

# How can we make our voice heard?

a Practical Guide to the Aarhus Convention

*Justice and Environment 2014*

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Introduction .....	3
What difference does it make to know law? .....	3
Can it be used for any practical purpose?.....	3
Has there been anything achieved by legal means? .....	3
Why do you really need this?.....	4
International law.....	4
What is an international treaty? .....	4
Is it any useful for the ordinary persons?.....	4
What is the story of the Aarhus Convention?.....	5
The Aarhus Convention .....	5
Is it an environmental treaty or is it a human rights treaty?.....	5
What kind of treaty is it? .....	5
What is a right? .....	6
The Rights Guaranteed by the Aarhus Convention - How to Use the Rights?.....	6
Information .....	6
What does this exactly mean for you?.....	7
What are the limitations to the openness of information? .....	7
Participation .....	8
Justice .....	9
For how much and for how long?.....	10
How much all these would cost? How long all these would last? .....	10
What if all that fails? .....	11
Closing remarks.....	12
Contact information: .....	12

## Introduction

Many people are confronted with things in their life and in their surroundings that disturb them. Principal among these are **environmental problems**, such as pollution of the air and waters, inappropriate waste management or littering, loss of biodiversity, or just simply unreasonable decisions causing more environmental damage instead of healing the current ones.

However, many people do not think about law as a possible solution to these problems, and even more, they do not think that they should be applying **any legal means to do anything** to remedy such problems.

### What difference does it make to know law?

It is a matter of fact that those who know the laws applying to them and to a given problem are better at solving that very problem. **Knowing the law also means knowing your rights!** And knowing your rights means you will be suffering from any kind of harm (either from maladministration by the government or harassment by the corporate sector) with a significantly less probability.

### Can it be used for any practical purpose?

Well, the law is intended to make one's life (or rather, everyone's life) regulated so that it is predictable and safer compared with unregulated areas. Law in the protection of environment can be used for **a multiple practical purposes**, ranging from preventing environmentally harmful developments to remedying past pollutions.

### Has there been anything achieved by legal means?

It is a very valid question, especially in environmental protection. Environmental damage sometimes happens very rapidly and in a large quantity, such as an oil tanker accident or a power plant explosion. In such cases, legal means that are inherently slow and require lengthy premeditation, are not the perfect tools of solution. However, in situations when a planned project is to be permitted or a long lasting pollution is to be tackled, **legal means can be definitely useful.**

## Why do you really need this?

We at the Visegrad 4 Aarhus Center, comprising of public interest environmental law offices from the **Czech Republic, Hungary, Poland and Slovakia** have numerous examples when legal means really made a difference. And many times we used the Aarhus Convention, and international treaty to achieve legal victories. Read on to learn more!

Also to **read more about our cases**, please visit regularly the Facebook page of Justice and Environment at <https://www.facebook.com/justiceandenvironment>.

## International law

International law is an area of law. Or, as lawyers call it, a branch of law. One of the basic principles of international law is that no country can be bound by any obligation to which it did not give its consent. This is called the principle of sovereignty. However, **sovereignty is not unlimited!**

## What is an international treaty?

An international treaty is **an agreement between sovereign states and/or international organizations**. A treaty can be bilateral (if it has only two parties) or multilateral (if it has more than two parties). International treaties typically regulate important issues between two states (or countries) such as economic relations, migration, taxation, use of shared natural resources, like river crossing the borders, culture, etc.

## Is it any useful for the ordinary persons?

Citizens are rarely subjects of international law. Traditionally, international law was a thing that interested only states and international organizations. However, a few decades ago a new trend emerged, i.e. international law started to recognize individuals as its subjects. **Citizens can also benefit** from an international treaty's provisions. This is the case when such treaties grant certain rights to citizens (or group of citizens) that they can enforce, either in a domestic context or even internationally.

One such international treaty is called **the Aarhus Convention**.

## What is the story of the Aarhus Convention?

The Aarhus Convention is a **short name**, the treaty has a full name called: The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

It was signed in 1998 in June in the Danish city of Aarhus; that is why it is called the Aarhus Convention. The Convention was developed during **two years of negotiations** with input from countries and non-governmental organizations from throughout the UNECE region.

A unique feature of the Convention is that during negotiations, a group was formed to assist in drawing up a draft convention. This group contained also **non-governmental organization (NGO)** representatives as well, which was almost unprecedented before in negotiations aimed at concluding an international treaty.

## The Aarhus Convention

The Aarhus Convention was signed in 1998 but it took another 3 years until it entered into force. This means, until its provisions were binding on the countries that signed the treaty.

## Is it an environmental treaty or is it a human rights treaty?

The Convention regulates participatory rights in environmental matters, and also acknowledges the human right to environment. It is **not really an environmental treaty** in a sense that it does not protect any part or element or component, etc. of the environment.

## What kind of treaty is it?

The Aarhus Convention is best described as a **procedural treaty**. It regulates HOW access to information, public participation and access to justice can be exercised. It also regulates WHAT the government has to do in order to respect these access rights.

## What is a right?

A right is an entitlement to something, whether to concepts like justice and due process or to ownership of property or some interest in property, real or personal. These rights include: various freedoms; protection against interference with enjoyment of life and property; civil rights enjoyed by citizens such as voting and access to the courts; etc. These **access rights** enshrined by the Aarhus Convention are useful in environmental matters, as detailed below.

## The Rights Guaranteed by the Aarhus Convention - How to Use the Rights?

As we have mentioned in the foregoing, the Aarhus Convention guarantees three types of access rights, the one to **information**, the one to **participation** and the one to **justice**.

### Information

Information is key. Information is indispensable before making any decision or taking any actions. This is also true for the environment and citizens and environmental NGOs need information to plan their strategies and actions in the protection of environmental interests. That is why the Aarhus Convention regulates as follows:

- **public authorities have to disclose information upon a request**
- **they cannot ask why someone needs the information and what is the applicant's interest in getting that information**
- **the information has to be provided in the form requested unless it is reasonable to make it available in another form or the information is already publicly available in another form**
- **the information has to be made available as soon as possible and at the latest within one month after the request**
- **if the request is about a large volume of or a complex set of information then this period can be up to two months after the request**
- **if the public authority does not hold the environmental information, the applicant has to be informed or the request transferred to the right place**
- **access to environmental information is not free of charge, but any such charge shall not exceed a reasonable amount**

## What does this exactly mean for you?

All this means that in case there is an environmental information that you want to know, the public authorities are **obliged to disclose** it.

## What are the limitations to the openness of information?

There are a few restrictions to transparency, i.e. there are a few reasons why a public authority may refuse disclosure of information. These are:

- **the public authority does not hold the environmental information**
- **the request is manifestly unreasonable or formulated in too general a manner**
- **the request concerns material in the course of completion or concerns internal communications of public authorities**
- **confidentiality of the proceedings of public authorities**
- **international relations, national defence or public security**
- **the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature**
- **the confidentiality of commercial and industrial information**
- **intellectual property rights**
- **the confidentiality of personal data and/or files relating to a natural person**
- **the environment to which the information relates, such as the breeding sites of rare species**

It means that in such cases, the public authorities **can withhold the requested information**.

There are however two limitations to the application of these exceptions:

1. Generally, the aforementioned grounds for refusal shall be interpreted in **a restrictive way**, taking into account **the public interest served by disclosure** and taking into account whether the information requested relates to **emissions into the environment**.
2. Specifically, **information on emissions** which is relevant for the protection of the environment shall be disclosed even if the rest of information is protected because of commercial and industrial information.

## Participation

Participation is all the actions of the public that are performed in order to influence a planning, a programming or a project-level (individual) decision-making process before the final decision is made (in environmental matters of course). This requires an opportunity for the public to learn about such procedures and an entry point where the public can express itself. That is what the Aarhus Convention says about this issue:

- **the public has to be informed early (= when all options are open and effective public participation can take place) about a decision-making procedure**
- **such information about a procedure has to happen in an adequate, timely and effective manner information must include, amongst others: the proposed activity and the application on which a decision will be taken; the nature of possible decisions or the draft decision; the public authority responsible for making the decision; the commencement of the procedure; the opportunities for the public to participate; the time and venue of any envisaged public hearing; an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public; an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and an indication of what environmental information relevant to the proposed activity is availablek**
- **there must be reasonable time-frames for different phases of the procedure (including the information of the public about a process, the preparation of the public for participation and the participation itself)**
- **the participation is mainly an opportunity that the public can submit comments, information, analyses or opinions**
- **this has to be taken into due account in making the decision in the procedure**
- **finally, a prompt information has to be given to the public on the decision made**

In practice it means that the public is given a rights **to express itself** in certain environmentally important procedures.



One important factor is that such rights are available pursuant to the Aarhus Convention **only in relation to a selected number of planned installations and facilities**, factories, plants, etc. that are listed in the Annex I of the Convention, being the potentially most polluting developments from an environmental point of view.

## Justice

There may be situations when the public authorities do not disclose the requested information, or they do not allow participation in a decision-making procedure, or simply the decision they made does not align with what members of the public believe is right for the environment. Ultimately, there may also be situations when a public authority or a private entity (a company for instance) breaches environmental law and the public would like to achieve that an action is made to control such situations. For these situations, the Aarhus Convention regulates as follows:

- **when a request for information has been ignored, wrongfully refused, inadequately answered, or otherwise not dealt with in accordance with the Convention, the applicant for information has access to a review procedure before a court of law or another independent and impartial body (this is typically an ombudsman or a specific information commissioner)**
- **when the members of the public concerned have a sufficient interest or, alternatively, maintain the impairment of any of their rights, they have to have access to a review procedure before a court of law and/or another independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission made in relation to the aforementioned list of facilities and installations, i.e. those where public participation was obligatory**
- **finally, members of the public have to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment, typically in situations where a damage to the environment is detected**

In reality, this means that if your rights were not respected by the public authorities, you can turn to the court or elsewhere if there are other mechanisms **servicing justice** in your country.

As it can be seen from the above list, these are not only and not exclusively the courts where remedies (or access to justice) can be sought. Another independent and impartial body can also serve justice to applicants for information whose request was denied or those who are not satisfied by the issuance of a permit, because they believe that a given installation should not be located in their neighborhood. Also, if someone detects damage to the environment, it is not necessary that a court action be filed, but administrative procedures could be also initiated.

### **For how much and for how long?**

Many people believe that the number of lawsuits started in the protection of the environment depend on the legal opportunities to file court actions. Therefore many people believe that if the law allows members of the public to start such cases, that will be resulting in **millions of cases** before the courts. This, as a matter of fact, is simply **not true!**

The factors on which the willingness to use legal means, or even to file a lawsuit, depends are many, and only one of them, and not even the most important, is the breadth of legal standing, i.e. the ability to file a lawsuit. Other factors are the costs of procedures, the complexity of the legal matter, the availability of legal help, the foreseeable length of the legal procedure and last but not least, the predictability of any meaningful outcome.

### **How much all these would cost? How long all these would last?**

In order to limit costs as well as speed up procedures, in addition to ensure fairness, the Aarhus Convention has set, in a general manner, the basic characteristics of any remedy procedure. It says that the procedures started in order to get access to information, to have legal standing in decision-making processes, to file a lawsuit against decisions made in environmentally important processes, or simply to fight against breach of environmental law, have to provide adequate and effective remedies. It means that the remedies should be appropriate for the situation, and have to be enforceable. The Convention also says that once needed, injunctive reliefs should be used – these are temporary actions by the court, by which a judge orders the preservation of a situation if environmental damage is foreseeable, or on the contrary, orders rapid action if that is needed to avoid more harm to the environment.

The procedures have to be **fair, equitable, timely and not prohibitively expensive.**

## What if all that fails?

OK, this much about theory, but we all know that things **sometimes do not come across** as smoothly as planned. There may be public authorities who overcharge fees for public access to information, or permits are issued that clearly violate environmental laws, or there may be polluters who can be taken to court, but eventually the court procedure will be lengthy and overly costly for the applicant, being either a community of citizens or a regular environmental NGO, none of them disposing of huge amounts of financial resources.

In these situations, and given that domestic remedies fail (i.e. there is no other independent and impartial forum where one can seek justice), there is an ultimate chance to **submit a complaint to an international body**. This is the so-called Aarhus Convention Compliance Committee (ACCC) that is seated in Geneva, in the Palace of Nations where the UN has a headquarters.

Basically, anyone can submit a complaint (or officially called, a “communication” to the ACCC and request that a breach of access rights is established and adequate recommendations made by the ACCC towards the country whose public authorities or judiciary restricted or limited access rights. Logically, one has to submit this **complaint against a country that is party to the Aarhus Convention**. And while the recommendations of the ACCC are not binding, they still have a strong convincing power and can exercise pressure on governments to respect access rights.

There is an easily understandable online guidance document on how to submit such a complaint, and there are a number of tips and pieces of advice how to formulate your complaint. Also, the ACCC in the last 10 years have accumulated a rich case law that reacts to a number of questions, such as too high court fees, too restrictive standing criteria for NGOs, too long procedures for making judicial decisions in environmental matter, or too short time given to the public for commenting administrative decision-making processes. The ACCC is **a true guardian of environmental access rights** and is accessible for each and every person who lives in a country that has ratified the Convention.

**link to the ACCC:**

**<http://www.unece.org/env/pp/cc.html>**

## Closing remarks

All in all, the willingness of the public to stand up for its environmental rights must come from inside; this cannot be planted into people by law.

What law can do is to create the external conditions for its implementation. It can also make sure that the enforcement of the information, participation and justice rights of the public is exercised in a fair and equitable manner, not entailing excessive burdens.

And ultimately, it is law again, in the face of an international organization's compliance review body that can make sure that even if such conditions are not met, public authorities are slowly but steadily driven in a way to respect the human right to environment and to respect those procedural rights that are necessary for its full enjoyment.

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