

EU AND CIVIL SOCIETY PARTICIPATION IN ENVIRONMENTAL MATTERS

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Abstract

During recent years, the concept of civil society has obtained increasing popularity in European Union. Institutionalized interest groups (think tanks, NGOs, Trade Unions etc.) have tried to influence and shape discourses and legal basis on civil society participation in decision-making process in certain policy areas. However, a long road lay ahead to a ‘functional democracy’ and a developed civil society sector, where a ‘functional democracy’ is useful to ensure the room for democratic participation of citizens through associations. Indeed, the main scope of this research is limited to one of the most Europeanized internal policies such as Environment Policy. Hence, this paper will be focused on the EU Directive 2003/35/EC **providing for public participation in respect of the drawing up of certain plans and programs relating to the environment matters and amending with regard to public participation and access to justice**. In order to explain the importance and the involvement of the civil society in decision-making process and access to justice in environmental matters, this paper aims at providing an answer to the following research question: Does the EU Directive 2003/35/EC strengthen and improve civil participation and access to justice in environmental matters?

Key words: access to justice, environmental matters, civil society, functional representation, functional participation, public participation

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Introduction

Recently, the popularity of the European civil society concept is increased. The European Union (EU) institutions have established and developed discourses and directives on civil society participation in the decision-making processes on certain policy areas. Also, institutionalized interest (think tanks, NGOs, Trade Unions etc) have influenced and shaped these discourses and directives.

In order, to address the EU's approach in promoting civil society participation, this paper tends to focus on one of the most Europeanized internal policies such as Environment Policy. Public participation and access to justice in environmental matters have been on the political agenda of the European Union for several of years. On 26th of May 2003, Directive 2003/35/EC on public participation in environmental decision-making process and access to justice on certain environmental matters, was adopted concerning the second and third pillar of Aarhus Convention. According to Aarhus Convention, Article 1, *"in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention"*². Hence, Aarhus Convention provides for:

- the right of access of every legal person to environmental information (in written, visual, aural, electronic or any other material) that it is held by public authorities. The environmental information shall be made available at the latest, within one month after the request has been submitted. A request for environmental information may be refused if the public authority is not in the possession of the requested information, if the request is deemed either unreasonable or too general, or if the material is in the course of being completed or concerns internal communications of public authorities - **"access to environmental information"**³;

² Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Denmark, 25 June 1998, retrieved from:

<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

³ See Article 4 of Aarhus Convention

- the right of every legal person to participate in environmental decision-making process, in order to enable the public affected and environmental non-governmental organizations to comment on, for example, proposals for projects, plans or programs regarding the environment matters – “**public participation in environmental decision-making**”⁴;
- the right of every legal person to review procedures relating to information requests, public participation, public review of acts and omissions of private persons or public authorities, etc. in order to review public decisions that have been made without taking into consideration the two aforementioned rights or environmental legislation in general – “**access to justice**”⁵.

It is important to emphasize here that the Aarhus Convention is implemented in European Union and supported by four EU Directives, such as:

1. Directive 2003/4/EC Public Access to Environmental Information,
2. Directive 2003/35/EC Public Participation and Access to Justice in Environmental Matters,
3. Directive 2003/98/EC Re-use of Public Sector Information and
4. Directive 2007/2/EC Infrastructure for Spatial Information in the European Community.

However, the scope of this paper is limited to the Directive 2003/35/EC Public Participation and Access to Justice. Regarding to the Directive 2003/35/EC, the key objective that should be applied by Member States (MS) is continuous contribution to implementation of the obligations that derive from Aarhus convention, by providing for public participation in respect of the drawing up of certain plans and programs relating to the environmental matters and improving the public participation and providing the necessary provisions on access to justice (Directive 2003/35/EC, 2004: 18)

Hence, this paper aims at providing an answer to the following research question: *Does the EU Directive 2003/35/EC strengthen and improve civil society participation and access to justice in*

⁴ See Article 6 of Aarhus Convention

⁵ See Article 9 of Aarhus Convention

environmental matters? In order to achieve the stated research question, firstly, we will focus at the concept of civil society and the theoretical background of civil society participation. Secondly, we will take a closer look at the EU Directive 2003/35/EC (on public participation and access to justice over environmental matters) in the light of the two concepts ‘functional participation’ and ‘functional representation’. Moreover, this part will tend to analyze if/how the Directive will work in practice for civil society. Finally, we will present some concluding remarks on public participation in environmental matters.

Civil society concept

Recently, the popularity and the diversity of civil society concept are increased. Broadly, civil society is defined as ‘a collective term for all types of social action, by individuals or groups that do not emanate from the state and are not run by it’ (Smismans, 2003: 482). The ‘civil society’ concept has raised diverse and confused terminological context of multiple terms that may be defined as the same phenomenon: ‘organizations pressing government to act (or not)’ (Curtin, 2003: 2). According to Curtin (2003) there is a variety of civil social actors such as lobby group, political interests group or economic interest group, organized interest group, NGOs, voluntary association, and organized interest groups etc. They share with each other some main characteristic such as ‘being voluntary, independent, non-profit, open, public, legal and non-violent’ (Raik, 2006: 2). As Keck and Sikkink (1998) claims they do not tend to minimize the role of state, but rather increasing the accountability of political actors (institutions) by establishing an active citizenship that has a specific interest in public affairs and is also engaged to respect common human values.

Indeed, the idea of civil society is rooted in antiquity (Cicerone and Aristotle) and its origin can be found in Latin language (*societas civilis*) (Curtin, 2003: 3). These ancient conceptions represent the idea that people by living together constitute a political community with a common interest. These political ideas are transmitted and evolved by other political philosophers of 18-19th century based on Scottish and Continental Enlightenment concepts of reason and rationality by proposing a separation between civil society, economy and state. Hence, Hegel and others (e.g. Thomas Paine) developed a diverse meaning of civil society, where the latter is separate from the state. Hegelian civil society is established outside the state, but organization and

institutional forms of civil society itself differentiated from the family or other social forms (Armstrong, 2002: 107-8). In addition, Hegel assumed that the development of individual civic virtue, values and norms and its intermediation with the state, contribute to the development of a public sphere. Also, English philosopher John Locke (1632-1704) presented a 'dichotomous' view of civil society, claiming that the civil society is completely independent from the state and its primary role is to exercise power against the latter (Junemann, 2002: 90).

Later on, after the Second World War, Antonio Gramsci (a Marxist theorist) portrayed the concept of civil society as a place for independent political activities, hence as 'a crucial sphere against tyranny' (Carothers, 2000: 19). This definition and perception from Gramsci provide a relevant civil society concept against dictatorial regimes, promoting so the development of democracies. In addition, a contemporary approach of civil society is given by political philosopher Jurgen Habermas, who presented the three-dimensional link between communicative action, deliberation and civil society. This theoretical approach is considered as a challenge of tradition approaches that consists of the separation of the public and private sphere. According to Habermas public interest group tend to politicize certain priorities by public opinion in order to be as soon as possible part of political agenda. Thus, the civil society is an open window to institutionalize public opinion, and a 'political public sphere', is a communication network in our daily life through the different networks of civil society (Curtin, 2003, p. 4).

Curtin (2003), goes further 'political public sphere', by explaining that also political institutions matter for influencing available options for civil society to affect certain political choices. The room for deliberation and participation from the bottom level is set by the political framework in order to facilitate citizen participation and discussion. However, citizen participation in everyday political activities is considered as a method of informing, rather than determining the process of representative governments (Curtin, 2003: 4-5). As a result, the role and the participation of civil society in political public sphere remain still vague and unclear.

Theoretical framework

However, according to Smismans (2003: 486) one can distinguish three main conceptualisations of civil society. The first conceptualisation is related to the 'functional

participation/representation' character of civil society. Regarding to the functional aspect of the participation, civil society can provide expertise, ensures compliance and implementation of certain policies. With regards to representation aspect, civil society does not only contribute to a better policy making process, but also to a better democratic representation. In addition, a 'functional democracy' is useful to ensure the room for democratic participation of citizens through associations.

Secondly, civil society is described as 'politicization'. According to Putnam, voluntary organizations from civil society may raise social capital by establishing social trust and providing social networks towards civic engagement, action. Through the establishment of a deliberative democracy, civil society will be more able to provide 'a public sphere of informal deliberation and opinion-formation which would subsequently be translated into a political public sphere of procedural deliberations in decision-making institutions' (*Ibid.*, 487). According to this approach, civil society has some autonomy from the state by providing civic, social and cultural values on public debates and ensuring that everyday politics are not only a technocratic event.

Thirdly, civil society is described as 'decentralisation', where different associations take over functions of the public authority, such as implementation or evaluation of policies (Smismans, 2003, p. 489). A good example of decentralization of the civil society is the neo-cooperatives model in Nordic countries, where certain NGOs has policy task, especially in children care policy area.

Looking at the variety of civil society definition and perception in different historical periods, one can assume that this term remains a key element of post-modernism period, where the promotion of certain un-material values, norms and rights are dominant.

Even though are three main conceptualization of the civil society, in this paper we will focus only on the first conceptualization. Indeed, we can assume that Smismans approaches on functional representation/participation offer generic explanatory tools for the stated research question. Hence, this theoretical framework helps to investigate whether *the EU Directive*

2003/35/EC can strengthen and improve public participation and access to justice in environmental matters. The contribution of Smismans approaches to this paper is discussed in the concluding section.

Directive 2003/35/EC and civil society

After presenting the main explanatory approaches of the civil society concept, this section aims to focus on the usage of this concept in the Directive 2003/35/EC on public participation and access to justice in environmental matters. The European Commission has established a top-down initiative by adopting a Directive on Environmental area to increase the involvement and participation of civil society over the EU affairs. Thus, public information, public participation and access to justice in environmental matters become major tools in environmental policy-shaping and decision-making process.

According to Article 11 of the Treaty, the EU institutions have a common responsibility to ensure that organized civil society, which represents the specific interests of the citizens of Europe, may actively be involved in the European policy formulation processes. It is evident that this article refers to the European civil society which is different from a traditional civil society within one Member State. Hence, as Armstrong claims, a European civil society should be described as multiform, multidimensional and multilevel. Multiform, because there are different forms of civil society participation from the individual, to formalised organisational structures. Multidimensional, because civil society' actors can play different roles from political deliberation, to the delivery of governance. Multi-level, due to the inclusion of diverse structures and traditions of national civil society' actors (Armstrong, 2002: 113).

As we emphasized above, one of the main initiative of the European Commission on the Environment policy, has been the Directive 2003/35/EC on public participation and access to justice in environmental matters, concerning the second and third pillar of Aarhus Convention. The Aarhus Convention aims to present a number of rights of the public (including individuals and their associations) in accordance with the environmental matters. Moreover, the Aarhus Convention and the Directive 2003/35/EC are considered a new kind of environmental agreements because 'these agreement address fundamental aspects of human rights and

democracy, including government transparency, responsiveness and accountability to society' (UN- Economic and Social Council, 2004: 2 & Directive 2003/35/EC, 2003: 17).

The Directive 2003/35/EC under Aarhus Convention, pursues its objectives for a healthy environment for *all* (which means not only NGOs) by upholding the right of every person to have access on information about environment matters, providing for public participation in respect of drawing up of certain plans and programs relating to the environment and by improving the public participation and providing access to justice in environmental matters, if those rights are denied and if there are general violations of environmental laws (Directive 2003/35/EC: 17-8).

What does 'the public' concept mean according to this directive? Indeed, 'the public' concept means 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups' (Directive 2003/35/EC: 19). It is evident from this definition, that 'the public' (civil society) is not defined only as NGO, but as a 'pluralist space' where everyone can make him/herself to be heard regarding the environmental matters.

In the Article 2, paragraph 2, of this Directive is well specified the role of the Member States in order to ensure that 'the public' is given early and effective opportunities to participate during the preparation (formulation) phase, or review of the plans or programs that are required to be drawn up under specific environmental provisions that are listed in the Annex one of this directive. This paragraph explains the importance of the existence of a democratic political system within MS, in order to guarantee the civic freedoms of everyone (individuals or organizations) to give their opinion and views over environmental matters.

Moreover, according to this directive MS should not only ensure that the public is informed (via public notices, or electronic media) about any proposals for such plans/ programs or for their modification or review, but also should ensure that relevant information about such proposals is available to the public, including the information about the right to participate in decision-making processes and competent authority to which comments, questions, opinions will be submitted (*Ibid.*, 18). In addition, reasonable time-frames should be provided for different

phases, in order to guarantee a sufficient time for informing the public and the public concerned to prepare and participate effectively in environmental decision-making processes.

According to Article 2/2/b the public is free to express its comments and opinions before the final decisions on the plans and programs are taken. After having examined the comments and opinions from the public (Article 2/2/d), the competent authorities within MS should inform the public about the decisions that are taken and the reasons and relevant considerations upon which those decisions are based. Moreover, MS should identify the public entitled to participate in environmental decision-making processes, including non-governmental organizations, for the purposes that are specified in Article 2/2. It is evident that these paragraphs are related with the main goals of the directive, such as accountability and the transparency of the decision-making process and the public awareness of environmental issues. Hence, one may assume here that the civil society 'is not only a channel for citizens to reach the state and influence public policy, but also a channel for the state to communicate its decisions and policies to the people' (Raik, 2006: 3).

Indeed, this directive goes further, introducing another definition: 'the public concerned'. This concept means 'the public' that is affected or likely to be affected by, or having an interest in, the environmental decision-making processes. According to this definition, non-governmental organizations promoting environmental protection and meeting requirements under national law shall be deemed to have an interest in environmental matters (*Ibid.*, 19). Hence, we can assume that this directive provides a necessary tool towards a 'functional democracy' that is useful to ensure the room for democratic participation of citizens through associations. Moreover, one can argue here, that this directive provides political room for the civil society, by upholding the public's right to provide expertise or compliance in environmental decision-making processes (functional participation), contributing not only to a better policy making process, but also to a better democratic representation (functional representation). Hence, this directive provides the necessary political tools in order to strengthen and improve what Smismans (2003) distinguishes as core civil society aspects: 'functional participation/representation'. As a result, more frequently people take part in public life and feel that they have a say in the decision making

process, they are more likely to approve public decision and to comply with common rules and norms (Raik, 2006: 3).

But, this definition on ‘the public concerned’, limits the previous definition of ‘the public’ concept - where everyone (legal person) has a say in environmental matters - by categorizing the civil society in institutionalized organizations. In this case, not every legal person - that is no member of any institutionalized organizations - can influence the environmental decision-making process, as long as the non-governmental organizations (not individuals) are deemed from the national law to have an environmental interest. But, as Carothers (2000: 19) states civil society is a broader concept and can not be equated only with NGOs.

Sometimes, this categorization of civil society, especially in certain MS where the role of civil society is very weak (Italy), may lead to the politicization and corruption of the certain NGOs or business associations that are directly/indirectly affected from environmental laws, where their economic interests has predominance over environmental interests. In this case, one may argue that this categorization of the civil society will not always lead to a functional participation/representation of civil society, because instead of bringing expertise and public concerns during the environmental decision-making processes some business associations (affected or having an interest on environmental laws) may comply with certain environmental laws that maximize their economic interests.

However, according to Article 15a, the public concerned have access to a review procedure before a court of law or other independent bodies which are established by the national law to challenge the procedural legality of a specific decision, act or omissions subject regarding to the public participation provisions of this directive (Directive 2003/35/EC: 21). Also, in order to enhance the effectiveness of these provisions, MS should ensure that practical information is made available to the public on having access to administrative and judicial review procedures. Moreover, in some cases (determined under national law) the public concerned may have access to a preliminary review procedure before an administrative authority, prior to judicial review procedure. These procedures should be fair, equitable, timely and not expensive. Hence, the public is considered as a ‘pluralist space’ where even small groups that find difficulties to bring

their ideas, opinions or views to the environmental decision-making process through their general representative channels can make their voice to be heard in legal basis (review procedure); helping so civil society to defend themselves from tyranny and governance majorities (Raik, 2003). But, there are some limits regarding the public access to justice, because the MS in accordance with the relevant national legal system should determine at what stage the decisions, acts or omissions may be challenged. This means that the public concerned have access to limited and fixed review procedures before the court or administrative authority.

Furthermore, it is very necessary to explain here that, in accordance with the Article 249 EC, a directive shall be binding, upon each MS to which it is addressed, but shall leave to the national authorities to choose forms and methods. So that, every MS has its own judicial instruments and methods to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive 2003/35EC. But, as long as these methods and legal instruments for transposition of the EU legislation into national law are different, the MS compliance between this directive and previous environmental national law will be different too. Hence, one can assume here that the effectiveness of this directive in practice may be diminished due to national political will, legal system and especially weak role and involvement of civil society. Moreover, not every MS can provide the necessary political space and tools for civil society participation in decision-making processes and access to justice in environmental issues in order to improve functional participation/representation.

In conclusion, we can assume here that this directive develops in general a good legal framework in order to strengthen public participation and access to justice over environmental matters. However, this paper is focused on the legal contextual aspect of this directive as a top-down initiative over environmental issues, and therefore cannot explain how it has been pursued or adopted from MS and how effective it has been in practice.

Conclusions

This paper has been looking at one of the most Europeanized internal policies such as Environment Policy, by analyzing the Directive 2003/35/EC on public participation and access to justice in environmental matters, which was adopted in order to increase the involvement and

participation of civil society in environmental policy area. The concept of civil society and especially the 'functional participation/representation' aspect of civil society that are presented in the first part of this paper, can be fully applied to explain the role and importance of this directive in practice in enhancing and improving the public participation and access to justice in environmental matters.

The directive on public participation in environmental decision-making processes, presents the concept of civil society referring to 'the public concerned' as a public that is affected or likely to be affected by, or having an interest in, the environmental decision-making processes; a public which alias is categorized as non-governmental organizations promoting environmental protection. In addition, in this Directive is well specified the role of the Member States in order to ensure that 'the public' is given early and effective opportunities to participate during the policy formulation phase, or review of the plans or programs that are required to be drawn up under specific environmental provisions.

Moreover, this directive provide political room for the civil society, by upholding the public' right to provide expertise or compliance in environmental decision-making processes (*functional participation*), contributing not only to a better policy-making process, but also to a better democratic representation (*functional representation*). Hence, this directive provides the necessary political tools in order to enhance and improve in practice functional participation/representation of civil society (the public concerned) in environmental decision-making processes.

Even though this directive tends to provide a political space and tools for public participation and access to justice in environmental issues, the categorization of the civil society in institutionalized organizations may lead to the politicization and corruption of the certain NGOs or business associations which may comply with certain environmental laws that maximize their economic interests instead of bringing expertise and public concerns during the environmental decision-making processes. Moreover, not every MS can provide the necessary political space and tools for civil society participation in decision-making processes and access to justice in environmental matters in order to strengthen and improve functional participation/representation.

Hence, the effectiveness of this directive in practice may be diminished due to national political will, legal system and especially weak role and low involvement of civil society.

In conclusion, this directive can be considered as a positive step towards strengthening 'non-parliamentary democratic structures' by implementing so the participatory model of the civil society; enabling civil society to participate in the decision-making processes (functional participation); and helping to reduce a certain 'democratic deficit' and so undermining the legitimacy of democratic decision-making processes (functional representation) (Smismans, 2003: 483). But, yet, while proposals and directives are approved to strengthen the consultation with the civil society organizations, especially during the formulation phase of the policy cycle, no concrete proposals are taken to delegate some policy task to them, such as implementation or evaluation of environmental policies.

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