

## 14 IN FAIRNESS TO FUTURE GENERATIONS

### *Building Effective Public Participation*

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#### 14.1 IMPORTANCE OF PUBLIC PARTICIPATION AND CAPACITY BUILDING

Environmental law is typically a top-down construction: the hierarchy starts with great values in international environmental treaties, regional rules, national constitutions, national environmental programs, environmental codes and end up in several lower level regulations such as acts, decrees on environmental protection in its narrower sense and on public health, forestry, nature protection, land protection, water management and so on – where the initial great values are not fully followed or sometimes rather denied. The aims of higher level norms are especially undermined by lower level norms when other social and economic interests are claiming their primacy<sup>1</sup>. Participation of the members and organisations of the public in decision-making is one of the best solution that counterbalance these negative developments, especially on local level, because the control function of community procedures and networks filters the selfish, short-sighted views. This opinion was reinforced by the International Council for Local Environmental Initiatives, saying that local government, as the lowest level of government, together with local citizens play a key role in local sustainability issues. However, it is argued, citizens and community groups will require support from local governments to be able to participate effectively<sup>2</sup>. Actually, this need for support seem to be mutual, local governments and their constituencies shall enter into a virtuous circle of more and higher quality public participation, stronger decisions and more effective implementation, thereafter more public support to the local governments and so on.

In addition to the local level, national level and international level professional non-governmental organisations (NGOs) represent a further indispensable condition of establishing and implementing solid environmental policies. The aims of environmental laws and programs cannot be reached without the contribution of the set of the mainstream

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1 Fulop S., Kiss Cs.: Coherence problems in the Hungarian energy policy – the road to a more sustainable energy sector through clarification and democratic engagement, Böll Foundation, 2016, p. 1-64 ([www.emla.hu/sites/default/files/B%C3%B6ll%20Energy%20Study%20full%20final%20web201602.pdf](http://www.emla.hu/sites/default/files/B%C3%B6ll%20Energy%20Study%20full%20final%20web201602.pdf)).

2 Cuthill, M., Fien, J.: *Capacity building: Facilitating citizen participation in local governance*, Australian Journal of Public Administration 64(4), 63-80, 2005, p. 1-18 (p. 63).

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environmental NGOs and local communities (grassroots), as well as, most generally, without the people with environmental consciousness. NGOs and local communities approach the environmental conflicts in a way that is different from the authorities, their positive (problem oriented, holistic etc.) attitudes and motivation are necessary complements of the official and professional ones of the authorities and their experts. The civil actors are not bound to the 'here and now' interests of business and political decision-makers, therefore they are the best sources of establishing the long term interests of the given communities in the given environmental conflicts. It is the decade long experience of the public interest environmental law groups like EMLA<sup>3</sup> and others within their European network called Justice and Environment<sup>4</sup> that the standpoints of local communities and the NGOs that support their cases are the best proxies to the interests of the future generations.

Everyone has its role in the network, but all agents of public participation have their respective weak sides. Local communities make the best clients where they fight for their immediate environment, for the value (not only financial value) of their houses and their surroundings. However, decision-makers, for whom they might represent a mere nuisance say that they are biased and unprofessional. On the other hand, NGOs, especially large international and national, overly specialised ones might fall into a so called legitimacy trap, where politicians ask if they represent anyone apart from themselves. Naturally, they can escape from this trap, first of all by organising, networking, serving local communities but also by high level preparedness through which they could be partners in more general policy discussions, too.

State interests in public participation are outweighing the alleged disadvantages, out of which few are real and not just a campaign of directly interested administrators or politicians. The environmental community represent the thousand eyes and ears of the environmental authorities. In the Information Age<sup>5</sup> governance is rather transgovernance<sup>6</sup> in the sense that state tasks cannot be solved anymore solely by the state organs, they must be in organic interconnection and continuous exchange with the media, the academia and the general public. Sometimes public participation is institutionalised in environmental protection laws, such as in nature protection laws of many countries where state officials and mostly local NGOs form joint patrols for monitoring and safeguarding precious nature protection sites and species. Public participation is therefore an indispensable element of environmental administration. In order to harness its advantages, public participation

3 See: <http://emla.hu/en>.

4 See: [www.justiceandenvironment.org/home/](http://www.justiceandenvironment.org/home/).

5 See especially in: Castells, M.: *The Information Age – Economy, Society and Culture*, Blackwell Publishing, 2010, p. 1-625 and in Giddens, A.: *Sociology* (5th edition), Cambridge University Press, p. 1-835 (p. 56-59).

6 Töpfler, K. et al.: "Transgovernance – The Quest for Governance of Sustainable Development", Institute for Advanced Sustainability Studies, Potsdam, 2011, p. 1-114.

shall be planned, organised, budgeted, institutionalised in a systematic, measured (by regular feed-backs or indicators) way within the frames of a governmental capacity building program.

When decision-makers complain about the negative sides and poor quality of public participation, they should be aware that their criticism, if valid at all, is in great part targeted to themselves. The quality of public participation depends on the ability and willingness of the concerned communities to take part in the preparation of the decisions with significant environmental consequences in the future. Building the capacities to participate in the most important environmental matters is a basic task of the government, in effect, it is the foundation of good governance. Researching the philosophical foundation for the capacity building framework Cuthill et al. underline that this is a core issue of democratic governance because citizen participation is a basic building block for contemporary democratic society, social capital and sustainable communities.

Such outcomes suggest a self-reinforcing process whereby local governments who support and facilitate citizen participation in local governance help re/build social capital, strengthen democratic governance and facilitate sustainable community outcomes<sup>7</sup>.

#### 14.2 THE AARHUS STORY

Public participation is a relatively new legal institution in the service of sustainable development, it is dramatically in conflict with the earlier legal situation where nobody had any access to administrative cases except the directly interested parties. The question is that this 'legal postmodern' is a longstanding progressive development in our laws or just an episode that will be washed away by a mix of aggressive counter-revolutions<sup>8</sup> (Shabecoff, p. 203) and slow and silent obstruction of the conservative decision-makers. In the law of public participation in environmental decision-making the Aarhus Convention occupies a central position. A regional international treaty seldom has such a carrier. The secret of the Aarhus convention is complex, where the fortunate historical moment of its evolvement and the system nature of its content definitely played decisive role.

The regular conferences of European environmental ministers called 'Environment for Europe' was initiated by the Czech environmental minister Josef Vavrousek (a system scientist himself and member to the Club of Rome). On their third meeting in Sofia, 1995 the ministers accepted the Sofia Guidelines on public participation. Under the pressure of

<sup>7</sup> Cuthill, p. 64.

<sup>8</sup> Shabecoff, P.: *A Fierce Green Fire – The American Environmental Movement*, Hill and Wang, New York, 1993, p. 1-352 (p. 203).

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a strong side event organised by the network of the European environmental NGOs a paragraph was added to the Guidelines in which the ministers requested the UN European Economic Commission to start drafting and hosting an international legal document of mandatory nature in the same topic. Uniquely even in the history of international environmental law, a 4 member coalition of the European green NGOs were allowed to take part in the drafting work. Their proposals were built in the text in many places and the NGO coalition had a strong influence on the spirit and the structure of the convention that was accepted at the following conference of the European environmental ministers in the second largest city of Denmark, Aarhus, in June 1998. The text of the Convention was an ambitious collection of all the elements of public participation that had existed separately in several international, regional and national laws, and these elements were organised into a self-reinforcing system of the three pillars of environmental democracy, namely access to information, participation and access to legal remedies. The three pillars originally had a fourth pillar, capacity building, Article 2 of the draft carried this title for long, but the drafters decided finally to merge these provisions into a general provisions section in Article 3 of the final text.

The Aarhus Convention entered into force very quickly by the next meeting of the European environmental ministers in Lucca, Italy in October, 2002 after the 16th ratification document arrived to the Secretariat. Apart from this, the Aarhus Convention has developed quickly: the Parties accepted a Protocol on Pollution Release and Transfer Registers in 2003 and an amendment on the Genetically Modified Organisms in 2005, in addition to them the SEA Protocol of the Espoo Convention is closely related to the Aarhus Convention, too. An important institutional development happened on the first meeting of the Parties in 2002: the Decision I/7 established a unique implementation tool to the Convention, the Compliance Committee (ACCC). Again, quite exceptionally in the realm of international law, not only the Parties (States and regional organisations of economic cooperation) but the members and associations of the public can initiate the procedures of ACCC. No wonder that the Committee has had by mid-2016 more than 130 cases and their decisions contribute very much to the development of public participation laws all over in Europe. The high prestige of the Aarhus Convention is also underlined by the fact that the Parties keep sending their respective country reports on implementation before all the Meetings of the Parties, almost without exemption.

### 14.3 THE SYSTEM OF CAPACITY BUILDING IN THE AARHUS CONVENTION

As the system nature is one of the key factor of the effectiveness of the Aarhus Convention, the capacity building elements of it can be also collected into a coherent system, even if the final version of the text of the convention do not handle them under one paragraph

or chapter. Actually, capacity building is a horizontal issue, it is strongly connected to all of the pillars as it is to be seen in Table 14.1.

**Table 14.1**

	<b>Information</b>	<b>Organisational-procedural help</b>	<b>Prohibition of capacity destroying</b>
<b>General</b>	1. Environmental, institutional, procedural (3.2, 3.3, 5.2a, 5.3a, 5.4, 5.5a-c 5.7a, b, Preamble)	3. NGO friendly laws, state subsidies etc. (Article 2.5, 3.4, 5.2.c)	5. No. discrimination (Article 3.9, Espoo 2.6)
<b>Individual cases</b>	2. Environmental, institutional, procedural (3.2, 3.3, 5.2a, b.i, ii, 6.2, 9.5)	4. E. g. ensuring standing for environmental NGOs (2.5, 4.8, 6.6, 9.1, 9.2, 9.4, 9.5)	6. No. penalization harassment or prosecution for pp. (Article 3.8)

Tools of capacity building can be divided into two plus one groups: help through the provision of information (first column), institutional help (second column) and refraining from any activities that prevent, hinder the subjects of public participation in their lawful activities (third column). The upper line in Table 14.1 represents general capacity building tools, while the lower line is about capacity building in individual cases, therefore we gain a 6-window matrix. In Window 1 we can speak about general information and in the Window 2 about individual information dissemination. The first window contains environmental education and environmental awareness raising and dissemination of several kinds of environmental information including meta-information (information about the process of participation itself). The second window includes assistance in enhancing the capacity of the representatives of the public to participate in individual cases. In the second column, window 3 about the general institutional help covers all the motions of the governments through which they support the environmental NGOs, while in window 4 the government tries to remove technical barriers before participation in individual cases or strengthen the actual, material capacities of those, who otherwise would not be able or willing to participate in a case. Finally, in the third column, window 5 is about the prohibition of general discrimination amongst the subjects of public participation, while window 6 is about the prohibition of any negative measures that retaliate the participation in a concrete case.

Similarly to the whole system of the Aarhus Convention, all these capacity building tools must act together, forming a coherent system. States shall have a well budgeted, steadily institutionalized capacity building program, within which they create a whole network of legislative changes and practical measurements aiming to elevate the capacity of the public to participate in environmental decision making. Even if only one important chain is missing from the network, the system won't work. Independent from the reason

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why members of the public cannot participate, the effect is the same: whether they do not get general information about the possibilities of participation, do not get specific information about one given environmental problem, do not get enough environmental education to be able to evaluate the actual information or are not motivated enough by being enlightened about the weight of these kind of problems or there are not environmental NGOs to facilitate the public reactions or there are prohibitively high procedural fees and so on. All it can make the system dysfunctional is one missing link.

Once a State acknowledges the usefulness and necessity of public participation and wishes to raise its effectivity with a capacity building system, it shall establish solid legal basis with definite rights and responsibilities for legal actors, it shall create legal procedures, financial background and institutions with well trained and committed personnel. A well designed, operational Capacity building system cannot be credible without feed-back and control mechanisms and mechanisms to measure its effectiveness, too.

While environmental education is properly addressed by public discourses, we do not see the same in connection with the so called *meta-information*, i.e. that set of information about the general operation of the state system which is indispensable for the members and organisations of the public for effective participation in environmental decision-making. The public has to be aware of several items which can be collected into three groups of meta-information:

- i. the *authority system and the persons* within the authority system (the connections amongst the authorities; the structure within the authorities; whom actually they have to turn to; who has the authority to decide certain issues etc.);
- ii. the *information system* (what kinds of information can be acquired and where from; what are the limitations of right to information, such as exemptions, charges, fees; what are the procedural rules of obtaining information etc.);
- iii. the *processes of decision making and the rights and responsibilities* of the participants (deadlines and other time frames; the way the participants can signal their willingness to participate; the procedural motions they can be present at; the eligible evidences and their formal requirements; possible legal remedies involving disciplinary regimes within the authority etc.).

The Convention first provides general instructions about the meta-information in Article 3, Paragraph 3, while other parts of the Convention also require the Parties to disseminate meta-information to the public and give more detailed and definite rules. Meta-information about the administrative system and the persons working in it is required by Article 5, Paragraph 5, Points a), b) and c). In our opinion the Parties should take into consideration the capacity building nature of these paragraphs, therefore the disseminated materials should contain explanatory parts, too, which make the structure and responsibilities of the authority system clear to the public. This requirement is further specified in Article 5,

Paragraph 7, points b) and c). As concerns the quality of meta-information Article 5, Paragraph 2, Point a) gives an exact description of it and the rest of this Paragraph stipulates the necessary organising measures for capacity building. This should be read together with Article 3, Paragraph 2 that itself does not directly advise the Parties about the technicalities of capacity building, but other provisions of the Convention do so, first of all the Parties are expected to create at their authorities the positions of special officials for public participation cases or to oblige the officials who are otherwise in charge of the individual cases in question to offer help to those who want to participate (Art. 5, Para. 2, Point b, Sub-points ii, and iii). Both solutions have advantages and shortcomings, both from the side of the authorities and from the side of the public. The special contact person in a large administrative office can save manpower, leaving the officials charged with the individual cases free from any disturbance from the participants or from those who are considering whether to become a participant or not. The special contact point person can have and develop special skills and knowledge that make him/her more effective in dealing with members of public than any other colleagues would be. After a time he/she develops a good network of contacts, so the information flows can become easy and multi-directional. On the other hand, it is far from being sure that the officers charged with the individual cases and the participants interested in an individual case need and want such a transferring agent. Sometimes the direct contact could be more fruitful and effective. Some might even say that the contact point system creates insulated, 'faceless' bureaucrats. Since both groups of arguments are quite convincing we can conclude that the best method could combine the two, that is at least the larger offices should appoint a community service person, but shall not prohibit that the participants from going directly to the officer in charge, especially if they want to have standing in the given case.

Since the text of the Aarhus Convention does not differentiate consequentially between the general and individual tools of capacity building, I would argue for that the generally sentenced rules of Article 3, Paragraph 3, and Article 5, Paragraph 2, Point a) shall refer to individual cases, too, especially in such cases where the general information does not give satisfactory help. Under the second pillar, the situation is different: the public participation rules of the Convention are naturally about certain individual cases, and as such, their capacity building aspects refer first of all to the individual capacity building tools. Article 6, Paragraph 2, for instance, prescribes giving information about the case and about public participation, keeping in mind the individual cases where the decision-making procedures have started.

As concerns the subjects of public participation, Article 2, Paragraph 4 extends the definition of the public even to those community groups, which are ad hoc, have no solid institutional and legal structure and usually formed to deal with only one local environmental case (grassroots). The state's responsibility towards these groups is double: a passive one, recognition (allowing them to operate within a broad limits of constitutionalism) and

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an active one, support. Support could be direct and indirect. Direct support usually appears in an income at the NGOs, while the indirect support usually prevent them from some expenditures, such as fee waiver provisions or tax reliefs do. The key condition of fairness and effectiveness here is normativity. Any kind of support which allows the state a case by case, NGO by NGO differentiation could be a threat to the independence and unbiasedness of the civil sphere. In case the state insist on using discretionary power (for instance because of some basic procedural principles or simply because of lack of resources), it is highly advised to give to the selection process the greatest possible transparency. Involvement of well accepted mainstream NGOs could be one of the tools of this.

Article 2, Paragraph 5, however, when defining the concerned public gives advantage to the formal NGOs and this differentiation between the two groups of the general public goes along the whole Convention. The leading rule is that in connection with the first pillar, the general public, practically anyone is the subject of the rights, while in connection with the second and third pillar, the subjects of participation rights are first of all the formal NGOs. As concerns capacity building, some measures, especially Article 3, Paragraph 4 concern also only the NGOs.

Even if a central, regional or local government is not willing to give or cannot afford any direct support for environmental NGOs, it could help a lot through creating a friendly legal atmosphere for them. A quick, smooth registration process, simple and short operational requirements, friendly, service oriented control mechanisms (by courts, prosecutors' offices, tax offices and others) can ensure the background of the development of hundreds and thousands of NGOs. The legal regulation of registration of associations, foundations, public interest enterprises and others should be short and easy to understand. The same is true for the processes of registration and control. There is another group of legislation which is necessary in this respect: the guarantees of non-profit economic activities. These are located in tax laws, book-keeping regulations or in separate tax and book-keeping regulations targeting especially the case of NGOs. Finally, it is important that in the personal income, company and other taxation regulations there should be reasonable advantages for those individuals or companies who are willing to support the NGOs. Commitment to long run support should be preferred.

Some laws ensure to the environmental NGOs standing in all environmental cases in which they would like to participate, others ensure them only the position of the *interested* that entails with less than full procedural rights. The Convention in Article 2, Paragraph 5 targets a medium solution with the notion of *concerned* public.

There are several places in the Convention, where legislator advises the Parties to levy or waive procedural fees. Such are:

- i. Article 4, Paragraph 8: "Each Party *may allow* its public authorities to make a charge for supplying information" Here the main rule is seemingly that the information is for free, and in exceptional cases, the authorities are allowed to make charge. Naturally,



- these cases shall be circumscribed well and they have to form an exhaustive list that means that in case of any ambiguity, the information is free;
- ii. Article 6, Paragraph 6 contains a mandatory fee waiver stipulation for all cases of public participation for examination of information relevant to the decision-making;
  - iii. access to justice is 'free of charge or inexpensive' when there is a question of reconsideration of alleged infringements of right to information According to Article 4 (Art. 9, Para. 1) and 'not prohibitively expensive' in other cases of access to justice (Art. 9, Para. 4).

Article 9, Paragraph 5 goes further than fee waiver stipulations in supporting public participation and poses this issue into the context of effective access to justice. There are lawyers who are willing to work *pro bono* or almost for *pro bono* for the public in environmental cases. States could spend some money on encouraging these lawyers. It does not have to be in the form of attorney's fees, but can be special awards, organized possibilities for regular consultations with the best academic lawyers, ensuring participation at prestigious conferences on environmental law, and other incentives which would help to turn more young lawyers towards the tasks of representing – at least part time – the interests of the public and the interests of our common environment.

There is another topic which logically supplements the topic of Capacity building: apart from the activities the states shall do in order to elevate the capacity of the members of the public to participate in environmental decision-making, they also shall refrain from any actions which would result in diminishing or destroying this capacity in harmony with Article 3, Paragraph 8 of the Convention. We cannot say, unfortunately, that this rule has no 'ecological validity' and that there are no cases when environmentalists or local communities would not be penalized because of their activity. In legal literature, for instance, there is a well-known acronym, SLAPP which covers: Strategic Lawsuits against Public Participation. Polluters start slender cases or damage cases against the environmentalists on the territory of civil law, and even they start criminal cases, too, on similar factual and legal basis. Usually there is no other aim of such cases than to threaten the environmentalists and to keep them away from dealing with the environmental issues of great concern.

Starting legal cases against those who acted *bona fidei*, threatening them with litigation or with other physical and material damages – all represent crimes, including blackmailing, abuses of official position, assaults and others. Destroying the capacity to participate is even more dangerous when it is selective according to any traits of the victims. Article 3, Paragraph 9 contains a prohibition on this kind of action. Environmental injustice is a well-known phenomenon states have to fight against. Some groups in our societies have less access to the tools of public participation and as a rule, they suffer environmental and public health damages several times more than other groups. Capacity building programs of the states have to intervene to this unjust situation. There is another topic that Article

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3, Paragraph 9 covers, namely the situation of foreign citizens when they are concerned with some environmental conflicts. Environmental pollution does not stop at the borders of countries, so the legal regulations of environmental protection, together with the public participation stipulations shall form a continuous geographical coverage, too, with no holes and gaps. Apart from the Aarhus Convention, Article 2, Paragraph 6 of the Espoo Convention sets the tone in such situations when it prescribes that the Party shall ensure all the rights to the public of the other affected Party as it ensures to its own public.

#### 14.4 MEASURING ENVIRONMENTAL DEMOCRACY

Members and organisations of the public are not just passive subjects of public participation and capacity building measures of the State but themselves can act as major stakeholders in evaluating and further developing these systems. The powerful international networks of environmental NGOs make this active role especially effective. In 2000 an alliance of four national-level NGOs<sup>9</sup> with the lead of the World Resource Institute, Washington have developed a set of indicators in order to systematically evaluate and compare environmental democracy in the countries of the world. They organised the indicators into four chapters: for the three pillars of public participation and for capacity building. After a pilot research in 9 countries they could show their results in Johannesburg in 2002, and the so called The Access Initiative (TAI) launched its global program which is present in 45 countries today. The very detailed, ambitious environmental democracy index was developed by national environmental NGOs and by independent scientist and in many countries 2-3 consecutive examination has been done, too, in order to show the directions and patterns of development. The TAI results represent a powerful lobby source for those who are fighting for higher level environmental democracy and also offer a great opportunity to learn from the best practices from all over the world for those governments that are determined to further develop their respective systems of public participation in environmental decision-making. Again: the key factor of the long standing success of the TAI project is its system nature: it examines the whole system of public participation, both the relevant laws and the everyday practice of the governments.

Within the capacity building chapter the TAI indicator system measures several aspects: the level of existing public participation capacities, capacity building activities targeting the general public, the NGOs and also those officials who are regularly confronted with public participation cases. The scope of TAI examination also extends to the administrative bodies other than environmental protection and also on national, regional, local level. Environmental education is an important subject of the survey, some indicators address

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9 Participa from Chile, the Thailand Environmental Institute, a loser network of environmental experts from Uganda and the Hungarian Environmental Management and Law Association (EMLA).

for instance the environmental and institutional elements of the national educational plan, others deal with the awareness raising programs of the government. Media attention and attitudes towards environmental issues and also towards environmental cases where public participation takes place is also an important element of the final score for the capacity building chapter, together with the governmental policy to influence them. Creative tools of enhancing the level of capacity of the public to participate in the cases that determine the long term life conditions of their communities are evaluated, too, such as using the tools of arts, involving the churches or opinion leaders (e.g. local teachers, labour unions etc.). In the TAI system, like in the Aarhus system itself, the pillars are interrelated. For instance, access to environmental information (such as annual report on the State of the Environment in the country) if detailed enough, broken down enough to localities and explained well, can represent the most important capacity building tool. Also, learning by doing, access to meaningful participation opportunities are evaluated as best solutions of capacity building.

#### 14.5 CAPACITY BUILDING IN THE INTERNATIONAL ENVIRONMENTAL LAW

The Aarhus system is nearly 20 years old, the underlying information systems, communication networks and social structures has changed a lot. It is worth looking around if other international environmental legal regimes or capacity building systems in general term offer some lessons to learn for the Aarhus community.

Sustainable Development Goal Target 17.9 of the 2030 Agenda for Sustainable Development is dedicated to capacity-building and aims to

Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation.

Within the 2030 Agenda for Sustainable Development, capacity-building is also mentioned by target 17.8 in the context of ensuring full operationalization of the “technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017”. We see that capacity building is used here in a much broader sense than simply to enhance good governance through better public participation.

The same use of the term capacity building can be found in Chapter VI of the outcome document of the Rio +20 Conference, the *Future We Want*, in Paragraphs 277-280. Member States committed themselves to enhanced capacity-building for sustainable-development and for the strengthening of technical and scientific cooperation within the

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frames of Bali Strategic Plan for Technology Support and Capacity-building *inter alia*, and invited relevant agencies of the UN system and other international organizations to support developing countries, especially least developed countries in capacity-building for developing resource-efficient and inclusive economies.

In an earlier document, the report on the discussions on the Biosafety Protocol of the Biodiversity Convention in 1997 the delegates discussed the topics of capacity building of developing countries and awareness raising amongst their respective public – this shows that the two topics were perceived by the international legal community as closely related ones. Especially in monitoring and ensuring compliance with biosafety regulations considered the Parties that capacity building (of the states in question) shall contain transferring methodologies for more effective public participation. However, in the awareness raising section no delegates used the phrase ‘capacity building’<sup>10</sup>. In general, we can underline that nature protection is the field of environmental protection in which public participation is most probably the most developed and elaborated because of historical and technical reasons (the large extension of the protected lands cannot be supervised solely by an authority even if it is one of the most equipped, let alone the authorities in the developing countries with large remaining pristine areas).

#### 14.6 CAPACITY BUILDING IN GENERAL TERMS

From the previous chapter we can conclude that we need to open our scope of examination even wider if we wish to find useful experiences for further developing capacity building in the realm of public participation. We have made a short survey of the meaning of the term capacity building outside environmental protection. There the term mostly used as ‘community capacity building’ (CCB), also referred to as capacity development, and is defined as a conceptual approach to development that focuses on understanding the obstacles that inhibit people, governments, international organizations and non-governmental organizations from realizing their development goals while enhancing the abilities that will allow them to achieve measurable and sustainable results. It has three major types on individual, community and societal levels. On individual level capacity-building requires the development of conditions that allow individual participants to build and enhance knowledge and skills. It also calls for the establishment of conditions that will allow individuals to engage in the process of learning and adapting to change. On the institutional level capacity building means first of all the activities of the aiding institutions in developing countries (in harmony with the results of our short survey in the field of international environmental law). It should not involve creating new institutions, rather modernizing

10 Report of the second meeting of the open-ended ad hoc group on the Biosafety Protocol, 12-16 MAY 1997: Capacity-building/Public Participation [www.iisd.ca/vol09/0967010e.html](http://www.iisd.ca/vol09/0967010e.html) (Biosafety).

existing institutions and supporting them in forming sound policies, organizational structures, and effective methods of management and revenue control. On societal level capacity building supports the establishment of a more interactive public administration that learns equally from its actions and from feedback it receives from the population at large. Community capacity building on that level is to be used to develop public administrators that are responsive and accountable<sup>11</sup>. In connection with these most general approaches of capacity building we have to underline the close relationship of the concept with the understanding of the basic goals of public participation in the field of environmental protection: these are the basic elements of good governance, namely transparency and accountability, in harmony with the general survey.

In the realm of global public health issues capacity building is defined as the development and strengthening of human and institutional resources. It is acknowledged that the process needs to go beyond the public sector, as it is also influenced by entities in the private sector including commercial enterprises and nongovernmental organisations. The United Nations Development Programme defines capacity as “the ability to perform functions, solve problems, and achieve objectives” also at three levels: individual, institutional and societal. The expected outcome of building national capacity is a comprehensive and sustainable national strategy for multi-sectoral health control programmes and policies<sup>12</sup>.

A group of British sociologists led by Vivian Lowndes made a large scale practical survey on public participation and capacity building at the end of the 1990s, an enthusiastic period for public participation. At that time British local authorities were in the forefront of developing innovative public participation initiatives such as interactive websites, citizens’ juries and panels, visioning and community planning. Such methods of engaging the public were spreading across the public sector and even to central government itself – through the ‘People’s Panel’, the ‘Foresight’ visioning programme, and the on-line ‘Democracy Forum’<sup>13</sup>. The issues local communities were more interested in were, apart from the local environmental and public health issues: open spaces and children’s play areas, crime (particularly with relation to drugs), housing maintenance and allocations and planning (specifically rural housing developments). The major issue that prevented further developing of public participation systems in Britain was the lack of proper motivation of the members of the local communities – we would say now that a typical capacity building problem. In the practical survey program of Lowndes and her colleagues the respondents claimed that they would get involved on the ‘big issues’, but very few people

11 [https://en.wikipedia.org/wiki/Capacity\\_building](https://en.wikipedia.org/wiki/Capacity_building).

12 UN Sustainable Development Knowledge Platform – Capacity Building <https://sustainabledevelopment.un.org/topics/capacity-building> (UN).

13 Lowndes, V., Pratchett, L. and Stoker, G.: *Public Management Trends in Public Participation Part 2 – Citizens’ Perspectives*, Public Administration Vol. 79 No. 2, 2001 (445-455) Blackwell Publishers Ltd. 2001, p. 1-11 (p. 445).

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had actually done so. The officials dealing with the issues otherwise important for the communities were complaining about public ‘apathy’ and people would not get involved even if their own interests were directly affected, but they would rather rely on a few committed individuals, the opinion leaders or natural leaders of the community. We think that this passive attitude is in close relationship with democracy deficit and with lack of fairness in public participation matters. However, those who happened to gain experience of ‘deliberative’ participation got really enthusiastic, as one of the typical interviews sounded: ‘I felt I’d never be able to do something like that – there was a feeling of euphoria at the end’<sup>14</sup>.

Lowndes and her group has summarized the methodologies for public participation in local government matters and revealed the following tools of encouraging participation:

- Public meetings (an opportunity for the public to voice its protest over a particular issue, but possibly with not the best efficiency in terms of being able to influence seriously the minds of the decision-makers);
- Questionnaires (detailed, factual tool, but not personal enough and people have to be assured that their opinion counts and will be taken into consideration);
- Ongoing forums, councils with members from the public (participating people felt that this is an effective way to influence the preparation of the decisions in essence, while it takes considerable time and efforts from the participants and the feed-back to their constituencies is worth some formalization);
- Deliberative exercises, such as citizens’ jury (a single occasion only, but interesting and substantial issues can emerge and even complicated issues can be discussed from several angles)
- Small group discussions (youth groups preferred this method that usually focusses on one concrete problem, they were especially willing to prepare and participate actively when and if some honoraria were paid for their time and inputs)
- One stop shops (officials booth or stall at well-frequented public places, usually for surveying public opinion, but with the possibility of informing the interested members of the public and exchange views, too)
- Citizen education (which explained how a certain council worked and what opportunities there were for participation)<sup>15</sup>

Another large, summarizing effort is from the Australian researcher, Michael Cuthill who focussed also on the local government level and performed a large overall survey of literature of capacity building. According to him capacity building requirements include:

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14 Ibid. p. 446-448.

15 Ibid. p. 449.

- i. the collection and provision of relevant empirical data describing the local community,
- ii. establishing equitable, accountable and transparent participatory policy and processes, and
- iii. the development of a supportive organisational culture,

while the results of successful community capacity building programs shall include?

- i. enhanced citizen ability,
- ii. enhanced community group ability, and
- iii. re/establishing of a cooperative community culture<sup>16</sup> (Cuthill, p. 64).

We see that Cuthill examines public participation in broader social contexts and comes to the same platform with Fukuyama's social capital concept when establishes that where capacity building programs operate well, "citizens and local government can come together to build relationships of trust and foster mutual understanding of what a sustainable local community might look like". This could form the solid basis for agreeing in the basic, general values of the community and a platform to which the measures and indicators of community well-being can be tailored.

The Australian researcher was also interested in the methodological side of capacity building and enlisted a series of innovative methodologies, including traditional ones that were modernized and accommodated to the modern requirements, such as citizen juries, community visioning, consensus conferences, citizen-initiated referendums and search conferences. "Such methods introduce a rich citizen perspective into local governance processes which can complement the oftentimes quantitative focus of more traditional research methods"<sup>17</sup>.

A couple of other important surveys for methodological traits and considerations 'outside the Aarhus universe' took place in the United States, where environmental experts and environmental public and private institutions were engaged with important questions concerning public participation and capacity building. Melinda Downing approached these issues from constitutional bases:

Environmental justice is the fair treatment and meaningful involvement of all citizens in environmental decision-making. It demands that no population suffer a disproportionate share of environmental burdens. Environmental justice is based on the idea that, in a democracy, when everyone participates meaning-

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16 Cuthill, p. 64.

17 Ibid. p. 70-72.

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fully in a process whose procedures and substance they understand, no group should be affected unequally by a decision<sup>18</sup>.

Downing's article is relatively an early one, but US had already a developed Internet system even at that time, therefore the departments of environment (DOE) in US strived to exhaust all the potentials of the public's electronic access to the DOE's files. In order to avoid situation that those who do not have regular access to computers would be excluded from public participation several DOEs assisted in creating community technology centres and served their respective communities with a vast array of environmental information available on the Internet. In addition to that – again in the spirit of fair and equitable public participation they organised community training workshops that consist of computer-based research, Internet research, geographic information systems (GIS), risk assessment and other subject matter. The training materials were extended to quite specific professional issues, too, such as access to Toxic Release Inventory Data and to Chemical Impact Analyses and Risk Assessments<sup>19</sup>.

Other North American sources started out from more practical points. The homepage of the US Environmental Protection Agency is quite straightforward in connection with the interrelationship of public participation and capacity building:

(...) effective public participation depends in part on the agency's willingness and ability to involve the public in the decision process. While it is critical that the agencies develop the skills to think through, plan for, and implement a public participation process, it is no less important that the public develop the capacity to participate effectively in decision processes. A well-designed and sincere participation process will not fulfil its potential if the public lacks the necessary participation skills. Hence, it is important for government agencies to build the public's participation capacity<sup>20</sup>.

The methodologies that are offered for the practice by the USEPA are:

- Modelling the behaviours that you want to see exhibited throughout the process;
- Developing and sharing with the public guidance documents that promote the values of public participation and delineate best practices;

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18 Downing, M. (Office of Stakeholder Relations Office of Legacy Management U.S. Department of Energy): *Environmental Justice and Public Participation through Technology – Building Community Capacity*, p. 1-9. ([http://energy.gov/sites/prod/files/EJ\\_buildingcommunitycapacity\\_0.pdf](http://energy.gov/sites/prod/files/EJ_buildingcommunitycapacity_0.pdf)) (p. 1).

19 Ibid. p. 5.

20 US Environmental Protection Agency: *Public Participation Guide*, February 2000, [www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation](http://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation).



- Providing training to community leaders and stakeholder representatives in basic public participation and communication skills;
- Identifying facilitative leaders within the agencies to mentor community groups/leaders by partnering with them during the planning and implementation of public participation processes;
- Inviting the public to participate in planning the process and this way creating a sense of ownership among the public;
- Hiring professional third-party facilitators to provide instruction at the project outset to the agency staff and external stakeholders on behaviours and techniques in connection with public participation;
- Where appropriate, using deliberative forums that encourage more active forms of participation instead of selecting forums that are viewed by sponsor agencies as being more “safe” because they control participation;
- Providing technical assistance to the public or community groups to help them understand technical information relevant to the decision.

The USEPA manual points out, however, that even the best and most creative methodologies are futile once the members of the public feel that the participation processes don’t result in meaningful public input, have no influence on projects, and the agencies do not hold themselves to the results of the public discussions at all<sup>21</sup>.

Recognizing that environmental protection is most effective when it has strong citizen support, the U.S. Environmental Protection Agency started a program to enhance public participation in its decision-making – in activities like issuing permits and implementation regulations. But a meaningful public role requires citizens who are informed and involved, a difficult task in a complex policy area that blends science, law, and other factors. At the Agency’s request, the Environmental Law Institute completed a study on how to improve the capacity of citizens to participate in EPA activities. The report based on a large scale empirical research to map out several important obstacles to capacity building and offered a long-term strategy for EPA to enhance the ability of the public to participate in its decision-making procedures.

It turned out that because of the highly technical nature of environmental information (especially on the operation of relevant facilities and on the mechanisms of pollution and appearance of the environmental and other long term effects) the public would need special assistance to effectively counter industry positions. The citizens would expect the Agency itself perform technical analyses on behalf of the public. Similarly to the underlying environmental factor, environmental law is also a very sophisticated branch of law, therefore the public need significant assistance in this field, too. Not only the technical nature of

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21 Ibid.

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substantial laws demand systematic explanation, but the circle of stakeholders and procedural steps in the environmental cases, too.

The ELI study discusses several vehicles for delivering these capacity building tools, ranging from improved EPA mailing lists to establishing a new, specialised ombudsman institution and hotline programs. It is an important warning from the authors – valid not only within American circumstances – that public and private capacity building programs should form a loose network, harnessing their similarities as well as their different approaches in order to achieve synergies in information dissemination, training, education, and other capacity building measures. Removing impediments to capacity building efforts can also be important to improving public participation, and the study identifies several ones. These include the lack of defined role for the public in particular initiatives and the public's lack of time, resources, and interest<sup>22</sup>.

#### 14.7 CAPACITY BUILDING IN THE WORK OF FUTURE GENERATIONS ORGANISATIONS

Designing and implementing the work program of institutions for intergenerational justice can profit a lot from the experiences in connection with public participation and its effectiveness factor, capacity building. We argued that the opinion and actions of the local communities and their organisations are the best available proxy for the interests of future generations in environmental conflicts, knowing that these communities fight for their own and their families' environment and health and for their future in a holistic, problem oriented way, rather than in a silo thinking as the administrative bodies typically do even if their major portfolio is environmental protection or a closely related issue. Therefore, the system of public participation and within that the system of capacity building shall be taken into serious consideration in the FGO offices. Table 14.2 starts out from the structure of Table 14.1.

**Table 14.2**

	<b>Information</b>	<b>Organisational help</b>	<b>Prohibition of capacity destroying</b>
<b>General</b>	1. Environmental, institutional, procedural leaflets	3. Lobbying for NGO friendly laws, state subsidies etc.	5. Fighting against discrimination, equitable client policy
<b>Individual cases</b>	2. Iterative procedures where all type of information are spread out	4. Involving environmental NGOs into the procedures	6. Protection against harassment or prosecution for public participation

22 Environmental Law Institute: Study Shows How to Build Public Participation Capacity, [www.eli.org/news/study-shows-how-build-public-participation-capacity](http://www.eli.org/news/study-shows-how-build-public-participation-capacity).

In the analysis of the windows of Table 14.2 we lean first of all on the experiences of the office of the Hungarian Ombudsman for Future Generations between 2008-2012 (hereinafter: FGO)<sup>23</sup>.

*ad 1*

The UNDESA drafted report of the Secretary General of UN highlights that one of the roles of a possible high representative of FGOs will be public participation and capacity building, especially by bridging the most important scientific achievements on global scale to the national and even local level, wherever there is a need to know and use them<sup>24</sup>. Three quarter of the staff members of the Hungarian FGO were natural scientists and social scientists (economist, sociologists etc.), while the other part of employees were lawyers – this arrangement ensured the mutual flow of information and performing the said bridging function. The activities of FGOs in that window of the matrix includes supporting research, collecting data and disseminating information in the media, at professional conferences as well as on NGO events. The colleagues of the Hungarian FGO took part in more than 150 conferences annually, gave 1500/1000 professional interviews about sustainable development issues in electronic and printed media in every years. The Hungarian FGO was involved in several networks that made research and action research in such complex topics, rarely addressed by the compartmentalised academic research institutes such as sustainable local communities or alternative indicators of social development and well-being.

*ad 2*

With its multidisciplinary staff, the Hungarian FGO was highlighting and explaining the scientific background of the cases for the complainants and also for the authorities that played a role in them. Indeed, the specific multidisciplinary (actually: transdisciplinary<sup>25</sup>) approach of the office allowed it to shed new lights on the local, regional and national environmental conflicts that could offer new solutions and learning to all stakeholders in these conflicts.

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23 See: <http://jno.hu/en/>.

24 Intergenerational solidarity and the needs of future generations – Report of the Secretary General (Points 27-28) (<https://sustainabledevelopment.un.org/content/documents/2006future.pdf>).

25 See Töpfler, p. 27.

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*ad 3*

The Hungarian FGO performed analyses about public participation laws and in numerous letters and lobby actions influenced the legal drafts that related to the procedural position of the environmental NGOs, including such topics as standing of NGOs and other interested members of the public in connection with re-codification of the General Administrative Procedural Code and several lower level decrees.

*ad 4*

In order to act in the environmental conflicts, environmental NGOs needed a clear picture about the proper interpretation of the relevant substantial and procedural laws in the individual cases. The most typical kind of individual capacity building activity of the FGO was performed in spatial planning cases where the extremely complicated and complex legal-technical background made the core of the problem almost unapproachable for the NGOs and the local communities they represented.

*ad 5-6*

Needless to say, an FGO is in unique position when it comes across serious abuses concerning public participation, being able to professionally collect the relevant facts both in general and individual cases and being in the position to initiate disciplinary, petty offence or criminal law sanctions. The high prestige of an ombudsman office would ensure the proper attention and resource allocation to these cases from the side of the law enforcement authorities. We need to add that the Hungarian FGO was in the fortunate situation to work in one building together with the Ombudsman for Minorities and the two offices could frequently exchange views and information about environmental injustice.

Finally, we have to note that the connection of FGOs with effective public participation and local communities is usually not one-sided. Effective public participation pays back as a great ally in fulfilling the substantial tasks of an FGO. If the environmental NGOs and local communities do not bring in strong cases, if they don't strive for more sustainable liveable local environment, if they don't form watchdog programs and independent analyses, an FGO cannot work well.