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Public Participation: A Bottoms-up Approach to Lawmaking and Enforcement

by Marianne Dellingar

A rab Spring. Occupy Wall Street. Protests against austerity measures in Europe. Around the world, people are unhappy with the way their governments govern. The call for legislative change as well as more government accountability and transparency sounds loud and clear. This holds true in the environmental arena too. With the world population’s having just hit seven billion and remaining on a steep incline, the demand for living space, water and other scarce natural resources is intensifying sharply around the world, including California. How are decisions about how to allocate such resources best made without spurring even more dissatisfaction with government lawmaking?

One solution is proposed by the UNECE Aarhus Convention, which just celebrated its tenth anniversary. The treaty was adopted in order to grant the general public broader and clearer rights to access to information, justice, and public participation in relation to government decision-making processes on issues significantly affecting the environment. In this context, “participation” means access to information, the right to comment on proposed decisions, and the notion that law and policy-makers should take such comments into serious account before making decisions. The term does not yet, however, cover actual co-decision making powers.

But why bother with public participation when it is, after all, the job of our governments and elected lawmakers to take our best interests into account? Recognized advantages of public participation include the possibility for better substantive decision-making by allowing for early feedback from affected stakeholders who can contribute with both highly specialized and localized knowledge. A greater amount of compliance with new legal provisions is ensured through better and early consensus-building.

Drawing a parallel to business life, employees have proven to be more likely to comply with policies that they personally resist as long as these were made using principles of transparency and democracy. Above all, it seems logical and fair that the general public should have a right to participate as much as possible in decisions that affect them. Public participation is thus considered one of the fundamental elements of good governance.

There is, however, a downside to public participation as well. For example, feasibility concerns abound. Some fear too much meddling by a large amount of highly motivated private individuals and their non-governmental organizations. This concern has so far proved futile, at least under the Aarhus Convention where private parties have shown remarkable self-restraint in the number of requests for review of treaty observance presented to the Compliance Committee. Some fear tyranny of the majority, where strong interest
groups could coerce governments into benefiting the groups over what may better serve the public interest. Some are concerned about an even greater risk of the “capture” of government entities by special interest groups than is currently perceived to be the case. In this connection, it is important to bear in mind that under the Convention, the “public” comprises private individuals and their organizations, including both business-interest and public interest NGOs. Kofi Annan and other experts have stressed the importance of involving both civil society watchdogs and commercial enterprises in greening our economy.

In short, public participation requires much willingness to think innovatively and inclusively, instead of in traditional “us-versus-them” ways, but is considered an overall success. Under the Aarhus Convention umbrella, even nations without strong democratic traditions, such as Belarus, have indicated their willingness to improve environmental laws substantively based on input obtained through the Convention procedures.

Today, public participation requirements are incorporated in legal instruments as diverse as U.S. and European Union legislation, at least one national constitution (that of Thailand) and numerous international agreements such as the NAFTA, the World Trade Organization’s dispute settlement mechanism, and the World Bank’s participation and civic engagement group. In the United States, the NEPA, the Administrative Procedure Act (“APA”), and the Clean Water Act feature public participation provisions. So does state law in New York, Connecticut, Rhode Island, and California. For example, the California APA requires rulemaking agencies to “involve” the public through hearings and commenting and to “consider” public input on proposals. In comparison, the Aarhus Convention requires governments to take “due account of” the public participation. However, because these requirements are so vague, it is difficult to ascertain whether or not they have been complied with. The requirements could and should be clarified. Further, the California APA mentions concerns regarding “create[ing] or eliminat[ing] jobs and businesses” as well as “public health, safety, or welfare,” but omits sustainable development or a green economy. Given today’s knowledge about the importance of the latter two concerns, the law would arguably be improved by incorporating similarly specific requirements for agencies to take these aspects into consideration.

Further, law without clear and strong
enforcement mechanisms is arguably not effective law at all. The California APA allows for judicial review of the agency’s authority to adopt particular regulations, but does not state who has standing to challenge such decisions. California standing requirements are considered more accessible than the federal equivalents. Here, the vindication of a “public interest” may suffice. In comparison, the Aarhus Convention specifically allows any member of the public—even individual citizens—to trigger review of alleged cases of non-compliance with the procedural requirements for public participation. This was a groundbreaking requirement when the Convention was adopted. Other treaties typically only allow such cases to be submitted by the countries themselves. As mentioned, this has not led to any gatekeeping difficulties under the Convention as NGOs have submitted only a reasonable amount of cases for hearing. Such specific and clear standing requirements could thus be incorporated into California law as well with appropriate limits for feasibility reasons. In short, while California does take public participation into account to some extent, it is not clear whether there really is much “bite” to the relevant requirements. Much could be learned from the Aarhus Convention which, although not perfect, aims much more specifically at a grassroots, citizen-focused approach to lawmaking and enforcement.

People around the world yearn for their countries to follow this approach and often seek to emigrate from those that do not. For example, one young Russian IT professional recently declared that she was packing her bags and moving to Canada, declaring, “I don’t see how I can change things [here in Russia], and I don’t want to waste my youth on it.” This presents not only a brain drain emigration issue for some countries, but also adds to the immigration pressure on other countries such as the United States. We should make sure that we improve our public participation provisions meaningfully to set an example for other nations and put pressure on them to do the same. The USA is a member of the UNECE region, but has not ratified the Aarhus Convention. Doing so would likely help create a race to the top within environmental democracy and other democratic issues, rather than one to the bottom. The Convention applies to nation states, but addresses governments at both “national and regional level,” so California and other states with public participation provisions would be expected to follow the Convention requirements. Of course, they would be able to decide themselves exactly how to do so under principles of state sovereignty. States without public participation laws would likely have to adopt such or at least be able to demonstrate how they otherwise observe the Convention. Although California and the United States currently already allow for much more citizen involvement than many other nations, we still can learn from the democratic mistakes made by others as well as from how some nations seek to solve these through public participation; the high mark for modern democracy and the way of the future.

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