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DIGITAL CITIZENS' PARTICIPATION RIGHT IN DEFENSE OF THE ENVIRONMENT

ABSTRACT

The Aarhus Convention of June 25, 1998, of the United Nations Economic Commission for Europe on access to information, public participation in decision-making and access to justice in environmental matters, introduced the commitment of each signing State to ensure, within the framework of its national regulation, that citizens could suit and appeal any decision, or any action or omission that falls within the scope of public participation regarding issues on environmental matters. Hence, citizens are entitled to appeal administratively and judicially against public environmental decisions if they invoke a legal infringement in relation to this issue. Access to justice for violation of the rights of public participation are set out in the same terms on Regulation (EU) number 1367/2006, of September 6, relating to the application, to the institutions and community bodies, of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice on environmental matters. Although the right of access is quite broad, it is not exempt from exceptions, such as those indicated on the Directive 2003/4/EC of the European Parliament and of the Council, of January 28, on public access to environmental information, which has recently been interpreted by the Court of Justice of the European Union on the Judgement (First Chamber) of January 20, 2021 in the Land Baden-Württemberg case (Communications internes). However, all this is not useful if citizens are not granted with the possibility of accessing to control judicially administrative decisions that do not comply with environmental policies with the same extension, because the opportunity for any citizen to be entitled to effectively control these actions is being excluded. This paper aims to analyze the extent of the right of citizens to participate digitally in public

decision-making of an environmental nature, and determine if such right is consistent with the possibilities of access to justice in this matter, since only through judicially control of the administrative decisions it is possible to make the participation right effective.

KEYWORDS: *Environment, citizens' participation, digitization, judicial control.*

THE IMPORTANCE OF ENVIRONMENTAL PROTECTION

The protection of the environment has many dimensions, as has been reflected in the Sustainable Development Goals (hereinafter, SDG) that refer to environmental sustainability, which are, the SDG-13 (Climate action), SDG-14 (Underwater life), and SDG-15 (Life of terrestrial ecosystems), fundamentally. It is clear that these goals interact and are related to each other, so that progress on any one of them benefits the other two. Objectives regarding these three dimensions are included in the 2015 Paris Agreement¹. Although the relevance of the three dimensions is identical, in this moment, there is great concern about reversing the effects of climate change, identified with objective number 13 (Climate action), since its achievement will have a high impact on the other SDGs that aim to protect the environment.

Although, since the end of the 1980s, the interest of the international community on sustainability has been increasing progressively, one of the biggest problems to achieve effective results has been focused on the difficulties for implementation of legal measures with enforcement. So that, mechanisms to combat climate change have been only recommendations for years, due to conflicts of interest of economic nature that we can consider soft law² in a high percentage of the whole legal regulatory framework on this matter. Thus, the main drawbacks for the effectiveness of the regulatory measures

¹ United Nations (2015), *Paris Agreement*. Last access on April 25, 2021, and available at: https://unfccc.int/files/essential_background/convention/application/pdf/spanish_paris_agreement.pdf

² Nava Escudero, C., *Estudios ambientales*, 3a. ed., Instituto de investigaciones jurídicas de la UNAM, México, 2018, pp.709-710.

have been the difficulties in making any initiative enforceable³. For years, they have remained in the realm of the merely programmatic initiatives. Given the States sovereignty, the will of each State to ensure hard law initiatives on a national scope, following international guidelines, is a key. Although the trend is changing, and in recent years hard law regulations have been approved on this matter there are a lot of to do because soft law is still predominant⁴.

Similarly, concern about climate change began decades ago, but it was only very recently that a more widespread and consistent awareness of the dimensions of the danger it poses to the planet has been achieved. Initially, the trend towards global warming due to carbon dioxide emissions was pointed out in the middle of the 19th century by Eunice Newton Foote and John Tyndall, a phenomenon confirmed by the Nobel Prize winner Svante Arrhenius in 1896, and although at that time it was a problem for which there was scientific interest, the World Wars of the 20th century diverted attention to armed conflicts. Subsequently, it was in the 70s when the rise in temperatures began to be detected throughout the world, and it was appreciated that an increase in the concentration of carbon dioxide in the atmosphere would generate an anomalous warming that would reverse the historical cooling corresponding to the stage interglacial⁵. The Paris Agreement contains the commitment for balancing emissions to zero by the end of the XXI century, so that cannot be emitted more carbon dioxide emissions than the ones that can be absorbed by the nature, and fixing the limit of 2 Celsius degrees of annual warming⁶.

³ García Sánchez I.J., “El cambio climático”, *Cuadernos de estrategia*, Nº. 159, 2013, (Issue devoted to: Los potenciadores del riesgo), pp. 143-182.

⁴ Chicharro A., “El carácter de *soft law* de los instrumentos internacionales sobre desarrollo sostenible” in Domínguez Martín R. Y Tezanos Vázquez S. (Eds.), *Desafíos de los Estudios del Desarrollo: Actas del I Congreso Internacional de Estudios del Desarrollo*, Ed. Red Española de Estudios del Desarrollo, 2013, pp. 12-19; And Mazuelos Bellido, A., “Soft law: ¿Mucho ruido y pocas nueces?”, *Revista Electrónica de Estudios Internacionales* nº 8, 2004, available in www.reei.org; See too, Alarcón García, G., “El soft law y nuestro sistema de fuentes”, en Báez Moreno, y otros (coords.) *Libro-Homenaje del profesor Álvaro Rodríguez Bereijo*, Vol. 1, Tomo I, Ed. Aranzadi, Navarra, 2010, pp. 271-298. Finally, see Abbot K.W. y Snidal D., “Hard and Soft Law in International Governance”, in *International Organization* nº 54-3, Summer, Ed. The IO Foundation and the Massachusetts Institute of Technology, 2000, pp. 421-456.

⁵ Ruiz De Elvira, A., “Contra el cambio climático, un cambio de mente”. *La Revista del Ministerio de Medio Ambiente*, Nº. 114 (Issue devoted to: Acuerdo de París sobre cambio climático), 2016, pp. 34-43.

⁶ Moreno, J. M. “El Acuerdo de París, un primer paso”. *La Revista del Ministerio de Medio Ambiente*, Nº. 114 (Issue devoted to: Acuerdo de París sobre cambio climático), 2016.

There is a general consensus that the Paris Agreement will be much more effective in achieving its objective.

This is relevant, since currently, there is an international consensus that the problems generated by climate change have reached a stage from which, if they continue to worsen, the situation will be irreversible, so that our planet will suffer an increase of extreme meteorological phenomena that involve serious economic and social risk, and that will accelerate the loss of the environmental conditions that are necessary for the continuity of life in it. Some of these phenomena are already beginning to occur, having been identified as such the extreme snowfalls that occurred in January 2021 in Spain⁷, and the floods that occurred in July 2021 in Germany, Belgium and Austria⁸, moreover the appearance of new viruses capable of putting in hazard health security⁹ and global economic stability¹⁰.

In addition to the commitments assumed in the international framework, the concern for environmental protection is reflected in the regulatory initiatives of recent years of the European Union (hereinafter, EU), where the European Green Deal stands out¹¹, as part of a Sustainable Development Strategy of the EU between now and 2050, which aims to be truly unrelated to the overexploitation

⁷ Portillo G., “Filomena y nevadas en España 2021”, en *MeteorologíaenRed, sección Fenómenos meteorológicos*, (18/01/2021). Last Access on February 3, 2021, in <https://www.meteorologiaenred.com/filomena.html>

⁸ Informativos Telecinco-Europa Press, *Las fuertes inundaciones dejan más de 190 muertos en Alemania y Bélgica*, 15/07/2021. Updated: 19/07/2021. Last access July 20, 2021 in: https://www.telecinco.es/eltiempohoy/meteorologia/muertos-desaparecidos-inundaciones-alemania_18_3170748523.html

⁹ Gascuña D., “Virus y cambio climático: como confluyen estas dos amenazas”, in BBVA web (15/04/2020). Last access on February 3, 2021, in <https://www.bbva.com/es/virus-y-cambio-climatico-como-confluyen-estas-dos-amenazas/>

¹⁰ Roldán T., García Pascual A., y Rey P., “Política económica contra el coronavirus: impacto y respuestas para España”, *EcPol Insight*, ESADE, Madrid, 2020, pp. 1-16.

¹¹ European Commission (2019), Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *The European Green Deal*, Brussels, 11 December 2019, COM (2019) 640 final, last access on April 24, 2021 and available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0004.02/DOC_1&format=PDF; And also, European Commission (2019), *Annex to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal*, of December 11, 2019, COM (2019) 640 final. Last access on April 25, 2021 and available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0004.02/DOC_2&format=PDF

of natural resources, and whose main objective is to increase the well-being of citizens¹². Also domestically, the EU Member States are adopting measures consistent with international initiatives and those of the European Union. At the national internal level, it is irrelevant whether the administrative powers in environmental protection are of the State or of other regional or local territorial public administrations. Since it is considered that the fight against climate change affects the competences on environmental protection, in general, which is incumbent on all Public Administrations, and also, other competences in matters that contact them, due to the transversal nature of the issue¹³, may also be affected and confer powers to all Public Administrations that are responsible for them.

CITIZENS' PARTICIPATION ON ENVIRONMENTAL MATTERS

The implementation of formulas for public participation is one of the parameters of good administration, and it is considered Fundamental Citizen Right pursuant article 41 of the Charter of Fundamental Rights of the EU, but although the dissemination of information on environmental issues is necessary for citizens to exercise control over public action, it is also necessary that those who have the right to participate and know, can access justice to challenge irregular administrative acts.

The Aarhus Convention of June 25, 1998, of the United Nations Economic Commission for Europe on access to information, public participation in decision-making and access to justice in environmental matters^{14 15 16}, introduced

¹² Economic And Social Committee Of The European Union, Opinion of the European Economic and Social Committee on *Leaving no one behind when implementing the 2030 Sustainable Development Agenda*, (2020/C47/05), Recommendation number 1.6.

¹³ Jaria-Manzano J., "Jurisprudencia constitucional en materia de protección del medio ambiente", in *Revista Catalana de Dret Ambiental*, Vol. X Núm. 2, 2019, pp. 1 – 23.

¹⁴ Pons Portella, M., "La acción popular en asuntos medioambientales", *Revista de Administración Pública*, 206, 2018, pp. 185-186.

¹⁵ Wójcicka M, Łęski M. Prawo do informacji w kontekście ochrony prawnej konsumenta energii elektrycznej. In Sitek M, Niedziółka I, Ukleja A, eds, *Wymiary ochrony informacji i polityki bezpieczeństwa. Państwo-prawo-społeczeństwo*. WSGE, Józefów; 2014:167-182;

¹⁶ Judycka M. The Right to Information in the Light of European Standards of Human Rights. In Sitek B, Trzaskalik R, eds, *Zarządzanie informacją i energią w systemie bezpieczeństwa Unii Europejskiej*. , Józefów; 2011:273-291.

the commitment of each signing State to ensure, within the framework of its national legislation, that citizens could participate in the decisions regarding environmental issues and suit and appeal any decision, or any action or omission that falls within the scope of public participation on environmental matters, pursuant article 9.2 in relation with article 4.1 of the Aarhus Convention. Hence, citizens are entitled to appeal administratively and judicially against public environmental decisions if they invoke a legal infringement in relation to the participation right on environmental issue when they have a sufficient interest to act or, otherwise, when they invoke an attack against a right. In these cases, they could appeal before a judicial body or other independent and impartial body established by law in relation to the merits or the procedure, of any decision, or any action or omission that falls within the scope of public participation¹⁷.

In the European Union scope this Convention has its reflection on Regulation (EU) number 1367/2006, of September 6, about the application of the provisions of the Aarhus Convention in the EU territory on access to information, public participation in decision-making and access to justice in environmental matters. Although the right of access is quite broad, it is not free from exceptions, such as those referred on article 4 of Directive 2003/4/EC of the European Parliament and of the Council, of January 28, on public access to environmental information. These exceptions have recently been interpreted by the Court of Justice of the European Union in the Judgement (First Chamber) of January 20, 2021 in the Land Baden-Württemberg case (Communications internes)¹⁸. This judgment refers to the interpretation of this limits regarding public access to documents of the European Parliament, of the Council and of the Commission, because it is allowed denying access to a document prepared by an institution for its internal use or received by it, related to a matter on which the institution has not yet made a decision, if its disclosure would seriously impact the decision-making process of the institution, unless such disclosure is of higher public interest.

¹⁷ Economic Commission for Europe Environmental Policy Committee, UN, *Convention on access to information, public participation in decision-making and access to justice in environmental matters*. Last accessed November 14, 2020, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43s.pdf>

¹⁸ Judgement of the CJEU (First Chamber) of January 20, 2021 in the Land Baden-Württemberg (Communications internes) case, C-619/19 (ECLI: EU: C: 2021: 35).

This limitation must be interpreted in the sense that the concept of “internal communications” includes all the information that circulates within a public authority and that has not left the internal sphere of this authority on the date of the request for access. The limit could be applied if the information has not been or should not have been made available to the public before this reception and it can only be applied during the period in which the protection of the required information is justified, because these limits cannot be extended along all the time.

The same limitations are applied in the Member States of the European Union. Thus, for example, in Spain, 27/2006 Act includes the idea that citizens need to be able to enjoy the right to a healthy environment and fulfill the duty to respect and protect it, and for that they must have access to relevant environmental information, being entitled to participate in environmental decision-making processes and having access to justice when such rights are denied. The possibility of taking actions against administrative acts that limit the right to citizen participation in this area is recognized for all citizens, on articles 3.3.a), 20 and 21 of 27/2006 Spanish Act. It is remarkable that access to justice is being recognized for all citizens in the event that they are denied to participate on environmental decision-making processes, not to challenge acts in which they are not interested, when they have not been denied the right to participate on public processes on environmental matters.

THE DIGITIZATION IMPACT ON CITIZENS’ RIGHTS CATALOGUE

when there are no limitations to the participation right, the possibilities of access to the due information have been increased as a consequence of the fact that the use of new technologies eases the access to public information’s enhancing transparency and accountability. But there are much more to do in this scope, and we are in the way because on March 9, 2021, the Commission presented the document *Vision and pathways for Europe’s digital transformation by 2030*, establishing a catalogue of digital rights, as freedom of expression, and the right to access to diverse, reliable and transparent information. All of them are built on digital principles,

among which we can highlight the following ones, due to their connection with the subject we are dealing with: the use of a safe and reliable online environment, the access to environmentally friendly digital systems and devices, the existence of an accessible and human-centered digital Administration and public services, and ethical principles applicable to human-centered algorithms.

This project is built over the former European strategy so-called *Shaping Europe's Digital Future* that includes some actions to consolidate a real digital access rights for citizens, and some of them are currently yet implemented and other are in the way. This strategy includes the approval of a *White Paper on Artificial Intelligence*, and also building and deploying cutting-edge joint digital capacities in the areas of Artificial Intelligence related with the *European Strategies on Quantum and blockchain* (implemented on 2020), and accelerating investments in Europe's connectivity. The strategy includes the approval of an *European cybersecurity strategy*, and the application of a *Digital Education Action Plan* too, to boost digital literacy and competences at all levels of education (implemented on 2020). Furthermore, it supposes to reinforce *Skills Agenda to strengthen digital skills on European citizens and to reinforce EU governments' interoperability strategy* to ensure coordination and common standards for secure and borderless public sector data flows and services (implemented on 2021).

All the former actions will be essential to set a digital right to access information on different public scopes, and of course, regarding environmental issues being it the main tool for citizens to control de public activity on this matter. The *European digital strategy* involves actions that imply a real improvement for the right to access, enhancing the digital participation right with benefit for democracy.

CITIZENS' PARTICIPATION EFFECTIVENESS IN THE SCOPE OF ENVIRONMENT PROTECTION

Despite the former actions that suppose a real effort to make more accessible the participation right using digital technologies, its effectiveness is still the weakest point. In this sense, it is needed some legal improvement to access to judicial control of the public decisions once the citizens would have got to know them. But regarding this question there is a lot to do for the moment, because all this digital infrastructure is not useful if citizens are not granted with the possibility of accessing to judicial control regarding administrative acts that do not comply with environmental policies with the same extension of the right to access, thus the opportunity for any citizen to be entitled to effectively control these actions is being excluded.

For that, it is a must to relax the requirements provided on Regulation (EC) number 1367/2006, of September 6, for accessing to justice in environmental matters, and to initiate a judicial procedure, because this requirements are: to be an association that have included in its statutes the protection of the environment, having been legally constituted at least two years before the exercise of the judicial action, and having been actively exercising their activities in this period developing their activity in a territorial area that is affected by the public action, or administrative omission.

As a consequence of the fact of demanding the aforementioned requirements, it is considered that we are facing a legal authorization to litigate but not a citizen action¹⁹. In any case, entitlement is not granted individually, beyond being able to sue in defense of the right of participation or access, since individual action is limited to cases in which the appellant is interested in a specific procedure. Perhaps, the explanation for the existence of this

¹⁹ Peñalver I Cabré A., “Nuevos instrumentos para la aplicación de la legislación ambiental ante la inactividad administrativa. De las acciones ciudadanas (*citizen suits*) al Convenio de Aarhus”, *Revista de Administración Pública*, 172, 2007, p. 481. And PEÑALVER I CABRÉ A., “El impacto del derecho de la unión europea en el acceso al contencioso-administrativo español ambiental”, en López Ramón F. Y Valero Torrijos J. (coords.) *20 años de la Ley de lo Contencioso-administrativo*, INAP, Madrid, 2019, p. 131. See too, Pons Portella M., “La acción popular en asuntos medioambientales”, *Revista de Administración Pública*, 206, mayo-agosto, 2018, p.191.

difference in the entitlement of both types of actions lies on the fact that, for a part of scientific literature, the right to enjoy an adequate environment is a collective or trans-individual right²⁰, and not strictly individual, which is the character that can be attributed to the action granted to all people in cases of violation of the right to citizen participation, that is also based on democratic reasons²¹ and good administration²².

These limitations that are foreseen in the scope of the European Union, and in the national laws of the majority of Member States in their internal regulations, differ from the possibilities to exercise the action in defense of the environment that any citizen has through the citizen suits, in the North American legal system, which allows “any person to sue other people, whether public or private, for certain breaches of environmental laws”²³, although it is necessary to allege individual harm derived from the action against which the litigation is addressed²⁴.

In this regard, it should be highlighted that, very recently, the revision of the Aarhus Convention agreements has been proposed by European authorities, through a Communication from the Commission so-called *Improving access to justice in environmental matters in the EU and its Member States*, of October 14, 2020. The Commission proposes to encourage improvements in access to administrative justice, especially improving the active entitlement of non-profit entities and individuals directly affected by an infringement of environmental legislation. The Commission pointed out that one of the greatest obstacles

²⁰ Hachem W. y Klein Gussoli F., “La multifuncionalidad y doble titularidad (individual y transindividual) del derecho fundamental al medioambiente”, *Revista Catalana de Dret Ambiental* Vol. X Núm. 2, 2019, p. 7.

²¹ Barnés J., “Buena administración, principio democrático y procedimiento administrativo”, *Revista Digital de Derecho Administrativo*, nº 21, Universidad Externado de Colombia, 2019, p. 112.

²² Sitek M., “Human / society’s right to information on the environment. Reception of selected issues of the Aarhus Convention into the EU and Polish law”. *Journal of Modern Science* 42 no. 3, 2019, p. 186.

²³ Pons Portella, M., “La acción popular en asuntos medioambientales”, *Revista de Administración Pública*, 206, 2018, p. 192.

²⁴ Niro W.L., “Standing to Sue in Environmental Litigation: Sierra Club v. Morton”, en *DePaul Law Review*, Volume 22, Issue 2 Winter (1973), p. 452. In relation with the case law of the US Supreme Court in *Sierra Club v. Morton* 405 U.S. 727, 1972). See too, Jordano Fraga J., “El contencioso ambiental: la larga marcha por el *standing to sue* en el estado ambiental de derecho”, en López Ramón F. Y Valero Torrijos J. (coords.) *20 años de la Ley de lo Contencioso-administrativo*, INAP, Madrid, 2019, p. 36.

that should be removed is the possibility of bearing costs that are described as “prohibitive”²⁵. But it does not introduce an enhancement in the scope of the possibilities of access to justice to individuals who consider themselves injured if they are not interested parties on administrative procedures.

The European Commission has recently stressed that it is necessary to harmonize internal rights to eliminate undue restrictions on procedural capacity²⁶, in favor of effective protection of environmental rights such as water, nature and air quality, which affect the fight against climate change, as deduced from the case law of the Court of Justice of the European Union (Case C-240/09, on the *Lesoochranárske zoskupenie* case, ECLI: EU: C: 2011: 125, paragraphs 47-48)²⁷. For this reason, such unification should contemplate the aforementioned extension in relation to entitlement and judicial standing, since environmental actions serve to defend the environment in all cases, and in particular, they can be a useful tool in the fight against climate change, to adapt its now projected regulation to the criteria that prevail from supranational instances, and that agree with the idea of expanding access to justice on administrative matters in defense of the environment.

As a result, while citizens are seeing improved currently their right of access to environmental information by application of artificial intelligence, they will not be able to litigate in defense of the environment individually, which should be considered a key element for making effective the right of access to information in defense of environment as a public control democratic tool.

²⁵ European Commission (2020), Communication from the Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions named *Improving access to justice in environmental matters in the EU and its Member States*, Brussels, 14.10.2020 COM (2020) 643 final, numbers 5 and 30.

²⁶ In this sense, see, the Judgment of the CJEU issued in the joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and others*, and case C-182/10, and others / *Région wallonne* Case C-240/09, *Lesoochranárske zoskupenie*, ECLI: EU: C: 2011: 125, and Case C-197/18 *Wasserleitungsverband Nördliches Burgenland*. And too European Commission (2020), Communication from the Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled *Improving access to justice in environmental matters in the EU and its Member States*, Brussels, 14.10.2020 COM (2020) 643 final, number 37.

²⁷ European Commission, cit. Communication from the Commission, to... COM (2020) 643 final, number 23.

CONCLUSIONS

The protection of the environment requires measures that entail enforcement, both for individuals and for public entities. Regarding the control of activity in the public sphere, citizen control is a fundamental tool through the right of access to public information, which is a right that is not exempt of limitations, but is currently quite broad. The use of digital media favors the exercise of this right, which is expanded in practice. However, its effectiveness is limited if there is no possibility of litigating when the right of access to public information do not includes the possibility of challenging actions that are deemed harmful in relation to the environment. The most recent proposals of the European Union on this matter tend to propose improvements in relation to the right of access, and also to facilitate access to justice in cases where litigation can already be done today. However, the right of access to public information lacks effectiveness if access to justice is banned for individual citizens in the majority of cases.

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