Environmental Justice Implications of Maritime Spatial Planning in the European Union

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Abstract
This paper examines the implications of environmental justice in the regime for Maritime Spatial Planning (MSP) currently developing in the European Union (EU). An 'ecosystem-based approach' to marine management is enshrined in the new Integrated Maritime Policy and Marine Strategy Framework Directive and forms the basis of MSP. This concept is intended to encompass all aspects of an ecosystem, including the human element. Yet the modes of including meaningful public participation in the decision-making process for MSP remain undetermined. At the same time, the Aarhus Convention (on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters) empowers non-governmental organisations to hold EU Member States to account. Consequently the issue of transparency will gain increased importance, as will linkages between human and environmental rights. Such public interest-based activism on the part of NGOs has the potential to enforce the developing framework for stakeholder engagement within MSP, but it also has implications worth considering regarding the appropriate role of interest-based organizations in the international political arena.

Keywords
Maritime Spatial Planning, Marine Strategy Framework Directive, Environmental Justice, Aarhus Convention, NGOs

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1. Introduction

The political economy of the European Union (EU) is inexorably linked to the maritime environment. Bordered by two oceans and four seas, the EU coastline comprises 70,000 kilometres and the Community's marine regions contribute 40% of its GDP and population [1]. The recent advent of new political instruments for marine environmental management in the EU is linked to a broader agenda towards Maritime Spatial Planning (MSP) and seen as a means of implementing an 'ecosystem-based approach' to marine management. These instruments include the 2007 Integrated Maritime Policy (IMP) and 2008 Marine Strategy Framework Directive (Directive 2008/56/EC hereafter abbreviated as MSFD). In combination with the existing 1992 Habitats Directive, 2002 Common Fisheries Policy, 2000 Water Framework Directive and other relevant legislation, the MSFD and IMP are intended to provide a framework for integrating all uses of the marine environment and 'enhance Europe's capacity to face the challenges of globalisation and competitiveness, climate change, degradation of the marine environment, maritime safety and security, and energy security and sustainability' [1].

However, whilst European environmental legislation has embraced an 'ecosystem-based approach', this concept has a deeper consideration of the human element than commonly perceived. As defined by a consortium of US academic scientists and policy experts [2], ecosystem-based management is an integrated approach to management 'that considers the entire ecosystem, including humans' and its goal is to maintain an ecosystem in a healthy, productive and resilient condition 'so that it can provide the services humans want and need'. That is to say, ecosystem-based approaches to management move away from a species-focused approach and towards a more integrated, holistic view of the system, including linkages with human activities. This results in a coupled social-ecological system in which ecosystem services connect the social domain (*i.e.* cultures, institutions, and individuals) with the ecological domain (*i.e.* local ecosystems, regional seascapes, and large marine ecosystems). Social and political institutions evolve in response to the environment, thus human interaction with the environment is a two-way adaptive process, including both anthropogenic impacts but also being shaped by environmental change. Active public involvement in environmental decision-making is a means of positively influencing the human-environment interface, through increased knowledge, responsibility and ownership. Although the IMP and MSFD call for increased stakeholder participation in marine governance, the mechanism through which this will be implemented has yet to be determined. There is therefore a risk that the human dimension of the social-ecological system is not being fully taken into account whilst the regime for MSP is being designed.

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter referred to as the Aarhus Convention) has been adopted by the EU and implemented via a Regulation and two Directives to date. This paper explores the potential of the Aarhus Regulation's 'internal review' mechanism to empower non-governmental organisations (NGOs) and legitimize public interest activism. To that end, this analysis examines how NGOs can hold Member States accountable to their environmental obligations, in particular the goals and expectations set out in the MSFD and broader MSP agenda. The United Kingdom provides a case study example for examining how

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EU Member States are addressing their obligations to this suite of legislation meant to harmonise environmental conservation and management in the marine realm. This paper also addresses the emerging discourse of environmental justice in the United Kingdom (UK), as its potential role in linking sustainable development and social inclusion is becoming increasingly evident [3]. As environmental NGOs gain greater understanding of the potential for synergy between sustainability and environmental justice, mechanisms for public interest activism such as the Aarhus Regulation's 'internal review' process could lead to procedural linkages between human rights and environmental rights.

2. The Institutional Framework for Maritime Spatial Planning

The concept of spatially managing multiple uses of the marine environment can be traced back to the design and implementation of the Great Barrier Reef Marine Park over 30 years ago. Spatial approaches to marine management have been evolving with the development of marine protected areas over the past few decades. MSP has recently gained more widespread attention as a tool for improving decision-making, providing a framework for resolving competing human interests whilst managing their impact on the marine environment. With regard to Europe in particular, the Commission envisions MSP as a means for balancing sectoral interests and achieving the sustainable use of marine resources in line with the EU Sustainable Development Strategy. In 2008 the Commission released a communication on MSP (COM(2008) 791) but has not provided detailed guidance on implementing MSP on the national level. To date spatial planning has been occurring on an ad hoc basis; Member States can draw on recent work by the Intergovernmental Oceanographic Commission of UNESCO on a step-by-step approach to implementing MSP that outlines preliminary approaches to spatial management [4].

The IMP lays the foundation for an overarching maritime policy for Europe, encompassing all relevant sectors, and is comprised of two pillars: economic and environmental. The MSFD provides the environmental pillar, with the objective of achieving 'good environmental status' of Europe's marine environment by 2020. These two instruments, in concert with existing and forthcoming legislation, are to provide the basis for MSP in Europe, including stakeholder involvement. However the underlying economic pillar of the IMP is rooted in the Lisbon Strategy, an initiative launched in 2000 by the Heads of State of the European Union, aimed at making Europe 'the most competitive economy in the world' by increasing economic growth and job creation. This prioritisation is one reason why the EU uses the term 'Maritime Spatial Planning' whereas other countries refer to 'Marine Spatial Planning'; the term 'maritime' has a more economic and job-focused connotation [5].

The MSFD's focus on attaining 'good environmental status' is intended to draw together existing instruments addressing marine management and harmonise their efforts; however the definition and exact parameters of what determines 'good environmental status' remain unclear. Discussions about this lack of clarity led to the addition of an Annex to the MSFD prior to its launch that outlines qualitative descriptions of what will be required. It does not however refer to legal instruments that can be used to implement these objectives; that is left up to the Member State to decide. The MSFD addresses European marine management on the national level and it also requires coordination surrounding regional seas. Hence, Member States are required to

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implement the Directive into their national legislation and also address regional cooperation. How this is to be achieved remains to be determined, but it is highly likely that public participation will play a key role, especially with regard to alternative livelihood issues related to fisheries management. The remainder of this section explores how stakeholder engagement is being incorporated in marine management within Europe, with a particular focus on the UK.

2.1 Provisions For Stakeholder Engagement

Chapter IV of the MSFD on 'Updating, Reports and Public Information' sets out requirements for providing access to environmental information and public consultation. In particular, Member States must regularly review their individual and regional marine strategies, report on the implementation of these instruments, and ensure that this information is publicly available within set time frames. Within this chapter of the MSFD, the Commission is also subject to requirements, namely regular reporting on the Directive's implementation.

Viewed within the context of the requirements set by the Aarhus Convention, the MSFD is in line with the Convention's emphasis on access to environmental information and public engagement. Article 19 encourages the use of existing management bodies for the latter, including Regional Sea Conventions, Scientific Advisory Bodies and Regional Advisory Councils. It is worth noting however that there is some danger in relying on pre-existing bodies, such as Regional Advisory Councils (RACs), which are viewed by some as 'talking shops' without real influence. RACs were set up as regional consultative bodies following the 2002 reform of the Common Fisheries Policy, with the intention of providing stakeholder input into the decision-making process. Seven RACs have been established, covering the Baltic Sea, the Mediterranean Sea, the North Sea, North-Western waters, South-Western waters, pelagic stocks, and the high seas/long distance fleet. Six of these are currently functioning; the Mediterranean RAC is the most recently established and still forming. Whilst the RACs are intended to be widely inclusive and allow for deliberation, they are also a potential stage for intra-industry power relations that can hinder and manipulate policy making [6].

Given the range of issues that need to be addressed in order to attain 'good environmental status', it would be more efficient to integrate existing regional stakeholder bodies and include additional sectors. The RACs only address fishing; bringing these stakeholders together with representatives from shipping, dredging, oil and gas extraction, and other activities that impact the environment would be more effective, as well as a strong step towards building a framework for MSP. The UK provides an interesting example of how a Member State is implementing the MSFD and restructuring its internal governance structure to best implement spatial approaches to management.

2.2 Marine Management: The UK Example

The UK is in the process of transposing the MSFD into national legislation, as all European Directives must be implemented by Member States through the creation of new national instruments. The draft Marine Strategy Regulations are intended to come into force in July 2010 and outline parameters for public participation in line with the MSFD. Part 4 on procedural

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requirements contains a section (18) on public participation that sets out requirements for keeping the public informed and involved in preparing, modifying and reviewing monitoring programmes and programmes of measures as set out in the regulations.

In parallel with the development of the European IMP and MSFD, the UK has been designing unilateral legislation towards MSP. In 2009 the UK released its Marine and Coastal Access Act, building on seven years of development that began with a Marine Stewardship Report in 2002 and was fuelled by a Government election manifesto commitment in 2005: *'Through a Marine Act, we will introduce a new framework for the seas, based on marine spatial planning, that balances conservation, energy and resource needs. To obtain best value from different uses of our valuable marine resources, we must maintain and protect the ecosystems on which they depend'*. This Act unifies the UK's approach to marine management using MSP as a mechanism to balance conservation, energy and resource needs.

A significant outcome of the Act is the creation of a Marine Management Organisation (MMO) to bring together several marine management functions within one body. The MMO will take the place of the Marine and Fisheries Agency, thereby integrating fisheries management and enforcement with wider marine management functions. However the MMO only has jurisdiction over English territorial waters (i.e. out to 12 nautical miles from shore) and over non-devolved matters in the offshore area (i.e. between 12-200 nautical miles). Under the devolution settlements, both Wales and Northern Ireland are permitted to ask the MMO to undertake functions on their behalf (at a charge); Scotland does not have such an arrangement in place [7]. In 2010 Scotland released the Marine (Scotland) Act in parallel to the UK's Marine and Coastal Access Act, establishing a new overarching authority to coordinate its marine management, called Marine Scotland, encompassing the functions of the previous Scottish Government Marine Directorate, Fisheries Research Services, and Scottish Fisheries Protection Agency. In Wales, the Welsh Assembly Government will take on the role of the MMO, and in Northern Ireland it is currently the Northern Ireland Executive.

Devolution is a key issue affecting the implementation of environmental legislation in the UK. Following the devolution settlement of 1999, fisheries management has been devolved among the relevant Scottish, Welsh, English and Northern Irish authorities, whilst nature conservation has not (except in the case of Scotland, which gained jurisdiction over planning and nature conservation out to 200nm in 2008). This discrepancy is mirrored in the European Commission's relationship with Member States wherein the latter are responsible for nature conservation whilst fisheries management falls within the exclusive jurisdiction of the Commission. As a result, Member States face a difficult challenge implementing nature conservation in areas threatened by fishing activities [8]. The MSFD implementing regulations are not yet in force and the Marine and Coastal Act is still quite new; it is therefore too early to make an assessment of how effectively the UK will manage its marine environment within a devolved framework, nevertheless it is worth mentioning these underlying tensions so as to better appreciate the inherent challenges this country faces in meeting the European objective of acquiring 'good environmental status' by 2020. As Bulkeley [9] argues, it is unwise to assume that environmental governance functions smoothly from international to national and then local levels, rather issues are created, constructed, regulated and contested between, across and among scales. Certainly for

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the UK, membership within the EU provides a degree of complexity which is further complicated by the process of devolution. Whilst there exist tensions between Directorates within the Commissions, there are also tensions between Member State and European advisory bodies, especially with regard to the science-policy interface [5].

With regard to public engagement, the Marine and Coastal Access Act requires the preparation and publishing of 'statements of public participation' (SPP) prior to the preparation of marine plans. Detailed guidance on required content and time frames for implementing SPPs is set out in the supplementary materials to the Act, under Schedule 5 on the preparation of marine policy statements. In order to understand the broader agenda under which public participation is evolving in the UK, the following discussion examines the Aarhus Convention and its implications for EU Member States, as well as wider issues of NGO politics and environmental justice.

3. The Aarhus Convention

The Aarhus Convention was adopted in 1998 under the auspices of the United Nations Economic Commission for Europe and came into force in 2001. Its continued global relevance is due to the fact that it is the first comprehensive effort at the supra-national level at implementing Principle 10 of the Rio Declaration, providing legally binding obligations on public access to environmental information, decision-making, and justice [10]. The opening article of Convention emphasises the 'right of every person of present and future generations to live in an environment adequate to his or health and well-being'. This linkage between human and environmental rights may seem fixed, however it is worth noting that upon signing the Convention, the UK made a declaration specifying that this reference only represents an aspiration behind the negotiation of the treaty and that the legal rights binding parties are limited to the three pillars of the convention [10]. In addition, at the time of the Aarhus Convention's adoption, the United States criticized its compliance mechanism for the power it grants to non-State, non-Party actors [11].

The Convention is comprised of three pillars: access to environmental information, public participation in environmental decision-making, and access to justice. The Convention itself is fairly weak legally, lacking enforcement mechanisms, but it makes an important statement on the importance of public participation in environmental decisions, and its obligations are given teeth through EU legislation [12]. The European Community has been a Party to the Aarhus Convention since 2005, and has implemented it via two Directives and a Regulation. The Directives address public access to environmental information (Directive 2003/4/EC) and public participation in environmental decision-making (Directive 2003/35/EC). The Regulation (Regulation 1367/2006, hereafter referred to as the Aarhus Regulation) addresses the application of the provisions of the Aarhus Convention, including that enabling NGOs meeting certain criteria to request an 'internal review' of administrative acts or omissions. This mechanism is discussed in greater detail below. Another Directive addressing the third pillar of the Convention, i.e. access to justice, was proposed in 2003 (COM(2003) 624) however whilst the European Parliament has supported the proposal, a coalition of countries within the Council of Ministers has so far prevented this Directive's adoption [13]. If the third pillar of the Convention is not implemented into European law as a Directive, the EU will not be able to completely ratify

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the Convention and will lose credibility at the international level. Without a Directive on access to environmental justice, there is no framework to guide how Member States implement this pillar of the Convention, which will result in different levels of environmental protection and enforcement on the national level.

3.1 Accountability and Agency

One of the fundamental tenets underpinning the Aarhus Convention is the right of a citizen of Europe 'to live in an environment adequate to his or her health and well-being' (preamble, para. 7). Individuals have gained environmental rights under international law with the increased availability of complaint procedures. The Inspection Panel of the World Bank and the non-compliance mechanism established under the Aarhus Convention represent formal mechanisms for implementing this right [14]. Three key aspects of the Convention's compliance mechanism include: (1) the ability of NGOs to nominate experts for possible election to the Compliance Committee, (2) the requirement that all Committee members be independent experts rather than representatives of State Parties to the Convention, and (3) the right of any member of the public and any NGO to file a 'communication' with the Committee alleging a Party's noncompliance [11]. The power granted to NGOs to participate in the meeting of Parties is not unusual for international environmental agreements, but the ability to nominate candidates for election to the Convention's implementation committee is unique [14]. Environmental NGOs played a substantive role in the negotiation and drafting of the Convention, and can be seen as 'principal clients' of the treaty, given their inclination to act on behalf of the public [10].

Whilst the 1993 Lugano Convention was the first international agreement to elaborate rules governing access to national courts to allow the enforcement of environmental obligations in the public interest, the Aarhus Convention goes a step further, providing public access to a review procedure before a court of law (Article 9(2)). This right has been implemented in the Aarhus Regulation as a 'request for internal review' mechanism: any NGO that meets certain criteria is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law (or omitted to do so). The criteria for NGOs to be entitled to make a request for internal review are set out in Article 11 of the Regulation as follows: '(a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); and (d) the subject matter in respect of which the formal request for internal review is made is covered by its objective and activities'.

It can be inferred that the procedural rights granted to NGOs brings them within the standing requirements of the EU Treaty to access the European Court of Justice (ECJ) [15]. This empowerment is in line with the European Commission and ECJ's view of third parties (i.e. individuals, industry and NGOs) as allies against reluctant Member States in making legislative progress. However it is important to question whether NGOs truly represent the public, and consider whether NGO involvement equals improved democracy [12]. Looking back over past experience with European environmental legislation, it has been argued that the key role granted

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to environmental NGOs in the establishment, interpretation and implementation of the Habitats Directive may indicate disparity between the European and national priorities [16, 17, 18]. A key impediment to pursuing an internal review is the issue of costs. Although the Aarhus Convention requires that court procedures must not be 'prohibitively expensive' (Art 9(4)), it seems unlikely that this requirement will be met [19]. Under English law the losing party pays the costs of the successful party and the costs of a one-day hearing could result in a claim for £100,000 [20].

'Transparency' as a moral and political imperative is closely associated with accountability and inclusive governance [21, 22]. There has been a long tradition of public participation in environmental matters in England and Wales, primarily related to pollution permitting [19]. In recent years, there has been an increased emphasis on 'transparency, information, participation and access to justice' in the UK: principles outlined in the Government's Sustainable Development Strategy and driven by a general loss of public confidence in scientific advice from government. This loss of confidence may have largely been driven by the BSE crisis in which the link between BSE in cattle and CJD in humans was announced following some years of denial by the government [12]. The controversy surrounding genetically modified organisms (GMOs) and more recent doubts about the validity and objectivity of climate change research (i.e. the recent 'climategate' scandal) have further weakened public faith in the government and strengthened the case for access to environmental information. Given the focus of the Aarhus Convention on procedural rather than substantive rights, it is worth examining the relationship between environmental and human rights, as this relationship underlies NGO public interest activism.

3.2 Linkages Between Human and Environmental Rights

The environmental justice movement began as a spinoff of the environmental movement focused on civil rights; it recognises that environmental discrimination exists on the basis of race, gender and class. In examining environmental justice, it is useful to adopt a social constructivist approach, i.e. recognising the environment as a social construction, and environmental problems as social problems. One way of expressing this approach is to view environmental justice as an interpretive 'frame', fashioned simultaneously from the bottom-up (local grass roots groups) and top-down (national organisations conveying the term to local groups) [23]. The concept of environmental justice can also be viewed as a paradigm, i.e. an ideological package expressing bodies of thought that change over time and according to the actors responsible for its development [24]. Consequently, it can be argued that the environmental justice movement functions as a social movement, relying on discourses about injustice as an effective mobilizing tool [24]. Mainstream environmental activists and environmental justice activists exist for the most part in different social spheres, and thus have different perspectives and perceptions of environmental issues. This leads to another perspective on environmental justice, which views it in terms of a politics of scale [25]. The politics of environmental justice can therefore be seen in terms of tensions between the scale(s) of the problem itself and the scale(s) at which the problem is to be addressed via government policy [26].

Within the context of fisheries management, Jones [27] makes a distinction between social and environmental justice wherein social justice refers to the fair and economically sustainable

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allocation of adequate access to fishing grounds and stocks amongst fishers, and environmental justice relates to managing the ecological impacts of fishing for the wider societal benefit of present and future generations. A full discussion of the growth and development of the environmental justice movement is beyond the scope of this article, but it can be inferred that to date, the discourse of environmental justice has been somewhat separate from that of environmental management. However as we move towards a more widely encompassing 'sustainability science' [28], it seems likely that divisions within the environmental movement will need to fade and partnerships grow. It has been argued [3] that as environmental justice discourse has matured, it has become increasingly evident that it should play a role in the wider agendas for sustainable development and social inclusion. This point is worth emphasising in terms of the linkages between human and environmental rights.

As outlined by Boyle [29], environmental rights do not fit neatly within the realm of human rights, rather there are at least three areas of broad interaction. First, there is a right to environmental information, as codified under the Aarhus Convention and described above – this right can be seen as empowering NGOs to intervene on the public's behalf to gain information and lobby governments to meet minimum standards for protecting people and their property from environmental harm. Second, the right to a healthy environment can be seen as an economic or social right comparable to those promoted by the 1966 United Nations Covenant on Economic Social and Cultural Rights. A third approach would be to treat environmental quality as a collective or solidarity right, giving the collective public (rather than individuals) a right to determine how their environment and natural resources should be managed and protected [29]. None of these approaches addresses environmental rights as stand-alone, but rather as a greening of human rights law. The Aarhus Convention does recognize that protection of the environment is essential to human well-being and the enjoyment of basic human rights, however its focus is strictly procedural, as mentioned earlier.

4. Concluding Remarks

As it stands, the EU has implemented the Aarhus Convention via two directives and a regulation. Whilst the two directives are aimed at access to information and environmental decision-making, they do not directly address justice, however this is covered to some extent in the Aarhus Regulation via the 'internal review' mechanism described above. A directive aimed solely at environmental justice would ensure equitable legal access to justice across the EU; maintaining equal footing across Europe on this issue is particularly important given the MSFD requirement to implement MSP both nationally and regionally. Most Member States have now ratified the Convention directly, thus technically they have agreed to implement all three pillars of the Convention, including justice, however the passage of a third directive would ensure common standards across Europe and help strengthen transboundary governance in its regional seas.

At the same time, the increased role of NGOs and wider societal interests in marine environmental decision-making has been viewed by some in the fishing industry with resentment and fear of marginalisation, especially with regard to the designation of marine protected areas [27]. As we move towards a more inclusive governance model, building greater public

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participation into processes such as MSP, there is some risk of what has been termed a 'participation paradox' [30] whereby the greater the number of actors, the smaller the role each plays, and the lesser the importance of each sector. Nevertheless it is important to ensure the participation of all sectors that will be affected by and involved in MSP both nationally and regionally within European Member States and regional seas. For this reason it is recommended not to build on existing bodies such as RACs, but to create new partnerships where different sectors will feel they are on equal footing. Given the procedural power granted to NGOs through the Aarhus Regulation, there is an impetus on Member States to implement the MSFD and MSP in an equitable and transparent manner.

The UK has been a leader in maritime management to date and it is hoped that they will serve as an example for the future management of Europe's coasts and seas. However the path towards achieving MSP and 'good environmental status' of the European marine environment is at risk from the complex scales of governance and politics both within the EU and between Member States, and will require both third party (i.e. NGO) vigilance and adaptive approaches to management.

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