

The Development of Environmental Legislation through Procedural Means and the Right of Participation

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Introduction

Rather than recommending "new" means to be established for the first time in terms of Turkish legislation, "The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters" ("The Aarhus Convention", in short) will ensure that already existing procedural means that implement rights such as the right to information, the right of participation and the right to environment are compatible with international networks. In this sense, the Aarhus Convention is the body of "procedural means" that is clearing the path to establishing a participatory public administration that can transform the aforementioned rights into effective tools for their beneficiaries, to assist in the creation of an egalitarian, transparent and effective administration and a new public order facilitating the social integration of disadvantaged groups like the elderly, the youth, women, children and immigrants.

The 2872-numbered Environmental Law and the 4982-numbered Right to Information Law are the most distinct laws that fall within the scope of the Aarhus Convention. Aside from being the fundamental regulations concerning access to environmental information in Turkey, these aforementioned laws establish the legal infrastructure and administrative practice that will allow Turkey to become party to the Aarhus Convention which it as of yet has not signed. On the other hand, by-laws concerning the application of both of these laws prescribe important procedural

provisions about access to environmental information and participation. Accordingly, as much as there is a need for these rights to be constitutionally recognized, there is also the need for legal regulations that will put these rights into practice, for procedural means that will allow demanding, improving and implementing these rights, and (most importantly) for an administrative culture¹ that will internalize democratic governing.

The Aarhus Convention and opportunities

The Aarhus Convention was opened for signature by the United Nations Economic Commission for Europe during the “Environment for Europe” process at the Fourth Conference of Ministers in 1998 and the Convention went into effect in 2001. It can be said in light of the 1st article of the Convention, titled “Objective”, that the Convention text aims for the international sovereignty of an active and participatory understanding of environmental law where everyone can access environmental information, participate in decisions and play a role in implementing them.

The Convention lays out the basic principles and boundaries regarding the issues of “1- Access to Environmental Information, 2- Public Participation in Decision Making, 3- Access to Judicial Mechanisms”. It imposes the responsibility of sharing environmental information on states and corporations and the responsibility of developing ways of increasing means of public participation in decision making processes on states. It aims to make applying to judicial mechanisms easier, promoting the freedom to defend rights and thereby rendering the administration auditable in all its activities. In this way, the Convention expands the scope of the right to environment a step further within the context of a demand for democratic governing and the principle of participation.

The Aarhus Convention can be analyzed through principles and concepts connected with these 3 fundamental headings. The first of these is Access to Information. Within this context, the Convention contains regulations on topics of a- environmental information, b- access to environmental information, c- collection of environmental information and d- dissemination of environmental information.

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The second heading is Participation in Decision Making Processes. Within this context, the Convention draws up ways that will enable relevant subjects to become party to all processes of the production of environmental information; those being a- participation in the decision making process, participation in plans, programs and policies, and c- participation in processes of establishing norms.

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The last heading of the Convention is Access to Justice. On this point, the Convention sets out to draw up judicial means to address losses of rights due to denial or incomplete provision of requested information and has regulated

judicial access concerning issues of access to environmental information and participation through a- administrative applications and then b- procedural issues such as means of judicial application, duration, those concerned and cost (fees).

Access to information

“Environmental information” does not exist as a “special” field of information that constitutes the right to information in Turkish law. However, it is possible to utilize constitutionally and legally based mechanisms regarding the right to information within the field of legislations that concern the environment; the environmental law being paramount among them.

The Right to Information Law defines the concepts of information, documents and access to information or documents quite broadly; however, this must not be interpreted in such a way as to expect all information and documents in question will be accessible/reachable within the scope of this Law. Due to exceptions within the scope of the Law, all of these definitions still do not answer the questions “which information/documents?” and “how can we access them?”. The scope of information and documents that will not/cannot be accessed according to the Law appears to be defined by uncertain concepts and political influences within the discretionary power of the administration.

The fact that the right to information is a basic right and that its purpose is to involve those concerned in the decision making processes that rely on the information which the state holds as a corollary of its privileges of public authority must be taken into consideration. The provisions concerning the

range of information and documents that will not/cannot be accessed within the scope of the Right to Information Law should be interpreted narrowly. Especially when it comes to environmental issues, the scopes of categories of information such as commercial secrets and accounting information of companies that should remain confidential and information regarding economic interests must be kept narrow in the face of the value of the right to living in a healthy and balanced environment. There is a need for means that will expand these concepts for establishing the right to a life worthy of human dignity and a human and nature-centered right to the environment. This will be one of the important contributions of the Aarhus Convention for Turkey.

Access to information encompasses the sharing of information by the holder of power, the opening up of information on its own accord and explaining its justifications so that the information can be audited, as much as it encompasses those concerned being able to reach the information held by administrations on the basis of the right to information. In other words, the right to information bestows upon administrations the duty to bring together information with those who wish to access it. According to the Convention, those concerned can make a request for information without needing to provide a particular reason, while public authorities have the duty to share environmental information even in the absence of an explicit demand for it.² While administrations in Turkey have taken some steps toward publishing some information, primarily on web pages, the rarity of the practice and requirement of sharing information ex-officio remains a fact.

The Aarhus Convention approaches information through a definition that is specific to environmental information. It has created a special field for the concept of information by encompassing information in written, visual, audio, electronic or in any other concrete form, as well as all information that directly relates to the right to environment and a healthy life. Through its definition of environmental information, it has widened the scope of the concept of information and of the right to environment. Access to the information held by administrations –which are referred to by the Convention as public authorities with the duty to provide information– is recognized as a right. In expanding the scope of the concept of information in the context of the right to information, the Convention has preferred the term “public authorities”, assuming a wider public authority than “administration in a narrow sense” as the interlocutor. In terms of information and management, this expansion has primarily concerned the right to information and therefore the scope of transparent and auditable administration.

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The Aarhus Convention contains the statement that no discrimination can be made on the basis of citizenship status between persons who may utilize the right to information. Thus, it will also be rendered possible for “others”, foremost among them refugees, feeling the direct life consequences of environmental damage and risks to be included in decision making processes. Another important detail is that the duty bestowed upon public authorities regarding the issue of publishing environmental information and enlightening those concerned by informing them, has a basis that can be attributed to the duty ascribed to the state in Article 56 of the Constitution.

Interpreting the definition of real and legal persons who can benefit from the right to information liberally, so as to include associations, organizations and groups is compatible with the Convention; making it easier for it to be reflected on to domestic law. The Convention will primarily allow local governments to diversify their means of direct participation. Associations and platforms can thereby come together to determine their common local needs, go beyond being demandants in issues under study, to instead act like constituents of local government in the implementation of decisions as possessors of information and documents, so that they can monitor processes themselves. Meanwhile, the timidity of citizens about getting involved in the bureaucratic hurdles of the administration on their own will be overcome within the process of leaving behind their subjectivity as “complainants” in favor of the dynamism of forging public opinion.

Participation in decision making processes

While means of participation and regulations that feature the principle of participation do not have a very long history in Turkey, legislations such as the Municipal Law and Environmental Law have defined certain means of participation. The Environmental Impact Assessment Directive, which is the most detailed of regulations concerning participation mechanisms, is in force to ensure the application of the Environmental Law and constitutes a quite important procedural means. It involves local people in identifying environmental impacts and in decision making processes by establishing a connection between the right to life and the right to environment.

According to the Aarhus Convention, the avenues for public participation vary according to three different kinds of decisions. The first group of decisions concern activities cited in Appendix 1 of the Convention, such as those of the energy sector, metal production and processing, the mining industry, the chemical industry and waste management which have serious impacts on the environment. The decisions may encompass the description of the field and the construction and operation of the facilities. Activities aimed at national defense may be excepted. Even though decision making processes regarding Genetically Modified Organisms (GDOs) have not been included in the Appendix

1 list, the state is still responsible for applying the provisions of this article to decision making processes concerning the willful release of GDOs to the environment, “to an applicable and appropriate degree”. The second type of decisions concern plans and programs. These decisions include sectoral plans of every scale, landscaping plans, environmental action plans and environmental policies. Article 7 of the Convention stipulates that the state is required to develop the most appropriate and practical ways of ensuring the participation of the public in the preparation of plans and programs about the environment. The third type of participation concerns the preparatory process of laws and regulatory procedures. Article 8 of the Convention stipulates the need for states to prescribe the ways of participating in the process of establishing norms.

The legislation in Turkey mostly regulates participation in decisions through expert opinion and technical information, participation at the stage of implementation of already defined decisions and ways of participation through judicial supervision. On the other hand, the means by which those who formulate their needs and demands can also become stakeholders in the service that will meet these needs and demands, and by which they can become partners in planning and program preparation processes by establishing norms that bind the holders of public power are quite few. On this point, in reminding for example, that efforts of city dwellers to include their demands and needs in the plans being drawn up within the context of local administrations preparing the strategic plan of the city (which is their duty), must also be seen as a demand for democratic governing; it must also be emphasized that it has become clear in this process that the need for assembly organizations that will bring city dwellers together in order to determine their common local needs has increased. Precisely with the Aarhus Convention, as participation procedures multiply, there will be increased opportunities for groups that can become solution partners by rendering common their demands in the face of public authorities to organize,³ manage, implement and supervise.

Access to justice

According to Item 1 of Article 30, titled “The Right to Information and Appeal” of the Environmental Law, “everyone” can appeal to relevant offices to demand necessary measures be taken regarding an activity that pollutes or damages the environment, or to demand that the activity be halted. Meaning, the Environmental Law has secured the right of “everyone” to appeal to justice concerning environmental issues without the condition of directly being harmed by the polluting activity or having to prove a legitimate connection to the procedure related to the activity. Article 30 of the Environmental Law includes administrative appeals to relevant administrative officials to prevent activities that pollute/damage the environment and to activate administrative processes.

Meanwhile, administrative trial procedure law recognizes the interest of those persons who have a current, personal and legitimate connection to the procedure and their right to litigate action for annulment. The “connection” referred to as criterion for interest, which allows the relation established with the procedure to be included in the prosecution process is in need of being interpreted broadly in trials of environment and city. On the other hand, the expectation in full remedy actions that those whose “rights” have been affected and harmed by a procedure or action of the administration will become plaintiffs, carries certain difficulties in establishing the causal link when it comes to environmental damages. It can be expected within the framework of the statement that the Aarhus Convention may serve to expand the relation of “interest” when it comes to environmental issues due to its wide definition of environmental information and documents and allowance for everyone to access this information, thereby increasing judicial supervision of administrative procedures.

According to the Convention, any individual who believes that the information request they made within the framework of national legislation is being partially or fully ignored, unduly rejected, insufficiently addressed or unmet in any other way according to the provisions of the article at hand, has the right to appeal to a court or another legally created independent and impartial institution for processes to be evaluated. The Convention stipulates that “persons with sufficient interest” or “those who have had their rights violated” who meet the conditions prescribed by the national legislation do not need to possess special credentials. When it comes to NGOs, the condition of “being or likely to be affected by the process of environmental damage” is held to be sufficient. In cases where national legislation requires channels of administrative appeal be exhausted before appealing to the judiciary, this condition must also be met.

Conclusion

While it is important that the right to environment is regulated in the constitution and the environment is recognized as a protected value, it is also quite important that this right is made concrete through procedural means that will allow it to be utilized and that it is supported by other environmental rights.⁴ The importance of procedural means lies in putting rights into practice and rendering a right concrete. The Aarhus Convention will facilitate the amelioration of mechanisms that currently cause rights that legislation in Turkey has already established to be interpreted narrowly and which prevent them from being implemented because of limitations in administrative procedures.

Through expanding the meanings of the rights to information, participation and environment, and through rendering decision making mechanisms participatory, the Convention will allow a new public service to be founded at the center of society’s demands and needs. Additionally, it will also

allow the establishment of a new rights-based public regime that upholds diverse bundles of rights directly related to life, housing, health and environment.

Participation in the stages of decision making, implementation and appeal to judicial supervision is a condition for democratic governing. Democratic governing further requires a public administration that can guide the state in decision making, develop the decision making procedures of the state and ensure social justice by equalizing the effects of decisions on people of different status. The ratification of the Aarhus Convention as an international opportunity and possibility for developing administrative procedural means in order to establish a new public that is integrated in a sense of community and a new public administration that overcomes the governing-governed dichotomy will prove a small but significant step towards furthering the present day agenda of “environment, health and safety”.

Notes

- 1 “What I mean by Administrative culture, (...) is the perception and function of administration/state.” Cüneyt Ozansoy, “İdare Hukukunun Arka Bahçesi Olarak İdare Kültürü”, [Administrative Culture as the Backyard of Administrative Law] The Council of State and Administrative Justice Day 140th Year Symposium: May 12 2008, Danıştay Tasnif ve Yayın Bürosu Yayınları, No: 77, Ankara 2008, p.38.
- 2 “(...) the right to information has an active facet from the perspective of public officials that encompasses the provision of information upon request and includes activities such as collecting, updating and publishing passive and environmental information. Providing, in short order, the information that any member of the public may demand without being required to demonstrate an interest, provided they are not on the list of excepted categories which must be interpreted in limited and restricted fashion, while rejecting (with justification provided) demands concerning those that are on the aforementioned list constitute the passive facet of the right to information in the Convention; while public officials rendering, step by step, environmental information accessible on the internet, publishing reports on the state of the environment in intervals no longer than four years, and sharing the information they hold with the public immediately in cases of emergencies that may damage public health and the environment constitute its active facet which is the subject of the next article” Evren Güldoğan, Çevrenin Korunması İçin Vatandaşın Güçlendirilmesi: Aarhus Sözleşmesi, Avrupa Birliği Uygulamaları Ve Türkiye, [The Empowerment of the Citizen for Protecting the Environment: The Aarhus Convention, European Union Policies and Turkey] p.7. 18 - 21 April 2007 National Environment Symposium Mersin University Environmental Engineering Department Çiftlikköy Campus
- 3 Seda Yurtcanlı Duymaz, Çevre Örgütlerinin Çevresel Yönetime Katılma Sürecinde Dayandığı Haklar, [Rights Relied on by Environmental Organizations in the Process of Participation in Environmental Management] TBB Dergisi 2013 (107), p.191.
- 4 Ahmet M. Güneş, Yeni Anayasa Tartışmaları Bağlamında Çevre, [The Environment in the Context of Debating a New Constitution] Gazi Üniversitesi Hukuk Fakültesi Dergisi Vol. XV, Y. 2011, Issue. 3, p. 265

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