

Sustainable Development Master Thesis

Track *International & European Environmental Law (d)*

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Title:

The Aarhus Convention :
a partial solution
for the Environmental and Democratic Crises?



JUSTICE

AARHUS CONVENTION
for our environment

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II The Crises

Introduction

Before presenting any argument to the discussion to follow, it is primordial to first establish the grounds on which the following thesis will be founded. The questions this paper seeks to answer are based on alleged democratic and environmental crises. These crises are clearly distinct in their origin; however some solutions may refer to both. This is indeed what the Aarhus Convention is set to investigate: whether a development of citizen's rights may induce a better protection of the environment. To engage the discussion it is crucial to first identify both crises. Why is the environment in crisis? What exactly defines a democracy and why would it be in crisis? These questions will be answered in the first part of this thesis to provide the foundations on which the answers to the main research question may be constructed.

A) Environment in Crisis

a) Definitions

Even though it may not be a subject to debate it seems indispensable to introduce this matter with a clear overview of the environmental crisis. Why is environmental awareness and appropriate action needed in response to the problems occurring on planet Earth?

(i) 'Environment'

In academia in general, and specifically in the field of law terminology is crucial. It is therefore similarly crucial to properly define the terminology to avoid void discussions. The term 'environment' is an ambiguous one¹. Definitions vary from 'something that environs' to 'the whole complex of climatic, edaphic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social or cultural conditions that influence the life of an individual or a community'². In this paper it is most important to look at the definitions originating from international legal bodies and conventions. The Aarhus Convention recalls the principle 1 of the Stockholm Declaration. The 1972 Stockholm Conference on the Human Environment added to this definition that this environment is essential to human life and the enjoyment of basic human rights, and the 1992 Rio Declaration (also recalled in the preamble of the Aarhus Convention) mentions 'environmental needs, environmental protection and degradation, however it does not specifically state what these exactly entail'³.

Despite the confusion around this term there seems to be a general consensus at the international level through the specific issues which are dealt with. International Environmental Law addresses the conservation and sustainable use of natural resources and biodiversity, conservation of endangered and migratory species; prevention and deforestation and desertification; preservation of Antarctica and areas of outstanding natural heritage; protection of oceans, international watercourses, the atmosphere, the climate, and the ozone

1Birnie & Boyle, International law and the Environment, p.3

2Webster New World Dictionary, (3rd Colledgeedn., Cleveland, 1988), P;454

3Birnie & Boyle, International law and the Environment, p.3

layer from the effects of pollution; safeguarding human health and the quality of life⁴. This research is aimed at the Aarhus Convention; therefore the definition recalled in the preamble of the convention at hand is most appropriate.

(ii) 'Crisis'

The word crisis originates from the ancient Greek word 'krisis' which means « a turning point in a disease⁵ ». The word crisis can entail several nuances; it can either mean *a crucial or decisive point or situation; a turning point, an unstable condition, as in political, social, or economic affairs, involving an impending abrupt or decisive change*. In the case of the environmental crisis the situation is such that the resilience of the planet's ecosystem is in danger in face of multiple threats coming from all parts of the globe. The word crisis implies that there have been changes which lead (are leading) to a certain turning point. What are those changes and can we talk of crisis when discussing environmental and democratic issues?

b) *The roots of the environmental crisis*

If today the environment is in crisis it means that major changes have occurred. Indeed rapid global socio-economic changes can be observed since the Industrial Revolution. The latter term is misleading in the sense that it suggests that this occurred overnight (such as the French Revolution of 1789); however this is not the case. Perhaps the term *Industrial Evolution* is more appropriate. Also, in the same line of thought, it is important to remind that the Industrial Revolution is not an independent entity acting alone; instead it is meant to capture the technological evolution of humankind and the demographic, social, economic, scientific and ecological evolution which occurred in parallel over the last century. Developments prior to this period of technological evolution are also crucial to understand the global context. Indeed the first signs of globalization are already visible with the colonial period. This era marks the beginning of international division of labor. The Industrial evolution clearly fits into the prolongation of the colonial era.

Roughly since the end of the 19th century, technological innovations have changed the face of the Earth and the way humans organize their societies. To be more exact, already in 1705, Thomas Newcomen invents a steam powered machine which can be used in industry⁶. At first this machine was quite inefficient and unpractical due to its size; however James Watt worked on improving this machine in the years following. During the 18th century several inventions were made in the UK allowing for what was to come.

In this evolution there are already in these early stages clear links between liberal capitalism and the new technological improvements. In 1801 the British government promulgates the 'General Enclosure Act' basically forcing all agrarian parcels to be enclosed, making an end to communitarian exploitation of the land and forcing all agrarian parcels to be exploited individually. This development led to commercial agriculture and provided for the

4Birnie & Boyle, *International law and the Environment*, p.3

5 Online Etymological Dictionary, Douglas Harper, Dictionary.com, "crisis," in *Online Etymology Dictionary*. Source location: Douglas Harper, Historian. <http://dictionary.reference.com/browse/crisis>. Available: <http://dictionary.reference.com>. Accessed: May 04, 2010

6 History website 'l'interneute' Histoire de la révolution industrielle on http://www.linterneute.com/histoire/motcle/4660/a/1/1/revolution_industrielle.shtml, last accessed may 23rd 2010

foundations of the revolution of British agriculture⁷. This would eventually lead to the first textile industry (a crucial element of colonial trade relations shaping international division of labor).

In the field of transport the steam powered train was invented in 1804. Also in 1859 petrol was found in Pennsylvania and marked to beginning of an energetic era. The ‘black gold fever’ has yet to fade from our societies.

Following these developments, several other inventions opened up a world of possibilities; such as the classification of elements by Mendeleev, a Russian chemist, the invention the light bulb by Edison, the invention of the car. These technological innovations, along with the shape of international division of labor, led to the development, in the beginning of the 20th century, of managerial practices and principles of scientific management such as Standardism, *Fordism* and *Taylorism* (which are still relevant today).

Ford’s idea was to divide the labor task and place each task along a conveyer belt, reducing the workers movements and increasing their efficiency. The other crucial element in Fords system was producing a car anyone could buy. The production costs were driven down to such an extent that his own workers could also afford a Ford. There are a few key elements in Fords production scheme: centralization of the production place, the conveyer belt and the standardization of the product. This is the beginning of mass production and consumption. After WWII, consumption became the symbol for prosperity.

Before this ‘Revolution’, societies were mainly agrarian ones and working the land was the main occupation. Industry was limited to individual craftsmen which made tools, on the side of their agrarian practices. The machinery which was developed to work cotton opened minds and technological ideas flourished to make the work easier, faster, more efficient. With workers having less time to work the land, people moved towards the industries and urban areas grew. Changes in transportation means also induced many opportunities in terms of trade. The unsafe, slow and unreliable sailboats and horse carriages were slowly replaced by steamboats and the railroad.

Now it would be fallacious to argue that the sole industrial revolution is to be blamed for the ecological crisis. It is indubitable the Industrial Revolution became an integral part of the capitalist market economy which evolved in parallel and which led to a system of continuous economic growth and development and of consumerism (Fotopoulos, 2007)⁸. It is a matter of social organization which led to the current situation. It is the evolution that took place and the consequences thereof which created the environmental crisis humankind faces today.

Let’s resume this evolution in the term “growth economy”.

Growth economy relies on centralized power structures. This is inevitable in the system of representative democracy. However the concentration of power is not only a consequence of the growth economy, it is also the fundamental condition for the reproduction of that system. Reproducing the system entails the reliance on inequality and the concentration of economic and political power as argued by Fotopoulos.

The result is the following: the *growth economy* of the past century induced a system of production which pollutes air, water and soil continuously with vast quantities of toxic material. It produces types of waste we do not know how to process or eliminate (some types

⁷ Cf 6.

⁸ Fotopoulos, “The ecological crisis as part of the present multi-dimensional crisis and inclusive democracy”, 2007, p.3

extremely are dangerous). It also requires an intricate system of regulations (set to protect human health these regulations rather prevent from being poisoned too quickly), and in which productivity means that as few people as possible are working. It is based on extracting vast amounts of natural resources for a short use which are in turn buried, stocked on a pile or burnt. This system also seriously damages biodiversity and cultural diversity (Braungart & McDonough 2002⁹).

It is only in the end of the 1960's that environmental concerns reach the social and political sphere of western European countries and the United States. However, grossly, the world pursued its development without regarding the environment and its ecosystems as an economic value.

Now in the decades following the 60's namely in the last two, a lot of awareness has been raised on the environmental issues which threaten mankind. The 1971 Meadows Report is a fair illustration of raising such awareness via scientific research. The idea to reconcile economic and technological development and protection of the environment came to light. Nevertheless the main global concerns still prevail and some might argue that they are growing to alarming proportions.

c) The symptoms of the environmental crisis

Sadly there are numerous illustrations to demonstrate why the environment is in crisis. Many of the facts are not hard facts in the sense that much scientific uncertainty resides around the global environmental matters. The many intricacies between various global phenomena render it difficult to pin point exactly where the thresholds lie in order to avoid an alleged crisis. As mentioned before, the use of the word crisis implies that there is a threshold and that reaching it would be disastrous for human survival.

(i) Climate change

In spite of these uncertainties some developments appear very alarming. The area covered by snow and ice in the Arctic in the winter has significantly reduced since 1980 (National snow and ice data center/NASA earth observatory¹⁰). In spite of all the efforts to reduce CO2 emissions it is estimated that there was an increase of those emissions of 3% in 2009¹¹. This may of course be explained by the essence of those efforts; some may safely argue that the non participation of the US to the Kyoto protocol and the fact that a CO2 trade scheme has been established (in which the right to pollute may be purchased) have rendered those efforts somewhat useless, or in any case counter productive.

The IPPC estimates that without any changes overall temperature on the Earth would increase between 1.4 and 5.8°C by the end of the century¹². This may not seem as much. However even a slight change in temperature have a very important impact. To illustrate this point it seems fair to point out that only 3°C separate us from the Holocene Era. Similarly the temperature during the last Ice Age was only 5°C lower than it is today. An increase of temperature will have multiple consequences, amongst which the melting of the polar areas, leading to a rise in sea level (estimated at half a meter in 2001 by the IPPC by the end of the

9 Braungart & McDonough, *Cradle 2 Cradle*, 2002 p.18

10 Le Monde, Hors Série, Bilan Planète, 2010 p.12

11 Le Monde, Hors Série, Bilan Planète, 2010 p.12

12 Kempf, « Pourquoi les Riches détruisent la planète », 2007, p.15

century). Furthermore as ice and snow reflect sunlight having less ice and snow would in turn increase temperature levels as less light would be reflected from the surface of the Earth. Similarly increase in temperature would induce a melting of the permafrost (about 1 million km²), mainly in Siberia. It is estimated that 500 billion tons of carbon is stocked in the permafrost areas. The melting of these areas would release the carbon and therefore also large amounts of CO₂ into the atmosphere accelerating climate change even more.

Basically, the idea of climate change relies on three observatory items. The amount of carbon dioxide and other greenhouse gases in the atmosphere is constantly increasing, the temperature of the Earth is increasing, and prediction tools such as scientific models on biosphere are improving, offering better insight of the situation. The IPCC is unequivocal on the matter; the situation is worsening every day.

(ii) Biomass & Biodiversity

Regarding biomass the southern continents continue to break records in terms of deforestation (ie. 4 536 000 hectares cut down in average in southern America annually between 2000 and 2005¹³). As for biodiversity there are currently more than 45000 species on the IUCN (International Union for the Conservation of Nature) endangered species list. This number has been tripled in 6 years¹⁴. At the UN Conference on biodiversity in 2006 in Brazil the report on global biodiversity affirms that humans are responsible for the 6th major extinction period in history. The most alarming factor of these changes is the great velocity at which this is occurring.

The main reason for the extinction of species is the destruction of habitat. Since 1980 35% of the mangroves and 20% of the corals have been destroyed (Millennium Ecosystem Assessment).

Also 28% of the fish stocks are being overexploited and are endangered. With an unprecedented exponential human demographic growth as we know today it is expected that fish consumption would double the current yearly 110 million tons of fish by 2030. It is impossible that the oceans can support such a high demand. According to the FAO, the maximum exploitation potential has probably been reached¹⁵. The FAO estimates over a billion people to currently be underfed¹⁶.

Furthermore disrupting the reproduction of fishes has similar consequences. Especially for the communities relying primarily on fish these disruptions may result to be catastrophic.

Returning to land, another very alarming phenomenon is the decline of bees. All around the globe the domesticated bees are in strong decline. In the winter of 2008 to 2009, the USA recorded a loss of 30% of its bees. In Europe the decline is somewhere between 10 and 30%. In other parts of the world the decline is clear, however not recorded. Pesticides are blamed by many and others point at the 'varroa destructor' and other parasites to explain the decline. As is the case with many issues, various causes probably work in combination. If this decline would reside the ecosystem would be gravely disrupted as bees are essential for the pollination of wild and cultivated plants, vegetables, fruits and nuts. Peter Neumann, responsible for a 'prevention of loss of colonies' program reminds that about a third of the

13 FAO, 2009, situation des forets du monde, in le Monde, HS, Bilan Planète, 2010 p.12

14 Le Monde, Hors Série, Bilan Planète, 2010 p.12

15 Le Monde, Hors Série, Will we have to stop eating fish?, 2010 p.39

16 FAO, World Summit on Food Security, Rome 16 to 19 of November 2009

current human population depends on the service rendered by bees; disregarding the added consequences in loss of biodiversity.

(iii) Gaia theory

According to James Lovelock, author of the Gaia theory, the Earth behaves in the same fashion as a living organism which auto-regulates itself. According to his theory climate change will result in the desertification of the largest part of the Earth's surface, forcing people to gather around the Arctic region. There will not be enough space for everyone, leading to conflict and war. The Earth is not at stake but the survival of human specie¹⁷. The main motivation is clearly an anthropogenic one. Lovelock's main concern is the climate's resilience, which may be broken suddenly, and with too much velocity to be corrected by human action.

This theory has not been approved by the scientific community and therefore is difficult to use in paper such as this one. For this reason it will not be used for the elaboration of this research in further detail. However it provides for an interesting theory in which we can approach environmental concerns as a web of interconnected ecosystems directed by a set of checks and balances. This global ecosystem (as it were) resided on a certain equilibrium which is needed to provide and guarantee human life on this planet. Disrupting this balance and the resilience of this ecological system will undoubtedly present life threatening challenges to humankind.

(iv) Conclusion

Environmental concerns affect practically all living beings on the planet, and all spheres of the global ecosystem, and of many local ecosystems. Climate is affected inducing irreversible changes, biodiversity and biomass are declining and atmospheric composition is changing. To resume, the earth is changing drastically and very fast relatively to observed planetary evolution. Our survival as a specie depends on a certain balance of the ecosystem. Usually natural systems are slow in evolution, and also slow to return to an anterior state of being. Once the resilience of a system is broken, it may prove extremely slow and most probably impossible to return to the anterior situation of equilibrium in which humans live prosperously. It seems as if the Earth is soon to reach a turning point. When will the resilience of the system reach its breaking point? Shouldn't we try everything to avoid this point to be reached?

In order to try to avoid this breaking point, humans need to work together. The socio-political model which seems to allow cooperation between individuals most is Democracy. Now western societies have established their democracies more than 5 decades ago, still the environmental problems have grown larger in that period. How can democracy foster this cooperation? Clearly changes are needed.

B) Democracy in Crisis

a) The concept of Democracy

The concept of Democracy stems from ancient Athens and has taken various forms around the globe throughout history. The crisis which is elaborated upon in this paper is an alleged crisis of the liberal democracy as we know it today. The term 'liberal' refers to the

17 Kempf, Pourquoi les Riches détruisent la planète, 2007 p.13

ideology of political liberalism. Liberal democracies can also be referred to as constitutional democracies as they are *generally*¹⁸ based on a constitution which protects the rights and duties of the individuals from the power of the government. These ideas stem from the Enlightenment Era amongst others through the works of Hobbes and Locke. The separation of the executive, legislative and judicial powers (Montesquieu) is also of crucial relevance for liberal democracies. Also the rule of law fosters Democracy which grants the government its legitimacy. These are all general characteristics. It is important to have a more detailed look.

In contrast with the ancient direct Greek model of democracy, in which every household had a seat in the parliament, modern democracies are built on a representative model. Nowadays labor is highly specialized and it would be unthinkable to have every single household participate in every decision. Instead citizens vote political representatives to govern for them with generally a system of universal suffrage (all adults can exercise their voting right –duty). So when the power lies in the hands of the people one may refer to a system of democracy, as opposed to aristocracy or oligarchy in which only a part of the people detain supreme power¹⁹. The right to suffrage is the fundament of this government. It is also of great essence to determine the exact number of seats in the parliament to ensure that the votes are given their true proportionate value. According to historian Ebenstein the ruin of Rome can partly be explained by the fact that there were never a fixed number of seats in Parliament. Furthermore there are many elements which deny Rome the definition of a democracy. Ebenstein's point is mentioned here to underline the importance of clear rules governing Parliament.

Whatever exceeds the power of the people should be managed by ministers chosen by the former. However to power to legislate should always lie in the hands of the people. The decrees made by the Senates of Rome and Athens were binding during a year but needed to be ratified by consent of the people to extend this period²⁰.

Rousseau introduces the idea that Government is established for the common good²¹; in his view it is because of clashing interests that such an organization of society is necessary. It is that common interest which allows and ties the society together. In this view sovereignty means the collective will, power may be transmitted, but the will shall always lie within the collective being: sovereignty. Sovereignty is therefore unalienable.

Sovereignty is fostered and protected by the rule of law. Constitutions, laws, decrees and rules establish and protect the system on which the society relies. According to Rousseau Conventions and Laws are needed to join rights to duties and refer justice to its object²². Everybody is deemed to be equal before the law, even the State, the guarantee of the rule of law. The public is subject to the laws but also their authors.

b) Indicators of the democratic crisis

To assess the extent to which we may talk of a democratic crisis it seems essential to determine a certain number of indicators. These indicators may indicate that there is indeed a situation of crisis in western liberal democracies or that there is not.

¹⁸ This is not the case for all nations, for instance the UK does not have a written constitution however may still be referred to as a liberal representative democracy

19 Ebenstein, Great Political thinkers, from Plato to the present, 2000, p. 414

20 Ebenstein, Great Political thinkers, from Plato to the present, 2000, p.416

21 Ebenstein, Great Political thinkers, from Plato to the present, 2000, p.458

22 Ebenstein, Great Political thinkers, from Plato to the present, 2000, p.461

Democracy is a concept and can adopt various forms. Institutional and practical organization defines the shape of a certain democratic system. The core of such a system lies in its concept and its essence lies in its values and not in its form. Democracy is a compromise between liberty and equality and therefore always relies on a certain equilibrium. It is *not* and *cannot be* a perfect system. The more a system is democratic, the less efficient it may be upon deciding matters; simply put: the more people have a say, the harder it becomes to make a decision.

It is crucial that the values of democracy remain intact, independent of which form it may adopt. When democracy is defined by its institutions and no longer by its values its contents become void and it would become somewhat of a theater of shadows²³.

In France, political analyst Capdevielle analyses that institutional discrepancies and places them within the context of the global crisis of power legitimacy. Indeed we can observe a clear increase in abstention in elections which carries great risks for Democracy (as illustrated by the accession of the fascist Jean Marie Le Pen to the second round of the presidential elections of 2002). However in parallel there is strong increase in popular strife and a clear demand for democracy²⁴. According to Capdevielle, civil society, how organized it may be, cannot replace political representation²⁵. This is however a matter of opinion.

There are two distinct indicators that we can retain from these observations. On the one side abstention rates in public elections attest of the alienation of the people to politics, and on the other side the feeling of alienation pushes people to show their discontent in ways that appear meaningful to them. The latter clearly indicates the need for democracy and the need to participate. If we recall Rousseau's view on sovereignty, these indicators cannot be taken lightly. Rousseau stated that Sovereignty is inalienable; if the sovereign people generally feel alienated of their political representation one may safely suggest that there is a profound illness in today's democratic system in western liberal societies.

According to Robert (journalist of "le Monde Diplomatique") the resolvment of such a democratic crisis can only be attained via a renewed investment in the democratic ideals and values. It is not about the form, but about the essence. Indeed citizenship needs to be reinvented when at the same time the grossly inegalitarian nature of the globalised capitalist market logic reduces the capacity of individuals to react. There seems to exist a consensus on the fact that it is needed to shift towards a more local approach of management and a stronger 'proximity democracy'.

However the democratic deficiencies reach further than sole popular discontent and alienation of the sovereign people, the impotence of politics in face of environmental and economic concerns are crucial. Indeed the representative model seems incapable of fostering answers of such global concerns. There are structural shortcomings to this democratic system. Indeed the global environmental concerns have a much broader geographical and temporal scope than the scope given to the political representatives. Citizens elect representatives for more or less five years and their scope of action is restricted to a political territory defined by national boundaries.

²³ Anne Cecile Robert, Par dela la crise democratique, le Monde Diplomatique, oct 2005, on <http://www.monde-diplomatique.fr/2005/10/ROBERT/12844>, last accessed on may 23rd 2011

²⁴ see footnote n.°23

²⁵ Jaques Capdevielle, *Démocratie : la panne*, Textuel, coll. « La discorde », Paris, 2005 as found in the article mentioned under footnote n°23

The indicators that we can retain are various; **institutional dysfunctions, political impotence, abstention rates, occurrence rates of demonstrations, manifestations and strikes, socio economic inequalities and the loss of public freedoms in the name of security.**

c) Are our liberal democracies in crisis?

Now that we have established a set of indicators based on social observations and analyses we may investigate upon the alleged democratic crisis. Due to the geographical and legal focus of this paper (the Aarhus Convention member States France and the Netherlands) this paper will analyze those indicators in both nations.

The indicators are closely linked. However we will try to observe them singularly. The (non-exhaustive) list extends further than the specific topic of the Aarhus Convention to draw the contextual picture in which this research is embedded. It is important to see the larger frame of democratic deficiencies to comprehend the situation fully. In turn it is crucial to focus solely on the indicators which the Aarhus Convention is designed to affect.

(i) Institutional dysfunctions

As mentioned the essence of democracy lies in its values and its organization is defined by its institutions. The French expression “le fond et la forme” fosters this idea perfectly. The values are the ‘fond’ (the essence) and the institutions are the ‘forme’ (the shape a particular democratic system adopts). Institutions are set up in a certain fashion in order to ensure those democratic values and define how those values function in a given society.

Even if the institutions are in theory not the essence of democracy, it is of utmost importance that those institutions function properly to allow for the exercise of the democracy and to guarantee the democratic values.

The Aarhus Convention is however not likely to affect the institutions themselves. It is in any case relevant in terms of redefining certain relationships between the institutions and the citizens. Indirectly enforcing the Aarhus Convention could improve how public institutions work as it renders more transparency.

(ii) Political unrest-instability

According to Harvard political science professor Robert D. Putnam, various surveys point out that people’s faith in their politicians is in decline. Confidence in politicians has dropped in 12 out of 13 countries studied. Putnam states that only in the Netherlands confidence has increased²⁶. This does not mean that the Dutch have absolute confidence in their politicians (much can be argued on the contrary). This is a relative increase compared to a certain point in time.

Indeed in the journal of democracy, he writes that public opinion trends show that political leaders and institutions receive decreasing trust from their people. Roughly since the 1960’s, in western societies, popular protests have become a common feature of political life, clearly indicating popular deference to political elites²⁷. Symbolic of this growing skepticism, many

²⁶ Putnam, Chronical of higher education,

²⁷ Pharr, Putnam, Dalton, A quarter century of declining confidence, Trouble in the advanced democracies? Journal of Democracy, volume 11, number 2m April 2000. p. 11

European Parliaments have set up particular committees to investigate upon governments (a way for the people the attempt to control the executive branch).

In Germany surveys clearly attest of the lack of confidence in its political leaders since the 1980s. Similar developments are observed in Italy where 84 percent of the population expressed 'politicians do not care what people like me think' in 1997, against 68 percent in 1968. According to Russel J. Dalton there is "*clear evidence of a general erosion in support for politicians in most advanced industrial countries*"²⁸.

As the AC affects the role of the citizens and redefines the nature of being a citizen, it is very relevant when discussing popular confidence in politics. It is not clear whether the implementation of the Aarhus Convention will affect this confidence in a negative or positive fashion, in any case it will have certain consequences. In any case the rights and obligations which arise from the AC allow for a more transparent system and creates new links between the public and public authorities. If information, decision making and justice are all accessible to the public; clearly the public should feel more recognized and respected in their role as citizens.

(iii) Abstention rates and civil strife

Abstention rates at public elections illustrate the level to which citizens feel concerned and represented by politics. The numbers show a general trend of increase. The French statistics office (TNS SOFRES) published revealing data. For European elections there was an abstention rate of 39,3% in 1979 for 57,2% in 2004 for the French. Regarding all European citizens for the same election we observe a similar increase, from 37% in 1979 to 47,2% in 2004²⁹. This increase is not negligible. The same applies for French municipal elections, however the increase is less significant (from 25% in 1959 to 33% in 2008). There seems to be no change regarding Presidential Elections, this is not a strange phenomenon when realizing the strong powers of the executive in France. However for the legislative elections there is a clear increase in abstention between 1958 and 2007 from 22,8% to 39%³⁰. The number has almost doubled in 50 years. Almost 40% of the French did not participate in electing the legislative powers, clearly attesting of a lack of interest and involvement. Growing abstention rates may prove to bear many risks. Indeed if people do not participate in public election the risk of misrepresentation arises. It may lead to a situation in which representatives are elected, who do not foster the common interest of a society. It may result in an even larger alienation of the people which is supposed to be sovereign. The main risk is therefore the loss of a people's sovereignty: the foundation of democracy.

The 1960's have been mentioned in a previous paragraph describing the roots of awareness the environmental crisis. That decade is mentioned in the context of a growing environmental concern which is deemed to have emerged at that time.

Indeed the 1960's witnessed the birth of radical political activism (Putnam, 2000, p.6). This emerged with the civil rights movement in the US and had repercussions in democratic societies around the world such as the events of May 1968 in France.

²⁸ Dalton, R.J. "Political Support in Advanced Industrial Democracies". In Pippa Norris, ed., *Critical Citizens: Global Support for Democratic Government*, p.63.

²⁹ TNS Sofres (abstention) on <http://www.tns-sofres.com/points-de-vue/7EB7E45F23E545629454F8FDF2A44E3F.aspx>, last accessed on may 23rd 2011

³⁰ "La France aux urnes, 60 ans d'histoire électorale", P. Bréchon, La Documentation Française, 2009 as found in the tables mentioned under footnote n°29

Recent and current events seem to confirm the trend. Indeed in the last couple of months (since September 2010) many examples of manifestations can be found. The French are repeatedly taking the streets to show their discontent. On the 16th of October a new manifestation is planned. Brussels was the host of a large European manifestation on the 29th of September. Strikes and manifestations also occurred in Greece, Spain & Portugal this last month. The latter may not be interpreted as data to confirm a point of argument; however it is a fair illustration of that point and may be utilized as such. Also the Arab Spring movements show that the need for democracy is a global phenomenon.

Nevertheless there is no evidence of a clear increase in manifestations in Europe. Even if there were such an increase it can hardly be said that this attests of a certain type of crisis. On the contrary it can easily be argued that the occurrence of manifestations and strikes attests of an important democratic mechanism. It is the exemplification of the exercise of democracy by the citizens. When discontent with political developments, citizens show their discontent in a demonstrative fashion.

Manifestations and strikes show that some problems are pertaining in society but at the same time they attest of a certain democratic function. Clearly if people strike and/or take the streets they must be discontent with the situation. However they claim their democratic right and exercise it in that manner. Beyond the right of suffrage, the people retain the constitutional right to make themselves heard through popular action to exercise their sovereignty.

(iv) Socio economic inequalities

These inequalities, a consequence of economic liberalism, are not so much an important indicator as the previous ones, as the AC is not set to address this issue; however socio economic inequalities namely legitimize civil strife. Indeed the democratic system as it resides does not manage to reduce those inequalities to acceptable levels. On the contrary, inequalities seem to grow larger, within nations, but also internationally. When the democratic system is supposed to foster popular sovereignty and that instead a large part of society is seeing its chances to a better future reduced every day it seems legitimate for these people to make them heard and to attempt to redress the situation in their favor.

Inequalities are growing world wide. Perhaps humankind is experiencing its most prosperous age in its history; ironically poverty is growing dramatically³¹. Humankind has never produced as many goods and services as today, yet the production is distributed in a poor fashion, or rather not distributed. To illustrate this point there were 157 billionaires and 2 million millionaires in 1989 with 1.2 billion people living in absolute poverty³² (Brown, 1993). In 1993 the United Nations Development Program (UNDP) reported that 20 percent of humanity possessed 82.7 percent of the world's income³³. The ratio between the top 20 percent and the lowest 20 percent of humanity has increased from 30 to 1 in the 1960's to 61 to 1 in 1992³⁴ (UNDP, 1992).

³¹ Jorge Nef, Globalization and the Crisis of Sovereignty, Legitimacy and Democracy, Latin American Perspectives, Vol.29, No.6, Nov 2002, p.62

³² Brown, Lester. "a new era unfolds", in Lester Brown, Edward Wolff, and Linda Starke (eds.), State of the World 1993: a worldwatch institute Report on Progress towards a sustainable society. New York: W.W.Norton in the Article mentioned under footnote n°31

³³ Jorge Nef, Globalization and the Crisis of Sovereignty, Legitimacy and Democracy, Latin American Perspectives, Vol.29, No.6, Nov 2002, p.62

³⁴ UNDP, Human Development Report 1992, New York: Oxford University Press

It would however be fallacious to draw a picture of absolute impoverishment around the world. According to the French journalist Hervé Kempf life expectancy is increasing in the developing nations and that extreme poverty has reduced from 28 percent of world population in 1990 to 21 percent in 2007³⁵ (Kempf 2007). Nevertheless he argues that on a world scale the social mechanisms do not function. Also the growing urbanization entails a clear degradation of the human habitat as one third of urban population lives in so called ‘slums’. Poverty has become a major trait of urban expansion.

Additionally it seems relevant to mention the works made by Sociologists Pierre Bourdieu and Loic Wacquant. The main theme of their works is social inequalities. Governments, such as the French government, use social ills such as delinquency and insecurity as a fear factor to limit public freedoms. Fearful middle and popular classes accept the limitations of their freedoms to combat delinquency and the feeling of insecurity. One of the main weapons in this strife is prison. This is where Wacquant’s theories come in. Indeed the number of prisoners in the US has gone from 500.000 in 1980 to 2.2 million in 2005³⁶. This represents 738 prisoners for 100 000 citizens. Aside from that the situation in prisons is also worsening with increased rape rates and poor medical and psychiatric services in prison according to Human Rights Watch³⁷. It is also interesting to note that the poorer classes are overrepresented in prison clearly attesting of gross social inequalities. Similarly the imprisonment rate in France is increasing with 29500 prisoners in 1971 to 59000 in 2005.

Redressing socio-economic inequalities is not the focus of the Aarhus Convention. It hardly presents solutions to this end. However this paragraph attests of a grave and worsening situation which pertains in western societies. On an additional note, Kempf would argue that the relationship between the environment and socio-economic inequalities is linear at the domestic level but also world wide.

(v) *Limiting public freedoms and democratic values*

Hervé Kempf describes today’s world as being dominated by a sort of economic oligarchy. In his view societies are always dominated by a small group which detains most wealth and means of social reproduction. Now in face of such ecological and economic turbulence such a group will attempt to maintain the social order. He argues that in current situation, the alleged oligarchy is trying to weaken democratic values by limiting discussions on collective choices, by weakening the law and its representatives and by restricting individual liberties vis-à-vis the State and other authorities³⁸. Comparing the current situation with western dictatorships such as the 3rd Reich is highly fallacious. Instead of such a clear dictatorship today’s ruling elite prefers to slowly empty Democracy of its values.

Alexis de Tocqueville made the following prediction on this matter: “The character of oppression threatening democratic peoples will be nothing like it has been in the past (...). I want to imagine under which new form despotism will appear in this world: I see a crowd of uncountable men similar and equals who turn around themselves without resting, to procure small and vulgar elements of pleasure with which they fill their souls. Each of of them, taken aside, is like a stranger to the destiny of all others: his children and his friends make up for the

³⁵ Kempf, Pourquoi les riches détruisent la planète, 2007, p.47

³⁶ “Mille détenus de plus par semaine aux Etats Unis entre mi-2004 et mi-2005” Le Devoir, may 23rd 2006

³⁷ Human Rights Watch, World Report 2006, January 18th 2006

³⁸ Kempf, Pourquoi les Riches détruisent la planète, 2002 p.93

entire human race and the rest of his 'co-citizens', he is besides them but does not see them.³⁹ (...).”

This descriptive prediction alarmingly reminds of many social aspects of today's western society. His description clearly illustrates the consequences of individualism.

According to Kempf, the antidemocratic slide has emerged in the 1990's. Liberalism defeated Socialism in 1989. In 2000 the American election system failed its citizens and the world by allowing the candidate with lesser votes to become president. However the main development against public freedoms has begun after the events of September 11 2001. The resulting adoption of the Patriot Act allowed serious restrictions on these freedoms. This Act allows recording and surveillance of communications between citizens, facilitates interventions without warrants and consultations of information databases such as medical, financial etc. In parallel the Patriot Act also reduces the power of Parliament and of Courts to control these police actions. The National Security Agency (NSA) controls outgoing calls from its citizens and also monitors all emails transiting through the three main telecommunication agencies ATT, Verizon and Bellsouth. The NSA has a far larger budget than the CIA and constitutes the largest information database in the world. These controls also extend over financial transactions with the Terrorist Finance tracking program. The same occurs regarding flight passengers to the US. The EU is helping the US to answer their curiosity by allowing the customs to access all information regarding passengers to the US (identity, itinerary, place of residence, health, eating habits etc).

Developments in the United States are indeed very relevant as the latter presents itself as the warrant of freedom and democracy around the world. However behind the mask another face is hidden. There many illustration of the US' feeble democratic values.

Indeed the numerous military camps which evade the Geneva jurisdiction on war prisoners attest of the American double agenda. In the Bagram camp in Afghanistan, or Guantanamo Bay, Cuba, prisoners are held without judicial protection. This entails that the American model of democracy allows torture. Larry Cox, director of Amnesty international USA, confirms that the Bush administration made prisoners disappear in a network of secret prisons by kidnapping them and sending them to interrogations in countries such as Egypt, Syria or Morocco. However we do not talk of torture but of “Reinforced Interrogations Techniques”. Examples of such methods of inquiry I leave to you imagination. Other nations have made themselves accomplices of such conduct by aiding the CIA in the transfer of prisoners or by simply letting US planes with such missions land in their airports.

A similar act has been adopted in Russia to fight terrorism, limiting essential individual freedoms in 2006.

That same year, Amnesty International provides for a very negative report on the human right situation in the UK. Foreigners are held captive for years without a fair trial, the police carries out surveillance of suspects without judicial control, suspects are being deported to countries where torture is possible. Belgium introduced the term “particular methods of inquiry) in new antiterrorist legislation. The EU adopted a directive strengthening legislation on telecommunication data.

In December 2005 France adopts its 8th anti terrorist law further empowering the police over the judiciary. This entails less administrative and judicial control on surveillance and intervention by the police, a facilitation of identity control, forces transport firms to communicate passenger details, allows for constant photographic recording of users of the

³⁹ De Tocqueville, A. De la Democratie en Amérique, Gallimard, coll.”Bibliothèque de la Pleiade”, 1992, p.836

road network, allows the control data collected by internet providers. The “syndicat de la magistrature” observes the following statement: “*The proposed dispositions all constitute, without exception, new restrictions to fundamental freedoms*”⁴⁰.

A key word in this context is fear. Fear makes these developments possible. The Bush administration as started a war, a war on terror. The enemy does not exist as such as it is not a particular person or country: it is an *-ism* and one cannot defeat an *-ism*. War carries the justifications for the restrictions made on human rights for governments wishing to do so. The intellectual Medhi Belhaj Kacem captures the situation rather fairly with the following statement: “*This ‘perfect’ democracy produces its own inconceivable enemy, terrorism; far from posing a threat it embodies the ultimate guarantee of its perpetual maintenance; as it needs no longer to be judged by its results but by its enemies*”⁴¹.

Both Kempf and Kacem ring the same alarm bell I mentioned when defining democracy and therefore support my argument; democracy is about its values and not its form.

d) Conclusion

As argued by Pharr, Putnam and Dalton, there is no evidence of declining commitment to democratic values by civil society. They even argue the contrary; commitment has risen in the last quarter century. However based on three indicators of their own (attachment to and judgment of political parties, approval of parliaments and other political institutions, and assessment of political class and evaluation of political trust) these authors conclude that citizens are in general less satisfied with the performance of their representative political institutions then 25 years before⁴².

Indeed the increasing abstention rates, manifestations, strikes attest of the democratic deficit. The use of the word Crisis is perhaps a bit strong as it suggests liberal democracies could collapse at any given moment. This is not the case. However there is no doubt on the fact that the situation has clearly deteriorated. Governments are growingly incapacitated towards the market economy, the sovereign people are being growingly alienated, the latter is increasingly engaging in civil strife and resorting to radical measures to demand its democratic purpose. Public freedoms are being restricted and inequalities are growing. To describe the current status of liberal democracies it is perhaps too strong to talk of a crisis rather important specific democratic deficiencies.

The concept of liberal representative democracy clearly experiences a number of deficiencies as explained above. However the topic of this research is based on the provisions of the Aarhus Convention (AC). The latter is designed to answer a number of specific concerns based on three interconnected pillars. It is set to promote public participation in environmental matters and therefore does not provide answers to the complete list of democratic deficiency indicators. In this research, a range of indicators have been presented to provide for the contextual explanation of the democratic crisis. The focus on the AC renders the relevance certain indicators void as the latter convention detains neither the goal nor the motivation to

⁴⁰ Syndicat de la Magistrature, “observations sur le projet de loi n.2615”, November 2005. Roger, P. “La France durcit pour la huitième fois en dix ans son arsenal antiterroriste”, LE MONDE, December 23rd 2005.

⁴¹ Belhaj Kacem, M. *La Psychose Française*, Gallimard, 2006, p.40

⁴² Pharr, Putnam, Dalton, A quarter century of declining confidence, Trouble in the advanced democracies? *Journal of Democracy*, volume 11, number 2m April 2000.

redress **all** democratic deficiencies. The AC is designed to resolve a specific number of issues regarding public participation.

Public participation is indeed part of democratic values as we know them today; it regards the rights and duties of the citizens, the vertical relationship between state and citizen, and the horizontal relationship between citizens.

The AC brings no benefit to issues such as the limiting of public freedoms in the name of security nor can it redress institutional dysfunctions or socio economic inequalities. However the Aarhus Convention has the potential to affect the confidence of citizens in politics and politicians, to involve the public in decision making, to give more responsibility to the State, and perhaps most importantly put more responsibility on the citizens.

C) the link between the Environment and Participative Democracy: Why is Participation necessary?

The Aarhus Convention departs from the idea that participation in decision-making is beneficial and necessary to the right to live in an environment adequate to a person's health or well-being⁴³. The same principle can be found in legal literature amongst others J. Verschuuren en Birnie and Boyle have discussed this item in their works. As mentioned in previous parts, Public Participation was already a principle of international law, the AC renders it a hard legal obligation. Birnie and Boyle claim that an open, accountable government in which civic participation occurs is 'more likely to promote environmental justice, to balance the need of present and future generations in governmental decisions, to integrate environmental considerations in decisions, and to implement and enforce environmental standards'⁴⁴.

Another relevant author in this context is Jonas Ebbesson. He states that developing democracy towards a participative model reflects an expansive notion of democracy. According to him 'involving citizens and NGO's in governance not only furthers the individual interests of participating actors but also potentially contributes to promoting certain public interests and concerns such as the environment'⁴⁵. Participation is beneficial on several points. It allows environmental interests to be voiced and represented in decision making processes. It allows to create a larger consensus on the decisions made. Indeed Lee and Abbot argue that transparency and frequent contacts between the authorities and the public allows to reach a larger consensus on decisions. In turn, Habermas argues that such regulated participation is necessary for the legitimacy of law and should provide for the tools to grant equal opportunities to all parties to influence the decisions⁴⁶. It is also aimed at limiting the discretion for authorities rendering them more accountable, more transparent and more legitimate.

Furthemore public participation leads to better decisions⁴⁷. In cases of individual and of NGO participation the grounds of a decision are better motivated and the quality of the decision is

⁴³ Aarhus Convention, Article 1

⁴⁴ Birnie & Boyle, *International law & the Environment* (Oxford : OUP, 2002) 216-5

⁴⁵ J.Ebbesson, 'The notion of Public Participation in International Environmental Law' in (1997) 8 *Yearbook of International Law*, 56

⁴⁶ J.Habermas, *between facts and norms, Contributions to a discourse Theory of Law and Democracy* (Cambridge: MIT Press 1996), 228-229

⁴⁷ J.Verschuuren, *Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention* in (2004) 4 *Yearbook of European Environmental Law*, Oxford University Press, 31

enhanced. The Aarhus Convention translates this benefit to the public in two elements; on the one side the public may act on protecting their own interest and on the other a responsibility to do so.

Verschuuren also mentions a number of disadvantages of public participation, namely the fact that participation induces a larger time frame for decisions to be taken and a larger number of court cases. The main challenge that arises from establishing such rights lies in the hand of the authorities. They must find a balance between the 'problem solving effectiveness of public participation and leadership and democratic authenticity'⁴⁸. In other words governments must find the balance between equality and effectiveness.

⁴⁸ J.Verschuuren, *Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention* in (2004) 4 Yearbook of European Environmental Law, Oxford University Press, 49

III The Potential of the Aarhus Convention

A) introduction : larger context of international & European Law

Before we can discuss the implementation of the Aarhus Convention and the obstacles to this process it is necessary to first analyze the text and observe what the theoretical potential of the AC may be.

Any international treaty is embedded in a larger legal context. The Aarhus Convention is a UN/ECE treaty and therefore relies on other UN law. Also the EC is a party to this convention, which means that it also has clear links with EC law.

It is always very helpful to look at the preamble of a given convention as it places it within a wider legal and political context and provides information for the interpretation and the determination of implementation tasks. The preamble presents the motives, the objective and the purpose of the treaty. This is confirmed by Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties; the preamble is part of the context and is the primary source of interpretation.

The preamble of the Aarhus Convention refers to a number of international legal principles. In the first paragraph reference is made to the first principle of the Stockholm Declaration which entails the fundamental right “to freedom, equality, and adequate conditions of life, in an environment of a quality that permits life of dignity and well being”. In the second paragraph, reference is made to principle 10 of the Rio Declaration which is the first instance in which public participation in environmental matters was brought forward in such international conventions. Paragraphs three, four and five link the two previous concepts to further fundamental rights in the field of environmental and to human health and sustainable development.

Indeed the Convention is placed within larger international developments such as “Environment for Europe” and “Environment for Health” and other organizations such as the UN/ECE (as mentioned).

At the international level the issue of human environment was raised in 1968 by the United Nations Assembly General. The issue was discussed in Stockholm in 1972 and namely resulted in a declaration of 26 principles, also mentioned above. This set of principles clearly establishes a link with human rights, which is on itself a distinct part of international law, although growingly intersecting with environmental law.

Another relevant development is the 1987 Brundtland report as it sustained discussion and established the grounds for the 1992 United Nations Conference on Environment and Development (UNCED), also known as the Rio Declaration. For the purpose of this research Principle 10 is most relevant as it refers to the need to develop public participation in questions relating to the environment. One may safely argue that all three pillars of the Aarhus Convention legally stem from Principle 10 of the Rio Declaration.

The 1982 World Charter for Nature is also very relevant in this discussion. The latter has a strong emphasis on the intrinsic value of nature however it repeatedly refers to public participation (paragraphs 16, 23 and 24). Those paragraphs touch upon issues such as disclosing information (transparency and access to information), participation in decision making (par.23) and the obligations of individuals to protect the environment (horizontal relation between individuals and vertical relation citizen-state). When reading these

paragraphs one may even argue that the principles of the Aarhus Convention stem directly from the World Charter for Nature.

The Preamble also refers to the concept of sustainable development. This concept can be found in the Rio Declaration (principle 3), but can also be found a one of the main objectives of the Treaty of Amsterdam (1997) amending the treaty on the European Union. This means that “the principle of sustainable development” is strongly present in the larger legal context of the nations at hand in this study (France and the Netherlands).

The preamble also recalls the Convention on Biological diversity which defines the terms ‘sustainable use’ and ‘environmentally sound’.

The chosen structure acknowledges that public participation is a crucial element in guaranteeing the right to a healthy environment. A clear parallel is drawn between the development of the recognition of environmental rights and the recognition of what public participation means for reaching sustainable development. The seventh preambular paragraph clearly indicates which specific rights the Aarhus Convention is set to guarantee. It recognizes the fundamental right to live in an environment adequate to his or her well being. The Convention is meant to allow for the means to enjoy such an environment and to make sure that it is duly protected.

The preamble also touches upon more practical issues such as improving decision making, creating a larger social consensus, creating more transparency, allowing more freedom of information and increasing the role of NGO’s. In order to achieve these practical matters emphasis is put on education, on capacity building and on improving communication. The sixteenth and the seventeenth paragraphs are very relevant for this research; they touch upon the responsibilities of government and the vertical relation between individuals and government. Given the international legal context we can pursue our analysis of the legal provisions of the AC.

B) legal provisions of the AC

a) Objective of the Aarhus Convention

In the general part of the convention one may find the objectives, the definitions and the general provisions (which have more effect than the preambular provisions).

Article 1 lays down the objective of the convention. Notably article 1 makes a clear link between the environment and basic human rights. It does not state it explicitly but implies it by referring to the Rio Declaration. The latter states that human beings “are entitled to a healthy and productive life in harmony with nature”.

Also it is important to note that Article 1 states that the guarantee of access to information, public participation and access to justice in environmental matters in accordance with the provision of the Convention **contribute** to the protection of the right to a healthy and productive life (...).

This article also brings the concept of intergenerational equity forward, which is a fundamental trait of sustainable development. This is not a new element, as it was first mentioned in the Stockholm Declaration of 1972. However the AC is the first legal instrument to apply a set of legal rights and obligations to this concept. Indeed the Aarhus Convention does not essentially establish that right to a healthy environment. Instead it is founded on various international legal instruments mentioned above and goes beyond them and attempts to establish a set of procedural rights to access information, access to decision making and

access to justice. It is the first set of practical tools to achieve, or rather, contribute to achieve the protection of certain complex international rights, such as the right to a healthy environment. Indeed the Convention specifies a State obligation to reach this objective. It is unjust to assume that the Convention simply creates *more* obligations, instead it creates new ones. The State is responsible for implementing the Convention by providing the 'necessary administrative, legal and practical structures' to guarantee the rights of the AC. The State is not asked to take care of everything and solve all social problems. Instead the AC demands from States to act as coordinators and as a referee between the various actors. In the first instance, the State is required to establish a transparent system. Once this is achieved, the State must guarantee the functioning of such a legal framework.

b) general provisions

Article 3 lays down the general provisions of the Convention. These provisions concern the document as a whole, therefore not specifically one pillar or the other, but refer to all three pillars of the Convention. These provisions range from compatibility issues between the Convention and national legal frameworks (Article 3 par.1) to non discrimination or anti harassment concerns (respectively par.9 and par.8).

The second paragraph demands 'best efforts' in terms of assisting the public in pursuing its rights; the use of the term 'endeavour' illustrates that States cannot give an absolute guarantee of assistance and guidance of the public, however the Convention demands that Member States engage in such practices.

Similarly the third paragraph encourages the promotion of environmental education and awareness which is not a goal which can be attained in an absolute manner. Such promotion is generally positive to reach the goals set by the AC and therefore encouraged.

As mentioned various general provisions touch upon national legal orders. Paragraph 1 concerns compatibility to allow proper enforcement (as a whole). Paragraph 4 concerns an adjustment of a national legal system in terms of NGO recognition and support. The following Paragraph lays down the Convention as a 'floor' instead of a 'ceiling'. This is an important provision as it encourages members to introduce measures which go beyond the AC and to maintain more positive rights which already existed within that legal jurisdiction.

Also the relation between the Convention and the national legal order is at hand in paragraph 6 as it stipulates that the AC may not induce any derogation of a pre-existing right.

Paragraph 7 stands out as it concerns solely the international legal sphere; it encourages the promotion of the AC principles in the international sphere. This should take place at international meetings, within international organization, or at further conferences and Conventions relating to environmental or development issues.

c) structure of the Aarhus Convention

The Aarhus Convention is no different from other treaties and conventions; even more so for the AC is the structure crucial in understanding the motives and in interpreting the legal provisions.

The Aarhus Convention is explicitly founded upon three distinct yet interrelated pillars. Pillar I deals with access to environmental information, pillar II with participation in decision making and pillar III concerns access to justice. Pillar I appears as the starting point, a crucial prerequisite for all the rights embodied in the AC. Indeed, the public must be able to access environmental information to know what is going on. To be able to participate coherently in making a decision, or to access a court in a given situation, one must detain the necessary and

relevant information relating to that particular issue. It encourages a transparent system. To quote the implementation guide:

“Under the Convention, access to environmental information ensure that members of the public can understand what is happening in the environment around the. It also ensures that the public is able to participate in an informed manner.”⁴⁹

Pillar I is essential to the Convention, however taken alone it will not have much impact on the status quo.

The sum of pillar II & III present the public with a coherent and comprehensive set of tools redefine western liberal democracies.

Pillar II regards participation in decision making. As mentioned, participation cannot occur coherently if the public is not informed properly. Nor does the second pillar make sense if there is no enforcement possible (this is made possible by the 3rd pillar, which allows the public to access justice in case of breach of the 2 first pillars). The second pillar appears as the most complex one. Ideally enforcing pillar II would involve the *“activity of members of the public in partnership with public authorities to reach an optimal result in decision making and policy making”⁵⁰*. However there is not model for this provision, it may differ in various situations. Indeed this Convention is aimed at setting a minimum standard. One cannot involve the public in the same fashion in all situations. The level of involvement depends on various elements such as the scope of the decision to take, the expected outcome, what will be affected and in what fashion and of course at what level the decision is to be made (international, national, regional or local)⁵¹. The degree of involvement granted to the public may also vary. Indeed it seems appropriate to allow those who will be most affected by a particular decision more room to be involved. This is where the distinction of ‘public’ and ‘public concerned’ comes into play. This difference will be elaborated upon while describing the legal provisions of the Aarhus Convention.

In a similar fashion, pillar III carries little meaning if not granted the appropriate relevant information and if no possibility is given to participate. As stipulated by Article 9 of the Aarhus Convention access to justice means that *“members of the public have legal mechanisms that they can use to gain review of potential violations of the access to information and public participation provisions of the Convention as well as domestic environmental law”⁵²*. It is clear from this definition that the 3rd pillar is meant to strengthen both pillars I & II -and the Convention as a whole-, as it allows the public to review decisions in a court of law. It gives the Convention a clear binding aspect; not only parties to the convention but also citizens and NGO’s can enforce it. Without such a provision the effectiveness of the Convention as a whole would be seriously undermined. It simply aids in ensuring and effectively implementing the Aarhus Convention. To this day various obstacles pertain to implementing this 3rd pillar; such as the lack of legal standing for NGO’s in some situations or the lack of authority of some courts in other situations. However its existence is crucial.

Furthermore, pillar III is not restricted to granting legal standing in reference to pillars I & II exclusively but can be invoked in relation to domestic environmental legislation as well. This is important as it extends the rights of citizens not only in the framework of this particular

⁴⁹ Implementation guide, p.46, par.2

⁵⁰ Implementation guide, p.85, par.2

⁵¹ Implementation guide, p.85, par.2

⁵² Implementaiton guide, p.123, par.1

convention but can be applied and invoked in a more extensive legal context. Also Article 9 lays down particular provision to ensure access to justice itself. Indeed a number of procedural measures must be taken to ensure such a right.

The structure of the Aarhus Convention is crucial to its understanding and its enforcement. All three pillars are distinct provisions however they are strongly interconnected. The Convention only makes sense because it embodies those three complementary pillars. Public participation and access to justice cannot be effective without having access to information. There is also no point in involving the public in decision-making if the latter cannot review decisions in court. It is similarly meaningless to grant the public access to information and to justice if it cannot, at any point, voice its interests and participate in decision making. Therefore the Aarhus Convention is founded upon those 3 interconnected pillars. They complement each-other into a complete set of tools to involve the public in politics and redefine democracy as we know it. This set of tools is aimed at presenting solutions to the environmental and democratic crises.

C) First Pillar “Access to Information”

a) essence and purpose

The first pillar of the Aarhus Convention is ‘access to information’. As mentioned the rights arising from this convention strongly depend on this first pillar. Access to information resides on two components, embodied in article 4 and 5 of the Convention, respectively on access to environmental information and on the collection and dissemination of environmental information. One may safely state that article 4 corresponds to the right created by the first pillar, and article 5 corresponds to the obligation created in parallel. Article 4 and 5 embody the core of the right to access environmental information and are supported by the preamble, Article 1 and Article 3. These supporting articles establish the right to information which they seek to guarantee and require Parties to assist the public in realizing it. Also Article 3 reminds that Articles 4 and 5 are minimum requirements. Similarly to most legal provisions of this convention, the AC provides for a legal ‘floor’ and not a ‘ceiling’.

As was necessary for the first part of this research it is of utmost importance to define crucial terminology. Discussing the first pillar it is indeed crucial to define the term ‘environmental information’. The AC defines the latter in article 2, paragraph 3. It includes elements such as the ‘state of elements of the environment, factors that may affect the environment, decision making processes, and the state of human health and safety’⁵³.

The purpose of this first pillar is clearly outlined in the implementation guide. “Under the Convention, access to environmental information ensures that members of the public can understand what is happening around them. It also ensures that the public is able to participate in an informed manner”⁵⁴. The purpose is clear and also directly links to Pillar II: allow the public to be informed, and therefore allow it to participate constructively.

⁵³ Aarhus Convention, article 2, par.3

⁵⁴ Implementation Guide, p.49 par.2

b) Access to information in International Law

Now the idea of access to environmental information is not a new one in the field of law. At the international level it appears that the Rio Declaration is the basis for developing the right to access information. Principle 10 of the Rio Declaration states that **each individual** shall have appropriate access to information concerning the environment that is held by the public authorities⁵⁵. Following the Rio Declaration various international treaties from the 1990's embodied provisions resembling those one can find in Pillar I of the AC. The 1993 Lugano Convention on Civil Liabilities for Damage Resulting from Activities Dangerous to the Environment, the 1992 United Nations Framework Convention on Climate Change, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Directive 90/313/EEC on the freedom of access to information in the EC all embody such legal provisions. The Lugano Convention is the closest to the provisions of the AC stating that **any** person detains these rights without having to prove a direct interest, establishing in what way this right may be restricted upon, and specifies time frames. Other mentioned treaties are less detailed, such as the UNFCCC which simply demands a promotion and a facilitation of access to information by the parties, information specifically linked to climate change only. The Convention on Protection and Use of Transboundary Watercourses and International Lakes regards specific information related to the essence of that very convention. Therefore it is much more narrow in scope.

At the first glance the EC Directive 90/313/EEC seems very similar to Pillar I of the AC. However there are many differences. It is crucial to highlight these differences to establish why the implementation of the AC is important, as the European Community is a Party to the AC independently.

The AC appears broader and more detailed. The definitions of environmental information and public authority are expanded. The use of the term 'adversely affect the environment' is replaced by 'affect the environment' therefore covering a broader range of information⁵⁶. The EC Directive was not clear on time limits; the AC determines a clear time period of one month with a possible two months extension. Furthermore, under the AC the applicant has no need to **state** and interest, under the Directive the applicant has no need to **prove** an interest. It is therefore easier to access information under the Convention. Also not stipulated under the Directive but embodied under Convention is the duty to give information in the form requested and the right to receive actual documents. Also under the Convention (again in contrast with the Directive) information in emissions may not be withheld due to industrial or commercial confidentiality. Another important difference is the exception to disclose "unfinished materials" under the Directive and materials "under the course of completion" under the Convention. This difference is of great importance as the Convention puts pressure on the parties to complete the materials. If a material is not finished, but no-one is working on it, than it would not be disclosed under the Directive. Under the Convention, the material must be 'in construction' as it were, and may not be hidden in a closet under the excuse of being unfinished. Either the public authorities are in the process of completing a material or document, or they need to disclose it.

Furthermore, the Convention establishes a narrower framework of exceptions than the Directive. Also new under the Convention is the duty to transfer the request if the addressed public authority does not detain the relevant information. Previously the applicant needed to

⁵⁵ Rio Declaration, Principle 10.

⁵⁶ Implementation Guide, p.65 box.4

address the appropriate public authority by its own means. Under the Convention the public authorities must aid to direct the request to the appropriate body.

For all the reasons mentioned above the Aarhus Convention is more stringent, clearer, narrower and more detailed than the Directive 90/313/EEC. As the AC goes beyond the EC directive it is clear that the discussions to follow will regard the AC as the most important legal provision as it covers a broader field and confers more detailed rights and duties.

c) interpretation of Pillar I

The essence, structure and general provisions are crucial to understand what the Convention is about. These provisions are laid out in a detailed manner in the various articles referring to specific rights and duties. Pillar I; about access to environmental information is embodied in articles 4 and 5. As mentioned article 4 deals with the right created of a relative 'passive' character and article 5 with the obligation created and therefore of a more 'active' character.

What right does Article 4 create?

The so called 'passive' provisions of Pillar I create a straightforward right for the public. It states that the public is entitled to request environmental information (a) without having to state an interest and (b) in the form requested⁵⁷.

Article 4 stipulates the creation of "a system to allow the public to request and receive environmental information from public authorities"⁵⁸. This has several implications. Parties must create a law or a regulation which regards access to environmental information. Also the public must be informed about which public authority detains what information. Furthermore the public must be assisted in formulating properly directed requests⁵⁹. Moreover there must be clear time limits, fees and definition of exemptions.

What are the exceptions?

Article 4 is divided into 8 paragraphs each determining specific obligations. Most of those paragraphs regard obligations which must be observed by the Parties and the public authorities; however two, namely paragraphs 3 and 4, determine the exceptions in which a Party may refuse to grant access to particular environmental information. Indeed paragraph 3 mainly establishes three 'optional exceptions'; the Party may refuse access if the public authority does not detain the relevant information or if the request is manifestly unreasonable or too general. It seems evident that a Party cannot give information if it does not hold it. This may be the case. However under article 5, paragraph 1 (a) the public authority may be in violation of the duty to possess environmental information relevant to their functions. Therefore this exception only applies when the public authority is not deemed, by the character of its function and responsibilities, to hold that particular information. Secondly Article 4 paragraph 3 (b) states that refusal to disclose may occur on the basis of a 'manifestly unreasonable' 'too general' request. This clearly implies that the Party must clearly define both terms, in order to assist the public in a clear system and to avoid arbitrary refusals. The Convention does not define 'manifestly unreasonable' in a detailed fashion. However refusal may not rely solely on the volume and complexity of a request. Indeed Article 4 paragraph 2 stipulates that volume and complexity may lead to extending the time

⁵⁷ the public authorities do not need to respond in the form requested if it gives reasons for disclosing it in another form or if the information at hand is already available (as stipulated by Article 4.1(b)i, ii.

⁵⁸ Aarhus Convention, article 4

⁵⁹ Implementation Guide, p.51

limit to answer the requests. It is up to the Parties' discretion to define this term properly, and may be held accountable under the Convention in cases of failure.

The same applies for the term 'too general'. The parties must define it, and much of this occurs in practice. Indeed some existing cases provide for some guidance.

If a Party decides upon refusal based on paragraphs 3 and 4, it must follow the procedures as laid out in paragraph 7. There are indeed strict procedures to do so. Refusal must be communicated in writing. Clear reasons must be stated. In some nations the national provisions go beyond the AC provisions. For instance in France the authority must indicate on which legal provision the refusal is founded.

The public authority must inform the applicant about the review procedure to allow the latter to react accordingly, especially if he or she does not agree with the refusal. Also clear time limits must be observed and respected. These limits are as follows: a refusal to a request must be made as soon as possible with a maximum of one month. An extension of one extra month is possible if the complexity and/or volume of the request require it, however the State must inform the applicant of this delay and the reasons of this delay within the first month after the application of the request.

What rights does Article 5 create?

Article 5 regards the creation of "a system under which public authorities collect environmental information and actively disseminate it to the public without request."⁶⁰

It creates the right for the public to access information by imposing obligations on the contracting party.

The implications that follow these obligations are various. Naturally information must be collected and a record of this collection must be set up by public authorities and by operators. The collected information must be drawn up in lists and registers which must be accessible free of charge. It also requires to setup offices and places where individuals can specifically access environmental information. Furthermore it is required from the Parties that they use the internet to diffuse such information and also that they create incentives for operators (private parties) to give information directly to the public⁶¹ (therefore avoiding intermediaries and avoiding time and effort losses).

Type of information

As mentioned, Article 5 regards a more 'active' character of rights and obligations. Article 5 is divided into 10 paragraphs. Specifically, Article 5 lays down the duties of public authorities to actively collect and disseminate environmental information. This article can be seen as offering a type of guidance in implementing the legal provisions at hand. It is worthy to note that much discretion is left to Parties in this respect.

In contrast to article 4, article 5 is aimed at laying down specific provisions for specific types of information. Various types of information are therefore defined. Difference is made between 'urgent' information, information needed for people's daily lives, information central to basic public decisions and information to facilitate the implementation of the Aarhus Convention⁶². Also the paragraphs of article 5 lay down practical requirements.

For instance paragraph 1 regards the general obligation to collect, possess and disseminate environmental information. Logically this requirement is relative to the function of specific public authorities. Also it stipulates the utmost importance of information dissemination in cases of direct threat to human health or to the environment. We find that urgency is an

⁶⁰ Aarhus Convention, article 5

⁶¹ Implementation Guide, p.51

⁶² Implementation Guide, p.67

integral part of this provision. Paragraph 1 therefore regards various types of information; urgent information and information affecting people's daily lives.

In relation to urgent information, it must be disseminated immediately (par1). Regarding information necessary for the public to make decisions in their daily lives, information must be collected, made accessible (par.1, par.2), also electronically (par.3) and disseminated with specific measures (par.5), make direct links between private operators and the public (par.6), publish material (par7) and develop mechanisms to give more product information to consumers (par.8).

Regarding information central to basic public decisions one must specifically look at paragraphs 1, 3 and most importantly at paragraph 4 which requires national state-of-the-environment reports to be drawn at regular intervals, not exceeding three or four years.

Articles 4 & 5 stipulate in detail what the exact rights and duties are under the Aarhus Convention regarding access to information. In relation to the second pillar, active participation of the public in decision making, another set of articles provides for the legal provisions.

d) short concluding overview of Pillar I

The description of these articles renders a lot of information. It is important to describe the legal provisions of these articles with precision. However it is also very important to recapitulate the most important points for the sake of clarity.

In relation to access to information a certain number of questions are central; what does environmental information mean? Which information is relevant? Who is entitled to access what information? In which manner is this right exercised? What requirements must be fulfilled for information administration?

Type of information

The main concepts of articles 4 and 5 are environmental information, the public and public authorities. They are defined in Article 2 of the AC.

-Environmental information is divided into three categories. (a) the first category refers to natural elements, 'the state of elements of the environment' which includes things such as the quality of the air, of the soil, the atmosphere, water, land, landscapes, biodiversity, and the interaction of such elements⁶³.

(b) The second category refers to factors, substances, measures and activities which affect or are likely to affect elements as mentioned in sub-paragraph (a).

(c) The third category exemplifies the relation to human health and human life as related to both subparagraphs (a) & (b). Information which can be interpreted within the scope given by the definition laid out by all three categories of Article 2 can be defined as 'environmental information.'

Public Authority

-'Public authority' is applied in a broad sense and refers to 'a whole range of executive or governmental activities⁶⁴'. The convention distinguishes three parts of public

⁶³ Aarhus Convention, Article 2.3 (a)(b)(c)

⁶⁴Implementation guide, p.32 par.3

authority; (a) government at national, regional and other level, (b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, (c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above.⁶⁵

It seems important to note that public authority is not limited to authorities which are in direct link with the environment. All executive governmental authorities are subject to Article 2.2(a).

The Public

-‘The public’ as defined by Article 2.4 means ‘one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.’⁶⁶

Whenever the Convention refers to ‘the public’ it is therefore not relevant to establish whether ‘one or more natural or legal persons’ is actually affected or has an interest in the environmental information at hand. The notion ‘the public’ is a very broad one and holds no particular conditions apart from being a natural or legal person. ‘The public’ is entitled to the rights enumerated in Articles 4 & 5.

Requirements of requests

-It must be possible to categorize the requested information under one of the 3 subparagraphs of ‘environmental information’.

-The applicant has no obligation to prove being affected or to have an interest in the requested information. (Article 4, par.1)

-the request may be refused if ‘manifestly unreasonable’. This term needs to be defined by the Parties. Volume and complexity alone do not suffice to refuse a request, as there is a two month extension period possibility in those cases. (Article 4, par.2)

-the request may be refused if ‘too general’. Similarly Parties have flexibility to define this term. However the Convention reminds that this may not be applied to broadly at the risk of violating Article 4.

-Furthermore information may not be disclosed under Article 4(a) of the release of it would adversely affect the confidentiality of such a proceeding. Parties may not arbitrarily stamp documents ‘confidential’. The latter must be defined under national law and must refer to internal operations of a public authority, and not substantive proceedings⁶⁷. (Article 4, par2)

- Article 4, paragraph 4 lays down the exceptions in cases of adversely affecting international relations, national defense or public security. Similarly the Convention does not define the terms mentioned as such. These terms must be defined by Parties according to standards of international law⁶⁸. The main issue to bear in mind when discussing this type of exception relates to the general provisions of the AC. It strives towards a transparent system and provides for minimum standards. Parties are therefore bound to provide for clarity and therefore to define the terms above precisely as to avoid arbitrary refusals of disclosure.

⁶⁵ Aarhus Convention, Article 2.2

⁶⁶ Aarhus Convention, Article 2.4

⁶⁷ Implementation Guide, p.59, par.1

⁶⁸ Implementation Guide, p.59, par.3

- Article 4, paragraph 4 also lays down the exceptions in cases of adversely affecting commercial and industrial confidentiality, intellectual property rights and personal data. This means that also private interests can provide for grounds to not disclose particular information. To qualify as confidential commercial or industrial information, environmental information must meet certain requirements. First such confidentiality must be expressly stated in national law. The second criterion is that the confidentiality must protect a 'legitimate economic interest'.⁶⁹ The latter must be established by the Parties via three elements. (a) A process must be established in which information may be identified as protecting a 'legitimate economic interest' if kept confidential, (b) confidentiality must be defined objectively, (c) and harm must be defined in the sense that disclosure of certain information would significantly harm the private interests at hand⁷⁰.
- There is also an exception to the exceptions laid out in this part; pollutant emissions relevant to protecting the environment may not be qualified as confidential. (Article 4d)

It is clear from this overview that in relation to Pillar I 'the public' is entitled to access 'environmental information' which 'public authorities' are obligated to collect and disseminate. This information must be granted in the form requested (paper, electronic media, analog media etc.) and within the time frames as established by the AC.

D) Second Pillar: Active Participation in Decision-Making

a) essence and purpose

introduction

It is no coincidence that participation in decision making is the second pillar. As explained in the part regarding the structure of the Convention, there cannot be effective and coherent participation of the public if the latter is not well informed. In this fashion Pillar II resides on the effective implementation of pillar I. Ideally the involvement of the public would contribute to reach an optimal result in decision-making and policy making⁷¹. However there is no set formula to reach a 'perfect' system. As mentioned in the first part of this thesis Democracy is essentially a compromise. Therefore the search for the ideal democratic system comprises a series of checks and balances to reach an equilibrium which fosters the main issues to be dealt with at that particular time.

Decision-making

The starting point is that decisions are growing more and more complex. In this context it seems advantageous to involve the public in order to take 'good' decisions. There are two main goals to be achieved here. First involving the public would improve the capability of governments to 'carry out their responsibilities and provide the necessary conditions for the people to enjoy their rights and meet their obligations'⁷².

Now in practice it proves very difficult to carry out the involvement of the public in decision-making effectively. Indeed as it sometimes seems wiser and quicker to take decisions without asking the public, often hidden factors only appear in discussions with the latter. Even if participation doesn't necessarily alter a decision, the fact that participation was possible, at

⁶⁹ Implementation guide, p.60, par.2

⁷⁰ Implementation guide, p.60, box 'options for implementing "legitimate economic interest"'

⁷¹ Implementation Guide, p.85 par.1

⁷² Implementation Guide, p.85 par.2

any rate informs the public of the events and promotes the idea that the public is enjoying its citizenship. Another point of concern is that if the participation procedure that is established focuses only on the form in itself disregarding the actual results of such a procedure then it is legitimate to question those decisions made.

Indeed public participation is more than simply establishing a set of procedural rules; to quote the implementation guide of the AC once more: “(...) it (public participation) involves public authorities genuinely listening to public input and being open to the possibility of being influenced by it”⁷³.

So the importance lies in the fact that the public **can** influence a decision. This must be evident in the final decision and must also become evident for the public.

Participation

Now what is meant exactly with ‘public participation’? The Convention itself does not give a detailed definition of this concept. This is not surprising as the concept of public participation has no set formula. Time and space render various legal, social and economic contexts which make a set and clear definition of this concept meaningless. It is more a set of ideas and principles which must be followed and applied according to the national and local context. This is perhaps what makes this pillar the most complex one, at any rate the least straightforward in terms of legal obligations.

So the Convention does not define the term exactly, as it would be incoherent to do so. It does bring forward a number of alleged advantages of public participation. These advantages are already mentioned in the preamble of the AC. It states that public participation in environmental matters is beneficial to the quality and implementation of decisions (as an involved public would be more inclined to cooperation), contributes to public awareness of environmental issues (beyond access to information involvement in decision making also informs the public about the process of decision making and the outcome of such processes), it also grants the public the possibility to express its opinion and concerns (a more direct and frequent expression of concerns instead of limited expression only during election times) and it gives the opportunity to governments and public authorities to take those concerns into account in a more direct and more frequent manner. In short it seems that this provision would aid to bridge the gap between government and public. Also it seems to put more emphasis on the common interest as opposed to the individual interests. In this sense it is clear that it renders the political system more democratic as it evolves towards a system in which common interest should prevail over individual ones.

Procedure

Even though strictly procedural provisions would prove insufficient, it is indispensable that some procedural rules be established at the discretion of the Convention only. Indeed the AC does establish a number of procedural rules to be met in relation to public participation. These rules cover issues such as notification, timing, relevant information, commenting, response and communication⁷⁴. These provisions can be found in Articles 6, 7 and 8. Aside from the procedural rules the Convention also urges Parties to engage in other measures to promote and facilitate public participation at all levels.

It is also important to remind Article 3 of the AC which states that the articles to follow are minimal requirements. Parties are encouraged to go beyond the proposed course of action.

⁷³ Implementation Guide, p.86, par.2

⁷⁴ Implementation Guide, p.86 par.5

b) Public Participation under International Law

Before we have a look at the exact provisions of this second pillar it is important to investigate upon the existing legal character of public participation in international law, as the AC fits within a larger legal context. It is important to understand this context to comprehend what the AC adds to the existing legislation and how it differs from it.

The Aarhus Convention is not the first international legal body to deal with public participation. Indeed a number of international treaties touch upon this issue. This is for instance the case for the 1982 World Charter for Nature. This Charter included provisions to grant to possibility to individuals or groups of individuals to participate in decisions when holding a direct concern in relation to their direct environment. Also the EC resolution No.171 of 1986 included very specific provisions regarding public participation in environmental decision-making.

Similar provisions are found in the 1992 Rio Declaration in which Principle 10 states that each individual shall have the opportunity to participate in such decisions and that giving this opportunity to concerned citizens would allow for the best management of environmental issues⁷⁵. In Agenda 21 we can also find public participation recognized as a key element in achieving sustainable development. However these are general provisions and they are perhaps not specific enough to reach satisfactory results in the struggle for sustainable development.

The UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) goes a bit further than the previous legislation. It is clearly laid out, namely in Article 2, paragraphs 2 and 6, and article 4, paragraph 2, that in cases of assessing the impact of activities with a potentially important transboundary environmental impact, concerned public should be invoked to participate. Similar provisions can be found in the 1992 UNFCCC and the 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents.

In short, the idea of public participation in international law roughly emerged in the 1990's. It has been developed and evolved in various international treaties and conventions. It appears that the AC provides for the more stringent and concise provisions regarding this issue to this day.

c) Interpretation of Pillar II

introduction

As mentioned, this is the provision of the AC where there exists more discretion for the Parties to implement. Nevertheless there a number of concise and clear obligations to which Parties are bound. These obligations can be found in articles 6, 7 and 8 of the AC. It is crucial to make an overview of what those provisions entail exactly to pursue the discussion on the contribution of the Convention as a whole to both environmental and democratic crises.

All three articles stipulate certain obligations and rights on specific elements. Article 6 deals with public participation in decisions on specific activities. It concerns activities which require a permit or a license to be carried out. Article 7 deals with public participation concerning plans, programs and policies relating to the environment. As this part is broader in scope it is evident that it is less specific than article 6. It also allows more discretion for the

⁷⁵ Rio Declaration, Principle 10

Parties. There are however provisions of article 6 which apply to 7, namely in terms of time frames and the effectiveness of opportunities for public participation for plans and programs only. Article 7 distinguishes between plans and programs on the one hand and policies on the other⁷⁶. Article 8 concerns public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments. This part goes beyond those decisions which affect people's lives directly. Article 8 regards the right to influence the evolution of the legal system and of normative acts⁷⁷. This idea stems from the larger idea that 'all branches of government should be transparent' and that the legislative branch should engage in similar proceedings. However States prove to be reluctant to form concise obligations in this field wishing to not undermine the role of their legislative branch. It may be said that Article 8 binds Parties to take specific measures, however the result of Article 8 can only be measured in the efforts made by a Party. After this quick overview of the three articles at hand it is important to have a more detailed analysis of those provisions.

Article 6

Article 6 is perhaps the most concise provision of Pillar II as it regards more specific activities; namely those which need a permit or a license. It is then of course necessary to establish clear criteria for such listed activities. This is necessary to guarantee participation already in early stages as there can be no discussion on whether or not an activity should be on the list or not. A list must be established as well as a non-list and the national defense exemptions must be established to allow for a clear and transparent system (article 6, par1).

Also, (paragraph2) the public must be notified by the authorities about the fact that the dialogue is open to them. Requirements must be drawn up to make sure this happens early in the process of taking a decision. This will give incentives to the public to participate. In this respect the obligation lies with the public authority, as is the case for most of these public participation provisions, however in some cases it may prove more appropriate for the applicant of a decision to carry this obligation⁷⁸. The public may be informed in two ways; either with a public or with an individual notice. Public notice means that as many members of the public as possible are being informed via widespread means of communication, and the Convention estimates that as long as the public concerned is notified this requirement is fulfilled to a satisfactory level.

Procedural time frames must be established which must be broad enough to allow for notification, preparation and effective participation by the public (par.3). Procedures must be clear to avoid confusion and to avoid limiting the effectiveness of those legal provisions. Paragraph 4 reminds that it is not all about procedure. Indeed public participation must occur as early as possible in the process, regardless of procedural rules which envision it later in the process.

Of course it is crucial that the public retains the appropriate information. This is mainly established in the first pillar, however paragraph 5 of Article 6 reminds, in the narrow context of specific activities, that information must be exchanged between permit applicants and the public. It is reminded here in more detail as it concerns a very specific situation which may involve private parties at both ends. Still the State is responsible and is required to provide the public with the relevant information (Article 6 par.6), free of charge, upon request, as soon as it becomes available, to all information relevant to the decision making, (...) without

⁷⁶ Implementation Guide, p.113

⁷⁷ Implementation Guide, p.119

⁷⁸ Implementation Guide, p.95, par.6

prejudice to Article 4 paragraphs 3 & 4⁷⁹ regarding grounds for refusal. Paragraph 7 in turn establishes the procedures for public participation in the context of article 6 and does so for the **whole** public and not only to the public **concerned**. This has clear legal implications. Whereas the public concerned retains more rights in relation to notification and examination of a decision the whole public is entitled to comment, submit information, analyses and opinions during the decision-making process⁸⁰.

Paragraphs 8, 9 and 10 concern the outcome of the decision. Paragraph 8 states that public authorities must make sure that the decision takes due account of public participation⁸¹. This reminds the legal necessity highlighted while discussing the relevance of Article 6 and the consideration of EIA's in decision-making. As is the case for most of this convention information must be made available, also in relation to made-decisions.

Paragraph 9 stipulates the public must indeed be informed of the final decision (promptly, in publicly accessible texts, and must give reasons and considerations of the decision). It is coherent that once a decision is made it is explained why and how this has occurred. It is the only way to ensure the provisions of paragraph 8 are being respected.

Paragraph 10 has a slightly different scope as it concerns public participation when an existing activity is reconsidered or changed. When this is the case, paragraphs 2 to 9 apply, meaning that changing or altering an existing activity consists, in light of this Convention, of an activity in need of a permit or license all the same. The same applies for paragraph 10 concerning GMO activities.

It is very important to highlight that Article 6 is not simply an Environmental Impact Assessment (EIA) provision⁸². EIA is not a permitting process but solely a research on possible negative or positive effects of a decision on the environment. It does not constitute the decision process in itself but is a part of this process. Even when an EIA indicates possible adverse effects a decision may be taken anyhow. A law must establish that environmental considerations, such as brought up by an EIA, must be taken into account. This is where article 6 attempts to embed such practices in domestic legal systems to oblige Parties not only to conduct an Environmental Impact Assessment but to bind Parties to take them into consideration.

Article 7

Article 7 concerns public participation in realizing plans, programs and policies. It is clearly a much larger field than Article 6. It is for that reason that the obligations of Article 7 are less detailed. Even though it refers to some concise obligations of article 6 in general, it provides more discretion and flexibility to the parties. Concerning plans and programs Article 7 refers to several provisions of the previous article. Namely concerning time frames, the effectiveness of opportunities for public participation and the obligation to make sure that public participation is actually taken into account⁸³. This is not the case for policies which are dealt with distinctly in this Article. As is the case for Article 6, the obligations laid out by Article 7 lie with the public authorities. First the Party must set up a transparent and fair framework for public participation in plans and programs relating to the environment. This entails that clear rules must be established as well as clear mechanisms for notification. Also there must be clear rules about the quality of information. Also it is important to identify the

⁷⁹ Aarhus Convention, Article 6, paragraph 6

⁸⁰ Implementation Guide, p.108

⁸¹ Implementation Guide, p.90, table 1

⁸² Implementation guide, p. 90 par.2

⁸³ Implementation Guide, p.113

participating public for which tools must be developed. It is also demanded from parties that they engage in the process of participation very early in the decision making process (also found in Article 6 par 4). Furthermore reasonable time frames must be established, as is the case for other provisions of this Convention. In terms of policies, Article 7 stipulates in its fourth sentence that the public authorities must establish policies to endeavor public participation in policy making to the extent appropriate. This means that governments and ministries are encouraged to engage in such practices (as it is the case for the environmental policy set forth by the Dutch Ministry of Defense). This policy was not the result of a direct legal obligation but arose from the initiative of that Ministry in question.

Article 8

Article 8 concerns public participation in yet another field. It deals with public participation in the executive branch of political power. It regards public participation during the preparation of executive regulations and/or generally applicable legally binding instruments⁸⁴. This article goes beyond the influence citizens are granted regarding decisions made to affect their daily lives. Indeed it allows the public to enter the negotiations on matters referring to law making processes. The first sentence of Article 8 states that the objective of the Article must be promoted. It attests that the obligations are less stringent than previous obligations under this Convention. Parties must show their best efforts, leave options open and consider involving public when decisions may have potentially a significant effect on the environment. This entails that a criteria must be established to determine significance of decisions, that rules must be developed governing this type of participation and that information must be granted in the form of published drafts. Also a clear procedure for commenting must be established. It is also important that a supervision mechanism is established to observe how these comments are dealt with. Also the Convention stipulates the necessity of flexible time frames and flexibility in taking due account of the outcome. Parties must ensure that public participation is taken account of, as far as possible⁸⁵. Again it is visible that Article 8 establishes less binding provisions than the previous articles, as it concerns a very broad field.

Conclusion

Articles 6, 7 & 8 share a similar character in terms of obligations. In all this provisions, the Party is obligated towards its citizens; either to draw up rules of procedure or publishing drafts, or even to take participation into account. The public receives a number of rights⁸⁶. These various articles encompass all types of activities which may be decided upon by public authorities. Ranging from small activities to normative policy making, with varying degree of influence, Articles 6,7 & 8 cover the principles and procedures to follow in order to implement the AC effectively. Now if decisions are taken and some of the discussed articles are being infringed upon or violated, it is necessary for the public to access to judiciary under international and national law to redress such violations.

d) short concluding overview of Pillar II

To resume in clarity: which decisions must be subject to public participation, what are the various types of decisions? Who can participate for what decisions? What requirements are there for public participation in decision in relation to environmental matters?

Type of Activities

⁸⁴ Aarhus Convention, Article 8

⁸⁵ Aarhus Convention, Article 8

⁸⁶ However it is not clear to what extent the right to participate is also a duty, a hard obligation.

-The AC provisions on public participation in environmental matters distinguish between three types of activities which may be decided upon, and each type holds different provisions.

-Listed activities in annex I, which may have the potential to affect the environment (this doesn't need to be proven in absolute prior terms), are subject to public participation. (Article 6). In addition Article 6 (b) stipulates the necessity to allow public participation, in accordance with national law, on activities not listed in Annex I which may have a significant effect on the environment. This reflects the aim of the Aarhus Convention to set minimum legal standards. It also reflects the fact that Annex I may not encompass all activities which may affect the environment as defined under Article 2.

-Plans and programs are subject to public participation in the early stages of development.(Article 7) They may include land-use and regional development strategies, sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation etc, at all levels of government⁸⁷. These activities relate to decisions made by the executive branch.

-Laws, rules, policy making is subject to public participation when potentially carrying significant effects on the environment. (Article 8) Roughly these activities relate to the legislative branch of government.

Who can participate?

In relation to pillar I 'the public' is entitled to access information. In relation to public participation the AC invites the 'public concerned' to participate.

-Article 6.2 stipulates that the 'public concerned' must be notified. As defined in Article 2.5 'the public concerned' means 'the public affected or likely to be affected by the environmental decision-making or having an interest in it.'⁸⁸ Access to pillar II is therefore narrower than to pillar I. There is also a difference between Article 6.5 and Article 7. Under Article 6 (listed activities) the public concerned must be identified by the applicants of a proposed activity. This does not apply under Article 7.

-Article 7 stipulates that the relevant public authority must identify the 'public concerned'. The right to be informed is granted to 'any person' which in turn, as they would hold the relevant information, may become part of the 'public concerned'. It seems most appropriate to interpret article 7 as a responsibility for the public authority to identify who may participate.

-Article 8, regarding legislation is open to 'the public'. This broad access can be explained by the fact that Article 8 does not stipulate hard obligations for Parties but instead it encourages governments to involve the public in policy and law-making processes. The aim is that Parties will develop mechanisms, through representative consultative bodies, to involve its people in exercising the legislative power.

-As is the case in the Netherlands for instance, public authorities may replace permits for specific activities by a system of general rules. This brings some additional complexity as it mainly regards activities which would generally fall under Article 6 due to size and scope of such activities. However if those permits are replaced by general rules governing a particular sector, then it can be argued that those activities

⁸⁷ Implementation Guide, p.115, par.3

⁸⁸ Aarhus Convention, Article 2.5

would fall under article 7 and to be part of ‘plans and programs’. In that case the ‘public concerned’ is entitled to participate in the decisions governing those activities.

Procedural Requirements

-Time frames, clear procedural rules, information to the public, early in the process, insurance of due account of the outcome of participation are all crucial elements and strive towards a clear, transparent and fair framework of decision-making. However certain flexibility is necessary to ensure that the process does not focus solely on procedure but on the essence of the decision.

As it is the case for the whole of the Aarhus Convention, Articles 6, 7 & 8 present minimum legal standards which may be surpassed to Parties’ discretion. This research will not elaborate further on Article 8 as no existing jurisprudence allows an analysis of the practical consequences of that provision. Also, it is not always clear whether particular activities fall under Article 6 or 7. This does not present major difficulties in the analysis to come as the main legal characteristics of both articles are similar. Therefore it seems that discussing mainly article 6 and parts of article 7 provides for the necessary insight on the practical implementation of the Pillar II.

E) Third Pillar: Access to Justice

a) essence and purpose

Under the Aarhus Convention “access to justice” is means that members of the public have legal mechanisms to review potential violations of the access to information and public participation provisions as stipulated in the former paragraphs and also of domestic environmental law provisions⁸⁹. It therefore reaches beyond the scope of the Convention as it also grants judicial means to the public in terms of domestic law.

As explained in introductory paragraphs all three pillars are complementary. The purpose of Pillar III is to strengthen the rights and obligations laid out in articles 1 to 8. It helps to ensure a consistent and effective implementation of the Convention. In addition to strengthening the Convention alone, it allows the public to help to enforce domestic law and therefore strengthens the rule of law concerning the environment directly⁹⁰.

It is important to note that article 9 of the AC establishes that not only Parties are meant to enforce this treaty, but also individuals and NGO’s and members of the public. Also it creates both vertical and horizontal legal relations, as the access to justice provisions allow the public to challenge “acts and omissions” committed by private persons and public authority. Pillar III is clearly an attempt to allow for larger control concerning environmental issues⁹¹.

Aside from establishing general ideas around the essence and the purpose of this provision, article 9 also determines a number of procedural items. Indeed those procedures must be fair, equitable, timely and not prohibitively expensive. Furthermore these procedures must allow for adequate and effective remedies and naturally the judicial role must be carried out be impartial and independent bodies⁹².

⁸⁹ Implementation Guide, p.123 par.1

⁹⁰ Implementation Guide, p.123 par.2

⁹¹ Implementation Guide, p123, par.5

⁹² Aarhus Convention, Article 9, par1.

b) interpretation of pillar III

Article 9 comprises two main general requirements which lie with the Parties. On the one side the Parties are bound to set up a review system of decisions made by the public authority based on articles 4 and 6 and other relevant provisions. On the other hand the Parties must establish a review system for citizens to challenge violations of domestic environmental law.

This part offers Parties clear obligations in form of a general requirement with flexibility in the implementation details.

First off both systems require the insurance of available independent and impartial review bodies (Article 9, par1). It is also crucial to establish clear rules on standing of individuals and NGO's to access those judicial bodies to avoid confusion and an ineffective implementation of the Convention. The public is entitled by Article 9 to review decisions based on access to information and on participation. There is much discretion to be exercised by Parties as review systems vary and that under the AC these obligations must be met "within the framework of national legislation"⁹³. Under article 4 'any person' who has requested information has standing. Under article 6, as a minimum, the 'public concerned', as defined under Article 2(5)⁹⁴ has legal standing to ask for review. However in some paragraphs, namely 7 & 9, Article 6 confers rights to 'the public'. The Convention therefore holds that members who actually participate in the decision-making process qualifies and constitutes the "the public concerned"⁹⁵.

Final decisions shall be binding and explanation shall be given in writing about those final decisions (par1). This is the case for both Article 4 (information) and Article 6 (public participation). For Article 6 there is also the possibility for preliminary administrative review procedure as stipulated in Article 9 par.2. As for domestic environmental law provisions administrative and judicial review procedures must be developed by Parties. Paragraph 4 establishes the minimum standards applicable to access to justice procedures, decisions and remedies. These concern the standards which Parties may exceed in, such as adequate and effective remedies, including injunctive relief, fairness, equity, timeliness, not prohibitively expensive, a record of decisions in writing which must be accessible.

Furthermore Parties must assist the public in accessing justice and on being informed about the administrative and judicial procedures (paragraph 5). This is necessary in order to ensure the requirement of Parties to facilitate effective access to justice. Information must be given, and appropriate mechanisms must be offered to remove and reduce financial and other obstacles to access to justice.⁹⁶

Article 9 provides for a broad view on access to justice. The Convention promotes a very broad interpretation of 'standing' to review decisions. Aside from allowing a broad approach on standing, it allows decisions, acts and omissions to be challenged, both relating directly to the Convention and to domestic environmental law. Again the scope is very broad. The challenges must be heard by an appropriate court or an impartial and independent body. Challenges may result in the requirement to provide effective remedies, including injunctive relief. Also barriers, financial or others must be minimized to allow for the best judicial protection possible⁹⁷.

⁹³ Aarhus Convention, Article 9 (1)

⁹⁴ Aarhus Convention, Article 2(5) (the public concerned means) "the public affected or likely to be affected by, or having an interest in, the environmental decision making"

⁹⁵ Implementation guide, p.129 par.2

⁹⁶ Implementation guide, p. 125, table 1

⁹⁷ Implementation Guide, p.136, table 1

c) Short concluding overview of pillar III

To resume in a concise way the following questions need to be answered with precision; what is a court of law, what is a judge? Who is entitled access to such judicial bodies? What are the restrictions to this right? What are the requirements to which access to justice is subject?

Judicial body

-When judicial review is requested it must be carried out, as laid out by Article 9.1, by a court of law or another independent and impartial body established by law. The latter concept can also be found in the Convention for the Protection of Human Rights and Fundamental Freedoms. It states that ‘impartial and independent bodies’ are not necessarily courts; the essential requirements to fulfill this definition are that such a body must be quasi-judicial, must have safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity⁹⁸.

Existing courts of law may be invoked in such matters, when the request lies within their jurisdiction. However other bodies may serve this purpose, bodies may even be set up especially for these types of issues. This is the case in France for instance where the CADA (Commission d’Acces aux Documents Administratifs) has been set up to this end. The main requirement is that such a specialized body be established by law.

Legal Standing

-The issue of standing is also dealt with in Article 9.1. Under the convention ‘any person who considers that his or her request for information under Article 4 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(...)’⁹⁹.

-Judicial standing in relation to public participation (Article 6) is more narrow: in this context standing is granted to ‘members of the public concerned’ as defined in previous paragraphs¹⁰⁰.

It is indeed consistent with the objectives of the Convention that a member of the public who participated in the challenged decision qualifies as a member of the public concerned. This is also legally supported by the fact that public participation must be taken into account under Article 6.8 of the AC¹⁰¹.

-NGO’s can automatically qualify as detaining ‘sufficient interest’ when meeting the requirements under Article 2 par.5¹⁰². Access to justice for NGO’s differs per member State as ‘sufficient interest’ is defined by Parties themselves. The term is defined in

⁹⁸ Implementation Guide, p.126, par.4

⁹⁹ Aarhus Convention, Article 9.1

¹⁰⁰ Cf Aarhus Convention, Article 2 par.5

¹⁰¹ Implementation Guide, p.129, par.2

¹⁰² Cf. Aarhus Convention, Article 2, paragraph 5

accordance with national law. For nations where a right must be infringed upon before granting legal standing subparagraph b of Article 9.2 provides for answers. In these cases Parties must provide for a minimum legal basis under which NGO's can indeed have rights which may be impaired. If this is not developed it would deny access to justice to a part of civil society, violating various provisions of the AC.

-One may observe different stances in relation to granting access to justice to NGO's. The Netherlands is perhaps the nation where the least restrictive legislation in this respect. Since 1987 environmental NGO's are recognized as seeking to protect the environment and need not prove any further interest or ownership¹⁰³.

-Another model takes the form of a legislated standing for NGO's. Either a criteria is set up to determine standing, or the nation may elaborate and maintain a list of NGO's which may bring challenges to a court. This model appears more restrictive.

-Yet another model is the 'sufficient interest standing' model¹⁰⁴. This model can be used for the public as a whole but also for a part of the associative world. This is the most restrictive model.

-In relation to environmental domestic law the situation is somewhat more complex from the perspective of the AC. The criteria to define 'members of the public' lie within the jurisdiction of national law. The AC exercises influence on the definition of these criteria however it is within the Parties' discretionary powers to define it in further detail. In many countries the criteria encompasses links to the matter at hand.

-Also Article 9.3 creates legal relation between members of the public and private parties. National law must provide for criteria to allow members of the public to challenge acts and omissions by private persons (...) ¹⁰⁵.

If one may access a court it is coherent that remedies are available in consequence. This is the main objective of any administrative or judicial review process¹⁰⁶; to obtain a remedy for a transgression of a law. Therefore under Article 9.4 review procedure shall include the provision of effective remedies, including injunctive relief, as appropriate, and be fair, equitable, timely and not prohibitively expensive¹⁰⁷.

Damages

-When the damage is irreversible a remedy almost always adopts the form of financial compensation. When prior damage can be reversed or reduced, or when the initial damage or additional damage may still happen a review body may prohibit certain actions to be pursued. This is what is meant with 'injunctive relief'. In many cases monetary compensation is incoherent or at least inadequate as many aspects of the environment are not translatable into financial value. Using injunctive relief, especially in environmental matters, is a much more flexible and responsive way to deal with such issues as opposed to monetary damages or criminal sanctions¹⁰⁸.

Barriers

¹⁰³ Handbook to Access to Justice, p.32

¹⁰⁴ Handbook to Access to Justice, p.33

¹⁰⁵ Aarhus Convention, Article 9, paragraph 3

¹⁰⁶ Implementation Guide, p.132, par.2

¹⁰⁷ Aarhus Convention, Article 9.4

¹⁰⁸ Implementation Guide, p.133, box 'What is injunctive relief?'

-Barriers must be removed. Review procedures must be ‘fair, equitable, timely and not prohibitively expensive’. Timeliness is crucial as the review procedure must have an “expeditious” nature. Furthermore the process may not be ‘prohibitively expensive’ not to exclude the involvement of persons and of NGO’s for financial reasons. Steps may be taken in this direction, in Slovakia for instance NGO’s are exempted from court fees¹⁰⁹.

To conclude; legal standing is interpreted broadly under the AC and varies according to the nature of the issue to be reviewed. Decisions, acts and omissions may be challenged by the public both in terms of AC provisions and of provisions of national environmental law. Such a challenge can be received and dealt with by an appropriate impartial and independent review body. In consequence effective remedies must be offered, including injunctive relief and preliminary injunctive relief. Also barriers must be removed to allow for a greater access to justice.

F) Conclusion on the potential of the Aarhus Convention

There is no need to dwell upon the potential of the Aarhus Convention to contribute to solving the environmental crisis. It is mostly evident as the very essence and motivation of the convention is to establish new means to protect the environment. It is essentially aimed at creating a more transparent system to ensure that protecting the environment becomes a prevailing political interest. Information regarding the environment must be publicly accessible, public participation should ensure the environment is duly considered at all decision tables and in case of unlawful conduct by public and private parties it should be possible to seek justice.

In relation to the democratic deficiencies laid out in the first part of this research the Aarhus Convention theoretically contributes to several concerns.

The AC seeks to create more transparency in public life, in professional life and in public administrations. More transparency inevitably leads to more confidence of citizens. At any rate if citizens have the reasonable feeling that information is being kept from them, they are likely to feel alienated from the authorities.

Furthermore engaging in public participation processes at all decision making levels creates a larger social consensus on the decisions taken. The Convention redefines the role of citizens, allows for more grounds to the public to protect itself from its government, creates stronger obligations between State and citizens, between citizens, and between private parties. The potential of the Aarhus Convention to contribute to solving part of those democratic deficiencies lie in these elements; create more transparency, allow a larger social consensus, bringing politicians closer to the people they represent and create stronger legal rights and obligations. The Aarhus Convention approaches the environmental concerns via democratic changes. They seem to go hand in hand. These new means of democratic practice depart from a concern to protect the environment. As this concern grows these new means take more and more importance and meaning as a proper solution. At the same time as these new means attempt to solve parts of the environmental crisis, citizenship and democracy evolve towards a more participative and deliberative model.

¹⁰⁹ Implementation Guide, p.134, box “Keeping costs down”

As can be observed from the conclusions made above, it seems most relevant and practical to retain only a number of articles in the analysis of implementation. Article 3 seems relevant for general provision however it does not present the answers to our central question. It is evident that general provisions and principles are at stake; however it does not constitute the main object of this research. In contrast the relevant provisions of the Aarhus Convention which present elements for answering our central question are Article 4, Article 6 and Article 9, as explained above.

Now that the theoretical potential of the Aarhus Convention has been discussed we can continue this research. How is the Convention implemented in practice in France and in the Netherlands? What are the obstacles to effective implementation?

IV: “Implementation”

Introduction

Until this point, this research has investigated upon the theoretical potential of the Aarhus Convention (AC) to solve parts of the environmental and the democratic crises. By providing a description and analysis of the legal provisions of the AC this research has established the foundations for an analysis of the implementation in practice. This is what is at hand in this third part: the implementation of the AC in France and the Netherlands. We will utilize the structure of the concluding remarks of Part II. We will proceed by taking the theoretical analysis point by point to observe how these provisions are respectively implemented or not. The focus clearly lies in the provisions to which there appears to be problems to effective implementation and for which there is jurisprudence. The relevant Articles are mainly articles 4,5, 6, and 9. Articles 4 & 5 synthesize the obligations in terms of access to information; article 6 does the same for participation and Article 9 for access to Justice. These articles present clear links and possible solutions to the democratic deficiencies defined in the first part of this thesis.

This part of the research relies on the analysis of the various available compliance reports of national environmental law handbooks and case-law. We will encounter a number of obstacles. Comparing the compliance reports to available jurisprudence will allow to reach concrete conclusions on the implementation of the Aarhus Convention.

Once we have pinpointed substantial obstacles it will be possible to observe where new or pursued efforts must be concentrated to achieve more satisfactory results. Also it will become clear if and how the Aarhus Convention contributes to both the democratic deficiencies and the environmental crisis. This will lead us to the final conclusion of this research.

A) The Aarhus Convention; Compliance and Implementation

The Aarhus Convention has established and developed its own mechanisms to implement the Convention successfully. As stipulated in Article 15 of the Aarhus Convention every three years the Meeting of the Parties assesses progress on implementation and compliance. The Meeting of the Parties (MoP) is the highest compliance body of the Convention. Parties have the obligation to prepare reports on their situation for those meetings. There also exists a Working group which remains active in between those meetings. It prepares the meetings and elaborates work programs for implementation.

The MoP set up its own Compliance Committee at its first meeting. It was established to look after and to promote compliance and also allows for communication from the public and civil society at the level of the Convention. Added to these Compliance mechanisms are the Task force on Electronic Information Tools and the Task force on Access to Justice. These are complementary bodies which focus on one particular pillar. Recently an agreement was established with a similar Task Force on Public Participation in environmental decision making.

Another recent development is the creation of the Pollutant Release and Transfer Register Protocol (PRTR) to the Aarhus Convention. It is aimed at providing for information on pollutant release and off site transfers of pollutants and waste. The first Meeting of the Parties

(MoP) of the PRTR protocol, which is the main compliance mechanism, was held on April 22nd 2010. This body strengthens the first pillar of the AC as a whole. PRTR are a cost effective way of ensuring access to environmental information¹¹⁰.

Under Article 10 of the Aarhus Convention the Parties are required to “keep under continuous review the implementation of the Convention on the basis of regular reporting by the Parties¹¹¹”. The Meeting of the Parties decided upon a reporting mechanism with decision I/8. This reporting mechanism is further developed by the MoP, namely with decision II/10 which regards preparation of the second and later reports. At this point Parties are required to submit reports every three years. Reports were submitted in 2008, consequently the latest reports are submitted in 2011. Both reports are included in this analysis and provide for central information. This part of the research also relies greatly on the reports made by various associations such as France Nature Environment (FNE) & les Amis de La Terre France.

B) France

a) Implementation of Article 3 of the Aarhus Convention

According to « France Nature Environnement » (FNE) and « Les Amis de la Terre France » there are already several implementation problems with Article 3. These NGO’s can be considered two of the main associations present at the various MoPs. First of all they claim that regarding Article 3 paragraph 3 the content of the National Strategy for Sustainable Development (SNDD, Stratégie National du Développement Durable) on governance strategy is too vague and general and therefore makes it difficult to assess to actual impact of such a provision on French public law. As for paragraph 4 France is still in the process of defining the criteria for representation for environmental NGO’s. These should be defined in Article L.141-3. To this day this criterion is absent. They also denounce the possible disappearance of a specialized body in the nuclear domain which should exist under Article 3 paragraph 7 AC.

The main obstacles to implementing Article 3, according to the FNE & “les Amis de la Terre France” are various. They propose to eliminate the phrase ‘according to some associations’ in the compliance reports. As the report is supposed to be objective it is crucial that France either confirms or rejects the criticism brought by the relevant NGO’s in the report.

As for Article 3 paragraph 2 both associations denounce that practice shows that territorial public servants are still largely anchored in a culture of administrative secrecy¹¹². Also they observe a clear lack of education of those public servants in terms of environmental information specificities. To illustrate this point one may think of Article R.124-2 of the French environmental code, which stems from Article 3 paragraph 5 of the EC directive 2003/4/CE on public access to environmental information. These provisions state that each administration must designate one person responsible for access to environmental information. This is rarely the case. France has produced a number of persons responsible for environmental information. However they do not present the source of this information. Furthermore designating such persons under Article R.124-2 of the environmental code should be supported by an information campaign or policy allowing to quickly identify such

110 European Eco Forum, Press Release First Meeting of the PRTR protocol adopts Compliance Mechanism, Enables citizen involvement. April 22nd 2010, par.2, on <http://www.eeb.org/?LinkServID=25AD4BB6-0EBE-33B1-5A73BEBF7249E1FA&showMeta=0>

111 Article 10 Aarhus Convention

112 Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’exécution soumis par la France (Convention D’Aarhus-COP4-2011) p.2 par.6

persons to allow for an efficient and transparent system. Concerning the same paragraph FNE & “les Amis de la Terre” claim that the term ‘education’ is not clear enough. It is in France mostly interpreted as concerning the education of children only, neglecting the civic education of all citizens. This consequently excludes a large part of the population of such education and awareness programs¹¹³.

According to the 2011 report submitted by France, France has developed a law to counter this failure. Article 55 of Act No. 2009-967 of August 3rd 2009 along with the National Sustainable Development Strategy 2010-2013 are set up to work towards a proper education in schools, in the professional sphere, in public education and awareness raising¹¹⁴.

In this report France lays out particular items which illustrate these efforts. Namely the revision of education program, integrating principles of sustainable developments in all levels of scholar education, the revision of programs in pre-professional education linked to the fields of construction, energy, chemistry and agriculture¹¹⁵ illustrate this point. Also, in June 2010 France launched the ‘Green Plan’ which is a sustainable development reference framework for higher education.

From the 2011 report, it appears that France is noting the criticism on its failure to educate its population. However it resides problematic as efforts seem to not reach much further than the education sphere. There seem to be little effort done in terms of education in the professional world, in particular the people exercising administrative functions.

As for paragraph 8, concerning anti-harassment in seeking to utilise provisions of the AC, both NGO’s claim that members of associations are sometimes prone to pressure, which sometimes originates from public actors. This view is supported by Marie Laure Lambert in her article ‘Liberté d’expression et risques contentieux’¹¹⁶.

Furthermore these associations claim that Article 3, paragraph 4 is violated as the qualification of an environmental NGO is sometimes dispensed to associations which do not specifically have the protection of the environment as a main objective. They support this claim with the example of allowing the national federation of hunters and the departmental federations of hunters to be qualified as environmental NGO’s¹¹⁷.

On another point, the Constitutional Court has not yet confirmed that the Charter of the Environment, namely Article 7 on access to information and public participation is indeed enforceable under article 61-1 of the French Constitution. Uncertainty resides on this point as it is too recent to tell how this will play out in practice.

Not all articles and paragraphs are mentioned; this can be explained by the fact that the not-mentioned paragraphs do not pose any problems in terms of implementation or do not have any case law to make any practical observations.

113 Remarques des associations “amis de la terre France” et “France Nature Environnement” sur le projet de rapport d’exécution soumis par la France (Convention D’Aarhus-COP4-2011) p.3 par.2

114 2011 Compliance Report France, .10

115 2011 Compliance Report France, .12

116 Marie Laure Lambert, ‘Liberté d’expression et risques contentieux’, 2006-2009 in *Droit de L’Environnement*, n°173, 2009, p.22

117 Article 14 of law n°2008-1545 of December 31st 2008, article L.141-1

b) Pillar 1- Access to Information

(i) Public Authority

To implement the Convention some provisions need to be transposed explicitly in national law. The Environmental Charter, part of 2005 Constitutional Law, devotes Article 7 to access to environmental information and public participation. This has a general character however it is important to note its existence and we will elaborate on this Charter in further parts of this research.

There are various legal documents which concern access to environmental information in France. As mentioned France is bound by the Aarhus Convention and at the European level by the Directive 2003/4/CE. At the national level the Constitutional law n° 2005-205 of March 1st 2005 in relation to Article 7 of the Environmental Charter. Furthermore access to environmental information is embodied in law n° 78-753 of July 17th 1978 on the improvement of public-administration relations and of various administrative, social and fiscal dispositions, but also in decree n° 2005-1755 of December 30 2005 on freedom to access administrative documents. The Environmental Code also devotes articles L.124-1 to L.124-8 to transparency¹¹⁸.

In relation to the legal provisions of the first pillar of the Aarhus Convention, France has developed various bodies. The 'Service de l'observation et des statistiques' (Observation & Statistics Service), the SOeS, is in charge of statistics in relation to the environment, energy, construction, housing and transportation since July 10th 2008. It is part of the General Commissariat of Sustainable Development (CGDD) and embodies the statistical body of the Ministry of Ecology, sustainable development, housing and transportation (MEDDTL). The SOeS was created to centralize certain functions previously allocated to three different bodies. It integrates functions previously exercised by SESP (Service Economy, Statistics & Perspectives) for the fields of construction, transport and housing, the IFen (the French Institute for the Environment) in the field of environment, and the energy observatory in terms of energy and natural resources. The SOeS is in contact with national bodies as well as European and International institutions. It is divided into five distinct sub-agencies: environmental information, sustainable development methods & data, energy statistics, housing and construction statistics, and transport statistics. The SOeS is responsible for collecting, producing and diffusing information in the fields just mentioned above. It has three main objectives amongst which one explicitly referring to the Aarhus Convention. The SOeS develops Sustainable Development Indicators, elaborates indicators for the Ministry in question and is specifically tasked to implement the first pillar of the Aarhus Convention. The SOeS is part of a larger national statistics system and is specifically assigned to information on biodiversity, water, air, the impact of human activities on the environment and to related social concerns. This reminds the definition of 'environmental information' under Article 2 of the Aarhus Convention in a general sense. It is regrettable to note that the IFEN (Institut Français de l'Environnement) has been terminated. It was responsible for collecting environmental information. Its termination means

¹¹⁸ French ministry website, tout sur l'environnement, <http://www.toutsurlenvironnement.fr/aarhus/laces-du-citoyen-linformation> accessed on April 11 2011

a loss of independence of such a body as its functions have been replaced by the ministry in charge of the environment¹¹⁹.

According to the 2011 report submitted by France Article 52 of Act No. 2009-967 of August 3rd 2009 provides public access to environmental information through an internet portal¹²⁰. On this portal users can also find a smaller portal specifically on the Aarhus Convention. This is in line with the ‘education’ in accordance with Article 3.2 AC. The compliance reports are also available on this portal.

(ii) type of information

As established the AC divides ‘environmental information’ into three categories. The first category, information relating to elements of the natural world falls under the competence of the SOeS sub-agencies environmental information & sustainable development. It may also include information regarding natural resources used for energetic purposes and those requests can be referred to the energy sub agency. In order to avoid confusion it is crucial to highlight that the term ‘environmental information’ under the AC is broader than in French domestic law. In France when using the term ‘environmental information’ one refers to subparagraph a) of the definition of ‘environmental information’ under the AC¹²¹. The second category refers to factors, substances, measures and activities which affect or are likely to affect elements of the first category. Information which falls under this categorization can be dealt with by any of the sub- agencies, depending on the nature of the requested information.

In this context the French public authorities categorize information in a different fashion under domestic law than under the AC. Therefore requests for information which fit the AC definition of ‘environmental information’ will be referred to the sub-agency which is competent in the field related to that particular request. Due to the difference in categorization it is hardly possible to determine beforehand which sub-agency deals with information of subparagraph a), b) or c) as defined under the AC. It appears as this may induce some confusion as to practical use of the AC provisions. However this does not mean that France is failing to address the implementation of Article 4 AC, on the contrary France is exercising its discretionary powers to implement these provisions.

(iii)The Public

The SOeS publishes its results on the internet on freely accessible documents. The collected information is therefore accessible to the public, that is, anyone with access to a computer and internet. In a country such as France one can safely argue that this is a relative large portion of the population, however this does not mean that the ‘whole’ public can access this information. Most of the collected information is indeed available on various websites, centralized on the website of the SOeS itself¹²². On the website the information is categorized by theme and is freely accessible.

119 Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’execution soumis par la France (Convention D’Aarhus-COP4-2011) p.6 par.7

120 the website of the portal is www.toutsurlenvironnement.fr/aarhus/la-convention-daarhus-pilier-de-la-democratie-environnementale

121 (a) the first category refers to natural elements, ‘the state of elements of the environment’ which includes things such as the quality of the air, of the soil, the atmosphere, water, land, landscapes, biodiversity, and the interaction of such elements, Aarhus Convention, Article 2.3 (a)(b)(c)

122 <http://www.stats.environnement.developpement-durable.gouv.fr/>

According to the 2008 report to the Compliance Committee, some associations claim that there appears to be some kind of ‘cultural’ reticence to ‘transparency’. The CADA responded that refusals to disclose information are mostly due to administrative inertia. It calls the administrative bodies to respond accordingly. Other problems arise from a lack of capacity of some administrative bodies which lack manpower, from confusing demands or requests which do not specify the competent authority¹²³.

According to various NGO’s there is still much room for improvement in terms of disclosing environmental information on the internet, namely in relation to information relevant for participation purposes. France Nature Environnement (FNE) illustrated this point admirably with a press release on February 7th 2011. FNE discovered that permits have been granted for research on non conventional “hydrocarbures”, namely using “schist gasses”, on considerable territories without providing the public with any information, clearly in contradiction with the AC. This not only illustrates the point made in the application report, it also confirms that this obstacle to effective implementation is pertaining in 2011, three years after the report was submitted to the ACCC.

Furthermore, the 2011 report confirms that sending information via email, governed by AC Article 4, par.1, is far from being systematic¹²⁴.

Indeed internet sites elaborated for the diffusion of information as requested by AC Article 5 are only useful if the information is posted and updated. It appears that the update of information is often still to be improved¹²⁵.

(iv) Requirements of Requests

As we have seen in the theoretical part on the Aarhus Convention there are a number of exceptions in terms of accessing information. Indeed as stipulated by Article 4 of the AC a request may be refused if the request is ‘manifestly unreasonable’ or ‘too general’. There already exist a few cases in which these exception clauses were utilized. In cases of refusal by a public authority the request is referred to the Commission for Access to Administrative Documents (CADA). This Commission rules on the legality of the refusal. Indeed in this respect public authorities have the discretion to define the terms above. These definitions are reflected by various rulings of the CADA. In one instance the CADA ruled that the request for ‘any document’ relating to a specific wild bear species and a request for ‘all opinions’ issued for environmental impact assessments by the Government were too general¹²⁶. In another instance the CADA ruled that a request for the data from water analyses of all the local authorities in a department for five specified months and a request for all the documents relating to the development of the local road system was not too general, and that therefore the information had to be communicated to the applicants of the request.

The State Council decision of August 7 2007 n°266668 also limited the possibilities for refusal. The Council ruled that it was illegal for the prefect of Morbihan to deny the inhabitants of accessing information under the pretext that the document was preliminary¹²⁷. A request may be refused if the document is in the course of completion, but not if it is preliminary. The State Council therefore annulled the decision made by the Rennes

123France compliance report, 2008

124Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’execution soumis par la France (Convention D’Aarhus-COP4-2011) p.4 par.4

125Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’execution soumis par la France (Convention D’Aarhus-COP4-2011) p.6 par.6

126Implementation Guide, p.57, box « defining too general »

127 Conseil d’Etat, august 7 2007, n° 266668, on

<http://www.unece.org/env/pp/a.to.j/Jurisprudence%20prj/France/ConsEtatMorbihan7Aug07/FranceCEMorbihan7Aug07.pdf>, last accessed on april 13 2011

Administrative Tribunal and the prefect of Morbihan as it was incompatible with Article 3 of Directive 90/313/EEC, of which a similar provision exists in Article 4 of the Aarhus Convention.

FNE & les Amis de la Terre France note a decrease in requests presented to the CADA. However it does not allow saying that there are less refusals of requests. Indeed in face of a cultural reticence to administrative transparency as the public may simply be discouraged by such a culture. It has nevertheless come to light in practice that most non-justified refusals originate from territorial authorities. In this context it seems most appropriate to find information on the formation of such territorial public servants¹²⁸.

The same NGO's state that there appears to exist much confusion on the period available to respond to a request. The administrations have integrated the obligation to answer within one month, in contrast with AC Article 4, par.2 which clearly stipulates the obligation to communicate the documents, and not only a positive or negative response, within one month as a maximum, and at best as soon as possible. Furthermore often the costs for sending documents are often put on the applicant and the information is only rarely communicated via email. Also information is often only communicated when the applicant has paid the cost of reproduction and sending. A law of October 1st 2001 determines the maximum costs of copying administrative documents. It is regrettable to note that it is always the maximum cost which is utilized¹²⁹. All these elements consequently lead to many situations in which the 30 days period clearly violating the relevant AC provision.

Also, the confusion on 'document in the process of being finished' and 'unfinished document' (a confusion elaborated upon in a previous part on the interpretation of the Aarhus Convention) presents clear obstacles to the communication of administrative documents as attested by State Council decision n°266668.

(v) Conclusion

Prior national legislation supports the provisions of the AC. In 1978 France created a law on Free Access to Administrative Documents, (Law No. 78-753 of 17 July 1978). It enabled this type of right; however in practice a lot of non compliance took place. In 2002, after the ratification of the Aarhus Convention, a decision of the Conseil D'Etat (State Council) ruled that the right to access administrative documents was indeed a fundamental right under Article 34 of the Constitution¹³⁰. Nevertheless non compliance seems to reside, mainly due to the lack of awareness of such rights with the public and the lack of resources of the public authorities¹³¹.

According to the EEB France is showing concrete activities to promote the first pillar of the Convention to officials and or to the public however when looking in more detail, many violations occur and a tradition of administrative opacity resides.

128Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'exécution soumis par la France (Convention D'Aarhus-COP4-2011) p.4 par.3

129Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'exécution soumis par la France (Convention D'Aarhus-COP4-2011) p.4 par.3

130Banisar, David (2006) Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws, Privacy International.

131Compliance report France. 2008

c) Pillar 2- Public Participation in Decision-Making

(i) Type of activities

(a) Listed Activities (Article 6 AC)

Article 6 of the Aarhus Convention governs public participation in terms of specific activities. The FNE and 'les amis de la terre France' note that the legal research made by the CDE¹³² ("Concertation, Decision, Environnement") were too few (only two researches). The main researches have been conducted outside the scope of the CDE program. This entails that it is very difficult to find all the information on this matter as they are scattered around various legal journals. The overview of the situation and of its evolution is absent. It would seem most appropriate to assemble all these documents of the last ten years. As this is still not done in the 2011 compliance report the use of the CDE program appears rather superfluous¹³³.

If we look at the details of implementation of each paragraph of Article 6 there already appears to be a problem with paragraph 1. Indeed the independence of public participation reports is questioned as this responsibility lies with the applicant of a project. (The same can reasonably be argued for EIA's, the difference between EIA's and public participation procedures is outlined in the analysis of the legal provisions above). Furthermore Article 300-2 of the urban code seems incompatible with Article 6 of the AC. Also 2009 legal reform in terms of classified installations has significantly reduced the scope of public participation in this field¹³⁴. This reform created a third category of installations. It consists in 'recording' ("enregistrer" in French) installations. Some installations, which were previously subject to public participation, can be 'recorded' and are therefore exempted from such procedure. Instead of belonging to the category of 'permit' prone activities, some installations may belong to the 'record' regime. It translates into a clear reduction of scope in terms of participation¹³⁵.

Moving on to the second and third paragraph of Article 6, first of all Article 6 par2, d) vi) on disclosure of the details of procedure is not implemented in France. The details of procedure are in fact rarely disclosed. It is simply not required by French Law. Also, the difficulties in accessing the relevant files on time before the start of the decision making process, render the complete implementation of Article 6, par.3 impossible.

On top of that, a new law is in development on public inquiry seeks to reduce to number of local newspapers which publish information in research opinions from two to one. This would reduce the sources of information; sources which already prove insufficient. It also does not give any guarantee that the newspaper with the largest audience is chosen for this task. Indeed this is in strife with the Aarhus Convention. The ACCC ruled in a case concerning Lithuania

¹³² The CDE is a program launched by the french ministry of ecology since 1999. From 2008 onwards it was placed under the competence of the ministry of ecology, energy, sustainable development and territorial planning. http://www.concertation-environnement.fr/index.php?option=com_content&task=view&id=15&Itemid=29, last accessed on april 24 2011

¹³³Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'exécution soumis par la France (Convention D'Aarhus-COP4-2011) p.7 par.3

¹³⁴Ordonnance n°2009-663 of june 11th 2009, and décrets n°2010-367, 2010-368 and 2010-369 of april 13 2010.

¹³⁵Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'exécution soumis par la France (Convention D'Aarhus-COP4-2011) p.8 par.1

that if the chosen media is local press, than the press needs to be ‘popular’ and daily (in contrast with an official weekly paper). Furthermore the Compliance Committee demands that it must be the newspaper with the largest distribution which must be elected for this purpose. This is not the case in France.

Apparently the implementation of Article 6 paragraph 4 also poses a number of problems. Indeed it remains questionable whether public participation is not often simply pro forma which would in itself also constitute a violation of the Aarhus Convention. It remains unclear in French law to what extent public participation influences the decision. According to Jacques Chevalier “*public debate does not entail transfer nor real sharing of decision powers.*”¹³⁶ Specialists argue that the public inquiry is triggered too late, only when the project can merely be modified¹³⁷.

Article 6.4 can be found in case-law of the State Council. In case n° 310027 of 18 December 2008 the State Council decided that Article 6.4 and 6.8 cannot be invoked by an NGO as it creates obligations only between contracting parties. The Court argues that therefore those provisions have no direct effect in French legislation. However according to consumer law Professor Ludwig Kramer there are similar provisions to Article 6 AC in EU Directive 2003/35¹³⁸.

France was the subject of Compliance Committee case ACCC/C/2007/22. According to Kramer all options were not open when participation took place in the process of granting a permit for the construction of an incinerator, in contrast with the decision of the compliance committee in this instance.

In relation to the fifth paragraph, concerning a horizontal relation between private parties, France has little overview of the situation in face of this new type of obligation. FNE and ‘les Amis de la Terre’ propose to eliminate this provision for this reason¹³⁹, however it seems important that the exchange of information between an applicant of a permit and the public be laid down in actual legal obligation.

Public Participation via email is legally not possible in France to this day in absence of implementation decrees. The phrase of Article L.123-13 CE “in some case, public participation can occur via electronic means” needs to be replaced by a more stringent obligation. This is being investigated upon.

Regarding paragraph 8, on taking due account of public participation in the decision for specific activities, it is not clear how participation is indeed duly considered. FNE & ‘Amis de la Terre France’ note that the opinion of the inquiry commissary does not bind the final decision. Indeed permits can be granted against the opinion of the commissary. For a French administrative judge ‘taking into account’ means that the competent authority may not derive from ‘fundamental orientations’¹⁴⁰ of the documents to be taken into account. The result is a system in which taking public participation into consideration or account is not very stringent in France. To respect AC Article 6, par.8 effectively this consideration must be more

136 J.Chevalier, “le débat public en question”, in “Pour un droit commun de l’environnement, Mélanges en l’honneur de Michel Prieur”, p.505

137 Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’exécution soumis par la France (Convention D’Aarhus-COP4-2011) p.9 par.3

¹³⁸ http://www.gravybaby.eu/Practical_implementation_Ludwig_Kramer.pdf

139 Remarques des associations “amis de la terre france” et “France Nature Environnement” sur le projet de rapport d’exécution soumis par la France (Convention D’Aarhus-COP4-2011) p.10 par.1

140CE, July 28 2004, Association de défense de l’environnement et autres, Fédération nationale SOS environnement et autres, BJCL, n° 9, 2004, p.613

constraining for decision makers. Another point of concern on this matter is that France published in a compliance report that a negative opinion of the public entails a systematic and important legal consequence. This is not the case in the field and therefore the report needs to be updated¹⁴¹.

Partaking in public participation is also limited by Article L.126-1 of the environmental code which stipulates that the nature and the motives of modification of a project may not alter the general economy of such a project¹⁴². This means that a project may never be altered completely which seems to be in contradiction with Article 6, par.4 and par.8 of the Aarhus Convention.

Paragraph 9 is violated in France as the decision maker does not need to disclose the reasons for his or her decision not to take into account the result of public participation or the opinion of the inquiry commissary under French Law. Furthermore the publication of administrative decisions is not updated regularly on the national register of ICPE (Installations classées Protection de l'Environnement). The data of the ICPE register is often outdated and incomplete¹⁴³. This questions the efficiency of the implementation of these AC provisions.

As for GMO's much uncertainty and unclarity resides on this matter as the report presented by France does not take into account the latest law on GMO's. This needs to occur still in the 2011 report as requested by the ACCC. The information granted in the report under paragraphs 119 and 120 are therefore useless.

The State Council has established that Article 6 paragraphs 1, 2, 3 and 7 are directly applicable in French national law¹⁴⁴. The remaining paragraphs however have no direct effect and can only engage obligations between contracting parties. They can therefore not be invoked by private persons in court. This renders the effectiveness and applicability of those provisions very difficult.

(b) Article 7

The public debate organized in 2009 about nanotechnologies was conducted once the decision had already been taken. This is clearly in violation of AC Article 7 under which the activity of nanotechnology falls. This also occurred with debates around nuclear energy¹⁴⁵.

In relation to Article 7 of the Aarhus Convention the 2008 compliance report only states that associations regret that there seems to be a general ignorance of the existence of such tools with the public. They denounce an absence of proper education and a feeble culture of citizenship in France. There is little information available on this matter.

According to the EEB there is too little time for NGO's to comment on draft National Implementation Reports¹⁴⁶.

141Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'execution soumis par la France (Convention D'Aarhus-COP4-2011) p.10 par.4

142Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'execution soumis par la France (Convention D'Aarhus-COP4-2011) p.11 par.1

143Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'execution soumis par la France (Convention D'Aarhus-COP4-2011) p.11 par.3

1442011 Compliance Report France, paragraph 158

145Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'execution soumis par la France (Convention D'Aarhus-COP4-2011) p.13 par.5

There exists some confusion in various member States whether certain activities fall under article 6 or under article 7. This is however not necessarily a problem for this research as both articles provide for similar legal provisions. Conclusions on Article 6 will provide for an insight on fundamental parts of Article 7. Namely issues such as ‘all options open’ and ‘as soon as possible in the decision making processes are key elements shared by both articles of the AC.

(c) Article 8

In the context of establishing the 2003 Quota Directive (2003/87/CE) France only disclosed the project on the MEDAD internet website and in the ‘prefectures’ for a period of one month.

Some associations claimed in 2008 that Article 8 is not respected fully as all options are not always open when executing consultation as laid out by Article 8. Creating an open workgroup to ensure effective public participation at an appropriate stadium remains an exception.

In relation to Article 8 AC there are a number of developments, in French domestic law, which are crucially relevant. Article 244 of the loi Grenelle II of July 2010 provides the public with the right to participate in the elaboration of regulatory decisions^{147, 148}.

It is indeed very positive to note that environmental concerns are, by way of this new law, represented at the decision table. However it is regrettable to observe that this does not eradicate in any way the opacity of traditional lobbying of mainly economic interest groups. Article 244 of Grenelle II does not have the capacity to combat this problem.

Furthermore the scope of Article 244 Grenelle II is too restrictive, even though the Ministry has invited the public to participate on decree projects on their website. Also the procedural modalities are insufficient. The ministry publishes a decree project, to which the public may send observations and comments. Article 244 does not demand a meeting between the public and the competent authorities. Furthermore the invitation to send comments is a very discreet one, there is only a publication on the website without any further promotion. The public is regrettably granted a very limited time-span to react. Perhaps the main problematic concern, as mentioned for participation under Articles 6 & 7 of the Aarhus Convention, is the opacity of how public considerations are duly taken into account which clearly breaches Article 8 AC. On a general note, implementation seems to encounter a certain reticence to transparency of the French administrative authorities.

For Article 8, rules, laws and policy decisions, the consultation of a national representative body is required by law. The consultation of large associative networks is not demanded by law but is more and more frequent. There exists no necessity of public participation under French law as such. It therefore proves difficult to apply Article 8. Furthermore there exists no case law regarding article 8. It is therefore irrelevant to make further observations on this article, as no practical evidence can support arguments on the implementation of that article.

146 EEB, feb 2011 powerpoint on

<http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1>, last accessed on May 23rd 2011

147 this right is codified by Articles L.120-1 and L.120-2 of the environmental code.

148 ‘regulatory decisions’ are decrees, ‘ordonnances’ or ‘arrêtés’.

(ii) Procedural requirements for all types of decisions

According to some associations there are numerous obstacles to the implementation of the various Articles of Pillar II. For instance it has been communicated in the 2008 report that research files are sometimes too technical, the consultation hours and the geographical disposition of the folders to restrictive. Also, often only recognized associations are allowed to consult the information.

Furthermore financial constraints render it sometimes difficult to implement Article 6 of the AC. Also, the opinions which arise from consultation are often not disclosed clearly, public meetings not frequent enough, alternatives to the project not always proposed or taken into account. This clearly poses concerns to due process of debate.

Some organizations and associations regret that such folders regarding a particular project are not publicly available on the internet. They also regret that due to a lowering of the standard for permits the number of public consultations has also reduced. They furthermore regret that the opinion of the relevant environmental authority is not systematically added to the file. In terms of public debate consultation procedures have improved. However the results of such consultations are not being taken into account sufficiently.

The associative world also regrets that the consultation on Article L.200-2 of urban law was of a very minimalist character. This case shows that in France the public consultations do not sufficiently provide the opportunity to question the fundamental options of a particular project. In reaction the French Government has decided to harmonise and simplify the public consultation procedures.

According to the CRIDEAU (Interdisciplinary Research Center of Environmental Law of Territorial and Urban Planning) the absence of direct effect in France poses a problem to implementing Article 8 AC. The absence of “self executing” norms leads to the absence of direct effect and eventually to the absence of invocability of that provision before a Court of Law. Furthermore the absence of a clear European Directive regarding Article 8 renders it impossible to invoke the provisions governed by Article 8 AC under European Law. Similarly there are, to this day, no decisions made by the European Union Court of Justice confirm or reject Article 8 AC. The same can be said for the European Court of Human Rights.

To conclude the deepening of democratic practice in France depends on how much power is given to Article 8 by the relevant jurisdictions. Until now there seems to be a crucial absence of invocability of that article in French law. Sadly traditional lobbying seems to pertain, when implementing Article 8 would allow for all interest groups to lobby with the same means and would allow for a transparent system, the latter allowing for a more democratic system.

d) Pillar 3 - Access to Justice

(i) Judicial Body

In France cases are brought to different courts depending on their nature. These courts range from administrative courts to civil courts, first instance courts, instance courts, criminal courts and correctional courts¹⁴⁹.

Civil proceedings may be brought to court by a competent NGO. France grants direct access to civil courts to NGO's. However they are less frequent in environmental matters than criminal or administrative cases¹⁵⁰.

¹⁴⁹ Frédérique Agostini,, judge at the Cour de cassation, Access to justice Regional Workshop for High-Level JudiciaryTirana, Article 9.3 of the Aarhus Convention, Some current issues under French law,17-18 november 2008, p.2

Criminal proceedings can also be brought by a private or legal person who has been the victim of such a crime. In turn administrative courts are competent, through administrative action, to review and challenge the content of an authorization, its inadequacy, its deficiency or non-existence¹⁵¹. There exists a special feature in France; NGO's can successfully claim damages before an administrative court for having suffered moral damage¹⁵². These cases are rare but have a 80% success rate¹⁵³.

Between 1996 and 2001 there were 954 administrative cases, 34 civil cases and 210 criminal cases. Administrative cases are the most frequent; however criminal cases had the highest success rate for NGO's¹⁵⁴.

In relation to information requests under Article 4 of the AC the Commission on Access to Administrative Documents (CADA) was set up prior to the Convention. Its main goal is to guarantee freedom to access administrative documents relating to the environment. It has been granted the status of an independent administrative authority therefore fulfilling the legal obligation of Article 9.1 of the Aarhus Convention. It was established by Article 20 of Act No.78-753 of July 1978.

Furthermore Act No.91-647 of July 10th 1991 guarantees the public effective low-cost access to courts. As presented in paragraph 169 of the 2011 compliance report submitted by FNE one might regret that the opinions of the CADA are not binding upon administrations.

According to the 2008 report, it appears that judicial bodies respond the best when there exists a specialized jurisdiction in the field of environment. This comment is maintained in 2011 even though some specialization of judges has occurred¹⁵⁵.

(ii) Legal Standing

France takes an intermediate approach on legal standing as defined by Sadeleer¹⁵⁶. Sufficient interest must be demonstrated (not excessively uncertain or indirect). As demonstrated by a 1906 ruling the Council of State also grants legal standing on behalf of collective interests.¹⁵⁷

Before administrative courts even NGO's which are not registered can bring claims to represent collective interests if they have an interest to act¹⁵⁸. As soon as an NGO is recognized to defend a certain interest it can challenge administrative decisions. The statutes and the actions of the legal person must directly relate to the subject of the decision. To contest administrative acts NGO's are not required to demonstrating the violation of a subjective right; however this is the case before civil courts. Therefore it is easier for NGO's to be granted standing before administrative court. This is also reflected by the number of cases mentioned above.

¹⁵⁰ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.1.1, p.19

¹⁵¹ Frédérique Agostini., judge at the Cour de cassation, Access to justice Regional Workshop for High-Level Judiciary Tirana, Article 9.3 of the Aarhus Convention, Some current issues under French law, 17-18 november 2008, p.3

¹⁵² Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.1.1, p.18

¹⁵³ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.1.1, p.18

¹⁵⁴ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.1.1, p.19

¹⁵⁵ Compliance Report France, 2011, paragraph 193, p.29

¹⁵⁶ Sadeleer distinguishes various approaches on legal standing : the extensive approach, the restrictive approach, and the intermediate approach cf. footnote n°.49

¹⁵⁷ 2011 Compliance Report France, par170, p.25

¹⁵⁸ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.2.1, p.23

Now even NGO's which are not registered may bring claims before administrative courts as long as it has an 'interest to act'. There must be a direct link between the statutes and the activities of the organization and the interest of the contested decision¹⁵⁹. As long as the decision affects its objectives and activities an NGO may bring a claim before an administrative court. This is much broader than for civil courts for which a subjective right must have been violated.

Associations and NGO's have established rights to take legal action as defined in the Environment Code. Under Article L.142-1, paragraph 1. "*Any environmental protection association may bring proceedings in administrative courts for any complaint relating to its purposes*"¹⁶⁰. This seems to present a rather broad access to legal standing.

Under the second paragraph of that Article those "recognized associations are granted standing in proceedings against any administrative decision which has harmful impacts on the environment"¹⁶¹. This provision seems a bit more vague as it is not always possible to prove actual harm of the environment before a proceeding is launched.

Also, in certain conditions, associations have the right to exercise the same rights as those granted to applicants for criminal indemnification¹⁶².

It is encouraging to observe the December 7 2006 Cour de Cassation ruling which allows environmental protection associations to bring civil action in both criminal and civil courts. Prior to 2006 these actions were only admissible in criminal courts. That same ruling allows such action to represent collective interests. Naturally these interests must match the statutes of the association in question. However no reference is necessary to the requirement for authorization¹⁶³. This ruling allows a broader access to justice.

Since the 1st of March 2010 claims can be brought before all courts under a new procedure introduced by Article 61-1 of the 1958 Constitution, inserted by Constitutional Act No. 2008-724 of 23 July 2008. This procedure allows parties to challenge during legal proceedings a statutory provision which breaches rights and freedoms guaranteed by the Constitution. The principles and rules which are referred to are numerous, but most importantly for this discussion is the right to live in a balanced environment commensurate with health; as defined by Article 1 of the Environmental Charter and also the "right to access environmental information held by public bodies and to participate in public decisions that affect the environment"¹⁶⁴.

According to Agostini, judge at the French Court of Cassation, French Courts, either administrative or judicial have generally a broad view on NGO standing. The rights and obligations of environmental associations for legal action are clearly laid out in Articles L.141-1 and further of the Environmental Code.

(iii) Damages

¹⁵⁹ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.2.1, p.23

¹⁶⁰ Code de L'Environnement, Article L.142-1, paragraphe 1

¹⁶¹ Code de L'Environnement, Article L.142-1, paragraphe 2

¹⁶² Code de L'Environnement, Article L.142-2

¹⁶³ Cour de Cassation, 5 Octobre 2006.

¹⁶⁴ Charte de L'Environnement, Article 7

Roughly ten years after the ratification of the AC the 2011 compliance report submitted by France confirms that it is possible to obtain injunctive relief to prevent imminent damage or even to stop certain illicit activities before a civil court. The same may occur in the event of a non-performance fine¹⁶⁵.

Indeed a civil court can through a preliminary injunction/summary ruling impose an interruption of a certain activity.

A criminal court may sentence a criminal offender to fines, jail or other remedies and grant the victim compensation. Even in an administrative court can compensate moral damage which has been suffered by the claimant.

According to Sadeleer, it is however very difficult to obtain injunctive relief in France; the conditions are rather narrow even though the Conseil d'Etat is interpreting the provisions more broadly since 2002¹⁶⁶.

(iv) Barriers

According to the 2008 report to the Compliance Committee there exist obstacles for NGO's to access the Constitutional Court (art 3, par.8)

Article 9 of the Aarhus Convention can be found in French jurisprudence. There were a few cases relating to breaches of Article 4 of the AC (access to information). As mentioned in the analysis above the Council of State ruling of August 7 2007 remind local authorities of the restrictive nature of document refusal¹⁶⁷. Another interesting case, regarding environmental information held by a private body, relates to nuclear energy. After information was requested the CADA ruled that nuclear industries did not produce public services¹⁶⁸ and therefore did not qualify as 'public authority' as defined under Article 2.2 of the AC¹⁶⁹. That same year a new law was created to solve the unclarities still residing on the matter. This law of June 13 2006 on transparency and nuclear security imposed clear obligations on the legal person running a nuclear plant; mainly in terms of transparency¹⁷⁰.

In a more recent case a request refusal was considered legitimate by the commission. It was in relation to a wood boiler company. The commission (CADA) argued that it did produce public services, therefore qualifying under Article 2.2 of the AC, however the requested information contained commercial and industrial information. Requests can indeed be turned down if the information contains such elements under Article 4.4 of the AC. The mere existence of such confidential information cannot constitute on itself grounds for refusal. It is the authorities' task, along with a Court, which information is more important to safeguard or disclose.

1652011 Compliance Report France, paragraph 175, p.27

¹⁶⁶ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.4, p.30

¹⁶⁷ Frédérique Agostini., judge at the Cour de cassation, Access to justice Regional Workshop for High-Level JudiciaryTirana, 17-18 november 2008, p.3

¹⁶⁸ Cada : avis n° 20062388 – <http://www.cada.fr>.

¹⁶⁹ Aarhus Convention, Article 2.(2): Public authorities means : natural or legal person having public responsibilities or functions or providing public services, in relation to the environment under the control of a body or a person falling within previous paragraphs of the same article :a) government, at national, regional and other level,b) natural or legal persons having public responsibilities or functions under national law, including specific duties, activities or services in relations with the environment.

¹⁷⁰ Frédérique Agostini., judge at the Cour de cassation, Access to justice Regional Workshop for High-Level JudiciaryTirana, 17-18 november 2008, p.3

It is regrettable that an attorney at law is required for representation before the Tribunal de Grande Instance (TGI). This is not required for representation before a proximity court or a court of first instance, in which the claims cannot exceed respectively 4000 and 10000euros. The same applies for simultaneous representation before both Cour de Cassation and Conseil d'Etat. The fees for such lawyers are very high. It is however important to note that there exist a system of financial aid to overcome such barriers.

Some associations denounce a restriction on the access to justice for NGO's. Articles L142-1 of the CE and L600-1-1 of the urban code have stipulated that in order to act against an administrative decision an NGO must have been created before the decision at hand. Furthermore NGO's must have deposited their statutes prior to the disclosure of a decision by a public authority.

According to FNE and les Amis de la Terre France remind that since June 24 2003 (decree n°2003-543) a lawyer is obligatory before administrative judicial bodies. Also it has remained obligatory to be represented by a lawyer before the State Council and the Cassation Court in these jurisdictions in cases of cassation of ruling. Different types of lawyers are obligatory, even in cases of access to administrative environmental information refusal. (breach of Article 9. par1)

The 2011 report reminds the regret that representation by council is still mandatory before courts of major jurisdiction. France retorts to this comment by reminding that when claims do not exceed 4,000euro and 10,000euros local courts and courts of minor jurisdiction are competent and that representation by council is not mandatory before those courts¹⁷¹. It remains that in cases involving large activities, or in any case, cases involving claims exceeding 10,000euros, engaging in legal proceedings may prove very costly.

FNE and les Amis de la Terre France also question the independence of the French State Council (Conseil d'Etat), namely in cases of large territorial planning decisions as defined in Article 6 of the Aarhus Convention. The case around the A65 freeway illustrates this point. Another example is the 17 March 2010 State Council ruling on *Association Alsace Nature et a.*, n°314114 (...) The public report was clearly not in favor of this freeway project. The State Council disregarded public opinion to allow a project ridden by irregularities. René Hostiou, perhaps the best expert in French expropriation law comments this ruling in number 3-2010 of "la revue juridique de l'environnement". Hostiou explains that in no case the State Council was considering an annulment of this project. According to him this is due to the 'political' functions of the latter. He describes the Conseil d'Etat as "*interpreting law not only in function of the so-called internal normative dynamics but from various meta-legal considerations, in close symbiosis with priority values and the main choices made by society-which clearly results in completely different rulings in which the environment is yet again the main victim.*"¹⁷² In short, as illustrated by this speedy ruling of March 17 2010, the State Council rejects all claims directed against public declarations which approve large projects of national territorial planning¹⁷³. (breach of AC article 9.2 + fundamental rules of the State of Law)

171 2011 Compliance Report, p.29, paragraph 194

172 René Hostiou, *Revue juridique de l'environnement*, 2010, p.494

173 Remarques des associations "amis de la terre france" et "France Nature Environnement" sur le projet de rapport d'exécution soumis par la France (Convention D'Aarhus-COP4-2011) p.15 par.1

(v) Conclusion on access to justice

According to the EEB, France is in the list of Parties which have already reached a satisfactory situation in transposing and implementing the Aarhus Convention. Access for NGOs (depending on certain criteria) and members of the public with a certain interest (interpreted in a non-restrictive way) do exist – interim relief, low costs or assistance in costs are all possible¹⁷⁴: Indeed legal standing is granted rather broadly to associations which can prove sufficient interest. It is however narrower than ‘the public concerned’. It guarantees that there exists a link between the plaintiff and the contested decision. Administrative, civil and criminal courts may be accessed to review decisions. The success rate of those cases indicates that they are dealt with in due form.

Financial barriers exist, however the costs are generally not excessively high in France. As is the case in most countries it is mainly the risk of losing (loser pays principle) which discourages many NGO’s to sue polluters.

C) Conclusion on the Implementation of the Aarhus Convention in France

Clearly France is in the process of implementing the Aarhus Convention. Nevertheless when looking at the details of this process we encounter a number of obstacles to full effective implementation of all the legal provisions. This concluding paragraph presents an overview of the obstacles encountered in part III of this research¹⁷⁵.

For the provisions related to Article 3 of the Aarhus Convention :

- administrative secrecy (Art.3.2)
- 'education' rarely applied to the professional and administrative world (Art.3.2)
- the general governance strategy appears too vague (Art3.3)
- the criteria for representation for NGO's is not well defined, in some cases non environmental NGO's are considered as such (Art.3.4)
- the possible disappearance of a specialized body in nuclear affairs (Art.3.7)
- pressure is sometimes felt by NGO's (Art3.8 on anti-harassment)

Pillar I- Access to Information :

- termination of the Institut National de l'Environnement (IFEN) results in a loss of independence
- France uses different categories for types of information which may lead to confusion and non compliance. This is not necessarily the case.
- Administrative inertia & lack of capacity
- room for improvement in terms of publishing information on the net (in many cases information is not updated regularly or frequently enough and not systematic)
- Territorial administrations issue most non justified refusals of requests.
- Much confusion resides around the one month time limit of requests
- time limit is often not respected
- confusion around the term 'unfinished document'

174EEB 2010 powerpoint <http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1>

¹⁷⁵ This part is presented in bullet point fashion to provide for a straightforward list of obstacles

- PRTR register contains too technical information

Pillar II

- questionable independence of public participation reports
- Article 300-2 of the urban code seems incompatible with Article 6
- 2009 reform reduces the scope of public participation for listed activities
- details of procedure are rarely disclosed (article 6.2.d.iv)
- difficulty to access relevant information in time render the implementation of Article 6.3 impossible
- Public Participation appears only pro forma (Article 6.4)
- questionable whether outcome of participation actually influences the decision
- Participation via email is not possible to this day
- the outcome of participation is not duly considered (Article 6.8)
- nature and motives of the modification may not alter the economy of the project (Article L.126-1 of the Environmental Code)
- no necessity to disclose the reasons for the decision
- the publication of administrative decisions is not updated regularly
- the ICPE register is often outdated and incomplete
- no direct effect of many Article 6 provisions
- public participation on nanotechnologies and nuclear energy occurred after the decision was taken (Article 7)
- no necessity of public participation under french law for activities governed by Article 8
- options are not always open
- open workgroups are exceptional
- no eradication of traditional lobby opacity of economic interest groups
- Article 244 of Grenelle II is too restrictive and procedural modalities are insufficient
- reticence to transparency
- absence of invocability of Article 8

Pillar III

- not enough specialization of judicial bodies
- possible removal of the 'juge d'instruction' could endanger the independence of the courts in penal matters
- absence of term 'public concerned' in French law
- provisions on legal standing are too vague
- NGO's must exist prior to the decision it is challenging

D) The Netherlands

Introduction

There are two acts which implement the Aarhus Convention in Dutch Law. The Act on the approval of the Aarhus Convention for the Kingdom of the Netherlands (Wet betreffende de goedkeuring van het Verdrag van Aarhus voor het Koninkrijk der Nederlanden, Stb. 2004, 518); and the Act on the implementation of the Aarhus Convention (Wet houdende tenuitvoerlegging van het Verdrag van Aarhus, Stb. 2004, 519)¹⁷⁶. The first act ratified the Convention which entails that The Netherlands are a party to the Convention since march 2005. The second act contains the material for adaptation of dutch law¹⁷⁷.

a) Access to Information

(i) public authority

Similar to the analysis on French implementation of the AC we'll start with looking at under by which authority access to environmental information is governed.

The law on transparency of management (Wet Openbaarheid van Bestuur- hereafter Wob) embodies the rules which govern access to information in general. Also a special provision was added to environmental law, namely Article 9 of the Law environmental Management (Wet Milieubeheer –hereafter Wm) which specifically regards access to environmental information.

The Wob lays down the definition of a public authority: (art1a)

- a) ministers
- b) Administrative organs of provinces, cities, water-councils and public legal organisations (publiekrechtelijke bedrijfsorganisaties)
- c) administrative organs which function under the responsibility of organs defined under a) and b)
- d) other administrative organs

Under the Wob administrative organ carries a different meaning than under the General Administrative Law (Algemene Wet Bestuursrecht – hereafter Awb).

For environmental information no exceptions are allowed on applying the Wob on certain administrative organs. This implies an implementation of pillar I of the Aarhus Convention.

The Wob governs access to all types of information, and also of environmental information. Wm establishes more specific provisions in terms of access to environmental information. It can be said that wet milieubeheer is a *lex specialis* to the Wob. This implies that if Wm allows an exception it cannot be rectified under the Wob. If not special arrangement applies then it falls under the Wob¹⁷⁸.

176Nederland compliance report 2011, p. 3

177Nederland compliance report 2001, p.3

178Toegang tot milieurecht, 2010, 2011, p.175

(ii) type of information

As is the case in the Aarhus Convention, Dutch administrative law makes a difference between passive and active access to information (respectively Articles 4 and 5 of the AC). In terms of actively collecting and disseminating environmental information (Article 5 AC) the Netherlands participates in the PRTR protocol as laid out in chapter 12 of the Wm.

Information

The provisions of Article 4 are translated in Dutch legislation in the Dutch Freedom of Information Act (Wob). Articles 2, 3 and 7 stipulate that any person has access to information without having to state an interest (..) ¹⁷⁹. Further provisions of this act reflect the procedures and motivations of the Article 4 & 5 of the AC. For example Article 6 of the Freedom of Information Act (Wob) states that requested information must be disclosed or provided within two weeks, with delay provisions. The two week period complies with Article 4 of the AC which lays down a maximum of a one month period.

Environmental information

In the Netherlands specific access to *environmental* information is governed nationally by Article 19.1a Wm (Law Environmental Management). It characterizes information in a similar fashion as the AC article 4. Article 19.1a a) relates to all natural elements such as air and water, b) relates to factors and c) to measures ¹⁸⁰(...). There are some differences, namely c) of the AC relates to the effects on human health, which in Dutch law falls under heading f). Some additional elements are present in Dutch law. However in a general sense the characterisation is similar, at any rate similar enough to not create any confusion when dealing with issues of environmental information.

It appears that in the Netherlands environmental information is in fact public, as is claimed in the Dutch compliance report of 2011. Also the restrictive nature of exceptions is recalled. There are a number of cases which support this view:

Emission information

The Raad van State case n° 200907818/1/H3 of May 4 2010 regards environmental information, and more specifically the refusal of an information disclosure request on the basis that the concentration data does not make part of emission information. The Raad van State ruled that the interpretation of the Service of Environment Management Rijnmijd (DCMR) leading to the refusal was inconsistent with international legislation and namely the Aarhus Convention and the rules relating to the IPPC register. The Raad van State ruled that concentration data is part of environmental information as it relates and constitutes a part of emission information ¹⁸¹.

This case confirms that emission information is included in the Dutch definition of environmental information as defined in Article 19.1a Wm in conformity with the provisions of the Aarhus Convention.

179Nederland compliance report 1011, p.5

180Wet Milieubeheer, Hoofdstuk 19. Openbaarheid van milieu-informatie, Artikel 19.1a on <http://lexius.nl/wet-milieubeheer/artikel19.1a/> last accessed on april 25 2011

181Raad van State, May 4 2010, case n° 200907818/1/H3 on http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=XrXb9wQVDrU%3D, last accessed on april 25 2011

Energy usage information

In a similar claim brought by Greenpeace regarded extending the notion of environmental information to energy usage date of private companies, in this case of namely NUON energy sourcing. The idea of this case, case n° 200901021/1/H3 of October 28 2009, is similar to the case of May 4 2010 in the sense that it presents an attempt to include information at the basis of emission date to 'environmental information'. However in this case the Court ruled that the information regarding energy consumption is very sensitive information in relation to market competition. Therefore the claim was deemed inadmissible¹⁸².

Indeed energy usage information is not explicitly mentioned in the Aarhus Convention as being part of environmental information. It could theoretically be argued otherwise, as energy usage relates to the natural environment as defined by Article 2.2.a) AC. However energy usage remains protected by industrial confidentiality. It belongs to parties' discretion to outweigh environmental and commercial interests.

Information on GMO location

In relation to information on the location of GMO's dissemination Greenpeace brought claim to court in 2010. In case n° 200801400/1/M1 of April 28 2010 the Raad van State ruled that the claim brought by Greenpeace was inadmissible. Greenpeace reminded the EC case of February 17 2007 C-552/07 which ruled that such information may not be kept confidential. The Court argued that under Directive 2001/18/EC that whether disclosure is demanded by law depends on the characteristics of each introduction of GMO's and the possible effects on the environment. The type of GMO's introduced in this case belongs to a category-2; for this type of crop it is not necessary to disclose the exact location of the parcels¹⁸³.

Balance between transparency and confidentiality

From these cases we can observe various elements. The Courts have the restrictive nature of granting exception in mind especially when disclosing information endangers industrial confidentiality. However it does not exclude extending the definition of environmental information as was the case in the May 4th 2010 ruling of the Raad van State. It appears indeed that the State Council is successfully attempting to balance transparency with exceptional confidentiality.

Active disclosure of environmental information

Article 5 AC is reflected by Article 8 paragraph 1 of the Wob. Administrative bodies disclose information on their own, information about policy, the preparation and execution of that policy as soon as it is in the interest of a proper democratic administration¹⁸⁴.

Active transparency is also embodied in articles 4.2, 4.2a and 4.2b of Wm (Wet Milieubeheer). On those grounds public authorities draw a scientific report every four years regarding the developments of the quality of the environment over a period of ten years. Also a 'environmental balance' must be drawn every year which attest of which environmental goals have been achieved. Both reports are combined in the Planbureau for living environment. Furthermore in 2010 was created a 'balance for the living environment' in which

182 Raad van State, October 28 2009, case n°200901021/1/H3, on

http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=f0SCGqp%2FOhQ%3D, last accessed on April 25 2011

183 Raad van State, April 28 2010, case n°200801400/1/M1, on

http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=svQ7oiZbTrg%3D last accessed on April 25 2011

184 Toegang tot MilieuRecht 2010/2011, p.173

the balance for environment, for nature and for spatial planning are combined¹⁸⁵. These reports are sent to twice a year to the Staten Generaal and are disclosed publicly. The obligation to actively disclose environmental information can also be found in Article 19.1c of Wet Milieubeheer.

Disclosure of information about hazardous products is governed by REACH¹⁸⁶.

In terms of information relating to a (natural) disaster one must look at Article 19.2 Wm. In the event of an immediate threat for the life or health of people, of the environment or of significant material interests, the mayor and other officials provide the public concerned with all the information on the measure taken and the attitude to adopt¹⁸⁷.

Various types of environmental information are indeed accessible for the public.

(iii) the public

The definition of 'the public' in relation to access to information is no different than the definition of the Aarhus Convention. Article 3 of Wob regards the provisions which relate to Article 4 of the AC. It stipulates that 'anyone' can send a request for information to an administrative body. Article 6 lays down the provisions for time limits to answer.

This means that 'the public' as defined under the Convention has access to the information mentioned above.

The only exceptions that arise are related to the nature of the information at hand. Requests may not be refused on the grounds of who the applicant is. This is also supported by Article 3 and the preamble of the AC, and also by the Dutch Constitution anti discrimination provisions.

(iv) requirements of requests

As we have seen in the case mentioned above not all environmental information is public. Indeed Dutch legislation allows some information to stay confidential, namely information related to professional and industrial confidentiality, and which, if disclosed, could harm the competitiveness of a sector or a company.

Article 10 of the Wob lays down a number of grounds for exceptions. There are various categories. The first category is absolute; in cases of endangering the Crown, or State security, in cases of confidential information on persons, or of confidential production and professional information, the requested information may not be disclosed. This occurs without conducting a concertation of interests. Other grounds of refusal of Article 10 Wob are relative which can apply after a concertation procedure in which the various interests are weighed against each other¹⁸⁸.

This appears somewhat in conflict with the Aarhus Convention as it allows for broader grounds of refusal. Namely the absolute character of exceptions based on professional and industrial confidentiality does not stand in the AC insofar the requested information relates to emissions to the environment. With regards to environmental information (broader than only emission information) refusals may only be allowed if the interest of disclosing the information does not outweigh the interest of keeping certain production information secret. Consideration is necessary in these cases in contrast with Article 10 Wob.

185 Toegang tot Milieurecht, 2010/2011, p.174

186 EC Regulation on chemicals and their safe use "Regulation, Evaluation, Autorisation & Restriction of Chemical substances » EC 1906/2007

187 Toegang tot milieurecht, 2010/2011, p.174

188 Toegang tot Milieurecht, 2010/2011, p.173

Nevertheless the Dutch State Council appears to bear the restrictive nature of denying access to information:

In case n° 200806313/1/H3 of June 3 2009 the Raad van State issued a ruling which reminded the restrictive nature of denying access to environmental information. It obliged the Bestuur van Luchtverkeersleiding Nederland (Air traffic authority) to disclose certain information¹⁸⁹.

For some provisions Dutch legislation is actually more stringent than the requirements of the AC. For instance the time limit granted to authorities to provide the applicants with the requested information is only two weeks in the Netherlands when the AC allows for a one month period maximum.

A similar observation can be made on the implementation of Article 5. Indeed in line with this Article the PRTR protocol has been developed which the Netherlands complies with. However it remarks over and over again that the existing environmental reporting requirements are much more stringent than the demanded by the PRTR¹⁹⁰. Another criticism on the PRTR is shared by France; the information disclosed by the PRTR is often much too technical for the general public. Therefore it is questionable if this really enables the public to be informed on the status of the environment and to react accordingly.

(v) Conclusion

If we look back at the short concluding overview of pillar I on page and assess what the Aarhus Convention requires, it appears that the Netherlands has already implemented the first pillar quite successfully. Indeed one may safely argue that ‘environmental information’ is indeed accessible to ‘the public’. Substantive and procedural requirements are being fulfilled. The main criticism however which is brought forward, namely in the 2011 compliance report regards the implementation of Article 4 in a general way. Various provisions seem implemented with success however it appears that the grounds for refusal had to be integrated in a general law. These procedural safeguards have been designed in this general fashion and are therefore applicable not only to *environmental* information but to all types of information. Also there already existed such provisions in the Freedom of Information Act and in administrative procedural law. Subtle differences in terminology have rendered a very complex legal system¹⁹¹. This is perhaps the main criticism which Dutch implementation of Articles 4 & 5 may be taxed with.

b) Public Participation

(i) Type of activities for which participation is required

(a) Participation for listed activities (corresponds to Article 6 of the AC)

Dutch legislation

We have seen how access to information is regulated in the Netherlands. Moving on to the second pillar of the Aarhus Convention it must be established for which activities participation is required by Dutch Law.

¹⁸⁹Raad van State, June 3 2009, case n° 200806313/1/H3, on

http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=%2BO8pMg7sU2A%3D, last accessed on April 25 2011

¹⁹⁰Nederland compliance Report 2011, p.10

¹⁹¹Nederland Compliance Report 2011, p.6

Dutch law has developed a rather complex permit system. The ‘Wet Algemene bepalingen omgevingsrecht’ (hereafter Wabo- the general rules on spatial law) comprises rules for the permit system. It was redesigned to attempt to simplify the system; the amended Wabo came into force in 2010. The Wabo defines the system for spatial permits¹⁹². The spatial permit is necessary for projects which influence the physical environment¹⁹³. It appears surprising that water quality and quantity is not comprised in the definition of physical environment. Projects which relate to water are subject to a different permit.

The spatial permit governs many aspects of a proposed project, as a project may comprise multiple activities. The spatial permit is being developed namely to allow for a system in which one single permit request which is to be submitted to one single public authority and that one single procedure follows and which regards the project as a whole, instead of the complicated system which preceded the spatial permit (omgevingsvergunning)¹⁹⁴ in which different permits had to be obtained for different aspects of a project. The new “omgevingsvergunning” of 2010 strives towards a more straightforward and clear permit system. Parts of the former permits have been integrated to the new system in their entirety. This is the case for construction permits under Living Law (Woning Wet) and also for environmental permits under Wm. These integrated permits are listed in art.2.1 part I of the Wabo¹⁹⁵. The permits which are granted at a local level (city or province) are listed in art.2.2 part I Wabo.

As mentioned in the introduction of this part the Wabo lays down the type of activities for which a permit is necessary; Article 2.1, part 1 of the Wabo stipulates that it is forbidden to engage in the following activities without a permit¹⁹⁶: the construction of a building, the execution of works for which a larger urban, land use or management regulation has been defined; the use of ground or buildings in relation to fire hazard if it falls in the category of the amvb¹⁹⁷; the creation, alteration or the alteration in functioning of an establishment or a mining exploitation; the destruction of a construction in cases in which the construction was defined under a particular land use or management regulation; and exercising another activity which may influence the physical living space (fysieke leefomgeving).

The Wabo has two distinct preparation procedures to grant spatial permits: the regular preparation procedure and the elaborate preparation procedure. The Wabo defines which procedure is appropriate in line with provisions of the Awb.

regular preparation procedure

The regular preparation procedure (reguliere voorbereidingsprocedure) is the procedure by default (art. 3.3 Wabo)¹⁹⁸. Only when the permit request regards specific activities the exceptional elaborate preparation procedure applies (art. 3.10 Wabo)¹⁹⁹. When the permit request regards elements of activities which would require a regular procedure and elements which would require an elaborate procedure the latter applies for the entire activity. The regular procedure derives directly from chapter 4 of Awb.

¹⁹² Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.151 (spatial permit translates into omgevingsvergunning)

¹⁹³ Physical Environment is to be interpreted broadly, namely including environment, nature, landscape, cultural and historical values, as established in *kamerstukken II*, 2006/2007, 30 844, nr.3, p.15

¹⁹⁴ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.152

¹⁹⁵ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.154

¹⁹⁶ we will only retain the activities related to the environment as defined in the first part of this thesis

¹⁹⁷ amvb stands for ‘algemene maatregel van bestuur’ which means ‘general administrative measure’

¹⁹⁸ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.173

¹⁹⁹ Boeve, omgevingsrecht, 2010, hoofdstuk6, p.177

The first step in acquiring a spatial permit is the request which is sent to the competent authority by the applicant. The competent authority notifies as soon as possible the public via daily newspapers or other appropriate means (art. 3.8 Wabo).

Third parties must have the possibility to raise their views on the project for which a permit is requested when they have reasons to disagree with the request. They can do so when the decision relies on facts and interests which regard the interest holders and when these facts are not provided by the interest holders themselves (art. 4.8 Awb)²⁰⁰. The interest holders do not have to be heard if they have already been heard in the instance of a previous decision and when no new facts or circumstance have risen (art. 4:II Awb).

The decision to grant the permit or not must be issued within 8 weeks after the request was received. When the authority fails to do so the so called “lex silencio positive” applies and the permit is granted automatically²⁰¹. This arrangement can be found in art.3.9 part 3 of the Wabo. Nevertheless a permit granted on those grounds can be revoked partly or entirely when the activity has serious and unacceptable implications for the physical environment or threatens to do so and that an adaptation of the permit offers no solutions²⁰².

When taking a decision on a regular permit request the competent authority must take the various views and advices²⁰³ into account. Furthermore once a decision is taken it must be disclosed publicly within a two week delay (art. 4:20c Awb) and must be published in a regular newspaper or another appropriate media (art. 3.9, part 4 Wabo).

It appears that the possibility for third parties to participate is limited in the regular preparation procedure; participation is limited to issuing an advice or a view in the preparation stage. A number of procedural aspects comply with Aarhus (such as the notification of a request and of the decision) however the limited nature of participation to third parties seems to breach the obligations under Article 6 of the AC which clearly stipulates that the public concerned must be able to participate in the decision on activities listed in Annex I of the AC.

elaborate preparation procedure

The elaborate preparation procedure is based on the uniform transparent preparation procedure of part 3.4 Awb and applies in various cases. It applies when the concerned request partly or entirely relates to (1) the use of soil or constructions in conflict with a land use plan (bestemmingsplan) or a management regulation (beheersverordening), (2) the set up or the alteration of an establishment of a mining activity, (3) cases in which a ‘declaration of no objection’ (advies van geen bedenkingen) is required. The exceptional cases are listed in art. 3.10 Wabo²⁰⁴.

The elaborate procedure requires the authority to notify the public of the request. The public authority notifies the public of where and when the documents will be available for inspection, for whom it will be possible to bring views forward and how this may occur and

²⁰⁰ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.173

²⁰¹ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.174

²⁰² Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.175

²⁰³ advices refers primarily to the so called ‘advies van geen bedenkingen’ (advice of no objection) which can be issued by authorities such as the college van B&W, the GS, the waterquality managers, VROM...

²⁰⁴ Boeve, omgevingsrecht, 2010, hoofdstuk6, p.176

the delay for the decision to be taken (art. 3:12 Awb). This means that the competent authority identifies and determines who the interest holders are.

The competent authority must deposit the decision-design (ontwerpbesluit) for public inspection (art. 3:11Awb) and must be available for six weeks. Interest holders (belanghebbende) have a six week period to raise points of concern on a project orally or in writing as stipulated by articles 3.15 and 3.16 Awb²⁰⁵. However in these cases, the Wabo applies as it is a *lex specialis* of the Awb in this respect. Under the Wabo anyone can raise their views on the proposed project.

Boeve confirms that this is the case for anyone. Boeve argues that while working on the Wabo in parliament an amendment had been adopted to limit this right to the 'belanghebbende' which is literally translated into 'one with interest'. However restricting this right to the public with interest was deemed in conflict with the Aarhus Convention by the State Council and therefore the right to raise points of concern was granted to *anyone*²⁰⁶. It would indeed constitute a breach of the AC if this right was only open to interest holders in the elaborate procedure. Dutch Parliament was obliged to observe the obligations as laid out by Article 6 of the Aarhus Convention. The alteration of Article 3.12 paragraph 5 Wabo is the result of the advice given by the State Council on this concern²⁰⁷.

The decision must contain which advices or views have been brought forward and to what extent they have influenced the decision²⁰⁸. The delay for the decision is 26 weeks. *Lex silencio positive* does not apply when the decision is not issued on time. The decision comes into force when it is made public. The competent authority notifies the applicant directly followed by a public notification of the decision in a daily newspaper or another appropriate medium. The decision is also sent to the all who were involved in the process.

Article 6.2 AC stipulates that the public concerned must be notified in a timely fashion on the nature of the proposed activity and on the possibilities of participation. Directives 2003/4/EC and 2003/35/EC support the execution of those obligations²⁰⁹. This process is embodied in Dutch national law in the Law on Environmental Management (Wet Milieubeheer). The preparation to be granted a permit falls under part 3.4 of the Algemene Wet Bestuursrecht (Awb). In case n°200706406/1 the Raad van State observed the procedure in which the public concerned was notified and ruled that Dutch National legislation, namely parts of the Awb acted in conformity with the provisions of Article 6 of the AC and the corresponding EC directives. The claim brought by the NGO VSL was therefore deemed inadmissible. All claims were dismissed in this case.

Similarly to the French State Council interpretation of Article 6.4 of the AC the Dutch Raad van State (the Dutch highest administrative court) ruled that there is no direct effect of that provision in Dutch law²¹⁰. This interpretation is derived from the arrest of the European

²⁰⁵ Awb, Afdeling 3.4, articles 3.15 & 3.16

²⁰⁶ cf Kamerstukken II 2008/09, 31 953, nr.3, p.56-57, in Boeve, omgevingsrecht, 2010 hoofdstuk 6, p.177 footnote n°48

²⁰⁷ Kamerstukken II 2008/09, 31 953, nr.3, p.56-57

²⁰⁸ Boeve, omgevingsrecht, 2010, hoofdstuk 6, p.177

²⁰⁹ Raad van State, April 9 2008, case n° 200706406/1, on

http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=B3fmuZ6oTJM%3D, last accessed on april 26 2011

²¹⁰ Raad van State, january 19 2011, case n° 201006773/1/R2 on

http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=xL4ukt751Lc%3D, last accessed on april 25 2011

Court of Justice of September 11 2007 case C-431/05. In the 2011 case the Raad van State ruled that the request of the applicants was not receivable.

Raad van State case n° 201004771/1/M2 of November 17 2007 provides for a similar ruling. Article 6.4 and Article 9.2 can not be invoked directly by private parties, it is however very relevant to observe whether those international binding provisions are applied in national legislation. In the 2007 case the applicants found their request refused and deemed unfounded and not receivable by the Raad van State²¹¹.

(b) *Participation for executive regulations (Article 8)*

Environmental policy planning is also subject to public participation. For planning at the municipal or provincial level participation must be organised at the respective level of decision making. Also the national environmental policy preparation is subject to participation as stipulated by art.4.4 Wm following the transparency of preparation procedure of part 3.4 of the Awb²¹². It stipulates that *anyone* may raise their views to the preparation procedure.

Due to increased costs and time loss in relation to the extensive permit system the Dutch government has introduced a new measure. The *Activiteitsbesluit* (Activity Decision) was amended and came into force on January 1 2010. In line with Article 7 of the AC this decision was open to participation by way of commenting the proposal in writing. There is however little information regarding the influence this participation may have had. With the application of this new rule it is estimated that 3.500 companies no longer require an environmental permit²¹³. Naturally NGO's are worried that this weakens the framework of environmental protection and the government reassures that this is not the case. As a result since 2008 there is a clear increase in the number of companies which now deal with general rules instead of individual permits²¹⁴.

When an activity requires a permit it appears that public participation is made possible by the authorities: However with the amendment on the "Activiteitenbesluit" many activities no longer require a permit and are governed by general rules²¹⁵. This may not occur for activities for which the IPPC directive requires a permit²¹⁶.

This implies that the rules on public participation also change for these activities. In Article 1.10 of the *Activiteitenbesluit* one can find the notification requirements. Notification occurs digitally. On the website companies can find a 'question tree' which informs if the request is (a) obliged to notify, (b) not obliged to notify, (c) obliged to obtain a permit. This is the sole requirement. There is no possibility to participate for the public and no possibility for appeal²¹⁷. As argued by Rosa Uylenburg replacing permits by general rules restricts the

211 Raad van State, november 17 2007 case n° 201004771/1/M2 on http://www.raadvanstate.nl/uitspraken/zoeken_in_uitspraken/zoekresultaat/?zoeken_veld=aarhus&verdict_id=%2Fuwi8BaD1Tg%3D last accessed on april 25 2011

212 Boeve, *omgevingsrecht*, 2010, p.125

213 Nieuwsbericht rijksoverheid 'Inspraak wijziging Activiteitbesluit', 02-03-2009

214 Nederland compliance Report 2011, p.11

215 Boeve, *omgevingsrecht*, 2010, p.149

216 Boeve, *omgevingsrecht*, 2010, p.150, cf van 't Lam en Uylenburg (2007)

217 Kennis Centrum Infomil, *Activiteitenbesluit, Oprichten of Veranderen*, on <http://www.infomil.nl/onderwerpen/integrale/activiteitenbesluit/activiteitenbesluit/eerste-kennismaking/oprichten-veranderen/>, last accessed on May 27 2011

participation possibilities²¹⁸. Uylenberg argues that is not necessarily in breach of the Aarhus Convention as the concerned activities no longer fall under Article 6 AC. Indeed this change in the permit system places the concerned activities under Article 8 of the AC for which the legal provisions are looser and less stringent. It is therefore clear that this arrangement limits the participation possibilities and is in conflict with the objectives of the AC. However it does not come in conflict with the binding provisions of the AC but with the general objectives of Article 3 AC.

(c) Participation in executive regulations, generally applicable legally binding instruments (Article 7 AC)

For participation in the preparation of structural planning views Dutch legislation does not comprise a binding procedure. The authorities must however notify the public (art.3:12 Awb). When disclosing the preparation information the authorities must also indicate the way in which public participation shall occur. They must explain how citizens may be implicated with the preparation of a plan. In terms of structure views for the Kingdom (Rijksstructuurvisies) Dutch legislation encompasses a system of parliamentary control. No “Rijksstructuurvisie” may be adopted without the opinion of Parliament²¹⁹. In this context public participation occurs in its original form: democratic representation. Article 7 of the Aarhus Convention does not create hard obligations upon parties, however it stipulates that participation in this context is open to the ‘public’²²⁰. It aims at promoting the set up of commenting procedures and ways to take views into account. However as it lays down no binding provisions it is not surprising to see little impact of such a provision on Dutch legislation.

(ii) public concerned (who can participate?)

At the start *anyone* can carry and voice any concern in relation to particular decision²²¹. In decision-making law, concerned public is however granted more extensive rights. The public concerned is deemed to potentially carry certain interests; interests which may be important to take into consideration when taking a decision. However the Awb does not establish that all interests must be taken into account as that would render it very difficult to take decisions at all. The public authorities must consider interests and decide which ones are most important²²². In relation to preparatory proceedings *anyone* can raise their views.

Further than simply voicing a private interest, the interest holders can also voice interests of a collective or general dimension. When this is the case, the legal person voicing such interests can be categorized under art 1:2 of the Awb, similar to the first category of concerned public²²³. Once the public is indeed recognized as holding an interest it may be possible to participate in the decision making process. It is in any case necessary that the public which seeks to be recognized as holding an interest be involved in the process from the start, as soon as the preparation of the decision occurs. If not, the public can by no means be recognized as concerned and therefore cannot participate in taking the final decision. This applies under the Awb which relates to general administrative rules.

²¹⁸ Van t’Lam & Uylenburg, STEM publicatie 2007/4, p.86

²¹⁹Boeve, omgevingsrecht, 2010, p.130

²²⁰ Aarhus Convention, Article 8

²²¹Schlossels, de belanghebbende, 2004, p.15

²²²Schlossels, de belanghebbende, p.17

²²³Schlossels, de belanghebbende, p.103

Under the Wabo (specifically regarding the environment) in relation to decisions on activities for which a permit is required Dutch legislation allows for participation limited to issuing views and advice in the preparatory phases under the regular preparation procedure. Under the elaborate procedure participation is open to anyone.

In cases of activities which correspond to activities which fall under article 8 of the Aarhus Convention there is no duty for authorities to engage in public participation procedure. Parliament plays its traditional role in public representation and controls national structural planning.

c) Access to Justice

(i) Judicial body

The Dutch rule of law evidently comprises an independent judicial body. It is composed 19 distinct Courts which exercise their functions within the jurisdiction for which they were designed. There are civil courts and criminal courts. The court for appeal in administrative cases is the Council of State (Raad van State). Higher appeal is possible at the Cassation Court or at the High Council.

In case of violation of Article 4 AC the General Administrative Law Act lays down the review procedure of the refusal (Art. 7 Awb). The review procedure is free of charge²²⁴. Article 8 Awb lays down the possibility of review by a court of law. Also Article 37 of the Act on the Council of State guarantees the possibility of appeal at the Council of State²²⁵. In case of violation of Article 6 AC the possibility to review the substantive legality of decisions, acts or omissions is embodied in Article 8.1 Awb and in chapter 20 of the Environmental Management Act (Wet Milieubeheer). The primary legislation governing appeal possibilities is therefore Article 8.1 of the Awb.

In relation to appeals in case in which an extensive public participation procedure applied (section 3.5 Awb) one must look at Article 20 paragraph 6 of Wm. Legal persons can only appeal if they had already raised objections on the draft decision²²⁶. The Dutch compliance report describes this right as an indirect action popularis²²⁷. However this provision was abolished in 2005. The situation is as such: to be able to appeal legal persons must have participate in the preparation procedure. This is a requirement to be able to be identified by the competent authority as an 'interest holder'. Since 2005, having participate does not directly mean that one may appeal as well (which was previously the case with the *indirect actio popularis* provision²²⁸).

Furthermore acts or omissions made by private persons or public authorities which breach national environmental legislation can be challenged by **interest holders**. Article 18, par 14 of Wm stipulates that any person can request the administrative authorities to apply executive coercion, to impose financial sanctions, to withdraw a permit or a license, or an exemption to make a decision to that effect²²⁹.

²²⁴ Netherlands Compliance report, p.15

²²⁵ Nederland Compliance Report 2011, p.15

²²⁶ Wet Milieubeheer, Article 20, par.6

²²⁷ Netherlands Compliance Report, p.15

²²⁸ The 2011 compliance report submitted by the Netherlands is simply untrue

²²⁹ Wet Milieubeheer, Article 18.4

To resume in the Netherlands administrative courts grant access to NGO's. The same occurs before civil courts. Direct access is granted to civil courts²³⁰. Civil courts may be accessed by NGO's to request an administrative body to enforce particular environmental legislation and to sue polluters²³¹. Criminal courts appear not to grant access to NGO's in environmental matters.

(ii) *Legal standing*

In the Netherlands access to court can be granted to the **interest holders** (*belanghebbende*)²³². Furthermore the persons seeking to contest a decision also utilized their rights in terms of participation in the process of taking that decision (Article 6.13 Awb). Also the interests for which a claim is brought to court must be personal, objectively definable, current and direct²³³. However recent cases have defined in more detail the requirements for legal persons which bring claims for the general interest. In these cases the statutory interests of such a legal person must be in direct relation to the interest which is at stake. However the statutes may not be so broad as to render it impossible to observe the direct relation (ABRvS may 2008, AB 2008, 238 m.nt. A.G.A. Nijmeijer)²³⁴. Furthermore the legal persons (mainly NGO's) must in fact engage in activities which confirm their interests in a particular matter. Statutory interest does not suffice. It appears that the restrictive character of access to justice in this respect provides for insufficient means to implement the Aarhus Convention effectively.

Legal standing for judicial review is indeed restricted to 'interest holders' in accordance with Art. 8.1 of the Awb²³⁵. Article 6.13 Awb stipulates that interest holders may only lodge an appeal if they have participated in the preparation procedure. It appears that the Netherlands therefore takes an intermediate approach on legal standing. The intermediate approach signifies that an *actio popularis* is excluded and that applicants need to show an interest on the subject matter at hand²³⁶. This guarantees that there is always a causal link between the applicant of a review and the matter at hand. In the Netherlands and in France it is however not required to have had a subjective right violated before administrative courts; NGO's must demonstrate to have sufficient interest as defined above. In other words there must be a link between the activities and the objective of the legal person and the interests of the matter at hand. This applies in administrative courts. In civil courts plaintiffs must demonstrate that they have been violated in a subjective right. 'Interest' carries a rather broad meaning in the Netherlands but is however more narrow than 'public concerned'.

Now according to a report by Sadeleer there were 4000²³⁷ cases brought to court by NGO's²³⁸ between 1997 and 2001. This number is much higher than other Parties to the AC mainly because of the high number of NGO's in the Netherlands. However Sadeleer reports that the

²³⁰ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.1.2 p.18

²³¹ cf footnote n°56

²³² Awb, Article 8.1

²³³ Toegang tot Milieurecht, 2010/2011, p.180

²³⁴ Toegang tot milieurecht, 2020/2011, p.180

²³⁵ Kamerstukken II 2008/09, 31 953, nr.3, p.56-57

²³⁶ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.2.1, p.23

²³⁷ An especially difficult situation was encountered in the Netherlands, where the number of cases brought by NGOs is comparatively high, due i.e. to the high number of local NGOs, but which are very difficult to research because cases are not registered according to this criterion. The latter situation has been identified in other member states, too. Furthermore, it is obviously more difficult to register the 4,000 cases as estimated in the Netherlands than the around 120 as estimated in Germany.

²³⁸ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 2.1, p.3

number of environmental cases is decreasing sharply. This is partly due to the *Activiteitenbesluit* described above. Furthermore the Dutch government has abolished its *indirect action popularis* in 2005 which induced an even further decrease in court cases. If we however look at the number since the 1980's then, similarly to most parties, the number of environmental public interest cases has clearly increased²³⁹. According to Sadeleer about half of those cases are won by the NGO's. According to the President of the Environmental Law chamber this number is lower (30-40%)²⁴⁰. This difference can be explained by the fact that only estimations can be made in absence of all the data. Not all data is available. It appears that in the Netherlands cases built on formal grounds have a higher success rate than cases on substantive grounds²⁴¹.

Civil Courts can also directly be accessed by NGO's in both France and the Netherlands²⁴². The Dutch Civil Code grants this access to request court to make sure environmental legislation is enforced and to sue polluters. Access to civil courts for NGO's was enabled by the New Lake case of the High Council of 27 June 1986. There is no legal standing for NGO's before criminal courts in the Netherlands.

(iii) Damages

Legal provisions on effective access to justice (measures which provide for effective remedies such as injunctive relief, and that the procedures are fair, timely and not prohibitively expensive are embodied in the Awb (art. 8, paras. 41,51, 72, 66, 67 and 81) and in the Environmental Management Act (art. 20, paras. 1(3)and 6)²⁴³. In Civil proceedings, NGO's may seek financial injunction or prohibition against both the administration and private parties. They can claim compensation for clean up and restoration costs²⁴⁴. Injunctive relief is possible to obtain if considerable damage is to be expected²⁴⁵.

(iv) Barriers

Submission of objections and reservations on a draft decision is free of charge. In cases of appeal the presence of a solicitor or barrister is not required. However one must cover court fees in Dutch Courts. In environmental cases the amount is 150 euros for natural persons and 298 euros for NGO's. In cases of appeal the prices amount to respectively 224 euros and 448 euros. When people require legal aid but cannot afford it a financial aid mechanism exists.

Civil proceedings may be engaged by NGO's; however this does not occur frequently due to the high cost risks bared by the claimant. Administrative courts remain the main venue for NGO court cases where costs are much lower²⁴⁶. Furthermore legal standing is limited to 'interest holders' as defined by the objectives and activities of that legal person seeking standing. This is more restrictive than 'the public concerned'.

Even though the costs are not exceedingly high in the Netherlands and that aid mechanisms exists, shortage in funds still influences the number of cases which are brought to court²⁴⁷.

²³⁹ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 2.3, p.6

²⁴⁰ see footnote n°240

²⁴¹ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 2.3, p.8

²⁴² Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.2.1, p.18

²⁴³ Nederland compliance report, p.15, par. 28(d)

²⁴⁴ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.2.1, p.18

²⁴⁵ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.4, p.30

²⁴⁶ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.5, p.31

²⁴⁷ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 4.5, p.32

d) Conclusion on the Implementation of the Aarhus Convention in the Netherlands

The Netherlands is also in the process of implementing and applying the Aarhus Convention domestically. There are nevertheless a number of obstacles that we can retain from the observations made above. This concluding paragraph presents an overview of those obstacles²⁴⁸:

For the provisions regarding the first pillar:

- More attention needed for education
- AC remains generally unknown to the public
- Increase in the complexity of the Dutch legislation concerning freedom of information. This is partly caused by (subtle) differences in terminology and definitions. These differences occur in Dutch legislation because there already was a general freedom of information act and a general administrative law act concerning administrative procedures. But they also are caused by differences in terminology and definitions in European legislation. Together this complicates the efforts to try to optimize and standardize terminology and definitions in legislation.
- Information in the PRTR is too technical: information is unsuitable for citizens to comprehend which arguably means that the information is in fact not accessible

For the provisions regarding Pillar II:

- Complex permit system: recent efforts attempt to simplify the system
- In the regular preparation procedure to request a permit participation is limited to issuing an advice or a view in the preparation stage
- Authorities identify the ‘interest holders’ in the regular procedure
- In the elaborate preparation procedure participation is open to ‘interest holders’
- ‘interest holders’ is narrower than ‘the public concerned’
- no direct effect for several provisions of Article 6 AC in Dutch Law
- replacing permits by general rules in many cases results in the restriction of public participation possibilities for a range of activities
- no binding obligations in terms of enforcing Article 8 of the AC

For the provisions regarding Pillar III:

- abolition of the indirect action popularis
- restriction of legal standing to ‘belanghebbende’ (interest holders)
- interest of NGO’s defined by statutes and activities
- Criminal courts not accessible for NGO’s
- Subjective right must be infringed upon in civil proceedings (limits standing)
- Costs and fees influence the amount of cases
- Risk to loose and the consequent costs discourage many cases

²⁴⁸ this part is presented in bullet point fashion to provide for a straightforward overview of obstacles

V Results

A) France and the Netherlands compared

At the moment of ratification of the Aarhus Convention in 2001 both nations, France and the Netherlands, entertained a very different approach to public participation, transparency and access to justice. Indeed the Dutch had developed participation mechanisms in the 1970's already whereas France did not. The starting point is therefore very distinct in both nations. The Netherlands departed from a situation in which certain advancements were already made. Experience showed certain administrations the inefficacy of broad public participation and attempted to come back on certain provisions. For instance, the wish of Parliament to restrict participation to 'interest holders' in the elaborate preparation procedure for permit requests, attests of this concern. However it was specifically the Aarhus Convention which made this impossible²⁴⁹. France departed from a different situation, a tradition of paternalistic administrative opacity. Therefore the implementation of the AC in both nations has occurred (and occurs) in various ways.

a) Common obstacles

NGO's in both nations denounce the absence of proper education of the population. In both nations it seems that the existence of the Aarhus Convention and the rights which are derived from it remain largely unknown with the general public. Also in France education of professionals and civil servants remains insufficient.

Also the information made available via the PRTR register is too technical for the general public to understand and use. However it can be argued that specialized NGO's may access this information and use it in participation procedures and in court.

Information is not exactly categorized in the same fashion as the in the AC. This provides for some additional complexity in practice. Subtle differences in terminology sometimes render it more difficult to address problems regarding access to environmental information. However it must be noted that on a general note both nations have regulated access to environmental information successfully in terms of the Aarhus Convention provisions of pillar I.

In relation to public participation there also seem to exist a number of similar obstacles. First the absence of direct effect of certain provisions of Article 6 AC is shared by France and the Netherlands. The Dutch Raad van State and the French Conseil d'Etat have issued similar rulings denying direct effect of Article 6.4 and Article 6.8. These high administrative courts have repeatedly ruled that those provisions contains obligations between contracting parties and could therefore not be used in court by third parties²⁵⁰. This clearly implies that there is no real judicial remedy to the breach of those provisions for the public (there are however other review mechanisms to enforce such provisions, the AC is also part of EC law and is therefore binding upon its parties). The ACCC (Aarhus Convention Compliance Committee) can also remedy breaches of such provisions. One may therefore question if participation is sometimes not solely pro forma (Article 6.4 AC) and if the outcome of public participation is

²⁴⁹ Cf part IV. D)b)i)a) of this research

²⁵⁰ a number of cases are mentioned in part IV on implementation

duly considered when taking a decision (Article 6.8 AC). Indeed these criticisms appear to have grounds in France and in the Netherlands according to various NGO reports. Furthermore both nations have initiated a process in which they attempt to simplify permit systems. This development generally entails that less activities and installations require permit as the latter are being replaced by general rules. In general it results in fewer possibilities for the ‘interest holders’ to participate. Both France and the Netherlands attempt to limit the participation modalities by placing activities which require a permit under another legal standard; executive regulations. Moving those activities legally results in fewer obligations in terms of public participation as the legal provisions of Article 8 AC are simply more vague and less stringent.

As mentioned in previous parts the concept of ‘public concerned’ seems effectively absent in both nations. Instead France and the Netherlands allow certain ‘interest holders’ to participate and to access courts. *Actio popularis* does not occur and participating public must have sufficient interest in the matter. This concept is however broader than if one must demonstrate to have had a subjective right infringed upon but narrower than ‘public concerned’.

Another shared shortcoming relates to Article 8 AC. Indeed it appears that neither nations have created binding obligations to ensure that public participation occurs at the national level for regulatory measures. Even if the AC has created less stringent obligations for Article 8 & 7 than for Article 6 this remains a clear shortcoming as the AC creates a minimum standard which is to be surpassed and not simply abided by²⁵¹. Furthermore participation is meant to bring more attention and strength to environmental interests, however it appears that the practice of traditional (mostly commercial) lobbying pertains. The opacity of traditional lobbying makes it very difficult to find a satisfactory equilibrium of interests.

Regarding access to justice the aforementioned absence of the ‘public concerned’ concept in both domestic legal systems also has implications. Indeed courts grant standing to ‘interest holders’ ensure that there is a link between the claimants and the interests at hand. There are however important distinctions before different courts. Administrative courts appear to grant a rather broad approach on legal standing in contrast with civil proceedings. In the latter claimant must demonstrate to have been violated in a subjective right. France provides for access to criminal courts, which proceedings are rare but very successful for NGO’s in practice. Financial barriers are not excessively high but still constitute an obstacle in some cases.

b) Common Successes

In terms of implementing pillar I both nations have already achieved relative satisfactory results. Especially the Dutch are effectively allowing broad access to environmental information both actively and passively. France is still remains somewhat anchored in a certain tradition of opacity and is showing reluctant to engage in full transparency. It appears that the lack of education and a certain administrative inertia, especially at local management levels this seems to pertain. A lack of administrative capacity adds to this problem. Also in consequence the balance between environmental information disclosure and commercial confidentiality seems harder to entertain in France than in the Netherlands. The Dutch case law attests of a satisfactory weighing of environmental and economic interests.

²⁵¹ cf Article 2 of the Aarhus Convention : ‘objectives’

In relation to the second pillar even though both nations have a narrower interpretation of who may participate than is stipulated in the AC, both France and the Netherlands have procedures of participation. Especially for listed activities for which a permit is needed this seems to occur to a satisfactory extent. However as mentioned in the obstacles the complexity of bureaucracy and the decreasing scope of permits seems regrettable in terms of participation. As attested by namely Sadeleer the number of court cases brought by NGO's seem to indicate that access to justice is indeed possible in France and in the Netherlands. Various courts may be accessed (administrative, civil, high courts). The particularity of French access to justice is that criminal proceedings may also be initiated by the 'interest holders'. Both nations apply an 'intermediate approach' on legal standing and therefore obtain similar results.

B) Environmental Crisis

The Aarhus Convention was specifically designed to protect the environment. It aims at create a more inclusive/participatory democratic system to allow for a better protection of the planet and its ecosystems.

It is however important to look in detail which concrete measures factually contribute to this end.

(a) Firstly the AC relies on various prior international conventions and treaties which were designed to protect a certain aspect of the environment or to promote ideas of sustainable development as a whole. It goes further than those agreements in creating hard obligations from previous soft law provisions. So clearly the AC is aimed at improving environmental protection for both intrinsic and anthropogenic values.

(b) Secondly the AC creates a set of tools to achieve those goals. The combination of the three pillars also carries a specific philosophy. The underlying idea is that environmental concerns lie at all different levels (local, regional, global). Various authorities are competent to make decisions at that level. If information is publicly available it simply means that more people can pay attention to possible arising or worsening environmental problems. It means that anyone can notice certain problems and voice that interest. Simply put: *two eyes see more than one*²⁵².

However seeing is not enough. If one can observe a problem, it does not mean he or she has the possibility to act accordingly. To give a concrete example: if someone sees a sinking boat at a distance and has no boat to reach the castaways he or she cannot act accordingly to save those people. In other words, information must be available but does not suffice to protect the environment via public involvement. Indeed participation must be made possible.

(c) It is reminded in Article 1 of the AC, but also by legal authors such as Birnie & Boyle, or Verschuuren; Public participation in decision-making in environmental matters is 'beneficial and necessary to the right to live in an environment adequate to a person's health or well being'²⁵³. (The focus is clearly anthropogenic). As was stated in Part I. C) of this paper Birnie and Boyle argue that that an open, accountable government in which civic participation occurs is 'more likely to promote environmental justice, to balance the need of present and future generations in governmental decisions, to integrate environmental considerations in

²⁵² 1591 A. Colynet *True Hist. Civil Wars France* p.37

Read more: <http://www.answers.com/topic/four-eyes-see-more-than-two#ixzz1NMWntJml>

²⁵³ Aarhus Convention, Article 1.

decisions, and to implement and enforce environmental standards²⁵⁴. It seems important to note that the relation is not a direct one: B&B believe that it is 'more likely' to resolve environmental concerns with such participation²⁵⁵.

Ebbeson takes the argument further by stating that allowing public participation in environmental matters allows the environment to be voiced as a concrete interest (which usually lacks in decision-making).

(d) The third tool which must be available is recourse to judicial review. If the rights of the two first pillar are being infringed upon, or other domestic environmental legal provisions are being violated the public must be able to access the Courts to redress the situation. It is indispensable that such a right exists to avoid rendering the first pillar void of practical meaning. It allows to create a stringent binding system which infiltrates all branches of power and levels of decision.

Sadeleer reports that NGO court actions present a clear benefit to the environmental protection as it contributes to environmental law and its enforcement²⁵⁶. This idea is built on the premise that when environmental and economic interests come into conflict the latter tends to prevail²⁵⁷. NGO court actions illustrate that environmental interests can be voiced through litigation to counter this imbalance.

In the first place NGO court action allows for more provisions of environmental law to be enforced substantively. Secondly such cases improve environmental law enforcement because administrative practices are observed with more scrutiny. It forces administrations to abide by certain provisions more carefully at the risk of facing litigation.

Criminal proceedings also have a clear benefit, namely in France. It appears that due to the fact that NGO's can engage in criminal proceedings environmental law is better enforced, in particular in the field of water and wildlife regulations²⁵⁸.

NGO court actions also improve the enforcement of European Environmental legislation. In France the deficient implementation of the EC Habitats Directive was duly noted in Court. Pressure was created to remediate the failure. Similarly the Netherlands was sued by an environmental NGO for not implementing Directive 91/676/EEC correctly²⁵⁹. The law suit brought attention to the failing implementation and most certainly exerted similar pressure as felt in the French case.

C) Democratic Deficiencies

In the first part of this paper we retained a number of democratic deficiencies; namely institutional dysfunctions, political impotence, abstention rates, occurrence rates of demonstrations, manifestations and strikes, socio economic inequalities and the loss of public freedoms in the name of security. These indicators were utilized to attest of the concerns which are threatening current liberal democracies. A number of those were mainly used for this purpose. Others are however closely linked to the motivations and goals of the Aarhus

²⁵⁴ Birnie & Boyle, *International law & the Environment* (Oxford : OUP, 2002) 216-5

²⁵⁵ J.Ebbesson, 'The notion of Public Participation in International Environmental Law' in (1997) 8 *Yearbook of International Law*, 56

²⁵⁶ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 3, p.12

²⁵⁷ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 3.1.1, p.12

²⁵⁸ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 3.1.1, p. 14

²⁵⁹ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 3.1.2, p. 14

Convention. These are the institutional dysfunctions, diminishing confidence of the public in their political representation and popular discontent translating in high abstention rates and the frequent occurrence of civil or syndical action.

Indeed the enforcement of the Aarhus Convention provisions would improve a number of elements of current liberal democracies:

Improved Democracy

To many scholars democracy needs to evolve towards a more inclusive model. The Aarhus Convention is in essence a step in this direction. Sadeleer claims that all environmental rights are democratic rights²⁶⁰. The AC embodies these rights in its three pillars. Furthermore Article 3.3 of the AC demands the promotion of environmental awareness & education towards the population.

Restoring the link between Popular Sovereignty and Government

(a) Firstly allowing information (environmental & other) to be access publicly creates more confidence. Clearly a transparent administration allows the public to stay informed and to be involved if that need is felt. The public can acknowledge what goes on and cannot distrust the administration and/or public authorities as little to no information is kept secret. The idea of a paternalistic state which acts for the good of the people and which deems necessary to withhold information for that same purpose seems somewhat outdated. The popular need for transparency appears as a global phenomenon. The collective idea that power corrupts and that politicians should be kept in check is growing. Recent developments regarding a certain Wikileaks archive attest of this modern development. Wikileaks doesn't specifically relate to the environment or inclusive democracy as such. It regards primarily-if not solely- diplomatic information, which traditionally is kept secret. The interest and excitement that arose from the disclosure of such information is mainly linked to the fact the people could suddenly reach information which was never supposed to reach them. However it does attest of a certain evolution towards societies where nothing is kept secret. As more and more scandals have splashed politicians all over the world over the last decades, people are growing more and more distrustful of their rulers. The explosive expansion of digital media plays a key role in the need to access information freely and easily. Aside from restoring the vertical relationship between citizens and representatives access to information creates informed citizens and increased awareness. It attempts to create a new type of citizen, as better informed and more involved citizen.

(b) Confidence is not only restored or improved via transparency; allowing the public to participate in decision-making is the next step. Promoting and allowing public participation truly involves the public which wishes to participate and avoids creating feelings of alienation. As argued by Jonas Ebbeson, allowing public participation creates a larger social consensus on the made decisions. This view is also supported by Lee and Abbot. Furthermore such inclusive practices increase the legitimacy of law²⁶¹ and the sovereignty of the people. Moreover, as argued by Verschuuren, participation simply leads to better decisions²⁶².

²⁶⁰ Sadeleer, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report, 3.2, p. 15

²⁶¹ J.Habermas, *between facts and norms, Contributions to a discourse Theory of Law and Democracy* (Cambridge: MIT Press 1996), 228-229

²⁶² J.Verschuuren, *Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention* in (2004) 4 Yearbook of European Environmental Law, Oxford University Press, 31

Grounds for decisions are better motivated and the quality of the decision is also improved. In this interpretation the public not only has the right to participate, but is obligated to do so to allow for improved decision making. This AC nevertheless does not make it clear to what extent the right to participate is also an obligation. In this light it must be noted that the mere possibility to participate should improve confidence but does not necessarily mean that more participation will occur.

(c) Confidence is an important element of a well structured society however it cannot be indefinite. A political structure requires a degree of trust and confidence, however people also need systems of control. Being able to access the courts to defend oneself against private parties or from public authorities is also crucial in a well functioning democracy. Independent justice is an essential branch of power and cannot be undermined.

NGO court actions have clear positive implications for democracies. First of all it ensures a better enforcement of the rule of law²⁶³. This idea is built on the premise that when economic and environmental interests are in conflict the former tends to prevail. Creating more rights in terms of environmental legal enforcement enables a more stringent and coercive system in which the environment can no longer be ignored. There various ways in which such law suits improve the situation. First of all such actions improve the protection of substantive environmental rights and enforce obligations. Secondly such actions influence administrative and legislative practice structurally²⁶⁴. According to Sadeleer this is perhaps the main contribution. Another contribution lies in the possibility to engage criminal proceedings; this is possible in France. In this respect parts of environmental law are better enforced in France than in the Netherlands. Indeed the parliamentary issue around defining legal standing after an elaborate preparation procedure illustrates this contribution fairly. As explained on page 68 of this study Parliament attempted to limit the possibilities to raise views for third parties to 'interest holders'. The Raad van State obliged Parliament to observe the Aarhus Convention and this right was restored to *anyone* as stipulated in Article 3.12 paragraph 5 Wabo.

This issue illustrates that the Aarhus Convention contributes to guarantee the possibilities for the people to participate coherently.

In relation to Community law NGO law suits have an indirect influence, but influence nonetheless. To illustrate the French case related to the EC Habitats Directive brought attention to the deficient implementation of the latter. It did not result in a direct sanction as such a claim was deemed inadmissible in the absence of direct effect of the provision at hand. It did however bring public attention to the deficiency and increased pressure on the French authorities to remedy this shortcoming²⁶⁵. A similar case in the Netherlands in relation to EC Directive 91/676/EEC ignited discussion on the direct effect of Community Law and put pressure on the Dutch authorities to observe the Directive effectively.

On another note the combined rights and obligations of all three pillars improve the concept of popular sovereignty. Indeed creating more rights for civil society grants more power to the people. If the public domesticates those rights effectively it would increase its means to exercise its sovereignty (besides the traditional election rights). With the Aarhus Convention the public has better means to stay informed and therefore has the possibility to be involved (Pillar I), it can influence decisions (pillar II) and can exert better control over public

²⁶³ Sadeleer, p.13

²⁶⁴ Sadeleer, p.13

²⁶⁵ Sadeleer, p.13

authorities and private entities via the rule of law (pillar III). As the Convention also contains provisions on education and awareness building it promotes the development of a more involved type of citizenship. By redefining citizenship steps towards a new democratic model are initiated.

D) Conclusion

To conclude the combined pillars of the AC present elements of response to certain democratic deficiencies. They both create rights and obligations which strengthen the relationship between voters and representatives.

Pillar III has the potential to reinforce the belief people may carry of the judicial system. The judiciary being one element of the trias politicas, it cannot be disregarded. It remains a crucial branch of power which allows for independent and objective control over society. If the link between the people and their government is indeed restored or even improved, it should result in a decrease of civil strife movements and abstention rates. However it is difficult to realize a clear and absolute correlation as many other socio-economic elements come into play. The increasing socio-economic inequalities and the growing limitations in public freedoms may excite and entertain certain social ills and popular discontent.

The Aarhus Convention carries potential in answering certain democratic deficiencies. It however does not aim nor does it have the sufficient provisions to provide solutions to the entire problem. Mainly the AC provides for new tools which attempt to develop the so called inclusive democracy, a more participatory model. Insofar the AC provides for concrete steps towards such a model it provides for solutions against current deficiencies of liberal democracies. The potential of the AC in this respect is factual however limited to the relationship between citizens, their political representatives and the decisions made. Clearly the –insofar the implementation is successful and satisfactory- implementation of the AC in France and in the Netherlands has brought a number of changes. A more transparent system is in construction and people have increased possibilities to influence decisions and to represent environmental interests. Furthermore environmental law is enforced more effectively in both nations as a result of broader access to justice. As both nations attempt to withdraw from participatory obligations the Aarhus Convention provides for binding protection of those rights.

Now the implementation of the AC is not complete and satisfactory to an absolute extent. Indeed the AC experiences a number of internal deficiencies and is not absolutely clear on all provisions. This entails that not all provisions are stringent and observed by Parties. In addition national legal systems also experience internal deficiencies. In consequence the potential of the AC is somewhat undermined and the results are not as satisfactory in practice as it appears in theory. Nevertheless concrete steps are taken in both France and in the Netherlands towards a more inclusive and participative democratic model. The developments in this respect are positive and concrete changes can easily be observed. The Aarhus Convention contains legal provisions which provide for partial answers to a number of democratic and environmental deficiencies. It is a tool towards sustainable development; it does not however contain all the answers to all the problems enunciated in the first part of this study. In relation to the environment it allows for a better enforcement of existing environmental law (both domestically and internationally). In terms of democratic deficiencies, the AC improves popular sovereignty, improves the relationship between the people and its government.

E) Solutions for the Future

There are a number of satisfactory results in both parties France and the Netherlands. However various shortcomings can be observed. A number of efforts must be initiated or maintained to achieve even more satisfactory result.

First all provisions of the AC which are clear and concise in creating certain rights and obligations must be duly observed and effectively implemented. Both nations are nevertheless well engaged in this process. It appears as a matter of time. However not all provisions of the AC are clear and concise. Indeed a number of concerns require a development of the AC provisions themselves. Namely issues such as the absence of direct effect of Article 6 of the Aarhus Convention undermine the effectiveness of those provisions. They cannot be invoked before a court of law by third parties which in turns undermined access to justice as civil society cannot review decisions related to taking due account of participation outcome in decision making, or making sure that public participation is not simply carried out *pro forma*. Solutions must be found in this respect however it appears very complex to do so. The implications to allow legal provisions which create only obligation between contracting parties to be invoked by third parties are multi-dimensional. It would alter the character of international and community law fundamentally.

On another note clearer obligations must be formulated in relation to Article 8 AC as both nations have not created them at their discretion. For this reason Article 8 is not implemented in France and in the Netherlands.

In terms of participation modalities a clearer and more extensive procedure could provide for answers. As argued by Julien Bétaille a continuous procedure from the starting point to the final decision with various moments in which participation is possible would increase the occurrence of participation and the due consideration of the outcome²⁶⁶. Also more promotion of participation possibilities and modalities would improve the system. This is also in line with the fact that education of the citizens and civil servants is deficient. Promotion of Aarhus tools at all levels needs to be improved and be systemized.

All these measures combined improve the situation both in terms of environmental protection and in developing a more appropriate model of democracy in this point in history. This does however not mean that implementing and enforcing the Aarhus Convention suffices to redress all social ills. As we have seen while defining democratic deficiencies socio-economic inequalities and restricting public freedoms in the name of security are fundamental concerns. The AC doesn't have the objective nor has it the means to address these issues. The conflict of environmental and economic interests is a recurrent theme. In general the latter tends to prevail. This can easily be explained by the close relationship entertained between our democratic models and the development of liberal capitalism. For a more detailed explanation of this relationship please consult Part I of this study. While market rules prevail the environment remains undermined. Also the somewhat artificial focus on security concerns blurs the picture and also continues to undermine the dire necessity of addressing environmental concerns. These social ills can by no means be overlooked. The impotence of democratic leaders in face of international financial power structures appears as another major issue in undermining democracy as a model for economic social and environmental managing.

²⁶⁶ Julien Bétaille, Symposium on Aarhus and the Nuclear, 2011, p.13

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