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NGOs versus the right to ocean aquaculture

By Katherine Hawes

An insight into the legal support for non-governmental organisations regarding environmental protection of the seas

Along with the development of offshore and ocean aquaculture comes the legal challenges brought about by non- government groups (NGOs) who challenge development approval. It is not an easy process for NGOs to start legal proceedings leading to many of them resurrecting *acto popularis* as a legitimate means of public participation in environmental human rights.

For any individual to take action in the courts, there must be an actual case or 'controversy'. This means that they must have suffered an actual injury, or an injury is imminent which has been caused by the party they wish to take action against. In law terms this means that a person must have 'sufficient standing' to make a complaint.

In recent years, the U.S. Court of Appeals for the Ninth Circuit issued a decision on a very important lawsuit about ocean fish farming. In this lawsuit, several NGOs had taken action to stop the National Marine Fisheries Service NMFS (the federal agency responsible for conservation and management of ocean resources) from issuing a permit to an ocean fish farming company based in Hawaii.

Initially, the court ruled against the NGOs, stating that since aquaculture was a form of fishing, the NMFS had the right to issue the permit. In addition, the court also stated that they were under no obligation to study the impacts of allowing fish farms in federal waters, once the facility's activities had terminated.

However, an appeal was lodged on this decision and the International Convention Appellate Court reversed some of the lower court's decisions including the agency's argument that the NGOs did not have sufficient standing to take action.

In law, a larger scope

Within the legal world, it is generally accepted that a person who has suffered an injury has access to support from the legal system. However, when it comes to environmental human rights, this has a larger scope than the individual as it may affect a whole community. As a result, the Aarhus Convention has provided unlimited community access to justice, thereby re-establishing the concept of *acto popularis*.

The need for legal support for communities relating to environmental matters is not a new initiative and has been widely recognised. Principle 10 of the Rio Declaration of 1992 committed governments to the proposition that 'at the national level…. effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. Due to this, a legal re-think commences of who should have access to justice.

The Aarhus Convention entered into force on October 30, 2001. This Convention is a unique international legal instrument, which combines the subject of environmental protection with human rights and the responsibilities of public institutions and their associations towards the environment. It also distinguishes between public participation in decision-making and access to justice.

Environmental protection

Article 9(2) of the Aarhus Public Participation Convention states that access to justice should be available to the public when they are likely to be affected by, or having an interest in, environmental decision-making. This is called 'public concerned'. However, this is still a

restriction as Article 9(2) states that they must only have a 'sufficient interest' or who can assert 'impairment of a right'.

There are also further restrictions as although the Convention explicitly requires that NGOs 'be given the status of the public concerned' (and therefore allowed to sue), this is further qualified by allowing parties to put a stop to legal action by imposing 'other requirements under national law'. However these must be interpreted as 'consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention'.

The Convention also requires the parties 'to ensure' that members of the public have access to information and have access to judicial review. In part, the Convention draws on notions of international human rights law and it is intended to provide for participatory, informational and procedural rights in environmental matters, and a failure to do so implies a breach of human rights.

Instead of defining who may participate in environmental decision-making in terms of 'private' and 'public interest', the Convention refers to the 'public concerned'; meaning: the 'public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

The provision establishes a broad class of persons concerned, and it presumes that environmental NGOs are concerned in a legal sense. The parties to the Convention are also required to generally provide for the recognition of and support to environmental NGOs. Moreover, drawing on earlier European Conventions as well as the OECD recommendations on pollution policies, the Aarhus Convention prohibits discrimination with respect to the person's citizenship, nationality, domicile and, in the case of a legal person, the place of its registered seat or effective centre. This applies to access to information, participation in decision-making, and access to justice.

Although the wording of the Convention is vague; it sets out five means for enhancing participation:

1) Parties need to provide for '*early* public participation, when all options are open and effective public participation can take place'. This is essential, since the later the public gets involved, the more difficult it is to influence the decision.

2) Each party must *inform* the public concerned, by public notice or individually, about the proposed activity, the nature of possible decisions, the envisaged procedure and possibility of participating, the time-frames, and the place where information is being held.

3) The public is to be allowed to *submit comments*, either in writing or at hearings or inquiries that it finds relevant to the proposed activity.

4) Each party is to ensure that in the decision due account is taken of the outcome of the public participation. This is a critical moment in the decision-making process, since 'due account' is not very precise and thus provides leeway for the decision-making authority. Even though it does not amount to a veto of the public, the decision-making authority cannot simply do away with the comments and opinions without considering them seriously. Moreover, the decision must state the reasons and considerations upon which it is based.

5) The right to have the decision legally reviewed. Basically, access to justice, as defined by the Aarhus Convention, is a means of having erroneous administrative decisions on *environmental issues* corrected by a court or another independent and impartial body established by law. The right to access to justice pertains to two kinds of situations. First, any person who considers that his or her request for environmental information has been ignored, refused or not dealt with in accordance with the Convention, must be ensured access to a review procedure before a court or another independent and impartial body. Second, any member of the public having a sufficient interest or maintaining impairment of a right, must be ensured access to a review procedure before a court of law or another independent and impartial body, to challenge the substantive and procedural legality of any decision, act or omission concerning specific activities, which may affect the environment. Therefore, access to justice is not limited to cases where the participatory or informational rights of the Aarhus Convention are infringed, but must also be granted in order to challenge the substantive legality of a decision. In addition to decisions concerning specific activities, the parties are required ensure access to justice in cases concerning other relevant provisions of the Convention (e.g. decisions on plans and programmes) 'where so provided for under national law'.

The vague language and the fact that it essentially remains a matter for national law to determine what constitutes a sufficient interest and an impairment of a right, indicate the difficulties in drafting this part. Nevertheless, what is a sufficient interest and an impairment of a right should be defined in a manner consistent with the objective of the Convention, namely to give the public concerned 'wide access to justice'.

Two key things should be observed in this regard. First, according to the Convention, environmental organisations are deemed to have an interest in environmental decision-making and in the judicial review procedure sufficient interest to grant standing. Second, contrary to the principles established on access to the European Community Judicature, the Aarhus Convention does not require the persons 'concerned' to be more affected or more likely to be affected than the public in general. If the entire population in an area is likely to be affected, then all persons may participate and bring the case to court for review.

In conclusion, the right of groups and individuals to unfretted access to justice has not been fully embraced by the Convention. The vague language of the Convention and the fact that it essentially remains a matter for national law to determine what constitutes a sufficient interest and an impairment of a right, indicate the difficulties in expanding access to justice for public participation.

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