

# A guide to the three pillars of the Aarhus Convention



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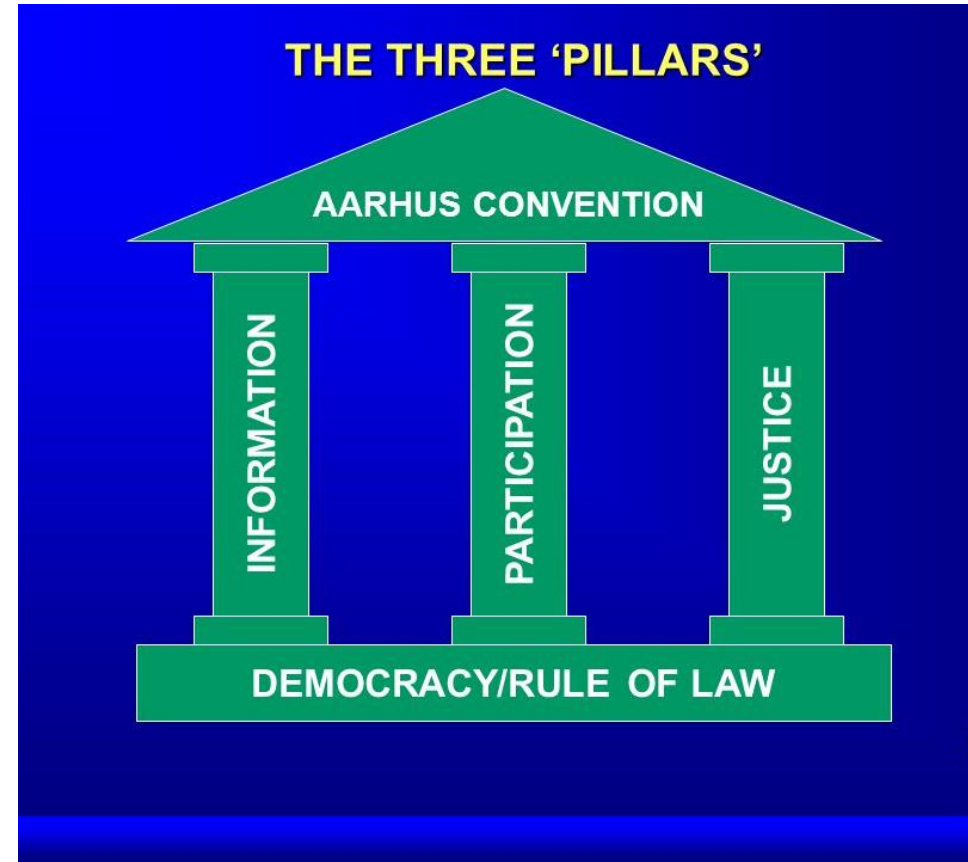
*Aarhus, Denmark*

## The Three Pillars

- Access to information
- public participation
- access to justice in environmental matters



*Pillars of Creation*



*Pillars of Aarhus Convention*

Article 1 Aarhus Convention:

*“In order to contribute 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, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”*



*Aarhus Tourist information centre*

## **Pillar 1: access to information**

## Pillar 1: access to information

- Drafters drew heavily on Council Directive 90/313 on the freedom of access to information on the environment
- However as the first pillar went beyond that Directive, the Union replaced it by Directive 2003/4 of the European Parliament and the Council on public access to environmental information, prior to ratifying the Convention
- Ensuring the highest possible degree of transparency is an important aim of the Convention, as demonstrated by several recitals in the Preamble.
- This pillar is governed by Articles 3, 4 and 5 of the Convention

## Pillar 1: access to information

- Article 4 sets out the general right of the public to gain access to existing environmental information on request
- Article 5 sets out the duties of states parties to collect and disseminate information of their own initiative



## Pillar 1: access to information

- Article 4(1) includes the primary right of access to environmental information
  - Requires a request
  - No ‘interest’ needed: motive irrelevant
  - “actual documentation” required- not summaries (cf public law duty of candour)
  - Information is to be provided in the form requested (Communication ACCC/C/2008/24 (Spain): in breach where provided in paper form which attracted a charge; had been requested in CD-ROM format)
  - Time limits: as soon as possible after request is submitted, in any event within a month: ACCC/C/2008/24 (Spain) held 7 month wait was a breach.

## Pillar 1: access to information

- Various exemptions in Article 4(3) and (4) which may be familiar from the EIR Regs
- Article 4(3)
  - Public authority does not hold the requested information
  - Request manifestly unreasonable or formulated in too general a manner
  - Material is in the course of completion, or internal communications of public authorities where such an exemption is provided for in national law or customary practice ‘taking into account the public interest served by disclosure’
  - Note ACCC/C/2010/53 (United Kingdom)- raw data not yet subject to data correction fell to be disclosed

## Pillar 1: access to information

- Various exemptions in Article 4(3) and (4) which may be familiar from the EIR Regs
- Article 4(4) covers various other exceptions e.g.
  - Confidentiality of public authority proceedings
  - International relations, defence, public security
  - The course of justice/ fair trial issues
  - IP rights
  - Confidentiality of personal data
  - Third party interests
  - Breeding sites of rare species
- All subject to test of adverse impact on protected interest

## Pillar 1: access to information

- Article 5: the 'active' environmental information requirement.
- highly prescriptive provision: includes measures to ensure that public authority information systems are effective in providing publicly accessible information, including the progressive provision of information on 'electronic databases which are easily accessible to the public through public telecommunications networks': Article 5(3).
- Article 5(7)- publish facts and analysis of facts which the government considers relevant and important in framing major environmental policy proposals



*Aarhus Town Hall*

## **Pillar 2: public participation**

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- Articles 6, 7 and 8 of the Aarhus Convention
- A large number of complaints received by the Aarhus Convention Compliance Committee ('ACCC') arise from alleged breaches of Articles 6 and/or 7.
- Article 6 sets out a series of requirements which must be met when the Article is engaged. The requirements of paragraphs 3, 4 and 8 of Article 6 also apply to Article 7.

## Pillar 2: public participation

- Article 6 implemented in the EU through the EIA Directive
- Will not rehearse the requirements of EIA here!
- Key requirements from Aarhus (Art 6(2)): public informed of environmental decision-making procedure and information in adequate and timely manner at an early stage in the process
- Query if Environmental Outcomes Reports (post-Brexit replacement for EIA) under Levelling Up and Regeneration Bill (LURB) will be Article 6 compliant-very vague and minimal consultation requirements
- Also applies to plans, programmes and policies (Article 7)

## Pillar 2: public participation

**An aside:** note article 6(11) of the Convention:

*Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.*

Note the new regime under the Genetic Technology (Precision Breeding) Bill. Will it comply with this? No requirement in primary legislation to consult before release of GMOs



## Pillar 2: public participation



*The public have been concerned about the impact of genetically modified organisms for some time*



*Aarhus Courthouse*

## **Pillar 3: access to justice in environmental matters**

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- Article 9
- Big impact on costs via CPR.
- First mention of the Aarhus Convention in an English case was about costs:  
*R (Burkett) v Hammersmith, Fulham LBC (Costs)* [2005] CP Rep 11 (*per Carnwath LJ- as he then was!*)

## Pillar 3: access to justice in environmental matters

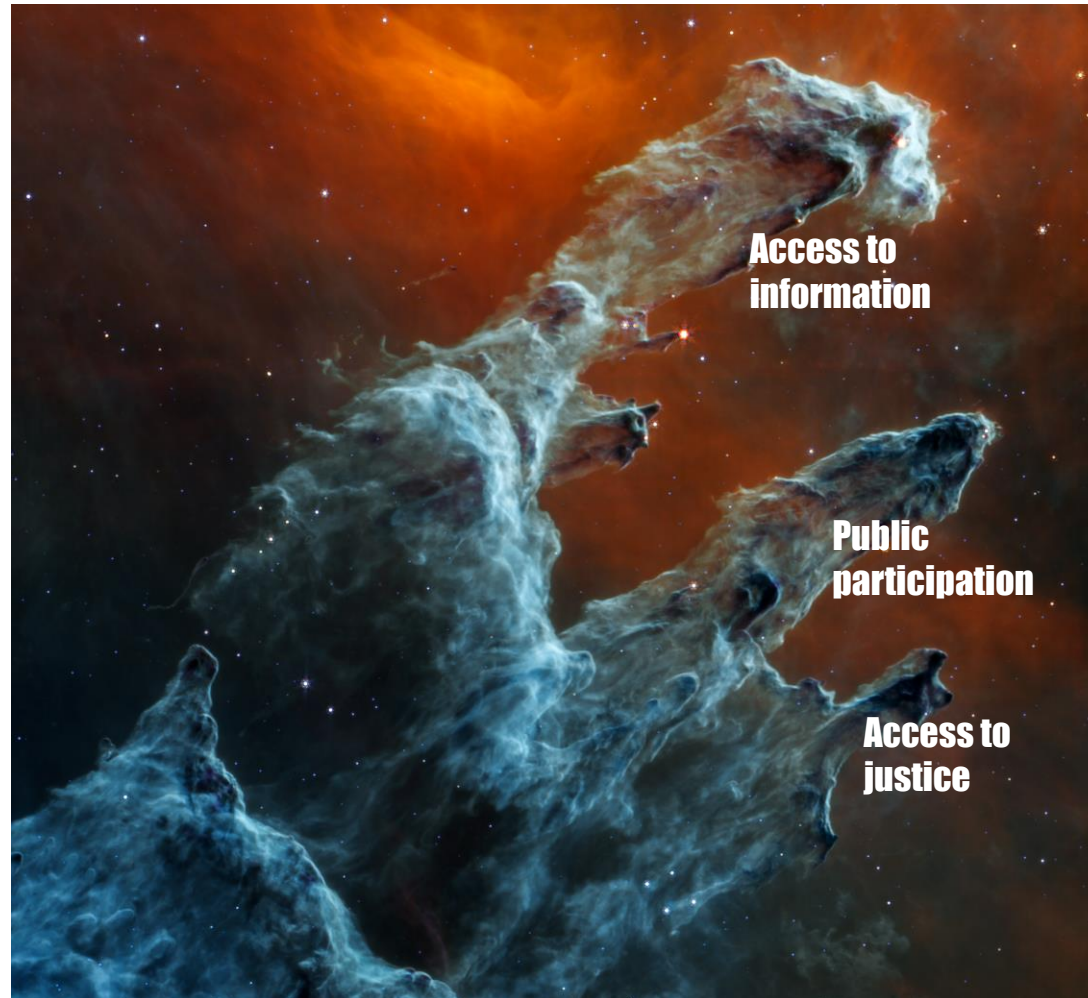
- A bit fiddly- three categories of case within scope:
  - Challenges to decisions on requests for environmental information (Art 9(1)). **Requirement: Independent and impartial body to review information requests (in the UK, the ICO).**
  - Challenges to decisions, acts, or omissions concerning the permitting of activities covered by Art 6 of the Convention (Art 9(2)) **Requirement: a review procedure for members of the public concerned to challenge the substantive and procedural legality of the decision, before an independent and impartial body.**
  - Challenges to other acts or omissions ‘by private persons and public authorities which contravene provisions of its national law relating to the environment’ (Art 9(3)). **Requirement: access to administrative or judicial procedures to challenge the omissions.**

## Pillar 3: access to justice in environmental matters

- Under Art 9(4), for all three categories there must be ‘adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and **not prohibitively expensive**’.
- Note also the issue of standing arises from Art 9(1): right to challenge is given to “members of the public concerned”
- UK standing rules tend to be more liberal than European countries, though see recent standing JR cases which may suggest a more restrictive approach

## Pillar 3: access to justice in environmental matters

- “Substantive and procedural legality”
- ACCC/C/2008/33 (UK)- Concern expressed as to whether narrow JR grounds complied- ultimately no finding of non-compliance. UK courts have not been particularly impressed with arguments along these lines



**Thanks for listening**

# Thank you for listening

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