

Background Paper on "Public Participation and Collaboration"

Contribution to COST-Action E19

"National Forest Programme in a European Context"

DRAFT

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The challenge of creating *participative structures in decision-making* that will help fulfil the goal of *sustainability* - equity in regard to democracy - is reflected in the increased attention devoted to participatory elements in the context of both domestic and international law and policy. The concept of sustainability has in the last few decades also been the major goal of forestry and forest sciences – drawing from leading principles in global and national development strategies. The traditional concept of sustainability in forestry - focusing on economic efficiency - has remained too narrow and unable to accommodate with the new environmental and social demands forestry is facing today. Today we have realised the close and inevitable connection between ecological, economic and social sustainability - i.e. the recognition of the three E's of sustainable development: *Ecology, Economy and Equity* – emphasising the emergence of participative elements in recent international instruments.

1. The concept of public participation

1.1 A multi-stakeholder process

The importance of giving public participation *a contextual application* is obvious, and we can conclude that public participation only take on a concrete form first when applied at *the national level*, where consideration is paid to a country's political tradition, legislation, and the structure of forest ownership. The contextual application then enhances, by allowing *a subjective dimension* into decision-making (a dimension of lay knowledge and, for example, the insights of local interests and traditions) – the strength of participation by placing the problem or conflict in another context, lending it a different perspective. Ultimately the participative approach should function as *a civil society dialogue*, and public participation can – drawing from the Agenda 21-concept – be viewed as *a grassroots approach* in decision-making that leads to collective and constructive activities in the management of natural resources. But participation in the sense that is discussed in this background paper, ought to be more. A full right to participation includes both *consultation, negotiation* and *a certain limited right of decision-making*.¹

1.2 Defining 'the public'

'The public' can in this context be defined as "a vast and heterogeneous group of people or stakeholders, organized or not, who are concerned by a specific problem or issue",² whereas the concept discussed in a more *specific* participatory process is better defined by using the generic concept of 'stakeholder', divided in two categories: partly as "commodity and producer interest groups" (e.g. forest owners, forest industries, tourism and leisure industry), and partly as "citizens and socio-cultural interest groups" (e.g. individuals, environmental NGOs, rural communities, indigenous people, various associations of recreation, sporting, hunting).³ In international conventions 'the public' is commonly referred to as "one or more natural or legal persons",⁴ while 'the public concerned' is defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making".⁵

1.3 Defining 'participation'

As participation has been furthered by the development of new norms and perspectives encouraging a broad-based, *bottom-up approach*, it may be fruitful to embark from the grassroots level when defining participative processes in forest management as a tool "to pursue an open, interactive and people oriented everyday management and planning philosophy" where nature's potential, economic aspects of various activities as well as the values and expectations of citizens and society are all taken

into account.⁶ A definition viewed as a more 'direct' form of participation has been agreed upon by the FAO Team of Specialists: "a voluntary processes whereby people, individually or through organized groups, can exchange information, express opinions and articulate interests, and have the potential to influence decisions or the outcome of the matter at hand."⁷

Efficient participation also requires a *procedure* resting upon transparency and fairness, and this calls for a structured process, a framework, not least important in facilitating a dialogue based on equality between the different stakeholders. This implies a movement towards methods of planning as *a solution to conflict, negotiation, learning, communication and adoption*; methods involving less top-down steering aiming at more negotiation between parties to secure long-term programmes for sustainable management, while not neglecting the market forces.

1.4 Dialogue and negotiation

Here *dialogue* can be seen as an important requirement of learning and a corner-stone in a participative structure more focused on understanding issues and arguments than forming strategic positions. This allows the participants to get beyond initial polarization in the search for a common ground. If dialogue provides us with a structured process and "a framework for communicative action and interaction between the participants"⁸, *negotiation* has different aspects. Firstly, it may be looked upon as a more 'interactive'⁹ form of participation than dialogue, increasing the participants' knowledge of problems and solutions, bringing forward possible options to be studied and providing a more solid base for the final proposals. Hence, negotiation can be a positive means to reach understanding, inducing greater participation of those interested in a process of give and take. Secondly, another aspect is however it also may entail problem *solving*, involving mainly public interests and strong group interests, which may reduce the process to *mere formality*, excluding other interests and more general participation. Then the process as well as the outcome will more likely be a result of conflict solving and mediation, whereas the final result will be determined by the relative powers of the different actors and whether they know how to use their power in the negotiation process.¹⁰

2. The rationales for public participation in environmental decision-making

The attention devoted to participatory elements in the context of both international and national environmental law and policy, was enhanced and manifested at the 1992 Rio Conference on Environment and Development (UNCED).¹¹ The goals of UNCED: a broad notion of participation in decision-making, access to environmental information and access to courts, was furthered by the Aarhus Convention of 1998¹², which is currently most detailed and advanced treaty on public participation. The rationales and explanation for the development of public participation in environmental decision-making are expressed in the Aarhus Convention through three 'pillars', or categories of arguments:

- the first rationale, a pragmatic policy argument drawing on *environmental concern*, argues that the involvement of non-state actors may not only contribute to 'making bureaucracy think', but that it also may enhance the informational basis as well as the ongoing scrutiny of environmental matters, given the valuable lay knowledge and subjective perceptions and insights provided by the public;
- the second argument, addresses the deductive aspect by applying the norms and notions of international *human rights law* for the introduction and requirement of participative measures. Participatory claims could be argued to draw from four established human rights concepts, where especially the right to political participation could provide a starting point and a conceptual basis for the rationales for public participation at large in environmental matters;

- the third rationale argues that public participation is relevant in an environmental context because it constitutes a prerequisite for *legitimacy* (and thus acceptance of the law, the rule and the decision). Public participation here is placed in a broader context, relating to the democratic aspect of participation. It also reflects structural changes relating to a growing value pluralism creating *a normative shift* that, in turn, has affected legitimacy factors. A question that must be asked in this context is: Are participatory elements in decision-making processes *essential* legitimacy factors? What makes a policy, a programme or a decision legitimate and thus accepted by those affected or concerned? This third rationale is especially important as democracy – and thus legitimacy – is a precondition for sustainable development.

2.1 Practical impact: a transition from 'making' decisions to 'getting' decisions

While the notion of public participation has been influential in principle, *the practical impact* has yet been less effective. Thus, public participation can, in different forms, provide a useful and creative means for contributing to and influencing decision-making and for implementing environmental laws. A variety of dialogue processes and stakeholder coalitions can contribute to, for example, forest management; e.g. *regional* dialogues initiated to ameliorate conflicts between the values of those in favour of conservation and those of established stakeholders. Or, in other cases, dialogue among stakeholders can be highly *localized*, while some might operate on a larger regional or even *national* scale. The key issue is *communication*: participation as a communicative mechanism may foster a productive dialogue *to break down misconceptions and set common goals*, that is to say a transitions from 'making' decisions to 'getting' decisions by convening and providing leadership to different stakeholders. In order for public participation to emerge, there need not be a specifically defined project, event or occasion – continuous observation by the public of the authorities' environmental information is also a form of participation. Important to notice is though the distinction made in the Aarhus Convention between participation in decision-making processes concerning (i) specific activities; (ii) plans, programs and policies; and (iii) the drafting of generally applicable regulations and/or legally binding normative instruments.¹³

2.2 The benefits of a participative structure in forest decision-making processes

Land management is thus a game with many actors, all pursuing different goals. In contemporary forest management, multipurpose usage must consequently be taken into consideration in the attempts to reach a reasonable *balance* between overlapping but also conflicting interests; between requirements for high yields and demands for conservation of a good environment – arriving at a balance that utilises the full capacity of the forests in the best possible manner. The difficulty lies in opinions being divided on *how* this balancing act should be achieved and how much weight each of the different objectives should carry. Hence it may be difficult to arrive at a united view, because what is needed for one purpose must be taken from another, unless the different uses can be superimposed; that out-door activities and conservation demands can be met without loss of production and so on. However, certain land requirements can only be satisfied by the exclusion of others. Participation could then provide a means of gaining *an overall view* of the various interests and conflicts surrounding land use – departing from a common approach rather than a divided, sectoral one, which could create a basis for arriving at a balanced solution, at least *acceptable* to all parties concerned

Knowledge of forest ecosystems has grown rapidly during the last decades, initially within the field of forestry, and later in ecology. Developments in these fields have led to a new paradigm for forest custodianship reflected in *process, ecosystem and adaptive management strategies*. The revised and advanced perspectives allow forest administrators, scientists, conservationists and forest owners to better understand how forest use affects the environment. Today the focus in the forestry sector has moved toward the concept of long-term sustainability of forest ecosystems; the maintenance and restoration of ecosystem integrity and biodiversity. This revised approach to forest management calls for innovation and use of new silvicultural methods, acknowledging a need to broaden the scope of forest management and consider multiple forest values, uses and functions, and hence the introduction and use of *collaborative processes*.

Such collaborative 'multi-stakeholder' processes could provide an input in forest decision-making processes concerning *specific activities* regarding:

- areas with significant natural values (the role of forestry v. conservation)
- protected areas
- timber harvest methods and volumes (introducing new methods etc)
- urban forests (also areas of especially aesthetic value)
- tourist enterprises
- areas with 'overlapping' activities: logging, hiking, hunting, recreation
- overall planning situations

and the advantage of introducing a participatory approach could then be:

- to avoid and anticipate possible conflicts
- to predict the impact of proposed actions (reactions and concerns)
- to pass on and gather information
- for the authorities to learn about new ideas and alternatives to proposed plans and actions; to induce 'local expertise'
- to resolve ongoing conflicts

2.3 Advantages and disadvantages of a participative approach

Most environmental decision-making processes will benefit from introducing a participative structure, because if the people affected by a policy, a program or a plan are not involved in the process, the implementation will likely run a greater risk of being contested or flouted. In order to create greater acceptance for decisions, transparency and communication are inevitable mechanisms; people generally make reasonable demands and respect the solutions reached, if the viewpoints they put forward are treated with respect and thought.

There are, though, some weaknesses related to this approach which must be acknowledged to obtain a balanced discussion. A criticism sometimes voiced is that "participatory elements are *time-consuming, obstructive* and *costly* [emphasis added]"¹⁴. These economic arguments must be confronted to the extent to which participatory elements enhance democracy - and, being a well known fact, institutions and procedures that foster democracy in a civic society *are* often costly and time-consuming. On the other hand, participation may well foster economic efficiency, by promoting *rational and shorter processes* through (in fact) less obstruction and mutual understanding, and by promoting *more environmentally sound decisions* gaining sustainable use of natural resources. Participation may also be time-saving as a means 'to meet the conflict': resolving ongoing conflicts and anticipating new ones, considering both short-term and long-standing issues. An important aspect of participatory *conflict resolution* has been discussed by Carlman¹⁵ who notes that certain conflicts can, through expanded participation implying enhanced communication and transparency in the process, be revealed as "*false*" conflicts - opposed to "real" conflicts which will remain obstacles even after making the arguments structured and the material and facts transparent. Such "false" conflicts can then be resolved and diminished by revealing their true character.

That public participation could be a means to 'meet the conflict', a conflict that actually might be a mismatch in perceptions, "demonstrates the power of *consensus* in joining former adversaries in pursuit of common interests".¹⁶ Among some environmental organizations, though, there is a concern that consensus obtained through participative procedures can mask a 'sell-out' of environmental protection and co-optation by resource industries, or even that national environmental laws may be comprised through a collaborative process.¹⁷

3. Operational criteria

3.1 Public participation in reality

From a global viewpoint one might say that participation is about *finding consensus in diversity*, representing immense diversity with widely varying goals, reflecting a normative shift toward multiple-use values, which recognizes a wider range of forest values and hence substantially changes the goals of forest management. Though there is no ready, fixed precise manner in which participation is to be carried out, it is of the utmost importance to ensure that the participative process is not just an illusory spectacle, delivering nothing more than the appearance of democratic participation, nor merely a *pro forma* matter. Participation must - to have a democratic foundation - have a *decisive influence* on the outcomes of the decision-making process.

Of course the most fundamental demand for the practical impact to be successful is that there is a sincere desire among decision-makers, authorities, forest owners etc., to pay attention to the beliefs and opinions of various groups and individuals. In this way the process can be decentralised and decisions can be more solidly established. One aspect is how costs and benefits can be distributed, as well as decisions receiving greater acceptance in that the interested parties feel integrated in the decision-making process.

How can we assure that participation is *not merely pro forma*? In other words, how can it be ensured that public participation actually influences decision-making?

Without being able to guarantee such influence, the Aarhus Convention sets out five means for enhancing the impact of participation; a general framework for *transparent and participatory procedures*:

1. First, it obliges the parties to provide for *early* participation, when all options are open and effective public participation can take place. This is essential, since the later the public gets involved, the more difficult it is to influence the decision.
2. Second, early in the decision-making procedure, each party *must inform* the public concerned, by public notice or individually, about the proposed activity, the nature of possible decisions, the envisaged possibilities and procedures for participating in the decision-making process, time-frames and so on.
3. Third, the public shall be allowed to *submit comments*, either in writing or at hearings or inquiries.
4. Fourth, each party shall ensure that in its decision *due account is taken of the outcome* of the public participation. This point reflects a critical moment in the decision-making process¹⁸
5. The fifth means for avoiding mere pro forma participation is provided by the right to have the decision *reviewed by a court*. Any member of the public having a sufficient interest or alleging impairment of a right shall be ensured access to a review by a court of law or an equally independent and impartial body. In this sense, public participation and access to courts are closely linked¹⁹

The degree of participation thus varies, and given these suggested five means we can discern three stages in the participative decision-making process:

Stage 1: INITIATION²⁰

For a *high degree* of participation at the initiating stage, before the actual procedure starts, the following preconditions are to be recognized:

- political commitment to *use* the outcome
- sufficient *financial* resources to support participation
- *cross-sectoral* representation
- (the use of an) *independent* moderator/ facilitator

- mutual agreement to *share* information
- procedures in place to *monitor and evaluate* the process
- recognition that it is a *long-term, adaptive and iterative process*

Stage 2 : THE PROCESS; Procedural aspects

For a *high degree* of participation, the process (itself) should provide for:

- *early* participation, when *all* options are open
- *true* opportunity to take part in the process
- a *broad* understanding of who may act (to protect a certain interest; standing)
- *transparency* and *openness*
- access to *all* relevant information – each party must inform the public concerned
- that the requirements for participation are *institutionalised* and normally expected
- that the process has a '*code of conduct*', i.e. procedures dealing with minority viewpoints

Stage 3: SUBSTANTIVE ELEMENTS relating to the outcome of the completed process

For a *high degree* of participation in regard to the outcome, the following elements should be secured:

- the public shall be allowed to *take part* in developing the actual plan or decision (to submit comments)
- each party shall ensure that in its decision *due account* is taken of the outcome of public participation, and that this is *clearly shown* and substantiated/documentated²¹
- the public shall have the right to *legal review* and the right to *appeal*
- the *follow-up monitoring* of implementation measures shall be open and transparent
- the public shall have a *decisional*, not just consultative role

3.2 Participation: the art of the possible?

As *the impact* of public participation as a means to find a consensual balance to a great deal is dependent on a holistic approach: the normative structure of the current political context, the environmental problem being addressed and the structure and design of the national legal system and its institutions (including the implementation of its substantive norms) will be decisive for its effectiveness. If this normative structure allows for the balancing of various interests, “participatory processes may enhance the environmental interests, while counter- interests may reduce the standard of environmental protection in favour of other concerns, such as employment and economic growth”.²²

In sum: why is public participation in natural resource decision-making necessary?

The need for a framework to incorporate interest groups' values and needs into functional management systems is unquestionable. This, of course, has yet to be institutionalised in forest policy and management practices. Participation is not just as a means but also as *a model for involving* those concerned: *a pro-active approach* to create more understanding for objectives and problems and possible ways to solve them. From a *practical*, 'the art of the possible' perspective, participation is a set of procedures and methods for collaborating and learning, a means to increase knowledge of the factual situation, bring forward possible options to be studied, and given this, be a help in deciding what to do next and a base for discussions and negotiations. Optimally the outcome of the participative process will help create more qualified operative decisions in the present situation, and thus provide a more solid base for the final solution. From a *general* point of view, public participation *is* an essential part of a democratic society, where the different aspects of participation: *transparency, flexibility* and *access to information*, are the very notion of democracy itself. Hence, the increased belief in public participation as a means for pursuing environmental interests and a sustainable use of natural resources, reflects indeed an enlightened aspect of

democracy, providing a basis for thinking in alternatives. Participation can contribute to the formulation as well as the implementation of environmental policy and law. It is as relevant in decision-making processes concerning general plans and programs (for example National Forest Programs) as specific projects.

¹ Mattson, H. (1985) *Influence in Planning*, p.15. Stockholm: Royal Inst. of Technology, Dept. of Real Estate Planning.

² Following the definition established by the FAO/ECE/ILO Team of Specialists on Participation in Forestry (2000) *Public Participation in Forestry in Europe and North America*, p. 31, Geneva: ILO.

³ Categories established by the FAO/ECE/ILO Team of Specialists on Social Aspects of Sustainable Forest Management (1997) *People, Forests and Sustainability: Social Elements of Sustainable Forest Management in Europe*, p. 10, Geneva: ILO.

⁴ The 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 30 I.L.M. (1991), art. 1(x) [hereinafter the Espoo Convention].

⁵ The Economic Commission for Europe (ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998 (hereinafter the Aarhus Convention). The Convention should be regarded as a *minimum* model, and it is binding for the countries which have ratified. For treaty text, see UN Doc. ECE/CEP/43. In contrast to the Rio Declaration though, the Aarhus Convention does not deal with community rights of indigenous people in environmental decision-making, at art. 2(4)

⁶ Loikkanen, T, Simojoki, T. and Wallenius, P. (1999) *Participatory Approach to Natural Resource Management. A Guidebook*. Finnish Forest and Park Service, Metsähallitus. Kuopio: Suomen Grasfiset Palvelut Oy LTD.

⁷ Team of Specialists on Participation in Forestry, *supra* note 2, at 9.

⁸ Andersson et al. (1999) *Transparency and public Participation in Complex Decision Processes – Pre-study for a Decision Research Institute in Oskarhamn*, p. 25. Stockholm: Royal Inst. of Technology.

⁹ Loikkanen, *supra* note 6, at 21.

¹⁰ Cf. Bacharach, S.B. and Lawler, E.J. (1980) *Power and Politics in Organizations*. San-Francisco: Jessey- Bass.

¹¹ United Nations Declaration on Environment and Development, 13, June 1992, UN Doc. A/CONF. 151/26/Rev. 1(1992) 31 I.L.M. 876, (hereinafter

Rio Declaration) stating in principle 10 that “(e)nvironmental issues are best handled with the participation of all concerned citizens”. Of great importance was the linkage between public participation and sustainable development, influenced by the report of the World Commission on Environment and Development (1987) *Our Common Future*, pp. 21,65 326f. Stockholm: Prisma.

¹² *Supra* note 5.

¹³ The Aarhus Convention, *supra* note 5, at art. 6: public participation in decisions on *specific activities*; art. 7: public participation concerning *plans, programs and policies* relating to the environment; art. 8: public participation during the preparation of *executive regulations* and/or generally applicable *legally binding normative instruments*.

¹⁴ See the discussion on justifications for a participatory approach in Ebbesson, J. (1997) The Notion of Public Participation in International Environmental Law in Brunnée, J. and Hey, E. (eds) *Yearbook of International Environmental Law*, Vol. 8, p. 62ff. Oxford: Clarendon Press.

¹⁵ Carlman, I. (1992) *Att acceptera eller inte acceptera*. pp. 8-13, 90-94. Björklinge: Åmyra förlag.

¹⁶ See Poffenberger, M. and Selin, S. (eds) (1998) *Communities and Forest Management in Canada and the United States. A Regional Profile of the Working Group on Community Involvement in Forest Management*, p. 109. WG-CIFM.

¹⁷ These fears are most evident among environmental NGOs in North America, and also reveal the growing division between some national environmental organizations in the United States.

¹⁸ This element, stating that the process should give the participants a *true* opportunity to participate, has been fully regarded and manifested through the EU Directive 97/11/EG, and as well reflected in the new Swedish Environmental Code. In the Aarhus Convention, *supra* note 5, this requirement reflects though a weak point in the process, as its not very precise and might provide for leeway for the decision-making authorities. The decision-making authority can, however, not simply disregard the comments and opinions expressed, and it must also be evident in the final document that the authorities, in reaching their decisions, have taken into consideration the public comments and contributions.

¹⁹ It is a matter for *national law* to define what constitutes a sufficient interest or an impairment of right, but this definition must be consistent with the objective of 'wide access to justice' that is contained in the Aarhus Convention, *supra* note 5. Regarding 'standing', the Aarhus Convention does not require the person 'concerned' to be more affected or more likely to be affected than the public in general. If the entire population in an area is likely to be affected, then all such persons have the right to participate in the relevant decision-making procedures and submit any decision taken to a court for review.

²⁰ I base the following recommendations for participatory decision-making processes on various international instruments for participation: e.g. the Espoo Convention, *supra* note 4; Agenda 21, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/Conf.151/26, Annex II; the Aarhus Convention, *supra* note 5; EU Directive 97/11/EG, as well as practical application similar to the ideas voiced by Margaret Shannon and Tove Enggrob-Boon at the COST Action E19-meeting in Aberdeen, March 2001.

²¹ *See supra* note 18.

²² Ebbesson, *supra* note 14, at 59.