. Driessen, Arend Kolhoff, Hens A.C. Runhaar, Public participation in environmental impact assessment: why, who and how?, Environmental Impact Assessment Review 43 (2013) 104–111.

20 Citizens as Partners, OECD Handbook on Information, Consultation and Public Participation In Policy-Making. Marc Gramberger, 2001. http://www.internationalbudget.org/wp-content/uploads/Citizens-as-Partners-OECD-Handbook.pdf .

21 Lee and Abbott, Public Participation Under the Aarhus Convention, The Modern Law Review 2003. The Modern Law Review Limited 2003. (MLR 66:1, January). Published by Blackwell Publishing Ltd.,809600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA.

22 Ridder, Mostert, Wolters, (2005) Harmonising Collaborative Planning (HarmoniCOP); Learning Together to Manage Together/ Improving Participation in Water Management

The Report of the Working Group on Local Government[23] in 2014 developed the following table:

INCREASING INTENSITY OF ENGAGEMENT

1. INFORMATION -GIVING	2. INFORMATION -GATHERING	3. CONSULTATION	4. PARTICIPATION	5. COLLABORATION	6. DELEGATED AUTHORITY
Purpose: To provide people with information to assist their understanding.	**Purpose:** To collect information about attitudes, opinions and preferences that will assist your understanding and therefore your decision-making.	**Purpose:** To obtain feedback on specific policies or proposals.	**Purpose:** To involve people actively at all stages to ensure their concerns are understood and considered, and to give them some influence on and ownership of decisions.	**Purpose:** To bring people into active partnership and agree sharing of resources and decision -making.	**Purpose:** To transfer resources and decision-making.
Expectation: That information given will be accurate, balanced and up-dated as necessary.	**Expectation:** That information gathered will be treated and used responsibly, and reported honestly.	**Expectation:** That feedback will be taken seriously, decisions will be influenced, and people will be informed of the influence they have had.	**Expectation:** That people will be able to shape the process, that it will be transparent throughout, and that they will have some influence over decisions.	**Expectation:** That decision-making will be shared and some resources will be held in common.	**Expectation:** That sufficient resources will be transferred to enable decision-making, and that what is decided will be implemented.
Examples: Fact sheets Websites Exhibitions	**Examples:** Surveys Questionnaires Focus Group	**Examples:** Consultation papers Public meetings Surgeries	**Examples:** Deliberative workshops Stakeholder dialogue processes	**Examples:** Advisory Panels Local Strategic Partnerships	**Examples:** Ballots Referenda Delegated decision-making

making in early course, when all options are on the table (Article 6(4)). There are also non-mandatory suggestions that applicants first identify the public concerned and consult with them pre-application. All of this is suggestive of a regime where the public get to express views not just on a fully formed proposal presented by a developer, but on all the possible alternatives for the proposed development, including whether the development is required at all.

It is interesting that the Maastricht Recommendations[24] to the Aarhus Convention has expanded on this idea, known in EIA literature as the "Business as Usual Option"[25], and have named it "*The Zero Option*". The Maastricht Recommendation explains this as follows:

> **"Public participation on the zero option"**
> "*16. In line with the Convention's requirement for the public to have an opportunity to participate when all options are open, the public should have a possibility to provide comments and to have due account taken of them, together with other valid considerations required by law to be taken into account, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called zero option). This recommendation has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should not be provided only at a stage when there is no realistic possibility not to proceed.*"

23 The Report of the Working Group on Citizen Engagement with Local Government published by the Department of the Environment, Community & Local Government February 2014, http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/Community/CommunityVoluntarySupports/FileDownLoad%2C36779%2Cen.pdf

24 "Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters" hereinafter the Maastricht Recommendation, ECE/MP.PP/2014/2/Add.2 29th Jan 2015. https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp.pp_2014_2_add.2_eng.pdf .

25 Glasson, J., "*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Para 4.5.2.

It is interesting to note that this is also referenced as the weak point in the implementation of public participation under Articles 6 and 7 in the latest Report of the Task Force on Public Participation in Decision-making on its sixth meeting[26]. In that Report the Task Force acknowledged that, despite the discussions on the topic, early public participation remained an outstanding issue, and faced a number of challenges, in particular ensuring that participation came early enough when the "zero option" was still available. The Task Force also made reference to the need to ensure effective public participation already at the screening and scoping stages of EIA and SEA, or at the "pre-application" stage. They also mentioned the need to ensure that the outcome of early public participation was taken into account.

According to the Aarhus Convention Implementation Guide[27], Czech Republic, Denmark, Estonia, Finland, Latvia, Netherlands, Spain and Sweden allow for public participation at the scoping stage, as well as a second participation phase later on. The Netherlands and Poland, also have independent EIA commissions to check the quality of EIAs which includes public participation.

A 2009 study[28] showed that 16 EU member States provide for scoping as a separate procedural stage with mandatory public participation and 9 EU member States provided for mandatory public participation in screening.

As mentioned though the Aarhus Convention does not explicitly state this will be made a mandatory requirement. In its findings on communication ACCC/C/2004/4 (Hungary)[29] the Compliance Committee noted that "the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region".

However, in ACCC/C/2006/16 (Lithuania)[30], at Para 73 the Committee stated "While the information available to the Committee is not sufficient to conclude whether indeed in this particular case the public had a chance to participate in the scoping (i.e. designing the EIA programme), the Committee welcomes the approach of the Lithuanian law which envisages public participation at the stage of scoping. This appears to provide for early public participation in EIA decision-making."

Article 7 mandates public participation for programmes and policies including sectoral or land-use plans, environmental action plans, and environmental policies at all levels– what we call SEA or strategic environmental assessment. This short article imports some of the requirements of Article 6 – reasonable timeframes (Art 6(3)), early public consultation when all options are open (Art 6(4)), ensuring due account is taken of the results of public consultation (Art 6(8)). This Article uses consultation and participation interchangeably. Article 7 does not specify the detailed information to be provided to the public in terms of baseline environmental effect, as is set down in Article 6.

Article 8 concerns public participation in legislation and is also brief, specifying only three main requirements, reasonable time-frames for participation, a draft stage, and a direct comment facility.

Aarhus public participation is at its most intensive in the Article 6 projects provisions. The model envisaged is one which sees public participation as a way to inform the public about environmental decisions, and to take their input as a means of giving them some stake in the process and to enhance decision making by broadening perspectives. It is not a collaborative model of decision making. No power is shared. Ultimately real decision making power remains with central authority. There is no devolution or decentralisation. The traditional regulation structure remains the same.

In terms of the diagram drawn up by the Report of the Working Group on Local Government[31] it would seem that in this model the process envisaged by the Aarhus Convention reaches stage 4 (Participation) and does not delve into the more intense engagements of stages 6 (Collaboration) and 7 (Delegated Authority).

However it has also to be borne in mind that the procedural rights set out in the Aarhus Convention must be judged in terms of the stated objectives of public participation in the Convention which are set out particularly in the recitals 5, 6, 7, 8 and 9 of the Preamble and Article 1, (Objective). These provisions indicate that public participation is necessary to ensure protection of

26 "Report of the Task Force on Public Participation in Decision-making on its sixth meeting", 8th April 2016 ECE/MP.PP/WG.1/2016/4, http://www.unece.org/fileadmin/DAM/env/pp/wgp/WGP-20/documents/English/ECE_MP.PP_WG.1_2016_4_E.pdf.

27 The Aarhus Convention: An Implementation Guide, 2nd Ed., UN 2014, https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

28 European Commission, Directorate General for Environment, Study concerning the report on the application and effectiveness of the EIA Directive, Final report, June 2009. Available from http://ec.europa.eu/environment/eia/pdf/eia_study_june_09.pdf .

29 https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2004-04/C04findings.pdf

30 https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf

31 The Report of the Working Group on Citizen Engagement with Local Government published by the Department of the Environment, Community & Local Government February 2014, http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/Community/CommunityVoluntarySupports/FileDownLoad%2C36779%2Cen.pdf

the right to adequate protection of the environment, (positioned as a basic human right), by ensuring that citizens can assert this right and that they can carry out their duty to protect and improve the environment.

This overarching stated purpose implies a deeper level of stake-holding in the decision making processes mandated by the Convention than would appear at first glance, and would seem to indicate a place for a deeper level of shared or collaborative decision making in the area of environmental matters. It would have been useful if this had been made more explicit in the Convention text.

F. The Public Participation Principle in the European Union legal framework.

The perception of a democratic deficit in the EU predates Brexit by many years. This is evident in the White Paper on Citizenship[32] from 2001. The idea of participation as the remedy for this problem is also evident in the document. This document boldly and simply stated:

> "*Policies should no longer be decided at the top. The legitimacy of the EU now lies with the participation of its citizens*".

It also laid down concepts that have gone on to become fundamental drivers of change in the area of the environment, like Better Regulation.

Addressing the democratic deficit was also evidently the driver of the failed draft Constitution of Europe and the later Lisbon Treaty. However somewhere along the way the idea of participation got lost.

The Lisbon Treaty[33], despite having the stated aim of enhancing legitimacy of decision making and promoting decisions being taken more closely with the citizen, contains little or no reference to public participation in decision making of any kind.

While the Lisbon Treaty does guarantee environmental protection, access to information for EU Citizens generally, and voting and candidacy rights, there is no explicit mention of public participation in decision making, environmental or otherwise in the Treaties. There are mentions of encouraging the rights of young people (Art 165(2)) and the disabled (Art 26 Charter of Fundamental Rights) to participate in democratic life.

The Preamble of the Treaty of Lisbon contains some references to democratic legitimacy and decisions being taken closely with the citizens.

> *"DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,"*

> *"RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,"*

Article 15 (ex Article 255 TEC) contains access to information rights and transparency. "In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."

It appears from the above that there is a general sentiment in favour of greater citizen involvement/participation in decision making generally at EU level, but very little has been done to create concrete rights or structures to facilitate this aim.

G. Public Participation Framework under the EIA Directive.

The regime envisaged by the Aarhus Convention envisages early public participation when all options are open and that Member States would encourage applicants for licenses or permissions to identify the "public concerned" and engage with them in advance of submitting an application to the relevant authority in the Member States.

Lee[34] (2014, pg. 159) highlights that EIA is about much more than public participation, its purpose being the gathering of information about impacts on the environment in a scientific manner. She highlights the tension between the lay and expert modes of reasoning required by the deciding authority in an Environmental Impact Assessment with public participation.

Examining the Environmental Impact Assessment Directive 2011/92/EU as amended by Directive 2014/52/EU provides ample evidence for facilitation of public participation in the impact assessment process.

32 Communication from the Commission of 25 July 2001 "European governance - A white paper" [COM(2001) 428 final - Official Journal C 287 of 12.10.2001].

33 Official Journal of the European Union C 83, 30.03.2010, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union : Charter of Fundamental Rights of the European Union http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=FXAC10083 .

34 Lee, M. *EU Environmental Law, Governance and Decision Making*, 2nd Ed. 2014, Vol 43, Modern Studies in European Law, Hart Publishing, Oxford and Portland Oregon, Ch.7 & Ch.8 contain extensive critiques of EU compliance with Aarhus obligations.

There is a lack of any mandatory or non-mandatory pre-application engagement process whereby applicants engage with the public concerned before submitting their application, which would be in line with Article 6(5) of the Aarhus Convention.

There is no mandatory provision for public participation at screening stage (in fact, it is explicitly stated at Recital 29 of the Preamble to the new EIA Directive 2014/52/EU that public participation will not be required for screening stage decisions). Notably some Member States have implemented public participation at screening stage[35]. However, public participation is not specifically required by the Aarhus Convention, but it would be in line with the requirement to consult with the public early in the process when all options are on the table in Article 6(4) of the Aarhus Convention.

This would appear to be a considerable flaw in the current environmental impact assessment regime. Indeed the reality of public participation in EIA is acknowledged by the process based definition of the EIA set out in Article 1(2) of the EIA Directive 2014/52/EU, which defines EIA for the first time as (a) the preparation of the report by the developer (which will contain all the later mandated information on environmental conditions as well as consideration given to alternatives set out in Article 5(d)); (b) public consultation; (c) assessment by the deciding authority; and (d) the issuing of a reasoned decision.

This clearly sets up a scenario where the developer makes their choice on alternatives and then carries out the report and this is followed by public consultation. Quite clearly in this scenario the requirement to involve the public early when all options are open (Article 6(4) Aarhus) is not properly vindicated. The wording of Article 5(d) which sets out the required content for the report to be presented by the developer really underlines this issue – among the information required to be present in the report is a requirement to set out:

> *"(d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics,* ***and an indication of the main reasons for the option chosen****, taking into account the effects of the project on the environment;"*
>
> **Emphasis added.*

This shows that in reality the fundamental choice has been made.

The Maastricht Recommendation[36] (discussed in detail above) on the Aarhus Convention sets out at paragraph 16 "The Zero Option". This paragraph envisages a consideration of whether the proposed development is in itself even necessary to begin with. This is a very important option in terms of minimising environmental impact but one that does not feature in the Environmental Impact Assessment regime as it currently stands. The Zero Option (Maastricht Recommendation[37]) or Business as Usual Option (Glasson)[38] (which involves not carrying out the development) does not even exist in Directive 2014/52/EU.

Finally, the Directive fails to provide for a draft decision process, something explicitly mentioned in Article 6 of the Aarhus Convention, and that has been implemented in the IED regime in 2010. It is surprising the draft decision process did not make it into the revised EIA directive in 2014.

This failure to include the public in the EIA process from the very beginning of the project is a failing of the EIA regime in terms of Aarhus principles.

Where public participation is conducted as an after-thought to the real and substantial decisions being made regarding a project, it is not genuine "participation", it is placation[39].

It is unlikely to result in acceptance of a project by local communities and likely to result in a long drawn out process of objections being raised through the various appeals mechanisms.

H. Public Participation Framework under IED.

The Industrial Emissions Directive (IED) 2010/75/EU replaces the Integrated Pollution Prevention and Control (IPPC) Directive 2008/1/EC (the original IPC Directive being 1996/61/EC), as well as a number of Directives

35 European Commission, Directorate General for Environment, Study concerning the report on the application and effectiveness of the EIA Directive, Final report, June 2009. Available from http://ec.europa.eu/environment/eia/pdf/eia_study_june_09.pdf .

36 "Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters" hereinafter the Maastricht Recommendations ECE/MP.PP/2014/2/Add.2 29th Jan 2015 accessible at https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp.pp_2014_2_add.2_eng.pdf

37 "Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters" hereinafter the Maastricht Recommendations ECE/MP.PP/2014/2/Add.2 29th Jan 2015 accessible at https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp.pp_2014_2_add.2_eng.pdf

38 Glasson, J., "*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Para 4.5.2.

39 Sherry R. Arnstein's "A Ladder of Citizen Participation," Journal of the American Planning Association, Vol. 35, No. 4, July 1969, pp. 216-224.

applying to specific sectors such as combustion and incineration facilities on a large scale, titanium and volatile organic compounds.

This Directive covers licensing of emissions levels from industrial facilities. It takes a "smart" regulation approach, in which emission limits and prescribed technologies are described in the Directive but not specifically set in the Directive, so that emission limit values (ELVs) and standards for technology used (BAT) can be constantly updated through innovative collaborative processes based on ongoing improvements in knowledge (the Seville Collaborative Governance Process[40] updating through BAT Reference Documents or BREFs). In this way the Directive is self-updating and designed to be an adaptable mechanism.

The licensing process described in it provides for opportunities for public participation.

Recital 27 of the Directive states:

> *In accordance with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters effective public participation in decision-making is necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. Members of the public concerned should have access to justice in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.*

Article 24 of the Directive sets out provisions for access to information and also that public participation shall be carried out in accordance with Annex IV.

Annex IV provides that the public shall be informed of certain matters early in the procedure for taking of a decision or at the latest as soon as the information can be provided, these being:

- The fact of an application for a permit/updating of a permit.
- The fact of transboundary or national EIA.
- Details of the procedure for public participation.
- The nature of possible or draft decisions.

The public are entitled to reasonable timeframes for participation, to be able to express comments and opinions and to see how account has been taken of the public consultations.

This regime is very similar to EIA, except for the introduction of the draft decision stage. Even though this is mentioned in Art 6 of the Aarhus Convention, it did not find its way into the EIA Directive. The draft decision stage, while not guaranteeing a "Zero Option", comes closer to the kind of early involvement that the Aarhus Convention Compliance Committee have indicated is desirable.

However again similar issues arise as can be seen in EIA in terms of the depth of engagement really happening in these regimes, the extent to which participation is taking place when all options are open, the extent to which those in charge of the process (in theory the regulatory authority but more realistically the developer) are aware of the need to be cognisant of excluded or marginalised social groups and equality theory. There is a lack of a clear cut understanding of what public participation really is and what it is for.

Other Areas

Kramer[41] highlights the gaps in participation in environmental decision making created by the EU regime, pointing out that 2011/92/EU, 2010/75/EU and 2000/60/EU and the different waste directives mentioned in 2003/35/EU do not cover all decision making in environmental matters. Most medium and small projects and installations are assessed at the Member State's discretion. Also the legislative framework does not capture a range of environmental decision making such as decisions on the "*authorisation of products and processes, management decisions, monitoring methods and processes, derogations, omissions to decide etc*." He also highlights the lack of specificity in how the "public concerned" is defined, and how consultation is to be carried out.

There are also issues with the EU's implementation of the Aarhus Convention to its own institutions[42],[43].

Conclusion.

While the Aarhus regime itself can be vague as to what public participation actually is, and does not really map a very deep level of engagement as envisaged by the various scales of participation discussed above, such as Arnstein[44]

40 Eippcb.jrc.ec.europa.eu/. "The EIPPCB organises and coordinates the exchange of information that leads to the drawing up and review of BAT reference documents according to the dispositions of the Guidance document on the exchange of information (Commission Implementing Decision 2012/119/EU)."

41 Kramer, L. *EU Environmental Law*, 8th Ed.2015 Sweet and Maxwell, London, para 4-10.

42 Kramer, L. *EU Environmental Law*, 8th Ed.2015 Sweet and Maxwell, London, paras 4-04 – 4-21

43 Lee, M. *EU Environmental Law, Governance and Decision Making*, 2nd Ed. 2014, Vol 43, Modern Studies in European Law, Hart Publishing, Oxford and Portland Oregon, Ch.7 & Ch.8 contain extensive critiques of EU compliance with Aarhus obligations.

and the Report of the Working Group on Public Participation[45], the objective and meaning of the procedural rights here have to be judged in the context of the objective to be achieved. The stated purpose of the procedural rights in the Aarhus Convention is not just to provide better information to the decision maker but also to ensure vindication of the human right to a clean and healthy environment[46].

However in terms of the European Union implementation of this objective, there are numerous shortcomings evident. The specificity of different decision making regimes like EIA and IED discussed above, and the others only briefly mentioned like SEA, Waste and Water, mean that there is something of a jig-saw puzzle of different levels of coverage in terms of public participation in decision making and numerous areas that fall through the cracks. Do the regimes created by the EIA and IED really provide for the kind of participation that enables vindication of the citizen's right to live in a clean and healthy environment, which is the stated purpose of the procedural rights in the Aarhus Convention? The engagement here is by way of submission of comments which can be taken account of in the process. There is no real power handed to the citizen in the decision making process and no real way to assert their rights once the decision maker acknowledges the results of public consultation correctly.

Another matter of concern is the extent to which public participation occurs sufficiently early for the public to have any meaningful effect on the ultimate outcome of the process and the extent to which there really is Zero Option public participation.

It would be useful for consensus to be developed on what exactly is meant by public participation under the Aarhus regime, and what it should involve. Also consensus on the purpose of public participation under the various regimes should be pursued to introduce greater consistency in environmental decision making as a whole.

Finally, it would be useful to develop a more nuanced inclusivity analysis drawing on the human rights equality traditions from which these civil and political rights have originated, to create a better and more effective practice in this area.

44 Sherry R. Arnstein's "A Ladder of Citizen Participation," Journal of the American Planning Association, Vol. 35, No. 4, July 1969, pp. 216-224.

45 The Report of the Working Group on Citizen Engagement with Local Government published by the Department of the Environment, Community & Local Government February 2014, http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/Community/CommunityVoluntarySupports/FileDownLoad%2C36779%2Cen.pdf

46 Paragraphs 7,8 and 9 of the Preamble to the Aarhus Convention, and Article 1.