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Judicial Control in a Globalised Legal Order – A One Way Track?

An Analysis of the Case C-263/08 *Djurgården-Lilla Värtan*

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Abstract

This article examines the preliminary ruling given by the Court of Justice in the Djurgården-Lilla Värtan *case. The case involves the Swedish implementation of the Aarhus Convention via an EU Directive, granting right to access to justice to environmental non-governmental organisations (NGOs). Even though the Aarhus Convention and the Directive both state that the right to access to justice is granted only to NGOs "meeting any requirements under national law", the Court of Justice found that Swedish requirements were too restrictive. The question arises whether there is still room for the Member States to choose other enforcement models rather than judicial control when monitoring the implementation of EU law. If not, how does this affect the constitutional systems of the Member States as a whole? More precisely, what about the national parliaments?*

1 Introduction

In *Djurgården-Lilla Värtan*,[1] the Court of Justice of the European Union found that the Swedish implementation of Directive 85/337, as amended,[2] giving NGOs standing, and consequently, access to justice, with regards to matters covered by the Directive, was incorrect. The Swedish legislation stated that only organisations that had as their objective the protection of nature and the environment, have carried out activities in Sweden for at least three years and had more than 2,000 members, could enjoy

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1 C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd* ECR [2009], nyr. See also the related case C-24/09 *Djurgården-Lilla Värtans Miljöskyddsförening v. AB Fortum Värme samägt med Stockholms stad*, ECR [2010], nyr, regarding the interpretation of Council Directive 96/61/EC concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

2 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, hereinafter "Directive 85/337".

this right of standing. The last requirement meant that in practise only two organisations in Sweden were large enough to pass this test. The rules in the Directive are the result of the implementation of UN/ECE[3] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention, which the EU, the Member States and 19 other countries signed in 1998. A key part of the Convention is to strengthen the role of environmental NGOs, giving them a right to information, participation and the right to access to justice within the environmental field.

The Aarhus Convention, as well as Directive 85/337, states that the right to information, participation and access to justice is granted only to NGOs meeting *any requirements under national law*. This would, at least at first glance, seem to place the right of deciding the specific conditions for awarding the right to access to justice on the Member States. On the other hand, Advocate General Sharpston held in her opinion of the case that according to her, the specific provisions in the Aarhus Convention and the Directive regarding the right of access to court for NGOs were actually not even necessary in order to conclude that Swedish law was contrary to EU law. The Swedish NGOs could thus have relied on the EU principle of effectiveness alone to ensure themselves access to court. The question asked in this article is how far reaching this interpretation of the principle might be. Is it still possible for the Member States to choose a different enforcement model over the implementation of EU policies or is judicial control the only way forward?

2 The Case *Djurgården-Lilla Värtan*

The Land Council (*marknämnd*) Stockholm municipality, had awarded a contract to a private enterprise to lay a high-voltage power line underground in the northern part of Djurgården in Stockholm. To be able to carry out this work, certain arrangements for abstracting and recharging groundwater had to be made. On examining the project, the County Administrative Board (*Länsstyrelsen*) in Stockholm County found the groundwater arrangements to be of such a nature that they could have significant effects on the environment, whereby the matter was referred to the Environmental Chamber (*Miljödomstolen*) at the Stockholm District Court, for an extended administrative procedure, including an environmental impact assessment. *Djurgården-Lilla Värtans miljöskyddsförening*, ("DLV"), a small association for environmental protection, locally established in the area where the high-voltage tunnel was to be built, submitted briefs within this administrative procedure opposing the application. After the Environmental Chamber of the Stockholm District Court had granted the development consent, DLV

[3] ECE stands for Economic Commission for Europe, an organ within the UN.

appealed the decision to the Environmental Appeal Chamber of the Svea Court of Appeal (*Miljööverdomstolen*).

2.1 The Legal Issue

The Environmental Appeal Chamber of the Svea Court of Appeal found the appeal to be inadmissible, since DLV did not meet the requirement in the Swedish Environmental Code (*miljöbalk*),[4] that it had to have a minimum of 2,000 members in order to appeal against the decision at hand. Even though DLV had been working actively with environmental question in the Djurgården-Lilla Värtan area in Stockholm for 25 years, the organisation in fact had only 300 members. DLV appealed the decision to the Swedish Supreme Court (*Högsta domstolen*), arguing that Swedish law must be interpreted in light of the Aarhus Convention and Directive 85/337, hence giving DLV a right of access to Court.

The Supreme Court decided in May 2008 to stay the proceedings and refer three questions to the Court of Justice for a preliminary ruling. The first was a rather technical question as to the scope of the Directive and whether the work at issue fell within its scope, and is not dealt with further here. The second and the third question regarded the right to appeal decisions taken under the Directive; when does the right to access to justice apply and who may rely on the right. These questions are discussed in section 2.2 and 2.3 respectively. In section 2.4 the judgement of the Supreme Court in the case is discussed.

2.2 When Does the Right of Access to Justice Apply?

With respect to the second question, the Supreme Court enquired about the connection between the right of the concerned public to have access to a review procedure and the right to participation in the administrative procedure, namely, whether the concerned members of the public had the right to challenge a decision of a court in development consent proceedings, even in cases where they already had been given the opportunity to participate in the decision-making procedure of the court.

The background to the questions is that the Swedish system is quite generous in including the concerned public in the first stage, the administrative stage, but rather restrictive in allowing members of the public to challenge decisions (see further section 3.2). While any party may take part in the decision-making process in the first stage, the right to challenge a decision is limited to either parties having an interest in the matter, certain trade unions organising workers in the activity concerned, or to NGOs active in

4 Paragraph 16:13 of the Code (1998:808).

Sweden for at least three years, with at least 2,000 members.[5] When development consent is sought for a project that may have significant effects on the environment, the proceedings are carried out by a specialised environmental court, as in the *Djurgården-Lilla Värtan* case, where the consent decision was taken by the Environmental Chamber of the Stockholm District Court. In its second question, the Supreme Court therefore wanted to know if the right to a review procedure could be considered to have been exhausted already in the proceedings leading to the decision, since these proceedings were conducted by a court, or if the concerned public still had a right to challenge that decision.

In answering the question, the Court of Justice stated that the right of participation and the right to a review procedure were two separate rights, with two separate purposes. Article 10a of Directive 85/337, following the amendments introduced in implementing the Aarhus Convention, gives concerned members of the public who fulfil certain conditions a right to a review procedure before a court of law or other independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions falling within its scope. This article should be read in conjunction with Article 1(2) of Directive 85/337, stating that any NGO which promotes environmental protection and meets the conditions which may be required by national law, satisfies the criteria of belonging to the concerned public, for example as referred to in Article 10a.[6] The Court of Justice went on to state that the concerned public was also guaranteed effective participation in environmental decision-making-procedures with regards to projects likely to have significant effects on the environment, Article 6(4) read in conjunction with Article 2(2).[7]

The fact that Sweden has chosen to allocate the task of granting development consent to a court of law instead of an administrative body therefore did not change the status of the proceedings from administrative to judicial, it simply meant that the court exercised administrative powers.[8] The two stages cater to different purposes and therefore are not interchangeable. In the words of GA Sharpston:[9]

> Article 6 of Directive 85/337, as amended, concerns an administrative procedure which brings together the views of all interested parties in order to

5 Regarding the right of standing, see paragraphs 16:12 and 16:13 of the Environmental Code. Further, see Darpö, Jan, *Biological Diversity and the Public Interest*, de Lege, Yearbook of the Faculty of Law, Uppsala University, 2009, pp. 226 and Ebbesson, Jonas, *Sweden*, Ebbesson, Jonas (ed), Access to Justice in Environmental Matters in the EU, Kluwer, The Hague, 2002, p. 447.

6 Case C-263/08 *Djurgården – Lilla Värtan*, at paras 33 and 35.

7 *Ibid*. at para 36.

8 *Ibid*. at para 37-38.

9 Opinion of GA Sharpston in *ibid*. at para 35.

> take an environmental policy decision. Given the administrative authorities' wide discretion when conducting an environmental assessment leading to a planning decision, the legislation promotes maximum participation so as to ensure that the measure adopted will be lawful, but also correct from technological, social, economic and other perspectives. Judicial proceedings, in contrast, involve a dispute between parties focusing principally on questions of law and their subsequent application to particular facts.

The Court of Justice concluded that the two stages are separate and with different purposes, therefore participation in the decision-making procedure had no effect on the conditions for access to the review procedure.[10] The fact that Sweden is generous in its definition of the public in the first stage does not give Sweden any margin of discretion to reduce the right to review procedure in the second stage. Instead, NGOs fulfilling the conditions of the Directive and the Aarhus Convention have an independent and automatic right to both administrative participation and access to justice.

2.3 Who has Access to Justice?

The conclusion by the Court to the second question is directly connected to the third question posed by the Supreme Court, whether it is possible to interpret Articles 1(2), 6(4) and 10a of Directive 85/337 as meaning that different national requirements can be laid down with regard to the concerned public in the two stages of the Directive, the administrative stage and the judicial stage, with the result that small, locally established environmental protection associations would have the right of participating in the administrative stage, but not to appeal the decision in the judicial stage.

This question is also closely connected to the specific system laid down in Swedish environmental law, and even though the Supreme Court did not specifically ask for a review of whether the Swedish solution is compatible with the Directive, the Court of Justice read this into the question, transforming it into the core of its answer to the Swedish court. The Court of Justice stated that it was clear from the order for reference, the file submitted to the court, and the arguments put forward at the hearing, that the reason for the third question was the existence in the relevant national legislation of the rule that only an association with at least 2, 000 members may bring an appeal against a decision adopted on an environmental matter.[11]

The Court of Justice started out by stating that Directive 85/337 in fact distinguishes between the concerned public with regard to matters falling under the Directive in general on one hand, and a sub-group of natural and legal persons within the concerned public who, because of their particular

[10] Opinion of GA Sharpston in *ibid*. at para. 38.

[11] *Ibid*. at para 41.

position in the matter at issue, are entitled to challenge a decision according to Article 10a, on the other.[12] Article 10a of the Directive specifies two general conditions for admissibility of the actions that Member States may apply, either 'sufficient interest' or 'impairment of right', but leaves it to the Member States to determine those factors that should constitute these conditions, reminding the Member States that the requirements must be consistent with 'the objective of giving the concerned public wide access to justice'. However, with regards to environmental NGOs, it follows from Article 1(2) of Directive 85/337, read in conjunction with Article 10a, that any NGO 'meeting any requirement under national law' is to be regarded either as having 'sufficient interest' or as having rights which are capable of being impaired by matters under the Directive. Any NGO fulfilling the conditions in Article 1(2) should therefore, also be considered as fulfilling the conditions set out in national law for challenging decisions under Directive 85/337.

Even though this information would have been enough to answer the question of the Supreme Court, namely that the room for manoeuvrability for Member States when deciding which NGO should enjoy procedural right under Directive 85/337 lies in Article 1(2), which in turn, is the key to both the participation rights in Article 6(4), in conjunction with 2(2), and the access to justice in Article 10a, the Court of Justice continued discussing how broad this room for manoeuvring actually was:[13]

> While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

The obligation of the Member States to ensure access to justice is given two separate legal grounds. First, the Directive itself requires the Member States to ensure a 'wide access to justice', and secondly, the national rule must render effective the provisions of the Directive. This second ground for the obligation of the Member States must therefore be found outside the specific Directive at hand, namely in the general obligation on the Member States to be loyal to the Union, specified in the doctrine of direct effect

[12] *Ibid*. at para 42.

[13] *Ibid* at para 45.

and supremacy, including the limitations on Member States within what is commonly referred to as their institutional and procedural autonomy, in short, the general principle of effectiveness. The Member States are under a general obligation to render provisions of EU law effective. From here, the Court of Justice did not have any difficulties concluding that Directive 85/337 precluded national law such as the Swedish, reserving the right to appeal in the Directive solely to NGOs with more than 2,000 members.

As mentioned above in the introduction, GA Sharpston went even further in her opinion, stating that the second ground brought forward by the Court of Justice, would in itself be sufficient to ensure DLV access to Court:[14]

> Finally, I add that, in my view, the result would have been the same had there not been a specific provision such as Article 9 of the Aarhus Convention or Article 10a of Directive 85/337, as amended. The case-law of the Court contains numerous statements to the effect that Member States cannot lay down procedural rules which render impossible the exercise of the rights conferred by Community law.[15] Directive 85/337, which introduces a system of environmental assessment and confers rights, would be stripped of its effectiveness if the domestic procedural system failed to ensure access to the courts. The present case is clear proof that, given that access to justice is made impossible for virtually all environmental organisations, such a measure would fall foul of the Community law principle of effectiveness.

According to this reasoning, Member States have a duty to ensure an effective legal protection to the right awarded to NGOs in Directive 85/337, apparently separate from the right to access to justice, even without the specific provisions such as those in Article 10a in Directive 85/337, and its equivalent in the Aarhus Convention. The procedural rights of access to a court laid down in the Directive and Convention would thereby already be included in the general principles of EU law.

This is a broad interpretation of the principle of effectiveness. Even if it is well-established in case law that Member States must provide individuals with effective remedies to allow them to defend their EU-rights before courts,[16] the Court of Justice has admittedly also accepted national procedural orders that in practise leave quite narrow access. In another Swedish case on access to court, the *Unibet*-case,[17] the Court of Justice accepted the

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[14] Opinion of GA Sharpston in *ibid.* at para 80.

[15] Opinion of GA Sharpston in *ibid.*, referred to joined cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, at para 17, case C-129/00 *Commission v Italy* [2003] ECR I-14637, at para 25, case C-432/05 *Unibet* [2007] ECR I-2271, at para 43 and joined cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233.

[16] For examples the cases cited by GA Sharpston, footnote 15 *supra*.

[17] Case C-432/05 *Unibet v. Justitiekanslern* [2007] ECR p. I-2271.

Swedish rejection of an application for a declaratory judgment for a party, content with declaring that as long as there were alternative ways to access the court, the right to an effective remedy was fulfilled, even though in reality the alternatives must be considered rather difficult to pursue.[18]

The question raised here is what is role that the principle of effectiveness and the right to access to court ought to have in today's EU law. Has judicial control become the only conceivable way to monitor Member States, national authorities and their application of EU law? If so, how does this affect the relationship between the courts and other organs pursuing control mechanisms in the Member States? Besselink argues that the counterweight to the executive is no longer the parliaments, but the courts.[19] The question then becomes, where does this leave the national parliaments?

2.4 The Judgment of the Supreme Court

In its decision following the preliminary ruling from the Court of Justice, the Supreme Court closely followed the interpretations laid down by the Court of Justice.[20] The Supreme Court stated that the Court of Justice had clarified that the issue at hand in the case fell within the scope of Directive 85/337 and that the Directive, within its scope of application, hindered national legislation restricting access to justice for environmental NGOs with less than 2,000 members. Consequently, the Supreme Court found that the relevant provision of Swedish law, paragraph 16:13 of the Environmental Code, was not to be applied in the case. The Supreme Court further noted that the relevant provision at the time was subject to review by the legislature in order to adjust it to the preliminary rulings of the Court of Justice.[21] The Supreme Court thus decided to set aside the dismissal of DLV's appeal and to refer the case back to the Environmental Appeal Chamber of the Svea Court of Appeal for a review of the merits of the case. The case was still pending before this court in the middle of October 2010.

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[18] In *Unibet*, the alternative way in effect consisted of initiating a Member State liability action, which can be quite a cumbersome procedure. See further Andersson, Torbjörn, *Abstrakt lagprövning – en aspekt på Unibetmålet*, in Heckscher, Sten & Eka, Anders (ed), Festskrift till Johan Hirschfeldt, Iustus, Uppsala, 2008.

[19] Besselink, Leonard F.M., *Shifts in Governance: National Parliaments and Their Governments' Involvement in European Union Decision-Making*, in Barrett, Gavin (ed), National parliaments and the European Union: the Constitutional Challenge for the Oireachtas and other Member States Legislatures, Clarus Press, Dublin, 2008, p. 31.

[20] Supreme Court decision of the 7 July 2010 in case number Ö 1824-07.

[21] The Supreme Court also referred to the preliminary ruling in the related case C-24/09 *Djurgården-Lilla Värtans Miljöskyddsförening v. AB Fortum Värme samägt med Stockholms stad*, ECR [2010], nyr, regarding Directive 96/61, as amended.

3 The Role of NGOs in the Enforcement of Law

International law has always had problem with enforcement. There is no world government to execute what the world legislator has enacted. Instead, the implementation of international law is too often dependent on the goodwill of the signatory states. In EU law, the task of enforcing which has been decided on jointly at the European level, at least traditionally, has also to a large extent fallen upon each Member State, within each legal order, according to each individual constitutional regime. However, in contrast to international law in general, EU law contains several mechanisms at the European level to ensure an effective control of the implementation of its provisions within the national legal orders, for institutional enforcement, through public institutions or organs, and private enforcement, initiated by individuals, either private or legal persons, via judicial control. The most important mechanism for institutional enforcement vis-à-vis the Member States is the possibility for the Commission to initiate infringement proceedings (Article 258 TFEU), whereas private enforcement may be carried out through national courts which have been granted the right and obligation to refer questions to the Court of Justice for preliminary rulings (Article 267 TFEU).[22] The Court of Justice in its case law has fortified this preliminary ruling mechanism with a toolkit of doctrines and principles, with the dual aim of encouraging and obligating national courts to do their part of the work in ensuring the functioning of the 'complete court system of the EU',[23] for example through the principle at issue here, the principle of effectiveness. It may be readily accepted that it is the preliminary ruling mechanism, together with the case law of the Court of Justice, with its dynamic doctrine of direct effect and supremacy and the weight laid upon ensuring the loyal cooperation of the national courts, that has enabled the EU to escape the implementation trap of traditional international law.[24]

[22] There is further a mechanism for mutual cooperation within the area of auditing the EU budget, article 287 TFEU, even though the practical importance of this cooperation has so far been limited, see further Reichel, Jane, *Ansvarsutkrävande – svensk förvaltning i EU*, Jure, Stockholm, 2010, pp. 142.

[23] An understanding of the common task of the Union courts and national courts developed by the court in case 294/83 Parti écologiste "Les Verts" v. European Parliament [1986] ECR p. 1339, at para 23.

[24] Harlow, Carol, *Accountability in the European Union*, The collected courses of the Academy of European Law, Oxford University Press, 2002, p. 147, Douglas-Scott, Sionaidh, *Constitutional law of the European Union*, Longman, Harlow, 2002, pp. 225 and Andersson, Torbjörn, *Rättsskyddsprincipen: EG-rätt och nationell sanktions- och processrätt ur ett svenskt civilprocessuellt perspektiv*, Iustus, Uppsala, 1997, p. 276.

3.1 NGOs as Tools for Enforcement in a Globalised Legal Order

In an enforcement model based on the initiatives of individuals, there is always a risk that those individuals with the economic and logistic resources to take matters to court are not representative of the public at large, and the issues pursued do not reflect the will and needs of the many. It is no secret that free movement cases within EU law have more than their fair share of cases related to alcohol, pornography and gambling. It is easier to go to court in order to have obstacles to trade torn down, than to go to court to defend the right to a balanced market.[25]

Granting the right to participation and access to justice to NGOs active in a policy area which the international legislator, the EU or the UN, wants to promote may be an advantageous alternative for channelling the voice of the public. In environmental law, the negative effects of an environmentally hazardous activity, even when carried out with all the permits and consents needed and with the support of the government is, first and foremost, felt by those other than the ones involved in its permission. If solely the government or a public authority and the polluting industry are involved in the process, and solely their arguments are taken into account in balancing the interests of economic growth against environmental protection, there is a risk that the interest of those affected will not be weighed in properly. In these circumstances, NGOs may play a central part in pursuing what is sometimes referred to as "environmental justice", a movement focusing on the 'unfair' distribution of the negative impact of modern society.[26] The polluter may be acting in another country, another region or even locally, but even so it might be difficult for individuals to act against the polluter on their own. It is therefore assumed that the availability of litigation rights for environmental associations foster better environmental law enforcement.[27] Further, NGOs may play an important role in enforcing environmental issues in situations where no private or legal person is concerned in a legally

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[25] Weatherill, Stephan, *Addressing Problems of Imbalanced Implementing in EC law: Remedies in an Institutional Perspective*, Kilpatrick, Claire, Novitz, Tonia & Skidmore, Paul (ed), The future of remedies in Europe, Hart, Oxford, 2000, pp. 100.

[26] Ebbesson, Jonas, *Comparative Introduction*, Ebbesson, Jonas (ed), Access to Justice in Environmental Matters in the EU1567, Kluwer, The Hague, 2002, p. 8. Another term sometimes used in these circumstances is "environmental democracy", relating to the participation of the public through environmental NGOs, see Darpö, *Biological* Diversity and the Public Interest, op cit footnote 5, pp. 220 with further references.

[27] de Sadeleer, Nicolas , Roller, Gerhard & Dross, Miriam, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal*, Europa law publishing, Groningen, 2005, p. 175.

relevant manner in order for them to be granted access to court, for example regarding questions of biodiversity.[28]

This role of NGOs as a tool for enforcement is also relevant in other areas of the law, where the interest of the members of the public may come into conflict with the interests of economically stronger parties, such as consumer law and laws on the protection of social rights. In both of these areas, there are examples of how NGOs have been assigned a role to contribute to the monitoring of the implementation and respond to incorrect enforcement of the enacted legislation, within EU Consumer law[29] and within the Council of Europe, with the Social Charter.[30]

NGOs may, however, also have an agenda that is not welcomed by the international community, and even be considered a threat to world peace. In another case with a partial Swedish connection, the well-known *Kadi and Al Barakaat* case, the roles were reversed. One of the parties to the case was a small Swedish association, Al Baracat International Foundation, initially together with three of its members, who found themselves blacklisted by the UN because of a suspected connection to Al Qaeda and Osama bin Laden. In this case, it was the NGO and its members who turned to the Courts of the European Union, the General Court[31] and on appeal the Court of Justice,[32] in order to seek judicial protection from the far-reaching effects of the UN sanctions. These issues are revisited below.

3.2 The Role of NGOs in Swedish Environmental Matters

In organising an enforcement model for environmental law, Sweden has chosen a different path from the one described above. Until the Swedish Environmental Protection Agency was established in the late 1960's, some environmental NGOs were granted the right to appeal mat-

[28] Darpö, Biological Diversity and the Public Interest, op cit footnote 5, p. 215.

[29] For example, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. See further Micklitz, Hans-Wolfgang, *Collective Action of Non-governmental Organisations in European Consumer and Environmental Law – A Mutual Learning Process?*, Macrory, Richard (ed), Reflections on 30 years of EU environmental law: a high level of protection?, Europa Law, Groningen, 2006.

[30] Article 1 a-c of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. See further Lind, Anna-Sara, *Sociala rättigheter i förändring: en konstitutionellrättslig studie*, Juridiska institutionen, Uppsala universitet Uppsala, 2009, p. 240.

[31] Case T-306/01 Ali Yusuf and Al Barakaat International Foundation v. Council and Commission [2005] ECR p. II-3533.

[32] Case C-402/05 P Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR p. I-6351.

ters under the current legislation, in order to protect public environmental interests. With the establishment of the Environmental Protection Agency, the role of representing the will and interest of the public in this area was assigned to the agency alone, and the rights of the NGOs were repealed.[33] On the other hand, other kinds of NGOs, certain trade unions and in some circumstances consumer associations, continued to enjoy the right to appeal environmental matters, and still do.[34]

The restrictive Swedish view on private enforcement in environmental matters, here in the form of procedural rights for NGOs, is representative of the Swedish approach in general. The Swedish constitutional system rests upon the principle of the sovereignty of the people, with Parliament as the foremost representative of the people.[35] The Swedish democratic model has therefore been described as majoritarian rather than constitutional, with the state identifying itself with majoritarian or paternalistic policies.[36] The right to judicial appeal in administrative matters has in general been secondary, or even non-existent, in the traditional Swedish administrative model.[37] Institutional enforcement through public authority, often in the form of ombudsmen,[38] on the other hand has held a strong position in Swedish law, at least apart from the labour market.[39]

Even so, the international debate on the role of NGOs in environmental matters did not leave the Swedish legislator unimpressed. In the late

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[33] Darpö, Biological Diversity and the Public Interest, op cite footnote 5, pp. 202. See also Ebbesson, Sweden, Access to Justice in Environmental Matters in the EU, op cite footnote 5, p. 450. The right of NGOs to participate in the administrative stage however has always been extensive in Swedish law.

[34] Ebbesson, Sweden, Access to Justice in Environmental Matters in the EU, op cite footnote 5, p. 451 and paragraph 16:12 of the Environmental Code

[35] Paragraph 1:1 and 1:4 of the Swedish Constitution, the Instrument of Government.

[36] Nielsen, Ruth, *Scandinavian Legal Realism and EU law*, p. 261 and Bakardjieva Engelbrekt, Antonina *Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model*, p. 339, both in Neergaard, Ulla B., Nielsen, Ruth & Roseberry, Lynn M. (red), The Role of Courts in Developing a European Social Model – Theoretical and Methodological Perspectives, DJØF Publishing, Copenhagen, 2010.

[37] Carlson, Laura, *The Fundamentals of Swedish Law: a Guide for Foreign Lawyers and Students* Studentlitteratur, Lund, 2009, p. 163. See further Ragnemalm, Hans, *Administrative Justice in Sweden*, Juristförlaget, Stockholm, 1991, pp. 209.

[38] There are several sector specific ombudsmen in Swedish law, for example the Consumer ombudsman, Equality Ombudsman, which is the result of a merger of four previous anti-discrimination ombudsmen in January 2009, the Office of the Child and School Student Representative. Regarding Consumer law, see further Bakardjieva Engelbrekt, Antonina, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation*, Stockholm University 2003, p. 271.

[39] Carlson, The Fundamentals of Swedish Law: a Guide for Foreign Lawyers and Students, op cite footnote 37, p. 365.

1990s, environmental NGOs were again granted some rights to standing in environmental matters, rights that were subsequently expanded to include additional sectors within environmental law, partly due to the Swedish implementation of the Aarhus Convention and the amendments in Directive 85/337.[40] The restrictive conditions set out in the late 1990s under which environmental NGOs could enjoy the rights remained the same; only environmental organisations who had carried out their activities in Sweden for at least three years and had more than 2,000 members. Already from start, questions were raised in the review by the Council on legislation (*lagrådet*),[41] as well as in the Implementation Guide to the Aarhus Convention over whether the conditions in Sweden were compatible with the Aarhus Convention and Directive 85/337.[42] The Implementation Guide uses the Swedish provisions as an example of rules that can be considered problematic:[43]

> For example one UN/ECE country requires environmental NGOs to have been active in that country for three years and to have at least 2,000 members. The requirement of activity in the country would not be consistent with the Aarhus Convention, because it would violate the non-discrimination clause of Article 3, paragraph 9. The membership requirement might also be considered overly strict under the convention.

The Council on Legislation focused on the question that is relevant in this case, namely the condition regarding the number of members needed, whereas the Implementation Guide, as seen above, also criticized the requirement of activity in the country. In the *Djurgården-Lilla Värtan* case the latter was not the issue, since the DLV is a Swedish NGO. It therefore is interesting, and certainly a bit discouraging, to note that in the Swedish amendments to the Environmental Code, enacted in order to adjust Swedish law to the outcome of the *Djurgården-Lilla Värtan* case, only the provision on the number of members has been changed. According to the version of Paragraph 16:13 in force since 1 September 2010, NGOs having carried out activities in Sweden for at least three years and having more than 100 members or may otherwise prove to have the support of the public, are granted a right of access to a court.[44]

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[40] Legislative prepatory works in Prop. 2004/05:65 Århuskonventionen, and Jan Darpö, Biological Diversity and the Public Interest, op cit footnote 5, p. 219.

[41] The opinion of the Council on legislation, protocol of *Lagrådets yttrande över implementering av Aarhuskonventionen, utdrag ur protokoll vid sammanträde* 2005-01-10.

[42] The Aarhus Convention Implementation Guide, enacted by UN/ECE, 2000.

[43] *Ibid*, at p. 41. The Guide refers to a personal communication with Jonas Ebbesson, Professor of Environmental law, Stockholm University, Sweden.

[44] My translation. The categories of NGO that may come into question for an access to court has however also been broadened. Before, only certain aloud non-profit associations (*före-*

4 Analysis – Is There Still a Place for Institutional and Procedural Autonomy in the Member States?

The organisation of executive powers in the Member States differs from state to state and to date, it has not been considered a question for EU to decide how EU law is to be enforced and monitored within the states. According to the traditional doctrine of institutional and procedural autonomy, it is for the Member States to decide which public authorities are to be competent to handle EU matters[45] and what procedural rules should apply.[46] With the deepening and widening of the European integration process, the scope for the Member States to uphold diverging enforcement schemes has narrowed noticeably.[47] The question is what effect this has on the constitutional and administrative systems of the Member States as a whole.

4.1 Institutional Autonomy v. Supremacy and Loyal Cooperation

The institutional choices behind the organisation of the enforcement schemes in the Member States have often been made for historical reasons. The rather unusual Swedish administrative model is an illustrative example. This model is characterised by large, well-staffed public authorities, which are partially independent of the Government. The Government, in turn, is equipped with comparatively small government offices. The model dates back to the end of the 17th century, when the public authorities were granted a limited independence, in order to ensure that neither the king nor the nobles could rule the authorities singlehandedly, but only through jointly enacted laws. To this date, the partial independence of the public authorities vis-à-vis the Government remains a pillar of Swedish constitutional tradition.[48] One way for the Government to influence

ingar) had access to court, whereas after the amendment, other non-profitable legal persons are included, for example foundations (*stiftelser*).

45 Case 51- 54/71 *International Fruit Company v. Produktschap voor groenten en fruit* [1971], ECR p. 1107, at para 4.

46 Case 33/76 *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland* [1976], ECR p. 1989, at para 5.

47 The close cooperation between public authorities in the Member States and the EU within many policy sectors has influenced the organisation of national administration in several ways, see further Egeberg, Morten (ed), *Multilevel Union Administration: the Transformation of Executive Politics in Europe,* Palgrave Macmillan, Basingstoke, 2006 and Hofmann, Herwig C.H. & Türk, Alexander, *The Development of Integrated Administration in the EU and its Consequences,* European Law Journal vol. 13 No. 2, 2007, 253-271.

48 Bull, Thomas, *Administrative Independence and European Integration,* European Public Law, 2008, Volume 14, Issue 3, s. 285-296, pp. 288.

the public authorities formerly was by reviewing administrative decisions. As noted above, the traditional Swedish form of reviewing administrative acts were not judicial control, but review within the administrative system, with the Government as the last instance. The Swedish courts, on the other hand, have not traditionally held a very strong position in the area of judicial review of the neither the executive nor the legislator. [49] Over the last few decades, the Swedish court system has however gone through visible changes, not least due to a general Europeanisation of Swedish law and the new role of Swedish court as protectors of EU law.[50]

The Swedish courts, as all courts of the Member States, function under the tension of two major principles in EU law, the doctrine of institutional (and procedural) autonomy on one hand, and the doctrine of direct effect, supremacy and loyal cooperation between the Member States and the EU on the other.[51] While the doctrine of institutional autonomy and the duty for the EU to respect the national identities of the Member States, in the Lisbon-Treaty more explicitly articulated in Article 4(2) TEU, seems to leave sufficient room for States to retain institutional enforcement schemes in areas where this is found to be suitable, the doctrine of supremacy, the principle of loyalty and the never-ending search for a uniform and effective application of EU law will always favour private enforcement and judicial control. This is further underlined by the new wording in Article 19.1 (2) TEU, laying down a duty on the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, a duty previously only formulated in case law. A strong ground for this is that it allows the opening of the gate to judicial cooperation between national court and the Court of Justice through preliminary rulings.

This favouring of private enforcement and judicial control is further enhanced in the Aarhus Convention, implemented in the EU through Directive 85/337 and others. For the reasons described above, environmental law seems to be an area especially suited for strengthening the role of NGOs in order to safeguard enforcement of environmental policies. Even though protection of the environment is usually on the agenda of all official national

[49] Reichel, Ansvarsutkrävande – svensk förvaltning i EU, op cite footnote 22, pp. 96 with further references. Further, see regarding the role of Swedish courts prior to the *Djurgården-Lilla Värtan* case, Jan Darpö, Biological Diversity and the Public Interest, op cit footnote 5, pp. 233.

[50] The development is manifested in the current revision of the Swedish constitution, the Instrument of Government, where the reinforced position of the courts in the Instrument to a large extent is attributed to the Europeanization of the Swedish law. See preparatory works in SOU 2008:125 Grundlagsutedningens betänkande En reformerad grundlag, pp 309 and prop. 2009/10:80 En reformerad grundlag, pp 119.

[51] In the words of Jürgen Schwartze, the principles of separation and co-operation, see *European Administrative Law*, revised 1st ed., Sweet and Maxwell, London, 2006, pp. clxxi. See further the 19th declaration to the Maastricht-Treaty.

policies, when it comes to assessing large scale projects with the potential of both job-creating and infrastructure building harming the environment, the former often seem to have a built-in advantage over the latter.

If this is true in regards to environmental law within the area of the Aarhus Convention, the question is how much further this interpretation can be drawn. Is the interpretation of the principle of effectiveness in *Djurgården-Lilla Värtan* case relevant to the EU in general? Clearly, there is an inherent structure in global legal orders that tend to raise questions not easily answered by national control organs, under the government or the national parliament, other than by courts. In a global legal order, the legal landscape in itself, the sources of law, the legal methods of interpretation, the questions of hierarchy of norms, etc., are inevitably more complex than in a national legal order, where the legislator, the executive and the courts all stem from the same constitutional framework. The national legislator can no longer claim that enacting legislation with binding effect within the state is its own prerogative, and consequently, the national parliament is no longer the final interpreter of the entire body of law applied in the land. Within the sphere of application of EU law, the Treaty has enabled national courts to step forward as the first protectors of EU law at the national level.[52] As stated above, the preliminary ruling mechanism in EU law has proven to be an exceptionally successful method for providing national courts with authoritative interpretations of EU law. The mechanism allows representatives of the national legal order to engage in a dialogue with the supra-national level, while still restoring the supra-national quality of the legal provision at hand, and thereby the legitimacy of the supra-national legislator.

This is, to my understanding, a further reason for the Court of Justice to underline the different purposes of the right to participate in the administrative procedure and the right to access to court as the court did in its answer to the second question of the *Djurgården-Lilla Värtan* case. Even if an environmental NGO in practise may have just as good, or even better, possibilities to influence the outcome of an actual decision on an environmentally hazardous project at the administrative stage, the right to access to a court serves the wider purpose of reviewing the application of the law in the case, wherever the law might come from. The question then becomes, is it conceivable that any other representative of the Member State could shoulder the role of courts, to represent the Member State in a supra-national dialogue on the review of national law in the sphere of Union law?

[52] For example, see European Parliament Resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

4.2 Consequences for the National Legal Orders – What is Left for the Parliaments?

If judicial control is the only way forward in a globalised legal order, what does this mean for the constitutional order of the Member States as a whole? An oft-discussed weakness of the Swedish administrative model, with its strong and independent public authorities, is that they may be difficult for the Government to control and, as a result, difficult for Parliament to be held accountable.[53] Together with the generally strong position of the parliament as the foremost representative of the people, this may be a further explanation of why private enforcement and judicial control has not held a strong position in Sweden. With institutional enforcement, the public authority responsible for a specific sector is at least still within the reach of the Government and Parliament. The more emphasis put on private enforcement and judicial control, the further away the Government and Parliament will find themselves from where the action is.

Not long ago, this author heard a civil servant working at the Swedish chancellor of Justice's office (*Justitiekanslern*), the Swedish office responsible for handling Member State liability matters, state that if someone wanted to challenge what the office found to be a valid, democratically enacted Swedish law, the office would do anything in its power to defend that law. I do not think this is an uncommon position in organs working within the national constitutional system. And yet, it is as if the dualistic principle of international law was applicable within the EU. What they do out there is of no relevance to us, unless we allow it to be.

Judging from the *Djurgården-Lilla Värtan*-affair, one may ask if there actually exists an alternative to a strong, supra-national judicial control in order for DLV to reach their rights stipulated in the Aarhus Convention. How could the Swedish implementation of the Aarhus Convention have been reviewed without the preliminary ruling on direct effect and the effective mechanisms given by the Court of Justice? Article 16 of the Aarhus Convention provides a means to settle disputes between the parties of the Convention, but it cannot be used as a mechanism for resolving disputes between members of the public or NGOs and the parties.[54] Swedish courts have not been unwilling to respond to the calling from the Court of Justice to protecting EU law in Sweden, but outside the sphere of EU law, in traditional international law, the role of national courts in resolving conflicts between the national and international legislator is not self-evident.[55] This

[53] Bull, Administrative Independence and European Integration., op cite footnote 48, p. 287. See further Swedish Agency for Public Management (Statskontoret) report 2007:12 National Agencies in the Internal Market. Applying Free Movement, p. 16.

[54] The Aarhus Convention Implementation Guide, 2000, p. 150.

[55] See for a recent example of the careful approach of the Swedish Supreme court, verdicts of the 31 of March in case no B 2509-09 and B 5498-09, regarding the Ne Bis In Idem princi-

situation is even more apparent in the other Swedish case on the implementation of a UN act via EU law, the *Kadi and Al Barakaat International Foundation* case.[56] What national organ would have the courage or legitimacy to stand up against the UN and declare that their resolution is contrary to human rights as protected within the its legal order?

Even though the last example is rather extreme, and hopefully an exception to the general rule that acts enacted by the UN are in conformity with human rights, the situation with multilayered legislation, trickling down from global, through European, to national law, is in itself more and more common. If national parliaments want to stay relevant, they must stop acting as if they are the only democratically legitimate representatives of their people and realise that they cannot distinguish between legislation enacted by themselves and legislation enacted by others in accordance with international legislative procedures, enabled by the transfer of power from the national parliaments themselves. Democracy is no longer a question solely for the nationally elected parliaments, but also for the EU, the UN and other international actors. The national parliaments must be more careful when signing treaties with contents that they do not want to abide by. Once the ink is dry, national parliaments should be as careful in monitoring the correct application of the treaty as they are in monitoring their own laws. Not in order to protect the effective implementation of international law in the national legal order, but to protect the role of the national parliaments as the foremost, if not the only, representatives of the people. While the Swedish legal system has begun, as seen above, to adjust itself to a Europeanised, or even globalised, legal order when it comes to enhancing the role of courts within the national constitutional order, the insight of what consequences the development has for the role of Parliament is still to be sought. If Parliament does not take its obligation according to the globalised legal order seriously, the courts will take that responsibility in is place. And Parliament will again find itself having to correct its law after the verdicts of courts.

If the national parliaments are to take full responsibility for the result of internationally enacted legal acts within the EU and elsewhere, this would mean that they also should have an interest in being more active in the international legislative procedures, for example as has been developed in the Lisbon treaty with subsidiarity control mechanisms.[57] The involvement of the parliaments in the international arena and in the EU of course does give rise to a long list of unresolved questions. Is it conceivable, in a parliamentary system in a Member State, that a national parliament and its national government could pursue two different positions in the European legislative procedure? If not, what has been gained by giving the national parliaments

ple laid down in h 7th protocol to the European Convention of Human Rights.

[56] Case C-402/05 P Kabi.

[57] Article 12 of the EU Treaty and Protocol on the application of the principles of subsidiarity and proportionality.

their own voice? Could the 27 national parliaments of the EU ever come to a position common enough to be relevant in the EU legislative procedure? Is the EU really willing to listen to what the 27 parliaments have to say, if the Member States in the Council and the European Parliament have been able to agree on something? If nobody listens anyway, why should the national parliaments even bother? The task facing national parliaments today is to start defining what their future role in the Europeanised as well as the globalised legal order will be.