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The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing

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Abstract: This article analyzes the potential for legal transplant theory to strengthen the legal regimes guaranteeing the right of access to environmental information in England and China. Guaranteed by the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the right has had a substantial impact on how individuals can act as environmental stewards. However, despite the framework provided by the Aarhus Convention, there are shortcomings in how these states guarantee the right when compared with the obligations set by the provisions of the Convention. The article applies Watson's legal transplant theory to the environmental information regimes in England and China and considers the likelihood of each jurisdiction sourcing legal reforms from the other. It also seeks to identify common trends shared by each jurisdiction and the impact of the Aarhus Convention on such transplants.

Keywords: Right of access to environmental information; Legal transplant theory; Law reform; England; China

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1. INTRODUCTION

It is increasingly recognized by states that the accountability of public authorities is a key component of environmental protection efforts. The development of environmental law, as enshrined by the Rio Declaration on Environment and Development[1] and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[2] has moved away from traditional 'command and control' legislation toward public participation as a means of engaging civil society as environmental regulators.[3] In particular, information disclosure provisions can help to minimize the information asymmetry between the state and its citizens. In so doing, individuals are empowered in their role as environmental stewards, able to effectively participate in environmental decision-making procedures[4] and to exert 'bottom-up' pressure on the State and private entities in their role as consumers and investors.[5]

A key player in these developments is the European Union (EU). While states such as Sweden, Finland and the United States (US) were the first to guarantee the general right of access to information[6] which has been replicated throughout the globe,[7] it was the EU that first recognized the right of access to *environmental* information in 1990 through Directive

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[1] Adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc.A/CONF.151/26 (Vol I), available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[2] Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html.

[3] D. Case, 'The Role of Information in Environmental Justice' (2011-2012) 81 *Mississippi Law Journal*, pp. 701-42, at 704-5. Examples of public participation in environmental matters include reporting potential breaches of environmental regulations, participating in environmental decision-making procedures and submitting environmental cases to court.

[4] J. Ebbesson et al., *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations, 2014), p. 19.

[5] J. Rowan-Robinson, A. Ross, W. Walton & J. Rothnie, 'Public Access to Environmental Information: A Means to What End?' (1996) 8(1) *Journal of Environmental Law*, pp. 19-42, at 19-21.

[6] A key point here is that these access to information regimes were implemented before the creation of the Aarhus Convention: Sweden implemented the Freedom of the Press Act in 1766, Finland promulgated the Act on the Openness of Public Documents in 1951, and the US implemented the Freedom of Information Act in 1966.

[7] Currently, there are over 100 national right to information regimes: see V. Lemieux & S. Trapnell, *Public Access to Information For Development: A Guide to the Effective Implementation of Right to Information Laws* (The World Bank, 2016), pp. 1-2.

90/313/EEC on the Freedom of Access to Information on the Environment.[8] The EU continued to play a vital role in the negotiations leading to the creation of the Aarhus Convention, which is the keystone instrument that enshrines the right of access to environmental information at the international level. Based on Western liberal-democratic values and described as a regional convention with global scope,[9] the Aarhus Convention obliges states to guarantee the right of access to environmental information held by public authorities, subject to various exceptions, by linking environmental and human rights.[10] The Convention's procedural rights entrench the right of access to environmental information within states that are Parties to the Convention, and had a significant influence on how states conceptualize the right in their respective environmental information regimes.

It is under the auspices of the Aarhus Convention that both the United Kingdom (UK) and China have guaranteed the right of access to environmental information. However, the relationship between the Aarhus Convention and these two jurisdictions differs greatly. The UK is a Party to the Aarhus Convention and is obliged as a matter of international law to guarantee the procedural rights enshrined in the Convention. This is further entrenched through the UK's (current) membership of the EU, which imposes the obligations of the Aarhus Convention through its Party status to the Convention and through Directive 2003/4/EC on Public Access to Environmental Information.[11] There is added complexity in how the UK complies with its obligations under the Aarhus Convention and Directive 2003/4/EC due to differences between the different parts of the UK. The Environmental Information Regulations 2004 (EIR) imposes obligations on public authorities to disclose environmental information on request in England, Wales and Northern Ireland. Public

[8] [1990] OJ L 158/56.
[9] S. Stec & S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (United Nations, 2000), at Foreword.
[10] P. Coppel, *Information Rights: Law and Practice* (4th edn, Hart, 2014), p.184.
[11] [2003] OJ L 41/26.

authorities in Scotland are obliged to comply with the Environmental Information (Scotland) Regulations 2004, the provisions of which are substantively identical to those of the EIR. However, while both sets of instruments are substantively identical the context in which they operate in is not. This can be seen in the provision of public utilities, in particular water and sewerage services, which is privatized in England and Wales but not in Scotland or Northern Ireland. This is significant, as these differences can lead to the regulations having different scopes in each constituent country in the UK, depending on the degree of control the state has over public utilities in each country. In order to recognise the impact of these differences and provide a coherent comparative analysis, the article will focus its analysis on the EIR and its implementation in England and Wales.[12]

In contrast to the UK, China is not a Party to the Aarhus Convention and is not bound to implement the Convention's approach when guaranteeing the right. Nevertheless, China has broadly adopted the principles of the Aarhus Convention in guaranteeing the right of access to environmental information[13] and there is ongoing academic debate on whether China should become a Party to the Convention.[14] Thus, regardless of whether states have acceded to the Convention or merely draw inspiration from it, the overarching framework provided by

[12] For the purposes of narrative clarity throughout the article, the jurisdiction of England and Wales will be shortened to England.
[13] Part 6(c), Global and Regional Developments on Issues Related to Principle 10 of the Rio Declaration on Environment and Development Statement by Mr Hou, Aarhus Convention Meeting of the Parties 5, Maastricht 30 Jun – 4 Jul 2014, available at: https://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/MOP-5_6c_Statement_China_University_01.pdf. See also Q. Du, 'Public Participation and the Challenge of Environmental Justice in China', in J. Ebbesson & P. Okowa, *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 139-57, at 151; and L. Li, 'Environmental Disclosure in China: A Comparative Study to the US and EU System' Georgetown Environmental Law Review, Online Feature (18 May 2016), available at: https://gelr.org/2016/05/18/environmental-disclosure-in-china.
[14] EU-China Environmental Governance Programme, 'Aarhus Convention Workshop Held in Beijing' (EU-China Environmental Governance Programme, 5/12/2014), available at: http://www.ecegp.com/english/news/shownews.asp?ID=878.

the Aarhus Convention informs states throughout the world on how best to guarantee the right of access to environmental information.[15]

As will be demonstrated below, there are shortcomings in the rules governing access to environmental information in both England and China when measured against the standards in the Aarhus Convention. These shortcomings have significant impact on how the right operates in practice. This article focuses on two particular aspects of the environmental information regimes in England and China that lead to deficiencies in application of the right. Firstly, it discusses the definitional implications of 'public authority' and 'Government department' and, secondly, it reviews the circumstances in which public authorities may withhold information from disclosure. The article contends that legal transplant theory can assist in remedying the observed shortcomings that are associated with these two aspects. Legal transplant theory helps to make sense of the nature of law and its connection to the needs of society,[16] and is appropriate for application in this context as it provides a lens through which to view legal reforms and gauge their likelihood of being successfully adopted.

This article seeks to highlight both the similarities and the differences between the two jurisdictions in how they approach selected aspects of the right of access to environmental information and their success in guaranteeing the right when judged against the standards of the Aarhus Convention. By highlighting the similarities and differences between the two jurisdictions and as against the Convention, the article aims to: (a) identify the different approaches that England and China have adopted in the context of the normative framework created by the Aarhus Convention; and (b) explain how these approaches impact on the

[15] L. Krämer, 'Transnational Access to Environmental Information' (2012) 1(1) *Transnational Environmental Law*, pp. 95-104, at 100-1 and U Etemire, 'Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights' (2016) 28 *Journal of Environmental Law*, pp. 393-413, at 402-7.
[16] W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law*, pp. 489-510, at 499-502.

success or otherwise of guaranteeing the right. Additionally, this article uses the lens of legal transplant theory to analyze how the legal reforms of the selected environmental information regimes that are proposed by this article interact with the normative framework of the Aarhus Convention and with the conceptualizations of the right in both jurisdictions. There is scant application of legal transplant theory in this area. This article aims to fill in the gap and provide insights into which aspects of the right should be treated as: (a) essential to meeting the objectives of promoting environmental democratic values; or (b) open to change to fit within the legal and political culture of a state.

The next section introduces legal transplant theory. It discusses the tenets of the theory and shows how it can be applied in the context of guaranteeing the right of access to environmental information in England and China. The following section identifies how England and China have guaranteed the right of access to environmental information, focussing on which bodies are subject to the environmental information regime and what information is exempt from disclosure. These aspects of the regime were selected because they best represent the differences between English and Chinese conceptualizations and approaches towards guaranteeing the right of access to environmental information. Legal reforms sourced from each jurisdiction are then proposed and the likelihood of the proposed transplants being successfully adopted into the receiving legal system is explored. The article concludes that it is theoretically possible for England and China to look to each other as sources of legal reform to improve how the right is guaranteed, which would have a wider positive impact on environmental democracy. However, the article concedes that the cultural and political barriers between these states will likely hinder the sourcing and adoption of the proposed transplants.

2. LEGAL TRANSPLANT THEORY

> Law shows us many paradoxes. Perhaps the strangest of all is that, on the one hand, a people's law can be regarded as being special to it, indeed a sign of that people's identity… [Yet] on the other hand, legal transplants - the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history.[17]

It is commonly accepted that the laws in a jurisdiction mirror the unique needs of that jurisdiction,[18] a theory referred to in this article as the 'mirror theory.' Originating from the legal studies of Montesquieu, the mirror theory denotes the importance of society within the local law-making process and precludes the possibility of laws travelling between jurisdictions.[19] When viewing the law through this theoretical lens, a reasonable assumption is that because the specific needs of a society differ in different states due to natural, political and legal factors, the laws of one jurisdiction cannot fit the different needs of another. However, as identified in the above quote, there is a flaw in Montesquieu's theory. While laws should not easily travel between jurisdictions, there is evidence that 'foreign' laws have been used as sources of legal reform for various jurisdictions throughout history.[20] Additionally, modern academics have noted that this phenomenon is not restricted to the past: the exchange of laws between jurisdictions has increased in the 21st century.[21] Consequently, Montesquieu's theory of law mirroring society does not fully explain how law operates in reality.

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[17] A. Watson, *Legal Transplants: An Approach to Comparative Law* (The University of Georgia Press, 1993), at p. 21.
[18] A. Cohler, B. Miller & H. Stone (eds), *Montesquieu: The Spirit of the Laws* (Cambridge University Press, 1989), at p. 25.
[19] Ibid. See also P. Legrand, 'The Impossibility of Legal Transplants' (1997) 4(2) *Maastricht Journal of European and Comparative Law*, pp.111-24.
[20] An example of this is the incorporation of Roman Law into 15th Century Scotland: Watson, n. 17 above, p. 36.
[21] J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar, 2008), p. 434.

Alan Watson attempts to fill this gap through legal transplant theory. Pioneered in the 1970s,[22] legal transplant theory proposes that law does not reflect the needs of society[23] because the law and the legal institutions of a jurisdiction are created by the 'legal elite.'[24] The 'legal elite,' Watson posits, constitutes a group trained in matters of law which, by virtue of that training, is more inclined to rely on legal authority in order to justify the legitimacy of their proposals for law reform.[25] Consequently, the laws of a state will tend to reflect the specific legal desires of the 'legal elite,' partially severing the link between the law and the needs of society. As a result of this disconnect, jurisdictions are free to look beyond indigenous sources of law and source legal reforms from another jurisdiction, even if it holds different social or political values. Indeed, Watson describes this as the 'most fertile source of development'[26] for legal systems because they are economically efficient,[27] allowing the 'legal elite' to build on the experience of the donor jurisdiction and prevent costly errors arising from the implementation of unsuitable laws.[28] Additionally, the desire to increase the legitimacy of the state at the domestic and international level through incorporating internationally recognized legal norms into domestic law[29] has been identified as a key reason for jurisdictions to look beyond their own borders for legal reforms. This is of particular importance in the context of the right of access to environmental information because the Aarhus Convention acts as the normative international instrument in this area. Any domestic environmental information regime which complies with the Convention is seen to be effectively implementing the right of access to environmental information.

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[22] A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974).
[23] A. Watson, *The Evolution of Law* (Johns Hopkins University Press, 1985), p. 93.
[24] Ibid., p. 115. The 'legal elite' can include jurists, politicians, legal academics and judges.
[25] Watson, n. 17 above, p. 55.
[26] Ibid., p. 95.
[27] A. Watson, 'Aspects of Reception of Law' (1996) 44(2) *The American Journal of Comparative Law*, pp. 335-51, at 335.
[28] J. Morin & E. Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 *International Studies Quarterly*, pp. 781-92, at 782.
[29] Ibid., pp. 782-3.

However, the process of looking towards other jurisdictions to source legal reforms is easier said than done and raises a plethora of questions that the 'legal elite' must answer: firstly, how will the jurisdiction source these reforms; secondly, are the selected transplants likely to be successfully adopted And; thirdly, will there be unintended consequences? In addressing the first two questions, Watson identifies three conditions which must be met for the legal transplant to be adopted successfully: the laws being transplanted must be accessible to the 'legal elite';[30] they must be respected or perceived as legitimate by the receiving society;[31] and they must not be inappropriate for the receiving society.[32] While these conditions indicate that a variety of factors affect whether legal transplants are successfully incorporated into the receiving legal system, a common theme is that they must not be contrary to the needs of society. This is similar to Montesquieu's theory but differs in one important respect: the transplant need not perfectly reflect what society desires; it just needs to not be contrary to the values of the receiving society.

Leading from this, it must be asked why England and China would look towards each other as a potential source of legal reform, as they both differ significantly in terms of legal, cultural and political attributes. England, similar to other western states, adopts a liberal democratic view of state/citizen relations. This view, espoused by academics such as Bentham, emphasizes that the state holds information on behalf of the public interest and that it is necessary for citizens to hold the state to account to protect against abuses of power.[33] In contrast, China's totalitarian rule under the Chinese Communist Party (CCP) is not based on liberal-democratic values[34] but rather on Marxist doctrines of State/citizen relations.[35] Such a

[30] Watson, n. 23 above, p. 95.
[31] Ibid.
[32] Ibid., p. 118.
[33] J. Bentham, 'Chapter II: Of Publicity', in J. Bowring (ed.), *The Works of Jeremy Bentham, Vol 2* (William Tait, 1838-1843), s.1(1), pp. 309-12.
[34] E. Larus, *Politics & Society in Contemporary China* (Lynne Rienner, 2012), p. 108.
[35] K. Marx, *Critique of the Gotha Programm*e (London Lawrence and Wishart, 1875) Part IV, p. 28.

political position eschews the virtue of transparency and builds upon China's Confucian tradition of secrecy in matters of governance.[36]

However, it can be suggested that because both jurisdictions share a common desire to implement the right of access to environmental information, this gap is not an insurmountable obstacle to transplanting legal reforms. Indeed, under legal transplant theory these differences are a boon since the unfamiliar social views and legal procedures can offer previously unthought-of ideas that could not be conceived purely within the receiving jurisdiction's legal system. Additional factors can also bridge the gap between the two jurisdictions. England's Party status to the Aarhus Convention, the prestige of England's environmental information regime which has been praised by the Aarhus Convention Compliance Committee,[37] and the accessibility of English as a global language[38] help promote aspects of England's Environmental Information Regulations 2004 (EIR) to China's 'legal elite' in considering legal transplants. Conversely, as a state suffering from severe environmental degradation[39] which only recently has guaranteed the right of access to environmental information, China is well placed to experiment with implementing the procedural rights enshrined in the Aarhus Convention. In this context, any legal innovations by China may be of interest to England, and thus can drive them to consider China as a source of legal reforms under legal transplant theory.

Finally, states may attach particular importance to the question of unintended consequences. These consequences are not merely the potential rejection of the proposed transplant. Legal

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[36] J. Head, 'Opposing Legal transparency in Dynastic China: The Persuasive Logic of Confucianist Views on Legal Opaqueness', in P. Ala'I & R. Vaughn (eds) *Research Handbook on Transparency* (Edward Elgar, 2014), pp. 115-39, at 123.

[37] Report of the Compliance Committee on its Twenty-Sixth Meeting, Addendum, Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain, ECE/MP.PP/C.1/2009/8/Add.1, para. 77, available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece_mp.pp_c.1_2009_8_add.1_e.pdf.

[38] A. Pennycook, *The Cultural Politics of English as an International Language* (Routledge, 2014), p. 7.

[39] L. Wenjing, 'Approaching Democracy Through Transparency: A Comparative Law Study of Chinese Open Government Information' (2011) 26(4) *American University International Law Review*, pp. 983-1007, at 987.

transplants may also act to transform the legal system in which they have been transplanted, thereby altering characteristics of the receiving system to reflect the legal system of the donor State.[40] The transformative impact of legal transplants can be substantial, because they can subtly introduce legal principles into a jurisdiction that would normally dismiss such principles outright. This can be seen to some extent in China's implementation of the right of access to environmental information, which has incorporated Western ideals of transparency into the traditionally closed-off system of Chinese governance. However, it must be noted that the receiving jurisdiction is not obliged to transplant the proposed reform in full; it can certainly amend the provisions of the original law to fit within its own legal system.[41] In doing so, it is possible for the receiving jurisdiction to minimize the transformative impact of the legal transplant.

3. APPLYING LEGAL TRANSPLANT THEORY TO THE ENVIRONMENTAL INFORMATION REGIMES IN ENGLAND AND CHINA

3.1. The Aarhus Convention and the Right of Access to Environmental Information in England and China

The Aarhus Convention, as the keystone of the right of access to environmental information, is vital to setting the minimum procedural standards[42] required to effectively guarantee the right. Negotiated by the EU Member States and informed by the Rio Declaration and Directive 90/313/EEC, the Aarhus Convention sets out the scope of the right,[43] secondary procedural rights relating to the request for environmental information,[44] and review

[40] M. Langer, 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45(1) *Harvard International Law Journal*, pp. 1-65, at 5.
[41] Watson, n. 17 above, p. 20.
[42] Ebbesson et al, n. 4 above, p. 19.
[43] Art. 2.
[44] Art. 4.

procedures that must be available to applicants.[45] However, the Convention does not prescribe the procedures to guarantee these rights. This is an important design element of the Aarhus Convention: it is open for global accession and thus must accommodate diverse political and legal cultures found in the United Nations Economic Commission for Europe (UNECE) area and beyond.

Moreover, in addition to playing a vital role in the creation of the Aarhus Convention, the EU has an influential position in how England and China guarantee the right of access to environmental information. England, due to the UK's (current) membership to the EU, is obliged to implement the provisions of Directive 2003/4/EC, which transpose the obligations enshrined in the Aarhus Convention into EU law and is binding upon Member States. China is not bound to follow EU law, but the EU has established numerous programmes such as the EU-China Environmental Governance Programme,[46] which act to promote the adoption of European principles underpinning environmental law into China's legal system. In this way, the EU plays an influential role in how the right is guaranteed in these jurisdictions.

It is within the frameworks of the Aarhus Convention and the EU that England and China have created domestic regimes to guarantee the right of access to environmental information. In England, the right is implemented through the EIR regime and in China through the Regulations of the People's Republic of China on Open Government Information 2007 (OGI) and the Measures on Open Environmental Information 2007 (MOEI). Both regimes have adopted the same overall structure: they each provide a right of access to environmental information held by the state, which is triggered when a request for information is submitted to a public authority. On receiving a request for environmental information the public authority is obliged to decide, subject to various procedural obligations, whether to disclose

[45] Art. 9.
[46] European Commission, 'EU-China Environmental Governance Programme', available at: http://ec.europa.eu/europeaid/projects/eu-china-environmental-governance-programme_en.

the requested information or whether to rely on an exemption and withhold disclosure. If the public authority decides to withhold the requested information, or if in reaching their decision they breach procedural obligations, individuals can seek to have the decision reviewed and, if successful, avail themselves of the remedies provided by the review body.

While both regimes have adopted a similar structure to guarantee the right, there are significant differences in their regulatory frameworks. One difference is that the EIR regime operates in parallel with the Freedom of Information Act 2000 (FOIA) which is of national, rather than EU, origin and does not distinguish between environmental and other types of information. This arrangement does not occur in China. Conversely, it has been suggested that the CCP's reason for guaranteeing the right in China is to entrench their domestic legitimacy as the ruling party[47] rather than to empower citizens in environmental protection efforts. This assertion arises due to the implementation of China's environmental information regime, which provides access to environmental information only when it portrays the CCP in a favourable light[48] and attempts to minimise public engagement with state decision-making processes.[49] This differs from the underlying environmental democratic principles behind the Aarhus Convention which underpin the EIR regime in England. If so then it could act to undermine the transparency and environmental protection aims of the right itself in the Chinese context.

[47] R. Williams, 'China's Transparency Two-Step: Reform and Control in the Wake of the Fourth Plenum', *Georgetown Journal of International Affairs* (26 Nov. 2014), available at: http://journal.georgetown.edu/chinas-transparency-two-step-reform-and-control-in-the-wake-of-the-fourth-plenum/.
[48] E. Economy, 'How Long Can China Keep Pollution Data a Secret?', *ChinaFile* (27 Feb. 2013), available at: http://www.chinafile.com/conversation/how-long-can-china-keep-pollution-data-state-secret and BBC, 'Report: One Fifth of China's Soil Contaminated' (BBC, 18 Apr. 2014), available at: http://www.bbc.com/news/world-asia-china-27076645.
[49] C. Yongxi, 'An Empty Promise of Freedom of Information? Assessing the Legislative and Judicial Protection of the Right to Access Government Information in China' (Ph.D. Thesis, University of Hong Kong, Sept. 2013), p. 116, available at: http://hub.hku.hk/handle/10722/197074.

These differences are important because they influence the content of the domestic environmental information regimes in both jurisdictions. Indeed the differences between jurisdictions and their laws shapes the legal transplant process. Nonetheless, despite these differences it is important to note that both jurisdictions adopt the structure of the Aarhus Convention in establishing a framework for their environmental information regimes. This is important from the perspective of legal transplant theory, as the similarities in the structure of both regimes make it easier for the proposed legal transplants to be incorporated without being substantially altered.

3.2. Public Authorities and Government Departments: The Scope of the Right of Access to Environmental Information

The definition of 'public authority' is the first aspect of the English and Chinese environmental information regimes requiring analysis. Doing so is essential for delineating the scope of the right of access to environmental information, as only information held by public authorities is accessible under the Aarhus Convention.

Under the Aarhus Convention and Directive 2003/4/EC, a public authority is defined as:

> (a) Government at national, regional and other level;
>
> (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
>
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
>
> (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention

This definition does not include bodies or institutions acting in a judicial or legislative capacity[50]

This definition is broad and covers all state bodies, not merely those related to the environment,[51] which ensures that a wide range of interactions between the state and the public are covered by the obligations.

In England, the provisions in the EIR that define 'public authorities' closely resemble the text of the Aarhus Convention and Directive 2003/4/EC. Under the EIR regime, four groups of bodies have been defined as public authorities: government departments:[52] any public authority listed under Schedule 1 of the FOIA;[53] any bodies or persons carrying out functions of a public administration;[54] and any bodies or persons under the control of a public authority that has public responsibilities, exercises functions of a public nature or provides public services relating to the environment.[55] Additionally, the EIR specifically excludes public authorities acting in a judicial or legislative capacity[56] and the Houses of Parliament if its inclusion would infringe House privileges.[57]

At first glance, the definition of 'public authority' in the EIR is compliant with the obligations imposed by the Aarhus Convention and Directive 2003/4/EC, as all government departments, not merely those with environmental remits, are covered by the EIR. However, this initial impression does not reflect the issues surrounding private entities that provide public services in England. The Court of Justice of the European Union (CJEU) ruled in *Fish Legal and Emily Shirley*[58] that the appropriate approach to determine whether a body is a

[50] Aarhus Convention, n. 2 above, Art. 2(2); and Directive 2003/4/EC, n. 11 above, Art. 2(2).
[51] Ebbesson et al, n. 4 above, p. 46.
[52] Environmental Information Regulations 2004, reg.2(2)(a).
[53] Ibid., reg.2(2)(b).
[54] Ibid., reg.2(2)(c).
[55] Ibid., reg.2(2)(d).
[56] Ibid., reg.3(3). This is because legislative bodies are open to scrutiny via democratic accountability, see Ebbesson et al, n. 4 above, p. 49.
[57] EIR, n. 52 above, reg.3(4).
[58] Case C-279/12, *Fish Legal and Emily Shirley* v. *Information Commissioner and Others* [2013] ECLI:EU:C:2013:853, para. 56.

public authority for the purpose of the EIR is to analyze whether the body in question is 'vested … with special powers' beyond those granted by the normal operation of private law. The CJEU also held that, in determining whether a private entity is under the control of a public authority, the Aarhus Convention and Directive 2003/4/EC only require that the entity in question does not perform its functions 'in a genuinely autonomous manner'.[59] While this broadens the definition of 'public authority' in England to match the breadth of the Aarhus Convention and Directive 2003/4/EC, a degree of ambiguity still exists within the definition. As Reid has noted, the Upper Tribunal's application of the CJEU's ruling left open the question of whether an entity requires a range of 'special powers' to be defined as a public authority or whether a single 'special power' suffices.[60] This is problematic, as such bodies can argue that a single 'special power' does not meet the 'special *powers*' test set out by the CJEU. Consequently, this can obfuscate the true scope of the EIR regime and the right of access to environmental information, and may confuse potential applicants in determinations whether they can submit requests for environmental information to private bodies that only have one 'special power.'

In stark contrast to the position in England, China does not encounter this issue of ambiguity in defining government departments for the purpose of its environmental information regime. Under the OGI and MOEI, 'departments of the State Council, local people's governments at all levels and departments under local people's governments at the county level or above,'[61] including Environmental Protection Bureaus,[62] are within the remit of the regime. This definition is broad, covering a wide range of executive bodies and, crucially, bodies that have

[59] Ibid., para 68.
[60] C. Reid, 'Case Comment: Information and Public Authorities' (2015) *Scottish Planning and Environmental Law*, pp. 62-3, at 63.
[61] Regulations on Open Government Information 2007, Art. 13.
[62] Measures on Open Environmental Information 2007, Art. 5.

delegated powers to manage public functions.[63] Additionally, all public enterprises and institutions that make or obtain government information while providing public services are encapsulated in this definition.[64] This breadth is possible due to the greater role that the state plays in providing public utilities and in public-private partnerships.[65] Without a socialist philosophy underpinning the supply of national utilities, such a broad definition is difficult to implement in practice. This approach is particularly interesting when compared with the scope of the Aarhus Convention; the breadth of the OGI and MOEI regime broadly matches the scope of the Aarhus Convention despite the Convention itself operating under a 'market-liberal' economic model[66] and not one informed by Marxist socialist values.

Notwithstanding this positive aspect of the Chinese environmental information regime, a critical problem is that the CCP itself is not within the remit of the regime. This problem is unique to China. The Aarhus Convention and England also exclude political parties on the basis that they are directly accountable through democratic elections;[67] however China, which does not utilize Western forms of democratic governance, does not have this degree of accountability. More concerningly, the CCP is China's sole political party so it effectively exercises complete control over the state executive departments[68] and promulgates policies that are applied at the local administrative level.[69] This degree of control is not exercised by political parties in other jurisdictions. As a result of the CCP's exclusion from the OGI and MOEI, large portions of the 'real' decision-making process in China are hidden from public

[63] Regulations on Open Government Information 2007, Art. 36.
[64] Ibid., Art. 37.
[65] There is an increasing number of public-private partnerships in China: see H. Thieriot & C. Dominguez, *Public-Private Partnerships In China: On 2014 as a Landmark Year, with Past and Future Challenges – Discussion Paper* (International Institute for Sustainable Development, 2015). However, in these partnerships Government departments are reluctant to give away power to private entities: see S. Zhang et al, 'PPP Application in Infrastructure Development in China: Institutional Analysis and Implications' (2015) 33(3) *International Journal of Project Management*, pp. 497-509, at 507.
[66] M. Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10(3) *Global Environmental Politics*, pp. 10-31, at 13.
[67] Ebbesson et al, n. 4 above, p. 49.
[68] Y. Tang, 'Feeling For Rocks While Crossing the River: An Analysis of the Statutory Language of China's First Freedom of Information Law' (2014) 4 *Journal of Information Policy*, pp. 342-76, at 351.
[69] Yongxi, n. 49 above, p.116.

scrutiny.[70] This position deviates from the Aarhus Convention, which covers bodies with this degree of executive power[71] and would encapsulate the CCP if China ratified the Convention.[72] Such a position is obviously problematic because it only provides a diluted form of transparency that insulates the CCP and undermines the environmental protection aims of the right and the Aarhus Convention. As such, the shortcomings in the Chinese regime impact upon the right of access to environmental information to, at least, hinder the effective implementation of the right at the broad scope envisioned by the Aarhus Convention or, at worst, render it illusory.

However, the analysis also indicates various parallels between the Chinese and English regimes which, in turn, can act as sources of inspiration for legal transplants. England could remedy the ambiguities in defining private entities that provide public services as public authorities, by looking to the broad definition used in China which encapsulates all entities performing public functions. This would eliminate the uncertainty in determining whether a private entity providing a public service is, for the purposes of the EIR, a public authority. Moreover, it could do so without requiring applicants, who generally do not have legal training, to apply the 'special powers' test. This makes it easier for applicants to submit requests under the regime and broadens the accessibility of the right. However, in practice, adopting this transplant may be difficult because England lacks the degree of state control that China has over the provision of public utilities[73] which makes such a broad definition possible. Notwithstanding this potential obstacle, it must be noted that the Chinese definition of government departments matches the broad scope of the Aarhus Convention whereby the structure of public utilities does not absolve the state of its obligation to provide access to

[70] Ibid.
[71] Ebbesson et al, n. 4 above, p. 46.
[72] *Fish Legal*, n. 58 above, para 51.
[73] Zhang, n. 65 above, p. 507.

environmental information.[74] The ideological convergence between the Aarhus Convention and Chinese law adds a degree of legitimacy to the Chinese provisions, and may act to surmount the difficulties raised by the different structures of public utilities and make the proposed transplant more feasible.

Conversely it would also be difficult for China to look to and adopt a specific provision in the English EIR regime as a means of legal reform. This is not because of the text of the OGI and MOEI, which does match the scope of the Aarhus Convention. Rather, it is how the provisions are applied in practice, which shields the CCP in its role as the executive and breaches the spirit of the Convention's provisions. This is not to say that China cannot look towards England for inspiration; rather, it must look towards the spirit of transparency woven through the provisions of the EIR instead of focusing on a specific provision. The current Chinese regime clearly does not deliver on the promise of transparency because it hides large portions of the CCP's decision-making processes from public scrutiny. Abolishing this exclusion, while not strictly following the text of the Aarhus Convention and the EIR, would follow the spirit of these instruments and harness the right to information.

Naturally it is debatable whether the CCP, acting as the 'legal elite', would ever consider this transplant. On the one hand, the CCP may only have implemented the right of access to environmental information to shore up its domestic legitimacy. By providing a diluted form of transparency that excludes itself, the CCP simultaneously addresses some transparency concerns while maintaining control over the flow of information between the state and Chinese citizens. On the other hand, guaranteeing the right of access to environmental information normatively erodes the CCP's control of information. The international influence of the Aarhus Convention and the EU, alongside the example set by England, may pressure the introduction of further reforms. Additionally, since Chinese citizens are now more likely

[74] Ebbesson et al., n. 4 above, p. 46.

to take action in order to hold the state to account,[75] the introduction of the OGI and MOEI regime can be said to have precipitated a cultural change as well. This cultural shift may act to push the CCP into adopting this proposed transplant, despite this counteracting its interests as China's 'legal elite.'

3.3. Exceptions and Exemptions to the Right of Access to Environmental Information in England and China

A key element of the Aarhus Convention, Directive 2003/4/EC, and the domestic environmental information regimes of England and China, is the ability of public authorities to refuse requests for access in certain circumstances. This is important because, while states do hold information in the public interest, public authorities need to be able to withhold sensitive information that may cause harm if disclosed. At the international level, the Aarhus Convention sets out two categories of information that are exempt from the obligation of disclosure on request. The first category is general in nature and concerns whether the authority holds the information;[76] whether the information is in the course of completion or constitutes an internal communication;[77] and whether the request is 'manifestly unreasonable' or too general.[78] The second category protects a range of specific interests that can be adversely affected by the disclosure of sensitive information. These interests are broad, ranging from international relations, national security, public security[79] and the privacy rights of individuals.[80] Requests for environmental information can also be refused under this category if it relates to confidentiality of commercial or industrial information, when such

[75] T. Johnson, 'Environmental Information Disclosure in China: Policy Development and NGO Responses' (2011) 39(3) *Policy and Politics*, pp. 399-416, at 401; and S. Hoffman & J. Sullivan, 'Environmental Protests Expose Weakness in China's Leadership', *Forbes*, 22 June 2015, available at: http://www.forbes.com/sites/forbesasia/2015/06/22/environmental-protests-expose-weakness-in-chinas-leadership/#58b74a6b2f09.
[76] Aarhus Convention, n. 2 above, Art. 4(3)(a).
[77] Ibid., Art. 4(3)(c).
[78] Ibid., Art. 4(3)(b).
[79] Ibid., Art. 4(4)(b).
[80] Ibid., Art. 4(4)(e).

protection is granted by law,[81] and if the disclosure of the requested information would impair environmental protection efforts.[82] Directive 2003/4/EC follows a similar division of exceptions and protects an identical set of interests.[83]

In addition to setting the scope of the exceptions themselves, the Aarhus Convention and Directive 2003/4/EC place limits on how they can be used. Under both instruments, public authorities are obliged to interpret exceptions restrictively and must disclose the information if the public interest in withholding the information from disclosure is outweighed by the public interest in having the requested information released.[84] Furthermore, the exceptions operate under a presumption of disclosure,[85] which further increases the likelihood of the requested environmental information being disclosed. These conditions prevent public authorities from unduly withholding sensitive information to hide wrongdoing, and play an important role in ensuring that the right of access to environmental information is effectively guaranteed.

In implementing the exceptions enshrined in the Aarhus Convention, England has directly transposed the text of the Convention and Directive 2003/4/EC into the EIR regime.[86] The interests protected by the EIR[87] mirror those found in these instruments. The EIR exceptions also operate under a presumption of disclosure[88] similar to that articulated in the Aarhus Convention and Directive 2003/4/EC. This presumption works alongside the public interest test, which states that a refusal based on one of the exceptions can be overruled if it is in the public interest for the requested information to be disclosed.[89] The public interest test acts as

[81] Ibid., Art. 4(4)(d).
[82] Ibid., Art. 4(4)(h).
[83] Directive 2003/4/EC, n. 11 above, Art. 4(1) - (2).
[84] Ibid., Art. 4(2); Aarhus Convention, n. 2 above, Art. 4(4).
[85] Aarhus Convention, n. 2 above, Art. 4(4) and Directive 2003/4/EC, n. 11 above, Art. 4(2).
[86] EIR, n. 52 above, reg.12.
[87] Ibid., reg. 12(4) and reg. 12(5).
[88] Ibid., reg. 12(2).
[89] Ibid., reg.12(1)(b).

an additional safeguard in the public authority's determination on whether to disclose or withhold the requested information, where the public authority must weigh the considerations for disclosing and withholding the requested information.[90] In applying the public interest test, the public authority can take into account the promotion of participation in environmental matters; the free exchange of views and a greater awareness of environmental issues.[91] Additionally, public authorities can aggregate the weight of the exceptions in deciding whether or not to disclose the requested environmental information.[92] While this does have the potential to undermine the restrictive interpretation of the exceptions promoted by the Aarhus Convention,[93] in practice overlapping interests are discounted from the aggregation process[94] and the general approach of considering the weight each individual interest should be accorded[95] limits the impact of this power. In obliging public authorities to follow these steps, the EIR regime is predisposed towards disclosing the requested information, following the aims of the Aarhus Convention. This predisposition is arguably to be expected, considering the shared Western liberal background of the UK and the Aarhus Convention.

However, despite strict adherence to the text of the Convention, England has had mixed success to date in effectively implementing the exceptions. For example, in applying the exception relating to relating to international relations, defence, national security or public safety, [96] the EIR grants public authorities the discretion to neither confirm nor deny holding

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[90] Information Commissioner, *The Guide to the Environmental Information Regulations* (Information Commissioners Office, 2015), p. 28, available at: https://ico.org.uk/media/for-organisations/guide-to-the-environmental-information-regulations-2-4.pdf.
[91] *Office of Communications* v. *Information Commissioner* [2009] EWCA Civ 90, para 56.
[92] Case C-71/10, *Office of Communications* v. *Information Commissioner* [2011] ECR I-07205, para. 25.
[93] Aarhus Convention, n. 2 above, Art. 4(4).
[94] Code of Practice on the Discharge of the Obligation of Public Authorities under the Environmental Information Regulations 2004, para. 30, available at: https://ico.org.uk/media/1644/environmental_information_regulations_code_of_practice.pdf.
[95] *Office of Communications* v. *Information Commissioner, Everything Everywhere Ltd and National Policing Improvement Agency* [EA/2006/0078] para 90.
[96] EIR, n, 52 above, reg.12(5)(a).

the information when responding to a request for access.[97] This is justified on the basis that, in certain instances, even revealing the existence of the requested information is akin to disclosing it and can have a negative impact on the public interest. Notwithstanding the strength of this justification, the power to neither confirm nor deny is not mentioned in the Aarhus Convention or Directive 2003/4/EC and, in fact, contradicts the obligation to reason refusals.[98] The English approach breaches both the letter and spirit of the Aarhus Convention because if such a response is issued by the public authority the applicant will not know the basis for the refusal. Consequently, the applicant will be unable to make an informed decision as to the prospects of having the decision reviewed, which undermines their ability to enforce their right of access to environmental information.

In addition to this, the implementation of the exception relating to the secrecy of commercial and industrial information has been problematic. Under the provisions of the EIR, information relating to commercial or trade secrets can be withheld from disclosure if it protects a legitimate economic interest and the information is designated as confidential by law.[99] The designation of confidentiality can be done through both statute and case law,[100] but if it is granted through case law then the information must be *imparted* to the public authority 'in circumstances importing an obligation of confidence.'[101] This means that information that is created between a public authority and a private body does not fall within the exception because it cannot be said to have been 'imparted.' This has a mixed impact on the right: while it does ensure that public authorities are fully transparent in their dealings with private bodies, private bodies are less likely to share information with public authorities if there is a risk of the information being disclosed to the public. Additionally, private bodies

[97] Ibid., reg. 12(6).
[98] Aarhus Convention, n. 2 above, Art. 4(7) and Directive 2003/4/EC, n. 11 above, Art. 3(4).
[99] Environmental Information Regulations 2004, reg. 12(5)(e).
[100] *Roy Jones (on Behalf of Swansea Friends of the Earth)* v. *Information Commissioner* [EA/2011/0156].
[101] *Coco v. A.N. Clark (Engineers) Limited* [1968] F.S.R 415, 419, emphasis added. The other two requirements are that the information must have the 'necessary quality of confidence' and that 'an authorized use of the information to the detriment of the communicating party'.

are also less likely to work alongside public authorities, thereby potentially hindering state-led environmental protection efforts in the private sector and conflicting with the overarching environmental aims of the Convention and the right itself.

Unlike England, China has not directly transposed the text of the Aarhus Convention, yet the OGI and MOEI regime has adopted a similar structure to the Convention and the English EIR. The Chinese regime broadly protects the same interests as those listed in the Convention, albeit defined less precisely,[102] and includes: protecting state secrets;[103] commercial and trade secrets;[104] individual privacy;[105] and the 'three securities and one stability',[106] under which Government departments are entitled to withhold information from disclosure if it endangers state security, public security or economic security.[107] Chinese government departments, in certain instances, must also undertake a public interest test, balancing the public interest in disclosure with the public interest in withholding the information. While not identical to the test seen in the Aarhus Convention, the Chinese public interest test also creates an additional stage in the government department's determination on whether to disclose certain types of sensitive information. It is interesting to note that certain aspects of China's OGI and MOEI regime have been more successful in matching the standards set by the Aarhus Convention than its English counterpart. One instance of this can be seen in its application of the state secret exemption, where government departments are obliged to provide a reason for the refusal to disclose[108] and cannot rely on discretionary

[102] The Chinese exemptions are given a broad definition under the OGI and MOEI. For academic critique on this see J. Horsley, *Some Thoughts on Typical Exemptions From Government Information Disclosure* (Yale Law School, 2009), p. 7, available at: http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-OGI_Horsley_Some_Thoughts_on_Typical_Exemtions_from_Govoernment_Information_Disclosure_2009.pdf
[103] Regulations on Open Government Information 2007, Art. 14 and Measures on Open Environmental Information 2007, Art. 12.
[104] Ibid., Art. 14 and ibid., Art. 12. As far as the literature indicates, there is no appreciable difference between the two terms in this context.
[105] Ibid., Art. 14 and ibid., Art. 12.
[106] Ibid., Art. 8 and ibid., Art. 10.
[107] Ibid., Art. 8 and ibid., Art. 10.
[108] Ibid., Art. 21(2) and ibid., Art. 17(2).

power to neither confirm nor deny the existence of the requested information. Another example can be seen in how government departments do not require information to be 'imparted' in order to apply the exemption relating to commercial and trade secrets. These aspects of the OGI and MOEI regime are important, as they indicate a willingness from China to meet the standards of guaranteeing the right of access to environmental information as espoused by the Aarhus Convention.

However, while on the surface the Chinese environmental information regime complies with the obligations set by the Aarhus Convention, this is not the case in practice. The CCP has altered, or in some instances chosen not to adopt, certain elements of the Aarhus Convention in order to achieve its own political goals. This can be seen in the CCP's initial refusal to disclose a report on contaminated arable land[109] and the difficulties in accessing information on the disposal of hazardous waste.[110] Consequently, the right of access to environmental information is undermined and provides only a diluted form of transparency. This is evidenced in the range of information that can be withheld under the OGI and the MOEI, specifically the provision relating to the 'three securities and one stability.' While these exemptions are uncontentious, and features in both the Aarhus Convention and England's EIR regime, the provision also allows government departments to exempt information that threatens the 'social stability' of the state.[111] This exemption provides government departments with a large degree of discretion, and what is considered to threaten the 'social stability' can change depending on the priorities of the incumbent CCP leader.[112] As a result of this wide discretion and inclusion of 'social stability' as a protected interest, government

[109] Economy, n. 48 above.
[110] Article 19 and Centre for Legal Assistance to Pollution Victims, *Access to Environmental Information in China: Evaluation of Local Compliance* (Article 19 and Centre for Legal Assistance to Pollution Victims, 2010), p.18, available at: https://www.article19.org/data/files/pdfs/reports/access-to-environmental-information-in-china-evaluation-of-local-compliance.pdf
[111]Regulations on Open Government Information 2007, Art. 8 and Measures on Open Environmental Information 2007, Art. 10.
[112] Yongxi, n. 49 above, p. 152.

departments have withheld information on environmental incidents[113] and hindered environmental protest groups,[114] contrary to the aims of the Aarhus Convention. This is a consequence of the CCP's totalitarian rule: in order to maintain the one party system, the CCP needs to ensure that information that is potentially harmful to the CCP's domestic image is not disclosed, thereby necessitating the use of this exemption. It is telling that the environmental information regime in England, which uses a democratic system of governance, does not contain such an exemption.

The dilution of the right of access to environmental information can also be seen in other divergences between the Chinese environmental information regime and the Aarhus Convention. While China obliges government departments to provide the reason for withholding information,[115] there is no clear presumption of disclosure nor any discretion to disclose the information if there are considerations in favour of disclosure.[116] This provides government departments with a great degree of discretion to justify a refusal to disclose environmental information, particularly in instances where such disclosure would embarrass the CCP.[117] As such, the CCP is able to maintain its stranglehold over the flow of information and prevent efforts to improve the transparency of its governance, contrary to the aims of the Aarhus Convention.

A similar divergence from the procedures of the Aarhus Convention can also be seen in the public interest test contained in the OGI and MOEI regime. Utilized in the exemptions relating to commercial and trade secrets and individual privacy, the OGI and MOEI oblige state bodies to identify the public interest and analyze the impact that withholding the

[113] Ibid., p. 155.
[114] Ibid., p. 153.
[115] Regulations on Open Government Information 2007, Art. 21(2) and Measures on Open Environmental Information 2007, Art. 17(2).
[116] Horsley, n. 102 above, p. 2.
[117] Indeed, this has already occurred in China with the Ministry of Environmental Protection refusing to disclose a Soil Contamination Report which showed one fifth of arable land in China is contaminated. See Economy, n. 48 above.

requested information would have on it.[118] While superficially similar, this test inverts the public interest test under the Aarhus Convention[119] and the English EIR,[120] focusing on the harm that would be caused by non-disclosure as opposed to how the public interest is served by disclosure.[121] The Chinese public interest test has a negative impact on the right of access to environmental information as it predisposes state bodies to withhold information from disclosure. This is further exacerbated by the fact that the decision is generally based on whether the impact of non-disclosure would 'far exceed' the impact on other related interests,[122] which creates a high threshold to overcome.[123] Clearly, these practices diverge from the generally accepted standards set by the Convention, and it is here we can see how the transparency aims of the Aarhus Convention conflict with the domestic legitimacy concerns of the CCP. Consequently, this has a negative impact on the right's goals to promote environmental democracy and transparency in China.

In contemplating the shortcomings in English and Chinese implementations of the exceptions to the right of access to environmental information, legal transplant theory can help to formulate proposals for legal reform. One shortcoming in England's regime is the requirement for information to be 'imparted' for the EIR's commercial and industrial information exception to be applied, which stifles collaborative partnerships between the public and private sector. A potential transplant is for England to follow the example of China and abolish the requirement to 'impart information.' China, which has no such requirement, has seen an increase in such partnerships[124] and it is plausible that the low

[118] Yongxi, n. 49 above, p. 335.
[119] Aarhus Convention, n. 2 above, Art. 4(4).
[120] EIR, n. 52 above, reg. 12(1)(b).
[121] Yongxi, n. 49 above, p. 335.
[122] Ibid., p. 342.
[123] Ibid.
[124] This can also be seen in the US, where there is a lack of 'imparting' requirement and a substantial degree of federal environmental work is undertaken by private enterprises. See S. Lamdan, 'Sunshine for Sale: Environmental Contractors and the Freedom of Information Act' (2013-2014) 15 *Vermont Journal of Environmental Law*, pp. 1-35, at 5.

likelihood of commercially sensitive information being disclosed through such partnerships is a reason for this uptake. This increased uptake of public/private partnerships is to China's benefit for two reasons: firstly, the economic savings generated by such partnerships[125] can be redistributed to other projects, such as environmental protection efforts; and, secondly, the state can influence how private parties conduct business, redirecting them towards more environmentally friendly business practices. These benefits act to promote the overarching aims of the Aarhus Convention. England therefore has a strong incentive to consider adopting this transplant, despite it being sourced from an entirely different political and legal model.

Another potential transplant relates to the public authorities' ability to neither confirm nor deny the existence of information under the national security exception. In contrast to England, China does not allow government bodies to refuse to provide the reason for the request[126] and, in this instance, is in full compliance with the standards set by the Aarhus Convention. England, therefore, may wish to follow the example set by China and abolish the power to neither confirm nor deny. In considering whether England can successfully adopt such a transplant, it must be noted that this particular transplant matches with the Western democratic values that underlie both England and the Aarhus Convention, and indeed mirrors the obligation contained in the Aarhus Convention. It is due to the procedural and ideological similarity between the Aarhus Convention and the Chinese provisions on this issue that this proposed transplant could be successfully adopted by England, thereby bringing its legal framework more closely into line with the requirements of the Convention.

China can also benefit from looking towards England to seek legal reforms. One particular set of transplants that China should consider incorporating is the English public interest test and the presumption of disclosure into the OGI and MOEI regime. By adopting these

[125] Thieriot & Dominguez, n. 65 above, p. 4.
[126] Regulations on Open Government Information 2007, Art. 21(2) and Measures on Open Environmental Information 2007, Art. 17(2).

procedures into its environmental information regime, China would redress the discretionary powers available to government departments that weight the request process towards non-disclosure. In turn, this would provide a more robust and effective means for citizens to utilize their right of access to environmental information. However, while these proposed transplants would help China to fully operationalize the right of access to environmental information, they also conflict with the CCP's aim of maintaining control over the flow of information. To an extent, the two aims oppose each other and cannot coexist within the same legal system. This, however, ignores the ultimate objective of maintaining control over the flow of information: to continue to improve the legitimacy of the CCP at the domestic and international level. The latter aim may ultimately trump the former and narrower aim of controlling the flow of information due to the change in how China's citizens and Chinese environmental non-government organizations (NGOs), wish to be engaged in environmental protection efforts.[127] If the CCP cannot respond to this increased desire on the part of China's citizens to access environmental information held by the State, then it is probable that they will lose some of their domestic legitimacy as the ruling party. Indeed, it is likely that, if this transplant were proposed, it would be on the initiative of Chinese environmental NGOs which, according to some commentators, play an increasingly important, albeit still limited, role in influencing decisions made by the CCP.[128] Additionally, in order to not be seen as acting contrary to the generally accepted norms of the Aarhus Convention, China may be pressured by the international community to adopt these transplants. Hence, despite the tension between certain aims of the CCP and the proposed transplant, if proposed, China might consider adopting it into its current environmental information regime.

[127] Hoffman & Sullivan, n.75 above.
[128] F. Wu, 'Environmental Activism in Provincial China' (2013) 15(1) *Journal of Environmental Policy and Planning*, pp. 89-108; and S. Tang & X. Zhan, 'Civic Environmental NGOs, Civil Society and Democratisation in China' (2008) 44(3) *Journal of Development Studies* pp. 425-48.

It is particularly interesting to contrast this with any proposed transplant relating to the 'social stability' exemption contained within the OGI and MOEI. One clear point is that neither the Aarhus Convention nor the EIR regime contains such a broad exemption, and that the use of this exemption in China provides more opportunity for Chinese government departments to withhold environmental information in comparison to their Western counterparts. As such, a potential reform that could be adopted by China is to abolish the exemption. While this is not a transplant as defined by Watson, which requires that a law be placed into the receiving jurisdiction to be defined as a transplant,[129] the reform encounters the encounters the same clash of values as transplanting the presumption of disclosure and the public interest test. However, this provision in the OGI and MOEI can be distinguished from the previously identified issues. This distinction arises from the fact that the social stability exemption epitomizes a fundamental aspect of the Marxist form of socialist government.[130] This lends a degree of cultural significance to the exemption that is lacking in the procedural elements of the public interest test and presumption of disclosure. Consequently, because it is intrinsically connected to the political and social fabric of China, the CCP is unlikely to abolish the 'social stability' exemption to match the Western values enshrined by the Aarhus Convention, even if such a reform would better guarantee the right of access to environmental information.

4. CONCLUSION

The right of access to environmental information plays a key role in modern environmental governance. It empowers citizens to act as stewards for the environment, allowing them to actively participate in environmental decision-making procedures, act as enforcers for environmental regulations, and protest against environmental harms caused by the state.

[129] While outwith the scope of this article, this raises an interesting question regarding the nature of legal transplants, and whether the definition of what constitutes a legal transplant should be enlarged to include reforms which are based on the general aims and spirit of the donor system's laws.
[130] Marx, n. 35 above, p. 2.

However, in order for the right to be effectively guaranteed it must be implemented with a set of procedural rights that govern which bodies are within the scope of the right and how public authorities process and determine information requests. Enshrined in the Aarhus Convention, these procedural rights are vital to ensure that requests are processed in a way that furthers the environmental protection aims of the right. Both England and China, despite their political, social and legal differences, have looked towards the overarching framework of the Aarhus Convention in their attempt to effectively implement the right of access to environmental information.

Both jurisdictions have encountered shortcomings in fully guaranteeing the right in line with the Aarhus Convention's obligations. These shortcomings are not uniform between the jurisdictions. Reflecting the different social concerns and legal architecture used to implement the right, each jurisdiction has separate areas in which improvements are required and areas in which they have successfully incorporated the requirements of the Aarhus Convention into their domestic environmental information regime. It is the differences between the respective regimes that can act as reciprocal inspirations for legal reforms under legal transplant theory. The application of legal transplant theory between these two jurisdictions, and the conclusion that both jurisdictions can offer legal transplants that are likely to be successfully adopted by the other, raises a variety of interesting findings.

Firstly, regardless of where a transplant is sourced from, and the cultural elements attached to it, if the proposed transplant matches the obligations enshrined in the Aarhus Convention it is more likely to be successfully adopted. This is due to the status of the Aarhus Convention as the keystone legal instrument, and the associated legitimacy that complying with the Convention confers on States. This idea of legitimacy is identified as a driver by legal transplant theory, and may help to carry transplants across jurisdictions with vastly different legal and political systems and social values. Indeed, the legitimacy and associated prestige

with complying with the normative values of the Aarhus Convention can drive England to adopt China's approach to exempting commercial and industrial information from disclosure, despite their very different views on capitalism. This underlying idea of legitimacy also drives China to adopt legal transplants from England, as far as they help China to comply with the normative values of the Aarhus Convention. However, as can be evidenced by the difficulty of reforming the "social stability" exemption, the political culture of the CCP can act to hinder such transplants from occurring. As such, the concept of legitimacy derived through the Aarhus Convention is not always enough to overcome domestic obstacles in promoting the adoption of legal transplants.

Secondly, China guaranteeing the right of access to environmental information, which is based on Western values of transparency and governance, may be indicative of a shift in China's relationship between the state and its citizens. By allowing citizens to access information held by government bodies and thereby opening these bodies up to scrutiny, China has departed from a long-held position of secrecy that has its roots in Confucian values. Serving as a means to resolve issues caused by China's severe environmental degradation, the right may continue to influence how Chinese citizens perceive their relationship with the state and pull China further towards Western values. However, this is not guaranteed: as evidenced by the CCP's exclusion from the OGI and MOEI regime, the CCP has altered the scope of the right to fit into the Chinese style of top-down governance. As such, instead of pulling China to the West, what might develop is a mix of the Aarhus Convention's Western focus on transparency with Chinese political values.

These highlighted points are of particular value to deepen our understanding of legal transplant theory by identifying key aspects of the application of this theory. Legal

transplants are the most 'fertile source of development'[131] for legal systems and it is possible that England and China could reform their respective environmental information regimes through the adoption of transplants. The transplants analyzed in this article, as shaped by the international framework of the Aarhus Convention and the particular national characteristics of England and China, seek not only to improve how the right is guaranteed but serve as an indication of how the right of access to environmental information will continue to develop into the future. Ultimately, the provision of environmental information is a key factor in engaging members of civil society and empowering them to act as environmental stewards. In considering how legal transplants can help improve implementation of the right to seek environmental information from the state, the 'legal elite' in both England and China could better promote the values of environmental stewardship and protection enshrined in the Aarhus Convention.

[131] Watson, n. 17 above, p. 95.