Transformative Effects of the Aarhus Convention in Europe

Karl-Peter Sommermann[*]

Abstract

The Aarhus Convention does not codify substantive standards of environmental protection, but provides for an ecological transformation by enlarging and improving access to information, public participation, and justice in environmental matters. Although the procedural safeguards and arrangements refer primarily to implementation by national authorities, a specific monitoring system at international level has been established, too. In the case of the State parties that are members of the European Union, which also adhered to the Convention, an additional level of European institutions supervises the "implementation of the implementation mechanisms". In practice, the Convention has contributed to substantial reforms in European and Central Asian States. It ranks among those international treaties that nowadays are most frequently quoted in administrative law decisions of domestic courts in Europe. As an example of a successful regional arrangement that provides for a closer, systematic cooperation in the enforcement

[*] Professor of Public Law, Political Theory and Comparative law at the German University of Administrative Sciences Speyer, e-mail: <sommermann@uni-speyer.de>.

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of universally recognized principles, the Convention might become a reference or even a model in other regions of the world.

I. Introduction

The Aarhus Convention[1] ranks among those international treaties that nowadays are most frequently quoted in administrative law decisions of domestic courts in Europe. In France, for instance, the *Conseil d'État* has referred to the Aarhus Convention in 71 judgements since 2004,[2] in Italy the *Consiglio di Stato* and the *Tribunali Amministrativi Regionali* referenced it in 107 decisions[3] and since 2015 the supreme administrative courts of Austria and Germany have quoted the Convention in 16 and 12 judgements respectively[4]. In the United Kingdom, the Convention appears in some relevant judgements of the Supreme Court,[5] established in 2009,[6] but in much more cases of the Administrative Court and the Administrative Appeals Chamber of the Upper Tribunal, established in 2008 under the Tribunals, Courts and Enforcement Act 2007[7].[8] The European Court of Human Rights has referred to the Convention several times;[9] dozens of cases

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25.6.1998, 2161 UNTS, 447.

[2] Counted according to the enumeration of judgements on <http://www.conseil-etat.fr> (last visited 30.11.2016).

[3] See <https://www.giustizia-amministrativa.it> (last visited 30.11.2016). Out of 104 decisions referring to the Aarhus Convention 96 were judgements.

[4] Germany (BVerwG): 25 judgements since 2008 (2013: 5, 2014: 2, 2015: 4, 2016: 8), counted according to the enumeration of judgements on <http://www.bverwg.de> (last visited 30.11.2016); Austria (Verwaltungsgerichtshof): 23 since 2008, 16 since 2015, <https://www.ris.bka.gv.at> (last visited 30.11.2016). However, much more judgements referred to the European Convention of Human Rights.

[5] 2010: 1, 2013: 2 judgements; see <https://www.supremecourt.uk> (last visited 30.11.2016).

[6] See Part 3 of the Constitutional Reform Act 2005, 2005, Chapter 4.

[7] 2007, Chapter 15.

[8] This can be derived from spot checks; see also the references to the Aarhus Convention made in HM Courts and Tribunal Service (ed.), The Administrative Court Judicial Review Guide 2016, available on the internet under <https://www.gov.uk>.

[9] See, e.g., the judgement of 27.1.2009, para. 118, in the case "*Tătar v. Roumania*", concerning the compatibility of a licence to exploit a gold mine (involving the use of sodium cyanide in the extraction process) with Art. 8: "Au niveau international, la Cour rappelle que l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement sont consacrés par la Convention d'Aarhus du 25 juin 1998, ratifiée par la Roumanie le 22 mai 2000 … Dans le même sens, la Résolution no 1430/2005 de l'Assemblée parlementaire du Conseil de l'Europe sur les risques industriels renforce, entre

have been decided by or are pending before the European Court of Justice[10].

Elaborated under the auspices of the United Nations Economic Commission for Europe, the Convention was adopted at the Fourth Ministerial Conference as part of the "Environment for Europe" process in the Danish city Aarhus in 1998. It entered into force three years later. To date, 46 States and the European Union have adhered to the Convention.

The regulations of the Convention reach deeply into the relationship between citizens and national authorities. The Convention creates obligations for the State primarily towards the public rather than towards other State parties. Insofar it is structurally comparable to human rights treaties. As its full title "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" indicates, the Convention is significantly procedure-oriented. It aims to reinforce of the implementation of environmental standards at the national level by strengthening and extending the influence of the individuals and the public on the decision-making in environmental matters and their right to initiate control procedures. In doing so, it simultaneously helps to enforce the internationally binding environmental standards, including those established in the conventions elaborated in the framework of the United Nations (UN) Economic Commission for Europe.[11]

However, this is not the only reason why the Aarhus Convention is interesting for studies on the implementation of international law. The institutional and procedural arrangements for the implementation of the Convention itself in a multi-level system deserves special attention. The following considerations will ask whether and, if so, to what extent the transformative effects of the Aarhus Convention can be attributed to specific mechanisms or circumstances of implementation. The further question, regarding which mechanisms or arrangements, if any, could serve as a blueprint or at least provide elements for use in other contexts, will briefly be touched upon.

In this line, the article will first address the normative scope and transformative potential of the Aarhus Convention (II.), then turn to the given mechanisms of implementation in a multi-level system (III.), before finally

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autres, le devoir pour les États membres d'améliorer la diffusion d'informations dans ce domaine …".

[10] To date, 35 judgements have been delivered (30.11.2016), see <http://curia.europa.eu>.

[11] See the Convention on Long-range Transboundary Air Pollution of 1979, 1302 UNTS, 217; the Convention on Environmental Impact Assessment in a Transboundary Context of 1991, 1989 UNTS, 309; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992, 1936 UNTS, 269; Convention on the Transboundary Effects of Industrial Accidents of 1992, 2105 UNTS, 457.

looking at the transformative effects of the Convention in selected Member States (IV.) and drawing a conclusion (V.).

II. The Objectives and the Transformative Potential of the Aarhus Convention

The objectives of the Aarhus Convention are ambitious. On the one hand, according to its adoption in the context of the United Nations, it is to provide for arrangements for the effective implementation of universal rules and principles concerning the protection of the environment; on the other hand, it pursues the further development of already existing implementation mechanisms in the States of Europe and Central Asia.

1. Implementing Universal Principles at Regional Level

The first two recitals of the preamble of the Aarhus Convention refer to the Stockholm Declaration on the Human Environment of 1972[12] and the Rio Declaration on Environment and Development of 1982[13] and thus places itself in the line of universal environmental protection through the UN. A look through the Declarations reveals that it is primarily Principle 10 of the Rio Declaration which inspires the Convention.[14] Principle 10 already calls upon the States to enable access to information concerning the environment, to open up participation in decision-making processes, and to ensure effective access to judicial and administrative proceedings. These are exactly the elements that the Aarhus Convention further develops and transforms into binding rules and principles. Thus, the UN Economic Commission for Europe followed a regional approach for the implementation of universal principles. Such regional approach presupposes that a group of States, in this case European and Central Asian States, do not only pay lip service to the universal principles recognised as necessary, but that they are ready to take the principles seriously and to establish effective enforcement mechanisms that go beyond those existing at universal level.[15]

12 UNYB 26 (1972), 319.

13 Report of the UN Conference on Environment and Development, Annex I, UN Doc. A/Conf. 151/26 of 12.8.1992; ILM 31 (1992), 876.

14 Consequently, the Convention makes explicit reference to Principle 10 in its 2nd recital.

15 *P.-M. Dupuy/J. E. Viñales*, International Environmental Law, 2015, 319, speak of a "powerful tool for the enforcement of States' obligations".

The regional approach entails implementation at different speeds, often accompanied by the hope that other regions or States will chose equivalent solutions in time.

Such regional solutions, that is, decentralised forms of implementation, are well known in the field of human rights. The European Convention of Human Rights of 1950[16] refers in its preamble to the Universal Declaration of Human Rights of 1948,[17] and so does the American Convention of Human Rights[18] subsequent to the reference made to the American Declaration of the Rights and Duties of Man,[19] which had been adopted some eight months earlier than the Universal Declaration. Though less prominently quoted, the Universal Declaration is also referred to in the preamble of the African Charter on Human and Peoples' Rights of 1981.[20] As another example of specific, yet less obvious regional implementation of universal principles, one might even quote the realisation of economic principles laid down in the General Agreement on Tariffs and Trade (GATT)[21] by the Treaty establishing the European Economic Community of 1957[22] where the GATT is only mentioned in Art. 229. For an analysis of the Aarhus Convention, a comparison with the regional, decentralised implementation of human rights remains the most insightful.

2. Establishing Three Procedural Pillars of Environmental Protection

There are two significant structural differences between the regional human rights treaties on the one hand, and the Aarhus Convention as a regional treaty on environmental protection on the other. First, the Aarhus Convention does not codify substantive standards of protection, but only regulates procedural safeguards and arrangements that should contribute, as Art. 1 puts it, "to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being". Second, the procedural safeguards and arrangements refer primarily to implementation by national authorities and not to international

16 ETS No. 005.
17 Res. 217 (III) A, GAOR 3rd session, Resolutions, 71; UNYB 3 (1948-49), 535.
18 OAS Official Records OEA/Ser. K/XVI I.I, Doc. 65, Rev. 1, Corr. 2; OAS Treaty Series No. 26; 1144 UNTS, 123.
19 AJIL 43 (1949), 133.
20 ILM 21 (1982), 59.
21 55 UNTS, 194 (GATT 1947).
22 298 UNTS, 11.

enforcement mechanisms, although a specific monitoring system at international level is provided for. The underlying guiding maxim of the Convention could be characterised as "ecological transformation by more citizens' participation in decision-making and control". The procedural concept of the Convention is based on three pillars:

a) The first pillar (Arts. 4 and 5) consists of making environmental information available to the public, that is, individuals as well as associations, organisations and groups, without requiring a statement of interest. In order to strengthen the function of the right to access of information, States Parties are obliged to ensure that the competent authorities possess and update environmental information.[23] The Convention precisely lays down what is understood as "environmental information"[24] and under which conditions the information may be refused.[25]

b) The second pillar (Arts. 6 to 8) covers public participation in activities "which may have significant effect on the environment".[26] Apart from this general clause that presupposes a further concretisation by the State parties, an almost exhaustive list of activities, to which public participation applies is given in Annex I of the Convention. The activities enumerated in 22 comprehensive points extend from mineral oil and gas refineries, chemical installations and waste management through the construction of motorways and groundwater abstraction to the construction of pipelines and installations for the intensive rearing of poultry or pigs. The Convention provides for procedural prerequisites that are to ensure effective public participation. The decision-making processes concerned are decisions in individual cases as well as the preparation of plans, programs and executive regulations.

c) The third pillar (Art. 9), which for many countries holds the greatest transformative potential, constitutes a "wide access to justice within the scope of this Convention" of the public concerned. The public concerned includes the public having a sufficient interest; the existence of such interest is irrefutably presumed in case of non-governmental organisations promoting environmental protection.[27] In order to ensure equivalent conditions of judicial control, the Convention stipulates the obligation to provide "administrative or judicial procedures to challenge acts and omissions by private persons and public authorities" and "adequate and effective remedies, including injunctive relief as appropriate" that are "fair, equitable, timely

[23] Aarhus Convention (note 1), Art. 5.
[24] Aarhus Convention (note 1), Art. 2 para. 3.
[25] Aarhus Convention (note 1), Art. 4 para. 3-8.
[26] Aarhus Convention (note 1), Art. 6 para. 1 lit. b.
[27] Aarhus Convention (note 1), Art. 2 para. 5.

and not prohibitively expensive". In 1998, these standards, in particular the existence of effective remedies against omissions and easily accessible interim relief, were far from common in Europe, not even in most Western European countries,[28] although the principle of effective judicial protection of Community Law by national courts had been recognised by the European Court of Justice as a general principle of law since the 1980s.[29]

3. Dynamic Clauses: The Aarhus Convention as a Living Instrument

The drafters of the Aarhus Convention conceived it as a living instrument. This is highlighted by the fact that it not only contains numerous promotional obligations alongside with "hard" rules, but also provides with the above-mentioned general clause on the scope of application a dynamic extension of the applicability of the Convention by the State parties. Among the promotional obligations, special emphasis is put on the improvement of the available information. In this vein, Art. 5 para. 3 stipulates:

> "Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks."

Backing this approach and further developing the conventional obligation stemming from Art. 5 para. 9, the Kiev Protocol of 2003 to the Aarhus Convention[30] seeks

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[28] See *K.-P. Sommermann*, Die Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive, in: R. P. Schenke/J. Suerbaum (eds.), Verwaltungsgerichtsbarkeit in der Europäischen Union, 2016, 189, 191 et seq.; see also M. Eliantonio/C. W. Backes/C. H. van Rhee/T. N. B. M. Spronken/A. Berlee (eds.), Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts, 2013, in particular p. 61-84.

[29] CJ, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, case C–222/84, judgement of 15.5.1986, [1985] 1651, paras. 1 and 2. See the analysis of *L. M. Ravo*, The Role of the Principle of Effective Judicial Protection in the EU and Its Impact on National Jurisdictions, in: Sources of Law and Legal Protection, EUT Edizioni Università di Trieste, 2012, 101 et seq.

[30] Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 21.5.2003, 2626 UNTS, 119.

"to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs) … which could facilitate public participation in environmental decision".[31]

This Protocol is open to signature for all Member States of the United Nations. To date, 35 European States and the European Union have adhered to the Protocol.[32]

III. Implementation of the Aarhus Convention in a Multi-Level System

What makes the Aarhus Convention so interesting is not only the approach that focuses on national procedural safeguards in order to improve the protection of the environment in practice; equally noteworthy is its implementation in the framework of a multi-level system, which is asymmetrical because 60 % of the State parties are members of the European Union that also adhered to the Convention. Thus, a two-level regionalisation can be seen that contributes to the considerable reinforcement of the implementation of the Convention. Obviously, the mere fact of a joint implementation of mixed treaties by the Union and by its members is nothing extraordinary. However, in the case of the Aarhus Convention, the European Union has to look after the implementation of implementation mechanisms in its Member states, which brings about a more sophisticated construction.

1. The International Enforcement Mechanisms of the Aarhus Convention

Looking at the implementation of the Aarhus Convention, one has to start with the monitoring system of the Convention itself, which applies to all State parties. On the basis of Art. 15 of the Convention, the State parties have established a Compliance Committee in their first meeting in 2002.[33] The Committee consists of eight independent experts and besides submis-

[31] See Protocol on Pollutant Release (note 30), Art. 1.

[32] See <https://treaties.un.org> (last visited 30.11.2016).

[33] Economic Commission for Europe, Meeting of the Parties to the Decision I/7 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Decision I/7 – Review of Compliance, adopted on 21.-23.10.2002, UN-Doc. ECE/MO.PP/2/Add.8 of 2.4.2004.

sions by parties and referrals by the Secretariat, considers also communications from the public, whether individuals, associations or groups. The review-procedure is non-confrontational, consultative and frequently used by environmental associations.[34] The communications are published and the meetings of the Committee are generally open to the public. Currently, the case law is formed by about 80 findings, while another 60 communications are under investigation.

Quite a lot of the findings concern Central Asian Member states, while among the Western States the United Kingdom is most seen. Thus, the Compliance Committee stated with regard to Kazakhstan in a finding of 2006, that there were "significant problems with the enforcement of national environmental law".[35] In a finding of 2011 related to the United Kingdom, the Committee expressed

> "concern regarding the availability of appropriate judicial or administrative procedures … in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of England and Wales".[36]

Before the entering into force of the Lisbon Treaty, the Committee, considering the situation in the European Community, noted "with concern the following general features of the Community legal framework: (a) Lack of express wording requiring the public to be informed in an 'adequate, timely and effective manner' in the provisions regarding public participation in the EIA [Environmental Impact Assessment] and IPPC [Integrated pollution prevention and control] Directives; (b) Lack of a clear obligation to provide the public concerned with effective remedies, including injunctive relief, in the provisions regarding access to justice in the EIA and IPPC Directives".[37] In the last years, one can observe a wider spectrum of State parties concerned by the findings.

Many findings relate to questions of definition, concretisation and interpretation of the provisions of the Convention. Overall, the Committee interprets the Convention in a dynamic manner, but acts prudently vis-à-vis the verdict of non-compliance. Binding decisions can only be issued by a

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[34] See *C. Day*, The Aarhus Convention and NGOs, in: C. Banner (ed.), The Aarhus Convention. A Guide for UK Lawyers, 2015, 181, 187 et seq.

[35] See Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28.7.2006, para. 31.

[36] See United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, 24.8.2011, para. 127.

[37] See European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2.5.2008, para. 59.

consensus basis in the Meeting of the Parties.[38] Generally, the Parties follow the recommendations of the Committee.

2. The Implementation by the Parties of the Convention: The Specific Role of the European Union

The Parties of the Aarhus Convention that are Members of the European Union are faced with two layers of obligations: first, the provisions of the Convention itself and second, the legislation of the European Union transposing the Convention into European Union (EU) law. Due to the supremacy of Union Law, the Member States will fulfil their conventional obligations by applying Union law, to the extent that the Union law complies with the requirements of the Aarhus Convention and does not leave regulatory gaps. In this line, the national legislators have transposed the Directive 2003/4/EC,[39] on public access to environmental information, and the Directive 2003/35/EC,[40] providing for public participation and access to justice. However, shortcomings in the transposition of the Convention by the EU legislator, cannot free the State parties from their commitments. Apart from possible loopholes in Union law, the Aarhus Convention enjoys all the advantages of enforcement mechanisms of the European Union, in particular the supervision of implementation by the EU Commission and the judicial control by the European Court of Justice.

As far as the State parties are concerned that are not members of the European Union, the control of the enforcement of the provisions of the Convention is limited to the soft mechanisms of the Convention and the national instruments of control. Given that several States have not yet completed their transition to a democratic, rule of law-based State, this can lead to an implementation of two speeds within the regional scope of the Convention. The fact that the first five States to adhere to the Convention were Turkmenistan, Macedonia, Moldova, Ukraine and Belarus (in 1999 and 2000) does not yet indicate a special advantage in the implementation process. The

[38] See Aarhus Convention (note 1), Art. 15.

[39] Directive 2003/4/EC of the European Parliament and of the Council of 28.1.2003 on public access to environmental information, OJ L 41, 14.2.2003, 26 et seq.

[40] Directive 2003/35/EC of the European Parliament and of the Council of 26.5.2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, 17 et seq.

Convention presupposes not only adequate legislation, but also a highly developed system of public administration and judicial control.

3. Mutual Complementing or Compensating in Multi-Level Implementation

The special relationship between Union law and domestic law in the implementation of the Convention does not only mean to double the tools for enforcement. It is also characterised by a productive interaction between the two legal spheres, by a relationship of complementation or compensation. In this sense, the European Court of Justice, dealing with the transposition of Art. 9 para. 3 of the Convention (modalities of judicial procedure), has underlined in its judgement of 8.3.2011 in the "*Slovak Brown Bear* Case", that in

> "the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law …".[41]

In other cases, the domestic legislation remained incomplete and therefore did not comply with the Convention. Thus, in its judgements of 12.5.2011 in the case "*Trianel*"[42] and of 7.11.2013 in the case "*Altrip*",[43] the Court deemed certain regulations of the German legislation incompatible with EU law. The *Trianel* case dealt with the German law of transposition of the Directive 2003/35/EC. In conformity with the subjective paradigm of German judicial review, this law had restricted the admissibility of actions brought by environmental protection organisations to claims concerning the violation of norms protecting individual interests. The Court recognised in this case the necessity to interpret EU law – here: the Environmental Impact Assessment Directive[44] – in the light of the Convention that stipulates

[41] *Slovak Brown Bear* Case (*Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*), Case C-240/09 (ECLI:EU:C:2011:125), para. 47.

[42] *Trianel* (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*), Case C-115/09 (ECLI:EU:C:2011:289).

[43] *Gemeinde Altrip u.a. v. Land Rheinland-Pfalz*, Case C-72/12 (ECLI:EU:C:2013:712).

[44] Directive 85/337/EEC of 27.6.1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 5.7.1985, 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26.5.2003 (OJ L 156, 25.06.2003, 17).

the "objective of giving the public concerned wide access to justice".[45] In the *Altrip* case the Court considered it contrary to EU law that the German legislation provided the annulment of an authorisation only in situations in which a compulsory environmental impact assessment was totally omitted.[46] When reforming the law in consequence of the *Trianel* judgement,[47] the German legislator took also into account a procedure pending before the Compliance Committee.[48] The law reform that became necessary as a result of the *Altrip* judgement was adopted on 20.11.2015.[49] Additional modifications that are to adjust the law to the further requirements established in the findings of the Compliance Committee and confirmed in the Meeting of the Parties to the Convention[50] are under way[51].

Loopholes in the access to justice in environmental matters can also be seen at EU level. Although the Grand Chamber of the European Court of Justice, in its judgment of 13.1.2015, denied the applicability of the obligations deriving from Art. 9 para. 3 of the Convention to the review system of the Union itself,[52] the discussion is still open[53]. It is not excluded that the Compliance Committee will deal with the question in the future.

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45 *Trianel* (note 42), para. 41-50.

46 *Altrip* (note 43), para. 42-45.

47 Law dated 21.1.2013: "Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften", BGBl. 2013 I, 95.

48 See the subsequent findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany (ACCC/C/2008/31), adopted by the Compliance Committee on 20.12.2013, Doc. ECE/MP.PP/C.1/2014/8.

49 "Gesetz zur Änderung des Umweltrechtsbehelfsgesetzes zur Umsetzung des Urteils des Europäischen Gerichtshofs vom 7.11.2013 in der Rechtssache C-72/12", BGBl. 2015 I, 2069.

50 Decision V/9h, fifth session of the Meeting of the Parties to the Convention, Doc. ECE/MP.PP/2014/2/Add.1.

51 See the corresponding draft law proposed by the Federal Government: "Entwurf eines Gesetzes zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und anderer Vorschriften an europa- und völkerrechtliche Vorgaben", BT-Drs. 18/9526 of 5.9.2016.

52 *Rat u.a. v. Vereniging Milieudefensie und Stichting Stop Luchtverontreiniging Utrecht*, Case C-401/12 P to C-403/12 P (ECLI:EU:C:2015:4), para. 52-62.

53 The General Court, which was overruled by the judgement of 13.1.2015, had come to different conclusions, see the judgement of the General Court of 14.6.2012, *Stichting Natuur en Milieu und Pesticide Action Network Europe v. Kommission*, Case T 338/08, para. 59-84. See also the critical analysis by *H. Schoukens*, Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?, in: Utrecht Journal of International and European Law 31 (2015), 46 et seq. (doi: http://dx.doi.org/10.5334/ujiel.di).

IV. Transformative Effects in Selected European Countries

Irrespective of these shortcomings, a broader look at domestic law shows that implementation is frequently not limited to the necessary minimum. The effects of the Aarhus Convention often go far beyond its intended scope of application. National legislators have been expanding the underlying principles of the Convention to other areas, and there are even indicators that, similar to human rights treaties, the Convention exercises an influence on the development of domestic constitutional law.

1. Implementing the Minimum

Numerous judgements issued by the domestic courts and the European Court of Justice, as well as findings of the Compliance Committee, draw attention to shortcomings in the implementation of the Aarhus Convention. This suggests that quite a number of States have already faced difficulties in complying with all minimum requirements of the Convention. In particular, the judicial review standards still seem to require substantial efforts before they completely implement all the rules and principles of the Convention.

2. Spill-Overs

However, as already indicated, a more differentiated picture emerges if one takes into consideration the reforms that many European countries have carried out in the fields of access to information, public participation, and access to justice. Even leaving aside those reforms that could be attributed to promotional obligations stemming from the Convention, there are numerous domestic laws that have been inspired by the underlying principles of the Convention and go far beyond its scope of application. A few exemplary cases can illustrate this point.

As far as access to information is concerned, the adoption of general laws on freedom of information appears to have temporal correlation with the elaboration and adherence to the Convention. To be sure, the 1990s saw the idea of a greater openness of public administration towards the citizens become a more common feature of administrative law, one which soon manifested in legislation. This trend is exemplified, for instance, by the Italian Law on new regulations of administrative procedure and the right to access

to information adopted in 1990,[54] the Dutch Law on the openness of public administration of 1991,[55] and the Portuguese Code of administrative procedure of the same year,[56] which significantly strengthened freedom of information. In Community law, the Council Directive on the freedom of access to information on the environment, adopted in 1990,[57] was pathbreaking. These antecedents have to be born in mind when analysing the context of the elaboration of the Aarhus Convention. However, the Aarhus Convention has accelerated the process of reform and notably extended the right to access to information. In addition to further-reaching legal reforms in the countries that had already recognised, to a greater or lesser extent, the right to access to information before, among them France[58] and Spain,[59] in several countries a paradigm-shift could be observed. This is the case in the United Kingdom and in Germany. In the United Kingdom, the Freedom of Information Act adopted in 2000[60] meant the abandonment of the "culture of secrecy and confidentiality" reflected in the Official Secrets Act of 1911.[61]

54 Legge 7.8.1990 n. 241 "Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi", Gazzetta Ufficiale n. 192 of 18.8.1990; last modification by law 69/2009 of 18.6.2009, Gazetta Ufficiale n. 140 of 19.6.2009.

55 Wet van 31.10.1991, houdende regelen betreffende de openbaarheid van bestuur (Stb. 1991, 703).

56 Código do procedimento administrativo de 1991, Decreto-Lei no. 442/91, de 11 de novembro (Diário da República, I Série-A, N.º 263 – 15-11-2001), adopted on the basis of the law 32/91 of 20.7.1991 (Diário da República, I Série-A, N.º 165 – 20-7-2001). See also the law of 28.8.1993: "Lei de acesso aos documentos da Administração", reframed by law of 24.8.2007: Lei N.º 46/2007, Diário da República, I Série-A, N.º 163 — 24-8-2007 (see Art. 1: "O acesso e a reutilização dos documentos administrativos são assegurados de acordo com os princípios da publicidade, da transparência, da igualdade, da justiça e da imparcialidade.").

57 Council Directive 90/313/EEC on the freedom of access to information on the environment, OJ L 158, 27.5.2014, 56.

58 Access to information was already regulated in the law of 17.7.1978: "Loi n° 78-753 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal. See now the law of 12.4.2000: "Loi n° 2000-321 relative aux droits des citoyens dans leurs relations avec les administrations", OJ L 97, 19.4.2000.

59 Access to information was first provided for in Art. 37 of the Law on administrative procedure of 26.11.1992: "Ley 30/92, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común" (Boletín Oficial del Estado, 27 noviembre 1992, núm. 85/1992). The new Law on administrative procedure of 1.10.2015 (Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas, Boletín Oficial del Estado, 2 de octubre de 2015, núm. 236) refers to special regulations in the shortly before adopted Law on Transparency: "Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno" (Boletín Oficial del Estado, 10 de diciembre de 2013, núm. 295).

60 2000, Chapter 36.

61 *P. Birkinshaw*, Freedom of Information. The Law, the Practice and the Ideal, 4th ed. 2010, 84.

In Germany, it was the principle of the limited public access to files – granted only to those directly affected by the administrative procedure in question – that was abandoned in favour of laws on access to information. Brandenburg, Berlin, Schleswig-Holstein, and North Rhine-Westphalia acted first (1998, 1999, 2000 and 2001);[62] the federal legislator followed in 2005.[63]

Even more important is the transformation of administrative justice that took place in most States that are parties to the Convention. Since the year 1998 fundamental reforms have been carried out in Spain, France, Italy, Portugal, and other Western as well as Eastern European countries.[64] Key features of the reform laws concern the improvement of judicial control in case of inactivity by the public administration and the establishment of an effective system of interim relief. Both elements are requirements also established for environmental issues by the Aarhus Convention. In Germany, the main discussion triggered by the Aarhus Convention centres around the question of the extent to which the focus of the German system on individual rights and interests can be maintained in the future.[65]

3. Constitutional Impact

This short glance at the transformative effects of the Aarhus Convention in domestic legislation already reveals that the impulses of the treaty go far beyond technical or procedural questions of minor importance. The Convention even exercises influence on fundamental principles of the legal order. In France, the Charter of the Environment, adopted in 2004 as part of

[62] Law of Brandenburg of 10.3.1998: "Akteneinsichts- und Informationszugangsgesetz (AIG) des Landes Brandenburg", GVBl. Brandenburg 1998 I, 46; Law of Berlin of 15.10.1999: "Gesetz zur Förderung der Informationsfreiheit im Land Berlin (Berliner Informationsfreiheitsgesetz – IFG)", GVBl. Berlin 1999, 561; Law of Schleswig-Holstein of 9.2.2000 (GVOBl. Schl.-H. 2000, 166); Law of Rhineland-Palatinate of 27.11.2001 (GV NRW 2001, 806).

[63] Law dated 5.9.2005: "Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz – IFG)", BGBl. I, 2722).

[64] For details see *K. P. Sommermann* (note 28); reports on the development of the administrative justice in the Eastern European countries are contained in Osteuropa-Recht 61 (2015) (starting with p. 253).

[65] Reluctant towards giving up the subjective orientation: the President of the Federal Administrative Court *Klaus Rennert*, see *K. Rennert*, Legitimation und Legitimität des Richters, in: JZ 70 (2015), 529 et seq.; a similar position is defended by *K. F. Gärditz*, Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts? Umfang des Verwaltungsrechtsschutzes auf dem Prüfstand, in: Verhandlungen des 71. Deutschen Juristentages, Bd. I: Gutachten Teil D, 2016; advocating for a greater change in the German conception *C. Franzius*, Modernisierung des subjektiven öffentlichen Rechts. Zum Funktionswandel der Verwaltungsgerichtsbarkeit, in: Umwelt- und Planungsrecht 36 (2016), 281 et seq.

constitutional law,[66] lays down the right to access to information and public participation.[67] In other countries, the discussion about a reinterpretation or an extension of the constitutional right of access to information, often limited to those documents which are made accessible to the public by decision of the executive, might become increasingly topical.[68]

The question whether the principles of the Aarhus Convention will bring about an environmental democracy, as the then Commissioner for the Environment *Margot Wallström* pointed out in 2003 with reference to the participatory approach of the Convention,[69] still has to be discussed, taking into account conceptualisation of democracy and the function of citizen participation.[70]

V. Conclusion

The overview of the mechanisms and effects of the Aarhus Convention lead to the following conclusions:

1. The Aarhus Convention is a good example of how international law can enhance an effective transformation of national policies according to international common interests by taking into account domestic implementation procedures. As *Christian Tomuschat* put it in his General Course de-

66 Loi constitutionnelle n° 2005-205 du 1.3.2005 relative à la Charte de l'environnement (JORF n° 0051, 2.3.2005, 3697).

67 See Art. 7 of the Charter of the Environment (note 66).

68 Corresponding demands have been formulated by the Freedom of Information Commissioners of the Federation and the *Länder*, see Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (ed.), Tätigkeitsbericht zur Informationsfreiheit für die Jahre 2010 und 2011, 2012, 10.

69 See European Commission, Press Release IP/03/1466 of 28.10.2003 ("Environmental democracy: Commission promotes citizens' involvement in environmental matters"), quoting *Wallström*: "Empowering people to protect their environment is a cornerstone of effective policymaking. Citizens must be given the right to know how good or bad the state of the environment is and to participate in decision-making that will affect their health and quality of life. A well-informed and active public means more effective environmental legislation and better enforcement of environmental policies. Citizens will now be able to act as environmental watchdogs!" The term has been used earlier, see in particular M. *Mason*, Environmental Democracy: A Contextual Approach, 1999, and the "Conférence inaugurale du cycle 2011-2012" delivered on 17.11.2010 by the Vice-President of the Conseil d'État *Jean-Marc Sauvé* on "La démocratie environnementale aujourd'hui"; see also *P.-M. Dupuy/J. E. Viñales* (note 15), 289 et seq.

70 See, e.g., for a first approach, the contributions in C. Fraenkel-Haeberle/S. Kropp/F. Palermo/K.-P. Sommermann (eds.), Citizen Participation in Multi-Level Democracies, 2015.

livered at The Hague Academy[71]: "Most of the tasks essential for the survival of humankind have to be performed within domestic contexts." In the case of the Aarhus Convention, the approach seeking to involve citizens in decision-making procedures concerning ecological issues and to mobilize the public for the implementation of international law has not least triggered the filing of actions and thus judicial decisions, which have helped to concretize and to enforce environmental standards.

2. Given the heterogeneity of institutional development and the enforcement of legal standards in the international community, the implementation of universal principles will always remain asymmetrical. Regional arrangements of less heterogeneous groups of States can be a way to more effectively advance in the implementation of universally recognized principles by providing for a closer, systematic cooperation in the enforcement of those principles at a decentralised level. Successful regional systems can be a reference or even model for the further development of other regions of the world. They contribute to an international learning process and maintain a productive competition for the best solution.

[71] *C. Tomuschat*, International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law, in: Collected Courses of the Hague Academy of International Law, Vol. 281, 2001, 435.