Søren Wium-Andersen

April 11, 2007

Mr. Jeremy Wates
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Re: Communication to the Aarhus Convention Compliance Committee concerning access to procedures to challenge acts and omissions which contravene provisions of national law relating to the environment in Denmark (Ref. ACCC/C/2006/18)

Dear Jeremy Wates

Thank you for the letter dated April 2, 2007. You have asked a number of relevant questions. Your questions are presented in italics.

> *1. From the information provided in the communication it appears as if the culling plans were made public through the newspaper. In light of this, did you approach the relevant municipality to discuss the matter before* ***or*** *during the culling? If* ***so,*** *what was the response? If not, why not?*

According to the latest game bag statistic 117.800 rooks were shot in 2005 in Denmark. The normal procedure, according to the regulations, is that the landowners contact the local branch of the National Forest and Nature Agency of the Ministry for Environment and obtain the permission for the culling from them. A public notification procedure has not been introduced.

The public in Hillerød was informed about the Municipalities culling of Rooks in 2006 through at least 11 informative articles or letters to the editor in the local newspaper, Frederiksborg Amtsavis and a number of similar articles in two local districts newspapers.

There was no need for me to contact the municipality in Hillerød. The local branch of the Danish Ornithological Society did that several times. According to a letter to the editor from the local branch of the society the political head of the technical department in Hillerød Municipality informed them that all rules and regulations would be followed in relation to the culling. The Ornithological Society was not able to receive a copy of the criteria used by the municipality for the culling in the very different situated colonies.

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2. In addition to the procedure before the local police and the public prosecutor, and the report to the Nature protection Board of Appeal, did you try to make use of any other possible means to challenge the acts or omissions of public authorities related to the protection of wild birds as set out in Danish legislation and the 1979 EC Directive 79/409 on the Conservation of Wild Birds? In particular, did you make requests to any local, regional or central supervisory authority, address the Ombudsman, or initiate a judicial procedure against the public administration in court? If not, please explain whether this was because ***no*** *such procedure is available or if this was not done for other reasons?*

It was not possible to use the supervisory authority for the municipalities ("Tilsynsrådet" under the Ministry of Interior) in this case. Because, according to a ruling by the "Tilsynsrådet", they have no right to intervene when a municipality do not follow a EU-directive.

Addressing the Ombudsmand has not been considered. As far as I am informed, the Ombudsman is not able to deal with a case like this, because it is the Danish Parliament who has not correctly implemented the EU Bird-directive in the Danish legislation.

A judical procedure against the public administration has not been initiatid. A judical procedure in the Danish Court system is setup in such a way that, it in practical terms is a prohibitively expensive procedure and it take years for an individual to challenge the official system.

3. Did you make any report on or complain about the decisions mentioned in the communication to the National Forest and Nature Agency, as suggested by the public prosecutor as well as the Nature Protection Board of Appeal? If so, what was the response? If not, why not?

Culling of Rooks has been discussed every spring in Denmark for the last many years. It has even been discussed in the Parliament. Example are question S2667 July 23, 2002 and S243 October 15, 2002. In answer S243 from the Ministry of Environment the minister refers to an opinion from the National Forest and Nature Agency concerning the Danish hunting law and the related regulations making the culling legal according to Danish law. The Parliament was informed that it is legal to cull juvenile Rooks even without prior consent. Only in towns and municipalities a prior consent is needed from the local branch of the National Forest and Nature Agency if there is a need to cull a limited number of adult Rooks before the nesting season.

The public prosecutor proposed me to contact the National Forest and Nature Agency if I wanted to pursue the question about the legality of the regulations. When I received the letter from the prosecutor, it was not possible for me to contact the Agency because I was based on the west coast of Sumatra in Indonesia as a member of the EU international monitoring mission in Aceh. Returning to Denmark some months later I restrained from contacting the Agency. I was convinced that the National Forest and Nature Agency would give me the same biased answer as they presented to the Danish Parliament in 2002.

The Nature Protection Board of Appeal did not suggest me to contact the National Forest and Nature Agency. They just forwarded my complaint to the National Forest and Nature Agency. The Agency did not contact me. That suggest they were not interested in taking up this issue.

*4. If you addressed the National Forest and Nature Agency and the outcome **of** the complaint was not satisfactory, did you then complain to the Ministry of the Environment? If so, what was the response? If not, why not?*

This question is partly answered under the previous point. Furthermore the National Forest and Nature Agency is the part of the Ministry of the Environment, which advises on and administers all matters relating to wildlife. The following quotation from an article in the conservative weekly newspaper Weekend-Avisen in 2003, under the headline "*25 Years of Keeping Quiet*" written by judicial professor in environmental law at Copenhagen University, Peter Pagh illustrates the background quite well.

> *"25 Years of Keeping Quiet…The government has problems fulfilling EU's demands for nature protection. It is decades of offences that now reach the surface… ..."The background covers 25 years of silences, misrepresentations and misunderstandings. It involves a government operating at the limits of the Basic Law, a national parliament which did not receive the necessary information, a ministry which misunderstood the rules that had been negotiated and adopted, media belief in Danish excellence and courts which showed a rather great faith in officialdom. Today it is mostly history. But not quite. Some of it is now inconveniently bobbing up to the surface… …The critical thing is, in my opinion, that there has been a broad consensus in the Parliament to adhere to the EU requirements on environmental protection, whereas the civil servants seem to have attached importance to avoiding court cases against Denmark…"* My translations.

Peter Pagh's article is attached to this communication as addendum number 2. Professor Peter Pagh has now been appointed as a high court judge

Based on this article and the biased answer in the opinion from the National Forest and Nature Agency presented by the Minister for Environment to the Danish Parliament in 2002 on question S 243, I was not encouraged to contact the agency or the ministry for discussing compliance concerning the Aarhus Convention and helps to explain why there would be no future in complaining to the Ministry or its Agency.

5. Are there, in your view, any other means available, inter alia under civil or administrative law, for challenging acts or omissions by public authorities which contravene laws related to the protection of wild birds as set out in Danish legislation and the 1979 EC Directive 79/409 on the Conservation of Wild Birds?

I am not a lawyer and I am not able to present an exhaustive examination to your question.

It is possible to run a civil action against the Danish state for not following the EU law. But as stated above it is very expensive and takes years. To illustrate the last point I could like to mention that the Danish judicial system have been exposed several time at the Human Rights Court for severe time lags in court cases.

A citizen can approach the EU Commission for lag of compliance with the directives. But I do not consider that possibility as the "effective judicial mechanism accessible to the public" described in the preamble to the Aarhus Convention.

Of course, EU can independently open a case against Denmark, if EU is of the opinion that Danish laws is not in compliance with the EU Habitat- and Bird-directives. Actually, in July

2006 EU forwarded two opening letters against Denmark concerning the directives. But the details of the openings letter were kept secret - even for the Parliament - and were not made available to the public before December 22, 2006 or nearly three weeks after I forwarded my first communication to your office. As a result of this opening letter from EU, Denmark has agreed voluntarily to more than 50 changes to laws and regulations.

In a draft for the, regulation of game, "Vildtskadebekendtgørelsen" presented to the public in January 2007 as a result of the opening letters, the former paragraph concerning regulations of Rooks, § 8, was unchanged. This in spite of that, the lack of compliance with article 9 in the EU Bird-directive concerning regulation of game was mentioned in the opening letter. Only after he hearing process where it was pinpointed that § 8 was incorrect, the paragraph was omitted.

§ 17, in the above mentioned regulation, "Vildtskadebekendtgørelsen" read: "Decisions made by the National Forest and Nature Agency after § 11, §12.2 and §14.3 cannot be appealed to another administrative body". In my opinion this wording is not in agreement with the Aarhus Convention. According to the Aarhus Convention citizens should have the right to initiate administrative or judicial procedures against acts or omissions that do not comply with environmental law.

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Further information
Last week – before I got the letter from the Compliance Commission - I contacted a lawyer, Mr. Carsten Lund, in the National Forest and Nature Agency and asked him what has happen to the proposal from EU dated October 24, 2003 concerning access to justice in environmental matters. Mr. Carsten Lund informed me, that the proposal has been turned down by the EU member states. The EU proposal has been added as addendum 1 to this communication.

If you need further documentation please let me know.

Yours sincerely,

Søren Wium-Andersen
digitally signed

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Addendum 1

http://europa.eu/scadplus/leg/en/lvb/l28141.htm

Access to justice in environmental matters

This proposal grants citizens the right to initiate administrative or judicial procedures against acts or omissions that do not comply with environmental law. It is also intended to implement at the level of the Community and the Member States the third pillar of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Århus Convention). The ultimate aim is to improve the application of environmental law.

PROPOSAL

Proposal for a directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters (presented by the Commission).

SUMMARY

This proposal establishes a set of minimum requirements on access to administrative and judicial procedures in environmental matters. It thus transposes the third pillar of the Århus Convention into Community law and the law of the Member States.

Acts and omissions by private persons

The Member States guarantee that members of the public (natural or legal persons and their associations, organisations or groups) may initiate administrative or judicial procedures against acts or omissions of private persons that do not respect environmental law.

Acts and omissions by public authorities

Member States will ensure that members of the public have access to administrative or judicial proceedings against administrative acts or omissions which infringe environmental law if they have a sufficient interest or if they show that their rights have been affected.

Member States guarantee that qualified entities (associations, groups or organisations recognised by a Member State whose objective is protecting the environment) may initiate administrative or judicial proceedings against violations of environmental law, without showing a sufficient interest or impairment of a right if the subject of the procedure is within the scope of their statutory and geographically relevant activities. Qualified entities recognised in a Member State may have recourse to such proceedings in another Member State.

Members of the public and qualified entities who have access to justice against an act or an omission must be able to submit a request for internal review. This request is a preliminary procedure under which the person or entity concerned can contact the public authority designated by the Member State before initiating legal or administrative proceedings. It must be submitted within four weeks of the date of the administrative act or omission. The public authority then has 12 weeks to take a written and reasoned decision and notify it to the party that submitted the request. In the decision, the authority should describe the measures necessary to comply with environmental law or, where appropriate, reject the request. If the authority cannot take a decision, it should inform the party submitting the request as soon as possible. If the authority fails to respond to the request within the period fixed for this purpose or if its decision does not enable compliance with environmental law, the party submitting the request may initiate an administrative or judicial procedure.

Recognition of qualified entities

The Member States should lay down a procedure for recognising qualified entities. They may choose between a preliminary procedure and a case-by-case (ad hoc) procedure. A qualified entity must always meet the following criteria:

- operate on a non-profit basis and pursue the objective of protecting the environment;
- have an organisational structure enabling it to achieve its objectives;
- be legally constituted and have experience in environmental protection;
- have its annual accounts certified by a registered auditor.

Administrative and judicial procedures

The administrative and judicial procedures provided for in this proposal must be objective, effective, adequate, equitable, timely and not prohibitively expensive.

Context: the Århus Convention

The Convention on access to information, public participation in decision-making and access to justice in environmental matters (Århus Convention) was signed by the European Community and its Member States in June 1998. Apart from the present proposal, two others presented in October 2003 were intended to give final approval to the Convention and apply its provisions to the Community's institutions and bodies .

The Århus Convention consists of three pillars. The first pillar, concerning the public's access to information , was implemented by the Community in Directive 2003/4/EC on public access to environmental information. The second one, transposed by Directive 2003/35/EC, concerns public participation in environmental procedures. The third pillar relates to public access to justice in environmental matters. The present proposal for a directive is intended to implement this third pillar of the Convention.

The Århus Convention is based on the idea that improving public access to information and justice and greater public participation in decision making in environmental matters lead to better application of environmental law.

REFERENCES AND PROCEDURE

Proposal	Official Journal	Procedure
COM(2003) 624 final	-	Codecision COD/2003/246

Last updated: 05.03.2004

Addendum 2
See the following pages

Weekendavisen | 25.04.2003 | 1. SEKTION | Side 2 | 1085 ord | artikel-id: e006663f

25 års fortielser

Naturbeskyttelse: Fugle: 25 års fortielser

Regeringen har problemer med at leve op til EUs krav til naturbeskyttelse. Det er årtiers forsyndelser, der nu dukker op til overfladen.

Af Peter Pagh

I de seneste måneder har dagspressen omtalt Danmarks problemer med at leve op til EU's krav til naturbeskyttelse. Ifølge medierne er problemet, at det koster væsentlig mere at overholde EU's krav, end man forventede, og at et notat fra Kammeradvokaten afslører betydelige mangler i den danske lovgivning. Omtalen har givet anledning til, at der fra oppositionen stilles krav om øgede bevillinger til naturbeskyttelse. Og i Folketinget er der stillet en række spørgsmål til ministeren. Umiddelbart kunne man få det indtryk, at de påtalte problemer skyldes regeringens modvilje mod at prioritere naturbeskyttelse højt - en antagelse, der næsten bekræftes af en af ministerens udtalelser, hvor prioriteringen begrundes med udgifter til bl.a. sygehuse.

Selv om der næppe er tvivl om, at den nuværende regering prioriterer miljøområdet anderledes end den tidligere regering, er sigtekornet i dette tilfælde rettet den forkerte vej. De EU-regler, som Danmark har problemer med at leve op til, er ikke af nyere dato, men var også gældende under den forrige regering og går for fuglebeskyttelsen tilbage til 1981. De af aviserne omtalte problemer med EU's naturbeskyttelse er derfor kun toppen af et isbjerg.

Forhistorien gemmer på mere end 25 års fortielser, fordrejelser og misforståelser. Det handler om en regering, der bevægede sig på kanten af grundloven, om et Folketing, som ikke modtog de fornødne informationer, om et ministerium, der misforstod de regler, man forhandlede og vedtog, om en presses tiltro til dansk fortræffelighed og om domstole, der viste vel stor tiltro til embedsværket. Det meste er i dag historie. Men ikke helt. En del dukker nu ubelejligt op til overfladen. Virkninger af tidligere fejl lader sig ikke længere skjule, når landmænd ikke længere kan bruge jorden som hidtil.

HISTORIEN startede så smukt i 1973 med vedtagelse af EU's 1.

miljøhandlingsprogram. Kommissionen fulgte planen op og foreslog et direktiv om fredning af vilde fugle. Forslaget blev mødt med positive reaktioner fra dansk side. Danmark tog dog forbehold for, om der i den daværende traktat var hjemmel til sådanne regler, da det var tvivlsomt, om grundlovens § 20 åbner for en sådan udvidelse af EU's kompetence. Men Danmark stod alene med synspunktet, og i efteråret 1977 konkluderede regeringens juridiske specialudvalg, at det »må anses for sandsynligt, at EF-domstolen i givet fald ikke vil anfægte retsgrundlaget for direktivet.«

Det endte med, at Danmark stemte for direktivet i december 1979. Det grundlovsmæssige problem blev holdt inden for regering og embedsværk og ses ikke forelagt Folketinget. I stedet drøftede Folketinget, om fugledirektivet vil kræve ændret lovgivning og fik herom oplyst, at direktivet alene betød »visse ændringer i jagtloven« og ikke havde »statsfinansielle konsekvenser«.

Det skulle siden vise sig, at det ikke kun var grundloven, der blev håndteret problematisk, men at man også havde misforstået direktivets regler. Ministeriet antog fejlagtigt, at det var tilstrækkeligt at optage de udpegede fuglebeskyttelsesområder i amternes regionplaner. Der skulle gå 15 år, hvor store trafikanlæg blev etableret tværs gennem udpegede områder, før der i 1994 kom regler om myndighedernes pligt til at beskytte de udpegede fugleområder. Den omstændighed, at EF- domstolen i 1991 afviste, at beskyttelsen kunne begrænses af hensyn til samfundsøkonomiske interesser, satte sig ikke spor i praksis. I stedet synes ministeriet at have sat sin lid til habitat-direktivet fra 1992, der åbnede en lem for samfundsøkonomisk afvejning i fugleområder og andre EU-naturområder. Men igen gik det galt.

FOR det første forpligter de danske regler kun myndighederne, hvilket er ubegribeligt, da EF-domstolen allerede i 1980'erne fastslog, at fuglebeskyttelsesdirektivets regler skal gennemføres som bindende regler for alle borgere. For det andet antog ministeriet frem til 1998, at beskyttelsen kun gjaldt inden for de udpegede områder, hvilket er uden støtte i ordlyden og siden afvist af EF-domstolen. For det tredje antog ministeriet, at beskyttelsen kun angik nye aktiviteter, der krævede tilladelse. Dette afvistes af EF-domstolen i juni sidste år og er anledning til, at der nu kan blive problemer med grundlovens beskyttelse af den private ejendomsret.

Hertil kommer en række andre mangler, som ikke lader sig beskrive i en klumme.

Da de udpegede områder omfatter ca. 7 procent af Danmarks territorium, er det ganske mange, der er berørt af den mangelfulde gennemførelse. De særligt naturinteresserede kan med rette hævde, at Danmark ikke lever op til EU's krav til naturbeskyttelse. Omvendt kan lodsejerne med samme ret hævde, at de netop har fået forsikringer af Skov- og Naturstyrelsen om, at udpegningen af habitatområder ikke berører den hidtidige brug af deres jord. Hvis det nu skal laves om, må det forventes, at landmændene finder indgrebet ekspropriativt, og at de derfor vil have udmeldt taksation. For at opfylde dette vil det være nødvendigt med en lovændring.

HVORDAN kunne det gå så galt? Det spørgsmål rejser sig naturligt, efter at det er klart, at det er ganske mange,

der er berørt, og det er nødvendigt med ændringer af lovgivningen og større udgifter end forudset. Der er næppe et enkelt svar, men den oprindelige årsag er formentlig, at miljømyndighederne misforstod EU-reglerne. Misforståelser er undskyldelige, men det forklarer kun en del af forløbet.

Med EF-domstolens domme i løbet af 1990'erne burde det tidligere have stået klart, at situationen var uholdbar. Ministeriet kan vanskeligt hævde, at man ikke kendte EF-domstolens praksis, eller at man var uvidende om Kommissionens fortolkning af reglerne - og hvis det er tilfældet, er der i hvert fald noget galt med prioriteringen af ressourcer.

Var styrelsen klar over problemet, savnes en forklaring på, hvorfor der ikke blev taget de nødvendige tiltag til at rette fejlene. De reaktioner, som kan dokumenteres, giver indtryk af, at man søgte en anden udvej, nemlig meget kreative fortolkninger af reglerne. I forhold til Kommissionen foreligger ikke tilgængeligt materiale, der kan belyse forholdet. Senest har Folketinget anmodet herom, hvilket har givet anledning til et ganske tankevækkende svar fra Skov- og Naturstyrelsen.

Styrelsen oplyser over for Folketinget, at korrespondancen med Kommissionen ikke er omfattet af akt-indsigt, og at det vil kræve betydelige ressourcer at udskille de øvrige dokumenter, som foreligger herom. Hermed synes styrelsen næsten at forudsætte, at Folketingets informationsadgang er begrænset til reglerne om offentlig aktindsigt. Dette er naturligvis ikke tilfældet.

Der er også en anden mærkværdighed i Skov- og Naturstyrelsens forhold til Folketinget. På et ikke kendt tidspunkt sidste år bad styrelsen Kammeradvokaten belyse, om der var problemer med den danske gennemførelse af EU's habitat-direktiv. Kammeradvokaten besvarede dette med et notat fra august. Indholdet heraf er ikke kendt, men på grundlag af spørgsmål fra Folketinget ligger det fast, at styrelsen ønskede, at Kammeradvokaten ændrede i notatet, og at der blev holdt møder herom.

Det ligger efter svarene til Folketinget ligeledes fast, at ministeren ikke har læst notatet, og at det lykkedes styrelsen at få rettet i notatet, men at Kammeradvokaten fastholdt konklusionerne i det endelige notat, der blev offentliggjort i slutningen af november. Det må konstateres, at fremgangsmåden og svarene giver næring til ubehagelig mistanke om, at der er noget at skjule. Det efter min opfattelse alvorlige er, at der i Folketinget hele tiden har været bred tilslutning til, at Danmark skal overholde EU's krav til naturbeskyttelse, mens embedsværket mest synes at have lagt vægt på, at Danmark ikke kommer for EF-domstolen.

Peter Pagh er professor, dr.jur., i miljøret ved Københavns Universitet.
