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INVITED ARTICLE

Transnational Access to Environmental Information

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Abstract
This paper traces back the efforts, in particular in Europe, to promote transnational legal provisions which grant a right of access to environmental information. Initiatives in the 1970s failed to establish a fundamental right to a clean environment. However, the establishment of fundamental procedural rights of access to information, participation in decision-making and access to justice in environmental matters has been more successful – culminating in the 1998 Aarhus Convention. This paper describes the – until now unsuccessful – attempts to extend the territorial scope of application of the Aarhus Convention to non-European countries and regions, and ultimately the conclusion of a global convention on access to environmental information.

Keywords: Aarhus Convention, Fundamental Right of Access to Information, Global Convention

1. INTRODUCTION

In 2010 and 2011, Wikileaks published large numbers of confidential and secret documents on the wars in Iraq and Afghanistan, on United States (US) diplomatic cables and on the Guantanomo Bay detention camp. These publications rekindled the international discussion on transparency, freedom of access to information and the legitimate interest of administrations to keep certain information confidential. Protagonists of transparency invoke the principles of open society as one of the basics of Western democracy. They argue that administrative secrecy is, in the last instance, incompatible with democracy, as it creates different degrees of knowledge and, hence, of power. This limits the opportunity for citizens, and for their representatives in Parliament, to decide in full knowledge of the facts. Against this reasoning stands the argument that full transparency and complete access to information are, theoretically,

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valuable concepts, but are incompatible with realistic, efficient and practical governance. Complete transparency is unsustainable as it will paralyze initiatives, make a problem-oriented governmental policy difficult, if not impossible, and will reduce administrative creativity.

This contribution does not intend to retrace the different arguments of this discussion. I am convinced that proposals for black or white solutions will not be helpful, as a middle way is needed which tries to take into account the legitimate interests of both sides. My intention is rather to discuss issues of access to *environmental* information which risk, without good reason, being drawn into the larger discussion on transparency versus confidentiality.

2. EUROPE'S EFFORTS TO IMPROVE ACCESS TO ENVIRONMENTAL INFORMATION

For the US reader, this restriction might appear to be surprising. Indeed, the US adopted, in as early as 1966, a general Freedom of Information Act (FOIA),[1] which was amended in 1996, 2002, and 2007.[2] Environmental information is part of general information and was thus covered by the wide access to information, transparency and openness that the FOIA grants to citizens. These principles are largely undisputed in the US. Any discussions concentrate on borderline issues and are, overall, not very controversial.

Matters in Europe are looking different: a general right of freedom of information, binding on the European Union (EU) and its Member States still does not exist. Although freedom of information legislation had been in place in some European states (Sweden, for example)[3] since as early as the 19th century, at EU level this policy was still in its infancy by the end of the 1960s when the US adopted its FOIA. At that time, the EU concentrated on the free circulation of goods and services, capital and labour; the rights of citizens played a rather subordinate role. Such rights were discussed more in the context of the Council of Europe (COE), another European regional organization that promotes cultural and democratic principles on the protection of individuals.[4]

The COE experts reflected on whether it would be possible to establish an individual human right to a clean and healthy environment. They considered this to be impossible, however, because the legal cultures in Europe were too different and the precise content of this right could not be determined. Instead, the COE recommended that citizens be given procedural environmental rights: a right of access to environmental information, a right to participate in environmental decision-making, and a right of access to the courts in cases of dispute. Their underlying reasoning was that the

1 5 USC 552.

2 This contribution will not discuss the legislation on access to information in the different states of the US, some of which dates back to the 19th century.

3 The Swedish Freedom of the Press Act dates from 1776 and is considered to be the world's oldest legislation on freedom of access to information. The national legislation of EU Member States or non-EU European states will not be discussed in any detail in this contribution.

4 For more details, see: http://www.coe.int.

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administrations in Europe take numerous decisions that affect and even impair the environment, such as the permitting of economic activities, the planning and implementation of infrastructure measures, the monitoring of pollution, or the enforcement of environmental legislation. Because the administration is not the owner of the environment, there is good reason to ensure the participation of citizens in administrative decision-making; furthermore, in order to allow citizens to discuss with administrations in full knowledge of the different positions, it was necessary to ensure that citizens and administrations had access to the same environmental information.

This concept was progressively, though slowly, put into practice by the EU. A Directive in 1985 introduced public participation in environmental impact assessment (EIA).[5] In 1990, a right of access to environmental information against national administrations was introduced.[6] A general right of access to information that was held by EU administrations was only introduced during the period 1997–1999, though it was subject to a number of conditions.[7] This move by the EU also resulted from the Rio Declaration of 1992,[8] which had requested that 'each individual should have appropriate access to information concerning the environment that is held by public authorities' and that environmental issues should best be handled with the participation of all concerned citizens.

Even at the height of the Cold War, in 1975, the Western countries and the Warsaw Pact countries, in particular the Soviet Union, had identified the environment as a policy sector where – despite ideological differences – exchange of information, common agreements and joint confidence-building measures could be undertaken between the East and the West. It was thus predictable that after the Berlin Wall had come down and East–West discussions started in Europe, in order to find common legal provisions, the concepts of access to environmental information and participation in environmental decision-making were priority candidates for joint undertakings. These pan-European discussions led to the adoption, in 1998, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[9] that had been negotiated and elaborated under the auspices of the United Nations Economic Commission for Europe (UNECE). The Convention has to date been signed and ratified by 44 European

[5] Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment [1985] OJ L 175/40.

[6] Directive 90/313/EEC on the Freedom of Access to Information on the Environment [1990] OJ L 156/58. In 2003, this Directive was replaced by Directive 2003/4/EC on Public Access to Environmental Information [2003] OJ L 41/26.

[7] See Art. 255 of the EC Treaty of 1997, which is now, after the entry into force of the Lisbon Treaties in Dec. 2009, Art. 15 of the Treaty on the Functioning of the European Union (TFEU). The implementing provisions on access to information are laid down in Regulation (EC) No. 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents [2001] OJ L 145/43, as well as Regulation (EC) No. 1367/2006 on the Application of the Provisions of the Aarhus Convention to Community Institutions and Bodies [2006] OJ L 264/13.

[8] Principle 10, Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992.

[9] Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html.

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countries and the EU. The US and Canada – which, as members of the UNECE had participated in the Convention's negotiations – felt unable to adhere to it.[10] The most likely reason for this was the general reluctance by the US to let itself be bound by international agreements; Canada did not explain its refusal to adhere.

The Aarhus Convention has produced results in Europe, in particular owing to its very active Compliance Committee. This Committee made a number of recommendations on the understanding and interpretation of the Convention that were without exception adopted by the Meeting of the Parties. These recommendations concerned the absence of specific legislation by some Contracting Parties to transpose the rights granted by the Convention into their national legal order, or the incorrect or incomplete transposition of the Convention. Furthermore, they went into the details of specific cases that were submitted to the Committee. For example, the Committee held that public authorities could not refuse the disclosure of environmental impact studies with the argument that the intellectual property rights of their authors had to be protected.

The Committee makes publicly available all the submissions of the Contracting Parties, and also of members of the public and environmental organizations for specific cases. In this way, the interested public – including the interested administrations of the 44 Contracting Parties – have the opportunity to follow the different arguments submitted in a specific case. This kind of practice is completely new for judicial procedures in the European states. While the Committee is not a court and does not pronounce judgments, its findings nevertheless have a very considerable influence on the interpretation of the Aarhus Convention. This influence is transboundary in that it also affects the interpretation and application of the Convention in those states that are not directly involved in the specific case decided by the Committee. The influence of the Committee's findings, therefore, goes beyond the influence of a judgment by a national court, which is limited in Europe to the national legal order within which it is formulated.

Overall, the Aarhus Convention has led to the adoption of legislation on access to environmental information in all states that have adhered to the Convention, resulting in a remarkable change in the legislative position over the last 15 years. The EU has also aligned its legislation to the requirements of the Convention. In many states, people started to ask themselves why access to information held by public authorities should be limited to *environmental* information and why there should not be a general right of access to information for citizens. In this way, the Aarhus Convention and its progressive implementation in Europe is acting as a forerunner and paving the way for a more general openness on the part of administrations.

[10] See the statement made by the US at the first Meeting of the Parties, Lucca (Italy), 21–23 Oct. 2002, available at: http://live.unece.org/env/pp/mop1docum.statements.html: 'Although we are supportive of the issues, we continue to have grave reservations with many of the provisions and direction of this Convention. These include concerns over granting special participation privileges to only one segment of civil society. We are also especially concerned about the direction the Convention is going in the areas of GMOs and Compliance.'

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3. EFFORTS TO REACH GLOBAL AGREEMENTS ON ACCESS TO ENVIRONMENTAL INFORMATION

The Aarhus Convention Secretariat and the UNECE have developed four initiatives to promote the Convention's principles at global level:

1. the development of a *global* convention on access to information, participation in decision-making and access to justice;
2. the promotion of the principles of the Aarhus Convention in international forums;
3. the promotion of the accession of non-UNECE states to the Convention; and
4. the spreading of information on the Convention at international level.

3.1. *A Global Convention*

Attempts failed to develop a global convention on access to information, participation in decision-making, and access to justice. The Johannesburg World Summit on Sustainable Development (WSSD) in 2002 only made some general statements with regard to access to information and participation. Attempts to have the topic included in the United Nations Environment Programme (UNEP) Montevideo Programmes for developing international environmental law remained unsuccessful.[11] It was reported by UNEP that, in particular, the African states that had been consulted favoured the elaboration of global guidelines on Principle 10 of the Rio Declaration in the form of a non-legally binding instrument ('soft law').

Such guidelines were adopted by UNEP in 2010.[12] These provisions are inspired largely by the provisions of the Aarhus Convention but remain, of course, vague as regards specific rights for citizens or environmental organizations, enforcement and compliance. It is not difficult to predict that they will share the destiny of so many international recommendations, guidelines or resolutions on the environment: they will have no significant effect.

In 2006 UNEP also developed a 'Manual on Compliance With and Enforcement Of Multilateral Environmental Agreements'.[13] Regarding access to information, Guideline 41j of this Manual provides that access to environmental information should be available 'in accordance with national and international laws concerning access, transparency and appropriate handling of confidential or protected information'. The wording of this guideline itself indicates that no change to existing provisions is favoured or requested.

11 Further details are available at: http://www.unep.org/law/About_prog/montevideo_prog.asp.

12 General Council of UNEP, Decision SS.XI/5, Part A, of 26 Feb. 2010: Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters.

13 Available at: http://www.unep.org/dec/docs/UNEP_Manual.pdf.

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3.2. *The Promotion of the Aarhus Principles in International Forums*

The Secretariat of the Aarhus Convention reported to the first three meetings of the Conference of the Parties to the Aarhus Convention on efforts to have the principles of the Convention adopted by other international organizations, agreements and forums.[14] It follows from these reports that, while there is a general recognition that access to information and participation in decision-making in environmental matters are important elements of environmental governance and play an important role in the practical application of environmental law, almost nowhere were enforceable rights for citizens or environmental organizations recognized.

3.3. *The Promotion of Access by Third States to the Aarhus Convention*

Article 19(3) of the Aarhus Convention provides that any state which is a Member of the United Nations (UN) may accede to the Convention upon approval by the Meeting of the Parties. In pursuance of this, the fourth Conference of the Parties of the Aarhus Convention adopted a decision concerning such access.[15] The formulation of the procedural requirements can easily be misread by any third state to imply that the Convention Member States would, before agreeing to its accession, scrutinize its internal state of law and institutional structure. This might not really stimulate the interest to adhere to the Convention. Be that at it may, as of mid-2011, no third state had officially manifested an interest in adhering to the Convention.

3.4. *Spreading of Information on the Convention at the International Level*

The Secretariat of the Aarhus Convention has tried, over the last ten years, to inform third countries and international organizations about the Convention, its principles, its working mechanism, and the results achieved. It has organized conferences and other events which, for financial reasons, have mainly been hosted in Geneva, Switzerland, but also in Russia, China, Brazil and Egypt. The Secretariat staff have participated in numerous public and private events to promote the Convention, mainly in Europe and in the countries of the former Soviet Union, though by no means limited to the European continent.[16]

If one looks back at the three to four decades of attempts to improve the individual's right of access to environmental information, the picture is mixed. Where legislation on the freedom of information existed – such as in the US, Sweden, the Netherlands – it was not really a problem to extend this general right of access to information to information on the environment. For other countries, the Aarhus Convention and/or EU legislation constituted considerable steps forward, although in

[14] See UNECE, ECE/MP.PP/2002/17 of 25 Oct. 2002; ECE /MP.PP/2005/17 of 4 Apr. 2005; ECE/MP.PP/2008/8 of 23 May 2008. A report to the fourth meeting of the Parties (Chisinau, Moldavia, 2011) was not submitted.

[15] See UNECE Decision IV/5 on Access to the Convention by non-UNECE Member States, ECE/MP.PP/2011/CRP3, of 1 July 2011.

[16] Details available at: http://live.unece.org/env/pp/international.html.

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almost all EU Member States and in the countries that have ratified the Aarhus Convention, government reluctance to disclose environmental information continued to exist and to make progress slow.

'Public authorities hold environmental information in the *public* interest.'[17] This statement should be commonplace, but apart from very few countries in the EU/Aarhus region, administrations continue to consider that disclosure of information on the environment is and should be the exception, and that administrative confidentiality or secrecy is the rule. 'Knowledge gives power' states the proverb, and administrations are often reluctant to share knowledge (information), as this would mean that they also have to share power.

This reluctance of administrations becomes particularly obvious when questions of active dissemination of information are at stake. The Aarhus Convention and EU law both provide for extensive legal obligations of administrations to disseminate, on their own initiative and without a corresponding request from the public, information on the environment, including studies, reports, assessments and other material. For example, while it would appear normal that any study on the environment by the administration (undertaken with taxpayers' money), is publicly available, the reality in many of the EU Member States, at EU level and in the Aarhus Convention member countries is unfortunately different, even in 2012. The greatest deficiencies in this regard are *ex post* evaluations of legislation or practices, monitoring results and assessments, and impact studies.

Both the Aarhus Convention and the EU, fortunately, have mechanisms to work towards an improvement in the situation. For the Aarhus Convention the mechanism is its above-mentioned Compliance Committee;[18] for the EU its Court of Justice (ECJ) serves this function.[19] Both bodies contribute, with their decisions on individual cases, to slowly but progressively strengthening the right of access to environmental information and to opening up national, regional or local administrations.

The international discussion on access to environmental information – or, if one so wishes, on a global Aarhus Convention – suffers from the reluctant position of the US. The reluctance of the US to bind itself by international conventions is well known. In the environmental sector, an internationally open attitude is less likely because the US is represented in international negotiations by the State Department or the Department of Commerce, as it lacks a Department for the Environment. However, the influence of the US in international forums is – for reasons of historical development, budgetary contributions or staff policy – so important that it is almost impossible to initiate or conclude environmental negotiations without or against the will of the US.

There is no intention to draw, in these lines, a picture of the general state of international negotiations on agreements concerning environmental issues. As regards access to environmental information, though, it can be fairly stated that there is no chance in the foreseeable future of a global agreement. Whenever such

17 Aarhus Convention, Recital 17 (emphasis added).

18 For details on the Compliance Committee, see: http://live.unece.org/env/pp/cc.html.

19 See Art. 251 and further TFEU.

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negotiations are proposed, the answer will most likely be that the UNEP Guidelines already exist, and that the experience of their effect on the legislation of the international community and on individual states should first be awaited.

Though the relevance and importance of these non-binding guidelines is not to be underestimated, the European discussion over the last 15 years very clearly shows that non-binding guidelines do not lead to significant changes in the attitudes of administrations. Indeed, most would agree in the abstract that citizens should have access to environmental information and that there should be 'appropriate handling of confidential or protected information'.[20] The devil is in the detail of what 'appropriate' means; citizens, environmental organizations and administrations normally disagree on this question. Frequently, the administrations simply do not disclose environmental information and leave it to citizens or environmental organizations to seek a remedy in the courts. And where no binding rules are laid down to balance the public interest in disclosure and the administrations' interest in non-disclosure, then lengthy, costly and resource-consuming court procedures are of very limited help.

4. REGIONAL CONVENTIONS ON ACCESS TO ENVIRONMENTAL INFORMATION

If the analysis is correct that existing international guidelines on access to environmental information are unlikely to lead to any significant change in the practice of the international community and its states, and that a global environmental agreement is unlikely to be adopted in the foreseeable future, the question then might be asked as to how and where progress in the debate on access to environmental information can be achieved. This might be linked to the question of who would or could be the driving force for improved access to environmental information. It seems obvious that environmental organizations, academics and other civil society representatives are the principal forces in favour of better access to such information. In contrast, it might not be an exaggeration to state that administrations are generally reserved with regard to a change in the status quo, for the above-mentioned reasons of power sharing, for fear of greater interference by the media in administrative decision-making, and for the general reason that any change in the status quo might bring about, in the eyes of the administration, uncertainties that could be unfortunate.

This constellation of forces indicates that, under normal circumstances, promoters of better provision on access to environmental information will be unlikely to succeed. In all democratic societies the protection of the environment has been laid primarily in the hands of the administration, which grants permits, elaborates and monitors environmental provisions, plans and realizes infrastructure projects, monitors pollution, etc. Administrations will thus successfully argue that their efficiency would be reduced if civil society had 'excessive' access to environmental information.

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20 Guideline 41j, n. 13 above.

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Such arguments will only be overcome when reconsideration is based on the broader objective of access to information – which is the principle of open society. These principles mean – simplified and limited to environmental issues – that administrative decisions on the environment might occasionally be wrong or erroneous. The best way to reduce such erroneous or wrong decisions is to lay open the different underlying assumptions, assessments and findings and to let the civil society that is concerned or affected by the environmental decision participate in the decision-making process. This implies that the public concerned has the same amount of information on the environment at its disposal as the deciding administration.

These principles are, of course, not limited to the environmental sector. But it should be clear that where any attempt is made, in the 21st century, to spread ideas and concepts of democracy – such as participation of citizens, openness, transparency, and accountability – these principles of an open society are an indispensable core which need to be actively promoted and shaped, if at all possible, into binding rules that link administrations as well as citizens. Non-binding guidelines will not be able to achieve these results.

It would thus be helpful if the EU and the US could pool their experience with the principles of open society (transparency, openness, participation, accountability), and actively promote the adoption of regional international agreements as well as national legislation concerning these principles. As in 1975, the environmental sector is one in which ideological prejudice has almost no place; thus, applying such principles to the environmental sector might be a first step. And it would be a good model if the US and the EU themselves were to be ready to become partners in such agreements, in order to demonstrate that they do not suggest rules for others that they are unwilling to apply to themselves.

It would therefore be a step forward if the countries forming the North-American Free Trade Agreement (NAFTA)[21] were to conclude a binding agreement on access to environmental information, if the Central American states would reach consensus over an Aarhus Convention type of agreement, or if Mercosur[22] would adopt such an agreement. The environment would profit, civil society would profit, democratic thinking and handling would profit. And the confidence in administrative decision-making, an indispensable part of a democratic society, would greatly increase.

5. CONCLUSION

The publications of Wikileaks raised concern within administrations worldwide that internal decision-making needs greater protection. However, environmental information relates to everybody's environment and is thus not comparable to the activities of Wikileaks. Striking the balance between society's right to know and the legitimate interests of administration is the challenge to be addressed. The UNECE

21 US, Canada and Mexico. NAFTA signed at San Antonio, TX (US), 17 Dec. 1992, in force 1 Jan. 1994, available at: http://www.nafta-sec-alena.org.

22 Details available at: http://www.mercosur.int.

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Aarhus Convention has succeeded fairly well in striking this balance. The potential of the Convention's Compliance Committee, to balance national legislation as well as specific administrative decisions against the letter and the spirit of the Aarhus Convention, is perhaps the greatest achievement of this Convention. Former UN Secretary General, Kofi Annan, referred to the Aarhus Convention as the most important piece of environmental democracy that had been developed under the auspices of the UN. Almost 15 years after the adoption of that Convention, it might be time to reflect on concrete steps as to how to promote its principles of environmental democracy internationally.

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