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PROMOTING ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND JUSTICE ON CLIMATE CHANGE

Valentina Durán Medina and Ignacio Sánchez González

Introduction

Climate change is probably the most pressing challenge of all time; therefore, it demands creative and comprehensive strategies and solutions through global cooperation. However, stakeholders must not only be States or public authorities; rather, we must also seek to include individuals, non-governmental organizations and different groups like Indigenous People, diverse ethnicities, migrants, women and children.

This chapter deals with the dynamic that the international legal framework provides between States and the public, especially shedding light on the meaning of green access rights as human rights and their importance on climate action. Key legal instruments will be examined to achieve the latter purpose. The Paris Agreements, the Aarhus Convention and the Escazú Agreement all encompass the actual three pillars of climate change action, meaning the access to environmental information, the right to public participation in decision-making processes and the right of access to justice on environmental matters.

In democratic societies nowadays, it is necessary to ensure these rights as they serve to hold public authorities accountable for their actions while also mandating a high level of transparency to promote robust citizen engagement mechanisms.

Finally, this chapter seeks to clarify how pivotal it is to engage people in climate action or climate governance, proving that States alone cannot reach the 2030 Agenda common goal of reducing greenhouse gas emissions in order to decrease global warming.

The Importance of Access to Information and Public Participation

The management of contemporary governments and international organisations should be based on a model governed by principles of transparency and probity, allowing citizens and all stakeholders in general to have access to the information they require, whatever it may be, and as a corollary, the possibility in principle of exercising citizen control over the actions of the State.

Indeed, this is what is expected of a state governed by the rule of law conceived as the correlative fruit of the overcoming of monarchies and absolutist states.

Democratic theories indicate that the political authorities fulfil a function in the service of the *demos*, of the common good, in an impersonal way, subject to the laws and within a framework of powers granted only by them. Among the indirect responsibilities is that of being accountable to their constituents, the citizens, by giving an account of their performance. Citizens can exercise a function of participation, supervision or oversight and control of state management, not only through periodic elections, but at all times through the exercise of their rights of expression, association, demonstration and petition.

It follows that it is not enough for rulers, or those who exercise roles of institutional representation or are in decision-making spaces of important global governance schemes, to be democratically elected, but that their functions must also be exercised democratically, and for this there must be mechanisms of control and effective mechanisms of public participation.

This can only be possible when transparency of public management and information is the general rule. The confidentiality of public information is a self-evident contradiction; therefore, to omit this obligation of transparency there must be a real reason proven with facts and sustained in law that justifies placing contingent conditions on this important right that the public possesses.¹

The right of access to information has been recognised as a human right; however, without the existence of suitable mechanisms to make it effective, it increases the likelihood that both authorities and people in positions of power and decision-making exercise cronyism and opens the possibility that through the weight of undue influence, control or capture of the political establishment by interest groups can be achieved through improper means.²

Citizenship, civil society and participation are semantically distinct but closely intertwined concepts. Various initiatives carried out by NGOs, social movements, civic associations or independent media, guided by a common concern to improve the transparency and accountability of government action, monitor the behaviour of public officials, denounce violations of the law or call for investigations and corresponding sanctions.³

In essence, the greater the transparency and access to information, the higher the standard and quality of the democratic system, including on environmental and climate justice issues. Any activity related to public affairs must be duly and timely known by all, and above all, accountability must be ensured with the utmost transparency in everything related to public funds, and it must be possible for citizens to access this information for auditing purposes. In this regard, the Organisation of American States has called on the countries of the region to update their transparency systems, indicating that neither the actions of the state, which are owed to its citizens, cannot remain indefinitely outside the public domain, nor can the reasons decisions were taken, since it is part of the *acquis communautaire* to know the facts and the acts carried out by the state.⁴

In the Ibero-American context, the Ibero-American Charter of Citizen Participation defines public participation as

the process of social construction of public policies that, in accordance with the general interest of democratic society, channels, responds to or expands the economic, social, cultural, political and civil rights of individuals, and the rights of the organisations or groups of which they are a part, as well as those of communities and indigenous peoples.⁵

Green Access Rights: Environment and Climate Action

Defining Green Access Rights

In environmental and climate law, access rights have been understood as one of the specific manifestations of environmental justice, and therefore part of the human right to live in a healthy environment. There is an intersection with the three rights of access: access to information, access to public participation and access to justice in environmental matters.

Access rights have been shaped by various international instruments dealing with environment and development. Indeed, Principle 10 of the Rio Declaration on Environment and Development, adopted in 1992 at the United Nations Conference on Environment and Development, known as the “Earth Summit”, states that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level”. In Rio +20 Conference, Principle 10 was also confirmed in the declaration called “The future we want”, recognizing the indispensable role of access rights in the framework of sustainable development. Sustainable development

requires the meaningful involvement and active participation of regional, national and subnational legislatures and judiciaries, and all major groups: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families as well as older persons and persons with disabilities.

Thus, it is understood that access rights in environmental matters have been configured as fundamental pillars in various areas and have become the basis of “environmental democracy”.⁶

Green access rights have three components: access to information on the environment and its provision by the authorities, effective and informed public participation in decision-making that affects the environment and access to justice, where people have the right to access the mechanisms of justice administration to institutionally demand environmental rights. Various instruments have consolidated this approach; for example, SDG 16 (“Peace, Justice and Strong Institutions”) has encompassed these elements since a healthy environment is crucial for peace and security, while environmental justice protects communities that are vulnerable and/or seek to enforce their rights. It also strengthens this link by promoting public participation and the rule of law.⁷ Furthermore, both the Escazú Agreement, which expressly encompasses these three areas under the concept of “access rights”, and the Aarhus Agreement, which refers to them jointly and in a correlated manner, have been reaffirming these insights and extending them to other areas, such as climate action.

Green Access Rights are Human Rights

It is important to highlight that the rights of access to information, participation and justice in environmental matters and decisions follow the same principles and logic detailed supra, i.e., conceptually, even though they are *environmental*, they are indeed human rights and contribute directly to the access and guarantee of access to justice.⁸

These rights do not operate in isolation but are inextricably linked. If one is diminished, the effectiveness of the others is compromised, while the guarantee of one is indispensable for the realisation of the others. This complex interdependence is the basis of environmental democracy, which in turn is a fundamental component of environmental justice⁹ and has been so understood, even in the Inter-American Human Rights System.

In relation to this last point, it is relevant to consider that the Inter-American Court of Human Rights has developed this interpretation in its advisory and jurisdictional powers.

On the one hand, Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights, issued in 2017 and requested by the Republic of Colombia, represents a fundamental milestone in analysing the relationship between human rights and the environment. The Court establishes a clear interdependence and indivisibility between environmental protection, sustainable development, and the enjoyment of human rights. This analysis recognises that the adverse effects of climate change, such as environmental degradation and pollution, directly impact the effective enjoyment of various basic human rights. The Court emphasises that the vulnerability of certain social groups, such as Indigenous Peoples or impoverished communities, makes them more susceptible to these violations. The Advisory Opinion also underlines the importance of procedural rights, such as access to information, public participation and access to environmental justice, pointing to them as essential tools to guarantee substantive rights and support States in the fulfilment of their environmental obligations.¹⁰

The well-known case of *Claude Reyes et al. v. Chile*, which has been decisive in defining the rights of access to information and participation, is noteworthy. The Court established that information is essential for public participation in the development of communities, as it allows people to know the risks and benefits of projects or activities and to make informed decisions about their future. The Court established that the refusal to provide environmental information must be exceptional, justified by law and guided by the principle of maximum disclosure. In addition, the denial is only valid if it is made within a reasonable period of time, is presented in writing, is based on a pre-established legal reason, responds to an imperative public interest and restricts access to information to the least extent possible.¹¹

Green Access Rights and Climate Action

As mentioned at the beginning of this chapter, access rights arising from strictly environmental matters are now intrinsically related to climate change and its normative and conceptual developments.

The severe climate crisis demands a strong response. SDG 13 calls for ambitious climate action that prioritises the most vulnerable. This action must be fair and consider human rights and the rule of law.

In terms of legal instruments, historic milestones have been achieved in the fight against climate change at the level of binding international treaties. The Paris and Aarhus Agreements, for instance, and the Escazú Agreement in particular (which will be discussed in detail in the following section), mark a “before and after” in community participation to meet the 2030 Agenda. These agreements are a fundamental tool for achieving climate justice and realising the theoretical and conceptual considerations summarised at the beginning of this chapter.

It should also be noted that regional and international cooperation can be strengthened by ensuring access to information, public participation and climate justice. For example, the Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean promotes these principles as fundamental elements of effective climate policy.¹²

When it comes to promoting good governance in climate change, public awareness, participation and access to information are crucial. The United Nations Framework Convention on Climate Change (UNFCCC) stresses the importance of public awareness, participation and access to information in the context of climate change.

In this regard, it is clear that access to information, climate and environmental justice and public participation are essential to address climate change at both local and global levels. These elements enable climate policies to be effective, transparent and accountable, ultimately leading to better outcomes for communities and the environment. By promoting these principles, governments, organisations and individuals (i.e. the multi-stakeholder community) can combine efforts to develop and implement sound solutions to climate change.

Paris Agreement Provisions on Access to Information and Justice, and Public Participation

The Paris Agreement Preamble

For more than a decade, it has been increasingly confirmed that the climate crisis reinforces situations of risk and vulnerability, directly affecting human development and certain disadvantaged groups: the poor, women, children, the elderly and Indigenous Peoples.¹³ Therefore, it has been of particular importance to have binding legal instruments at the international level to address this issue through access to information, justice and public participation.

In this regard, the Paris Agreement recognises the fundamental role of public participation, access to information and justice in effectively addressing climate change. Already at the preambular level, these important safeguards are recognised.

The preamble of the Paris Agreement recognizes the importance of the right to development and meeting the specific needs and concerns of developing countries that are particularly vulnerable to the adverse effects of climate change. This involves ensuring access to justice for those affected by the impacts of climate change.

In other preambular provisions, the parties reaffirm the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the issues addressed in the Agreement. It also introduces for the first time and recognises the importance of climate justice regarding the actions that can be taken to address climate change.

Substantive Provisions for Access to Information, Justice and Public Participation

There are also substantive provisions of the Agreement that address the aforementioned acknowledgements. For example, Article 7 refers to communications on adaptation, where parties must periodically communicate their adaptation plans and needs, promoting transparency and public access to this information.

Article 12 addresses improving education, training, public awareness, public participation and public access to information: This article encourages all countries to work together to improve public understanding of climate change and ensure that people can participate in decision-making processes related to climate action. These elements are particularly important, because although Article 12 does not detail aspects related to, for example, the actions involved in such guarantees, it is possible to provide content through the expertise of international legal doctrine.

Thus, public awareness necessarily involves increasing public understanding of climate change and its impacts.¹⁴ This provides the basis for effective and meaningful public participation, which can be understood as enabling people to participate in the decision-making and implementation processes related to climate action.¹⁵

The Paris Agreement Transparency Framework

Finally, in relation to public access to information, the aim is to ensure transparency and accessibility of information on climate change, including national contributions (NDCs), adaptation plans and financial support provided.¹⁶

Article 13 refers to transparency frameworks. This article establishes a robust transparency framework for monitoring and reporting on progress toward the Agreement's objectives. It includes provisions for public access to information submitted by countries, promoting transparency and accountability.

The Paris Agreement Transparency Framework ('Transparency Framework'), established by virtue of Article 13, constitutes one of the most important aspects of the Paris Agreement, as it involves monitoring and tracking progress towards the objectives of the Agreement, increasing trust between parties and ensuring clear information on climate action.

Transparency Framework introduces a number of elements of crucial importance for the international institutional framework for climate action.

First, it establishes the biennial transparency reports, which are submitted by all parties and describe greenhouse gas emissions, mitigation efforts, adaptation actions, support received and provided and other relevant information. Next, it refers to the Technical Expert Review, which involves a rigorous and independent assessment of the data by international experts to ensure the quality and consistency of the data. Third, the Facilitative Multilateral Review promotes a dialogue between party representatives and experts to share experiences, clarify issues and provide feedback on business monitoring reports.¹⁷

It should be noted that support and transparency from developed countries to less-developed countries is encouraged.

Given these important developments at the international level, it is important to keep in mind that while the Agreement encourages these elements, concrete implementation measures are left to each country; and civil society organisations and activists play a crucial role in pushing for stronger enforcement of these provisions and ensuring meaningful public participation and access to information and justice.¹⁸

Other Important Instruments for Access to Information and Justice and Public Participation

The Aarhus Convention

Formally known as the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters, this agreement was adopted back in 1998 and was considered a "new kind" of international tool as it aimed to link environmental rights with human rights, focusing on the interaction between governments and the public, then pursuing the involvement of all stakeholders with check and balances in order to achieve – in principle – a regional sustainable development. Specifically, its regulation within three pillars is key to hold governments accountable by giving people and NGOs a series of rights.

Firstly, Articles 4 and 5 regulate access to information covering two bases; on one hand, public authorities must be transparent when dealing with public requests of information while also actively providing it through periodical environmental updates and information dissemination.

The instrument aims for securing the receipt of data applying the *presumption in favour of access* principle, meaning that any public information is subject to disclosure unless it falls under certain exceptions, such as national security. Also, this right extends broadly to any person proving to have a reason for requesting information, and it must be delivered in a fixed period.¹⁹

Secondly, Articles 6 to 8 deal with public participation in environmental decision-making. When permitting certain activities *inter alia* chemicals installations and waste-water treatment plants, State Parties are obliged to comply with certain requirements of public participation, such as notifying them in time while giving them the right to inspect the relevant information and providing reasonable timeframes for participation.²⁰

Thirdly, access to justice is treated within Article 9 regarding appeals to access information and public participation. Thus, if a person requests information and the authority responds in an unsatisfactory manner, a review procedure before a court of law or an independent body is possible, whereas seeking a review of either substantive or procedural matters in decision-making processes is also doable when proven to have a “sufficient interest”. Additionally, if established by national law, persons can also challenge the general violations of environmental law done by authorities or private corps.²¹

Through its Compliance Committee, Aarhus has proven to be a key tool for the public and NGOs to hold governments accountable. In fact, over 200 communications from the public have been received since 2001, 60% of which have come from NGOs and almost 30% from individuals, demonstrating a very high level of public engagement is vital to achieve compliance.²² Out of this, the Committee has adopted 96 findings, assisting parties to remedy their noncompliance; for example, Denmark reduced their court fees for NGOs appealing, and Slovakia amended nuclear-related environmental information so it could no longer be deemed unconditionally confidential with no possibility of disclosure.²³

Now, as a regional-born instrument, Aarhus challenges with a rather low number of ratifications (47), but it is open to accession by any United Nations member; while it is mostly a European-centred body, other continents might enhance their environmental policies if entering the treaty. Further, some national implementation reports show that the provisions dealing with access to justice have had some difficulties, and effective practice operation of access to information and public participation has been challenging.²⁴

At any rate, the Convention has been regarded as a highly valuable contribution and nowadays has a Strategic Plan for 2022–2030 aiming to minimise the depletion of environmental resources, ensuring its remanence to future generations while addressing climate change.²⁵

The Escazu Agreement

More recently, a new regional instrument appeared in the international sphere: the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as Escazú Agreement. Adopted on 4 March 2018, it entered into force on 22 April 2021. It is the first treaty in the region to deal with environmental matters and the first one in history to include regulations on environmental human rights defenders.²⁶ It had its foundation in Principle 10 of the Rio Declaration and was also initiated within the context of Rio+20, mainly characterised for offering a wide protection of human rights while safeguarding the environment.

As established in Article 1, the objective of the Agreement is to fully guarantee and effectively implement the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters.

Articles 5 and 6 deal with the right to access environmental information, its denial, the conditions to deliver information, its generation and dissemination. Escazú enshrines and systematises

environmental regulations from other international treaties, giving a bigger-picture approach when, for example, facilitating and guaranteeing access to information for vulnerable people and groups, such as Indigenous People.²⁷ Further, any person can ask for information without the need to prove they have a special interest, while the authorities must disclose the information within 30 business days unless its disclosure falls under the exceptions regulated, such as when it would create adversities for national security. Additionally, transparency plays an essential role. Each State party must ensure the generation, collection, publicisation and dissemination of relevant information in an effective, proactive, timely, regular, accessible and comprehensive manner.

Escazú utilises the IACtHR reasoning, expanding the framing of the boundaries of access to information through the test of necessity and proportionality, thus proving once again the importance of human rights elements within the analyzing method.²⁸

Article 7 regulates rights of public participation, seeking to enhance the empowerment of the public in the decision-making process. In the international arena, it has been understood that public consultation derives from cultural construction; taking the people's opinion on the matter helps build a more legitimate project through effective participation.²⁹ Inclusiveness of all stakeholders, not leaving anyone behind, participation and equity are the goals.

For its part, Article 8 provides the right of access to justice in environmental matters. Although at first sight very similar to the provisions set in the Aarhus Agreement, Escazú acknowledges that mere access to justice is not sufficient, thus going beyond due process, stipulating the facilitation of justice access through reducing economic barriers, amplifying the *locus standi*, adopting precautionary measures, facilitating evidence production and adequate mechanisms of enforcement, reparation and settlement of disputes.³⁰

Access to information, participation and justice are key to achieve the goal of sustainable development and provide a healthy environment, especially for future generations. Even though there have been some difficulties in the ratification process and the implementation of the Agreement's provisions, it is fundamental that the rest of signatory parties ratify it. For example, in the *Quintero and Puchuncavi case* regarding sacrifice zones, the judiciary was not able to condemn private companies because of the lack of information, thus convicting State organs for omitting the delivery of preventive and exposure information to the public.³¹ Escazú aims to avoid these types of situations, believing that becoming an enforcing party is a major public necessity.

Future Directions

All three instruments encompass similar aims, but if we take a closer look, the Paris Agreement has the specific and time-fixed goal of reducing global warming below 2°C, preferably 1.5°C, by reducing global greenhouse emissions: a worldwide concern that conjugated the greatest quantity of countries working towards a common environmental objective. Nevertheless, an issue arose in its implementation since change of policies and application of international provisions in internal law are left to each State Party, therefore leaving a – not small – window for lack or delay of compliance.

The latter is why Aarhus and Escazú are vital to strengthening the implementation of the Paris Agreement: they are regional instruments that monitor each of their parties closely, as their compliance mechanisms have more rapid effectiveness while the cumulation of their diverse aims helps – at the end – in reaching the ultimate goal.

In addition, these treaties provide a settlement of disputes clause, establishing that parties must go first through negotiations or any other peaceful means before giving compulsory jurisdiction to the international court of justice and/or an arbitral tribunal. This means that, as usual, diplomatic

methods are always the first priority, but it does not close the door on litigation when they fail to be successful. In fact, if a controversy arises, then parties must resolve it through the jurisdictional means mentioned.

Concluding Remarks: Is This Useful at All?

It is clear that access to information, justice and public participation are crucial to addressing climate change at both the global and national levels. These aspects are interconnected and contribute to the effectiveness of climate policies and the overall well-being of communities. The current complex climate change situation requires concrete action on these issues.

For example, regarding informed decision-making, access to information allows individuals and communities to make informed decisions about climate change, enabling them to take appropriate actions and adapt to changing environmental conditions.³² On the other hand, direct engagement in climate change policies and decision-making processes helps build trust, bring expertise and strengthen legitimacy. It ensures that the voices of diverse stakeholders are heard and considered in the development and implementation of climate policies³³ on the stakeholder networking mechanisms that are possible in this area, in order to improve and adapt policies and actions.³⁴

In addition, accountability and public oversight allow individuals and communities to evaluate policies and hold decision-makers accountable for their actions. This helps to ensure transparency and accountability in climate governance, as well as helping close gaps in accountability by involving affected communities in the decision-making process, ensuring that their concerns and needs are addressed.³⁵

Notes

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