

# The Human Right to Public Participation in Environmental Decision-making: Some Legal Reflections

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**Abstract.** Recent years have seen an increase in climate-related protests and demonstrations. There is a clear disparity between the opinions of the public and those of the state in relation to climate change and how it should be tackled. At the heart of the problem is poor communication between citizens and state actors, which has resulted in a lack of support from the public for the state's climate policy formulation and implementation processes. To increase support for new and existing climate-related policies and initiatives, and to ensure that the fundamental human right to public participation is protected, the state must make a concerted effort to engage with the public during the policy formulation, introduction, application and monitoring phases. This would ensure that state actors are better informed about the concerns of the public and that, when promoting decision-making in climate-related policies, citizens are given opportunities to exercise their right to public participation. It would also promote transparency and accountability in the decision-making process and create a more engaged citizenry and inclusive society. The processes driving greater public participation are not new; they have been encouraged and supported by United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) and have been incorporated into environmental law both at the national level and at an international level through the United Nations Sustainable Development Goals (SDGs). However, it may be necessary to rethink and reframe existing public participatory processes to encourage stronger cooperation between all stakeholders in environmental decision-making processes including climate change.

**Keywords:** Aarhus Convention, public participation, human rights, climate policy, environmental law, sustainable development

## 1. Introduction

In the face of increasing global environmental protests including climate change-related civil disobedience, greater attention is being given to how the public engages with climate decision-making by the sovereign States. Citizens have become more vocal in communicating their concerns about the action, or rather inaction, of States

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in terms of climate-related goals, carbon emission reductions and fossil fuel subsidies. It seems environmental activism has been used as a channel through which citizens' voices are heard. However, engaging in this sort of activity is often seen as a last resort in a system that has failed to adequately consult with the public on matters relating to climate policy.

Sustainable development and climate action are two critical but challenging global goals that require collective effort by all stakeholders. To achieve these goals, it is essential to involve the public in the decision-making process. Public participation allows a diversity of insights, perspectives and values to influence policymaking and implementation, making policies more effective and sustainable. Indeed, engaging the public in sustainability and climate action initiatives can enhance public awareness, understanding and 'ownership' of the issues. It can also promote cooperation and collaboration amongst different sectors and stakeholders, leading to a more comprehensive and integrated approach to sustainable development and climate action. Clearly, it is crucial to prioritise public participation in sustainable development and climate action efforts as this will help to create a more resilient future for all. However, it is not always easy to bring about such public participation.

This paper seeks to outline how public participation is viewed from different perspectives and, ultimately, how to understand, interpret and apply the principle of public participation so as to achieve universal goals. Furthermore, by utilising climate action and climate policy as a case study, this paper sets out clear steps that could be applied at a state level to induce better public participation in climate-related policy design and decision-making. These steps can be taken within the context of sustainability and can assist in the practical implementation of the public's right to participate. The overall objective of this paper is to provide concrete examples and procedures for states and citizens to follow to achieve meaningful, inclusive and diverse public participation – not only in relation to climate action specifically, but also in relation to sustainable development in general.

## 2. Public Participation at International Level

Public participation is an essential element of democracy as it allows individuals to engage in decision-making processes that affect their lives.<sup>1</sup> At an international level, public participation is crucial for ensuring that global policies and agreements take into account the perspectives and opinions of those who will be affected by them.<sup>2</sup> One of the main channels for facilitating public participation at an international level is the United Nations (UN).<sup>3</sup> The UN provides a platform for civil society organisations and individuals to engage in discussions and negotiations on global issues such as climate change, human rights and sustainable development. To provide a specific example, in year 2015; the UN adopted the Sustainable Development Goals (SDGs), which are a set of 17 goals aimed at achieving a more sustainable future for all.<sup>4</sup> More recently, the Office of the High Commissioner for Human Rights (OHCHR) has played an important role in providing guidance and insight into the protection of the fundamental right to public participation, especially in relation to political and public affairs and in times of global crisis.<sup>5</sup>

### 2.1. *The SDGs and public participation*

Although sustainable development as an economic concept first started to gain traction in the 1980s, sustainable development as a practice only started receiving major attention with the launch of the UN

1 T. Nabatchi & M. Leighninger, *Public Participation for 21<sup>st</sup> Century Democracy*, (2015), at 239–240.

2 K. Syma Czapanskiy and R. Manjoo, The right of public participation in the law-making process and the role of legislature in the promotion of this right, 19 *Duke Jour. of Comp. and Int. Law*, 1(2008).

3 B. Adams and L. Pingeot, Strengthening Public Participation at the United Nations for Sustainable Development: Dialogue, Debate, Dissent, Deliberation, *Study for UN DESA/DSD Major Groups Programme* (June, 2013) available at: [https://archive.globalpolicy.org/images/pdfs/images/pdfs/UNDESA\\_MGs\\_Report.pdf](https://archive.globalpolicy.org/images/pdfs/images/pdfs/UNDESA_MGs_Report.pdf).

4 UN Department of Economic and Social Affairs, *Sustainable Development Goals*, (September, 2015) available at: <https://sdgs.un.org/goals.html>.

5 UN Office of the High Commissioner for Human Rights (OHCHR), *OHCHR and Equal Participation in Political and Public Affairs*, HRC Res. A/HRC/RES/48/2 (14 October, 2021), available at: <https://www.ohchr.org/en/equal-participation.html>.

Millennium Development Goals (MDGs), which were succeeded by the Sustainable Development Goals (SDGs), and the introduction of Agenda 2030, which provides:<sup>6</sup>

[A] plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom (...). The 17 Sustainable Development Goals and 169 targets which we are announcing today demonstrate the scale and ambition of this new universal Agenda (...). They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.

The formulation and introduction of the SDGs signalled the UN's aspiration to better understand the concept of sustainable development within the ever-changing social, political and environmental conditions of the 21st century. The 17 SDGs incorporate 169 targets, which "demonstrate the scale and ambition of [the] new universal Agenda" of the UN and its member states.<sup>7</sup> The SDGs' universality offers insight into what should be and could be expected of development agendas at an international level. If progress is to be made on the development front, there must also be broader participation, not only from governments but also from affected citizens.

Public participation is a key element of the SDGs. This is in acknowledgement of the fact that everyone should have a say in the decisions that affect their lives and, moreover, that their voices should be clearly heard. A particularly pertinent goal is SDG 16,<sup>8</sup> which is to achieve peaceful and inclusive societies for sustainable development; access to justice for all; and effective, accountable and inclusive institutions. Target 16.10 in SDG 16 is to ensure public access to information and the protection of fundamental freedoms, in accordance with national legislation and international agreements. Public participation in the decision-making process is thus essential, if the SDGs and associated targets are to be achieved in inclusive and sustainable ways, which are responsive to the needs and preferences of all.

## 2.2. *The OHCHR and the promotion of the human right to public participation*

According to the OHCHR, active public participation is essential for democratic governance, rule of law and inclusion of marginalised and vulnerable groups.<sup>9</sup> The OHCHR acknowledged that a failure to consider and encourage public participation in political and public affairs, even when not outrightly prevented, may further perpetuate barriers to public participation, which include direct and indirect discrimination.<sup>10</sup>

In year 2015, the OHCHR released a report relating to the promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law, best practices, experiences, challenges and ways to overcome them (Promotion and Protection Report).<sup>11</sup> This report contained an overview of human rights frameworks relating to equal participation in political and public affairs, and lists of the challenges, best practices and experiences with respect to the right to participate in political and public affairs. Ultimately, the report was developed as an initial starting point for ways to promote the right to public participation.<sup>12</sup> As per Article 25 of the International Covenant on Civil and Political Rights (ICCPR),<sup>13</sup> the right to participation encompasses the rights of the individual to vote and to be elected; to take part in the conduct of public affairs;

6 United Nations General Assembly, (2015); *Transforming Our World: The 2030 Agenda for Sustainable Development*, Seventieth Session, A/RES/70/1, (21 October, 2015) available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.pdf>; L.J.H. Houston, *A Comparative Analysis of Sustainable Development Legislation: Selective Elements for an 'African' Model Law* (LLM diss., Stellenbosch University, 2020), at p.11.

7 *Ibid.*

8 UN Department of Economic and Social Affairs, *Sustainable Development Goal 16: Peace, Justice and Strong Institutions*, (September, 2015) available at: <https://sdgs.un.org/goals/goal16>.

9 UN OHCHR, n. 5.

10 *Ibid.*

11 UN OHCHR, *Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them*, Report of the OHCHR, Human Rights Council Thirtieth Session, A/HRC/30/26, (23 July, 2015) available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc3026-promotion-protection-and-implementation-right-participate.pdf>.

12 UN OHCHR, n. 11, para 1.

13 UN General Assembly, *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

and to have access to public service. Of particular relevance is the interpretation and application of the right to public participation, which encourages that citizens take part in the conduct of public affairs.

As per the report, taking part in the conduct of public affairs includes: providing inclusive, meaningful and non-discriminatory processes and mechanisms; and access to justice and redress mechanisms to people who have been unduly deprived of their right to participate in political and public affairs.<sup>14</sup> Additionally, the report goes further to promote “the right of all people to be fully involved in and to effectively influence public decision-making processes that affect them.”<sup>15</sup> This includes: access to information; consultations with the public regarding policymaking and legislative drafting; and extensive, long-term dialogues with citizens to receive insight pre-, during and post- legislative development.<sup>16</sup> The report goes as far as to mention the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),<sup>17</sup> as an example of good recognition of the right to public participation.<sup>18</sup>

Building on from the Promotion and Protection Report, the OHCHR, in year 2018, provided an additional Report, which contained Guidelines for the States on the effective implementation of the right to participate in public affairs (Guidelines Report).<sup>19</sup> However, unlike the Promotion and Protection Report, the Guidelines Report provides practical suggestions that governments could implement in an effort to effectively promote and protect the right to public participation. These practical suggestions are provided in relation to:<sup>20</sup> principles for effective implementation of the right to participate in public affairs; participation in elections and non-electoral contexts; and participation in supranational and international organisations. Of particular relevance for the purposes of this research are the practical recommendations that include: providing mechanisms and institutions that support the inclusion of vulnerable and marginalised groups in policy discussions and decision-making procedures;<sup>21</sup> as well as remedies for recourse in instances where this is the not the case;<sup>22</sup> encouraging state institutions to maintain levels of transparency, openness and accountability in decision-making;<sup>23</sup> the establishment of federal and formal structures that are charged with ensuring public participation;<sup>24</sup> and detailed considerations and necessary steps for public participation at various stages of the decision-making process.<sup>25</sup>

Later in year 2020, the OHCHR hosted the “High-Level Side Event: Participation, Human Rights and the Governance Challenge Ahead,” during which, the then UN High Commissioner for Human Rights, Michelle Bachelet, made a statement regarding the importance of the right to public participation within both the international and national governance agenda.<sup>26</sup> During this event, Bachelet presented five key messages, namely: “participation is an essential principle of governance, [...] participation is key to achieving the core purposes of the United Nations, [...] not only is participation itself a human right, it also supports and is dependent on other rights that are collectively essential to effective governance, development and peace, [...] when people are prevented from participating in shaping decisions that affect them, the consequences for governance can be severe, [...] and strengthening participation is a concern of deep global urgency.” At the same event, UN Secretary-General António Guterres provided a statement reiterating the messages provided by

14 UN OHCHR, n. 11, para 5.

15 UN OHCHR, n. 11, para 9.

16 UN OHCHR, n. 11, paras 9-11, 41-45.

17 UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 1998, 2161 UNTS 447, 38 ILM 517 (1999), 25 June 1998.

18 UN OHCHR, n. 11, para 11.

19 UN OHCHR, *Draft guidelines for States on the effective implementation of the right to participate in public affairs*, Report of the OHCHR, Human Rights Council Thirty-ninth session, A/HRC/39/28, (20 July, 2018) available at: [https://www.ohchr.org/Documents/Issues/PublicAffairs/A\\_HRC\\_39\\_28.docx](https://www.ohchr.org/Documents/Issues/PublicAffairs/A_HRC_39_28.docx).

20 UN OHCHR, n. 19, paras 19-24, 30-48, 56-94, 99-114.

21 UN OHCHR, n. 19, paras 20(c) and 59.

22 UN OHCHR, n. 19, para 21(c).

23 UN OHCHR, n. 19, paras 23(a)-(b).

24 UN OHCHR, n. 19, paras 56-57.

25 UN OHCHR, n. 19, paras 63-94, 100 and 111-114.

26 UN OHCHR, *Statement by Michelle Bachelet, UN High Commissioner for Human Rights, at the 75th session of the UN General Assembly, High-Level Side Event: Participation, Human Rights and the Governance Challenge Ahead*, (25 September 2020), available at: <https://www.ohchr.org/en/statements/2020/09/high-level-side-event-participation-human-rights-and-governance-challenge-ahead?LangID=E&NewsID=26298>.

Bachelet and further emphasised the urgency of effective and inclusive public participation in decision-making.<sup>27</sup>

Lastly, to show its continued supervision and acknowledgement for national efforts regarding public participation, the OHCHR released a report in 2022, which commended and provided suggestions on good practices and challenges regarding the Guidelines Report released in 2018.<sup>28</sup> Following a similar structure of the Guidelines Report, the 2022 Report consisted of multiple accounts of various countries that had succeed in implementing the various recommendations provided in the Guidelines Report. This practice of naming and praising countries that have achieved notable strides in ensuring public participation also provides other countries with visible examples of what can and should be done to ensure public participation.

Besides the SDGs and the commendable work of the OHCHR in promoting the right to public participation, many other international organisations and treaties promote public participation. For example, the UN Economic Commission for Europe (UNECE) adopted the Aarhus Convention, which focuses on environmental concerns, requiring signatory countries to ensure that citizens have access to information, public participation opportunities and justice in environmental decision-making. What is of interest is the correlations between the procedures and requirements for executing the right to public participation, as outlined by the OHCHR and the UN, and those provided by the Aarhus Convention in relation to environmental law. These correlations are not a mere coincidence but rather a reiteration of the importance of maintaining the principle of the fundamental right to public participation throughout various branches of law including environmental law and ultimately climate change related policy design and decision-making.

### 3. Public Participation in the Context of International Environmental Law

According to Quick and Bryson,<sup>29</sup> public participation – particularly in the area of governance – refers to the direct or indirect involvement of stakeholders (in this case it would be the public at large) in decision-making about policies, plans or programmes in which they have an interest. Public participation is said to have numerous benefits, such as (to name a few): it promotes democracy; it enhances sustainable development initiatives; it leads to increased knowledge of and skills in public engagement; it expands knowledge pools amongst local communities; it legitimises state actors and improves transparency and accountability amongst government institutions; and it improves the state’s decision-making capabilities.<sup>30</sup>

The benefits of public participation also apply to the field of environmental law. In fact, public participation has played a key role in environmental decision-making and has prompted the formulation of a number of policies at international, regional and national levels.<sup>31</sup> The need for public participation in international environmental matters was first recorded in Principle 10 of the Rio Declaration on Environment and Development of 1992.<sup>32</sup> Since then, public participation in environmental decision-making has been widely regarded as essential for the development of environmental legislative instruments, prompting the adoption of a UN convention (the Aarhus Convention).

27 UN Secretary-General, *Secretary-General’s remarks at High-level side event: “Participation, Human Rights and the Governance Challenge Ahead” [as delivered]*, High-Level Side Event: Participation, Human Rights and the Governance Challenge Ahead, (25 September 2020), available at: <https://www.un.org/sg/en/content/sg/statement/2020-09-25/secretary-generals-remarks-high-level-side-event-participation-human-rights-and-the-governance-challenge-ahead-delivered>.

28 UN OHCHR, *Good Practices and Challenges Faced by States in Using The Guidelines on The Effective Implementation of The Right to Participate in Public Affairs*, Report of the Office of United Nations High Commissioner for Human Rights, Human Rights Council Forty-ninth Session, A/HRC/49/42 (2 February, 2022) available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc4942-good-practices-and-challenges-faced-states-using-guidelines.html>.

29 K.S. Quick and J.M. Bryson, “Public Participation”, in C. Ansell & J. Torfing, *Handbook on Theories of Governance*, (2022).

30 Y. Zhao and B. Butcher, “Coming to terms with public participation in decision making: Balancing clarity and impact in the Aarhus Convention”, 31 *RECIEL*, 2, 210, at 211 (2022).

31 Zhao & Butcher, n. 30, at 210.

32 V. Mauerhofer, Public Participation in Environmental Matters: Compendium, Challenges and Chances Globally, 52 *Land Use Policy*, 481, at p.481(2016).

In June 1998, the UNECE, at its Fourth Ministerial Conference, adopted the Aarhus Convention as part of the “Environment for Europe” process.<sup>33</sup> According to the UNECE, the Aarhus Convention and its protocols are the “only legally binding global instruments on environmental democracy”.<sup>34</sup> This widely adopted and recognised Convention has been accepted as the leading document addressing public participation in environmental law.<sup>35</sup> The main objective of the Aarhus Convention is to ensure that each party promotes the right to access environmental information, public participation opportunities and justice in order to “contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”<sup>36</sup> According to the UNECE, as of 24 October 2022, there were 46 parties to the Convention, including the European Union (EU) and its member states as well as a number of non-EU countries, such as Albania, Belarus, Georgia, Iceland, Kazakhstan, North Macedonia and the United Kingdom (UK).<sup>37</sup> It should be noted that although the Aarhus Convention was adopted by the UNECE, it is open to global accession, meaning that countries outside of Europe are eligible to sign and become parties to the Convention.<sup>38</sup>

In the European context, the European Commission has acknowledged the various rights that can be exercised by the public in relation to the environment as well as the responsibility of public authorities to ensure the exercising of said rights.<sup>39</sup> Specifically, the Aarhus Convention contains provisions relating to: the right of everyone to receive environmental information that is held by public authorities (“access to environmental information”),<sup>40</sup> the right to participate in environmental decision-making (“public participation”),<sup>41</sup> and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general (“access to justice”).<sup>42</sup> The articles relating to public participation are of particular relevance to this paper.

To determine how precisely the Aarhus Convention addresses public participatory concerns, it is necessary to provide a general overview of each of its articles that refers to public participation. Article 6, titled “Public participation in decisions on specific activities”, can be described as the article that regulates public participation in environmental decision-making. Broadly, Article 6 is very relevant to “decisions on whether to permit proposed activities”. This means that public participation is ultimately only necessary and applicable when and where an environmental activity is taking place, and provision is made for the public to be consulted prior to the execution of the activity. One could go so far as to say that public participation may take place only to ensure the successful execution of an environmental activity.

More specifically, Article 6 outlines which proposed activities can and may be permitted under the article; how and when the public will be informed about environmental decision-making procedural time frames; public consultations for environmental permit approvals; public access for examination; public enquiries; and consideration given to the public prior to, during and after an environmental decision is made. While Article 6 provides a detailed list of activities in Annex 1, parties can use their discretion as to when activities not listed in Annex 1 should include public participation issues that have a “significant effect on the environment”.<sup>43</sup> It is not exactly clear what a “significant effect” means. Therefore, the parties have scope to exercise their own judgement and introduce public participation into a wide range of activities. However, if a party finds that an

33 “Aarhus Convention - Introduction,” Aarhus Convention, UN Economic Commission for Europe (UNECE) (25 June, 1998) available at: <https://unece.org/environment-policy/public-participation/aarhus-convention/introduction.html>.

34 UNECE, “Public Participation,” Environmental Policy, available at: <https://unece.org/environment-policy/public-participation.html>.

35 J. Jendroška, Aarhus Convention Compliance Committee: Origins, Status and Activities, 8 *Jour. of Euro. Envir. Planning Law*, 4, 301, at 302 (2011).

36 UNECE, n. 17, Article 1.

37 “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,” Status of Treaties, United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27&clang=.en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=.en).

38 Zhao & Butcher, n. 30, at 212.

39 See, n. 30

40 UNECE, n. 17, Article 4.

41 UNECE, n. 17, Article 6–8.

42 UNECE, n. 17, Article 9.

43 UNECE, n. 17, Article 6, 1(b).

activity does not have a significant effect on the environment, there is no obligation to apply Article 6 provisions relating to public participation.

Ultimately, it falls to the state to define how and within what parameters the public may participate in environmental decision-making. This is often a point of contention between the public and the state, especially when the public is of the opinion that an activity will harm the environment and the state does not share this opinion.

Article 7, titled “Public participation concerning plans, programmes and policies relating to the environment”, requires the public to be involved in the formulation of such plans, programmes and policies. Lastly, Article 8, titled “Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments”, stipulates that parties must ensure “effective public participation” in the formulation of executive regulations by public authorities, including the steps needed to achieve this outcome.

It is clear from the Aarhus Convention that public participation is organised and defined, and places limits on the extent to which the public can engage in environmental decision-making. It has been broadly accepted by various legal scholars and academics that the Aarhus Convention’s applicability to environmental matters in general includes climate action specifically.<sup>44</sup> As they stand, the principles underpinning the Aarhus Convention are in fact applicable to both the formulation and the design of climate policies. Despite this, there is often perceived inconsistency and confusion as to how and in what form public participation should be applied within the context of climate action. The Convention came into force over 20 years ago and since then, people’s views on and the context of public participation have changed dramatically.

There are clear correlations among various international treaties and covenants with regard to public participation. Given that European countries are equally members of the UN, they accept and follow the guidelines and principles of UN institutions, such as the OHCHR while also being parties to the Aarhus Convention.<sup>45</sup> It is thus essential to understand whether and to what extent these instruments can generate synergies for public participation in respect of climate action.

#### 4. Understanding Public Participation

The concept of public participation contains two broad, interrelated terms: ‘public’ and ‘participation’. Each term attracts its own interpretation and definition, which impacts how public participation is understood and implemented. Accurately and effectively implementing a system of public participation on a national scale across various countries requires a clear and concise understanding of what public participation entails within the context of policy development in both environmental and climate change law. In the case of environmental law, the Aarhus Convention has provided direction and insights on what public participation should entail; however, it does not have a clear and specific definition of the concept. Additionally, there is no universal definition of public participation in climate change law. It is possible that the absence of a universally accepted definition of public participation is due to its fluid character, which changes according to the context and the specific needs of the stakeholders involved.

Recently, Akerboom and Craig,<sup>46</sup> amongst other scholars,<sup>47</sup> specifically defined public participation as “the ability of citizens representing different perspectives to inform governmental decision-making”. In this regard,

44 See, C. Brown, *The Plaumann Problem: How the People’s Climate Case Widened the Gap to Judicial Review of the EU’s Inadequate Climate Policy*, 50 *Den. Jour. of Int. Law and Policy* 2, 197, at p.207 (2022); G. Perlaviciute, *Contested Climate Policies and the Four Ds of Public Participation: From Normative Standards to What People Want*, 13 *WIREs Climate Change* 1, 1, at 2(2021); G. Perlaviciute & L. Squintani, *Public Participation in Climate Policy Making: Toward Reconciling Public Preferences and Legal Frameworks*, 2 *One Earth* 4, 341, at 342(2020); B. Lewis, *Balancing Human Rights*, in: O. Quirico & M. Boumghar, *Climate change and human rights: An international and comparative law perspective [Routledge Research in International Environmental Law]*, at p. 49 (2017).

45 Especially considering the latter’s prominence in climate-related matters.

46 S. Akerboom & R.K. Craig, *How Law Structures Public Participation in Environmental Decision Making: A Comparative Law Approach*, 32 *Envir. Pol. and Gover.* 3, 232, at p. 232(2022).

47 See, C. Chess & K. Purcell, “Public Participation and the Environment: Do We Know What Works?” 33, *Enviro. Sci. and Tech.* 16, 2685, at p. 2685 (1999).

public participation can help to prevent civil discourse, build trust and collaboration, and promote social justice. It can include activities such as public meetings, online engagement, surveys, and other forms of outreach activities designed to gather inputs and build support for policy development.

#### 4.1. *Identifying the public*

In its most basic form and according to various definitions, the public refers to a general group of people; a broad group of people within a nation or state; or a group of people who share a similar or common interest. Within an environmental context and considering environmental justice concerns, Nadal states that the public are “not simply passive immutable victims of environmental injustice but instead are, and should be perceived as, active self-determining actors.”<sup>48</sup> Identifying and acknowledging the role of the public will help to improve perceptions of how the public should be included in environmental decision-making, which in turn will reinforce environmental justice.

According to Article 2, sub-section 4 of the Aarhus Convention, “‘The public’ means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups”. This view of the public is limited by national legislation or practice. It is, however, inferred that all persons, both natural and legal, should be considered to be the public unless otherwise stipulated within a particular national context. Therefore, in instances where a state or public authority does not consider a specific association, organisation or group to be the public, then they would be excluded from national public participation considerations under the Aarhus Convention.

The Aarhus Convention goes further by stipulating in Article 2, sub-section 5, “‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. This definition covers a broad segment of the public and is rather vague, lacking firm criteria for identifying “the public affected or likely to be affected by” the environmental activity.

Article 6 specifically references the public concerned. More specifically, Article 6 sub-section 2 stipulates that the public who are directly impacted by the environmental activity shall be informed, either by public notice or directly (when appropriate). The sub-section goes on to outline specifically what the public concerned shall be informed about, such as: the activity in question, the specifics of a public hearing relating to the activity, the public authority responsible for the information, and the environmental information that is required.

In short, when reference is made to ‘the public’, it means individuals or groups as well as groups who are affected by or have an interest in the decision-making process. This includes individuals from diverse backgrounds, regions and communities, as well as organisations and interest groups with a stake in the outcome of the relevant decision or policy. The involvement of the public can ultimately help to ensure that policies are effective, equitable and widely accepted by the communities they impact.

#### 4.2. *What classifies as participation?*

Article 6 of the Aarhus Convention identifies a number of methods used to facilitate public participation in environmental matters, namely a public hearing where the public may submit comments, information, analyses or opinions prior to the hearing; an authority directing any questions and comments at, and holding discussions with, the public; and public authorities accessing and examining information. Sconfienza<sup>49</sup> highlights that public participation rests on the normative presuppositions of democracy, citizenship and the role of the public in decision-making processes. Democracy is based on the principle of popular sovereignty, while citizenship confers the right to participate in decision-making processes, including environmental governance.<sup>50</sup> These normative

48 C. Nadal, Pursuing Substantive Environmental Justice: The Aarhus Convention as a ‘Pillar’ of Empowerment, 10 *Enviro, Law Rev.* 1, 28, at p. 31(2008).

49 U. Sconfienza, The Narrative of Public Participation in Environmental Governance and its Normative Presuppositions, 24 *RECIEL* 2, 139 (2015).

50 Sconfienza, n. 51, at p.139.



assumptions constitute the frameworks and pillars of justice in any country. It is clear that public participation as a concept relies heavily on how participation is ensured and how it upholds the above-mentioned normative assumptions.

For public participation to be truly effective and efficient, clear and concise information must be extended to the public, decision-making processes must be accessible and understandable to all, and there must be mechanisms for feedback and dialogue between decision-makers and the public.<sup>51</sup>

#### 4.3. *Is public participation under the Aarhus Convention effective for climate policies?*

Duyck argues that the principles of the Aarhus Convention are relevant to the UN Climate Change Regime, as climate change is an environmental issue that affects the public and requires their participation and engagement.<sup>52</sup> However, the Aarhus Convention, as it stands, limits public participation solely to decisions on whether to permit proposed environmental activities.<sup>53</sup> Either these activities are listed in Annex 1 of the Convention or it is up to the party to the Convention (i.e. the state) to decide when the Convention can and should be applied to other activities not listed in Annex 1.<sup>54</sup> It is clear from Annex 1 that a broad range of environmental activities are covered, in detail, by the Convention. This creates both an opportunity and an obstacle for public participation in climate-related matters. When climate-related harm occurs that is explicitly listed under Annex 1 of the Aarhus Convention, there is an opportunity for the public to ensure participation under Article 6 of the Convention. However, in recent cases, climate-related matters are not explicitly referenced in the Convention, given that the Convention was introduced in 1998 – prior to the extensive research and legislative expansion and developments that have taken place in the area of climate change and related policies. As an example, Annex 1 makes frequent references to nuclear power when discussing energy sector activities. However, there is no mention of energy-sector activities pertaining to the just transition or to the formulation of energy-related subsidies and technology transfers.

The Aarhus Convention, while effective, functions predominantly as a retroactive, restrictive tool. In the wake of climate change, though, a more proactive, preventative tool is needed. Zhao and Butcher<sup>55</sup> aptly assert that although the Aarhus Convention successfully promotes transparency and public access to information, there is a need to balance clarity and impact in decision-making processes. This is not to say that the Aarhus Convention has not been useful in advancing environmental protection in a broad sense.

In year 2002, Getliffe wrote that the proceduralisation of environmental concepts outlined in the Aarhus Convention assists in ensuring standards of environmental protection, generating new information, communicating legal developments, and enabling and encouraging participation and open access.<sup>56</sup> This assertion is still relevant today. By providing and outlining strict procedures for the implementation of the rights underpinning public participation, as contained in the Aarhus Convention, there is greater legal certainty and clarity regarding the limits of public participation. In other words, the public are aware of whom to contact, what their involvement would entail, how to engage, when this would be appropriate, and ultimately why their participation is necessary.<sup>57</sup> Proceduralisation calls for transparency when taking the decisive steps towards engagement, both in terms of process and accountability.

It seems necessary to also consider the international perspective acknowledged by the OHCHR in the promotion of the fundamental right to public participation. While the Aarhus Convention contains provisions that can be immediately adopted into climate change regimes, it is important to note that human rights must also be considered within climate policy design and decision-making. That being said, if the Aarhus Convention can be utilised as a framework for public participation within the specific context of climate-related decision-making and policy

51 Zhao & Butcher, n. 30.

52 S. Duyck, Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime, 24 *RECIEL* 2, 123(2015).

53 UNECE, n. 17, Article 6(1).

54 *Ibid.*

55 Zhao & Butcher, n. 30.

56 K. Getliffe, Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-Making Process Lead to More Effective EU Environmental Law? 4 *Enviro. Law Rev.* 2, 101(2002).

57 Getliffe, n. 56, at 109.

design, the proceduralisation of its elements could be both critical and convenient for the advancement of public participation in climate law. On the one hand, the proceduralisation of the Aarhus Convention would be critical for improving transparency and accountability and, in turn, bolstering public support in climate-related decision-making. On the other hand, proceduralisation would be convenient in that it already provides a set of steps and targets to ensure public participation. However, given the complexities of climate action and the escalation in climate lawsuits, references to broad environmental commitments under the Aarhus Convention are too vague, and thus insufficient, given the evolving needs and developments in climate law.

## 5. A Public Participation Process for Climate Policy Development

As previously mentioned, there has been growing civil discourse on climate-related harm and state inaction.<sup>58</sup> There are more and more examples of the public attempting to hold states to account for failure to adhere to climate-related goals and commitments.<sup>59</sup> In short, the public is unhappy with the progress made by the state in achieving climate goals in a timely, effective and sustainable manner. It has been suggested that this growing civil discourse could be avoided if the public were given an active seat at the table to participate in climate-related decision-making and policy development.<sup>60</sup>

Developments in climate law point to the fact that the public has been asked to participate in the development of climate law itself.<sup>61</sup> While the Aarhus Convention has been instrumental in introducing the framework and basic principles of public participation in environmental decision-making, it does not do enough to support the changes and developments in climate law, climate action and citizen engagement. As such, it may be necessary to revert to the frameworks, principles and recommendations related to the fundamental right of public participation and highlighted by various UN institutions. Wibeck et al.<sup>62</sup> state that public participation can contribute to effective climate policy implementation by improving transparency, accountability and legitimacy, points which have been outlined in the OHCHR Guidelines Report. Hurlbert and Gupta<sup>63</sup> indicate that public participation can help to identify potential areas of conflict or disagreement early on in the policymaking process, thereby allowing policymakers to address these issues before they become major obstacles to the implementation of climate policies.

Against the above backdrop, it is necessary to review what is understood by public participation within the context of climate law. In this regard, there must be a formalised procedure or process that supports public participation and engagement in climate policy design, implementation, execution, monitoring and reporting. This procedure should, in essence, commence before the development of climate policy, include the public in climate-related decisions and, finally, involve the monitoring of the climate policy implementation process and its ultimate efficacy. Utilising the Aarhus Convention as a starting point, considering the human right to public participation as outlined in Article 25 of the International Covenant on Civil and Political Rights, and adopting principles of public participation referenced by UN organisations, the ‘proceduralisation’ of public participation in climate-related matters represents a next step in climate policy development.

58 Y. Kountouris & E. Williams, Do Protests Influence Environmental Attitudes? Evidence from Extinction Rebellion, 5 *Enviro. Res. Commu.* p.1(2023).

59 J. Setzer J & C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, at p.30.

60 W.E. Scheuerman, Political Disobedience and the Climate Emergency, 48 *Philo. and Soc. Criti.* 6 791, at p.797 & 802(2022); B.K. Sovacool & A. Dunlap, Anarchy, War, or Revolt? Radical Perspectives For Climate Protection, Insurgency And Civil Disobedience in a Low-Carbon Era, 86 *Ener. Res. & Soc. Sci.* 102416, 1, at p.2 (2022).

61 See S. Huttunen et al., What about citizens? A literature review of citizen engagement in sustainability transitions research, 91 *Ener. Res. & Soc. Sci.* 102714, 1, at p.7–9 (2022).

62 V. Wibeck, M.A. Dahlgren, and G. Öberg, Public Participation in Climate Science and Policy, 8 *Wiley Interdis. Rev.: Climate Change* 2, p.438 (2017).

63 M. Hurlbert & J. Gupta, The Split Ladder of Participation: A Diagnostic, Strategic, And Evaluation Tool To Assess When Participation Is Necessary, 50 *Enviro. Sci. & Pol.* 100(2015).

### 5.1. *Public participation and climate governance*

According to Article 6(a)(iii) of the United Nations Framework Convention on Climate Change (UNFCCC),<sup>64</sup> parties are required to promote and facilitate “public participation in addressing climate change and its effects and developing adequate responses” at national, subnational and regional levels. Additionally, as part of the UNFCCC commitments,<sup>65</sup> parties are to ensure high levels of participation in respect of education, training and public awareness of climate change. On the whole UNFCCC, there are only two articles that address public participation – albeit in a rather vague manner. The UNFCCC, as the international convention that sets out climate-related goals and commitments, does not contain specific references to how this public participation will take place and under what terms. This lack of direction on what and how public participation shall be carried out has often resulted in poor execution of the aforementioned UNFCCC articles.

In year 2002, during the 8th Session of the Conference of the Parties (COP), a decision was adopted regarding the “New Delhi work programme on Article 6 of the Convention” (the Work Programme) which was established to provide observations and insights on the progress being made by parties in relation to Article 6 of the UNFCCC.<sup>66</sup> When discussing how to implement Article 6, the Work Programme suggests that parties “seek input and public participation, including participation by youth and other groups, in the formulation and implementation of efforts to address climate change and encourage the involvement and participation of representatives of all stakeholders and major groups in the climate change negotiation process”. During the 13th Session of the COP in year 2007, following a five-year assessment, the Work Programme was amended; however, the above suggestion remained the same.<sup>67</sup> At the next assessment in year 2012, during the 18th Session of the COP, the Work Programme<sup>68</sup> reiterated the suggestion, with a minor addition in the form of a request that parties invite stakeholders to report on the implementation of Article 6 and to enhance the active participation of youth, women, civil society organisations and the media.<sup>69</sup>

More recently, in year 2021, during the 26th Session of the COP,<sup>70</sup> there was a review of the Work Programme.<sup>71</sup> Unlike previous reports from the Work Programme, the 2021 review attempted to provide more practical insights on what could be done by parties to ensure better public participation. Parties were encouraged to: include stakeholders and the public in initiatives to address climate change as well as in the negotiating process; encourage the public to report on progress in implementing the Work Programme; and establish public–private or public–non-profit partnerships. Particularly noteworthy were the instructions to: “Hold frequent, inclusive civil society consultations on climate decision-making, including follow-up processes with specific outcomes such as feedback surveys that enable participants to express how they feel their input was used” and “Develop guidelines for enhancing public participation in climate change decision-making and the inclusion of children and youth, and for assisting local governments and the public in climate change decision-making.”

Within the UNFCCC framework, little has been done to provide clear, actionable activities that parties can implement to enhance public participation in climate governance. This is partly to allow parties to independently formulate, adopt and monitor public participation needs that better suit the legislative, social and civil structure of the respective nation state. However, this leaves a gap in terms of public participation at an international level

64 UN General Assembly (UNGA), *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189 (20 January, 1994).

65 UNGA, n. 64, Article 4(1)(i).

66 UNFCCC, Decision 11/CP.8, New Delhi Work Programme on Article 6 of the Convention UN Doc. FCCC/CP/2002/7/Add.1, (28 March 2003).

67 UNFCCC, Decision 9/CP.13, Amended New Delhi Work Programme on Article 6 of the Convention, UN Doc. FCCC/CP/2007/6/Add.1, (14 March 2008).

68 During which time the name of the Work Programme changed from the New Delhi Work Programme to the Doha Work Programme.

69 UNFCCC, Decision 15/CP.18, Doha Work Programme on Article 6 of the Convention, UN Doc. FCCC/CP/2012/8/Add.2, (28 February 2013).

70 UNFCCC, Decision 18/CP.26, Glasgow Work Programme on Action for Climate Empowerment, UN Doc. FCCC/CP/2021/12/Add.2, (8 March 2022).

71 During which time the name of the Work Programme changed from the Doha Work Programme to the Glasgow Work Programme on Action for Climate Empowerment.

– a gap that, unfortunately, has morphed into inaction at the national level and, by association, the subnational and regional levels. Although the UNFCCC and its various bodies have done their best to offer insight and suggestions on what public participation should entail, the failure to provide clear and concise procedures and protocols for public participation has left states in the dark as to what public participation should include by way of fundamentals and the various benefits arising from effective public participation.

### 5.2. *Benefits of public participation in climate governance*

Public participation is a way for citizens to exercise their right to “take part in the conduct of public affairs”, as protected under Article 25 of the International Covenant on Civil and Political Rights.<sup>72</sup> By encouraging public participation, states and public authorities are inadvertently encouraging principles of transparency and accountability and boosting the public’s confidence in the legislative structures and actions of the state.<sup>73</sup> While public participation is often viewed as a means to encourage better citizen engagement, it is not only citizens who benefit from better public participation. States are also presented with an array of opportunities emanating from inclusive participatory processes.

In summary, with reference to what has been outlined above, there are clear and distinct benefits associated with applying, supporting and ensuring public participation. First, public participation promotes transparency and accountability in decision-making processes. When the public is involved in decision-making, decisions are made in the open and everyone knows the reasons behind the decisions. Second, public participation enhances the quality of decisions by bringing a diversity of perspectives, experiences and expertise to the decision-making process, thus leading to better-informed decisions. Third, public participation builds trust and legitimacy in decision-making processes because it ensures that the decisions taken reflect the public’s interests and values. Fourth, public participation increases civic engagement and encourages individuals and groups to actively participate in public affairs, which leads to a more informed and engaged citizenry. Fifth, public participation fosters social cohesion by bringing together people from different backgrounds and with different perspectives, and encouraging dialogue and understanding, which creates a more united and cohesive society. Lastly, public participation improves the chances of decisions being effectively implemented and complied with.

### 5.3. *Forms of public participation in the climate policy design process*

Various forms of public participation can be used depending on the desired level of engagement. This section refers specifically to the practical tools and instruments that have been used to encourage participation in environmental and climate decision-making, namely:<sup>74</sup>

1. Public hearings: These are meetings at which members of the public are invited to make oral or written submissions on particular climate-related issues.
2. Citizen advisory panels or citizen assemblies: These are groups of citizens who are tasked with evaluating evidence, giving opinions and making recommendations on a particular issue.
3. Public consultations: These are meetings at which members of the public can raise concerns, ask questions and provide feedback on a particular issue.
4. Referendums: These are initiatives in which the public is asked to make a direct decision about or vote on a particular issue.

72 United Nations General Assembly, International Covenant on Civil and Political Rights, 1966, GA RES 2200A (XXI) (16 December, 1966).

73 A. Varadi, Defining the Role of the Aarhus Convention as Part of National, International and EU Law: Conclusions of a Case-Law Analysis, 2019 *Hung. Yearbook of Inter. Law and Euro. Law* 125(2019).

74 See, Chess & Purcell, n. 49; P.L. Stein, Specialist Environmental Courts: The Land and Environment Court of New South Wales, Australia, 4 *Enviro. Law Rev.*, 1 (2002); L. Muradova, H. Walker and F. Colli, Climate Change Communication and Public Engagement in Interpersonal Deliberative Settings: Evidence from The Irish Citizens’ Assembly, 20 *Climate Policy* 10, 1322(2020); T. Weber, Are Climate Activists Protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for Environmental Defenders, 1 *RECIEL*, at p. 2–3(2022), A. Dantinne, M. Eliantonio & M. Peeters, Justifying a Presumed Standing for Environmental NGOs: A Legal Assessment of Article 9(3) of the Aarhus Convention, 31 *RECIEL* 3, 411, at 416 (2022).

5. Surveys: These are questionnaires used to gather information from members of the public on a particular issue.
6. Focus groups: These are moderated discussions amongst selected individuals who represent a particular demographic or interest group.
7. Online engagement: This involves using online platforms such as social media, websites and email to solicit feedback from and engage with members of the public.
8. NGO engagement: NGOs can play an important role in advocating climate action, providing expertise and resources to policymakers, and representing the interests of marginalised communities.
9. Green tribunals: These are specialised courts that hear environmental cases and ensure that environmental laws are enforced and environmental rights are protected.

The above are just examples of the many forms of public participation in which people can engage. The specific choice will depend on the issue at stake, the level of engagement desired and the available resources.

#### *5.4. Authority or body responsible for public participation in climate-related matters*

The establishment of such a government body would allow for a smoother transition to an inclusive participatory process. The government body would serve as an intermediary between the government and the citizens by providing a platform for the public to express their opinions and contribute to policy formulation. It would be responsible for organising public forums, debates and meetings to engage citizens on various issues affecting them. It would also be responsible for gathering feedback from the public on climate-related government policies and projects. This feedback would be used to improve the quality of government services and ensure that they meet the expectations of the citizens.

Furthermore, the government body would ensure that marginalised groups, such as women, youth and people with disabilities are included in public participation processes. This would see the opinions of all citizens being considered when important decisions are made that affect their lives. Moreover, the body would work in collaboration with civil society organisations, the private sector and other stakeholders to enhance public participation. This collaboration would facilitate the sharing of ideas, experiences and best practices in public participation. In summary, such a body would be comparable to that envisioned within the Guidelines Report of the OHCHR.<sup>75</sup> The establishment of a government body for public participation would be an important step towards enhancing citizen engagement and promoting transparency and accountability in government. It would also provide a channel through which citizens could voice their opinions and participate in decision-making processes, which would ultimately lead to better governance and an improved quality of life for citizens.

## **6. Conclusion**

According to Chess and Purcell, the success of public participation is either measured by the quality of the outcomes or through the process itself.<sup>76</sup> Public participation can contribute to the prevention of civil discourse on climate action. When members of the public are engaged and feel that they have a stake in the policymaking process, they are more likely to trust the decisions made by states and accept the outcomes. In addition, public participation can help to identify potential areas of conflict or disagreement early on in the policymaking process, thus allowing policymakers to address these issues before they become major obstacles to the implementation of climate policies.

Overall, public participation can go a long way towards building trust, promoting collaboration and increasing the chances of successful climate action. Moreover, public participation can help to ensure that the policies implemented are fair and equitable. Members of the public may have unique perspectives and experiences that policymakers may not have considered, especially those from marginalised communities who are often disproportionately affected by climate change. By engaging with these communities and incorporating their

<sup>75</sup> UN OHCHR, n. 19, paras 56-57.

<sup>76</sup> Chess & Purcell, n. 47.

feedback, policymakers can create policies that address communities' specific needs and concerns, thereby promoting social justice and reducing the likelihood of civil discourse. As already discussed, public participation plays a key role in fair, inclusive and effective decision-making as required under the International Covenant on Civil and Political Rights (Article 25), recommendations of various UN organisations and procedures provided under the Aarhus Convention. Clearly, policymakers must prioritise public participation in their efforts to address climate change.

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