

Canadian Institute of Resources Law
Institut canadien du droit des ressources

Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation

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Abstract

The paper focuses on the theoretical foundations of public participation in environmental decision-making and natural resources management, and develops general criteria to assess the effectiveness of both processes and results of participatory proceedings. The foundations of public participation and the justifications for its application are outlined. Habermas' theory of communicative action is used to describe an ideal model of public participation. The author's concepts of fairness and competence are used to shape the notion of effective participation. The study concludes that public participation is one important instrument to improve public policies related to environmental conservation and natural resources management. The proposed criteria incorporate ideas such as previous consensus on the rules of the debate, the increase of citizens' social and political capital, the enhancement of participants' autonomy, and the use of traditional and community knowledge. The appendix includes an analysis of the *European Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention), based on the criteria proposed in the paper.

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1.0. Introduction

Public participation is one instrument of deliberative democratic systems that seeks to capture the concerns and opinions of the people affected by government's decisions, or of the citizenry in general. The focus of this paper is the participation of citizens with the government in environmental decision-making and natural resources management. The goals are to outline the theoretical foundation for public participation, to explore the rationales for public participation in energy development and natural resources conservation decision-making, and to create criteria to evaluate the effectiveness of public participation in this decision-making. The paper gives an overview of the topic, its political origins in deliberative democracy and its basis in communication. It searches for procedural models and definitions of "good" participation through Habermas' theory of communicative action and ethics, as it is one of the most representative theories of deliberative democracy. A literature review on the standards of good public participation is conducted in order to outline general criteria to assess both the processes and the results of public participation.

Public participation has been growing in the majority of democratic states as a way to improve decision-making and to satisfy the demands of the people to be heard on various issues. Some of the reasons for this growth are the decline of mediating institutions, such as the church and political parties, the ascendancy of the bureaucracy as a mechanism to justify government decisions, and the growth of mass media which give people more information about government activities.¹ It has also been suggested that public participation is used more in government decisions about the environment and natural resources because of the impacts of environmental decisions on citizens' lives.² One reason for this increase would be population growth, which impacts many aspects of energy, natural resources and the environment. A second reason would be a growing awareness of the effects of environmental damages on human health and well-being.³ Finally, continuing development of human and political rights has created more political activity in these matters.⁴

In the areas of planning and environmental law, public participation began to be applied during the 1960s and 1970s. In the 1980s, "bottom-up" approaches to economic development started to flourish. And by the 1990s, public participation was highly

¹ Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development" in Donald N. Zillman, Alastair R. Lucas & George Pring, eds., *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University, 2002) 77 at 82.

² *Ibid.*

³ *Ibid.* at 82.

⁴ *Ibid.* at 83.

regarded as a mechanism for “good governance.”⁵ Richardson and Razzaque point to examples of citizens’ movements that instigated the growth of public participation. In Australia, in the 1970s and 1980s, many violent conflicts occurred in relation to logging in World Heritage forests. In Canada, New Zealand and the United States, environmental law reforms have been influenced by aboriginal movements.⁶ As a result of the various movements pushing for participation in environmental matters, some international legal documents were adopted, such as the UNECE *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,⁷ and the North American Agreement on Environmental Cooperation.⁸ In this context, countries began to develop their own laws regarding public participation as one essential component of planning processes, environmental decision-making and natural resources management.

Nevertheless, some still question if public participation is at all needed in environmental decision-making. Because the issues arising in these processes are highly technical and scientific, one could argue that ordinary individuals are not able to contribute to good results and that experts should have more influence over these matters. Therefore, one question that this paper seeks to answer is if public participation is by any means necessary to good decision-making. Further, if participation is really needed in environmental decision-making, does it actually influence government decisions and public policies? Could the fact that individuals bring different backgrounds, values, interests and objectives to the table prevent an agreement, causing public participation to fail? Do governments use public participation as a means to manipulate citizens especially when there are no guarantees that government will commit to the outcome of the process? And even when participation actually influences decision-making, is it really effective? Does it truly address and solve the problems in question? Barton’s view is that participation cannot “cure all the ills of the polity,” and that we should not expect it “to work a miracle where political leaders have refused to address a problem.”⁹ The

⁵ Benjamin J. Richardson & Jona Razzaque, “Public Participation in Environmental Decision-making” in Benjamin Richardson & S. Woods, eds., *Environmental Law for Sustainability* (Oxford: Hart, 2006) 165 at 168.

⁶ *Ibid.* at 169.

⁷ United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38 I.L.M. 517 (1999) (entered into force 30 October 2001) [Aarhus Convention], online: United Nations <<http://www.unece.org/env/pp/documents/cep43e.pdf>>.

⁸ North American Agreement on Environmental Cooperation, 32 I.L.M. (1993) 1480 (entered into force 1994) [NAAEC]. See also Malgosia Fitzmaurice, “Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environment Cooperation” in Jonas Ebbesson & Phoebe Okowa, eds., *Environmental Law and Justice in Context* (New York: Cambridge University Press, 2009) 211.

⁹ *Supra* note 1 at 118.

effectiveness of participation also depends on the political context; it “cannot make up for the lack of policy.”¹⁰ Finally, even if the political context is favorable to good participation, are there better methods that can be used in the process that may have an impact on how effective participation is perceived?

To address these concerns, the paper first outlines justifications for public participation, arguing that it is in fact a valuable mechanism for environmental decision-making, depending on the various conditions that should be observed by the government. Finally, the paper proposes criteria to assess the effectiveness of both processes and results of public participation. An analysis of the Aarhus Convention, as the most representative international document on the topic, is found in an Appendix to the paper. It provides a point of comparison with the criteria proposed in this paper.

2.0. Theoretical Foundations for Public Participation

2.1. Liberal Democracy and Public Participation: Contributions and Limitations

With the advent of liberalism in western democracies, individual rights were elevated over the state’s absolute power. This fact generated many significant concerns based on equal legal rights, which led to the establishment of procedural justice principles.¹¹ At the same time, the centralization of decision-making in the government started to be challenged. Because liberal approaches are strongly characterized by a focus on individual interests, procedural rights such as equality and fairness became central to the protection of the private sphere. For those reasons, it is argued that the roots of public participation are found in liberal democratic theories.¹²

The principles of procedural justice are exercised through participatory mechanisms such as notice of the proceedings, detailed information of the claim, access to information, disposition of sufficient time to prepare defense, right to counsel, etc.¹³ Barton argues that the duties of procedural justice were intended to enforce principles of fairness and natural justice.¹⁴ Liberalism also contributed to create clear rules of access to government decision-making. It led to statutes which are more explicit in their goals and

¹⁰ *Ibid.* at 119.

¹¹ *Ibid.* at 89.

¹² *Ibid.*

¹³ *Ibid.* at 89.

¹⁴ *Ibid.* at 90.

which consider more clearly what the decision-maker should and should not take into account.¹⁵

Richardson and Razzaque emphasize the importance of liberal principles for law reform in the areas of rights of access to information, submissions of issues to decision-making and to courts.¹⁶ In addition, procedural rights help to generate substantive policy outcomes.¹⁷ Therefore, liberal democratic approaches to participation were instrumental in creating and enhancing procedural rights, which are at the core of good public participation.

Nevertheless, the authors argue that “traditional polyarchal mechanisms (e.g. elections and political parties)”, which are intrinsic to liberal democratic systems, have been shown to be incapable of managing the demands of diverse interest groups in modern societies.¹⁸ It has also been pointed out that liberal democratic procedural rights will most likely not defy elites’ power over government decision-making. On the contrary, interests will be judged based on the standards defined by the elites and not by the people in general.¹⁹

One of liberal democracy’s theoretical developments, neo-liberalism, shows an even stronger bent towards economic interests. This theory is founded on individual and market based approaches. Barton points that “[n]eo-liberals believe that property rights, markets, and quasi-markets are the key to solving environmental problems” and that “[a] person participates in the management of such resources as a market participant [...] There is no other public participation.” It is thus clear that neo-liberalism has not contributed to democratic public participation; instead it would give market forces — including the citizen as a consumer only — exclusive power to influence decision-making.

On the one hand, liberal approaches have significantly contributed to public participation to the extent that they have engendered procedural justice principles through individual rights. On the other hand, liberalism can limit access to public participation. Richardson and Razzaque reason that these limitations have shaped deliberative democracy, a new model of participation that seeks to empower citizens to effectively influence decision-making and to reorient decision processes through ethical and social

¹⁵ *Ibid.* at 90.

¹⁶ *Supra* note 5 at 171.

¹⁷ *Ibid.* at 171.

¹⁸ *Ibid.* at 171.

¹⁹ *Ibid.* at 172.

values.²⁰ Dryzek argues that deliberative democracy is an advanced model compared to liberalism because it incorporates one missing key element — deliberation.²¹

2.2. An Overview of Deliberative Democracy Theory

As an alternative model to liberal approaches, deliberative democracy is premised on communicatively-generated power to pursue good decision-making.²² Barton argues that “the normative force of reasons generated by the public deliberation of citizens must, through legal requirements, be brought to bear on the exercise of political power.”²³ In other words, deliberative democracy’s main characteristic is the implementation of citizen political power through rational deliberation.

Barton distinguishes between participatory democracy, deliberative democracy and civic republicanism.²⁴ All three originated as a response to limited participation in classic liberal democratic theories and emphasize public participation as a primary tool for government decision-making. Because they share characteristics, the distinction is not needed in this paper. All three theories are, therefore, encompassed in this paper under the term “deliberative democracy”.

Jacobs *et al.* outline what they call five conditions for deliberative democracy.²⁵ The first characteristic, universalism, requires the participation of all citizens affected by a decision, breaking with elite power and individual interests. Inclusivity, the second characteristic, is intended to ensure participation by a wide range of individuals or groups and representation of diverse interests and voices. The third characteristic, rationality, looks for deliberation based on reason, with claims founded on clear argumentation. The fourth characteristic, agreement, states that, when deliberation is universal, inclusive and based on reason, it should lead to consensus on which premises are valued in a certain

²⁰ *Ibid.* at 172.

²¹ John S. Dryzek, “Democratization as Deliberative Capacity Building” (2009) 42 *Comparative Political Studies* 1379 at 1380 [Dryzek, “Democratization”].

²² Barton, *supra* note 1 at 96.

²³ *Ibid.* at 97.

²⁴ *Ibid.* at 96, 97. Participatory democracy focuses on “realistic ways of organizing effective participation in larger groups of political communities.” Civic republicanism “argues for the existence and legitimacy of public values and the common good, which will not necessarily be expressed by an aggregation of individual preferences, but are properly pursued by society.” Deliberative democracy focuses on the “force of reasons generated by the public deliberation of citizens.”

²⁵ Lawrence R. Jacobs, Fay Lomax Cook & Michael X. Delli Carpini, *Talking Together: Public Deliberation and Political Participation in America* (Chicago and London: The University of Chicago Press, 2009) at 9.

decision-making. Finally, the characteristic of political efficacy is that democratic deliberation should produce relevant effects on politics and government policy.²⁶

As a result, democratic deliberation emphasizes participation, cooperation and rational discourse.²⁷ It should encourage dialogue, focused on the common good, incorporating critical reflection about the values engendered in the process, which includes representation of all significant sectors of society.²⁸ Dryzek argues that deliberation should be authentic; in other words, it should stimulate reflection and apply general principles to specific claims and generate reciprocity. It should also be inclusive, incorporating different discourses. The author states that “without inclusiveness, there may be deliberation but not deliberative democracy.”²⁹ With this, it becomes evident why public deliberation, or public participation, is the core of deliberative democracy theory, and why participation of “ordinary” citizens in the political process is highly regarded. Hartz-Karp and Briand point out that public deliberation is widely understood as:

a pragmatic, inclusive form of discourse in which citizens collectively — even cooperatively — *analyze a ‘problem’*; *establish criteria* by which to evaluate public responses to it; *identify multiple options* that reflect different sets of values or value-priorities held by members of the public; *weigh arguments* for and against each option in light of the criteria established previously and, through an indefinite period of continuing discussion (that may or may not include voting), *approach a measure of agreement* that (ideally) most participants can accept as a collective ‘decision’.³⁰

As noted earlier, deliberative democracy presents an alternative to liberal procedural models. In the majority of democratic polities, citizens are restricted to voting for members of elected legislatures, and influence over decision-making is typically a prerogative of technocratic experts, interest groups and elected officials.³¹ This situation is presumably generated by the assumption that “ordinary citizens” are uninformed and incapable of creating good decisions.³² Deliberative democracy challenges that assumption by arguing that “ordinary citizens” participation is most likely to reflect a broad range of interests, view points and types of knowledge, and to improve the quality

²⁶ *Ibid.* at 13.

²⁷ Janette Hartz-Karp & Michael K. Briand, “Institutionalizing Deliberative Democracy” (2009) 9 *Journal of Public Affairs* 125 at 127.

²⁸ Barton, *supra* note 1 at 98. See Jonathan Poisner, “A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation” (1996) 26 *Envtl. L.* 53 at 83. Barton uses Poisner’s criteria to identify what deliberative democracy is. Criteria to evaluate effective public participation, as an instrument of deliberative democracy, will be discussed further on the paper.

²⁹ *Supra* note 21 at 1382.

³⁰ *Ibid.* (emphasis added).

³¹ Hartz-Karp & Briand, *supra* note 27 at 126

³² *Ibid.*

of decisions. For these reasons, democracy should give all citizens opportunities for active and direct participation. Nevertheless, deliberative participation is not expected to replace representative participation, but rather to complement it by allowing democratic governments to understand and to positively react to the values, priorities and aspirations of the people they allegedly represent.³³ Thus it is evident that public deliberation not only helps to increase individuals' decision-making power, but access to citizens' perspectives also enables representatives to reach informed and holistic decisions.

The literature emphasizes that communication among the participants, and communication between the participants and the government are the main components of public participation in deliberative democracy. Communication gives way to reasoning seeking to identify the most legitimate claims.³⁴ Decisions gain authority because they are based on the force of the better argument, and not on arbitrary processes.³⁵ In one study that searches for a deliberative democracy model that elicits environmentally protective values, Dryzek reasons that "democracy is a matter of effective communication, not just preference aggregation."³⁶ Therefore, the success of deliberative democratic systems depends largely on the application of constructive communication in public deliberation. The matter will be discussed in more detail in the analysis of Habermas' theory.

3.0. Justification for Public Participation in Environmental Decision-Making

It has been argued to this point that communication is one central element of deliberative democracy processes. It is still not clear why public participation, as one instrument of deliberative democracy, is said to be the best mechanism for hosting communication and producing good government decision-making. However, it has also been argued that the complex and dynamic nature of environmental issues requires more transparent decision-making, one that incorporates a variety of values and perspectives,³⁷ and that public participation is able to address those demands. This section explores why public participation is seen as a way of achieving better environmental decision-making.

³³ *Ibid.* at 125.

³⁴ Jürgen Habermas, *The Theory of Communicative Action, Volume One: Reason and the Rationalization of Society* (Boston: Beacon Press, 1984) at 89 [Habermas, *Communicative Action*].

³⁵ Stephen A. Gardbaum, "Law, Politics, and the Claims of Community" (1991-1992) 90 Mich. L. Rev. 685 at 716.

³⁶ John S. Dryzek, "Political and Ecological Communication" (1995) 4:4 *Environmental Politics* 13 at 13 [Dryzek, "Political and Ecological Communication"].

³⁷ Mark S. Reed, "Stakeholder Participation for Environmental Management: A Literature Review" (2008) 141 *Biological Conservation* 2417 at 2417.

A literature review was conducted in order to identify both substantive and process rationales for public participation in environmental decision-making. It is important to note that substantive and procedural rights, especially related to environmental and natural resources issues, are usually intertwined.³⁸ A substantive right to a healthy environment, for instance, should entail procedural rights so as to guarantee that the people affected by a decision will be heard.³⁹ The literature also points out that the separation between substantive and process rationale is not exact, so that many issues can be examined from both rationales, and that the division is not actually evident in practice.⁴⁰

One substantive justification for public participation in environmental decision-making is that it calls government attention to problems that have been underestimated or even ignored. In this case, citizens play an important role by exposing the issues that government did not notice, and demanding that they be included in the political agenda.⁴¹ Moreover, public deliberation can help to address the issues that government is incapable of seeing or solving.⁴² In the formulation of environmental public policies, participation might help the government to identify, to understand and to tackle public interest issues.⁴³ Through dialogue, the public interest may be better defined and applied to a certain context.

In addition, according to Barton, to the extent that public participation is applied to environmentally protective measures, such as environmental impact assessment (EIA), the quality of decision-making is improved.⁴⁴ That is so because public participation might induce an EIA to search for sound environmental results,⁴⁵ considering a larger range of concerns than only technical ones.

Public participation, for Reed, provides decision-makers with more complete information, helping them to anticipate and deal with eventual negative outcomes.⁴⁶ The community affected by a certain environmental policy might contribute information which is not usually accessible to experts, such as the special characteristics of local natural resources or better techniques to explore these resources in a sustainable way. The

³⁸ Richardson & Razzaque, *supra* note 5 at 167.

³⁹ *Ibid.* at 167

⁴⁰ Barton, *supra* note 1 at 106

⁴¹ *Ibid.* at 100.

⁴² Hartz-Karp & Briand, *supra* note 27 at 133.

⁴³ Richardson & Razzaque, *supra* note 5 at 165.

⁴⁴ *Supra* note 1 at 101.

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 37 at 2420.

author also argues that participation allows interventions and technologies to be meaningfully applied to local socio-cultural and environmental conditions.⁴⁷ As a result, higher quality decisions, such as sustainable environmental outcomes, are most likely to be obtained.

Furthermore, public participation is clearly important to identify and to shape environmental issues, helping to define which goals should be pursued through the decision-making process.⁴⁸ Hartz-Karp and Briand elaborate on this aspect, reasoning that public deliberation allows individuals and communities to shape their values, principles and priorities by sharing opinions, beliefs and knowledge with one another.⁴⁹ Participatory practices enable citizens not only to influence government policies, but also to act as moral agents and shape society's values. They help "sustain the moral character of democracy."⁵⁰

In the area of energy and resources management, Barton points to a common divergence between technical and community opinions. The rationale for public participation in such matters relies on the fact that people want to be heard on the issues that have an effect on them.⁵¹ He also explains that in the case of risk management, for instance, because citizens refuse to have experts define what is acceptable for their community, technicians and local people might strongly disagree on the policy proposed by the government.⁵²

In order to address the demand for participation and avoid having experts exclusively define public policy, public participation tends to promote inclusion in decision-making. As a result, the chances of marginalization from the deliberative process are decreased.⁵³ Inclusion also prevents environmental injustices by widening the range of decision-makers and then tackling a larger variety of social groups' concerns. As well as being inclusive, participation is also considered to be transformative of adversarial relationships because citizens are encouraged to search for means of working together.⁵⁴ Citizens and

⁴⁷ *Ibid.*

⁴⁸ Barton, *supra* note 1 at 101.

⁴⁹ Hartz-Karp & Briand, *supra* note 27 at 127.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 1 at 102. Barton classifies the right to influence government decision-making as a process right, focusing more on the procedural rights to influence environmental decision-making, rather than on the environmental outcomes *per se*. If the focus is on the human right rather than the influencing, then it might seem better classified as a substantive rationale. This rationale demonstrates the indeterminacy of the distinction between substance and process.

⁵² *Ibid.*

⁵³ Reed, *supra* note 37 at 2420.

⁵⁴ *Ibid.*

government representatives come face to face to dialogue and seek the best outcome in a certain environmental decision-making process.

For all these reasons, the main substantive rationale for public participation is that it promotes better outcomes. Environmental decision-making is improved by a range of opinions, concerns, information and types of knowledge. When deliberation takes place, information and technologies will presumably be better applied.

Regarding the process, one justification is that public participation is a human right, in that all citizens should have the opportunity to influence public policy formation, either directly or through representation.⁵⁵ Taking part in government decision-making is an inherent value,⁵⁶ which was incorporated in the 1966 International Covenant on Civil and Political Rights.⁵⁷ Protecting a human right to participation encompasses other procedural rights such as the rights of association, expression, political participation and personal liberty.⁵⁸ One could question how a human right to public participation may contribute to environmental protection. Barton uses the work of Anderson⁵⁹ to list three ways in which this right may engender environmental protection:

The first is *mobilizing existing human rights*, especially civil and political rights. A nation with a broad range of rights would constitute a social and political order where claims for environmental protection are likely to be represented. The second is *reinterpreting of existing rights to include environmental concerns*. [...] The third is the *creation of new rights of an explicitly environmental character*, whether substantive (a right to a healthy environment) or procedural and participatory.⁶⁰

Therefore, the law has an important role to play in enforcing, interpreting and creating rights to participate, as well as building methods of deliberation in order to help accomplish environmental objectives.⁶¹

The complexity of environmental decisions and their political impacts are strong arguments for citizens' participation. It is argued that public participation enhances the accountability of environmental decision-making, as the public acts as a watchdog over

⁵⁵ Barton, *supra* note 1 at 102.

⁵⁶ *Ibid.* at 103.

⁵⁷ United Nations General Assembly, *International Covenant on Civil and Political Rights*, 19 December 1966, art. 25; 6 I.L.M. 368 (1967).

⁵⁸ Barton, *supra* note 1 at 102.

⁵⁹ Michael A. Anderson, "Individual Rights to Environmental Protection in India" in Alan Boyle & Michael A. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996).

⁶⁰ *Supra* note 1 at 103 (emphasis added).

⁶¹ Richardson & Razzaque, *supra* note 5 at 167.

government policies. As government tends to privilege market development, it may overlook democratic values.⁶² Participation can help to increase governments' compliance with environmental and natural resources conservation.⁶³ Participation "injects different ideas, preventing the agency from descending into closed-door thinking in an intellectual vacuum."⁶⁴

Another justification for public participation is the fact that it contributes to legitimizing decision-making. Legitimacy is a central concept in democratic processes, especially significant for environmental issues, and closely related to how well society accepts a government decision. It is easier and more natural for citizens to accept a decision, and even to tolerate certain levels of nuisance or changes, if they have taken part in making that decision.⁶⁵ Related to the notion of legitimacy is the argument that participation may increase the chances that environmental policies are "perceived to be fair and holistic, accounting for a diversity of values and needs and recognizing the complexity of human-environmental interactions."⁶⁶ In this sense, a decision is considered to be legitimate, fair and holistic, looking at the problem as a whole, if it was ultimately shaped by participants' concerns and opinions.

Woolley, for instance, argues that the legitimacy of policy making in Canada is negatively affected by the lack of procedural requirements, which should be defined by legislation.⁶⁷ She notes that, in Alberta, apart from energy regulation and deregulation, other forms of participation processes have failed to provide clear procedures, and therefore, to address important matters for the stakeholders.⁶⁸

Moreover, good public participation processes engender public trust towards the government.⁶⁹ When people feel that the process was fair and that their inputs were valued, they are motivated to take part in further decision-making processes. As a result, public deliberation can bring the people closer to the government.⁷⁰ Public participation can also empower citizens through the sharing and production of knowledge with experts and researchers; as a result, they are all enabled to apply their knowledge.⁷¹ The idea

⁶² Barton, *supra* note 1 at 104.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 105.

⁶⁶ Reed, *supra* note 37 at 2420.

⁶⁷ Alice Woolley, "Legitimizing Public Policy" (2008) 58:2 U.T.L.J. 153-184 at 160.

⁶⁸ *Ibid.* at 162.

⁶⁹ Reed, *supra* note 37.

⁷⁰ Hartz-Karp & Briand, *supra* note 27 at 133.

⁷¹ Reed, *supra* note 37 at 2420.

relates to the fact that participation promotes social learning, where participants learn from each other, through interaction, by building on existing relationships and transforming adversarial relationships. In that atmosphere, “[i]ndividuals learn about each others’ trustworthiness and learn to appreciate the legitimacy of each other’s views.”⁷² Citizens are also empowered through participation to the extent that they are asked to take responsibility for their decisions.⁷³

Some perceived disadvantages of public participation relate to how expensive and lengthy processes may become. However, one defence against that argument is that, even when participation leads to delays in the decision-making process or to an increase in the costs, it is an important part of a democratic political system, one that we should never renounce.⁷⁴ Another defence is that participation is, in the long run, most likely to optimize time and costs. It may offer resolution to conflicts that would otherwise cause more expensive problems. It may also promote environmentally sound decisions, and rational sustainable use of resources, preventing unnecessary future expenses and delays.⁷⁵

It is also claimed that public participation strengthens both the government and the community.⁷⁶ Hartz-Karp and Briand argue that when institutionalized participation “is practiced over time, the experience, knowledge and skills of both citizens and officials improve, enabling them to accomplish more with more partners.”⁷⁷ Even when public participation does not generate agreement or action, it may induce people to stay open to dialogue and to keep searching for consensus.⁷⁸

Finally, participation helps generate enforcement of environmental justice principles, as all affected citizens, regardless of their social position, race, gender, etc., should be invited to exercise their right by voicing their concerns and opinions.

In conclusion, the process-oriented rationales for public participation recognize, first of all, the fact that it is a human right for citizens to participate in the decisions that affect them. Moreover, public participation lends legitimacy to a decision, promotes accountability of government policies and increases public trust towards the government. Public participation might also empower citizens through knowledge sharing. Finally, it

⁷² *Ibid.*

⁷³ Hartz-Karp & Briand, *supra* note 27 at 133.

⁷⁴ Barton, *supra* note 1 at 108

⁷⁵ *Ibid.*

⁷⁶ Hartz-Karp & Briand, *supra* note 27 at 133.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

may contribute to reducing costs and to optimizing the duration of the process, by anticipating and preventing bad decisions.

If public participation is a good mechanism for environmental decision-making and helps produce good and sustainable decisions, the next question is what would be the best model for participation? How should the process occur? The next section addresses these questions through one specific deliberative democracy theory, that of Habermas.

4.0. An Ideal Model for Public Participation: Habermas' Theory of Communicative Action

To this point, the historical and political foundations of public participation were outlined and justifications, such as the generation of better outcomes, have led us to conclude that public participation is a good instrument for environmental decision-making. Nevertheless, public participation is a controversial topic and one could argue that, if it is not appropriately conducted, it may engender poor processes and poor results, such as manipulation and therapy, as argued by Arnstein.⁷⁹

For these reasons, a large body of literature is dedicated to formulating theories of public participation. One theory, which is commonly used as the basis for public participation, is Habermas' theory of communicative action and ethics. Habermas seeks the genesis of good participation in language and rationality. Because his model is an inspiration to deliberative democratic decision-making, it was chosen as the theoretical basis for this study. This section outlines Habermas' main ideas on the topic, which will help to define criteria to evaluate effective public participation.

4.1. Habermas' Theory of Communicative Action and Ethics

Because Habermas focuses on the roles of rationality⁸⁰ and language to explain how society functions, deliberative processes, through which people form their opinions and defend them, are seen as very important to create and to strengthen democracy. For those rational processes to occur, it is necessary that at least two people interact, seeking to reach a mutual understanding about the situation they want to influence and about their plans of action. Since this interaction involves a series of claims, interests and interpretations, it should engage prior negotiation and consensus on the rules of the

⁷⁹ Sherry R. Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 *Journal of the American Planning Association* 216.

⁸⁰ A person is rational when she can express feelings and desires according to cultural principles, inherent to her values. *Supra* note 34 at 20.

decision-making process. This sequence of interaction, negotiation and consensus, when accompanied by the serious disposition of the participants to reach an agreement, is named *communicative action* by Habermas.⁸¹ Communicative action, therefore, is the means through which rational claims are made and debated, and the means by which agreement is possible. Habermas argues, however, that the greatest problem for public deliberations in modern societies is the predominance of scientific rationality over other forms of rationality, such as morality and art. Therefore, communicative action, which is based on equality among different participants' opinions, should promote cooperation among different rationalities as well.⁸²

Furthermore, deliberation processes require that language and social interaction be validated through discourse, when competent speakers present their claims (what is true for them) in a way that is accepted by their hearers.⁸³ This ability to communicate rationally, using language to lead to understanding and agreement, is named by Habermas *communicative competence*.⁸⁴ Any rational person capable of formulating rational claims and interacting with other actors is considered a competent actor.⁸⁵ Competent actors, therefore, can contribute to create an ideal speech situation, where every participant has the same opportunity and ability to speak, and each hearer isolates and evaluates a claim based only on the arguments presented.⁸⁶ The ideal situation thus consists of the following conditions:

- 1) All potential participants of a discourse must have the same chance to employ communicative speech acts; 2) All discourse participants must have the same chance to interpret, claim or assert, recommend, explain, and put forth justifications; and problematize, justify, or refute any validity claim; 3) The only speakers permitted in the discourse are those who have the same chance to employ representative speech acts; 4) The only speakers permitted in the discourse are those who have the same chance to employ regulative speech.⁸⁷

⁸¹ *Ibid.* at 86.

⁸² Thomas Webler & Seth Tuler, "Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study" (2000) 32:5 *Administration & Society* 566 at 569, 570.

⁸³ Thomas Webler, "'Right' Discourse in Citizen Participation: An Evaluative Yardstick" in Ortwin Renn, Thomas Webler & Peter M. Wiedemann, eds., *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Dordrecht, Boston, London: Kluwer Academic Publishers, 1995) 35 at 47.

⁸⁴ *Ibid.* at 44.

⁸⁵ Jürgen Habermas, "Towards a Theory of Communicative Competence" (1970) 13 *Inquiry* 360 at 369, 371 [Habermas, "Communicative Competence"].

⁸⁶ Webler, *supra* note 83 at 40.

⁸⁷ *Ibid.* at 46. Representative speech acts in Habermas' theory refer to claims that reveal how a person sees and understands reality. Regulative speech acts state how reality should be. See also Thomas McCarthy, *Critical Theory of Jürgen Habermas* (Cambridge: Massachusetts Institute of Technology Press, 1978) at 285, 286.

Habermas' notion of the ideal speech situation⁸⁸ presumes equality among the discourse participants because all have the same chance to participate, and they are all capable of doing so. The idea of equality, in the author's theory, is based on the notion of individual freedom. Because all individuals are free to enjoy legal rights, they are considered equal and must be treated as so.⁸⁹ Therefore, in this theory, the law plays an important role by protecting the citizens' rights to participate equally in deliberations. This requires the existence of a legal background of basic rights to political participation.⁹⁰ Among the basic rights that guarantee to a person the status of a legal person are the "rights to equal opportunities to participate in processes of opinion and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law."⁹¹ Political liberty and political autonomy that guarantee the exercise of individual liberties are the fundamentals of the democratic principle. Therefore, when norms are legitimately created through individuals interaction and mutual agreement, "one can then justify basic rights of due process that provide all persons with equal protection, an equal claim of hearing, equality in the application of the law and thus equal treatment before the law."⁹²

Studies explain how the distribution of power among participants in a decision-making situation influences the way they assess the fairness of the process.⁹³ When decision-making power is distributed equally, participants tend to define the process as fair.⁹⁴ For that reason, *fairness*, for Habermas, should be focused on the process of public

⁸⁸ Habermas accepts that the ideal speech situation is not always possible and that social transformations are necessary to allow equality in discourse: "Only in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation can the potential of an unleashed cultural pluralism fully develop" See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Massachusetts Institute of Technology Press, 1998) at 308 [Habermas, *Between Facts and Norms*].

⁸⁹ Virginia de Oliveira-Alves, *Equal Treatment and Systemic Disadvantage: Sustain, Dworkin and Habermas* (Ph.D. Dissertation, Loyola University of Chicago, 1999) [unpublished] at 138.

⁹⁰ Habermas, *Between Facts and Norms*, *supra* note 88 at 122.

⁹¹ *Ibid.* at 122, 123 (emphasis in original).

⁹² de Oliveira-Alves, *supra* note 89 at 125.

⁹³ Karen S. Cook & Karen A. Hegtvædt, "Justice and Power: An Exchange Analysis" in Hans Werner Bierhoff, Ronald L. Cohen & Jerald Greenberg, eds., *Justice and Social Relations* (New York: Plenum Press, 1986) 19 at 21.

⁹⁴ This research uses the concept of substantive equality, meaning all persons are equal in dignity, although they are not in fact. For that reason, different treatment should be granted to persons in different circumstances. "To say that men are equal is not to say they are identical. The postulate of equality implies that underneath apparent differences, certain recognizable entities or units exist that, by dint of being units, can be said to be 'equal.' Fundamental equality means that persons are alike in important relevant and specified respects alone, and not that they are all generally the same or can be treated in the same way."

participation. The notion of fairness is an important concept in evaluating public participation effectiveness because it creates opportunities for all individuals to attend the deliberation forums, to participate by making claims, challenging other claims, and resolving disagreements.⁹⁵ These types of social interaction, named “discursive processes,” help to enable the construction and validation of the laws by society. The author argues that norms are judged by whether they can be accepted as legitimate by the people.⁹⁶ Therefore, the most legitimate claims are identified by reasoning and better arguments. This process of discussion and validation of the claims grants authority to the decision made in the deliberation.⁹⁷

According to Habermas, the law also plays an important role in decision-making because it mediates between the social complexity of real-life and the ideal norms of democracy by allowing a diversity of discourses, or opinions, about norms, policies and public goals.⁹⁸ By contrast, when decision-makers overlook these different opinions from the public, solutions for democratic deliberations cannot be found: “Since administration cannot simply manufacture motives and reasons at will but is constrained by the existing pool of cultural reasons, the failure at these other levels may produce a ‘motivation crisis’ among citizens as well.”⁹⁹

Because interaction through communication is expected to manage this complex and plural society, consensus is required to legitimize the laws.¹⁰⁰ Consensus, however, is a controversial principle in Habermas’ theory and has been critiqued by many authors.¹⁰¹ It refers to the satisfaction of the discourse principle; in other words, norms are justified if all the participants could reach a mutual understanding, in an ideal speech situation. As a result, he argues that democratic legitimacy relies on consensus-based agreements.

Bohman critiques Habermas’ idea of consensus by saying that his democratic principle sets the standard too high for democratic decisions.¹⁰² Bohman proposes an

Stefan Gosepath, “Equality” in *Stanford Encyclopedia of Philosophy* (Spring 2007 Edition), online: <<http://plato.stanford.edu/entries/equality/>>.

⁹⁵ Webler & Tuler, *supra* note 82 at 569, 570.

⁹⁶ Habermas, *Communicative Action*, *supra* note 34 at 89.

⁹⁷ Gardbaum, *supra* note 35 at 716.

⁹⁸ James Bohman, “Complexity, Pluralism, and the Constitutional State: On Habermas’ *Faktizität und Geltung*” (1994) 28:4 *Law & Soc’y Rev.* 897 at 898.

⁹⁹ *Ibid.* 902.

¹⁰⁰ *Ibid.* at 903.

¹⁰¹ *Ibid.* at 912. See also Lasse Thomassen, *Deconstructing Habermas* (New York, London: Routledge Taylor and Francis Group, 2008) at 33.

¹⁰² *Supra* note 98 at 903.

alternative principle: that the participation of all citizens in the decision-making process, in such a way that they would have the possibility to influence agreement and revise decisions, would satisfy the democratic process principle.¹⁰³ Similarly, Thomassen refers to Habermas' idea of consensus as an impossible ideal, which would represent the end of communication itself, since, if there are no disagreements, communicative reason is not needed.¹⁰⁴ Thomassen believes that Habermas argues for consensus on the process and not necessarily on the results of the decision-making. So, dissenting opinions would be possible, as long as there is *a priori* consensus about the rules of the deliberation.¹⁰⁵

It is also important to note that Habermas' theory aims at deliberative democracy, as opposed to pure representative democracy. The author argues for a decentered society "in which the political public sphere has been differentiated as an arena for the perception, identification, and treatment of problems affecting the whole of society."¹⁰⁶ It encompasses institutionalized representations such as the parliament, for instance, and informal deliberative bodies acting to capture opinions and concerns in the society as a whole.¹⁰⁷ In this environment, law can exercise coercion based on the legitimacy of the lawmaking, and not only on forceful mechanisms.

4.2. The Relevance of Habermas' Theory to Public Participation in Environmental Decision-Making

Many scholars have applied Habermas' theory to public participation in environmental decision-making. First, the theory has been used to justify the creation of a public sphere, a space where will formation occurs through the discourses of different actors. The public sphere enables the institutionalization of public participation once legitimate rules are created through democratic deliberative processes. Alario's work, for example, looks at the role of the public sphere in the fight against environmental destruction and instrumental approaches to nature.¹⁰⁸ She argues that when environmental issues are not contemplated in public discussions, they become invisible and therefore they are not recognized as legitimate political concerns.¹⁰⁹ For this reason, Habermas' work helps to shed light on the problem of environmental degradation and offers a space where

¹⁰³ *Ibid.* at 921, 923.

¹⁰⁴ *Supra* note 101 at 33.

¹⁰⁵ *Ibid.* at 35.

¹⁰⁶ Habermas, *Between Facts and Norms*, *supra* note 88 at 301.

¹⁰⁷ *Ibid.* at 299.

¹⁰⁸ Margarita Alario, "Environmental Destruction and the Public Sphere: On Habermas's Discursive Model and Political Ecology" (1994) 20 *Social Theory and Practice* 327 at 327, 329.

¹⁰⁹ *Ibid.* at 327.

environmental movements can contribute to transform invisible environmental destruction into a contestable issue.¹¹⁰

Furthermore, Habermas' theory adds to the discussion of public participation in environmental decision-making because it proposes an improvement to democratic procedures. It points out that effective public participation takes place when all citizens affected by a decision have the possibility of influencing agreement.¹¹¹ For this reason, deliberative democracy is a more appropriate theory than liberal theories, because it is able to "produce policy decisions that are more just and more rational than actual existing mechanisms."¹¹² Nevertheless, some scholars argue that environmental protection requires more than just procedures or democratic institutions; it also requires substantive values such as ecological sustainability.¹¹³ Dryzek, for example, points out that there are no guarantees that democratic procedures will generate ecologically friendly results, but democracy does offer the conditions for the public to seek environmentally sound outcomes.¹¹⁴

Brulle's approach to Habermas' theory argues for the use of scientific analysis and community participation in environmental decision-making, where science can offer the necessary knowledge for informed debate and better decision-making.¹¹⁵ Similarly, Barton points out that education and access to information are part of effective public participation¹¹⁶ because they help to improve participants' communicative competence, enabling them to influence decision-making.

Therefore, the public sphere is one concept from Habermas' theory that contributes to voicing environmental concerns. Moreover, even though democratic procedures, such as public participation, do not guarantee that the outcomes will promote environmental conservation, they enhance decision-making results by including different voices and interests, and by demanding the use of different types of knowledge for an informed

¹¹⁰ *Ibid.* at 333.

¹¹¹ Bohman, *supra* note 98 at 921.

¹¹² Walter F. Baber, "Ecology and Democratic Governance: Toward a Deliberative Model of Environmental Politics" (2004) 41 *The Social Science Journal* 331 at 332.

¹¹³ See e.g. Erland Sköllerhorn, "Habermas and Nature: The Theory of Communicative Action for Studying Environmental Policy" (1998) 41 *Journal of Environmental Planning and Management* 555 at 557.

¹¹⁴ John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York: Oxford University Press, 2000) at 141 [Dryzek, "Deliberative Democracy"].

¹¹⁵ Robert J. Brulle, "Habermas and Green Political Thought: Two Roads Converging" (2002) 11:4 *Environmental Politics* 1 at 15.

¹¹⁶ *Supra* note 1 at 79.

debate. Further, public participation, according to Habermas, requires that participants receive education and information to influence decision-making.

4.3. Fairness and Communicative Competence in Public Participation

The review of Habermas' ideas and their relevance to environmental decision-making reveals the need to develop two important concepts of Habermas' theory that will be used as the foundation for public participation evaluation criteria: fairness and communicative competence.

As outlined previously, fairness, for Habermas, is described in the ideal speech situation conditions.¹¹⁷ To date, the concept of fairness in environmental decision-making is still obscure and little research has been done on its application to public participation.¹¹⁸ Nevertheless, as noted earlier, the argument that public deliberation procedures are most likely to produce fair democratic outcomes is a well accepted one. In other words, it is thought that fair decisions are the result of fair processes.¹¹⁹ Studies do demonstrate that judging the fairness of procedures has a significant impact on a person's notion of social identity.¹²⁰ If procedures are just, there is usually a feeling that an individual will not be excluded from the group, and her participation will be regarded as important.¹²¹ Moreover, deliberative groups are more inclined to believe that the procedures they submit themselves to are fair if there is a sense of inclusion of diverse voices in the process.¹²²

According to Dietz, "fairness suggests that all those having an interest in or affected by a decision should have a say in that decision."¹²³ Nonetheless, fairness does not only contemplate opportunities to voice concerns and interests, but also the assurance that people's concerns will be heard, respected and considered in the decision-making

¹¹⁷ Webler, *supra* note 83 at 46.

¹¹⁸ Patrick D. Smith & Maureen H. McDonough, "Beyond Public Participation: Fairness in Natural Resource Decision Making" (2001) 14 *Society and Natural Resources* 239 at 239.

¹¹⁹ Meave Cook, "Five Arguments for Deliberative Democracy" (2000) 48 *Political Studies* 947 at 950. See also Smith & McDonough, *ibid.* at 239.

¹²⁰ Allan E. Lind, Tom R. Tyler & Yuen J. Huo, "Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgements" (1997) 73:4 *Journal of Personality and Social Psychology* 767 at 767.

¹²¹ *Ibid.*

¹²² *Ibid.* at 769.

¹²³ Thomas Dietz, "What is Good Decision? Criteria for Environmental Decision Making" (2003) 10:1 *Human Ecology Review* 33 at 35.

process.¹²⁴ The author also points out that fairness refers to the procedures adopted, as well as to the outcomes produced, and that substantive fairness always requires procedural fairness.¹²⁵

Habermas' concept of fairness, as described by Webler, focuses on the process:

Fairness refers to what people are permitted to do in a deliberative policy-making process. When people are to come together with the intention of reaching understandings and making public decisions in a fair process, four necessary opportunities for action by individual participants must be available. They are to attend (be present); initiate discourse (make statements); participate in the discussion (ask for clarification, challenge, answer, and argue); and participate in the decision-making (resolve disagreements and bring about closure).¹²⁶

The application of this concept depends on the legal protection of the participants' political liberty and autonomy to participate freely in the decision-making process, as well as social-welfare conditions that enable the exercise of political rights.¹²⁷ For instance, fairness relates to the capacity of potential participants to pay for their transportation to and from a decision-making meeting, the chance to make claims without fear of political retaliation, and the opportunity to challenge other participants' claims, trusting that their opinions will be respected and considered in the decision-making process.

Webler uses one case study to illustrate the concept of fairness.¹²⁸ He argues that the two components of fairness, substantive and procedural fairness, are intertwined. Substantive fairness can only be defined in a context of deliberation that follows the rules of procedural fairness.¹²⁹ The case study results demonstrate that fair procedures in public participation are the ones validated by the people affected by the decision-making. Those procedures help define fair decision-making outcomes and generate substantive fairness.¹³⁰

Turning to the second concept in Habermas' theory, for communication to take place effectively in public participation, it is also necessary that the actors involved in the process share a mutual understanding of their cultural context and that they feel free to

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Webler & Tuler, *supra* note 82 at 569, 570.

¹²⁷ Webler, *supra* note 83 at 46.

¹²⁸ See e.g. Ortwin Renn, Thomas Webler & Hans Kastenholtz, "Procedural and Substantive Fairness in Landfill Siting: A Swiss Case Study" (1996) 7 *Risk: Health, Safety and Environment* 145.

¹²⁹ *Ibid.* at 160.

¹³⁰ *Ibid.*

express their subjective claims.¹³¹ For Habermas, the notion of communicative competence relates to the personal skills of listening, communicating, self-reflecting and consensus building.¹³² Competence, therefore, is the result of personal development and social interaction, helping to produce mutual understanding.¹³³ But for understanding to be attained, the actors involved in the deliberation need to be committed.¹³⁴

Some scholars disagree with Habermas' concept of competence. Webler, for instance, argues that competence must not focus on the participants' ability to communicate, but on the ability of the public participation process to offer the necessary knowledge for participation.¹³⁵ According to Webler, "competence refers to the construction of the best possible understandings and agreements given what is reasonably knowable to the participants at the time the discourse takes place."¹³⁶ In other words, the notion refers to the assurance that the process includes sufficient and relevant knowledge and that the rules of agreement are set before deliberation begins.¹³⁷

Foster discusses communicative incompetence from a social and environmental justice perspective, arguing that social disparities result in language barriers in public participation. She explains that residents of low income communities, for example, most likely do not have knowledge about technical issues, which inhibits their participation in the discussions,¹³⁸ and excludes the groups considered communicatively incompetent from the process.¹³⁹ One New Zealand case study, for instance, illustrates the idea of communicative competence by arguing that lack of knowledge of "accounting language" prevented community members from understanding and giving their opinions in decision-making about the costs and funding of community projects.¹⁴⁰

Based on Habermas' analysis, Ross looks at the concept of communicative competence from a feminist perspective, and also argues that the lack of communicative

¹³¹ Habermas, "Communicative Competence", *supra* note 85 at 369.

¹³² Webler, *supra* note 83 at 39.

¹³³ *Ibid.*

¹³⁴ *Ibid.* at 44.

¹³⁵ Webler & Tuler, *supra* note 82 at 568.

¹³⁶ *Ibid.* at 571.

¹³⁷ *Ibid.*

¹³⁸ Sheila Foster, "Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement" (1998) 86 Cal. L. Rev. 775 at 812.

¹³⁹ *Ibid.* at 826.

¹⁴⁰ Jonathan Barret & Colin Scott, "Costs and Funding of New Zealand Local Authorities: The Role of Democratic Discourse" (2008) 21:3 International Journal of Public Sector Management 259.

competence excludes some groups from environmental decision-making processes.¹⁴¹ This is so because the use of rational, justice-based reasoning is commonly regarded as more competent than other forms of reasoning in decision-making forums. A competent decision-making process should therefore incorporate the different reasons and ways of participating. The way a woman, for example, assimilates the needs of her community and her environment may be different from a man's approach.¹⁴² Considering a male perspective only, or an upper class white person's perspective only, as the neutral standpoint contributes to distorted views of communicative competence.

Therefore, participants' lack of knowledge, or their different standpoints, should not be barriers to participation. For that reason, environmental decision-making processes should include procedures that enable all actors to have access to information and to learn about the debated issue. Moreover, once competence is set by the standards of procedure and not by personal skills, the decision-making process is more likely to include diverse types of knowledge which complement each other and contribute to the result.

4.4. Why is it Important to Define Criteria for Public Participation Assessment?

The discussion of Habermas theory, as well as the analysis of the different critiques of his theory, help establish an ideal of public participation, one that incorporates the concepts of fairness and competence. The notion of effective participation adopted in this paper, therefore, refers to participation that is both fair and that promotes competence of the actors.

In this sense, it important to recall one of Habermas' main arguments, which is that a fair participation process is one that defines in advance the 'rules of the game.' For that reason, it is vital to develop criteria to assess what is actually effective participation, helping to determine what should be expected from the government and from the other participants.

¹⁴¹ Susan Mallon Ross, "A Feminist Perspective on Technical Communicative Action: Exploring How Alternative Worldviews Affect Environmental Remediation Efforts" (1994) 3 *Technical Communication Quarterly* 325 at 335.

¹⁴² See Carol Gilligan, "Knowing and not Knowing: Reflections on Manhood" (2008) 6:2 *Psychotherapy and Politics International* 154 for the differences on ways of reasoning between gender. The author argues that "[g]ender binaries and hierarchies are linked to splits between reason and emotion, mind and body, self and relationships."

5.0. Criteria to Assess Effectiveness of Public Participation Processes and Results: A Literature Review

At this point, it is also relevant to discuss the work of Sherry Arnstein.¹⁴³ The author created one of the best known typologies of citizen participation in public policies, using the metaphor of a ladder to describe how public participation may range from no participation at all, such as manipulative and therapeutic activities, through experiences of tokenism, such as informing, consultation and placation, and finally evolving to degrees of real influence in government decision-making, such as delegated power and citizen control. Arnstein states that citizen participation is the ‘cornerstone of democracy’¹⁴⁴ and, although it is ‘applauded’ by many, very few take real measures to ensure it. She argues that “participation without redistribution of power is an empty and frustrating process for the powerless.”¹⁴⁵ Therefore, sharing of power in a continuous improvement towards citizen control is the basis of her concept of effective participation.

A large body of literature based on Arnstein’s typology seeks to create new and more sophisticated models of public participation, such as those proposed by Rowe and Frewer.¹⁴⁶ These studies elaborate on the degrees and methods of participation, arguing that the most effective processes are the ones that use the correct amount of participation, as well as methods and definitions of the available participatory mechanisms, in a well structured model. However, structured models and mechanisms of public participation, such as public hearings, consultation, surveys, etc., should be evaluated in concrete situations, and context-based circumstances which influence environmental decision-making, such as social inequalities, should be noticed as well.

Although this paper does not intend to explore the effects of social inequalities on public participation, but rather to give a broad theoretical foundation for good public participation, it is important to draw attention to the influence of social elements on the process. In a context-based analysis, considering those circumstances helps assess, in a more realistic and holistic way, whether the principles of fairness and competence are being respected. This is so because, when disparities exist, individuals do not have the same abilities or resources to exercise their political rights through public participation. As a result, they may be unable to attend meetings, or they may feel incapable of making useful claims because they lack education or financial resources, for example. Therefore,

¹⁴³ *Supra* note 79.

¹⁴⁴ *Ibid.* at 216.

¹⁴⁵ *Ibid.* at 216.

¹⁴⁶ Gene Rowe & Lynn J. Frewer, “A Typology of Public Engagement Mechanisms” (2005) 30:2 *Science, Technology and Human Values* 251. See also Patrick Bishop & Glyn Davis, “Mapping Public Participation in Policy Choices” (2002) 61:1 *Australian Journal of Public Administration* 14.

social conditions definitely affect how some actors are excluded from the process in fact, if not in law.

Foster points to the problem of inequality in environmental decision-making¹⁴⁷ and argues that the processes are highly influenced by class and race factors, shown by the fact that structural social inequalities are rarely addressed in decisions with respect to the location of hazardous waste facilities and in environmental decision-making in general.¹⁴⁸ For effective participation to happen, it is not enough to invite different social groups to take part in environmental decision-making; it is also important to investigate and take actions to mitigate the reasons that prevent some groups or individuals from influencing the process.

5.1. Criteria to Evaluate the Effectiveness of Public Participation Processes

One could ask whether the success of public participation should be measured by its outcomes. However, that is not sufficient because commonly each group, or individual, involved in the process has a different preferred outcome. One could also ask whether public participation should be evaluated through how well it serves the collective will; but the notion of collective will is constantly changing.¹⁴⁹ So, when is public participation considered effective?

To answer that question, Webler proposes a procedural model for public participation, consisting of two fundamental principles: fairness and competence, as defined above.¹⁵⁰ According to the author, the conditions for fair ideal speech situations are as follows: open participation; anyone can defend their opinions or interests; anyone can challenge others' defenses; anyone can contribute to the final decision.¹⁵¹ His conditions for competent ideal speech situation are: the participant should fit the requirement for cognitive and language competence; free access to knowledge; consensually approved translation rules; and most reliable methodological techniques

¹⁴⁷ *Supra* note 138. Foster's study shows that areas close to hazardous waste facilities are most likely to be occupied by marginalized groups, which have lower income rates than other groups. The Chester community is sixty-five percent African-American, and their income is forty-five percent lower than the rest of Delaware County, which is predominantly made up of white people. Research used in her work shows the existence of those disparities in the United States in general: approximately sixty percent of all African-Americans and Latinos in the country live in communities with uncontrolled toxic waste sites.

¹⁴⁸ *Ibid.* at 779.

¹⁴⁹ Webler, *supra* note 83 at 37.

¹⁵⁰ *Ibid.* at 47.

¹⁵¹ *Ibid.* at 60.

available to judge conflicting validity claims.¹⁵² As a result of Webler's analysis, his criteria for *fairness* in public participation processes are: "attendance at the event; initiation of different types of speech acts; participation in debate for and against validity claims; and participation in the group resolution of disputes over claims."¹⁵³ His criteria for *competence* in the process are: "[a]ccess to knowledge; and implementation of the best procedures for resolving disputes about knowledge and interpretations."¹⁵⁴

In a different approach, but also looking at a structured procedural model for public participation processes, and based on Arnstein's ladder of citizen participation, Rowe and Frewer establish a very detailed typology of participation.¹⁵⁵ They argue that an ineffective process is due to the lack of clear definition about what public participation actually is, what it encompasses and what the best mechanisms to be used are, depending on the goals determined by the government, in order to achieve effective participation. They define it as the "practice of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of organization/institutions responsible for policy development."¹⁵⁶

The authors also point out that the concepts of fairness and competence should be used to assess the effectiveness of public participation. They believe that fairness refers to what the citizens involved perceive as acceptable and just. Even though they adopt a procedural focus, Rowe and Frewer argue that mechanisms and methods of participation are not *intrinsically* fair or unfair, but their nature depends on the intention of the government and of those who participate.¹⁵⁷ Competence, which they see through an efficiency perspective, is defined as using the appropriate ways of sharing and combining government's and citizens' views. Like Habermas, the authors focus on the ability to use language, "maximizing the relevant information (knowledge and/or opinions) from the maximum number of relevant sources and transferring this efficiently to the appropriate receivers."¹⁵⁸ Finally, they conclude that the effectiveness of public participation relies on the choice of a specific mechanism, such as internet information, public hearings, public meetings, citizen's panel, focus group, etc., and how it should be applied to a concrete situation.¹⁵⁹

¹⁵² *Ibid.* at 59, 60.

¹⁵³ *Ibid.* at 79.

¹⁵⁴ *Ibid.* at 81.

¹⁵⁵ Rowe & Frewer, *supra* note 146.

¹⁵⁶ *Ibid.* at 253.

¹⁵⁷ *Ibid.* at 262.

¹⁵⁸ *Ibid.* at 263.

¹⁵⁹ *Ibid.* at 264.

The procedural approaches taken by Webler and by Rowe and Frewer emphasize the importance of prior consensus on the rules of the process, as well as the need for definition of the appropriate mechanisms to be applied, contributing to a more transparent and just process. Nevertheless, one critique that might be made of these approaches is that they do not take into consideration the negative influence of social disparities over a process fairness and competence, and that formal equality only helps reinforce social injustices in public participation.

Foster, on the other hand, as mentioned previously, believes that a precondition for the creation of any type of criteria is consideration of the structural social inequalities in the context. Foster defends a more deliberative model of participation, with direct participation, as opposed to an interest-group representation model, where a social group's interests are represented by some of their members.¹⁶⁰ She lists the following public participation criteria:

(1) [W]hether those *most affected* by the decision either have an opportunity to participate directly or to be represented in each phase of the decision-making process; (2) whether the community is informed adequately about all available information regarding the proposed action and whether such information is accessible; (3) whether the agency is responsive to community knowledge and concerns; (4) whether decision-making power and influence is shared between those asked to bear the greater risk, those who stand to benefit the most, and institutions, administrators, and technical experts responsible for the ultimate decision.¹⁶¹

It is relevant to note that the author does not focus on the participation of “directly affected” individuals, but on the involvement of the “most affected” individuals in a decision-making.¹⁶² This raises a question about how to define the affected groups: should it be done through the evaluation of proximity to the indicated area or through a property criterion? Clearly, the author does not adopt these approaches; on the contrary, she seems to defend more deliberative and inclusive ways to define affected individuals.

Even though most people would argue that “deep” and “wide” participatory processes are needed to reach effective participation, some may advocate they are not feasible in practice. Cornwall, for example, who bases her analysis on Arnstein's study, defends an “optimal participation.” In other words, participation should be balanced, depending on the purpose of the decision-making process.¹⁶³ It is, however, a difficult balance to achieve, considering the lack of criteria to determine who the individuals and groups affected by a certain environmental decision are. The author reasons that it is important to be explicit about which decisions citizens should have the opportunity to influence, and

¹⁶⁰ *Supra* note 138 at 834.

¹⁶¹ *Ibid.* at 834, 835 (emphasis added).

¹⁶² *Ibid.*

¹⁶³ Andrea Cornwall, “Unpacking ‘Participation’: Models, Meanings and Practices” (2008) 43:3 *Community Development Journal* 269 at 276.

who should participate.¹⁶⁴ Therefore, considering that access to decision-making goes to the core of fairness in public participation, clear standards to judge who should participate must be established by the government through fair and clear criteria.

In order to assess how fair a public participation process is, Smith and McDonough formulate criteria based on a case study with focus groups. The groups commented on the importance of involving a broad variety of people.¹⁶⁵ They also argued that representation is needed when the location and time of the meetings are not suitable for the community members.¹⁶⁶ When community members cannot attend meetings or do not have the power to vote, they should have their interests and concerns voiced by representatives. Furthermore, participants want their opinions to be heard, considered and respected by government officials. They pointed out that lack of consideration happens mostly when there are power disparities among participants.¹⁶⁷ In addition, the focus groups regarded the use of logic, or rationality, in the decision-making as a significant criterion. Finally, distributive justice was considered important by the participants, who believed that public participation processes should produce substantively fair outcomes.¹⁶⁸

Similarly, Agger and Löfgren look at planning theories to create tools to evaluate the democratic effects of collaborative planning.¹⁶⁹ In their view, the assessment of decision-making processes should be done through the following criteria:

- 1) access (who participates and through which channels);
- 2) public deliberation (whether different types of knowledge are used in the process);
- 3) adaptiveness (whether the rules are clear before the process);

¹⁶⁴ *Ibid.* at 280.

¹⁶⁵ *Supra* note 118 at 244.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at 245.

¹⁶⁸ *Ibid.* at 246, 247.

¹⁶⁹ Annika Agger & Karl Löfgren, “Democratic Assessment of Collaborative Planning Processes” (2008) 7 *Planning Theory* 145 at 145. See also Annika Agger, “Involving Citizens in Sustainable Development: Evidence of New Forms of Participation in the Danish Agenda 21 Schemes” (2010) 15:6 *Local Environment* 541 at 549. The author argues that the implementation of some specific characteristics is most likely to enhance participation. The first characteristic is the creation of realms for self-regulation which helps promote “new knowledge and skills, as well as creating reciprocal learning processes and collaboration among stakeholders.” The second characteristic is the emphasis on communicative means, focusing on the sustainability of social networks to promote dialogue about local projects. And finally, the author raised the importance of employing voluntary agreements among stakeholders, as opposed to top-down approaches.

- 4) accountability and transparency; and
- 5) political identities (whether the processes contribute to endowment and empowerment).¹⁷⁰

These ideas relate to Habermas' notion of self-determination, or autonomy, which enables individuals to participate in the production of legitimate norms.¹⁷¹

Based on the literature reviewed so far, one can summarize the criteria for effective public participation processes as follows:

- Access to the decision-making process should be broad, based on clear and inclusive criteria, and not founded exclusively on property or territorial approaches;
- The most affected stakeholders should have the chance to participate directly or to be represented in the event they are not able to attend the meetings;
- The rules of the process and the available participatory mechanisms should be defined by consensus in advance;
- Power relationships should be made substantively equal within the context of the decision-making process;
- All participants should have a chance to initiate speech and to get involved in the debate and in the dispute's resolution;
- All participants should have access to information and knowledge about the issues in debate;
- The best procedures, defined by consensus, should be used to select the knowledge and interpretations to be applied;
- Decision-making process should be responsive to community knowledge;
- The processes should be accountable and transparent.

¹⁷⁰ *Ibid.* at 160.

¹⁷¹ Habermas, *Between Facts and Norms*, *supra* note 88 at 419.

5.2. Criteria to Evaluate the Effectiveness of Public Participation Results

As noted earlier, the law should be the mediator between the norms and social reality,¹⁷² by enabling the application of decision-making outcomes to real life. Effective public participation, therefore, should influence social reality by producing tangible results. One outcome of participation identified by Habermas is the enhancement of individuals' autonomy or self-determination, in other words, the capacity to exercise legal rights and to influence law formation.¹⁷³ Therefore, the increase of autonomy among participants in environmental decision-making should be considered as one criterion for the assessment of public participation results.

Like Rowe and Frewer, Cornwall bases her analysis on Arnstein's ladder to examine concepts and practices related to participation.¹⁷⁴ Nevertheless, Cornwall's study focuses more on the outcomes generated by effective participation than the former authors do. Her first outcome refers to the distribution of control from authorities to citizens, to the extent that the amount of power transferred to the people indicates how effective participation actually is.¹⁷⁵ The second refers to the transformative power of participation, enabling people to make their own decisions and to take the necessary actions.¹⁷⁶ Finally, another way to measure the effectiveness of public participation is evaluating if the right to participate is actually being exercised.¹⁷⁷ This idea relates to Barton's work, arguing that participation, as a human right, is good for its own sake.¹⁷⁸

The values of participation as an intrinsic basic right are also explored by Parkins and Mitchell.¹⁷⁹ They describe 'ladder approaches'¹⁸⁰ to public participation to highlight the value of collaboration, local empowerment and local control in environmental decision-

¹⁷² *Ibid.* at 6.

¹⁷³ *Ibid.* at 419.

¹⁷⁴ *Supra* note 163 at 269. See also James Gruber, "Principles of Community-Based Natural Resource Management: A Synthesis and Interpretation of Identified Effective Approaches for Managing the Commons" (2010) 45 *Environmental Management* 52, for characteristics that identify effective community-based environmental management.

¹⁷⁵ *Ibid.* at 271.

¹⁷⁶ *Ibid.* at 273.

¹⁷⁷ *Ibid.* at 274.

¹⁷⁸ *Supra* note 1 at 102.

¹⁷⁹ John Parkins & Ross Mitchell, "Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management" (2005) 18 *Society and Natural Resources* 529 at 531.

¹⁸⁰ *Ibid.* at 531. See Arnstein, *supra* note 79.

making.¹⁸¹ The authors argue that the quality of public participation results depends on good public participation processes.¹⁸² In a process where the parties are engaged, for instance, it is more likely that outcomes will show a balance between competing interests.¹⁸³ Another example is a process that includes perspectives from local community members through their traditional knowledge. Chances are that better outcomes will be produced in that process, rather than if only scientific or technical knowledge were used.¹⁸⁴

Keck and Abers have noted that successful participatory water management, especially in small projects, follows a simple pattern.¹⁸⁵ Collaborative relationships and their practice result in “reciprocity and trust — social capital — and create a snowball effect through which committees gain the capacity to mobilize members to carry out more ambitious actions.”¹⁸⁶ Social capital, when seen as a result of public participation, may be an indication that effective participation is taking place. Additionally, it is a resource that contributes to relationship networks and social mobilization to enhance public participation processes.

The development of social capital through political participation is supported by Habermas’ concept of learning processes from discourses.¹⁸⁷ Muro and Jeffrey argue that social learning contributes to the improvement of resources management systems.¹⁸⁸ They reason that social learning is enabled by communication and interaction in worthwhile participatory processes.¹⁸⁹ According to the authors, social learning contributes to common understanding, mutual agreement and collective action. Those

¹⁸¹ See Timothy B. Knopp & E.S. Caldeck, “The Role of Participatory Democracy in Forest Management” (1990) 88:5 *Journal of Forestry (USA)* 13. See also Gerald J. Gray, Maia J. Enzer & Jonathan Kusel, eds., *Understanding Community-Based Forest Ecosystem Management* (New York: Hawarth Press, 2001).

¹⁸² Parkins & Mitchell, *supra* note 179 at 531.

¹⁸³ *Ibid.* at 532.

¹⁸⁴ *Ibid.* at 531.

¹⁸⁵ Margaret E. Keck & Rebecca Abers, “Running Water Participatory Management in Brazil” (2004) 38:1 *North America Congress on Latin America (NACLA) Report on the Americas* 29 at 33.

¹⁸⁶ *Ibid.*

¹⁸⁷ Habermas *Between Facts and Norms*, *supra* note 88 at 15.

¹⁸⁸ Melanie Muro & Paul Jeffrey, “A Critical Review of the Theory and Application of Social Learning in Participatory Natural Resource Management Process” (2008) 51:3 *Journal of Environmental Planning and Management* 325 at 325.

¹⁸⁹ Habermas *Between Facts and Norms*, *supra* note 88 at 15.

factors lead to meaningful results, such as acquisition of factual knowledge, acquisition of technical skills, change of attitudes, trust and relationships.¹⁹⁰

Similarly, Agger and Löfgren assume that collaborative planning, associated with community networks resources, such as social capital, is capable of creating a fair and inclusive environment for deliberations among government and private stakeholders.¹⁹¹ They argue that democratic decision-making results are necessarily intertwined with democratic processes and that criteria should consider the enhancement of individuals' self-determination. According to the authors, environmental decision-making results can be assessed through the following criteria:

Access: Are the outcomes biased in terms of fulfilling the wishes of only certain groups of participants? *Public deliberation:* To what extent do the debates produce something which is perceived, by the participants, as essential for the decision-making process? *Adaptiveness:* Is the network's work secured sustainability and continuity in terms of e.g. competencies? *Accountability:* What are the possibilities for accountability when implementing the outcome of the networks? *Political identities:* Have the processes contributed to the building of institutional capital and capacity?¹⁹²

The authors argue that, to the extent that collaborative networks aim at enhancing competence-building and empowering citizens, democratic success is achieved when citizens feel that the network has contributed to their empowerment.¹⁹³ Agger and Löfgren's criteria are in line with the ideas discussed by the previous authors as far as they defend non-discriminatory, sustainable, accountable outcomes, based on the capacity to enhance community social capital and individuals' autonomy.

Duane's case studies of community participation in ecosystem management illustrate the criteria discussed so far.¹⁹⁴ His main objective is to propose principles to guide the inclusion of communities in the decision-making process, using the concept of "communicative rationality" to discuss participation. He reasons that communicatively rational decisions are those generated by good reasons, and not by the political or economic power of particular stakeholders,¹⁹⁵ and that communicative rationality is possible where there is a certain level of social capital:

¹⁹⁰ Muro & Jeffrey, *supra* note 188 at 332.

¹⁹¹ Agger & Löfgren, *supra* note 169 at 145.

¹⁹² *Ibid.* at 160 (emphasis added).

¹⁹³ *Ibid.* at 161.

¹⁹⁴ Timothy Duane, "Community Participation in Ecosystem Management" (1997) 24 Ecology L. Q. 771 at 771. The case studies explore the Inimim Forest management plan and the Quincy Library Group forest management plan in the Feather River watershed, both in Nevada County, California.

¹⁹⁵ *Ibid.* at 774.

It is not enough to have only intellectual capital, grounded in good science, to resolve conflicts of values, interests and relationships. People must also trust each other and care about meeting each other's needs to reach successful agreements in good faith.¹⁹⁶

For that reason, social capital is not only a desired component of the decision-making process, but also a product of good public participation. The criteria Duane proposes refer to both processes and outcomes of public participation:

- 1) sufficient representation;
- 2) agreements and plans consistent with environmental law;
- 3) relatively small area of analysis;
- 4) development of social capital;
- 5) capacity for resilience in face of crisis;
- 6) symmetrical power relationships;
- 7) norms of reciprocity;
- 8) horizontal networks of civic engagement.¹⁹⁷

Weinberg and Gould take a parallel approach to community public participation, referring to both processes and results, in their case study on the “Wetland Watchers” in the United States.¹⁹⁸ The authors describe public participation processes, and conclude that, in practice, “political capital” is necessary for participants’ credibility before other actors; they should have “something to bargain with.” Weinberg and Gould conclude that in that specific case study, the Wetland Watchers were given no resources to bargain with, therefore, they were unable to effectively participate in the decision-making process. The authors argue that criteria to assess public participation effectiveness should incorporate not only legal and social aspects, but political ones as well. The practice shows the need to include measures to mitigate political disparities, and create more symmetrical relations.¹⁹⁹

Nevertheless, it is not sufficient to evaluate whether citizens are being empowered by a decision-making process and whether the levels of social and political capital are

¹⁹⁶ *Ibid.* at 775.

¹⁹⁷ *Ibid.* at 782, 796.

¹⁹⁸ Adam S. Weinberg & Kenneth A. Gould, “Public Participation in Environmental Regulatory Conflicts: Treading Through the Possibilities and Pitfalls” (1993) 15 *Law and Policy* 139 at 139.

¹⁹⁹ *Ibid.*

increasing within a community. It is also important to assess if government is committing to the decisions made. Bruns develops what he calls an “extended ladder of participation,” searching for more neutral terms, with less negative connotation, than the ones used by Arnstein.²⁰⁰ He notices that what is needed is not only a scale that measures citizens’ involvement, but also the means to assess if citizens are being empowered with the authority to decide, regulate and take actions.²⁰¹ He argues that “[a]nalysis of participation raises issues not only about how much citizens are engaged in government decisions, but also how much government is engaged in decisions made by citizens and their organizations.”²⁰²

Therefore, considering the literature reviewed in this section of the paper, the criteria to assess public participation outcomes are summarized as follows:

- Increase in citizens’ autonomy;
- Increase in citizens’ or communities’ empowerment and control;
- Enhancement of social capital (reciprocity of trust and social learning)
- Enhancement of political capital (‘having something to bargain with’);
- Production of unbiased outcomes;
- Participants’ positive judgment about the value of the result;
- Government’s commitment to the decisions made by citizens and their organizations;
- Sustainability and accountability of the results.

5.3. What Should the Roles of Government and Civil Society be in Effective Public Participation?

To this point, the literature reviewed helped to propose general criteria to assess what effective public participation in decision-making processes should look like. However, it

²⁰⁰ Bryan Bruns, “Water Tenure Reform: Developing and Extended Ladder of Participation” (Paper presented to the RCSD Conference on Politics of the Commons: Articulating Development and Strengthening Local Practices, July 2003) at 2.

²⁰¹ *Ibid* at 19, 20.

²⁰² See International Association for Public Participation (IAP2), “Spectrum of Public Participation”, online: <http://www.iap2.org/associations/4748/files/IAP2%20Spectrum_vertical.pdf>.

is known that the success of participation also depends on the engagement of the parties and on how well they fulfill their roles.

One important actor in environmental decision-making is the government. It is usually responsible for identifying the issues that should be subject to public policies and for creating the mechanisms to implement them. The government also creates opportunities for the public to influence the development of environmental policies through public participation. The government may define ways for the public to get involved (such as directed or represented participation), as well as types of participation (such as one that incorporates a wide range of concerns or just a few). Finally, the government determines the amount of power that will be given to the public. Nevertheless, the government should not make these choices in a vacuum, based on authoritarian or random arguments. There should be clear principles to guide governments' actions concerning public participation in environmental decision-making.

Good governance is one meaningful approach that offers principles to guide governments' choices regarding public participation. Good governance is defined according to the type of institution in charge of its implementation, such as international or local entities, or according to the established goals, such as economic or social development. The Organization for Economic Cooperation and Development (OECD) defines governance as "the use of political authority and exercise of control in a society in relation to the management of its resources for social and economic development."²⁰³ This definition covers the role of public authorities in establishing the grounds for economic and social development, for the distribution of benefits as well as the nature of the relationship between government and citizenry.²⁰⁴ The former UN Secretary-General Kofi Annan defines good governance as "ensuring respect for human rights and the rule of law; strengthening democracy; promoting transparency and capacity in public administration."²⁰⁵

Despite the diverse approaches taken towards defining "good governance," a definition that contemplates environmental conservation and natural resources management is still needed. Lockwood *et al.* elaborate on the notion of "new governance", as a way of determining which privileges collaborative experiences among government and non-government actors to create a set of principles of good governance to be applied to environmental matters.²⁰⁶ The principles are as follows: legitimacy,

²⁰³ Thomas G. Weiss, "Good Governance and Global Governance: Conceptual and Actual Challenges" (2000) 21:5 Third World Quarterly 795 at 797.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Michael Lockwood *et al.*, "Governance Principles for Natural Resources Management" (2010) 23 Society and Natural Resources 986 at 987.

transparency, accountability, inclusiveness, fairness,²⁰⁷ integration,²⁰⁸ capability²⁰⁹ and adaptability.²¹⁰ The government should keep these principles in mind when dealing with environmental decision-making, and especially when making choices about how and when to implement public participation.

According to Habermas, the government should create mechanisms to sustain public participation and legitimate lawmaking.²¹¹ The ‘supervisory’ role of the state consists of integrating a complex society. Social integration requires communication between the government and other members of the public sphere.²¹² The government receives social assets from the public sphere, in civil society, and in spheres of private life,²¹³ to create public policies that best reflect citizenry’s expectations. Therefore, creating and sustaining open channels of communication, through ordinary language, between the state and non-state actors is part of the government’s role. The public sphere is the place of the debate, allowing government, civil society and citizens in general to communicate, exchange information and points of view.²¹⁴ As a result, the public sphere has a “warning” function, since it is active throughout the whole of society and can identify and capture the important issues that need to be debated. It also “amplifies the pressure of problems” by giving them context, proposing solutions and “dramatizing” them in a way that calls for government attention.²¹⁵

Some case studies illustrate the role that civil society can play in the public sphere. van Koppen *et al.* analyze community-based water law in a wide range of countries.²¹⁶

²⁰⁷ The first five principles have been previously discussed. In Lockwood’s article they bear the same meanings used earlier in this paper.

²⁰⁸ Lockwood *et al.*, *supra* note 206 at 995. Integration refers to the interaction among governance levels, organization of priorities, plans and activities across government sectors.

²⁰⁹ *Ibid.* at 996. Capability refers to “systems, plans, resources, skills, leadership, knowledge, and experiences that enable organizations and individuals to direct, manage and work for them, to effectively deliver on their responsibilities.”

²¹⁰ *Ibid.* at 996. Adaptability refers to “the incorporation of new knowledge and learning into decision making and implementation; anticipation and management of threats, opportunities, and associated risks; and systematic reflection on individual, organizational, and system performance.”

²¹¹ Habermas, *Between Facts and Norms*, *supra* note 88 at 341.

²¹² *Ibid.* at 352.

²¹³ *Ibid.*

²¹⁴ *Ibid.* at 360 (emphasis in original).

²¹⁵ *Ibid.* at 359.

²¹⁶ Barbara van Koppen *et al.*, “Community-based Water Law and Water Resource Management Reform in Developing Countries: Rationale, Contents and Key Messages” in Barbara van Koppen, Mark Giordano & John Butterworth, eds., *Comprehensive Assessment of Water Management in Agriculture*

The authors define Integrated Water Resource Management (IWRM) as the set of a state's regulatory measures with respect to local water management.²¹⁷ They identify weaknesses and strengths of community-based water law, and the importance of a balance between governments' and communities' influence on the system.²¹⁸

A balanced distribution of roles between government and civil society is also proposed by Lemos and Oliveira.²¹⁹ The authors argue for transference of power from central to local power and for the application of "good governance" principles,²²⁰ focusing on decentralization. The authors describe how the lack of institutionalization of civil society can create a less threatening environment for participation, less threatening than formal arrangements. Civil society can contribute to the inclusion of informal tools in the process and in the final decision-making, encouraging broad participation.²²¹

Lemos and Oliveira point to the fact that civil society has a relevant role to play, in pressuring and questioning state arbitrary actions.²²² They also argue that the government should be "tolerant towards certain initiatives, especially those which would enhance the visibility of the state."²²³ When the government is tolerant of civil society initiatives, such as mobilization and political pressure, the state contributes to opening up the public sphere and to increase public participation.

On the one hand, the government should have a 'supervisory' function in public participation, taking into account that the public sphere is a complex arrangement of actors and points of view. The state should not dictate the final decision on environmental issues, but should be responsible for opening the space for debate, participating equally with the other actors, and hearing the different voices. On the other hand, civil society has a responsibility to identify social, political and legal problems, to pressure the government and to mobilize society. Civil society helps to constrain the state's power in public participation, and contributes to the symmetry of the discourses.

Series, Volume 5: Community-based Water Law and Water Resource Management Reform in Developing Countries (Wallingford, Oxon, GBR: CABI Publishing, 2007) 1 at 1.

²¹⁷ *Ibid.* at 2.

²¹⁸ *Ibid.* at 9.

²¹⁹ Maria Carmen Lemos & João Lúcio Farias de Oliveira, "Can Water Reform Survive Politics? Institutional Change and River Basin Management in Ceará, Northeast Brazil" (2004) 32:12 *World Development* 2121 at 2124.

²²⁰ *Ibid.*

²²¹ *Ibid.* at 2128.

²²² *Ibid.* at 2131.

²²³ *Ibid.* at 2134.

Therefore, the respective roles of government and civil society in environmental decision-making are relevant for the construction of criteria to the extent that they influence decisively how public participation takes place. Criteria should evaluate conditions such as whether the government creates a formal space for participation in environmental decision-making, respecting the principles of ‘good governance’, with inclusive, transparent and accountable processes and results, and whether the government is responsive to community knowledge, concerns, needs and interests. Moreover, the criteria should evaluate whether civil society has been warning the government about deficiencies in environmental decision-making, mobilizing society to participate and demanding the implementation of effective public participation mechanisms from the government.

5.4. Public Participation Evaluation Criteria: A Summary

In summary, the following criteria are proposed to evaluate fairness and competence as the basis for effective participation, with respect to both the process and the outcomes of public participation:

- Is access to the decision-making process broad, based on clear and inclusive criteria, and not founded exclusively on property or territorial approaches?
- Do the most affected individuals have a chance to participate directly or to be represented in the event they are not able to attend the meetings?
- Are the rules of the process and available participatory mechanisms clearly defined in advance?
- Are power relationships substantively equal during the decision-making process?
- Are information and education about the debated issue broadly offered to the participants? Do participants have access to the necessary knowledge to be part of the decision-making?
- Are the best procedures employed to select the knowledge and interpretations to be applied in the process? Are the best ways to select the types of knowledge and interpretations used in the process?
- Do all participants have a chance to initiate speech and to get involved in the debate and in the dispute’s resolution?
- Is the public participation process responsive to different types of knowledge?
- Is traditional or community knowledge considered to be at least as important as scientific knowledge in the process?

- Is the process transparent and accountable?
- Does the process contribute to the participants' empowerment and control?
- Does the process contribute to increase individuals' autonomy?
- Does the process contribute to increase social capital?
- Does the process contribute to increase political capital?
- Does the process contribute to identifying as yet unidentified environmental problems?
- Do the participants judge the results to be positive and valuable?
- Does the decision-making produce unbiased outcomes?
- Are the results sustainable and accountable?
- Is the government committed to the decision elicited through public participation?

6.0. Conclusion

The paper has focused on public participation as a valuable mechanism to produce good public policies related to energy and natural resources development. The theoretical foundations of public participation were outlined, emphasizing the importance of deliberative democracy theories for environmental decision-making. The paper also examines the rationales for public participation in those fields, concluding that it is in fact a good mechanism that helps to improve decisions.

Habermas' theory was used as a theoretical model for participation. His concepts of fairness and competence were examined through a large body of literature, and used to define criteria to evaluate the effectiveness of public participation in environmental decision-making, with respect to both processes and results. The criteria proposed incorporate ideas such as consensus, participants' autonomy, social and political capital, community and traditional knowledge use, transparency and accountability. The roles of the public and the government in effective public participation were also outlined in the paper.

This study's conclusions may contribute to a better understanding of the usefulness of public participation in environmental decision-making forums. The proposed criteria are intended to help assess processes and outcomes of public participation, in order to induce

positive changes in the development of environmental and natural resources public policies.

Appendix A: Examining International Law on Public Participation in Environmental Decision-Making: The Aarhus Convention

In 1972, international law linked environmental protection to human rights for the first time through the Stockholm Conference Declaration,²²⁴ which was followed by the Rio Declaration in 1992.²²⁵ Principle 10 of the Rio Declaration established that:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities.²²⁶

Thus, public participation, as a procedural right, has an important role to play in protecting a substantive right to a healthy environment.²²⁷ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters — the Aarhus Convention²²⁸ — is the most significant international document to date on public participation in environmental decision-making. Turner argues that the document is “the most far reaching manifestation of the Principle 10 of the Rio Declaration.”²²⁹ Although the Convention focuses primarily on European domestic law, it has a global character, since it is embedded in principles of participatory democracy that should be pursued by non-state actors as well.²³⁰

The Convention was chosen to be contrasted to the criteria proposed in this paper for two reasons: first, it establishes legal principles that are important to evaluate public

²²⁴ *Report of the United Nations Conference on the Human Environment*, GA Res. 2997, UN GAOR, 27th Sess., Supp. No. 30, UN Doc. A/8901/Rev.1 (1972) [Stockholm Declaration], online: United Nations <<http://www.unep.org/Documents.Multilingual/Default.asp?documentID=97&ArticleID=1503>>.

²²⁵ *Report of the United Nations Conference on Environment and Development*, Resolution 1, UN Doc. A/Conf.151/26/Rev.1 (vol. 1) (1993), 31 I.L.M 876 [Rio Declaration], online: United Nations <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>. See also Steve Turner, “The Human Right to a Good Environment — The Sword in the Stone” (2004) 4:3 *Non-State Actors and International Law* 277 at 281.

²²⁶ *Ibid.* at Principle 10.

²²⁷ *Ibid.* at Principle 1: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

²²⁸ *Supra* note 7.

²²⁹ Turner, *supra* note 225 at 281.

²³⁰ Eric Dannenmair, “A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums” (2007) 18 *Yearbook of Environmental Law* 32 at 33.

participation effectiveness; and second, the document's international character offers the possibility of transcending any State's legislation, and of being used as a neutral instrument of analysis. The Convention consists of three pillars: access to information, public participation, and access to justice. It recalls Principle 10 of the Rio Declaration, stating the relevance of citizen participation in environmental problems. Its implementation in each country should be based on a "clear, transparent and consistent framework."²³¹ According to the Convention, the "public" able to participate are "natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups,"²³² which allows civil society organizations, such as NGOs, to participate and to represent their groups' interests. The public involved in the processes are the individuals affected or possibly affected by the decision-making.²³³ The Convention does not establish criteria to define who the affected individuals are.

In their analysis of the Convention, Lee and Abbot note that participation contributes to improve a decision through a broad inclusion of people who can offer either expertise or information.²³⁴ It is important to evaluate who should participate and what the rules for the debate are. Specialized technological, scientific claims tend to limit the discussion to experts and exclude other participants. The Convention includes NGOs in the process, aiming to mitigate the dominance of economic interests, although not much has been done to promote the engagement of a more general public.²³⁵ The document promotes NGOs participation to the detriment of grassroots involvement, focusing on representation by civil society organizations, instead of direct participation.²³⁶

The authors' observations point to the Conventions' failure to contemplate means to increase competence among individuals affected by decision-making but who do not have the knowledge or communicative resources required to influence the process. Dannenmair also recognizes the need for broad inclusion of relevant actors. However, he shows concern about the lack of mechanisms in the law to enforce 'equity of access' due to over-representation or capture by a limited group of civil society actors.²³⁷ The inability to promote inclusion and equal access reflects the inability to promote competence or to recognize different types of competence, and to guarantee fairness through the law.

²³¹ Aarhus Convention, *supra* note 7, art. 3(1).

²³² *Ibid.*, art. 2(4).

²³³ *Ibid.*, art. 2(5).

²³⁴ Maria Lee & Carolyn Abbot, "The Usual Suspects? Public Participation under the Aarhus Convention" (2003) 66 Mod. L. Rev. 80 at 82.

²³⁵ *Ibid.* at 87.

²³⁶ *Ibid.*

²³⁷ *Supra* note 230 at 61.

The document also states that legislation must provide for environmental education and awareness so that citizens understand how to access information, how to participate and how to access justice in environmental matters.²³⁸ Concerning public participation in the creation of public policy, a legal framework must include the means to make the necessary information available to the public and opportunities for public participation in environmental public policies.²³⁹ Moreover, the Convention provides for public participation in specific decision-making activities. It lists the types of information that must be made available, such as who the public authority responsible for making the decision is, opportunities for the public to participate, identification of the public authority from which information can be acquired, and indication of what environmental information is relevant in the process.²⁴⁰

Lee and Abbot call attention to the motivation for public participation. One of the rationales for the Convention is the “loss of public confidence in scientific advice from the government.”²⁴¹ It recalls Habermas’ argument that the role of communicative action in the modern world reflects the failure of science, technology and economy to solve social conflicts.²⁴² In addition, Lee and Abbot emphasize that public participation should not be used as an alternative to regulation.²⁴³ Instead, it should be an instrument to construct more legitimate regulation. Furthermore, the authors reject the assumption that public participation mechanisms will always be deliberative, or elicit value, because the system in general is “too adversarial, time consuming and expensive.”²⁴⁴ The authors’ reservations address the incapacity of formal procedures alone, such as the norms generated in the Convention, to produce effective public participation. Its success also depends on the engagement of decision-makers and participants in the deliberation, and on substantive access to the process.

Palerm argues that the Convention falls short on four fundamental aspects. The first is the need to include cognitively and linguistically non-competent actors. The author uses Webler’s ideas of competence to argue that participants should be encouraged to increase their knowledge and skills, and that rules of knowledge selection and construction should be set before the decision-making process.²⁴⁵ The second aspect that should be improved

²³⁸ Aarhus Convention, *supra* note 7, art. 3(3).

²³⁹ *Ibid.*, art. 8.

²⁴⁰ *Ibid.*, art. 6.

²⁴¹ *Supra* note 234 at 94.

²⁴² Habermas *Between Facts and Norms*, *supra* note 88 at 40.

²⁴³ *Supra* note 234 at 96.

²⁴⁴ *Ibid.* at 99.

²⁴⁵ Juan R. Palerm, “Public Participation in Environmental Decision Making: Examining the Aarhus Convention” (1999) 1 *Journal of Environmental Assessment Policy and Management* 229 at 235.

in the Convention is the need to ensure a two-way communication process, as opposed to only giving a chance for the public to present their issues.²⁴⁶ It does not require governments to commit to the decision elicited through public participation. The third aspect refers to the recognition of both normative and subjective claims, indicating that, as much as scientific and technical arguments, participants' points of view should be considered in the process.²⁴⁷ For that reason, the notion of competence needs to be extended beyond the ability to make rational objective claims, and incorporate subjective elements of competence, as discussed in the previous sections. Finally, the fourth aspect that needs improvement in the Convention is the establishment of conflict management procedures.²⁴⁸

Lee and Abbot also critique the weakness of the document, naming it 'vague' and 'permissive',²⁴⁹ and point to the lack of enforcement mechanisms. The authors call attention to the real life limitations of representative democracy,²⁵⁰ and argue that the Convention does not include marginalized groups in the process, but illegitimately claims that NGOs represent broadly those groups.²⁵¹ However, the authors also point to the political importance of the document because it "makes a potentially powerful statement on the importance of public participation."²⁵²

It is important to note that some of the Convention's principles conform to the criteria proposed in this paper. First, the international document recalls Principle 10 of the Rio Declaration, arguing for the relevance of political participation. That is significant to the extent that citizen participation leads to legitimate law making. Moreover, the Convention calls for including education and information in public participation processes. This was an important point in the criteria, because knowledge contributes to informed participation. And finally, the criteria establish that clear rules of public participation should be set beforehand, which is also one of the requirements of the international document.

Nevertheless, some aspects of the Aarhus Convention diverge from the proposed criteria. First, the document focuses on representative participation, as opposed to direct participation. Moreover, the Convention argues for the inclusion of education and information, but does not create ways to promote participants' knowledge. Finally, the international document lacks mechanisms for two-way communication between the State

²⁴⁶ *Ibid.* at 240.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at 229.

²⁴⁹ *Supra* note 234 at 107.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.* at 81.

and citizens. This is an important aspect for Habermas, who argues that the state should submit itself to the public sphere and dialogue with the society through transparent methods. On the one hand, the Aarhus Convention partly satisfies the criteria to the extent that it considers access to information and education as premises for effective public participation, and it argues for transparent legal frameworks that inform the public about opportunities and means to participate. On the other hand, the Convention falls short on applying the criteria, by not including grassroots actors and ignoring the use of subjective claims and communities' traditional knowledge.

Therefore, an analysis of the Convention, through the proposed criteria, shows that it should incorporate broader participation from local community members, preferably through direct participation, or through legitimate and proportional representation. Moreover, the Convention should have provided ways for community knowledge and interests to be in an integral part of the decision-making process. Finally, it should have provided mechanisms for participants' communicative competence to be effectively enhanced by the education and information available.

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