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# A Comparative Legal Perspective on the Legal Framework Governing Public Involvement in Environmental Decision-Making

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**ABSTRACT**

*Public engagement has grown to be a crucial a factor in environmental decision-making, such as the several ways that governments are addressing climate change, despite some doubts about its efficacy. Nonetheless, the body of current research tends to discuss the broad advantages of public involvement in environmental issues rather than delving into the specifics of how it happens and how it varies throughout countries—even those that are ostensibly pursuing identical public participation objectives. In order to close that knowledge gap, this article looks at the crucial role that law plays in determining how the public can actually participate in the process of making decisions about the environment across national boundaries, including the development of national agendas in order to lower emissions of greenhouse gases and get ready for the repercussions of climate change.*

***Keywords****: Environmental, Ostensibly, Public Participation, European Union, Greenhouse Gas.*

## I. INTRODUCTION

The capacity of people from different backgrounds to influence making decisions by the government is known as well as public involvement rights in private. Decision-making in corporate settings, for example, is significantly less common. The impacted public's viewpoints as well as those of specialists and researchers in other sectors who work outside the government itself can be considered by a participatory public in the process of making decisions. These include bolstering the authority of decisions made by the government and ensuring that no significant element, effect, or unexpected consequence of the decision has been overlooked or disregarded.[2]

A particularly fruitful area of public involvement theory, research, and policymaking has been

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[2] https://onlinelibrary.wiley.com/doi/full/10.1002/eet.1986

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government making decisions about the environment, the availability of natural resources, and usage. In general, environmental governance, which covers the governance of climate change, is this area. Put differently, in the absence of public participation, the government bears a serious danger that its choices on the use of natural resources or environmental quality may be seen as either substantively problematic or an unlawful exercise of official authority, or both.

Take, for instance, a government's choice to control air contamination, such as greenhouse gases (GHGs), which are produced by power plants that burn fossil fuels. It is imperative that the government agency or authority responsible for overseeing these power plants be aware of the substances they emit, the types of harm they cause, the concentrations at which those harms manifest, the technologies options exist to change output processes or trap pollutants and greenhouse gases in order to lower air emissions, as well as the tactics used by power plants to control the pollutants and greenhouse gases they produce, but they don't release into the environment. Additionally, the agency or authority may wish to consider the country's pledges to lower emissions of greenhouse gases as well as the combined consequences of additional air pollution in certain places, especially on the weak populations.[3]

It will also likely take into account the effects of its decision to regulate on the economy, productivity, or energy, as well as its own capacity (budget, personnel, and technological) to carry out the new regulations. In other words, the choice in order to control air emissions involves a wide scope of knowledge, including public health, engineering, sociological demography and community values, cost tolerance, energy demands, and climate science, economics, and site-specific impact evaluations. For one government agency or power to possess all the data it requires, it has to be constant account for the potential that some of its own specialists may be purposefully or unintentionally biassed in favour of its choice to impose regulations.

## II. ANALYSIS OF COMPARATIVE LAW

"The act of comparing the laws of one country to another is the essence of comparative law." A greater comprehension of the scope and content of various legal frameworks can be attained through comparing and comparing the legal systems of various nations on the same issue. In addition, "the insights gathered can usefully illuminate the inner workings of a foreign legal system" and provide fresh viewpoints "that may yield a deeper understanding" of the researchers' "own legal order." Comparative law method can occasionally reveal or propose

[3] Benjamin J. Richardson and Jona Razzaque, Public Participation in Environmental Decision Making, https://www.researchgate.net/publication/228305864_Public_Participation_in_Environmental_Decision_Making

"universal principles of law that transcend culture" (Eberle, 2009: 453), but scholars of contrasting law have to resist the need to see some systems as superior to others.

The method of comparative law can also shed light on and thereby aid in the evaluation of the various legal strategies that countries adopt or the various legal instruments that they employ to carry out legal precepts, such as how important public involvement is to effective environmental governance—that the countries under study readily admit but scholars should also take into consideration Reitz's advice to search for functional equivalents among the variations in the legal frameworks. This piece fits within this second group of approaches to comparative law. As previously said, for many years, the US and the EU have both encouraged and frequently ensured public involvement in political making decisions generally and environmental stewardship in particular.

Both organisations, as well as the lower tiers of government within them, have a great deal of knowledge and expertise on the various facets of public involvement and the various channels through which Decisions pertaining to the environment can involve the public. Therefore, the similarities and differences between participation of the public in environmental concerns laws in the US and the EU should be instructive when it comes to the problem of fitting public engagement mechanisms into the frameworks of governmental decision-making and incorporating the entirety of public involvement options.

Naturally, awareness of the institutional and cultural uniqueness of nations is a keystone of comparative legal methodology (Eberle, 2009; Reitz, 1998). Most of the challenges faced by a single individual attempting to grasp the subtleties of an overseas legal framework by merging the knowledge of legal experts from each of the systems that are being examined.

## III. THE FIVE-STAGE PUBLIC PARTICIPATION SPECTRUM DEVELOPED BY THE IAPP

The public can participate in several ways, as mentioned. Public engagement was classified by Arnstein (1969) in a highly influential article as ladder with eight rungs, where each rung denotes a higher level of involvement. The rungs go from top-level citizen control, where the whole public actively decides how to govern itself, to At the bottom are therapy and manipulation, which are essentially non-participatory (Arnstein, 1969). Nonetheless, Arnstein's ladder fails to adequately acknowledge that various settings call for various forms of public engagement, instead presenting public involvement methods as an increasing normative scale betterment.[4] Because of this and its emphasis Arnstein's ladder of power has drawn a lot of

[4] What are the legal frameworks governing public participation in environmental decision-making processes in the United States? https://typeset.io/questions/what-are-the-legal-frameworks-governing-public-participation-

criticism, such as the claim that it does not fully convey the various forms of involvement by the public.

As a result, the IAPP's spectrum system—which is less hierarchical, less complicated and more inclusive than Arnstein's ladder—is used in this article to categorise public participation. The requirement for various forms of public engagement in various contexts is tacitly acknowledged by the range of public participation methods offered by IAPP. Furthermore, because the IAPP spectrum is widely utilised, it provides a uniform framework for evaluating how different countries use various forms of public engagement. The government's commitment to only informing the general people of its choices process is the first of the IAPP's five phases of public engagement. Specifically, when the government empowers the public by placing final decision-making in their hands" (IAPP, 2018). But we also acknowledge, in keeping with modern public participation researchers, that public participation strategies need to be situation-specific; empowerment isn't always suitable.

### (A) Information Access

Governments commit to informing the public falling under the first and most stringent public IAPP category involvement in order to provide the general public with impartial, unbiased knowledge that will assist them comprehend the issue, potential solutions, and/or alternatives (IAPP, 2018). Since information access promotes government accountability and transparency, it has been considered for a long time as the foundation of democracy. The definition of government transparency is defined as "the capacity to learn about internal operations within a public sector organisation through channels like open forums, record access, proactive information sharing on websites, protections for whistleblowers, and even unlawfully obtained information". For citizens to properly engage in government decision-making, they also need to be informed about their governments.[5]

According to some academics, public information is even legally owned by the government. Prior research has looked at laws governing information access, including ways to enforce that access, but very few have used a comparative viewpoint. Effective public engagement and sound environmental management, taking climate change into account governance, typically need the public to have access to two distinct types of data. Firstly, governments, along with their agencies, workers, and contractors, often produce, compile, and assess data regarding the

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[5] Sanne Akerboom, Robin Kundis Craig, How law structures public participation in environmental decision making: A comparative law approach, https://dspace.library.uu.nl/bitstream/handle/1874/421163/Env_Pol_Gov_2022_Akerboom_How_law_structures_public_participation_in_environmental_decision_making_A_comparative_law.pdf?sequence=1

surroundings—such as greenhouse gas concentrations, increases in the average world temperature, and the state of the water quality—as well as the potential for certain environmental changes, like pollution, to disrupt ecological processes or jeopardise human health and safety.

This essential scientific data is essential to evaluate The efficiency of environmental regulations and the suitability of new initiatives from the government. Within this initial classification, we recognise the mandates found in international agreements and domestic legislation, which obligate about 191 of the 193 countries worldwide to do environmental impact assessments under some condition (Morgan, 2012). Even though we recognise the value of EIAs, we won't go into detail about them in this article because the laws that govern them primarily mandate that environmental information is produced by governments and government agencies, although not always that they be made available to the public or that they permit public involvement in the undertaking.

Second, information on their own strategies for making environmental decisions and procedures is also available to government agencies and authorities. This information includes when judgements are expected to be made, about what topics, with what data, and for what specific purposes. Their decisions can range from the issuance of licences and permissions needed to use or exploit natural resources, to new legislation to limit polluters for the benefit of safeguarding public health. A crucial first step in facilitating alternative forms of public participation is making information about these decision-making processes accessible to the public. The legal frameworks of the EU, the Netherlands, and the US are outlined in this section and control both forms of government environmental data are accessible to the public.

### 1. Union of Europeans

The Netherlands and the majority of other EU members are party to the Aarhus Convention, which is officially known as the Convention on Public Participation, Information Access, and Justice Access in Environmental Matters (UNECE, 1998). Although the majority of the 47 signatories are European nations, this convention is the most significant piece of international law pertaining to involve the public in decision-making on the environment.

Furthermore, parties to the Convention are required to provide the public with access to all relevant information regarding the activity and decision throughout public participation processes (UNECE, 1998: art. 6(6)). In conclusion, the public may request administrative review under Article 9 of the Convention if they feel that the government has wrongfully refused their requests for environmental information. The Directive restricts governments' authority to

maintain the confidentiality of environmental data and expands the public's information access by offering a more expansive definition of "environmental information" in comparison to the Aarhus Convention. In line with this Directive, member states are required to make sure Any environmental information requested is made available to the public by government agencies; no justification is required (Hartley & Wood, 2005). Environmental decision-making on a national and international level is subject to these duties. Furthermore, member states are required by Article 6(1) of the Directive to permit independent judicial review if they believe that administrative public requests for information have not received a thoughtful or suitable response from the authorities. Requirements for public disclosure also apply to the EU. Articles 42 and 15(3) of the EU's Fundamental Rights Charter and the Treaty of the Functioning of the EU (TFEU) establish a right of access to information held by EU institutions, including environmental data at the EU level. Additionally, Regulation EC No. 1267/2006 guarantees the availability of environmental data from these institutes.

**2. The Dutch**

The privileges of the Netherlands to obtain environmental data have been integrated by both Directive 2003/4/EC and the Aarhus Convention. The Dutch Environmental Protection Act is the country's most significant environmental law. Waste disposal, greenhouse gas emissions, Water quality, recycling, environmental policies, and noise pollution are all included. The most significant regulations controlling how the general public can obtain environmental data are also included.

The Dutch EPA's Article 19.1a replicates the EU Directive's more expansive interpretation of "environmental information," and hence, the right to obtain the Netherlands' environmental data is likewise more expansive than required by the Aarhus Convention. However, Dutch agencies have the authority to refuse requests for data on the environment under specific circumstances, for example, in situations where the data is private as stipulated in the Dutch Government Information (Public Access) Act, as well as in the Aarhus Convention and Directive 2003/4/EC.

The Dutch General Administrative Law Act, which governs the interactions between the people and the government in the country, is another way that the Netherlands carries out the Aarhus Convention in terms of judicial Public involvement and accessibility during political decision-making. Through its broad criteria GALA creates administrative authority (environmental) information accessible to the public, particularly information pertaining to agency decision making. Basic guidelines are established by GALA; however, additional administrative regulations, such as the Dutch EPA or the spatial planning regulation, are used by Dutch

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legislation to enhance these guidelines. The guidelines for efficient management that have been established by case law have greatly influenced GALA's development over time.[6]

GALA mandates that the administrative authority declares in the open that it will make a decision regarding public access to information, such as imposing an administrative penalty or employing an expert. The administrative authority notifies the parties involved in the proposed decision if it may have an impact on specific individuals (art. 3:41 GALA). Unless its purpose is obviously clear, the authority is often required to provide justification for its judgement (art. 3:47 GALA; art. 3:48(1) GALA). Nevertheless, the agency is required by law to give an explanation as soon as feasible to anyone who wants it.

It is imperative for an administrative authority to notify the public of their ability to take part in the process of making decisions. Administrative Dutch bodies create the public involvement process under GALA by means of a public preparatory procedure (PPP), which is covered in greater depth under Section 4.2. When the PPP is applicable, the executive branch is required by law to make all relevant information about the decision available to the public.[7]

The documents will be made available by the authority either physically at a predetermined location or electronically. The public will then be informed of their accessibility via a newspaper or publications, free local publications, or any other appropriate means. In addition, according to GALA provisions 7:4(2) and 7:18(2), administrative bodies are required to notify the public of any objections to or court appeals of their decisions and to make all pertinent documents publicly available. Once more, the authority may make the documents available electronically or in person at a specified address. Administrative bodies are required by law to send all of these documents to the judge in judicial proceedings. However, documents may be withheld for very good reasons (see GALA provisions 7:4(6), 7:18(7), and 8:29(2)), and the degree of the cause is determined based on an individual basis (Daalder, 2005). The Government Information (Public Access) Act prohibits the authority from withholding information that is deemed "public."

### 3. The US

The Aarhus Convention does not participate in the United States. Furthermore, under the federalist structure of the United States, both the state and the federal administration. Every

[6] Laura H. Berry, Making space: how public participation shapes environmental decision-making, https://www.sei.org/wp-content/uploads/2019/01/making-space-how-public-participation-shapes-environmental-decision-making.pdf

[7] OBJECTIVES OF PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL DECISION-MAKING, International & Comparative Law Quarterly , Volume 72 , Issue 2 , April 2023 , pp. 333 – 360, DOI: https://doi.org/10.1017/S0020589323000088

level of government allows for public input in the environmental decision-making procedures that it undertakes. Public participation guidelines are generally established by the federal government for use in federal judicial systems and government offices, and by each state government for use in administrative bodies and state courts. The federal Administrative Procedure Act and its 50 state equivalents provide the most comprehensive set of regulations. These are frequently derived from the Model State Administrative Procedure Act (Bonfield, 1986). Environmental authorities are required to follow the default procedures outlined in these statutes.

Due to the similarity of the state-level and federal APAs, this article will concentrate on the federal obligations. The federal APA's Freedom of Information Act (FOIA), Section 552, mandates that all federal agencies regularly provide specific types of information to the public, such as details about the agency's structure, policies, substantive regulations, and procedures. Certain federal environmental statutes mandate that environmental agencies make particular types of environmental information available to the public, which is an addition to the general APA disclosure responsibilities. The Freedom of Information Act (FOIA) also provides a comprehensive set of guidelines that the general public can utilise to ask government entities for more information. The organisation has the right to charge for this extra material, but only up to the fair cost of duplicating the papers for non-commercial uses like news reporting, academic or scientific research, or education. Notably, the APA was passed by Congress in 1946—prior to the internet's development—and the majority of federal and state environmental agencies currently make a substantial quantity of information that is freely accessible to the public on their official websites. FOIA mandates agencies as well to appoint a Chief FOIA Officer to supervise the processing of requests for information. FOIA establishes nine clear exclusions from disclosure, the majority of which have been successfully contested in court. The exclusions cover a wide range of topics, including trade secrets, private company information, personnel and medical records, specific law enforcement documents, well locations, and secrets related to national defence and international policy. Under FOIA, federal courts have the ability to settle disputes between the agency and the requester about the disclosure of information.[8]

For instance, most federal agencies use informal rulemaking, sometimes known as "notice and comment," to enact, amend, and repeal regulations. These fundamental notice and information-providing requirements are still in place even though a few environmental statutes include extra

[8] Yunyue Peng, Public Participation in Environmental Decision-making, https://wesolve.app/public-participation-in-environmental-decision-making/

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steps in them. Furthermore, for especially important environmental rules, agencies are required to provide a range of regulatory impact evaluations. These may include, among other things, a cost-benefit analysis (Clinton, 1993; Obama, 2011) and an environmental impact statement (42 U.S.C. § 4332(C)).

These fundamental notice and information-providing requirements are still in place even though a few environmental statutes include extra steps in the them. Furthermore, for especially important environmental rules, agencies are required to provide a range of regulatory impact evaluations. These may include, among other things, a cost-benefit analysis (Clinton, 1993; Obama, 2011) and an environmental impact statement (42 U.S.C. § 4332(C)).

Adjudications, which include licencing, allowing, and enforcement proceedings that specifically impact individuals, are typically more official and resemble trials. Nonetheless, according to 5 U.S.C. § 554(a)–(c)), the government is still required to notify "all interested parties" of these actions. Furthermore, notice of the application for a permit, the final permit, the proposed permission, and the draft permit revisions under the majority of federal environmental regulations.

According to 5 U.S.C. § 706(1), it gives federal courts have the jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed," which includes disclosing information. Furthermore, the U.S. Supreme Court has ruled time and time again that standing to suit on behalf of the public members harmed by a government agency's failure to provide necessary information is supported.

## IV. PUBLIC INVOLVEMENT AND AVAILABILITY OF JUSTICE

Governments can involve the public in the process of making environmental decisions by going beyond just telling them regarding the state of the ecosystem and the fact that choices are being made about the environment. Examples of such decisions include which adaptation plans or best practices for reducing greenhouse gas emissions. Four stages of more engaged public participation are recognised by the IAPP. Governments pledge to inform the public, to "listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision" (IAPP, 2018) and to "obtain public feedback on analysis, alternatives, and/or decisions" when they consult with the general public. Governments aim to "work directly with the public throughout the process to ensure" that public participation is earned that the goals and concerns of the public are regularly recognised and taken into account (IAPP, 2018). When governments "partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution," they are engaging

in public-private collaboration (IAPP, 2018). Ultimately, when governments "put final decision making in the hands of the public," enforcing whatever choice the pertinent public aspect reaches, they empower the people (IAPP, 2018). Depending on the circumstances, the environmental laws of the US, the EU, and the Netherlands all fall somewhere along this spectrum of public involvement. Additionally, they distinguish between the appropriate "public" in various circumstances.

### 1. Union of Europeans

Public interaction is covered under Articles 6, 7, and 8 of the Aarhus Convention. These clauses make a distinction between the “public” and the "people in question." Non-governmental organisations that promote environmental protection and comply with all applicable laws are considered to have an interest for the purposes of this definition. This is a crucial distinction since, for example, in the Netherlands, public engagement opportunities are occasionally restricted to the relevant public.[9]

Crucially, the Convention stipulates that the impacted public must be informed and given the chance. Accordingly, "early in an environmental decision-making procedure, and in an adequate, timely, and effective manner, the public concerned shall be informed, either by public notice or individually as appropriate" (art. 6(2)). Such a public notice must specify the proposed activity, the nature of the potential decision, the planned procedure, the availability of pertinent environmental data, and whether the proposed activity is subject to a national or transboundary impact assessment procedure. Furthermore, each Parties shall demand that any information pertinent to the decision-making be made available to the public for examination upon request, without of charge, and as soon as it becomes available, if authorised by national law (art. 6(6)). The decisionmaker is also required to notify the public of the results of the public's participation as well as the final decision. Planning, programmes, and policies pertaining to the environment are governed by Article 7, which also controls public participation in those activities (UNECE, 1998: art. 7).

### 2. The Netherlands

The minimal guidelines for public engagement in governmental decision-making are provided by the Netherlands GALA. Though more specialised environmental regulations may offer further protection, GALA is applicable to all government decisions and guidelines for taking

[9] Agnes Gkoutziamani, Public Participation, a way to be at the heart of environmental democratic governance, https://yeenet.eu/public-participation-a-way-to-be-at-the-heart-of-environmental-democratic-governance-legal-seeds/

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part in or being exempted from the generally applied regime of public engagement. Two significant prerequisites for public involvement are established by GALA: the PPP (GALA div. 3.4). GALA's requirements for public engagement are guided by the concepts of meticulous planning, balancing of interests, and justification of choices (Addink, 2019). According to these guidelines, an administrative body that has the capacity to make decisions must: promote the general welfare; ensure that all relevant information is available before making a decision; be cognizant of regional inclinations and principles; make sure that all interests have been taken into account; and justify the decision.

A decision that directly impacts a particular person, actor, or small group of people is entitled to a hearing under GALA (GALA articles. 4.7 & 4.8). An example of this would be the denial of a permit for a windfarm or renewable energy project. Justice is always available to this actor in the shape of an opportunity to challenge that ruling. On the other hand, When more stakeholders are impacted by a government decision, such as when deciding whether or not to locate a nuclear facility or wind farm, the PPP rules the public participation process (GALA div. 3.4). Administrative authorities may also employ the PPP if they believe these processes are suitable, although it is necessary for specific decisions (GALA art. 3.10; Wertheim, 2019).

### 3. The US

In the US, decisions on the environment are typically divided into two categories: those that primarily impact people and those that have an impact on the public at large. Environmental and administrative law in the United States grant the public broad permission to engage in both types of processes and frequently to choose their parameters. People have the right to participate in government decision-making when such decisions directly impact them. Such individuals typically receive significantly more comprehensive participation privileges under the federal and state APAs. For instance, under the federal APA, decisions are government actions, such as licencing, permitting, and enforcement, that have an impact on a single person or small groups of related individuals. As previously mentioned, the majority of federal adjudications are formal in nature, and as such, the APA prescribes trial-like procedures with an impartial arbiter, stringent restrictions on formal evidence filing, ex parte conversations, sworn testimony, and rulings that are solely according to the record that was made. But in these processes, the government must also give "all interested parties" the chance to present information, defences, and proposals for settlement and discussion.[10]

[10] right to participate in environmental decision-making, https://environment-rights.org/rights/right-to-participate-environmental-decision-making/

Because these proceedings are trial-like, public participation in them amounts to participation of the general public in governmental decision-making, which may even qualify as partnership if the decision-maker takes into account the advice, recommendations, and settlement negotiations of the participants.

## V. CONCLUSION

The US, the EU, and the Netherlands offer a first glimpse of how equally-functioning governments or comparably dedicated to allowing public engagement when making decisions on the environment nonetheless do it in legally distinct ways.[11] This comparison also shows that various legal frameworks have the ability to:

(1) impose fundamental standards for public engagement, which can change depending on the setting;

(2) provide government organisations latitude to try out various forms of public engagement; and

(3) give people and non-governmental organisations the power to demand new or alternative forms of governance.

Accordingly, regulations in the US, the Netherlands, and the EU structure environmental public engagement in a broad comparable manners. For instance, all three jurisdictions have legal tools that guarantee the legitimacy of decisions made by administrative agencies by granting access to courts for at least the individuals and entities most directly impacted by those decisions, notification of official actions, the opportunity to consult on suggested decisions, and access to governmental information (inform). However, distinct modes of participation also arise here.

As a result, administrative decision-making that has broader applicability is legally distinguished from governmental acts such as permission and enforcement that have a direct impact on one or a very limited number of individuals or other organisations in both the US and the Netherlands. People in the former group must frequently be involved in the process of determining decisions by governments, enabling them to suggest the within the parameters of an authorised activity or to present data and arguments against agency recommendations. Contrarily, for the latter group, public involvement is typically restricted to offering feedback on behalf of the authority or agency planned decision, falling well inside the consult spectrum. Although the administrative agencies in the US and the EU are required to actively react to

[11] Public Participation in Environmental Decision-Making: Introduction to Public Participation, https://www.eli.org/research-report/public-participation-environmental-decision-making-introduction-public

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these views, it is unlikely that the agency's choices would be significantly impacted by this late-stage consultation.

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