
**Theoretical Foundations of Public Participation
in Administrative Decision-Making**

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If speaking about public participation in administrative decision-making, some notion of administration should be clear because participation in law making or the judiciary would be a very different issue. Administration (*Verwaltung*) can be defined as the working level of government. The term stems from the Latin word *ad-ministrare*, which can be traced back to *manus* (hand).¹ This refers to the practical ‘hand-ling’ of matters, as in *manum agere* (to act by hand) or management. In modern political and legal discourse, the term has often been used to emphasise the difference between matters of (high) politics, which belongs to the government (*Regierung*), and the setting of general rules by legislation, on the one hand, and technical or pragmatic issues, on the other.

However, the qualification of administration as technical and pragmatic does not mean that there are no policy questions involved in administrative decision-making. For instance, when standards of best available technology are to be determined the necessary technological knowledge, which is certainly technical and pragmatic, is often weighed against environmental risks and economic costs. The same is true for environmental quality objectives. Here, cognitive elements like dose-response relationships between noxious impacts and adverse outcomes are weighed against the importance of risks and the cost implications. Even in decision-making on individual cases, policy questions play a role. For instance, the risk assessment for a highly complex technical installation may well depend on different risk “philosophies” such as deterministic or probabilistic methods, “conservatism” in assuming the likelihood of accidents, etc. In more general terms of administrative sciences, bureaucracy is not only an instrument of but also a source of politics and policies. This is the very reason for why administrative decision-making cannot be left to the experts but needs to be subjected to procedures that provide reasonable choices of policies. Participation of the public is often considered to be the appropriate solution.

Public participation in administration raises many specific problems of design and practice. This paper aims at providing some theoretical underpinning that allows a better understanding of the problems and the development of solutions. Accordingly, first the problems will be sketched out; second, a number of theoretical concepts of public participation will be presented; third, solutions shall be suggested on that basis.

1 Problems of Public Participation

A superficial review of different legal frameworks and practical experiences suggests that some of the core questions of design and practice of public participation are the following:

- The role of participants in procedures: Is it to provide information in order to enhance the quality of the decision, is it making affected persons accept it, is it exerting the right of persons aggrieved by the decision to be heard, or

¹ Weinhart, L. (1821), p. 442.

is it inviting the public to a discourse about facts, assessments and evaluation?

- The delimitation of participants: Are only witnesses and experts admitted, or also those whose rights or individual stakes are affected, or associations bundling interests of concerned persons, or even the public at large?
- The steps of participation: Shall there be an early opportunity to comment when the options are still open, followed by a second one where details are clarified, or does one opportunity suffice?
- The range of information on display: Shall the information only comprise potential effects of the project on neighbours, or shall it include effects on the environment at large, shall it also encompass the technology that causes the effects, the need for the projects and possible alternatives? How are the interests in trade secrets and state secrets to be weighed against the interest in disclosure?
- The shape of the public hearing: Shall the responsible administrative body have discretion whether or not to hold a public hearing? Shall the hearing be conducted in a court-like contradictory procedure, or in an informal way that serves to collect facts and views, or as a discourse where the pros and cons of the project are debated, or as a forum for mediation and compromise?
- Involvement of societal organisations: Shall individuals be involved only as part of corporations representing a collective interest, or shall civil society organisations have standing besides individuals? Shall NGOs be given a privileged position, and if so, shall they in some way be subject to authorisation?
- Time management: Shall maximum time periods be fixed, and if so, shorter or longer ones?
- Preclusion of issues: Is the participation aimed at precluding concerns from later litigation, or is it a way to enhance the quality of the discourse?
- Effects of procedural failure: Do procedural failures lead to the quashing of the resulting decision, or does a relevance test apply, and if so, what criteria are used? Can “relevant” procedural failure be rectified during court proceedings? Can a project which has been realized in breach of procedural law even be “legalized” by subsequent procedure and decision?
- Court review of procedural failure: Should only persons ‘concerned’ have locus standi to challenge decisions for procedural failure, or also persons entitled to participate even if not individually concerned?
- Administrative rule making: Shall public participation be confined to procedures handling individual cases, or shall it also apply to general rule making?

2 Theoretical Backgrounds for Public Participation

There are different methods as to how to respond to those questions. One method would be to develop a list of criteria against which the response options are measured. For instance, costs and benefits of procedures could be identified as is suggested by institutional economics, costs being measured for instance in terms of forgone investment and transaction costs caused by public participation, and benefits in terms of acceptance of decisions, costs to public health and the environment avoided, etc. Alternatively, a legal approach could be chosen that would suggest identifying constitutional principles that allow an evaluation of the options. For instance, a given constitution may posit the rule of law principle for administrative action. This could be interpreted to require that affected parties must be heard, but that no further involvement of the public is required.

We will follow neither of these approaches. Rather than striving for an evaluation we will attempt to explain why certain options are chosen, and suggest for this a number of theories of state-citizen relationships as they have been proposed and tried in European history. These theories provide a framework that allows an understanding of how public participation has been shaped in different settings. The theories are rationalised abstractions, both from reality and normative visions. As such, they can be described as ideal types in the sense proposed by Max Weber (Weber 1964: 14).²

I suggest distinguishing between the following ideal types of state theories that may help understand different designs of public participation:

- Enlightened autocracy;
- Socialist popular democracy;
- Rule of law;
- Deliberative democracy;
- Post-modern relational rationality;
- Self-administration.

'Enlightened autocracy' trusts that administrative bodies are the best guardians of the public interest. Therefore, the participation of citizens is not essential or even disturbing, but may nevertheless add to the quality of the decision, because the investigation of the case can be enriched by contributions from society and the field. In addition, the supervision by superior bodies of the action of an inferior body can be facilitated if the public is given a right of complaint. Participation in this concept is also a means to create trust in government. Thus, the citizens are mobilised in order to enhance the public good rather than given an opportunity to defend their own individual interest.

One influential theory grounding this type is the Hegelian idealistic vision of the state. The state represents the general interest (of the propertied classes,

² Weber, M. (1964), p. 14.

to be precise³) and is as such detached from the many interests within society (*Gesellschaft*). This representation is not just pure power but the “realisation of the ethical ideal” (“*Wirklichkeit der sittlichen Idee*”). The various individual interests within society are organised in corporations such as guilds and local communities (to which we would today add associations and networks). These generate a corporation spirit (*Korporationsgeist*) which turns (*schlägt um*) into the spirit of the state. The final determination of the objective general interest however remains in the hands of the state executive officials.⁴

The “orléanist” vision of the state can be regarded as the French counterpart of the Hegelian version. It conceives of the state as an elected (republican) body, which is liberal in the sense of letting private property flourish but reserves for itself strong executive powers “above” the parties in order to identify and implement the general interest, of the propertied classes.⁵ The concept spans from the “roi bourgeois” Louis Philippe of Orléans to Charles de Gaulle.⁶

Asking whether autocratic approaches are reflected in sociological theory, systems theory appears to be pertinent. The version of Niklas Luhmann perceives citizens’ protests as one-sided idiosyncrasy,⁷ and participation as a means of absorbing protests and creating acceptance of administrative decisions.⁸ Real world versions include the French conception of professional administration based on staff educated in the *Ecole Nationale d’Administration* (ENA). Even the European Union has adopted a touch of the autocratic vision insofar as it conceives the citizen as a factor, which can “mobilise” procedures of administrative and judicial supervision in the interest of better implementation by Member States of EU law.⁹

‘*Socialist popular democracy*’ also entrusts the administration with the guardianship for the public interest. However, the modus of legitimation is fundamentally different: While in ‘enlightened autocracy’ legitimation is the endowment with power of a sovereign, in the socialist state the people are the only source of legitimation. There have been and still are very different variants of democratic socialism. One centralistic version became characteristic for the German Democratic Republic. It construes the state as being identical with the people so that an ‘additional’ participation of the citizens that would reflect the differences

³ See Hegel, G.W.F. (1821), Hegel, G.W.F. (1801) 2: § 13: “A collective of humans can call itself a state only if it is bound to communally defend the entirety of its property”. (My translation, G.W.).

⁴ Hegel, G.W.F. (1821), §§257, 289.

⁵ de Broglie, G. (2003). On orléanist imprints in the French republics see Duverger, M. (1974), pp. 15–80.

⁶ De Gaulle (1959), p. 287: “In my opinion, it is necessary that the state has a head, in other words a chef, in whom the nation can see, above the fluctuations, the man in charge of the essential and the guarantor of its destination.” (My translation, G.W.).

⁷ Luhmann, N. (1986), p. 235.

⁸ Luhmann, N. (1997).

⁹ Case 26/62 van Gend & Loos. See also: Masing, J. (1997) and Weiler, J. H. H. (1999).

of factual interests is not essential.¹⁰ Participation is anyway more a duty than a right of the citizen, and the contribution made by the citizen shall enrich the public interest rather than representing individual stakes. Societal organisations are invited and urged to participate, but they are also regarded as contributors to the public interest, not as representatives of individuals.¹¹ Later on, in the seventies, individual positions were strengthened by the right to file a complaint against an administrative decision.¹² Other, more decentralised versions were to be found in Poland and Hungary. Here, a certain plurality of societal interests was recognized and reflected in rules encouraging the participation of dissenting associations.¹³

In the conception of the '*rule of law*' the executive is, like in the autocratic tradition, construed to be the guardian of the public interest. But its powers are much more constricted by parliamentary laws. In addition administrative bodies must grant those persons whose individual interests may be adversely affected a right to be heard (*rechtliches Gehör*; natural justice). This right has gradually been extended from the addressee of an administrative act to third parties thus constituting a variant of what was later called public participation. It is however a narrow variant because the participant must be individually affected and is only heard with arguments concerning this individual interest.¹⁴ The state theoretical background of this concept is the theory of representative democracy. The executive is solely legitimated by parliament – organisationally through the election of the ministers as heads of administrative bodies, and substantially by legal commands of and powers delegated by parliamentary law. No additional legitimation is necessary through public participation in administrative procedures. On the contrary, this would mean that partial interests undermine the general interest expressed by the legislative and executive powers.¹⁵

The concept of '*deliberative democracy*' which has its foundations in discourse theories such as that of Jürgen Habermas¹⁶ does not reduce the democratic process to the election of parliament but sees it at work in many political arenas, including that of administrative decision-making. In this concept administration is not just an agency executing the parliamentary law but a constructive power disposing of discretionary margins. Even in countries like Germany, which have a high density of legal programming, such margins of discretion

¹⁰ See Polak, K. (1963) and critical: Heuer, U.J. (1989), p. 360.

¹¹ Autorenkollektiv (1975), p. 255 et seq.

¹² Bernet, W. (1990).

¹³ Boc, J., Jendroska, J., Nowacki, K. (1989), p. 434 et seq.

¹⁴ In practice, administrative agencies also acknowledge comments transcending the individual interests of stakeholders; they may also discuss them at hearings, but they are not legally required to consider them in the final decision.

¹⁵ Böckenförde (1991), pp. 379 & 406.

¹⁶ Habermas, J. (1992).

remain, especially if the issue is highly complex, such as when large infrastructure projects or high tech installations shall be authorized. In such a situation, it is of high importance who participates in the proceeding. Procedure matters. The procedure is in such cases construed as a discourse between developer, administrative body, and the public. As the dissenting opinion in the above-cited *Mülheim-Kärlich* decision of the *BVerfG* states, in the absence of precise material standards 'it is rather the administrative procedure which is called to producing "reasonable" safety-relevant decisions in the concrete case'. The judges specify this saying, that because of the high amount of uncertainty "safety philosophies" must be developed, and that these depend on value judgments, which can hardly be freed from fundamental preoccupations and subjective interests. This means: "It is all the more essential that the positions, interests and anxieties of all participants are timely introduced into the authorisation procedure and the consideration of all relevant concerns is ensured through a process of communication between plant operators, endangered citizens and competent administrative bodies."¹⁷ Interestingly, the use of the word "communication" resounds in Habermasian discourse theory. In this concept, the participating public does not only include those who are individually affected (the bourgeois, so to speak) but also those who are concerned about the public interest (the *Bürger* or *citoyen*).¹⁸ The knowledge that the public can be expected to bring into the procedure is not only that of everyday-life but extends to expert knowledge that is welcome as counter-expertise against the possibly one-sided expertise of the developer and the administration.

'Post-modern relational rationality' has as its background the theory of the post-modern state. According to this understanding, the state is confronted with an increasing uncertainty of risks, a vast range of possible measures, and a highly diverse pattern of social perceptions and claims. This complexity can prevent the state from aspiring to command. The line between state and society is blurred. State and society are reconstructed as a field of compatibilisation of stakes. The state will rather act as a facilitator of self-regulation by fragmented parts of society and a moderator between them.¹⁹ A plurality of individual interests and networks of interests interact flexibly, finding fragmented solutions and forming incremental decisions. In this way, unilateral decision-making by administrative bodies may become less imperative and rather take the form of ratification of the parties' agreement. One somewhat more active tool of encouraging compromises is mediation.²⁰ In some countries, involving mediators in administrative conflict resolution has been suggested by legislation. For instance, in the German Construction Code mediation is proposed by a clause entitling a local community to delegate the preparation and implementation of steps of the

¹⁷ BVerfGE 53, 30, at 76 and 77. (Author's translation).

¹⁸ Smend, R. (1955), p. 309 and Fisahn, A. (2002), p. 216.

¹⁹ Ladeur, K.-H. (1992), p. 176 et seq.

²⁰ Gaßner, H., Holzsnigel, B., Lahl, U. (1992).

land-use planning procedure to third persons.²¹ Empirical studies of mediation procedures suggest that three conditions must be given if mediation is to be successful: the nature of the conflict must be such that a compromise is possible, the mediator must be neutral, the participants must expect results which are positive for them, and the participants must be able and willing to bind themselves to the agreed compromise.²²

'Self-administration' means that the administrative decision is taken by the people themselves rather than by an administrative body. The people are thus administrators, not only participants in administrative decision-making. The theoretical background of self-administration is direct democracy which goes back to Athenian origins.²³ More realistic versions like Rousseau's however reserve direct democracy to the formation of the political will while the execution of the same by government is considered to be conducted without much participation of the public.²⁴ Self-administration has its genuine place on the local level rather than on the level of the state. One of its origins is the English local self-government.²⁵ Switzerland is the European country where such direct democracy plays the most important role. It is not only related to the making of the constitution and of laws but also to administrative decision making. While in principle administration is entrusted to administrative bodies, the people can take over by two means, the administrative referendum (*Verwaltungsreferendum*) that leads to the annulment of a decision of an administrative body, and the administrative initiative (*Verwaltungsinitiative*) which triggers the taking of an administrative decision. The participants of the referendum or initiative are not just the directly concerned persons such as those who live in the vicinity of the project but the entire constituency of the competent administrative body, be it a commune, a canton or the federation. This ensures that the decision is based on a generalised voting rather than a partial interest. The state theoretical background of this concept is the French revolution and the French commune which go back to Rousseau's *contrat social* (not, as sometimes postulated, the mythical Ruetli vow).²⁶ Partial self-administration of this kind must be distinguished from local and functional self-governance. The latter is related to local and functional areas of administrative tasks and based on corporate membership, while the former concerns functions of the state and construes participants as citizens.

²¹ Art. 4b Baugesetzbuch.

²² Kopp, F., Ramsauer, U. (2012), p. 48.

²³ Canfora, L. (2006), p. 34 et seq.

²⁴ Rousseau, J.-J. (1762), Vol. III, Chapter 4.

²⁵ See for a classical comparative analysis of the English, French and German approaches to local self-government. Gneist, R. (1869), p. 95.

²⁶ Ehrenzeller, B., Mastronardi, Ph., Schweizer, R.J., Vallender, K.A. (2008), p. 7 et seq.

3 Choosing a Theory and Deriving Solutions for Public Participation

As the difference of theoretical approaches shows, the choice between options for the design of public participation much depends on what theoretical concept is taken as a basis.

'*Socialist democracy*' as a model and even more so as a reality is so fundamentally different from Western European democratic capitalism that it cannot serve as a model. '*Enlightened autocracy*' is exposed to the paradox that it probably truly describes the reality in many states but can hardly be conceived as a normative and even constitutional concept. '*Post-modern relational rationality*' may be a way to approach opposite positions in many cases but it has failed whenever the conflict touched upon very fundamental issues, such as nuclear power, GMOs, large infrastructure projects, etc. '*Self-administration*' has only recently become a topic of general public discussion in Europe when more fundamental issues were at stake. For instance, the fierce protest against the mega project of the Stuttgart railway-station has stirred new debates and legislation on citizens' referenda in Germany.²⁷ It is widely disregarded by EU law but would deserve more consideration. It may be a way to remove more fundamental issues from autocratic decisions and entrust them to a popular vote.

This leaves us with the concepts of '*rule of law*' and '*deliberative democracy*'. The choice is the democracy principle if the legislation so determines. It is hardly imaginable that the court would find unconstitutional those already existing legal provisions, which invite participation not only of the concerned public but also of the public at large.

This solution is also suggested if the influence of EU procedural law is taken into consideration. Although most EU legal acts confine public participation to the public 'concerned' or public 'affected' thus following the wider version of the rule of law concept, some do also prescribe involvement of the broader public, such as the EIA directives²⁸ and of course the directive on access to information. Likewise, it would not breach any principle of primary EU law if such involvement of the public at large were deemed to be granting a democratic right.

I therefore submit that the concepts of the rule of law and deliberative democracy should be merged. The first might be taken as the minimum and the second as a necessary complement wherever activities are at stake that have a lasting and significant impact on society in general and nature at large. If public participation in administrative decision-making is based on this combination of 'rule of law' and 'deliberative democracy', the following answers to the initial questions could be considered:

²⁷ On this case and the related political debate, see Ewer, W. (2011). On the present state of legislation and practice of citizens' decisions and referenda on the communal level in Germany, see Ritgen, K. (2000).

²⁸ Directive 2011/92/EU, p. 1. According to Art. 6 the general public must be informed about the project development application (Art. 6 para 2), and the concerned public must be informed about details such as the EIA and given the opportunity to submit comments (Art. 6 para 3 and 4).

- On the role of participants in procedures: Participation not only serves to provide information in order to enhance the quality of the decision or to exert its right to be heard but also invites participants to a discourse about facts, assessments and evaluation
- On the delimitation of participants: Not only those whose rights or individual stakes are affected should be admitted but also the public at large as well as associations which bundle individual interests and relate them to general interests
- On the steps of participation: Public participation is so important as a device both of the rule of law and democracy that there should be an early opportunity to comment when the options are still open, followed by a second one where details are clarified.
- On the range of information on display: The information should not only comprise potential effects of the project on neighbours but include effects on the environment at large. It should also encompass the technology that causes the effects, the need for the projects and possible alternatives. When weighing the interest in trade and state secret with the interest in disclosure the interest in transparency must be given proper weight.
- On the shape of the public hearing: The responsible administrative body should have discretion whether or not to hold a public hearing, but should be obliged to do this in highly controversial cases. Depending on the comments raised the hearing should basically be structured in a court-like contradictory procedure but allow for discourses where policy issues of pros and cons of the project are debated.
- On the involvement of non-governmental organisations: Individuals should be involved not only as part of corporations representing a collective interest but have their own rights of participation. NGOs should however be given a privileged position, if they meet certain standards of reliability and inner democracy.
- On time management: The time allowed for public participation should not be standardised in order to allow for differentiation according to the complexity of the issue.
- On the preclusion of issues: The preclusion of refutations should be used as a tool in order to enhance the quality of the administrative proceeding; it should however not confine the scope of the court's review of the administrative decision.
- On effects of procedural failure: Procedural failures should in principle lead to the quashing of the resulting decision. Only if it is evident that without the failure the same result would have come out can the original decision persist.
- Court review of procedural failure: Not only individually concerned parties should have *locus standi* to challenge procedural failure, but also the members of the public if the law provides them with the right to participate.
- On administrative rule-making: Public participation should also be a requirement of general administrative rule-making.

4 Denationalisation of Administrative Decision-Making and Public Participation

Given the fact that more and more administrative decisions are taken or are predetermined by administrative proceedings within supranational entities (notably the EU), by international organisations as well as by 'trans-national' networks of national administrative bodies, the question arises if the theoretical approaches and solutions based on them are the same also in relation to public participation on those higher administrative levels.

The answer is largely negative. How the state may be construed – as authoritarian, socialist, ruled by law, democratic, post-modern or self-administrative – its constitution and cultural tradition still create a common framework that provides the administration with – albeit different kinds of – legitimisation. Such national cultural and constitutional framework is missing in the de-nationalised sphere. Alternatives must be found that better reflect the genuine characteristics of those spheres. They must take into account the different national approaches which will include the more types the farther away denationalised levels move from the Western European tradition. I will start with reconstructing participation in EU administrative procedures and then proceed to international and transnational spheres.

4.1 Participation in EU Administrative Procedures

In the supranational realm of the EU, the legitimisation of EU administrative decision-making is organised through two chains. The first chain links national representatives acting within the EU administration to national parliaments, namely both the MS ministers sitting in the European Council and the MS administrative personnel acting in EU regulatory and management committees (the so-called 'comitology'). Ministers are elected by and must respond to their national parliaments, and they are responsible for the activities of their administrative personnel. The second chain links EU administrative personnel acting within the Commission and within regulatory agencies to the European Parliament. The Commission is co-elected by the European Parliament and must respond to its questions both for its administrative personnel as well as for its regulatory agencies.

However, the two chains are long and provide only a weak legitimisation: the European Council is primarily a political organ only exceptionally endowed with administrative functions, and if so, rather functions as a rule-making body than a decision-making one in individual cases. As for comitology, as the committees are filled with national administrative personnel, national parliaments hardly get to know what issues are treated in the committees. On the other side, the EP is not the constituent of the Commission, nor can it influence the work of committees other than by claiming that they transcend the powers they are given by the relevant legal act. This means that there is a legitimisation deficit

concerning administrative functions of the Commission. In a few policy sectors legal acts do establish committees involving representatives of stakeholders, but these are rare. As a general legal norm, EU law does know the right of adversely affected parties to be heard.²⁹ But no right to public participation has been established.³⁰ There is nevertheless a practice of the EU Commission to invite public comments to its proposals for decisions. This practice will need to be framed by law. However, a theoretical background must be developed for this. It could be said that public participation can be a third and direct chain of legitimation besides the very long chains leading to the EP and the national parliaments. Content wise, it could once again be based on the combination of rule of law and deliberative democracy because these concepts are shared by most of the EU member states.

4.2 International and Transnational Spheres

Administrative rule making and adjudication in individual cases have become more and more frequent as activities of international organizations. To name just two examples: The adoption of emission standards for aircraft by the Council of the International Civil Aviation Organisation (ICAO),³¹ and the decision-making of the Board of Governors of the World Bank on a loan for a large infrastructure project of a member state.³²

Apart from formal powers of international organizations to set standards and take individual decisions a wealth of rule-making and decision-making activities are going on in the transnational sphere, transnational meaning the direct cooperation of national sectoral administrative agencies across borders. A highly organized example is the Codex Alimentarius Commission (CAC) with its wide-ranging activities in elaborating food safety standards. The CAC is not based on an international treaty but results from Memoranda of Understanding between competent international organizations, in particular the World Health Organisation (WHO) and the Food and Agriculture Organisation (FAO), as well as informal commitments of many states. The CAC system consists of very differentiated and well-structured ensemble of committees and working groups, which determine the scientific basis as well as the costs and benefits of food standards. The members of the committees and working groups are food experts from states' sectoral agencies. Industry is invited to participate. The general public has an opportunity to comment on draft standards. The final version is adopted by the guiding body, the Commission.³³ Much more numerous than this well organized system are more informal and ad hoc networks

²⁹ Article 41 (2) (a) ChFR.

³⁰ The right of public participation in Article 11 (1) TEU is very generally framed. The hurdles and possible effects of citizens' initiatives are quite discouraging, see Art. 11 (2) TEU and Art 24 (1) TFEU.

³¹ Art. 54 lit. 1 Convention on International Civil Aviation.

³² Art. IV Sec. 2 International Bank for Reconstruction and Development Agreement.

³³ See for an analysis of the CAC Arnold, D. (2011).

whose tasks and products can nevertheless be of high importance for the global welfare. One example is the global network which elaborated the Global Harmonised System for the Classification and Labelling of Chemicals (GHS).³⁴ Another example is an equally globalised network, which has produced Guidelines on Best Laboratory Practice for the Testing of Chemicals.³⁵

The practices of public participation in the international and transnational networks and systems of standardisation and individual decision-making are very diverse. Normally the addressees of regulations and decisions see to it that they are consulted, or they even act as initiators. For instance, the chemical industry is of course actively involved in the standardization activities concerning the classification of chemicals. By contrast, third persons which may be affected by the standards (such as consumers of food contaminated by chemical substances) and the public at large which may be concerned about environmental effects are involved in very different ways, or not involved at all. Some standardization formations practice pure autocracy excluding any public involvement. Others address the public only as an object of strategic information and propaganda. Often public participation is just not thought about by the network and may nevertheless happen spontaneously if the public actively inquires and insists. Rarely, such as in the example of the CAC, well-organized notice and comment opportunities are provided.

It has been proposed that international and transnational standard setting should be conducted according to principles of national administrative law such as right to be heard, access to information, and notice and comment procedures. An entire legal-sociological discourse has emerged to that effect, called Global Administrative Law (GAL).³⁶ Not surprisingly, the proponents often have in mind to transfer those principles of participation that are common to their own national law. As they usually stem from Western countries, the model most often proposed is of the type 'rule of law' and 'deliberative democracy', with the US Administrative Procedure Act (APA) as a particularly high developed version.³⁷

However, considering the global scope of inter- and transnational structures, there are many more national traditions to be taken into account than just the Western. Notably, 'rule of law' and 'deliberative democracy' may not appeal to those participants who are at home used to working in secrecy, because their state practices a sort of 'enlightened authoritarianism' or 'socialist democracy'. Inversely, participants may be used to unstructured openness/secrecy like in states practicing 'post-modern relational rationality', or they may advocate 'self-administration' of the sectoral private actors, and notably the relevant industry as a model.

³⁴ See for an analysis of this network Warning, M. (2009) and Winter, G. (2011).

³⁵ For an analysis of this network see Herberg, M. (2011).

³⁶ Kingsbury, B., Krisch, N., Stewart, R.B. (2005).

³⁷ Stewart, R.B. (2005).

As an alternative to levelling national approaches up to the inter- and transnational levels, it has been suggested that this level is a striking example for the post-modern plurality of stakes and cultures: “We should venture to design a new network-related model which links different public and private actors beyond and within the state in a productive way”.³⁸ While this approach is commendable insofar it draws the attention to the inter- and transnational spheres as such it stops short of an in-depth analysis of the *Eigenlogik* which characterizes these spheres. I believe before coming up with normative models it is indispensable to first look more closely to the genuine problems, dynamics and practices of existing inter- and transnational proceedings. Such empirical analysis will reveal that the multitude of formations is not arbitrary but does follow certain patterns. These patterns can be described and brought into a typology from which reform suggestions may be derived.

The problem characteristics of a given standardization formation is a first structuring factor. There are problems of a more or less purely scientific character and others, which involve both cognitive and policy elements. Examples were already cited: for the first, the standardization of laboratory tests of chemicals, and for the second the standardization of the classification and labelling of chemicals. What kind of food and how long and under what living conditions must it be administered to a sample of test rats is much more a cognitive question than whether the result of the rat test indicates that the chemical substance is highly toxic for human beings. Participation in the standard setting for cognitive problems can be concentrated on scientific experts while in the case of cognitive/evaluative problems the public must be involved. As the standards are abstracted from applications, there will hardly be identifiable “concerned” persons. The participation must therefore be open to the public at large. It is advisable that in the proceedings cognitive and policy questions are separated and possibly referred to different working groups (as it is done in the CAC proceedings).

North-South differences are a further important factor. Most of the inter- and transnational standardization formations are dominated by “Northern” experts and public interest groups.³⁹ Although in many formations compensatory mechanisms have been introduced in order to provide “Southern” personnel with means to participate in the meetings, this does not make good the structural differences of scientific capacities between highly industrialized and developing countries. Other rules and practices must be introduced to cope with this drawback.

In this and other ways, rules may be developed out of the needs and practices of the ongoing inter- and transnational standard setting and adjudication. I believe there is not yet sufficient empirical knowledge about the field to allow the development of a theory, which may serve as a basis for best practices. But the need for such theory is there, for sure.

³⁸ Ladeur, K.-H. (2004), p. 16.

³⁹ Gupta, J. (2011).