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ENVIRONMENTAL PROTECTION AND PUBLIC PARTICIPATION: THE RECENT DEVELOPMENTS IN THE INTERNATIONAL ARENA AND IN SPAIN

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ABSTRACT

This paper examines the recent public participation progress that has taken place in the field of environmental protection in the international arena and in Spain. In the twentieth anniversary of the Convention on access to information, public participation in decision-making and access to justice in environmental issues signed in Aarhus in 1998, the most significant improvements have also taken place in the international arena. In 2018, several Latin American and Caribbean countries signed the Escazú Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters. The first part of this article focuses on a comparison of the provisions on public participation in these two international Agreements. As for the developments taking place in Spain, the second part examines the amendments to the provisions on public participation in the Environmental Impact Assessment Law. Finally, in the third part, we deal with the most relevant court rulings regarding the application of the Aarhus Convention provisions to public participation in environmental matters. The analysis of these developments highlights the increasing importance of the right to public participation in environmental matters and of its effective legal protection. On the international level, the comparison between the Aarhus Convention and the Escazú Agreement shows, first, that the latter follows essentially the structure and approach of the former. However, it gives special attention to the specific problems of the region, such as equal access to public participation, as well as to new global challenges, such as the use of new technologies in public participation. The Aarhus Convention, on the other hand, is more precise in tracing the limits of participation requirements that national authorities has to meet in the decision making process on certain environmental activities

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that might have a significant impact on the environment. With regard to the legal developments in Spain, they have been driven – once more – by the obligation to transpose the amendments to the EU Environmental Impact Directive to domestic law. As for the legal application of the international and national provisions on public participation, Spanish courts are developing an important case law – not without gaps – to make effective the right of participation on environmental matters.

Keywords: Aarhus Convention; effective participation; environmental impact assessment; Escazú Agreement; judicial application, improvement and challenges.

PROTECCIÓN DEL MEDIO AMBIENTE Y PARTICIPACIÓN PÚBLICA: LA RECIENTE EVOLUCIÓN A NIVEL INTERNACIONAL Y EN ESPAÑA

RESUMEN

Este trabajo examina los avances en materia de participación pública que han tenido lugar recientemente en el ámbito de la protección del medio ambiente a nivel internacional y en España. En el veinte aniversario de la firma del Convenio sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en materia de medio ambiente, firmado en Aarhus en 1998 bajo los auspicios de la Comisión Económica para Europa de Naciones Unidas, los progresos más relevantes han tenido lugar también en la esfera internacional. En 2018 se firma un nuevo acuerdo internacional que va a seguir sus pasos en la región de América Latina y el Caribe: el Acuerdo de Escazú. La primera parte de este trabajo se centra en una comparación entre las disposiciones en materia de participación pública de estos dos instrumentos internacionales. En cuanto a los novedades en España, la segunda parte de este trabajo examina las modificaciones operadas en materia de participación pública en la Ley de evaluación de impacto ambiental así como los retos pendientes para avanzar hacia una participación efectiva. Finalmente, en la tercera parte, se da cuenta de algunas importantes resoluciones judiciales aplicando las disposiciones sobre participación pública en materia de medio ambiente. El análisis de estas novedades pone de relieve la creciente importancia del derecho de participación en materia de medio ambiente y de su tutela judicial efectiva. En la espera internacional, la comparación entre

el Convenio de Aarhus y el Convenio de Escazú revela que si bien este último se inspira en la estructura y enfoque del primero, va a prestar especial atención a los problemas específicos de la región para la que se ha diseñado, como la igualdad en el acceso a la participación pública, así como a retos actuales tales como el uso de las nuevas tecnologías como medio para ejercerlos. El Convenio de Aarhus es, sin embargo, algo más preciso en la delimitación de las condiciones de participación que han de respetar las autoridades públicas en la toma de decisiones relativas a ciertas actividades susceptibles de tener un impacto significativo en el medio ambiente.

Por lo que se refiere a los avances en España, a nivel normativo vienen impulsados – una vez más – por la obligación de transponer al ordenamiento nacional las modificaciones de la Directiva de Evolucional Ambiental de la Unión Europea. Finalmente, se advierte que los tribunales españoles siguen desarrollando una notable jurisprudencia – no exenta de algunas sombras – para hacer efectivo el derecho de participación.

Palabras clave: *Acuerdo de Escazú; aplicación judicial; avances y retos; Convenio de Aarhus; evaluación de impacto ambiental; participación efectiva.*

FOREWORD

Over two decades have passed since 39 European countries signed the Convention on Access to Information, Public Participation in Decision Making and Access Justice in Environmental Matters in the Danish city of Aarhus, under the auspices of the United Nations Economic Commission for Europe. During all these years, the Aarhus Convention, regarded as of the date of this text as the most ambitious initiative to promote universal environmental democracy (BAN KI-MOON, 2014, p. 3; PRIEUR, 1999, p. 9), fostered remarkable significant regulatory changes in the State Parties, in the European Union (since, under Decision 2005/370/EC of February 17, 2005, its execution was approved on behalf of the then European Community) and in Spain (following its ratification in December 29, 2004 as a member of the European Union).

This international instrument, which has been ratified by 47 countries in Europe and Asia, is also a key reference for adopting similar international instruments in other regions of our planet. This is the case of the recent

Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Matters in Latin America and the Caribbean, signed on March 4, 2018 in the city of Escazú, Costa Rica, with the support of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC).

The Escazú Agreement follows the Aarhus Convention's approach to subjective rights (the three so-called "access" rights: the right to access to information, public participation and justice in environmental matters) and the strengthening of democratic principles for the protection of the environment.

In terms of participation, the requirements and conditions in particular will be set to be largely similar to those of the Convention established 20 years ago by Europe, even though the Escazú Agreement also introduces new provisions – such as participation in international forums – and will reflect in its articles the needs and specifics of the Latin American and Caribbean region – in some points, very different from those in the European environment.

On the other hand, in Spain, they recently amended the provisions on public participation, where Law 21/2013 for Environmental Assessment (hereinafter LEA) was amended by Law 9/2018 of December 5. As discussed below, these are limited modifications to ensure the use of electronic media in public information procedures and consultations to Public Administrations and interested persons regulated by this Act. These provisions are introduced in order to complete the adaptation of the Spanish law to the provisions of Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the impact of certain public and private projects on the environment.

Finally, it is important to highlight some relevant court decisions in light of the appeals brought by non-governmental organizations denouncing the violation of the provisions on public participation in the Aarhus Convention and its national regulations.

Based on that, the provisions in the Escazú Agreement on participation are first analyzed and compared to those adopted twenty years ago by the Aarhus Convention. Secondly, we examine the basic regulatory framework adopted by the Spanish Government for compliance with the Convention, to what extent the recent changes to the Environmental Assessment Act operated by Law 9/2018 really suggest a breakthrough,

and the main challenges facing our government to advance towards more effective public participation in the defense of the environment. Finally, the main court rulings are examined by applying the provisions in force in this regard. Along with an analytical review of the provisions in the international treaties in question and the state rules adopted in this area, recent court rulings of particular interest have been identified to highlight the advances and difficulties encountered in the legal enforcement of the provisions of the Aarhus Convention by national courts. Finally, case law contributions to the study of this subject have been reviewed.

1 PROVISIONS CONCERNING PUBLIC PARTICIPATION IN THE ESCAZÚ REGIONAL AGREEMENT: MAJOR NOVELTIES

1.1 The purpose and objective of the Escazú Convention

On March 4, 2018, after nearly six years of negotiations, the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean was adopted in Escazú (Costa Rica).

The drive for negotiating this treaty has its immediate origin at the United Nations Conference on Sustainable Development (Rio + 20), where several Latin American and Caribbean countries (Chile, Costa Rica, Jamaica, Mexico, Panama, Paraguay, Peru, Dominican Republic and Uruguay) issued a *"Declaration on the Application of Principle 10 of the Rio Declaration"*. Countries attending the conference pledged to develop and implement a 2012-2014 Action Plan, with support from ECLAC as the technical secretariat, to move forward in reaching a regional agreement or other instrument requesting the organization to study the situation, the best practices and requirements regarding access to information, participation and justice in environmental issues in Latin America and the Caribbean (GÓMEZ PEÑA, 2018). Finally, after its adoption, the accession of the 33 countries of Latin America and the Caribbean was formally opened on September 27, 2018 at the United Nations Headquarters in New York, the same date as the annual general debate of the United Nations General Assembly, thus highlighting its importance in realizing the 2030 Agenda Sustainable Development Goals.

The Escazú Agreement aims to "guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access

to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development" (Art. 1). Like the Aarhus Convention, it adopts an approach based on subjective rights and the strengthening of democratic principles for the protection of the environment. Although in its explanatory memorandum it makes only an implicit reference to the Aarhus Convention – when it acknowledges "progress made in international and regional agreements" – it is clear that its structure and content are very similar to the Aarhus Convention and are articulated around the three "access rights": information, participation and access to justice (MÉDICI COLOMBO, 2018, p. 20-25).

On the other hand, the text of the Escazú Agreement also reflects the needs and specifics of the region, which in some points are very different from those found in European regions. Thus, among other things, the Escazú Agreement incorporates a commitment to guide and accompany vulnerable people and groups who encounter special difficulties in fully exercising the access rights acknowledged in the Agreement (Articles 2€ and 4(5)). This provision is adopted in order to contribute to the inequalities already deeply rooted in this region, which may undermine its application. It also includes a provision on the recognition of the rights of "Human rights defenders in environmental matters" to guarantee "a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity" (Article 9). A new indemnity provision is thus incorporated for the benefit of those who act by enforcing compliance with environmental law in order to protect them against any reprisal for their activity in defense of the environment – and whose application in practice may depend on the rest of the provisions of the Agreement in a socio-political context such as that of Latin America and the Caribbean.

The right to public participation is dealt with in Article 7 of the Convention, which generally states in section 1 that each party shall "ensure the public's right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision--making processes based on domestic and international normative frameworks". It is a generic obligation, the content of which will be specified in the following sections in the terms we will examine later.

The provisions of this single article regulate participation in decision-making processes related to projects and activities, as well as environmental authorizations that have or may have a significant impact on the environment (section 2), such as public participation in policy-making, strategies, plans, programs, norms and regulations (section 3). This differs from the Aarhus Convention, where the pillar of public participation is made up of three different articles: Articles 6 to 8. In these provisions, the Aarhus Convention regulates the following areas with varying degrees of precision and demand: participation in the adoption of decisions related to certain public or private activities (Article 6); participation in environmental plans, programs and policies (Article 7); and participation in the drafting of regulatory provisions or legally binding normative instruments

Firstly, it should be noted that Annex I of the Aarhus Convention includes an exhaustive list of activities with an impact on the environment that Governments must in any event guarantee participation right to, pursuant Article 6. On the other hand, the Escazú Agreement simply indicates that participation in activities that have or could have a "significant impact" should be guaranteed. It thus not does not determine what the assumptions to, in any event, guarantee the right to participation, but also leaves what may be required on issues such as environmental impact assessment or authorization of particular activities to domestic laws or international agreements. States that ratify the Escazú Agreement will therefore have a much wider margin of discretion in deciding in which cases public participation is required, in accordance with the provisions set forth below.

1.2 On the conditions to participation

Sections 4 to 6 of Article 7 of the Escazú Agreement set out the minimum conditions for participation that each State Party to the Agreement must comply with in relation to the environmental decisions referred to in both sections 2 and 3. Conditions which largely refer to those laid down in the Aarhus Convention in Article 6 (3) to (8) for the specific activities listed in Annex I to the Convention (and which apply in this latter Agreement only in part to participation in plans, programs and policies by Article 7 referencing Article 6(3), (4) and (7).

Thus, Article 7(4) of the Escazú Agreement brings to light the principle of early and effective participation, "from the early stages, so that due consideration can be given to the observations of the public". This principle was drafted similarly to Article 6(4) of the Aarhus Convention.

The obligation to establish "reasonable timeframes" for participation is set out in Article 7, paragraph 5, as in Article 6(3) of the Aarhus Convention.

In the same vein, section 6 details the minimum information that must be provided to the public "through appropriate means [...] in an effective, comprehensible and timely manner" within the framework of any participation procedure: type or nature of environmental decision, the authority responsible, procedure foreseen for participation, indicating the date and provided for mechanisms and public authorities. These requirements are partly similar to those set out in Article 6(2) of the Aarhus Convention, although the Aarhus Convention states that such information will be provided to the "public concerned" (i.e. according to Article 2(5) of the Aarhus Convention, which "affected or likely to be affected by, or having an interest in, the environmental decision-making") and not to the "public" as generally stated by the Escazú Agreement (defined in Article 2(d) as "one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party").

As regards the decision-making processes concerning the projects and activities referred to in Article 7(2) (those which have or could have a "significant impact" on the environment), section 17 of the same specific article alludes in more detail to information to be made public and which also includes: a) a description of the area of influence and the physical and technical characteristics of the proposed project or activity; b) a description of the environmental impacts of the project or activity and, where appropriate, the cumulative environmental impact; c) a description of the measures envisaged in relation to these impacts; d) a summary of the previous points "in non-technical and understandable language"; e) the reports and public opinions of the organizations concerned, addressed to the public authority linked to the project or activity in question; f) a description of available technologies to be used and alternative locations for carrying out the project or activity subject to appraisals, when the information is available.

This latter provision is also partly a reflection of those set out in Article 6(6) of the Aarhus Convention, which lays down a much more precise level of information for environmental activities and authorizations in Annex I to the Convention, subject to environmental impact assessment and authorization (and which apply even less to planning or regulatory

measures). However, the Escazú Convention includes as novelty the ease of access to information on "actions taken to monitor the implementation and results of environmental impact assessment measures" (item g), an essential aspect for projects and activities submitted to this environmental protection instrument.

Finally, section 7 states that the right to participate includes the opportunity to comment using appropriate and available means, and that the outcome of the participation process will be "properly taken into account" by the online authorities, again, like the Arhus Convention article 6(8).

1.3 On the results of the participation process

As regards the outcome of the participation process, the Escazú Agreement, Article 7(8) states that, once the decision has been made, the public will be "informed in a timely manner thereof and of the grounds and reasons underlying the decision, including how the observations of the public have been taken into consideration". As far as the Aarhus Convention is concerned, Article 6(9) merely requires the public to be "promptly informed".

In addition, the Escazú Agreement includes additional details on the Aarhus Convention: first, it states that the public should be informed "of how their comments were taken into account"; also, the obligation to disclose the resulting decisions using various means is added in section 9, which should also include references to administrative and legal actions relevant to what may be exercised by the public given in the situations in question. This information is not detailed in the Aarhus Convention.

1.4 Main features and novelties of the Escazú Convention

The Escazú Convention includes a number of remarkable singularities and novelties regarding the Aarhus Convention, which are the result, in some cases, of the specific challenges that are being faced in Latin America and the Caribbean, of other global challenges that came up at the time the Agreement was negotiated and, at some point, on the shortcomings noted over the years in the Aarhus Convention.

Accordingly, the Regional Agreement for Latin America and the Caribbean provides that the parties should "promote", in accordance with

domestic legislation, "public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum", as well as the participation of the public at the national level on matters of international environmental forums. This aspect is undoubtedly of great importance, given the growing relevance of international and regional treaties and conventions in the development of national environmental policies and laws not addressed by the Aarhus Convention.

The Escazú Convention also pays particular attention to the diversity of countries in the region, imposing on the Parties an obligation to lay down conditions conducive to public participation in order to adapt to the social, economic, cultural, geographical and gender (section 10), as well as language (section 11) characteristics of the public. "[...] local knowledge, dialogue and interaction of different views and knowledge, where appropriate" (section 13) should also be regarded.

On the other hand, not only does it require public authorities to strive to identify and facilitate the participation of "the public directly affected by the projects or activities that have or may have a significant impact on the environment", but it also pays special attention to the participation of "persons or groups in vulnerable situations" and respect for the rights of indigenous peoples and local communities.

Accordingly, the Escazú Agreement expressly provides that each Party "shall encourage the use of new information and communications technologies, such as open data, in the different languages used in the country, as appropriate", at the same time providing that "in no circumstances shall the use of electronic media constrain or result in discrimination against the public" (Article 4(9)). It refers, on the one hand, to the possibilities and facilities that new technologies offer to articulate participation processes, while the need to prevent the digital gap from leaving out of the participation processes those people who do not have easy access to such technologies, thereby worsening the deep inequalities that still exist in the region.

This Agreement, which is open for accession by all countries of this region included in Annex I, has already been signed by 16 Latin American and Caribbean countries (including Argentina, Bolivia, Brazil, Costa Rica Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Dominican Republic, and Uruguay), and shall enter into effect, pursuant its Article 22, as of the date when the eleventh instrument of ratification or accession is

deposited. It is undoubtedly a fundamental step towards realizing principle 10 of the Rio Declaration on a global scale, in addition to what was given to the Aarhus Convention two decades ago.

2 NORMATIVE NEWS IN SPAIN. PENDING CHALLENGES

The Aarhus Convention and the directives adopted by the EU within its framework caused Law 27/2006 of July 18 to be enacted in Spain, which regulates the rights of access to information, public participation and justice in environmental matters (in addition to Law 27/2006). This Law, which adapts Spanish basic legislation to the obligations taken on when ratifying the Convention, says in its Statement of Reasons that it intends to articulate "adequate instrumental means" to allow citizens, both individually and collectively, to effectively participate in the adoption of measures aimed at guaranteeing provisions of Article 45 of our Constitution: the right of all to live in an appropriate environment for the development of the individual, and the duty to preserve it through the active collaboration of society in the fulfillment of the mandate directed to the public authorities of defend and restore the environment, together with the indispensable help of society. Participation generally enshrined in our Constitution in its Article 9(2) and Article 105 for the administrative area in particular, as a channel for greater transparency and success in the management of public and democratic affairs of society (PLAZA MARTÍN, 2018, p. 5).

After more than a decade, the most significant novelty in terms of environmental participation in the Spanish regulatory framework is the adoption of Law 9/2018 of December 5, which amends, among other environmental regulations, Law 21/2013 for environmental assessment with the aim of fully adapting basic Spanish legislation to the EU regulations (specifically to the amendments that Directive 2014/52/EU introduced at the time to Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011 on the assessment of the impact of certain public and private projects on the environment).

However, as we will see in the following sections, the drive of measures that meet the key challenges facing public environmental participation in Spain remains pending.

2.1 The "novelty": the preferred use of electronic media

Regarding participation, various provisions in Law 21/2013 (Articles 9(3), 21(4), 22(1), 28(4), 36(3) and 37(3)) are amended to implement the preferential use of electronic means in order to "ensure effective participation of people" interested in environmental assessment processes". Among general obligations relating environmental assessment (Article 9), it includes a third section laying down the procedures for public information and consultation to affected public administration bodies and the stakeholders who, as provided for in this law, "shall be carried out electronically and by means of public announcements or other appropriate means capable of ensuring maximum dissemination to citizens in the affected and adjacent counties". Public administration bodies are also required to take the necessary measures to ensure, within the public information process, that relevant information is electronically accessible to the public on at least one central website or simple access points at the corresponding territorial administration level.

The requirement for public administration bodies to ensure that the documentation that must be submitted to public information is disseminated to the public to the maximum possible extent using electronic means is then replicated in several provisions of the Law: in Arts. 21(4), 22(1) and 28(4) in relation to strategic environmental assessment; and in Arts. 36(3) and 37(3) in relation to the strategic environmental impact assessment. According to its Explanatory Memorandum, these amendments "aim at strengthening public access to information and transparency".

Likewise, with regard to notification to interested people who should be consulted in the context of assessment procedures on the environmental impact of projects, the fourth section of Article 9 reinforces the means of notification when these people are unknown, requiring (in addition to being announced in the "Official State Gazette" or corresponding official newspaper) that it be carried out by the publication of public notices, and where appropriate, on the affected counties' websites. To this end, it lays down the minimum exposure period (thirty working days) and, even more peculiar and innovative, establishes a "control mechanism" for such exposure, requiring that, once the period has elapsed, the counties must send to the responsible body or, ultimately, to the environmental agency, "a public exposure certificate stating the place and time period when the environmental documentation was exposed".

2.2 Assessment: pending challenges

Today, of course, it is vital to ensure that the general public, stakeholders, and environmental organizations have easy access to information by electronic means, as well as the possibility of sending their comments and claims on environmental assessment procedures to the administration authorities in question using the means in question. This is, however, a regulatory change that, for the reasons explained below, amounts to a modest advance *in practice*, and whose application must be made without prejudice at any time to population groups who do not have easy access to such means.

In the first place, such means had already been effectively used by most public administration bodies, as stated in the compliance reports submitted by Spain to the meetings of the Parties to the Aarhus Convention. In these reports, one can see – among other things – practices related to the use of new technologies to facilitate transparency and early participation, especially by highlighting the publication of information on the different processes of participation at the websites of – mainly state and autonomous – environmental agencies. More specifically, and at the level the environmental assessment procedure – both plans, and programs and projects – the State General Administration has made environmental documentation available to the public by advancing information on the processing of files through the website of the Ministry responsible for environmental issues. (See, for instance, the Compliance Report submitted by Spain to the Sixth Meeting of the Parties to the Convention held in Riga, Montenegro, September 11-14, 2017, p. 28, section 111.) On the other hand, it is certain that its introduction into the Law implies the transformation of an administrative practice into a legal obligation for all public administration bodies, which undoubtedly implies an improvement in the existing regulatory framework.

Second, they still need to address the major shortcomings and challenges Spain faces in achieving truly "effective" public participation in environmental issues, as required by the Aarhus Convention. Deficiencies and problems which are reflected – at least in part – both in said reports on the implementation of the Convention and in the resolutions adopted in our country by the Aarhus Convention Compliance Committee and the Conference of the Parties. Some of them are detailed below:

- Sufficient timeframes for participation: The Application Report submitted by Spain to the Sixth Meeting of the Parties to the Agreement (2017) states that "The minimum time period regulated by the sectoral laws to lodge complaints in procedures subject to environmental intervention, especially in EIA [Environmental Impact Assessment] and AAI [Integrated Environmental Authorization] implies, in the opinion of some citizens and social partners, an insufficient volume of files and their technical complexity "(p. 26, section 119). This issue has been reported by environmental NGOs to the Aarhus Convention Compliance Committee on several occasions, which has issued several statements and recommendations in this regard, leading finally to the Fourth Meeting of the Parties (2011) for the adoption of Decision IV/f on compliance by Spain with its obligations under the Convention. That decision addresses, on the one hand, various violations of the Agreement provision by the city of Murcia during the processing of a residential area urbanization project; and, on the other hand, by the Administration of Extremadura and the General Administration of the State under the procedures to authorize the installation of three combined cycle thermal power plants and an oil refinery in Extremadura. At the same time, the Fourth Meeting of the Parties stated that not all required measures were taken to put an end to the violation of the various provisions of the Convention, including those related to public participation, reiterating that the need to "raise awareness" of the administration bodies and their staff to set reasonable deadlines for public participation in decision-making" (ECE, *V/9k Decision on compliance by Spain*, July 1, 2011, ECE/MP.PP/2011/CRP.8, paragraph 6).
- The limitations of communications using new technologies: While it is undoubtedly essential to facilitate participation through new information technologies, it is also essential to properly combine them with other conventional communication tools, mechanisms and actions to ensure that digital exclusion should not reduce possibilities for participation of population segments that do not have easy access to them. Notice that, on this issue, the Aarhus Convention Compliance Committee stated that when the text of the decision was finally adopted by a Government following a participation process (in this case, it was the processing of an authorization by the Government of Catalonia), it was published only on the website of the Department responsible for the environment. Thus, Article 6(9) was violated (information to the public

once the decision has been taken following the appropriate procedure). In connection with such violation, the Committee recommended that the Spanish State should take the necessary legislative, regulatory or other measures to ensure that the public is informed promptly of the decision finally made, not just through the Internet, but also through other means, including – but not limited to – those used to notify the public when a decision-making process is initiated according to paragraph 2 of Article 6 (see UNECE, Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2014/99 concerning compliance by Spain*, ECE/MP.PP/C.1/2017/17, p. 17). Non-compliance, which was also disclosed at the Sixth Meeting of the Parties to the Convention (*Decision VI/8j Compliance by Spain with its obligations under the Convention, Excerpt from the addendum to the report of the sixth session of the Meeting of the Parties*, ECE/MP.PP/2017/2/Add.1, Montenegro September 11-13).

- Little participation in practice: it remains to be seen whether the ease of communication through electronic means with the Government contributes, in practice, to greater engagement and participation of society in these processes. In any case, in order to solve this problem, which is systematically stated in the Spanish Government Reports (see, for example, the already-quoted 2017 Report, p. 28, section 128), the Governments need to articulate new proactive measures exploring other channels that promote real interaction between citizens and the Government from the early stages of the decision-making process; these go beyond the procedures that have so far been traditionally used (public information and stakeholder consultation), and should foster true culture of participation (see VICENTE DAVILA, 2019, p. 8-10).

3 LEGAL APPLICATION OF PROVISIONS ON PUBLIC PARTICIPATION IN THE ENVIRONMENT

The application of the Aarhus Convention provisions to public participation at the courts raises issues of particular interest when environmental decisions are adopted through a compound procedure involving not only the Spanish administration, but also institutions of the European Union. However, domestic courts have enforced compliance with the provisions of the Aarhus Convention on public participation. Participation in which case law is considered to be a qualified procedure,

the omission of which will result in voiding the measure or plan to deal with infringement cases.

3.1 Composite procedures involving the Domestic Administration and the European Union

Among the court rulings in which, throughout 2018, the provisions on public participation in environmental matters were applied, the ruling of the Administrative Litigation Panel of the Supreme Court (Fifth Section) No. 1203/2018 of July 12 stands out. This resolution raises issues of particular concern regarding compliance with Article 7 of the Aarhus Convention during the Spanish government processing of the National Transition Plan for Large Combustion Plants (NTP) adopted in accordance with Directive 2010/75/EU on industrial emissions (joint pollution prevention and control).

The Judgment disregards the administrative litigation filed by the Association International Institute of Law and Environment (IIDMA) against the Council of Ministers Agreement of November 25, 2016, which approved the National Transition Plan for Large Combustion Plants (NTP). This Agreement has been criticized, among other things, for avoiding the public participation requirements set out in Law 21/2013 on environmental assessment and Article 7 of the Aarhus Convention.

In accordance with Article 32 of Directive 2010/75/EU, the adoption of this Plan allows that, during its period of application (from January 1, 2016 to June 30, 2020), the facilities covered by it are exempt of the emission thresholds corresponding to them in accordance with Article 30(2) of said Directive. In accordance with Article 32(5) of the Directive, by January 1, 2013, Member States shall notify the Commission of their NTPs for assessment purposes, and should the Commission "raise no objections within 12 months" following receipt, the Member State concerned shall consider it approved". The Commission should also be notified of any subsequent changes to the plan.

IIDMA claimed in its appeal that only the third version of the NTP was subjected to a public consultation procedure and only for a period of 21 days from 4 to 21 December 2015.

The Supreme Court ruling showed that the procedure for processing that Plan was determined by the application of Article 32(5) of Directive

2010/75/EU, according to which those plans must be communicated to the Commission for approval (and also that any subsequent modifications should be reported). It can be seen that, as Spain has decided to apply a National Transition Plan to apply the rules, it sent the European Commission a first plan proposal on December 14, 2012, which the Commission did not approve, as it considered that several points had to be amended in order to comply with the requirements in 2010/75/EU (Commission Ruling 2013/1999/EU of December 17 concerning the notification by the Kingdom of Spain of the national transition plan referred to in Article 32 of the 2010/75/EU norm of the European Parliament and of the Council on industrial emissions).

The second project submitted by the Spanish Government, with the appropriate modifications, is no longer subject to objections; however, because the final list of Plan facilities was modified in November 2015 (as some of the organizations initially covered by the plan decided to step out of it), the text was changed again on November 20, 2015. This third draft was finally submitted to public participation for a period from December 4 to 21, 2015, including, because, according to the Administration, "The version that was considered the most up-to-date was that which matched the one the Commission had not commented on".

In its judgment, the Supreme Court rejected the notion that this course of action violated the provisions of the Aarhus Convention, stating that *"Not only has the NTP been subject to public information through its publication on the Department website, but also the comments and observations made by the various agencies to which the Plan was submitted for participation were also taken into account"* (FD 12).

He also argues that *"The Aarhus agreement does not mention a specific period for the public consultation process, leaving it at the discretion of Member States, so it can be concluded that the NTP public participation process was carried out in accordance with Law 27/2006 of July 18, which regulates the rights of access to information, public participation, and access to justice in environmental matters, which transposes that Convention into our legal system"*.

Finally, and regarding the principle of early participation, the Supreme Court stated that *"The Aarhus Convention states that public participation must take place when it can have actual influence and could hardly have been exercised on a project that has not even been approved by the Commission"*.

Leaving aside the question of whether the timeframe was reasonable or not (in which case we would have to weigh the complexity of the Plan and the number of days allowed for its review – which in any case requires expert knowledge – and to make the subsequent claims), the main issue which, in my view, gave rise to this judgment is related to the last argument of the Court saying that the obligation to allow for "early" participation of the public so as to have actual influence, as provided for in Article 6(2) of the Aarhus Convention, was not complied with.

Indeed, Article 6(2) of the Aarhus Convention (also applicable to plans and programs by reference to Article 7) requires that "public participation should begin at the commencement of the procedure, i.e. when all options and solutions are still possible and when the public can exert actual influence" In accordance with the provisions of the Aarhus Convention, Article 16(1) of Law 27/2006 of July 18, which regulates the rights of access to information, public participation, and access to justice in environmental matters, requires that the Public Administration plans and programs, when establishing or processing the procedures resulting from application, shall ensure that "b) The public has the right to make comments and express opinions when all possibilities are open, before decisions on the plan, program or general provisions".

However, when faced with a compound administrative procedure such as this, in which the European Commission must approve the measures proposed by a Member State, can it be understood that Article 7 was complied with in relation to Article 6(4) of the Convention, since a draft Plan has been submitted to the Commission and approved by that EU institution? In my view, when the Commission approves a plan where comments have been incorporated and objections made previously by this European institution, and although definitive formal approval by the competent national administration is still pending, it is hardly possible to understand that "all options and solutions are open", or at least "open enough" for the public to have "actual influence".

In the case of the NTP in particular, it should also be taken into account that this Plan was intended to be implemented as from January 1, 2016 and that any substantial changes made as a result of the consultation process would have to be notified again to the Commission for approval. Clearly, public participation did not start "at the commencement of the procedure", and the circumstances and factors highlighted here cast doubt, in my view, on "all possibilities" being open at that time prior to final approval, as required by Article 7 of the Convention.

In short, it seems logical to conclude that, in compound procedures, where both the National Administration and the European Commission operate in the decision-making process, and in particular when the latter have to adopt measures proposed by domestic authorities, the principle of early participation as set out in Article 6(2) of the Aarhus Convention requires that the process of participation be carried out before the National Administration notifies the European authorities for approval of the plan or measures that should or might be taken for the enforcement of a European Union standard. This without prejudice to any amendments that the European Commission may subsequently demand, as required by European Union law. Otherwise, the public will hardly have room for influence by participating in the process.

3.2 Other cases: "normality" in the legal application of the provisions on public participation

Finally, let us briefly mention two resolutions issued by the Supreme Courts of Justice, which exemplify how legal court control has been exercised over compliance with domestic or regional public participation provisions, whereby the second pillar of the Aarhus Convention is applied: (i) The first in which the nullity the Government ruling to omit the public participation procedures established by Royal Decree 815/2013 is stated, by which the Industrial Emissions Regulation is approved; (ii) the second will reject the appeal filed by a neighbors association against the Municipal Acoustic Plan passed by the Municipality of Elche after declaring that the Government had complied with the public participation provisions set forth in the specific noise regulations.

(i) The Superior Court of Justice of Galicia (Chamber of Administrative Litigation, Section 2) ruled in its judgment No. 370/2018 of June 28 the appeal filed by the Pontevedra City Council against the Resolution from August 22, 2016 issued by the Ministry of Environment and Regional Planning, which modified the validity of the joint environmental authorization granted to Electrochemistry do Noroeste, SAU for the production of chlorine and alkali industry chemicals by electrolysis. The City Council based its appeal on a breach of the legally-established procedure for moving forward with the temporary modification carried out because a hearing procedure was not granted to the Pontevedra City Council and no public information procedure was opened. The Court decided that

the Ministry of Justice ruling was void, pursuant Article 62(2) of LPAC – then in force – because "public information procedures, allegations and hearings were filed, among others" (in this case, regulated in Article 16 of Royal Decree 815/2013 approving the Regulation on Industrial Emissions and Development of Law 16/2002 of July 1 on integrated pollution prevention and control).

(ii) On the other hand, the Superior Court of Justice of the Valencian Community (Administrative Litigation Chamber, Section 1) rejected in its ruling No. 232/2018 from March 29 the appeal filed by the Elche Association of People Affected by Noise against the Elche City Council agreements on December 23, 2013, which approved the Elche Noise Strategic Map and the Acoustic Pollution Action Plan of the municipality, and the agreement of June 30, 2014, that finally approved the Municipal Acoustic Plan (MAP). First, the Association argued that, during the elaboration of the municipal acoustic plan, the City Council failed to comply with the environmental participation guarantees set out in Council Decree 97/2010 of June 11, which regulates on the exercise of the right of access to environmental information and public participation in environmental issues in the Valencian Community.

In its judgment, the Court considered that participation in this area is ruled – by reference to Decree 97/2010 – by the specific regulations on noise (Article 24 of the Generalitat Law 7/2002 and Protection against Acoustic Pollution, Article 15 of Decree 104/2006 from the Acoustic Pollution Planning and Management Council), which the Administration adhered to in the processing and approval of the MAP that was the subject matter of the appeal: it issued a contract subjecting the plan to public information; exhibited it at the municipal website, for a period of one month; published the judgment in a widely circulated general information newspaper in the province of Alicante; published the norms in the official journal of the Generalitat; and granted a hearing proceeding to the main associations affected by the municipal acoustical plan, including the now-appealing Elche Association of People Affected by Noise, which filed claims on two occasions (FD 2). Secondly, it rejected the claim that the MAP should have been subjected to a second information procedure following the changes introduced by the City Council following the report of the General Environmental Quality Board, which the Association considers of great importance and scope. To this end, the Court finds that the applicable provisions provide for a single public information process in approving

the draft municipal acoustic plan; for greater abundance, it specifies that the changes introduced by the City Council following the report issued by the Environmental Quality GD were not substantial, and that the Elche Association of People Affected by Noise was well aware of them, and had the opportunity to make statements before final approval of the corrected MAP, and did not do so.

Such a statement seems to leave a breach for, where substantial changes of such a nature should occur, questioning the effectiveness of the public participation process. Regarding this matter, it is necessary to recall the law theory on public participation laid down by the Constitutional Court in its ruling 28/2018 from February 16, which states that

> Public information is not a mere procedure in the process of preparing plans; rather, it is essential, thanks to the special impact that urban plans have on citizens' lives. This results in the related need to guarantee the right to public participation in urban planning resulting from the State norm – and which obviously must be effective –, a right that is violated if the planning instrument is approved without the corresponding public information process, and also when substantial modifications to the approved planning are introduced without this procedure. In the latter case, participation is also not effective regarding a plan that is not the one containing the decisions that the Government intends to adopt in the planning instrument and on which it should allow public opinion to be stated.

This statement, however, provides on the development of urban plans, but is undoubtedly equally applicable in the context of environmental planning or decisions, and it is fundamental to ensure the effective application of the provisions of the Aarhus Convention in our State. These court rulings undoubtedly show the importance that our legal system and our courts attach to these procedural rights for the protection of the environment.

CONCLUSIONS

A it is a regional international agreement, the Aarhus Convention is not only promoting environmental democracy in the countries of the European continent that have ratified it, but is also serving as a reference in other regions of our planet for the adoption of similar international instruments. The most prominent case is that of the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental

Matters in Latin America and the Caribbean, signed on March 4, 2018 in the city of Escazú, Costa Rica, with the support of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). In addition to extending these environmental rights to a very important region of our planet, this latter Agreement has introduced some improvements and clarifications in relation to those initially set out in the Aarhus Convention, in areas such as participation through new technologies, or equality of access to the right to participate. The Aarhus Convention, on the other hand, lays down more precise obligations as regards the obligation of submitting the activities likely to have a particular impact on the environment listed in Annex I to public participation.

As regards Spanish law, the Aarhus Convention has undoubtedly meant an advance in terms of public participation and environmental protection. The latest changes in basic government regulations have come hand in hand, however, with the modification of the European Union Directive on Environmental Impact Assessment. These changes are mainly limited to incorporating the obligation of governments to facilitate public participation through new information and communication technologies. However, there remain significant gaps and challenges for achieving participation.

Nevertheless, the adoption of appropriate norms is not enough to achieve "actual and effective" citizen participation. The very compliance reports submitted by Spain to the meetings of the Parties to the Aarhus Convention show that public participation in these proceedings remains very "little" and decisions made by the Convention Compliance Committee with regard to Spain still show areas where increased efforts are needed to properly fulfill the obligations taken on under the Convention. Along with the adoption of an appropriate regulatory framework to respond to the obligations taken on by the Spanish State by signing and ratifying the Convention, it is necessary to continue advancing in the education, awareness-raising and involvement not only of all citizens, but of different Governments, according to a sustainable development model.

Finally, effective judicial protection of this right to participate is essential to this end, and courts generally contribute decisively to this task.

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