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**EU LEGAL FRAMEWORK ON PERMITS FOR MINING PROJECTS: RIGHT TO
SAY NO OF LOCAL COMMUNITIES**

Master thesis

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LIST OF ABBREVIATIONS

Aarhus Convention - Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

EU - European Union

CJEU - Court of Justice of the European Union

ECHR - The European Convention on Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

Treaties – TEU and TFEU together

ICJ - International Court of Justice

CRM - Critical Raw Materials

Rio Declaration - The Rio Declaration on Environment and Development

the Charter - The Charter of Fundamental Rights of the European Union

EJAtlas - Global Atlas of Environmental Justice

UN -United Nations

UNECE - The United Nations Economic Commission for Europe

Environmental Impact Assessment Directive - Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)

Strategic Environmental Assessment Directive - Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

Stockholm Declaration -Declaration of the United Nations Conference on the human environment

INTRODUCTION

The scientific problem of the research

Mining projects can have significant negative impacts on the well-being and health of people living near these projects. Due to the nature of their activities, the mining of minerals and metals can lead to soil and water contamination, air pollution, and other forms of environmental degradation, which can have dangerous consequences for the health of people living nearby and destroy their livelihoods¹. Large-scale mining projects can even cause death threats and kill people living near them.² Human well-being, health, and life are inextricably linked to the enjoyment of human rights.³ Thus, it can be said that a healthy and clean environment is a precondition for the enjoyment of human rights. Therefore, the question arises: do the local communities have the right to stop mining projects that can have significant harm to the environment and thereby violate their human rights? Is the right of local communities to stop hazardous to human health and environmentally damaging mining projects recognized in law?

There have been cases where local communities, with the support of the general public, have successfully stopped the development of mining projects by protesting.⁴ In this way, through protests, local communities have exercised their “right to say no” to projects that could cause significant negative damage to the environment and their livelihoods. Although protests were not always legal and authorities had to intervene with the help of the police, protesters were able to legitimize their demands and stop mining projects they wanted to prevent. Protesting is how local communities have exercised their *de facto* right to stop mining projects by mobilizing and getting their claims recognized.

The law recognizes and guarantees the right of local communities to express their concerns regarding mining projects through public participation in permitting processes. The permitting process applies to projects which are subject to a requirement for development consent and impact assessments. Public participation is an integral part of the impact assessment procedure and as a right stems from the Aarhus Convention⁵ which is part of EU law itself and is implemented by the two impact assessment directives (will be discussed below). By granting the legal *de jure* right for

¹ Guidebook for evaluating mining projects EIAs, Environmental Law Alliance Worldwide, 2010, <https://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf>.

² *Author's note*: 270 people died in the Brumadinho dam disaster on January 25, 2019, when the tailings dam at the Córrego do Feijão iron ore mine collapsed.

Gabriel Araujo, “Brazil's Vale fined \$17 mln for Brumadinho tailings dam disaster”, *Reuters*, August, 15, 2022. <https://www.reuters.com/business/brazils-vale-fined-17-mln-brumadinho-tailings-dam-disaster-2022-08-15/>

³ This was recognized in the Stockholm Declaration (1972) which stated that “Humans have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and a solemn responsibility to protect and improve the environment for present and future generations”. <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>

⁴ 1) *Author's note*: Tens of thousands of people took to the streets across Serbia in over 50 cities in protest against a mining project of the Rio Tinto company.

“Environmental protests take over 50 Serbian cities by storm”, *Euractiv*, December 6, 2021.

https://www.euractiv.com/section/politics/short_news/environmental-protests-take-over-50-serbian-cities-by-storm/

2) *Author's note*: Thousands of people in cities across Romania have staged demonstrations against the gold mine project in Rosia Montana.

Radu Marin, “Romanian gold miners end underground protest after PM's visit”, *Reuters*. September 15, 2013. <https://www.reuters.com/article/uk-romania-goldmine-protest-idUKBRE98E0FK20130915>

⁵ Convention on Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, Aarhus, 1998. <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

the public, particularly the local communities, to say “no” to mining projects, the Aarhus Convention aims to safeguard the human right to a healthy environment.⁶

According to the Aarhus Convention, public participation rights in environmental decision-making have three main components: 1) access to information;⁷ 2) public participation in environmental decision-making;⁸ 3) access to justice⁹ in environmental matters, which are interrelated. The second pillar of the Aarhus Convention, public participation in environmental decision-making, is the most active and direct right that involves the public in decision-making through a public consultation procedure. This second pillar of the Aarhus Convention is the subject of this thesis, and its effective implementation in EU law will be carefully examined.

The EU shares competence with its Member States for environmental issues according to Article 4 of the TFEU. The EU uses various legal instruments to promote environmental protection and its high standards help ensure a healthy environment that promotes human rights.¹⁰ To guide the development and implementation of environmental policies, principles, and criteria outlined in Article 3 of the TEU and Articles 6, 11, and 191-193 of the TFEU must be followed. The principle of integration of Article 11 TFEU points out that the environmental dimension of all EU policies must be taken into account in the drafting of the EU legislation. According to Article 191 TFEU, the EU contributes to preserving, protecting, and improving the quality of the environment and aims to protect human health.¹¹ Article 37 of the Charter guarantees a high level of environmental protection that must be integrated into the EU’s policies from a human rights perspective.

The environmental EU procedural protection for individuals has notably been reinforced by the accession of the EU to the Aarhus Convention. The Aarhus Convention was signed and approved by the European Community by Council Decision 2005/370/EC of 17 February 2005 and, according to established case law, the provisions of the Aarhus Convention now form an integral part of the European Union legal order.¹² The second pillar of the Aarhus Convention, concerning public participation rights, has been incorporated into EU legislation in various legal acts regulating industrial emissions,¹³ waste management,¹⁴ energy and climate plans,¹⁵ and air quality.¹⁶ Provisions about public participation rights concerning permitting processes for mining

⁶Article 1 of the Aarhus Convention.

⁷Article 5 of the Aarhus Convention.

⁸Article 6-8 of the Aarhus Convention.

⁹Article 9 of the Aarhus Convention.

¹⁰ Summaries of EU legislation: Environment and climate change. <https://eur-lex.europa.eu/content/summaries/summary-20-expanded-content.html>

¹¹Article 191 of TFEU.

¹²Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, para 30.

¹³Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on Industrial emissions <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0075-20110106>.

¹⁴Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008L0098-20180705>.

¹⁵Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=EN>.

¹⁶ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:152:0001:0044:EN:PDF>.

projects can be found in Environmental Impact Assessment¹⁷ and Strategic Environmental Assessment¹⁸ Directives.

Environmental Impact Assessment and Strategic Environmental Assessment Directives set minimum requirements for public participation procedure in the impact assessments of specific projects, plans, and programs that can cause harm to the environment.¹⁹ These directives require that the results of the public consultation be given due consideration by the public authorities when making the final decision.²⁰ This means that public opinion should influence the decision on the fate of a development project. However, since the public often chooses to protest²¹ in order to stop development projects that may have harmful effects on the environment and its human rights, should public participation rights be considered ineffective?

In practice, the protection of public participation rights in EU law is vague and sometimes raises questions from the human rights protection perspective. Thus, due to the discretionary nature of EU law regarding public participation rights, the procedure for public participation in Member States can vary significantly, with some countries treating it as a mere formality, ignoring public opinion.²² Moreover, an opportunity for public participation in permitting processes is often provided too late, despite the Aarhus Convention's requirements for early participation and for tiered decision-making.²³

The time frame required by the Aarhus Convention for public involvement in environmental decision-making sounds like early participation and “when all options are open.”²⁴ The Aarhus Convention Compliance Committee²⁵ in its case law develops this requirement as the “zero option” and relates it to tiered decision-making. Tiered decision-making means that decision-making on development projects that may have a harmful effect on the environment must consist of several levels. One of them is the strategic level, which assesses the

¹⁷Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) Text with EEA relevance <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0092&qid=1684237376184>.

¹⁸Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0042>.

¹⁹Article 6-7 of the Environmental Impact Assessment Directive, Article 6-7 of the Strategic Environmental Assessment Directive.

²⁰Article 8 Environmental Impact Assessment Directive, Article 8 of the Strategic Environmental Assessment Directive.

²¹Karim Yahiaoui and Jonathan Walsh, “Notre-Dame-des-Landes: French environmental activists still dreaming of freedom”, *France 24*, January, 17, 2020.

<https://www.france24.com/en/20200117-revisited-notre-dame-des-landes-two-years-on-french-environmental-activists-still-dreaming-of-freedom>

Agence France-Presse in Paris, “France halts Sivens dam construction after protester’s death”, *The Guardian*, October, 24, 2014, <https://www.theguardian.com/world/2014/oct/31/france-halts-sivens-dam-protester-death>

Radu Marinas, “Romanian gold miners end underground protest after PM’s visit”, *Reuters*, September 15, 2013 <https://www.reuters.com/article/uk-romania-goldmine-protest-idUKBRE98E0FK20130915>.

²²Assessing environmental impacts of plans and programs “Implementation of key requirements of the SEA Directive in selected EU MS”, Justice and Environment, (Brno, 2018), 4.

²³Jerzy Jendrośka, “Public Participation in Environmental Decision-Making Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee” in “*The Aarhus Convention at TEN*”, ed. M. Pallemmaerts, (Europa Law Publishing, 2011), 146.

²⁴Article 6(4) of the Aarhus Convention.

²⁵Report by the Committee to the sixth session of the Meeting of the Parties. Meaningful and early participation (Article 6, paragraph 4; Article 7 in conjunction with Article 6, paragraph 4) paragraph 40 of document ECE/MP.PP/2017/32, the Aarhus Compliance Committee Communication ACCC/C/2009/38 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, 2011, 82.

cumulative effect of projects in a particular area, in the preparation of plans and programs. This level is regulated by the procedure of Strategic Environmental Assessment. The other level refers to the evaluation of a specific project and is governed by the Environmental Impact Assessment procedure.²⁶

In contrast to the Environmental Impact Assessment, the main purpose of the Strategic Environmental Assessment is to identify and describe alternatives. The so-called “zero alternative”, or not implementing the projects, is also one of the alternatives that can be presented as part of a Strategic Environmental Assessment, but which is not specified in the Environmental Impact Assessment.²⁷ Therefore, limiting public participation in decision-making only to the level of Environmental Impact Assessment may render public participation processes useless and deprive the public of the “right to say no” to a project at the strategic level.

However, according to Article 11(2) of the Strategic Environmental Assessment Directive, at the discretion of the Member States, there may be coordinated or joint procedures between the two levels of assessments. Thus, the provision allows Member States to merge or substitute a Strategic Environmental Assessment for an Environmental Impact Assessment if they overlap. Such duplication may occur, for example, in a situation where project proposals requiring amendments to land use plans are subject to the requirements of two procedures simultaneously.²⁸ Therefore, questions such as whether the general exploitation of mining projects in a particular area is allowed in land-use planning are only considered in some Member States.²⁹ Exploitation can take place anywhere as long as the necessary permits are obtained without a Strategic Environmental Assessment and public involvement at the strategic level.³⁰

When Member States use discretion in the case of overlapping Environmental Impact Assessment and Strategic Environmental Assessment and apply a joint or coordinated procedure, the multi-level relationship between the two assessments is lost.³¹ The consideration of cumulative impacts and alternatives as “zero alternatives” is unlikely.³² Also local communities lose the opportunity to say “no” to harmful projects at the strategic level.

Moreover, in general, public participation in Strategic Environmental Assessment is not effective. As the Strategic Environmental Assessment Directive does not provide explicit details on the procedures for public consultation. A variety of approaches is employed between Member States. The most typical approach dedicated to Strategic Environmental Assessment is an online

²⁶ Elsa João, “Key Principles of SEA”, in *“Implementing Strategic Environmental Assessment”*, eds. M. Schmidt, L. Knopp, Cottbus, (Berlin: Sprinkler, 2005), 4.

²⁷ William Sheate et al., “Relationship between the EIA and SEA Directives”, Final report to the European Commission, (London: Imperial College London Consultants, 2005), 85.

²⁸ Sheate et al., “Relationship between the EIA and SEA,”70

²⁹ *Author’s note*: This means that when public authorities grant development consent to a company that has applied for the development (mining project) of a specific area and land use planning has not been provided for such mining area, the authorities may not return to the Strategic Environmental Assessment procedure whereby deprive the public with opportunity of early participation and “zero alternative” or the “right to say no”.

³⁰ Study Legal framework for mineral extraction and permitting procedures for exploration and exploitation in the EU, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs Directorate Industrial Transformation and Advanced Value Chains, MINLEX Final Report, (Brussels, 2017), 149.

³¹ Sheate et al., Relationship between the EIA and SEA Directives, 85.

³² Sheate et al., “Relationship between the EIA and SEA,”70.

consultation.³³ However, this is not enough to engage the public widely and to have meaningful public participation.³⁴

According to the Strategic Environmental Assessment Directive, the public should be involved in decision-making only when the draft plan or program and the Environmental Report³⁵ are ready. However, most issues are already resolved earlier in the process before the public is involved. Public participation is not required in the screening or scoping stage of the Strategic Environmental Assessment. The public's opinions and comments are usually not taken into account. Because of this practice, the public loses interest and is reluctant in participating. This occurrence is known as the decline of participatory culture.³⁶

In order to ensure the protection of human rights during environmental decision-making this research will answer the following questions:

- 1) What is the legal way for local communities to stop mining projects that may have a detrimental impact on their health and well-being, thereby violating their human rights?
- 2) Does EU law sufficiently protect the public participation rights of local communities in environmental decision-making, including the “right to say no”, thereby guaranteeing the protection of their human rights?

Relevance of the final thesis

The EU has its climate commitment to become climate-neutral by 2050.³⁷ In order to achieve this objective the EU climate change agenda³⁸ includes such measures as energy transition and the need for a secure supply of Critical Raw Materials (CRM) that is also triggered by the geopolitical situation.³⁹ The European Green Deal⁴⁰ and the EU Climate Law⁴¹ are designed to help the EU develop the capacity needed to meet renewable energy production targets, build strategic manufacturing processes, such as electronic components, and achieve climate neutrality targets.⁴² In order to ensure an energy transition and secure supply chain, the European

³³ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), (Luxembourg: Publications Office of the European Union, 2016), 203.

³⁴ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), (Luxembourg: Publications Office of the European Union, 2016), 203.

³⁵ The environmental report is part of the plan or program documentation containing the information required in Article 5 and Annex I of the Strategic Environmental Assessment Directive.

³⁶ Stefan Heiland, “Requirements and Methods for Public Participation in SEA”, eds. Schmidt, M., João, E., Albrecht, E., *Implementing Strategic Environmental Assessment*. In *Environmental Protection in the European Union*, vol 2. (Berlin: Springer, 2005), 421-430.

³⁷ 2030 Climate Target Plan https://climate.ec.europa.eu/eu-action/european-green-deal/2030-climate-target-plan_en

³⁸ Paris Agreement, climate neutrality, EU Green Deal, energy transition, CRM, and Strategic projects

³⁹ Guillaume Ragonnaud, *Securing Europe's supply of critical raw materials*, European Parliamentary Research Service, 2023.

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739394/EPRS_BRI\(2023\)739394_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739394/EPRS_BRI(2023)739394_EN.pdf)

⁴⁰ European Green Deal https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

⁴¹ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1119>.

⁴² Strengthening the security of supply of products containing Critical Raw Materials for the green transition and decarbonisation, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, December 2022 [https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA\(2022\)740059](https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2022)740059).

Commission advanced its Action Plan on Critical Raw Materials⁴³ (hereinafter - the Action Plan on CRM) which is also part of the European Green Deal. According to the Action plan on CRM, the EU intends to become 80% self-sufficient in lithium by 2025 and to have its own rare earth mining and refining capability by growing and expanding mining in European terrains by 2030.⁴⁴ In practice, this means that the EU intends to carry out much more local mining, which could have an impact on the environment and human rights of local people.

The European Commission recognizes the fact that in the effort to secure EU raw materials supply a possible barrier could be the lack of social acceptance of mining projects.⁴⁵ As a result, the European Commission has developed a Strategic Implementation Plan for European Innovation Partnership on Raw Materials⁴⁶ (hereinafter - Strategic Implementation Plan). According to the Strategic Implementation Plan, public acceptance of mining projects will be achieved by raising awareness of the benefits and potential costs associated with the supply of raw materials and gaining public trust in the sector through the production cycle.⁴⁷ However, in most of the cases where mining conflicts arose, the reasons for social rejection of mining projects have been a disagreement with land development planning⁴⁸ and the lack of representation and participation of local communities in decision-making processes.⁴⁹

In addition, currently, a new proposal for regulation⁵⁰ establishing a framework for ensuring a secure and sustainable supply of critical raw materials has been presented by the European Commission. This regulation will apply to the projects concerning CRM and will ease the permit-granting process and allow the Member States to start mining projects in the zone where mining projects before were prohibited.⁵¹ Authorities can approve the projects even if they harm the environment if the responsible permitting authority concludes, on a case-by-case basis, that the public interest served by the project prevails over that impact.⁵² For local communities, this means that if projects serve the public interest but are detrimental to the environment, public authorities have the legal means to implement such projects, despite the threat of harmful consequences.

⁴³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability (COM/2020/474 final), Brussels, September 2009.

⁴⁴ Frank Umbach, Head of Research at the European Cluster for Climate, Energy and Resource Security, 2022 <https://energypost.eu/critical-raw-materials-for-the-energy-transition-europe-must-start-mining-again/>.

⁴⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability, COM/2020/474 final (Brussels, 2020).

⁴⁶ Strategic Implementation Plan for the European Innovation Partnership on Raw Materials, Part II “Priority areas, action areas, and actions”, European Commission, 2013 <https://single-market-economy.ec.europa.eu/system/files/2021-10/eip-sip-part-2.pdf>.

⁴⁷ *Ibid*

⁴⁸ Jaroslav Badera, “Problems of the social non-acceptance of mining projects with particular emphasis on the European Union – a literature review”, *Environmental and socio-economic studies* 2(1), (2015), 27-34.

⁴⁹ Sonja Kivinen, Juha Kotilainen, Timo Kumpulainen, “Mining conflicts in the European Union: environmental and political perspectives”, *Fennia. International Journal of Geography*, 198 (1-2), (2020), 175.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, 2023.

https://eur-lex.europa.eu/resource.html?uri=cellar:903d35cc-c4a2-11ed-a05c-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁵¹ *Ibid*

⁵² *Ibid*

These mining projects for critical raw materials are part of the EU Green Deal and should comply with European Climate Law. According to Article 9 of the EU European Climate Law⁵³ the public has the right to participate during the energy transition. The Commission recognizes the importance of the just and socially fair energy transition to a climate-neutral and climate-resilient society. However, the absence of tiered decision-making when modification of land-use planning happens or factors that public consultation procedures implemented in ineffective way can cause a risk of violation of human rights, and increased social tensions.⁵⁴ Therefore, considering all the arguments, the analysis of the problems raised is very relevant and timely, as many mining projects are on their way.

Scientific novelty and overview of the research on the selected topic

The possibility to stop mining projects that may violate human rights are not a topic for academic research, as such a right does not exist. However, in order to test the theory that public participation rights can ensure such rights, public participation rights were taken as the basis for this analysis.

A. N. Glucker⁵⁵ and other authors developed a comprehensive paper about the definition and objectives of the public participation process in environmental decision-making. They gathered all related academic works in order to establish the rationale and the role that public participation plays in the quality of undertaken decisions and the lives of people that are affected by these decisions. S. R. Arnstein⁵⁶ elaborated her theory of the “ladder of public participation” where she introduced an approach that splits public participation into three levels: nonparticipation, degree of tokenism, and degrees of citizen power. Her theory presents the idea that the way in which public participation is represented in decision-making can have different impacts on the final decisions.

S. Kivinen, J. Kotilainen, T. Kumpula,⁵⁷ and J. Badera⁵⁸ analyzed the reasons for mining conflicts in the EU and problems of the social non-acceptance of mining projects. T. Mononen et al., developed a study concerning the social and environmental impacts of mining activities from an EU perspective.

As each Member State has its own public participation processes, it was necessary to analyze the studies concerning the application and the effectiveness of the Strategic Environmental

⁵³Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1119>.

⁵⁴Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability (COM/2020/474 final), Brussels, 2009.

⁵⁵ Anne Glucker et al., “Public participation in environmental impact assessment: Why, who and how?” *Environmental Impact Assessment Review* Vol.43, (2013): 104-111, <https://doi.org/10.1016/j.eiar.2013.06.003>

⁵⁶ Sherry Arnstein, “A Ladder of Citizen Participation”, *Journal of the American Planning Association* 85, no. 1 (2019): 24-34, <https://doi.org/10.1080/01944363.2018.1559388>.

⁵⁷Kivinen, Kotilainen, Kumpula, “*Mining conflicts in the European Union*,” 175.

⁵⁸Badera, “Problems of the social non-acceptance of mining projects,” 27-34.

Assessment⁵⁹ and Environmental Impact Assessment Directives⁶⁰ that were prepared by the European Commission.

The questions about the enforcement of public participation in Strategic Environmental Assessment were raised by T. Fischer,⁶¹ C. Jones,⁶² et al., M. Partidario, N. Lee, et al. 's. M. Gauthier⁶³ et al. and A. Bonifazi⁶⁴ et al. evolved a theoretical basis for “democratic SEA” based on “democratic evaluation theories”. To enhance democratization processes, the authors contend that all participants in Strategic Environmental Assessment networks should regard themselves as equally accountable and be willing to challenge alternative environmental value systems that support spatial planning processes. However, as was pointed out by M. Gauthier⁶⁵ et al. “theoretical and practical aspects of public participation in Strategic Environmental Assessment are still research priorities and continue to present challenges”⁶⁶ and the issue of strengthening the role of public participation in Strategic Environmental Assessment in tiered decision-making should be raised on the EU level.

Public participation rights in EU law derive from the Aarhus Convention. Nonetheless, only a few papers can be found that discuss the problems of implementation of the Aarhus Convention in EU law, including the academic works of J. Jendrośka who made an analysis of this issue through the case law of the Aarhus Compliance Committee.⁶⁷

The originality of this thesis is that it provides a comprehensive analysis of public participation rights in EU law. This thesis examines whether public participation rights provide the local communities the “right to say no” to harmful development projects. Moreover, there is no comprehensive analysis of the relationship between the existence of problems in the implementation of public participation rights in EU law and the protests caused by these problems.

Research methodology

Linguistic method. This method was used to understand the meaning of public participation as well as for the interpretation of the EU legal acts and international treaties concerning public participation rights.

Descriptive legal method. This method was used to describe the case law of the ECtHR and CJEU. In addition, this method presented a picture of human rights violations by mining and development projects that are harmful to the environment.

⁵⁹Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) (Luxembourg: Publications Office of the European Union, 2016).

⁶⁰Study concerning the report on the application and effectiveness of the EIA Directive, European Commission, DG ENV, (COWI, 2009).

⁶¹Thomas Fischer, “Strategic environmental assessment in post-modern times”, *Environmental Impact Assessment Review*, no.23(2), (2003): 155-170.

⁶² Michael Jones, Marie Stenseke, *The European Landscape Convention: Challenges of Participation*, (Springer Science & Business Media, 2011).

⁶³ Mario Gauthier, Louis Simard, Jean-Philippe Waube, “Public participation in strategic environmental assessment (SEA): Critical review and the Quebec (Canada) approach”, *Environmental Impact Assessment Review*, Vol. 31 (1), (2011): 48-60.

⁶⁴Carlo Rega, Alessandro Bonifazi, Paolo Gazzola, Strategic environmental assessment and the democratization of spatial planning, *Environmental Assessment Policy Management*, 13(1), (2011): 9–37.

⁶⁵ Gauthier, Simard, Waube, “Public participation in strategic environmental,” 48-60.

⁶⁶ *Ibid*

⁶⁷ The compliance mechanism of the Aarhus Convention is unique in international environmental law, as it allows members of the public to communicate their concerns about a Party's compliance directly to a board of independent experts, the Compliance Committee, who have the mandate to examine the merits of the case.

Historical legal method. This method was used in order to establish the historical sequence of acts and positions of researchers in International Law and European Union law regarding the protection of public participation rights as well as to highlight the features of existing provisions and opinions at different times.

Critical method. This method became the basis for the transfer and reflection of the author's personal position in the work on issues related to the protection of public participation rights of local communities in EU law.

Method of logic. This method was used in conjunction with the other methods to determine whether the raised assumptions could be confirmed or denied. This method helped make sure that the conclusions drawn from the information made sense and that their reasoning followed a logical path and was supported by evidence.

Comparative method. This method was used in comparing the protection of public participation rights in EU Member States. With the comparative method, insight was gained into the effectiveness of the various measures adopted by different member states to protect the rights of public participation. This helped to identify successful strategies within the European Union.

Structure of research.

The thesis has three substantive parts that consist of chapters, subchapters, a bibliography list, an abstract, a summary, and an honesty declaration.

The first part "Protecting human rights and the environment: Why local communities should have the power to stop mining projects" will discuss two ways that local communities can use to stop harmful development projects, including mining. One way is the *de facto* right to stop projects through protests, and the other is *de jure* through public participation rights. In this part, the need to give local communities the *de jure* right to stop mining projects detrimental to the environment will be presented. This will be based on the cases from ECtHR and CJEU, which have confirmed that a healthy environment is essential for the enjoyment of human rights.

The second Part "Public participation rights in environmental decision-making as a legal way of realizing the right of local communities to say no to mining projects" will analyze public participation rights in environmental decision-making. It will start with the definition and explanation of the concept of public participation rights. An overview of the legal protection of public participation rights in environmental decision-making in international and EU law will be presented. As the Aarhus Convention is the only international and legally binding document that exists so far, that guarantees public participation rights as a procedural right, this Convention will be discussed. Furthermore, in this chapter, the legal provisions on public participation rights in environmental decision-making will be analyzed in terms of whether or not they can grant the right to stop harmful mining projects by local communities.

The third Part "Examining obstacles to enforcing public participation rights, including the right to say no, in Strategic Environmental Assessment Directive under EU law" will discuss obstacles that exist in EU law that do not allow the right to say "no" by local communities. It will describe the problematic aspects under the Aarhus Convention in EU law. It will conclude that while EU legislation calls for some harmonization to implement the Aarhus Convention and sets minimum requirements for public participation procedures, it still fails to provide adequate public participation rights for local communities. Therefore, the local communities do not have the "right to say no" through public participation rights. Additional measures for harmonization will be analyzed in this Part.

The aim of the research

The aim of the research is to conduct a comprehensive analysis and assess the extent to which public participation rights are regulated under EU law to allow local communities to say no to mining projects that may have a harmful impact on their human rights.

The objectives of the research

1. To identify and analyze the human rights which can be affected by environmentally harmful projects.
2. To scrutinize public participation rights in environmental decision-making as a legal instrument for the local communities to say no to mining projects that may violate their human rights.
3. To assess the EU legislation on public participation rights in environmental decision-making, and answer if it is sufficient to protect the human rights of local communities affected by mining projects during the energy transition in the EU.

Defended statements.

1. Public participation rights in environmental decision-making, as they are entrenched now in EU legislation, have limitations that cause violations of human rights.
2. Local communities should be granted more effective public participation rights in the decision-making process for mining projects, which would guarantee effective protection of human rights and the environment during the energy transition in the EU.

1. PROTECTING HUMAN RIGHTS AND THE ENVIRONMENT: WHY LOCAL COMMUNITIES SHOULD HAVE THE POWER TO STOP MINING PROJECTS

This part will discuss two ways that local communities can use to stop harmful development projects, including mining. One way is the *de facto* right to stop projects through protests, and the other is *de jure* through public participation rights. As the cases presented will show, communities prefer to use the *de facto* right, perhaps as a more effective one. Thus the question arises: Do public participation rights give local communities and populations affected by mining projects the *de jure* right to say no?

The need to give local communities a real *de jure* right to stop harmful mining projects will be presented. The ECtHR and CJEU cases have confirmed that a healthy environment is essential for the enjoyment of human rights. Local communities must therefore have the right to stop projects that may harm the environment and subsequently their livelihood and human rights.

1.1. The Legitimacy of Local Communities' Right to Stop Mining Projects: Analyzing *de facto* and *de jure* Perspectives

Opposition to mining projects by local communities is a widespread factor and can be met in different parts of the world. The Environmental Justice Atlas⁶⁸ (hereinafter - EJAtlas) database contains locations and a general overview of almost 4 000 conflicts related to environmental and violation of human rights issues worldwide. According to the EJAtlas, nearly 45% of the conflicts are related to primary mining of metals and minerals, among them 41% around energy minerals, and 13% around industrial minerals.⁶⁹ Most of the conflicts found in the EJAtlas included projects in the planning stage or opening and half of them were related to such projects.⁷⁰ According to EJAtlas, in the EU, as in other parts of the world, there are problems with public non-acceptance of mining projects and mining conflicts, and this phenomenon is not unique only to developing countries.⁷¹

Public non-acceptance as a social phenomenon called “NIMBY” or “Not in My Backyard”⁷² (hereinafter - NIMBY) characterizes local community groups opposing neighboring development initiatives close to their living place.⁷³ Social scientists who study this subject extensively found that there is an undeniable link between conflicts and lack of public involvement in the decision-making process.⁷⁴ Insufficient knowledge about the proposed plan or programs for the development of the region is the main cause for public non-acceptance of mining projects.⁷⁵ The reason why communities oppose the development proposal is that they have the impression that everything has already been determined before their involvement in the decision-making process and divergent views on future land use.⁷⁶ Therefore, local communities often resist mining

⁶⁸ Kivinen, Kotilainen, Kumpula, “Mining conflicts in the European Union, 163

⁶⁹ Kivinen, Kotilainen, and Kumpula, “Mining conflicts in the European Union,” 167

⁷⁰ *Ibid*

⁷¹ *Ibid*

⁷² NIMBY, an acronym for the phrase “not in my backyard”, is a characterization of opposition by residents to proposed developments in their local area, as well as support for strict land use regulations

⁷³ Badera, “Problems of the social non-acceptance of mining projects,” 30

⁷⁴ *Ibid*

⁷⁵ *Ibid*

⁷⁶ Badera, “Problems of the social non-acceptance of mining projects,” 27-34

projects and use their *de facto* right to stop mining projects through protest and resistance (below some cases).

In 2013, significant protests around the country forced the Romanian authorities to stop the Roșia Montană Project,⁷⁷ even though the country was at risk of heavy fines from investors. The Roșia Montană Project is a gold and silver mine proposed for Roșia Montană, Romania. If it was authorized, it would be Europe's largest open-pit gold mine employing the gold cyanidation mining method. The Roșia Montană's campaign "Save Roșia Montană" was founded by the local residents who refused to be relocated and challenged the corporation in court for years.⁷⁸ The protesters alleged that the proposal would ruin the environment and damage historic Roman archeological sites and requested that legislation that would allow the project to proceed be repealed. The controversial draft law provided the corporation with the authority to issue compulsory purchase orders to Roșia Montană residents who were unwilling to give up their homes and lands.⁷⁹

In France, already a new neologism appeared "Zone to defend"⁸⁰ (*zone à défendre*) (hereinafter - ZAD) that is used for a violent occupation that is designed to physically stop a development project. The ZADs are primarily organized in regions with an ecological or agricultural component and are used many times to characterize opposition to development projects. The name initially appeared in France in the early 2010s, during the opposition to the airport development project in Notre-Dame-des-Landes.⁸¹ The opposition to this project lasted almost 10 years, and in January 2018 the airport's plans were canceled with the current Nantes airport being renovated instead. Another well-known ZAD was related to the dam building project Sivens Dam (Barrage de Sivens)⁸² which was proposed in Southern France. Construction of the dam began in 2014 but was suspended after Rémi Fraisse, a 21-year-old man opposing the project, was murdered by police. The project was eventually closed in 2015 by the Ministry of Ecology.⁸³

According to the sources,⁸⁴ among the main environmental issues of concern to the public in the opposition projects cited above are possible degradation of the existing landscape, air pollution, depletion or contamination of surface and ground waters, loss of biodiversity, and prospective or actual deforestation that consequently will lead to and loss of (present) livelihood. Social concerns are mainly: land disposal, landscape/location destruction, and relocation. Moreover, a recent study⁸⁵ analyzing the potential benefits and limitations of critical raw materials development in 6 EU countries found that possible reasons for public opposition could also be that the sites where mining may be located are tourist sites, special cultural heritage sites, or areas of

⁷⁷Irina Velicu, "De-growing environmental justice: Reflections from anti-mining movements in Eastern Europe" *Ecological Economics* no.159(C) (2019): 272–273, <https://doi.org/10.1016/j.ecolecon.2019.01.021>.

⁷⁸Velicu, "De-growing environmental justice", 272–273.

⁷⁹*Ibid*

⁸⁰ *Zone à défendre* (zone to defend).

⁸¹ Kim Wilsher, "End of la ZAD? France's 'utopian' anti-airport community faces bitter last stand", *The Guardian*, December 28, 2017.

<https://www.theguardian.com/inequality/2017/dec/28/end-of-la-zad-frances-utopian-anti-airport-community-faces-bitter-last-stand>.

⁸² Agence in France, "France halts Sivens dam."

⁸³"Remi Fraisse death: France dam work at Sivens could halt", *BBC*, October, 29, 2014

<https://www.bbc.com/news/world-europe-29820623>.

⁸⁴ Irina Velicu, "De-growing environmental justice", 272–273, Wilsher, "End of la ZAD?", Agence in France, "France halts Sivens dam."

⁸⁵ Katarzyna Guzik et al., "Potential Benefits and Constraints of Development of Critical Raw Materials' Production in the EU: Analysis of Selected Case Studies", *Resources* 10 (7), (2021), 67. <https://doi.org/10.3390/resources10070067>.

high geohazard risk (landslides, rockfalls, and avalanches).⁸⁶ This survey showed that in 3 of 6 cases, there is a high possibility of opposition from local communities to mining projects.⁸⁷ This suggests that conflicts and public opposition usually arise directly from the divergent views of different stakeholders on future land use. It should not be forgotten that the situation in the EU is also complex due to the relatively high level of urbanization and the vast areas protected from development. Therefore, including a public view in land management, especially at the municipal and regional levels, is necessary to avoid conflicts.⁸⁸

Public and local communities are given the right to express their views on land management in a legal way, through public participation rights, in the perspective of environmental protection. The right to public participation⁸⁹ is a right that is enshrined in international and some national legal systems, which protects human rights and public participation in certain decision-making processes.⁹⁰ For the past few decades, public participation rights have become an indivisible part of environmental regulating systems worldwide.⁹¹ This came about after recognizing the link between ensuring a healthy environment and the enjoyment of human rights and the importance of considering the interests of all stakeholders when making decisions that may have harmful effects on the environment.⁹² More about the definition, legal protection, and other aspects of public participation rights I will discuss in the next Chapter. However, whether the public participation rights provide local communities and the public affected by mining projects with the *de jure* “right to say no” - is the question this thesis tries to clarify.

In the meantime, mining projects are subject to Environmental Impact Assessments and must comply with permitting processes where public participation is part of the scrutiny of the project, the public and local communities prefer and would (as the survey shows) like to express their “right to say no” through protest actions, probably as the most effective way.⁹³ Fundamentally, that can be caused by the disruption in the legal framework for public participation established by EU law and subsequently implemented in the national legislation of Member States, this theory has yet to be tested. But first, it must be clarified whether local communities and the public affected by mining projects should have the “right to say no” at all.

1.2. Protection of Human Rights Through Public Participation Rights

The inextricable link between the enjoyment of human rights and the protection of the environment is largely established by international soft and hard law, case law, policy, and other instruments that control how humans should interact with the environment so as not to harm it,

⁸⁶ Guzik et al., “Potential Benefits and Constraints,” 22

⁸⁷ Guzik et al., “Potential Benefits and Constraints,” 29-30.

⁸⁸ Badera, “Problems of the social non-acceptance of mining projects,” 27-34.

⁸⁹ Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Economic Commission for Europe, Chisinau, 29 June–1 July 2011 <https://unece.org/environmental-policy-1/public-participation>.

⁹⁰ “OHCHR and equal participation in political and public affairs”, United Nations Human Rights, September, 4, 2020 <https://www.ohchr.org/en/equal-participation>.

⁹¹ Benjamin J. Richardson and Jona Razzaque, “Public participation in environmental decision-making”, in *Environmental Law for Sustainability*, ed. Stepan Wood and Benjamin J. Richardson (Oxford, UK: Hart Publishing, 2006), 165.

⁹² UN Conference on the Human Environment (Stockholm) was the first international treaty to recognize the relationship between human rights and the environment, 1972, UN Conference on Environment and Development (Rio de Janeiro), 1992.

⁹³ Guzik et al., “Potential Benefits and Constraints,” 2-36.

since the United Nations Conference on the Human Environment in Stockholm.⁹⁴ This link has become particularly important now, in the face of environmental degradation caused by climate change and human activities. Therefore, the recognition by the UN General Assembly in 2022 of the resolution on the human right to a healthy environment⁹⁵ has become rational. This right must guarantee the protection of the environment, including various harmful human activities that can lead to harmful consequences, such as mining projects. Moreover, the dependency of enjoyment of the range of human rights on the protection of the environment has been established by the ECtHR case law that will be discussed below.

Before the UN General Assembly resolution on the human right to a healthy environment, which is not legally binding, came into effect, the protection of this right was mainly through legally binding procedural laws. These laws, particularly public participation rights, indirectly safeguarded the right to a healthy environment. Effective environmental protection and the human right to a healthy environment, therefore, depend on public participation rights.

The next subchapters will discuss the case law of ECtHR where the court came to the conclusion that protection of the environment is a precondition for the enjoyment of human rights. The ECtHR has recognized that a state can violate intersecting human rights, such as the right to life,⁹⁶ to respect private and family life,⁹⁷ right to the peaceful enjoyment of his possessions⁹⁸ due to its actions or inactions by harming the environment. CJEU in its case law built a connection between human health and the protection of the environment and justified the restriction of free movements in order to protect the environment. Therefore, public participation rights are one of the tools to protect the environment for the Union's goals.

1.2.1. Right to a healthy environment

The right to a healthy environment is a relatively recent phenomenon and was first formally recognized in July 2022, when the UN General Assembly adopted a resolution to the right to a clean, healthy, and sustainable environment as a human right.⁹⁹ The resolution recognizes that *the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land, and water, the unsound management of chemicals and waste, the resulting loss of biodiversity, and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights.*¹⁰⁰ This resolution is the result of a lengthy diplomatic process that lasted for 30 years and is not legally binding.

However, before the recognition the right to a healthy environment has been already maintained and spread promptly as procedural environmental rights that were protected by

⁹⁴ United Nations Conference on the Human Environment, where Stockholm Declaration was adopted, Stockholm, 1972 <https://www.un.org/en/conferences/environment/stockholm1972>.

⁹⁵ UN General Assembly resolution recognizing the right to a clean, healthy, and sustainable environment as a human right (New York, July 26, 2022) <https://digitallibrary.un.org/record/3982508?ln=en>.

⁹⁶ Council of Europe/European Court of Human Rights, 2022 “Guide to the case-law of the European Court of Human Rights: Environment” https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, 7.

⁹⁷ *Case Tătar v. Romania*, no. 67021/01, 2009, ECHR.

⁹⁸ *Case Dimitar Yordanov v. Bulgaria*, no. 3401/09, ECHR.

⁹⁹ UN General Assembly resolution recognizing the right to a clean, healthy, and sustainable environment as a human right (New York, July 26, 2022) <https://digitallibrary.un.org/record/3982508?ln=en>.

¹⁰⁰ *Ibid*

constitutional or statutory law in many countries.¹⁰¹ The right to a healthy environment as an environmental procedural right was enshrined in the laws of more than 150 countries and several human rights and procedural environmental rights treaties,¹⁰² including the Aarhus Convention,¹⁰³ that guarantee public participation rights and have legally binding effects.¹⁰⁴ The constitutional recognition of the right to a healthy environment led to the amendment of the laws related to public participation rights, as well as access to environmental information, the ability to participate in decision-making, and access to justice in almost all European countries since the Stockholm Declaration in 1972.¹⁰⁵

Principle 1 of the Stockholm Declaration¹⁰⁶ where the right to a healthy environment first time mentioned states that: “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*”. This principle was subsequently reaffirmed in the Rio Declaration in 1992, from which the Aarhus Convention was subsequently founded.¹⁰⁷ Even though Stockholm and Rio Declarations are soft law they were reaffirmed by legally binding rules of the Aarhus Convention (discussed below).

As the right to a healthy environment ensures that the environment meets certain health standards and includes rights to clean air, water, and protection from pollution. Recognition of the right to a healthy environment, therefore, leads to the creation of stronger environmental laws and better safeguards of the environment and human rights. Under EU law, the right to a healthy environment is not explicitly recognized as a fundamental human right. However, the EU has adopted a number of policies and legal acts aimed at protecting the environment in order to promote sustainable development¹⁰⁸ and guarantee procedural environmental rights, such as public participation rights,¹⁰⁹ which may help protect the right to a healthy environment indirectly.

1.2.2. Right to good administration

The right to participate in public affairs, is codified in international law, more specifically in Article 21 of the Universal Declaration of Human Rights.¹¹⁰ In democratic state models, public participation can be presented in two ways: individuals elect representatives and participate in decision-making processes through their representatives and individuals participate directly in the decision-making processes.¹¹¹ Both relate to democratic decision-making and aim to ensure

¹⁰¹ David Boyd, “The constitutional to a healthy environment”, *Environment: Science and Policy for Sustainable Development*, Vol.54 no. 54 (4), (2012):3-15 <https://doi.org/10.1080/00139157.2012.691392>.

¹⁰² Boyd, “The constitutional to a healthy environment”, 3.

¹⁰³ Article 1 of the Aarhus Convention.

¹⁰⁴ Pau de Vilchez, Annalisa Savaresi, “The Right to a Healthy Environment and Climate Litigation: A Game Changer?”, *Yearbook of International Environmental Law*, (2023):3–19, <https://doi.org/10.1093/yiel/yvac064>

¹⁰⁵ Boyd, “The constitutional to a healthy environment”, 4.

¹⁰⁶ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Stockholm, 1972.

¹⁰⁷ Recital 2 of the Aarhus Convention.

¹⁰⁸ Article 37 of the Charter.

¹⁰⁹ Strategic Environmental Assessment Directive.

¹¹⁰ Universal Declaration of Human Rights, United Nations General Assembly, Paris, 1948, <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>.

¹¹¹ Gyula Bándi, “Introduction into the Concept of Environmental Democracy”, in *Environmental Democracy and Law*, ed. Gyula Bándi (Groningen/Amsterdam: Europa Law Publishing, 2014), 3-20.

transparency and legitimacy in government decisions.¹¹² Public participation in both occasions allows for reaching informed and holistic decisions by taking into account public perspectives.¹¹³ The role of law is crucial in both the representative and participatory democracy models, particularly with regard to the procedure of public participation.¹¹⁴ The legal framework for procedural requirements of public participation rights is essential in safeguarding democratic values as it can facilitate the participatory decision-making process and control the outcome.¹¹⁵

Decision-making process in environmental issues in the EU depends on the political Member States' will, and the implementation of public participation by the Member States takes place with little or no public influence on administrative decisions.¹¹⁶ However, public participation rights relate to the human right to good administration that is enshrined in Article 41 of Charter¹¹⁷ and includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. It should also be noted that the CJEU applies Article 41 exclusively to the EU institutions, which follows from the wording of the provision. However, EU Member State authorities are under similar obligations under the general principle of EU law when they apply EU law.¹¹⁸

Right to be heard, according to CJEU case law,¹¹⁹ means that before the adoption of any kind of acts or decisions that can adversely impact individuals they must be heard by the institution, body, office, or agency in question.¹²⁰ That requirement is mandated by the Treaties or by secondary Union law or stems from basic legal principles and human rights. The person whose interests are visibly impacted by a decision made by a public body must be given the opportunity to express his point of view. This criterion is a necessary procedural requirement. The individual in question must be informed in a timely, effective, and personal manner of any material in the file that may be beneficial in his or her defence.¹²¹

On the whole, the practice of participatory democracy is a vital element of good governance, and it considers ideal for state administration where the decision-making process happens collaboratively and the public has given power in the decision-making process.¹²² It should be not forgotten, that according to Article 2 of TEU, the Union is founded on the values of respect for human rights, democracy, and the rule of law. Therefore, participatory democracy throughout the Union should foremost protect human rights, enhance democracy and respect the rule of law and grant the right to public influence final decisions during the participatory process.

¹¹² Bándi, "Introduction into the Concept of Environmental Democracy", 3-20.

¹¹³ Bándi, "Introduction into the Concept of Environmental Democracy", 3-20.

¹¹⁴ Joshua Cohen, "Procedure and substance in Deliberative Democracy", in *Deliberative democracy: essays on reason and politics*, ed. James Bohman and William Rehg (Cambridge, MA: MIT Press, 1997), 407

¹¹⁵ Richardson and Razzaque, "Public participation in environmental decision-making", 167.

¹¹⁶ Badera, "Problems of the social non-acceptance of mining projects", 27-34

¹¹⁷ Charter of Fundamental Rights of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT>

¹¹⁸ Case C-141/12, *YS v Minister voor Immigratie, Integratie en Asiel*, 2014, para 67 and 68

¹¹⁹ Pranvera Beqiraj (Mihani), "The Right to Be Heard in the European Union – Case Law of the Court of Justice of the European Union", *European Journal of Multidisciplinary Studies*, Vol.1 no 1, (2016), 264-265

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² Gerd Winter, "Theoretical Foundations of Public Participation in Administrative Decision-Making", in *Environmental Democracy and Law* (Groningen/Amsterdam: Europa Law Publishing, 2014), 29.

1.2.3. Right to environmental protection

The connection between environmental protection and the enjoyment of human rights operates in both directions: 1) Environmental protection is necessary for the enjoyment of a variety of human rights (as it will be established below), and 2) the exercise of human rights, particularly, procedural rights such as public participation rights are critical for effective environmental protection, as emphasized by the Stockholm Declaration on the Human Environment and the Aarhus Convention and afterward by the case law of the ICJ.

The link between the enjoyment of human rights and environmental damage that has been established in Principle 1 of the Stockholm Declaration¹²³ was reaffirmed by the ICJ in its judgment *Hungary v Slovakia*: “The protection of the environment is [...] a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments”.¹²⁴ In other words, environmental protection is an essential component for the enjoyment of human rights and public participation rights can contribute to the environmental protection that subsequently will lead to the protection of human rights by providing decision-makers with environmental and social considerations during the decision-making processes.¹²⁵

The EU has shared competence in environmental issues with its Member States.¹²⁶ Today, the EU has some of the highest environmental standards in the world due to the development of policy and legislation.¹²⁷ EU environment policy is based on Articles 11 and 191-193 of the TFEU. According to Article 191 of the TFEU, the EU aims to preserve, protect and improve the quality of the environment and to protect human health. Moreover, Article 37 of the Charter codifies a “high level of environmental protection” and “improvement of the quality of the environment” within the framework of the protection of fundamental human rights in the EU.

The CJEU defends trade restrictions on the basis of environmental protection. Classic examples include the cases *Danish Bottles*¹²⁸ and *Commission v. Belgium*¹²⁹ (Walloon Waste). In the *Danish Bottles* case, the CJEU states that the protection of the environment is “one of the Community's essential objectives”.¹³⁰ Article 37 of the Charter, which safeguards the environment

¹²³ Declaration of the United Nations Conference on the Human Environment, Stockholm Declaration, 1972

¹²⁴ Case *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Judgment, 1997, para 4.

¹²⁵ Sumudu Atapattu, Andrea Schapper, *Human Rights and the Environment: Key Issues*, (London: Routledge, 2019)
https://books.google.fr/books?id=5kmMDwAAQBAJ&lpg=PT47&ots=ja2-r2s_wm&pg=PT47#v=onepage&q&f=false.

¹²⁶ Article 4 of the TFEU.

¹²⁷ Summaries of EU legislation: Environment and climate change <https://eur-lex.europa.eu/content/summaries/summary-20-expanded-content.html#:~:text=EU%20environmental%20policies%20and%20legislation,move%20toward%20a%20sustainable%20economy>.

¹²⁸ Case C-302/86, *Commission v Denmark (Danish Bottles)*, 1988, para 7

¹²⁹ Case C-2/90, *Commission v Belgium*, 1992, para 33

¹³⁰ Case C-302/86 *Commission v Denmark (Danish Bottles)*, 1988, para 19

within a human rights framework, serves as a strong indicator of the EU's commitment to protecting the environment.¹³¹

Furthermore, in its case, *Commission v Austria*¹³² CJEU made a statement that “obstruct intraCommunity trade may be justified on one of the public-interest grounds set out in Article 30 EC, such as the protection of human health and life, or one of the overriding requirements relating inter alia to the protection of the environment, provided that the measures in question are proportionate to the objective sought.” The CJEU further elucidated that the objective of the protection of human health is closely related to the objective of the protection of the environment. This is consistent with earlier case law, such as *Mickelsson and Roos*,¹³³ where the CJEU determined that environmental protection and the preservation of the lives, health, and habitat of people, animals, and plants are “closely related objectives.”

The protection of environmental procedural rights and its significance to environmental protection can be found in the CJEU's well-known case *Trianel*.¹³⁴ This case is based on the idea that no one “owns” the environment and on the other hand the environment has no voice. In the same way, decisions about the environment now cannot be influenced by future generations.¹³⁵

The mining sector has always had a bad reputation worldwide due to its detrimental effects on the environment, human health, and fundamental human rights.¹³⁶ Problems such as the deterioration of human health, contamination of water, degradation of air and soil quality, and the destruction of biodiversity that mining can cause,¹³⁷ violate the human right to environmental protection that EU law and the Charter guarantee.

Moreover, the right to environmental protection ensures sustainable development that is on the global agenda now, and public participation rights are one of the tools to achieve sustainable development goals. Thus, sustainable development can be defined as development that “meets the demands of the present generation without compromising the needs of the next generations”.¹³⁸ For the first time, the notion of sustainable development and the link between it and public participation rights were mentioned in the Report of the World Commission on Environment and Development “Our common future” (hereinafter -Brundtland Report)¹³⁹ which subsequently

¹³¹ Sanja Bogojević, “EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?”, in *EU Human Rights Law*, ed. S. Douglas-Scott and N. Hatzis (Edward Elgar Publishing, 2014), 4 Available at SSRN: <https://ssrn.com/abstract=2475334>.

¹³² Case C-28/09, *Commission v Austria*, 2011, para 119

¹³³ Case C-142/05, *Mickelsson and Roos*, 2009, para 33.

¹³⁴ C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, 2011

¹³⁵ Justine Richelle, “Environmental procedural rights before European courts: still searching for a common script or multiplying avenues of protection?”, 2022, Web publication/site, WordPress <https://realaw.blog/2022/02/25/environmental-procedural-rights-before-european-courts-still-searching-for-a-common-script-or-multiplying-avenues-of-protection-by-justine-richelle/>

¹³⁶ Tapio Litmanen, Tuija Jartti, Eero Rantala, “Refining the preconditions of a social license to operate (SLO): reflections on citizens’ attitudes towards mining in two Finnish regions”, *The Extractive Industries and Society*, 3 (3), 782-792.

¹³⁷ *Author’s note*: An overview of the environmental and social impacts of mining projects can be found in reports of different corresponding organizations. One of the well-known Responsible Mining Index presents the adverse effects of mining activities on the well-being of local communities from different perspectives including human rights violations. Responsible Mining Foundation, Responsible Mining Index Report: Community Wellbeing, 2022, https://2022.responsibleminingindex.org/resources/RMI_Report_2022-Summary_EN.pdf, 26

¹³⁸ Pradeep K. Singh and Raj S. Singh, “Environmental and Social Impacts of Mining and their Mitigation”, Conference: National Seminar ESIMM-2016 (Kolkata, 2016), 6

¹³⁹ Report of the World Commission on Environment and Development: “Our common future” (Brundtland report), New York, 1987 <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

became the basis for legal environmental policies worldwide. The report tried to warn about the adverse environmental impacts that followed after growth in the economy and globalization and it sought to find possible solutions to the problems caused by industrialization and the growth of the population.¹⁴⁰ The report proclaimed that many existing development patterns are leaving a rising number of individuals poor and vulnerable, degrading the environment, and depriving later generations of a secure future.¹⁴¹ As the solution to these problems, the Brundtland report suggested that the concept of sustainable development should be implemented internationally¹⁴² and the ability of the engagement of the public should be considered to advance the objectives of sustainable development.¹⁴³

In order to achieve, sustainable development it is vital to balance three fundamental components: economic growth, social inclusion, and environmental protection, which are all interconnected and essential for the overall well-being of individuals and communities.¹⁴⁴ The basic principles and strategy for achieving sustainable development were laid down in Principle 10 of the Rio Declaration¹⁴⁵ which was incorporated into the Aarhus Convention that summarizes the various public participation rights. The Aarhus Convention gives the public a strong foundation for reference in exercising their procedural rights related to the environment. Public participation enables social inclusion in the decision-making processes and it plays a crucial role in sustainable development.¹⁴⁶

Global Sustainable Development Goals (hereinafter- SDGs),¹⁴⁷ which were adopted by the UN in 2015, have the aims to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. SDGs have principles, according to which promotion of the well-being of people so that everyone can fulfill their potential in dignity and equality and in a healthy environment.¹⁴⁸ The idea of sustainable development goals and public participation rights are connected. If the local communities would have the “right to say no” to development projects that can harm the environment and their livelihood then it can contribute to the achievement of the following SDGs: good health and well-being, clean water and sanitation, reduced inequality, sustainable cities and communities, life on land, peace justice and strong institutions.¹⁴⁹ As all of these SDGs shape the well-being and prosperity of communities with a connection to a healthy environment.

¹⁴⁰ *Ibid*

¹⁴¹ *Ibid*

¹⁴² *Ibid*

¹⁴³ Hugh Wilkins, “The need for subjectivity in EIA: discourse as a tool for sustainable development”, *Environmental Impact Assessment Review*, Volume 23, Issue 4, (July 2003), 401-414.

¹⁴⁴ Resolution adopted by the UN General Assembly: Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>

¹⁴⁵ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992

¹⁴⁶ Richardson and Razzaque, “Public participation in environmental decision-making”, 171.

¹⁴⁷ The 17 Sustainable Development Goals are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. <https://sdgs.un.org/goals>

¹⁴⁸ The basic principle of sustainable development that no one can be left behind
<https://www.sdg.services/principles.html>

¹⁴⁹ 17 Sustainable Development Goals, Department of Economic and Social Affairs, United Nations
<https://sdgs.un.org/goals>

Sustainable development is one of the primary goals of the EU since 2001 or since the Amsterdam Treaty.¹⁵⁰ Since then the EU has developed its policy on sustainable development¹⁵¹ that was updated in 2006 and provided “a long-term vision for sustainability in which economic growth, social cohesion, and environmental protection go hand in hand and are mutually supporting”.¹⁵² Sustainable development in the EU law finds support in Article 3(3) TEU,¹⁵³ Article 11 of the TFEU¹⁵⁴ and Article 37¹⁵⁵ of the Charter. The EU's law and policies on sustainable development are closely intertwined with the advancement of environmental law and the guiding principles that govern it. The EU prioritizes public participation by integrating sustainable development with the Charter's fundamental rights and freedoms while ensuring a balance with environmental protection.¹⁵⁶

Due to shared competence in regard to environmental issues, in its legal order, the EU also contains provisions about public participation rights in different legal acts. More relevant to this thesis are the Environmental Impact Assessment¹⁵⁷ and the Strategic Environmental Assessment¹⁵⁸ Directives. The aim of the Environmental Impact Assessment Directive is to achieve Union's objectives in the protection of the environment and the quality of life¹⁵⁹ and the aim of the Strategic Environmental Assessment Directive¹⁶⁰ is to promote sustainable development while environmental protection is the main goal.

Public participation in environmental decision-making processes contributes to more sustainable and environmentally friendly choices that consequently lead to sustainable development. Establishing mechanisms for public participation that entail shared decision-making and an assumption of obligations in favour of global sustainability is necessary to promote equitable, inclusive, and fair societies.¹⁶¹

¹⁵⁰ According to part one, Article 1(2) of the 1997 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts the European Union nations shall take into account “the principle of sustainable development” while promoting economic and social progress for their peoples”

¹⁵¹ Communication From the Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, Brussels, 2001

¹⁵² *Ibid*

¹⁵³ Article 3 of the TEU, The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy[...]

¹⁵⁴ Article 11 of the TFEU, Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

¹⁵⁵ Article 37 of the Charter, A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

¹⁵⁶ Marcel Szabó, “Public Participation – Human Right or an Instrument of International Administrative Law”, in *Environmental Democracy and Law*, ed. Gyula Bándi (Groningen/Amsterdam: Europa Law Publishing, 2014), 95-112.

¹⁵⁷ Environmental Impact Assessment Directive.

¹⁵⁸ Strategic Environmental Assessment Directive.

¹⁵⁹ Recital 4 of the Environmental Impact Assessment Directive.

¹⁶⁰ Article 1 of the Strategic Environmental Assessment Directive.

¹⁶¹ M.F.de Poza-Vilches, J.Gutiérrez-Pérez, A. López-Alcarria, “Participation and Sustainable Development”, in *Encyclopedia of Sustainability in Higher Education*, ed. Leal Filho (Springer, 2019). https://doi.org/10.1007/978-3-319-63951-2_57-1.

1.2.4. Right to respect for private and family life

In the light of ECtHR case law, environmental damage, including from mining projects, may in some cases be found to violate Article 8 on respect for private and family life, which can be seen as an implicit recognition of the right to a healthy environment. Article 8 of the ECHR safeguards the individual's right to private and family life, as well as his home and correspondence.¹⁶² A home is often the physically defined environment in which private and family life occurs.¹⁶³ The person has a right to respect his home, which includes not the physical space but also the calm enjoyment of such a place.¹⁶⁴ Therefore, a breach of the right to respect for the home is not limited to concrete or physical breaches, such as unauthorized access into a person's house, but also includes non-concrete or physical breaches, such as noise, emissions, smells, or other types of interference.¹⁶⁵ A major violation may result in a violation of a person's right to respect his home if it stops him from enjoying his home's advantages.

In *Tătar v. Romania*, ECtHR ruled that the Romanian authority had failed in its duty to assess the hazard of gold mining activity that was running in the vicinity of applicants' homes.¹⁶⁶ As a result, there was a breach of the dam and it caused releasing about 100,000 m³ of cyanide-contaminated tailings water into the environment.¹⁶⁷ Although Romania, according to the ECtHR, had an obligation to ensure safety, the environment, and human health by regulating the safety of industrial activities, it had not fulfilled its duty to assess satisfactorily the risks that its activities might entail. This led to a violation of the right to respect for private life and home, within the meaning of Article 8, and more generally their right to enjoy a healthy and protected environment.¹⁶⁸ The ECtHR has also noted that authorities failed to ensure public participation concerning environmental issues in this case and they did not provide the public the information about investigations and studies of harmful environmental effects from mining activities.¹⁶⁹

In another case, *López Ostra v. Spain*¹⁷⁰ the ECtHR has explored whether pollution might be prompt to the application of Article 8 of the ECHR. The problem initially arose in the case that involved a waste treatment facility for both liquid and solid waste that was twelve meters from the applicant's home. Based on medical reports and expert opinions the ECtHR found that the emissions from the plant exceeded the limit endangered the health of those living nearby and established a causal link between those emissions and health problems suffered by the applicant's daughter¹⁷¹. According to ECtHR, even though the domestic courts did not discover any health risks, the nuisances that are in question are a violation of the quality of life of those living in the plant's vicinity¹⁷². In that case, the ECtHR famously said that “severe environmental pollution may

¹⁶² Council of Europe/European Court of Human Rights, “Guide to the case-law of the European Court of Human Rights: Environment”, 2022 https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, 22

¹⁶³ Council of Europe/European Court of Human Rights, “Guide to the case-law of the European Court of Human Rights: Environment”, 2022 https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, 23

¹⁶⁴ *Ibid*

¹⁶⁵ *Ibid*

¹⁶⁶ *Case Tătar v. Romania*, no. 67021/01, 2009, ECHR

¹⁶⁷ *Ibid*

¹⁶⁸ *Ibid*

¹⁶⁹ Responsible Mining Foundation, Report “*Harmful Impacts of Mining*”, 2021 https://www.responsibleminingfoundation.org/app/uploads/RMF_Harmful_Impacts_Report_EN.pdf

¹⁷⁰ *Case Lopez Ostra V Spain*, no. 16798/90, ECHR

¹⁷¹ *Ibid*

¹⁷² *Ibid*

affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health¹⁷³.” This statement of the ECtHR is repeated in several cases.¹⁷⁴ Mining waste piles are acknowledged as long-term causes of environmental pollution, particularly with regard to water.¹⁷⁵

In the case *Taşkın and Others v. Turkey*, the ECtHR ruled that Article 8 applied because the way how gold was produced using sodium cyanide leaching had a severely detrimental effect on the environment that led to the breach of the right of the applicants to respect for their private and family life.¹⁷⁶ In this case, the ECtHR affirms that, in accordance with its well-established case law, even if Article 8 does not contain any explicit procedural criteria for the decision-making process, however, it must be fair and provide appropriate consideration of the individual's interests that are protected by Article 8.¹⁷⁷ Moreover, the decision to grant a permit for harmful mine operations by authorities in the instant case was taken, despite the fact, that the environmental impact assessment had highlighted the risks of using sodium cyanide for the local ecosystem and human health due to the location of the gold mine and the local geological features.¹⁷⁸ Referring to the findings of the impact study and other reports, the supreme domestic court annulled the operating permit for gold mining that authorities granted as it did not serve the public interest.¹⁷⁹ However, even after the annulment of the permit, the gold mine was not ordered to close for ten months after the delivery of the decision.¹⁸⁰ This case demonstrates, that the authorities while issuing the permit for mining activities can disregard even impact assessment reports that show negative consequences for the environment and as a result to human health and allow to start of mining operations. Therefore, public participation rights may preserve and safeguard the environment since appropriate environmental protection is necessary for human well-being and the enjoyment of fundamental human rights, including the right to life itself.

In its case law, ECtHR has stated that, while Article 8 has not specified procedural requirements, however, the decision-making process must be fair and ensure adequate respect for the individual's interests, as guaranteed by Article 8. As a consequence, the Court must analyze all procedural issues, such as the sort of policy or decision at issue, the extent to which individual opinions were considered throughout the decision-making process, and the procedural protections available.¹⁸¹

1.2.5. Right to property

Environmental damage can lead to a violation of the right to property. In theory, Article 1 of Protocol No. 1 does not guarantee the right to quiet enjoyment of possessions in an enjoyable

¹⁷³ *Ibid*

¹⁷⁴ This has notably been confirmed in ECHR cases *Taskin, and others, v. Turkey* no.46117/9, *Powell and Rayner v. the United Kingdom* no.9310/81

¹⁷⁵ Oana Cristina Modoi et.al., “Environmental risks due to heavy metal pollution of water resulted from mining wastes in NW Romania”, *Environmental Engineering and Management Journal* 13, no. 9, (2014): 1. <http://omicron.ch.tuiasi.ro/EEMJ/>.

¹⁷⁶ *Case Taşkın and Others v. Turkey*, no. 46117/99, ECHR

¹⁷⁷ *Case Taşkın and Others v. Turkey*, no. 46117/99, ECHR, para118

¹⁷⁸ *Case Taşkın and Others v. Turkey*, ECHR, para 121

¹⁷⁹ *Ibid*

¹⁸⁰ *Case Taşkın and Others v. Turkey*, ECHR, para 122

¹⁸¹ *Ibid*

environment.¹⁸² Nonetheless, industrial accidents, natural catastrophes, and, more broadly, environmental harm can result in the destruction, deterioration, or loss of property value. Under Article 1 of Protocol No. 1, the State may be held liable for the latter, regardless of whether the negative effects on the property were the result of a failure in the positive responsibility to preserve property rights or of interference because of the authorities.¹⁸³

In *Dimitar Yordanov v. Bulgaria*¹⁸⁴, the plaintiff claimed that the operation by a publicly owned company was illegal. The operation of an opencast coalmine, which included the use of explosives, had destroyed his house, which was located at a distance of 160-180 meters, causing him to leave.¹⁸⁵ The Court stated in this case, the state interfered with the exercise of his right to property protection. Considered under the first sentence of Article 1 of Protocol No. 1, the Court observed a violation of that provision on the basis that the interference was illegal, noting that the coalmine was running within the buffer zone provided for in domestic law and that the court of appeals had ruled that detonating explosives in such close proximity to housing was indisputably contrary to domestic law.¹⁸⁶

*Ouzounoglou v. Greece*¹⁸⁷ and *Athanasίου and Others v. Greece*¹⁸⁸, both addressed the development of infrastructure (roads in the former case and railroads in the latter) close the applicants' residences in expropriated areas of their land.¹⁸⁹ The applicants objected to the refusal to provide compensation under the expropriation procedure for the decrease in value of their remaining properties as a result of the proximity of the said infrastructure, which supposedly blocked their view and exposed them to noise pollution and vibrations. The Court held that the denial of compensation had thrown off the reasonable balance between competing individual rights and the necessity of public interest.¹⁹⁰

1.2.6. Right to life

Industrial activities, such as mining projects, can violate the human right to life that is protected.¹⁹¹ According to the ECtHR case law, the positive obligation of the state to protect life includes direct industrial operations, which are inherently risky.¹⁹² In the context of risky activities, extra attention must be focused on preventive regulations designed to the unique characteristics of the activity in question, particularly in terms of the amount of possible harm to human life.¹⁹³

Such preventive regulations should govern the licensing, establishment, operation, security, and supervision of the activity.¹⁹⁴ As well as making it mandatory for all parties involved to take practical measures to ensure the effective protection of citizens whose lives may be

¹⁸² Council of Europe/European Court of Human Rights, "Guide to the case-law of the European Court of Human Rights: Environment", 2022 https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, 68

¹⁸³ *Ibid*

¹⁸⁴ *Case Dimitar Yordanov v. Bulgaria*, no.3401/09, ECHR

¹⁸⁵ *Ibid*

¹⁸⁶ *Ibid*

¹⁸⁷ *Case Ouzounoglou v. Greece*, no. 32730/03, ECHR

¹⁸⁸ *Case Athanasίου and Others v. Greece*, no. 50973/08, ECHR

¹⁸⁹ Council of Europe/European Court of Human Rights, "Guide to the case-law of the European Court of Human Rights: Environment", 2022 https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, 68

¹⁹⁰ *Ibid*

¹⁹¹ *Case Oneryildiz v. Turkey*, no. 48939/99, ECHR

¹⁹² "Guide to the case-law of the European Court of Human Rights: Environment", 7

¹⁹³ *Ibid*

¹⁹⁴ "Guide to the case-law of the European Court of Human Rights: Environment", 9

jeopardized by the inherent risks of industrial activities.¹⁹⁵ Preventive regulations must, in particular, guarantee the public's right to information about hazards' effects.¹⁹⁶ Moreover, in assessing whether the respondent state had complied with the positive obligation under Article 2 of the ECHR, the ECtHR must consider the domestic decision-making process about industrial activities. Therefore, the states should comply with the procedural obligations of Article 2 that contain public participation rights.

Summary

Throughout its case law related to the link between harm to the environment and human rights violations, ECtHR affirmed the citation of the Parliamentary Assembly of the Council of Europe.¹⁹⁷ The citation states that the court should protect individual rights to access justice, information, and participation in decision-making as given by the Aarhus Convention.¹⁹⁸

Public participation rights in environmental decision-making are guaranteed by the human right to good administration that is enshrined in Article 41 of the Charter and include the right of every person to be heard. It means, that before the adoption of any kind of acts or decisions that can adversely impact individuals they must be heard by the institution, body, office, or agency in question.¹⁹⁹ Right to be heard, according to CJEU case law,²⁰⁰ means that before the adoption of any kind of acts or decisions that can adversely impact individuals, they must be heard by the institution, body, office, or agency in question.²⁰¹ In addition, procedural rights, such as public participation, can guarantee the human right to a healthy environment and the right to life, because they indirectly protect them, by protecting the environment, which then ensures sustainable development.

In general, human rights violations caused by the adverse environmental impacts of development projects are broad. Not only is loss of property an obvious threat to local communities, but also the noise pollution near development projects can lead to infringement of the right to property, as was the case in the *Ouzounoglou v. Greece*²⁰² and *Athanasίου and Others v. Greece*.²⁰³ Mining projects can cause noise pollution, for example, noise levels in the open-cast mining sector are second only to those seen near jet engines at airports.²⁰⁴ However, not all affected persons can be compensated in expropriation proceedings for diminishing the value of their property.

Environmental pollution may affect people's well-being and prevent them from enjoying their homes in a way that adversely affects their personal and family life without, however, seriously endangering their health, the ECtHR also found a human rights violation in *Lopez Ostra*

¹⁹⁵ *Ibid*

¹⁹⁶ *Ibid*

¹⁹⁷ Birgit Peters, "Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention", *Journal of Environmental Law* 1 (2017): 1–27.
doi: 10.1093/jel/eqx023.

¹⁹⁸ *Case Taşkın and Others v. Turkey*, no.46117/99, ECHR, *Case Tătar v. Romania* no. 67021/01, 2009, ECHR.

¹⁹⁹ Beqiraj, "The Right to Be Heard", 264-265.

²⁰⁰ Case C-49/88, *Al-Jubail Fertilizer v Council*, 1991.

²⁰¹ Beqiraj, "The Right to Be Heard", 264-265.

²⁰² *Case Ouzounoglou v. Greece*, no. 32730/03, ECHR

²⁰³ *Case Athanasίου and Others v. Greece*, no. 50973/08, ECHR.

²⁰⁴ Cem Sensogut, "Occupational Noise in Mines and Its Control – A Case Study", *Polish Journal of Environmental Studies* 16 no. 6 (January 2007): 939-942.

v. Spain.²⁰⁵ Whereas mining waste piles are acknowledged as long-term causes of environmental pollution, particularly with regard to water.²⁰⁶

The ECtHR case *Taşkın and Others v. Turkey* showed that in the decision-making process of development projects, impact assessments can show harmful effects on the environment. Nevertheless, the authorities are not obliged to stop development projects if they believe that the public interest prevails. Since state authorities must be guided only by the results of the impact assessment when making decisions on specific projects, however, they are not limited to this.

However, the right to a healthy environment is a human right and has recently been recognized by a UN resolution. Even before the recognition, the right to a healthy environment has been protected by constitutional, statutory law, and international treaties. It was guaranteed through procedural rights as public participation rights. In the meantime, the EU law enshrines the human right to environmental protection. Article 37 of the Charter, which safeguards the environment within a human rights framework, serves as a strong indicator of the EU's commitment to protecting the environment.²⁰⁷ Environmental protection and the preservation of the lives, health, and habitat of people, animals, and plants are “closely related objectives”, according to CJEU. The CJEU further elucidated that the objective of protection of health incorporated, in principle, the objective of the Union of protection of the environment.

Public participation plays an important role in the protection of the environment and human rights. The protection of environmental procedural rights and its significance to environmental protection can be found in the CJEU's well-known case *Trianel*.²⁰⁸ This case is based on the idea that no one “owns” the environment and on the other hand the environment has no voice. In the same way, decisions about the environment now cannot be influenced by future generations.²⁰⁹ It is difficult to guarantee the protection of human rights without public participation rights and their accurate implementation. Although public authorities must be guided by an impact assessment when granting permission for development projects, they may still decide to proceed with the project and thereby violate the human rights of a particular individual, justifying a social interest. Therefore, affected individuals or local communities should have the “right to say no” to these potentially damaging projects, as this is their human right.

²⁰⁵ *Case of Lopez Ostra V Spain*, no.16798/90, ECHR

²⁰⁶ Modoi, “Environmental risks due to heavy metal pollution of water”, 1.

²⁰⁷ Bogojević, “EU Human Rights Law and Environmental Protection”, 4.

²⁰⁸ C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening), ECLI:EU:C:2011:289.

²⁰⁹ Richelle, “Environmental procedural rights before European courts”, Web publication/site.

2. PUBLIC PARTICIPATION RIGHTS IN ENVIRONMENTAL DECISION-MAKING AS A LEGAL WAY OF REALIZING THE RIGHT OF LOCAL COMMUNITIES TO SAY NO TO MINING PROJECTS

In this Chapter, a definition of public participation rights will be disclosed, as well as the concept of such rights, as public participation rights have two dimensions. They can be characterized as substantive and procedural rights, and for a better understanding of the essence of such rights, I will elaborate on each of these roles.

Moreover, public participation rights can have different forms: information, consultation, citizen control, and others that have different aims and rationales. S.R. Arnstein claims that each form of participation correlates to the degree of public control over the outcomes.²¹⁰ Nonetheless, there is a tendency to use these forms of public participation interchangeably and it can be confusing. Therefore, I will clarify each form of participation that is important to this paper and will explain the difference between them.

An overview of the legal protection of public participation rights in environmental decision-making in international and EU law will be presented. As the Aarhus Convention is the only exciting international and legally binding document that guarantees public participation rights as a procedural right, this Convention will be discussed. The EU is a party to the Aarhus Convention and after the concession, it harmonized the existing legislation and adopted new legal acts in accordance with the requirements of the Aarhus Convention. Therefore, the implementation of the Aarhus Convention and the following changes in the EU legal framework will be analyzed.

Furthermore, in this chapter, the legal provisions on public participation rights in environmental decision-making will be analyzed in terms of whether or not they can grant the right to stop harmful mining projects to local communities.

2.1. Understanding the Definition and the Scope of Public Participation Rights in Environmental Decision-Making

In this subchapter, I will specify the definition of *public participation in environmental decision-making* since it cannot be found in any legal acts. To do this, I will provide the definition of the right to participate as public participation in environmental decision-making takes root from this right. Article 21 of the Universal Declaration of Human Rights²¹¹ denotes everyone has the right to participate in the affairs of his or her country, directly or through the election of representatives. The International Covenant on Civil and Political Rights²¹² makes a similar declaration about the right to participate in public affairs management. A notable tendency is to associate the idea of a right to participate with political representation.²¹³ However, political participatory rights are both excluding the public from decision-making and concentrating on representative forms of participation.²¹⁴ Whereas the right to participate in environmental decision-

²¹⁰ Arnstein, "A Ladder of Citizen," 24-34.

²¹¹ Universal Declaration of Human Rights, United Nations General Assembly, Paris, 1948, <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>.

²¹² International Covenant on Civil and Political Rights, General Assembly of the United Nations, 1966, <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

²¹³ Emilie Secker, "Expanding the concept of participatory rights", *The International Journal of Human Rights* 13, no. 5 (December 2009): 697-715, DOI: [10.1080/13642980802533190](https://doi.org/10.1080/13642980802533190).

²¹⁴ General Assembly, Report of the Office of the United Nations High Commissioner for Human Rights, Factors that impede equal political participation and steps to overcome those challenges, 2014.

making is direct public engagement in particular environmental decision-making processes. Therefore, the right to public participation in environmental decision-making is a human right that protects direct public engagement in the environmental decision-making process.

Public participation rights in environmental decision-making are described in the Rio Declaration: “*At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*”²¹⁵

Thus, according to the Rio Declaration, public participation rights in environmental decision-making have three constitutive parts: access to information concerning the environment, the opportunity to participate in decision-making processes, and access to justice. It is very important to distinguish between these forms as each of them has its own procedure and purposes. The Aarhus Convention elaborates all these three constitutive parts of public participation in its three pillars which will be discussed later. However, the right to participate in the decision-making process is the subject for discussion in this thesis, therefore, for definition purposes, I will concentrate on this right.

Apart from the law, public participation is defined in the context of impact assessments, because as a rule public participation is an important part of impact assessments that are undertaken during the environmental decision-making processes. Thus, the International Association for Impact Assessment describes public participation as “*the engagement of individuals and groups who are positively or negatively affected or that are interested in a proposed project, program, plan, or policy that is subject to a decision-making process.*”²¹⁶ Even though this definition is more precise, however, the level of involvement of the public and the intended outcome of public participation in the environmental decision-making process remains unknown by this definition. Works of scholars shed some light on this subject.

D.Hughes describes public participation as a procedure that enables people or organizations impacted by a proposed project to meaningfully alter decision-making.²¹⁷ According to D. Hughes the word “participation” is suitable only when individuals have considerable power over the decision-making process and hence have the ability to affect it.²¹⁸ This is a significant remark in order to distinguish participation from the less active form of participation such as information provided as the public has been given the right to participate in this occasion too but does not have the right to express its opinion and influence the decision. The definition given by J. Creighton combines all the components that public participation should involve and for the purposes of this paper, the public participation process would be described as “[...] *the process by which public concerns, needs, and values are incorporated into governmental and corporate*

²¹⁵ Principle 10 of the Rio Declaration.

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

²¹⁶ *Author's note:* International Association for Impact Assessment, the leading global network on best practice in the use of impact assessment for informed decision-making regarding policies, programs, plans and projects. <https://www.iaia.org/about.php>.

²¹⁷ Ross Hughes, “Environmental Impact Assessment and stakeholder involvement”, International Institute for Environment and Development, *JSTOR* (1998): 11, <http://www.jstor.com/stable/resrep18000>.

²¹⁸ *Ibid*

*decision making. It is a two-way communication and interaction, with the overall goal of better decisions that are supported by the public”.*²¹⁹

With this in mind, we established that public participation is a human right for direct involvement in the decision-making process that has three parts: access to information, the opportunity to participate in decision-making processes, and access to judicial and administrative proceedings. The core value of public participation is that the public has some level of impact or influence on the final decision.

2.1.1. Two dimensions of public participation rights: substantive and procedural rights

Public participation rights in environmental matters have two dimensions: substantive and procedural rights. As substantive rights, they can be codified in a constitution or statutory law and may originate from the human right to a healthy environment.²²⁰ Whereas, procedural rights relate to the decision-making processes and answer the questions on how decisions are made, what public input should be taken into account in decision-making, and what information the public should have access to and when.²²¹

The human right to a healthy environment was only officially recognized in July 2022, by a UN General Assembly resolution. However, according to the Aarhus Convention which was adopted as a legally binding instrument in 1992, access to information, public participation in decision-making, and access to justice, in fact, the aim is to uphold everyone's right to live in a healthy environment.²²² Thus, the Aarhus Convention establishes a connection between human rights and environmental protection, recognizing that parties to the Convention have a legal obligation to ensure that individuals have a right to a healthy environment through procedural rights.

In other words, the objective of public participation rights is to contribute to the protection of humans to live in a healthy and sustainable environment.²²³ This means that the need for a healthy environment is considered a human right under the Aarhus Convention²²⁴ and the Convention is significant to the protection of both human rights and the environment.²²⁵ Strengthening public participation rights can, therefore, guarantee the right to a healthy environment for individuals in a country where such a right has not been formally recognized.

Even though the EU law does not directly recognize the right to a healthy environment, it provides indirect protection of such a right through its environmental policies, legal acts, and case law.²²⁶ According to Article 37 of the Charter, a strong level of environmental protection must be incorporated into EU policies and according to Article 191 TFEU, the EU contributes to

²¹⁹ Jost Berčič, “The state of public participation in spatial planning in the European Union: Public participation in spatial planning between theory and practice”, *Igra ustvarjalnosti - Creativity Game*, no.3, (2017), 55

²²⁰ To date, 19 of the 27 EU Member States have entrenched this right in their constitutions and national legislation. The right to a healthy environment has already been legally recognized in those EU member states that have ratified the Aarhus Convention, which specifically mentions it in its language.

²²¹ Richardson and Razzaque, “Public participation in environmental decision-making”, 167

²²² Rodoljub Etinski, “Specific features of human rights guaranteed by the Aarhus Convention”, *Zbornik radova Pravnog fakulteta Novi Sad* 47(2), (2013):79-92 doi: 10.5937/zrpfns47-4437

²²³ Article 1 of the Aarhus Convention “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”

²²⁴ Etinski, “Specific features of human rights guaranteed,” 79-92

²²⁵ *Ibid*

²²⁶ Case C-67/97 *Danish Bee*, 1998, Case C-513/99 *Concordia*, 2002, Case C-262/12, *Vent de Colère case*, 2014

preserving, protecting, and improving the quality of the environment and aims to protect human health.²²⁷ Thus, the EU has established a substantive legal basis for public participation rights in its legal framework.

Public participation rights in decision-making processes regarding mining projects are represented through public consultation. I will disclose more about the procedural requirement of public consultation while discussing the legal protection of public participation rights. However, in order to understand the essence of public consultation, below I will consider the ladder of public participation.

2.1.2. Possible forms of public participation rights

According to S.R. Arnstein's theory about the "*Ladder of citizen participation*"²²⁸ (Figure 1) public participation can have different forms distinguished according to the level where they are situated in the ladder.²²⁹ The core of Arnstein's theory is the power distribution in decision-making, which finds a lack of citizens' control over decision-making.²³⁰ Arnstein's ladder of public participation, while acknowledging the shortcomings of superficial or manipulative participation efforts, presented a new approach that prioritized communities and their power in decision-making.²³¹ In order to better understand the current state of public participation in the environmental decision-making process it is important to describe, interpret, and explain different forms and levels of public participation.

²²⁷ Case C-142/05 *Mickelsson and Roos*, 2009, para. 33 where CJEU determined that environmental protection and the preservation of the lives, health, and habitat of people, animals, and plants are "closely related objectives."

²²⁸ Arnstein, "A Ladder of Citizen Participation", 24-34

²²⁹ *Ibid*

²³⁰ *Ibid*

²³¹ Mickey Lauria and Carissa Schively, "*Learning from Arnstein's Ladder: From Citizen Participation to Public Engagement*", Taylor & Francis (2020): 2-3

<https://books.google.fr/books?id=hnP2DwAAQBAJ&lpg=PT13&ots=dodIIApOH3&dq=ladder%20of%20citizen%20participation%20role&lr&pg=PT16#v=onepage&q=ladder%20of%20citizen%20participation%20role&f=false>

Figure 1. “Ladder of citizen participation”²³²

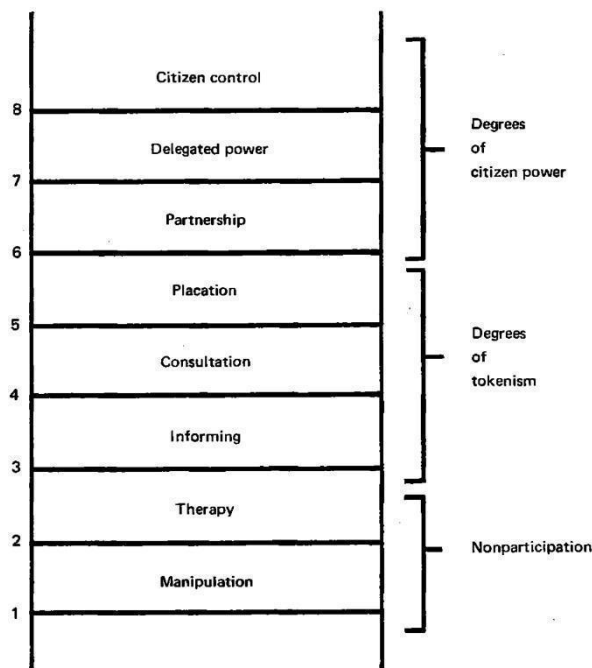


Figure 1 shows levels of public participation processes according to the theory of S. Arnstein. *Manipulation* and *therapy*, these two forms relate to the level of *nonparticipation*. The real objective of this level is not to enable the public with the power to participate in decision-making but to enable the authority to “cure” and “educate” public.²³³ It means that public participation at this level is a mere appearance and decision-makers do not look for any public input. The tokenism level ensures that the public can express their views to decision-makers when they make decisions, but the public has no influence over decisions. In other words, tokenism, allows the public to be heard but does not guarantee that their views will be listened to. This level has forms of *information* and *consultation*. The next level is *placation* is a higher form of tokenism because it allows the public to advise but retains the authorities with the right to decide.²³⁴ It means that the public has granted a limited degree of influence in a process, however, does not have control over the final decision. Control occurs further, at the level of *degree of citizens’ power* that increases the degree of influence of the public on the final decision. *The partnership* allows for negotiation with authorities, and *delegated power* and *citizen control* provides full managerial power over decisions.²³⁵

According to the Aarhus Convention, public participation in environmental decision-making is used through information and consultation, which on the levels of the ladder of public participation belong to tokenism. Information is a one-way flow of information from the public authorities to citizens with no way offered for feedback. However, undoubtedly, consultation is a more active form of public participation, relative to the information, and offers the public to submit their comments. But again, it does not give the assurance that public concerns and ideas will influence the final decision, and does not even provide the possibility for negotiating.²³⁶

²³² Arnstein, “A Ladder of Citizen Participation”, 24-34

²³³ *Ibid*

²³⁴ *Ibid*

²³⁵ *Ibid*

²³⁶ *Ibid*

S.R. Arnstein classifies the level of tokenism as follows: “What citizens achieve in all this activity is that they have “participated in participation” and what the decision-makers achieve is the evidence that they have gone through the required motions of involving the public”.²³⁷ Therefore, for public participation to have some influence and control over the final environmental decision, the level of public participation must start from the degree of citizen’s power. However, public participation in environmental decision-making has a form of information and consultation, that are level of tokenism.

2.2. Legal Protection of Public Participation Rights in Environmental Decision-Making Under International and EU law

Public participation rights as procedural rights were recognized at the UN Conference on Environment and Development in Rio de Janeiro back in 1992.²³⁸ Afterward, these rights were enforced by the legally binding international convention - the Aarhus Convention in 1992, which establishes the procedural requirements for the public participation procedure during environmental decision-making. The Aarhus Convention has been signed and adopted by the EU in 2005. By establishing regulations to harmonize EU legislation with the Aarhus Convention, the European Commission has taken the essential measures to implement it. According to established case law, the Aarhus Convention's provisions are now an integral component of the EU's legal order.²³⁹ The precondition for the adoption and general overview of the Aarhus Convention will be discussed in this subchapter.

The second pillar of the Aarhus Convention, concerning public participation rights, has been incorporated into EU legislation in various legal acts regulating industrial emissions,²⁴⁰ waste management,²⁴¹ energy and climate plans,²⁴² and air quality.²⁴³ Provisions about public participation rights concerning permitting processes for mining projects can be found in Environmental Impact Assessment²⁴⁴ and Strategic Environmental Assessment²⁴⁵ directives. These directives that set the minimum requirements for public participation procedures in the impact assessments during permitting processes for mining projects will be analyzed in this subchapter.

²³⁷ *Ibid*

²³⁸ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, Volume 2, Proceedings of the Conference, <https://digitallibrary.un.org/record/168679?ln=en>

²³⁹ Case C-240/09, *The Brown Bear case*, Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*

²⁴⁰ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0075-20110106>

²⁴¹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008L0098-20180705>

²⁴² Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=EN>

²⁴³ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:152:0001:0044:EN:PDF>

²⁴⁴ Environmental Impact Assessment Directive

²⁴⁵ Strategic Environmental Assessment Directive

2.2.1. International legal framework for the protection of public participation rights

On a global scale, public participation rights in environmental decision-making were first widely introduced at the UN Conference on Environment and Development (hereinafter Earth Summit), held in Rio de Janeiro in 1992.²⁴⁶ The Earth Summit highlighted the interdependence between environmental, social, and economic factors and how important the sustainable development of others is to the success of one. At the Earth Summit, it was also recognized that balancing economic, social, and environmental dimensions requires a new perception of consuming, producing, and decision-making. One of the main achievements of the Earth Summit was Agenda 21, a comprehensive action plan that calls for new investment strategies in the future in order to achieve common sustainable development.²⁴⁷ Agenda 21 is based largely on the creation, execution, and enforcement of environmental laws and regulations by civil society. Access to justice, public participation, and access to information are essential principles of Agenda 21.²⁴⁸

In addition, the Earth Summit adopted the Rio Declaration, which consists of 27 principles to guide states' relations with each other and with their citizens towards sustainable development. The principles of the Rio Declaration establish a clear link between economic growth and environmental protection. The Rio Declaration has been endorsed by 178 countries and even though it is not a legally binding treaty, however, its principles are widely recognized and have largely shaped international environmental law.²⁴⁹

In regard to public participation rights in environmental issues, Principle 10 of the Rio Declaration states that “*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level...*”²⁵⁰. Afterward, this principle provides a foundation for the “access rights” that have been stated as access to information, access to public participation, and access to justice. Principle 10 of the Rio Declaration was subsequently implemented by the United Nations Economic Commission for Europe (hereafter UNECE), which comprises 46 countries plus the EU. At the Fourth Ministerial Conference of the “Environment for Europe” on 25 June 1998 in Aarhus, Denmark the Aarhus Convention was adopted. The Aarhus Convention entered into force on 30 October 2001, and as of now, there are 47 parties to the Convention, including the EU. It is the only international legally binding treaty so far that grants procedural public participation rights and recognizes the relationship between human rights and environmental protection. In fact, the preamble specifically states that every individual has a right to live in an environment that is suitable for their health and well-being and, it directly relates environmental protection to human rights standards.²⁵¹

²⁴⁶ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992.

²⁴⁷ Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment.

²⁴⁸ Carl Bruch, *Regional Opportunities for Improving Environmental Governance Through Access to Information, Public Participation, and Access to Justice*, 8th Session of the African Ministerial Conference on Environment (AMCEN) Abuja, Nigeria, 2000.

²⁴⁹ Foo Kim Boon, “The Rio Declaration and its influence on international environmental law”, *Singapore Journal of Legal Studies*, (1992): 347–64. <http://www.jstor.org/stable/24866183>.

²⁵⁰ Principle 10 of the Rio Declaration.

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151.26_Vol.I_Declaration.pdf.

²⁵¹ The Aarhus Convention An Implementation Guide, United Nations Economic Commission For Europe, 2014 The Guide is an essential reference for policy-makers, legislators, and officials at all levels of government.

The Aarhus Convention provides important components of public participation rights to be included in the assessment of the possible environmental impacts of specific projects or activities listed in Annex 1. This also applies to activities that are likely to have a significant impact on the environment and is applied in accordance with the national legislation of Parties. Through the three “access rights”(access to information, public participation in decision-making, and access to justice) the Aarhus Convention allow the public to participate in the decision-making processes under environmental law, enabling authorities to respond to public demand, build consensus, and improve the adoption and enforcement of measures that promote environmental protection and sustainable development. As a result, the Aarhus Convention ultimately focuses on protecting the right to a healthy environment for present and future generations, the transparency of decision-making processes, and the accountability of decision-makers. Due to these elements, the Aarhus Convention is more than just an environmental pact; it is also a Convention about the responsibility, accountability, and openness of government, and it defines a set of fundamental procedural rights for the public and mandates that the public upholds these rights. Thus, the Aarhus Convention is crucial to preserving democracy.²⁵²

According to the Implementation Guide of the Aarhus Convention, there is no predetermined formula for a public participation procedure, but the Aarhus Convention sets out minimum requirements for it. Article 3(1) of the Aarhus Convention states that each party must establish and maintain a “*clear, transparent and consistent framework*” for implementing the Convention, consistent with the basic principles of the Convention and requiring the public to be aware of its opportunities for information, participation and access to justice with applicable rules and procedures, whilst being clear and consistent. The public should be the main beneficiaries of the Convention.

The EU and its all 27 Member States are all parties to the Aarhus Convention as well. By the Council Decision 2005/370/EC on 17 February 2005²⁵³ the Aarhus Convention has been signed and approved by the European Community. The Aarhus Convention was concluded by the EU under Article 216 of the TFEU. This provision gives the Union the possibility to conclude treaties with third countries or international organizations if the conclusion of an agreement is necessary to achieve one of the Union's objectives referred to in the Treaties. According to established case law, the Aarhus Convention's provisions are now an integral component of the EU's legal order.²⁵⁴ By establishing regulations to harmonize EU legislation with the Aarhus Convention, the European Commission has taken the essential measures to implement it. Provisions of the Aarhus Convention about public participation rights concerning permitting processes for mining projects can be found in Environmental Impact Assessments and Strategic Environmental Assessments.

The three pillars of the Aarhus Convention (access to information, the right to participate in environmental decision-making, and access to justice) have different purposes and procedural requirements.

The first pillar, *access to information*, can be defined as the right to seek, request and receive environmental information from the public authorities.²⁵⁵ The deadline to provide the

²⁵² Boon, “The Rio Declaration and its influence,” 347–64.

²⁵³ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters <https://eur-lex.europa.eu/eli/dec/2005/370/oj>

²⁵⁴ Case C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, para 30

²⁵⁵ Article 4 (1) of the Aarhus Convention,

requested environmental information shall be “as soon as possible” and at the latest within one month after the request has been submitted.²⁵⁶ The request may be also refused, but the public authority is obliged to explain the reasons for the refusal and public authorities should explain the right to challenge this decision.²⁵⁷ The requirement for the dissemination of environmental information states that information held by public authorities that could help people prevent or mitigate harm in the event of a threat to human health or the environment must be immediately shared with those who may be affected.²⁵⁸

Second pillar, *right to participate in environmental decision-making* applies to decisions on whether to permit specific activities that are listed in Annex 1 of the Aarhus Convention as well as activities that are not listed in Annex 1, but which Parties of the Convention will determine as activities that can have a significant effect on the environment.²⁵⁹ According to this right, the public concerned can effectively participate during decision-making concerning such projects, as well as plans, programs, and policies relating to the environment²⁶⁰ and executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.²⁶¹

The most extensive requirements for public engagement are described for specific activities (projects) that are also partly applicable to plans, programs, and policies. The basic requirements for public participation rights from the Aarhus Convention can be formulated as follows: the public concerned can participate when all choices are available and effective participation may take place;²⁶² the public has the right to make comments in a way that is appropriate (it can be a public hearing, written comments, or inquiries);²⁶³ the outcome of public participation has to be taken into due account;²⁶⁴ the public should be informed of the decision with reasons on which decisions are based.²⁶⁵

Third pillar, *access to justice*, this right gives the public the right to challenge the decision of public authorities concerning the first two pillars. Either is it the denial to provide environmental information or any decisions, acts, or omissions that subject is to the provisions of Article 6 of the Aarhus Convention.

Thus, the Aarhus Convention sets minimum requirements for the public participation procedures in environmental decision-making and gives more details to the application of such rights in the “Aarhus Convention an Implementation Guide”²⁶⁶ (hereinafter - the Aarhus Implementation Guide) and, furthermore, the Aarhus Compliance Committee²⁶⁷ interprets and applies the Aarhus Convention’s provisions to specific situations. When it comes to the implementation of the Aarhus Convention all the aspects and institutions of the Aarhus Convention should be considered.

²⁵⁶ Article 4 (2) of the Aarhus Convention,

²⁵⁷ Article 4 (7) of the Aarhus Convention,

²⁵⁸ Article 5 (1) of the Aarhus Convention.

²⁵⁹ Article 6 (1) of the Aarhus Convention.

²⁶⁰ Article 7 of the Aarhus Convention.

²⁶¹ Article 8 of the Aarhus Convention.

²⁶² Article 6 (4) of the Aarhus Convention.

²⁶³ Article 6 (7) of the Aarhus Convention.

²⁶⁴ Article 6 (8) of the Aarhus Convention,

²⁶⁵ Article 6 (9) of the Aarhus Convention,

²⁶⁶ Aarhus Convention an Implementation Guide, United Nations Economic Commission For Europe, United Nations, 2014.

²⁶⁷ Aarhus Convention Compliance Committee is the main body empowered to interpret and apply the Convention’s provisions to specific situations brought to its attention by the public and parties, as well as its own rules of procedures. https://unece.org/DAM/env/pp/compliance/CC_Publication/ACCC_Case_Law_3rd_edition_eng.pdf

In light of the fast development of contemporary society, the Aarhus Convention should be viewed as a highly significant accomplishment as it helped to define procedural environmental legislation for many nations. However, it seems that the Aarhus Convention focuses on formal requirements such as timeliness, written comments, consideration of comments, and others.²⁶⁸ The Aarhus Convention does not consider incorporating mandatory two-way communication process²⁶⁹ or negotiation (ladder of public participation) but simply provides a chance for the public to express their concerns. In addition, it is fair to say that the requirements of the Aarhus Convention, concerning public participation, are much more focused on specific project decisions than on strategic ones that address plans, programs, and policies.²⁷⁰ However, as a rule, the decision-making process for development projects requires tiered decision-making²⁷¹ that consists of two levels of assessments: plans and programs and projects.

In order to launch a new mining project, developers have to apply for a permit from public authorities to undertake the impact assessment procedure, as per the Aarhus Convention. The public has the right to know about undergoing the impact assessment procedure, as per Article 5 of the Aarhus Convention, and to participate in the decision-making processes regarding a permit for mining activities, in accordance with Article 6 of the Aarhus Convention. Moreover, before starting with the permit-granting process for the specific projects they have to be indicated in spatial planning by the authorities. The planning process is also subject to public participation procedure and regulated by the Article 7 of the Aarhus Convention.²⁷²

The procedural requirements regarding public participation rights in permitting process for mining projects from the Aarhus Convention were subsequently adopted in EU law, namely in the Environmental Impact Assessment and Strategic Environmental Assessment Directives that I will discuss below.

2.2.2. An overview of the public participation rights in environmental decision-making in EU law

Public participation rights have taken place within EU environmental policy since the First Action Programme (1973)²⁷³ and also played an increasingly significant role in shaping it from the outset. Overall, the nature of these rights has altered significantly, moving away from a straightforward awareness-raising and educational role toward active and decisive participation. Inside the EU public participation in environmental decision-making connects with the fundamental democratic articles of the TEU.²⁷⁴ As the TEU has already stated, democracy and the

²⁶⁸Jerzy Jendroska, "Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention", *Journal for European Environmental and Planning Law*, Vol. 6-4, (2009): 498

²⁶⁹Juan Palerm, "Public participation in environmental decision making: examining the Aarhus convention", *Journal of Environmental Assessment Policy and Management*, Vol. 1, No. 2(1999): 229-244, DOI: [10.1142/S146433329900017X](https://doi.org/10.1142/S146433329900017X)

²⁷⁰Jendroska, "Public participation in the preparation of plans," 501.

²⁷¹When a policy, plan, or program precedes and influences a project decision, the decision is supposed to be tiered

²⁷²Study Legal framework for mineral extraction and permitting procedures for exploration and exploitation in the EU, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs Directorate Industrial Transformation and Advanced Value Chains, MINLEX Final Report, Brussels, 2017, 103

²⁷³ Winter, "Theoretical Foundations of Public Participation in Administrative Decision-Making", 44

²⁷⁴Article 1 of the TEU, This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizens. Article 10 (1) of the TEU, The functioning of the Union shall be founded on representative democracy.

other primary source of current political and legal systems, the rule of law, can be divided into two main categories: representative democracy, based on elections, and direct or participatory democracy, for which public participation is the best approach in general.²⁷⁵

However, public participation rights in EU law have been more prominent since the adaptation of the Aarhus Convention into EU law. The Aarhus Convention was ratified by the European Community on June 25, 1998, and it has been in effect since May 17, 2005. The EU and all of its Member States ratified the Convention. When the EU joined the agreement, it aimed to contribute to the pursuit of the following objectives: preserving, protecting, and improving the quality of the environment; protecting human health; prudent and rational utilization of natural resources; promoting measures at the international level to deal with regional or worldwide environmental problems. The EU itself is actively involved in protecting the environment through a comprehensive and evolving body of legislation and policy,²⁷⁶ and it is considered important to not only sign the Convention at the Union level but also to extend it to its own institutions.

The Aarhus Convention was concluded by the EU under shared competence²⁷⁷ as a mixed agreement. It should be understood that the approval of a mixed agreement creates a complicated legal framework with duties for the Union and its Member States arising from the Aarhus Convention as a treaty. The secondary legislation adopted by EU institutions (in particular directives) and the mixed agreement, as part of the Union legal order, since the provisions fall within the scope of Union competence. Moreover, a general obligation on the EU, which has taken on responsibility for the proper performance of the agreement, as well as a general duty of loyal cooperation in situations involving shared competence.²⁷⁸

The second pillar of the Aarhus Convention, concerning public participation rights, has been incorporated into EU legislation in various legal acts regulating industrial emissions,²⁷⁹ waste management,²⁸⁰ energy and climate plans,²⁸¹ and air quality.²⁸² Provisions about public participation rights concerning permitting processes including for mining projects can be found in Environmental Impact Assessment and Strategic Environmental Assessment Directives. As these directives set minimum requirements for public participation procedures in the impact assessments during environmental decision-making processes regarding mining projects.

Article 10 (3) of the TEU, Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

²⁷⁵ Bándi, "Introduction into the Concept," 3-20

²⁷⁶ Article 3 of the TEU, Articles 6, 11, and 191-193 of the TFEU

²⁷⁷ Article 4 of the TFEU

²⁷⁸ Antonino Ali, "The EU and the compliance mechanisms of multilateral environmental agreements: the case of the Aarhus Convention" in *The External Environmental Policy of the European Union EU and International Law Perspectives*, E. Morgera (Ed.), (Cambridge University Press, 2012), 287 - 300, DOI: <https://doi.org/10.1017/CBO9781139152327.016>

²⁷⁹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0075-20110106>

²⁸⁰ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008L0098-20180705>

²⁸¹ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=EN>

²⁸² Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:152:0001:0044:EN:PDF>

The Environmental Impact Assessment Directive applies to the environmental effects of those public and private projects which are likely to have significant effects on the environment and which are listed in Annex I of the Directive. The Directive gives discretion to Member States, where they may in each case, where provided for by national law, not apply the Directive to projects serving national defence purposes and, conversely, Member States may add projects by setting thresholds or criteria to determine which of such projects should be subject to Environmental Impact Assessment based on the significance of their environmental effects.²⁸³ Projects which require development consent should be subject to an impact assessment procedure.²⁸⁴ However, the impact of such projects on the environment must be assessed in light of the need to protect human health, ensure the preservation of species diversity, and maintain the reproductive capacity of the ecosystem as a major resource of life. All of this is necessary to help improve the environment and the quality of life of local people.²⁸⁵

The public participation procedure is governed by Article 6 of the Environmental Impact Assessment Directive and begins with the right of access to information when a request for development consent is received. The public is then given the right to be consulted and the public can express its opinion and leave comments when all options are open and before a decision is taken by the competent authorities. The results of consultations and the information gathered pursuant to the Environmental Impact Assessment procedure shall be taken into consideration in the final decision according to development consent. When a decision to grant or refuse development consent has been taken, the competent authority shall inform the public about the content of the decision after having examined the concerns and opinions expressed by the public during the consultation. Moreover, the main reasons and considerations on which the decision is based, including information about the public participation process and description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the project, shall be provided to the public.²⁸⁶

The most important requirements for the public participation procedure that make it effective under the Aarhus Convention can be identified. It is early public participation, where all options are open, and public considerations and opinions should be taken into account when making the final decision. From the procedure described above, it would seem that the public participation procedure is very well described and should not be questioned. However, in practice, it is very difficult to assess whether the public has a right to participate at an early stage of the decision-making process, as impact assessment procedures have two stages:²⁸⁷ a *screening stage*²⁸⁸ and a *scoping stage*²⁸⁹ whose definition could be not found in the Directive. In this thesis, I contend that the stage at which the public begins to participate in the impact assessment processes deserves consideration since it has an impact on the quality of the assessment, which in turn has an impact on the quality of a final decision.

²⁸³ Article 1 and 4 of the Environmental Impact Assessment Directive

²⁸⁴ Recital 7 of the Environmental Impact Assessment Directive

²⁸⁵ Recital 14 of the Environmental Impact Assessment Directive

²⁸⁶ Article 9 of the Environmental Impact Assessment Directive

²⁸⁷ Chris Wood, *Environmental Impact Assessment: A Comparative Review*, (Longman Scientific & Technical, 1995)

https://books.google.rs/books/about/Environmental_Impact_Assessment.html?id=yzrbAAAAMAAJ&redir_esc=y.

²⁸⁸ Screening stage is a preliminary assessment of whether a project could have an essential impact on the environment

²⁸⁹ Scoping stage this stage aims to define the range of major consequences that need to be assessed if the project is determined to require an Environmental Impact Assessment

The Strategic Environmental Assessment Directive applies to the assessment of certain plans and programs that are likely to have significant effects on the environment. According to Article 1, the objective of the Strategic Environmental Assessment Directive is “*to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programs to promote sustainable development...*”.²⁹⁰ Plans and programs are defined in Article 2 as plans and programs, including those co-financed by the European Community, as well as any modifications to them, that must be prepared and/or adopted by a national, regional, or local authority. Moreover, according to Article 3, Strategic Environmental Assessment shall be carried out for all plans and programs, which set the framework for future development consent of projects listed in Annexes I and II to Environmental Impact Assessment. Plans do not usually come before programs in the planning process, and neither do projects.

Strategic Environmental Assessment of plans and programs must be prepared, taking into consideration the cumulative, indirect, and/or large-scale consequences, as a result of the cumulative impact of various specific projects.²⁹¹ This is linked to the concept of a tiered decision-making process and its methodology at different levels of the policy and planning hierarchy and of specific projects. Therefore, when developing a plan or program directly related to mining or where land use planning is considered for mining projects, Strategic Environmental Assessment should be conducted before the Environmental Impact Assessment.²⁹² As environmental impacts should be considered at the planning stage rather than at the implementation stage of specific projects, which is often too late to take environmental issues into account.²⁹³ Therefore, the Strategic Environmental Assessment Directive complements the Environmental Impact Assessment Directive by ensuring many different interests are taken into account in planning choices and the “public interest” in general is a direct objective of land-use planning.²⁹⁴

In Strategic Environmental Assessment Directive, the public participation procedure is described very scarcely. Article 6 of the Directive states that the draft plan or program and the environmental report prepared in accordance with Article 5 shall be made available to the public. The only requirement is that the public should be given an early and effective opportunity to express their views on the draft plan or program and the accompanying environmental report, within an appropriate time frame, before the plan or program is adopted or submitted to the legislative procedure. Member States have discretion in regard to the detailed arrangements for the information and consultation. When preparing a final environmental report, the outcome of public participation should be taken into consideration, and afterward, the public should be informed how their comments are taken into account.²⁹⁵

²⁹⁰ Article 1 of the Strategic Environmental Assessment Directive

²⁹¹ Jos Arts, Paul Tomlinson and Henk Voogd, “*EIA and SEA tiering: the missing link?*”, International experience and perspectives in SEA”, International Association of Impact Assessment, 26-30 September 2005, Prague

²⁹² Environmental assessments of plans, programmes and projects rulings of the Court of Justice of the European Union, European Commission, (Luxembourg, 2020) 30

²⁹³ Christian Kläne and Eike Albrecht, “Purpose and Background of the European SEA Directive”, in “*Implementing Strategic Environmental Assessment*”, eds. M. Schmidt, L. Knopp, Cottbus, (Berlin: Sprinkler, 2005),27

²⁹⁴ Lasse Peltonen, Rauno Sairinen, “Integrating impact assessment and conflict management in urban planning: Experiences from Finland”, *Environmental Impact Assessment Review*, Vol. 30, Issue 5, (2010): 328-337 <https://doi.org/10.1016/j.eiar.2010.04.006>

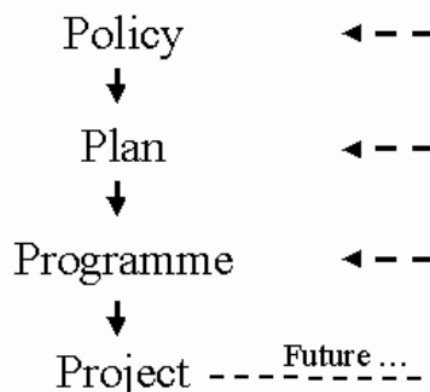
²⁹⁵ Article 9 of the Strategic Environmental Assessment Directive

Screening is again the initial step in Strategic Environmental Assessment; however, the Directive simply mentions this in Article 3 (5) and does not make it a requirement. Pre-selection of the plans and programs for which a SEA should be implemented may be made on an individual basis or in accordance with generalized rules.²⁹⁶ The following procedural step is scoping. This means determining how much information will be included in the assessment in this particular instance. Scoping is therefore viewed as the key component for the environmental assessment's quality, although the Strategic Environmental Assessment Directive does not require participation by NGOs or the public in general. The public can have the opportunity to express their opinion when the draft plan or program and the environmental report are prepared, according to Article 6 of the Strategic Environmental Assessment Directive.

2.2.3. Relationship between Strategic Environmental Assessment and Environmental Impact Assessment Directives

The relationship between Strategic Environmental Assessment and Environmental Impact Assessment is tiering.²⁹⁷ Tiering refers to the idea that some decisions made at one higher level do not always need to be revised at lower levels, possibly saving time and money. The environmental report of the Strategic Environmental Assessment procedure can be taken forward and become a starting point for the Environmental Impact Assessment.²⁹⁸ Figure 2 shows the links between the different tiers of environmental decision-making regarding policy, plan, program, and project: the policy's Strategic Environmental Assessment will influence and inform its Strategic Environmental Assessment of plans, which will then influence and inform its Strategic Environmental Assessment of programs, which will then influence and inform its Environmental Impact Assessment of projects²⁹⁹.

Figure 2. The links between the different tiers of policy, plan, program, and project³⁰⁰



For instance, the proposed construction of four new nuclear power plants with X capacity each in area Y by 2020 is referred to as a “program” and the effects of such a program would be

²⁹⁶ Eike Albrecht, “Legal Context of the SEA Directive – Links with other Legislation and Key Procedures”, in *“Implementing Strategic Environmental Assessment”*, eds. M. Schmidt, L. Knopp, Cottbus, (Berlin: Sprinkler, 2005), 45

²⁹⁷ João, *“Implementing Strategic Environmental Assessment”*, 4

²⁹⁸ Sheate et al., “Relationship between the EIA and SEA Directives,” 69

²⁹⁹ João, *“Key Principles of SEA,”* 5

³⁰⁰ *Ibid*

covered by Strategic Environmental Assessment. The Environmental Impact Assessment approach for separate projects would be used to address the implications of each individual planned nuclear power station in this example, which is referred to as a “project”. An environmental assessment conducted in accordance with the Environmental Impact Assessment Directive cannot result in a waiver of the requirement to conduct the environmental assessment required by the Strategic Environmental Assessment Directive to address the environmental issues specific to the Strategic Environmental Assessment Directive.³⁰¹ As Strategic Environmental Assessment Directive establishes two primary goals: one is procedural while the other is sustainable. The first focuses on environmental protection, while the second emphasizes the inclusion of environmental factors in the planning process of plans and programs to advance sustainable development. Therefore, Strategic Environmental Assessment and Environmental Impact Assessment normally should not overlap.³⁰²

Strategic Environmental Assessment has to include feasible alternatives that are discussed on an equal basis with the original plan or program.³⁰³ Therefore, in contrast to the Environmental Impact Assessment, the primary goal of the environmental report is to identify and describe alternatives. The so-called *zero-option*, or not pursuing a project, is also one of the alternatives that could be presented by Strategic Environmental Assessment which is not explicit in the Environmental Impact Assessment Directive.³⁰⁴ For instance, it is uncertain whether renewable energy installations would be constructed in a location where the energy strategy supports gas-fired power plants or as an alternative for the construction of the road can be considered to lower demand (eliminating the need for travel and favouring accessibility over mobility).³⁰⁵ Therefore, Strategic Environmental Assessment fosters better alternative scrutiny as when most projects are offered, many alternatives have already been closed as a result of decisions taken at a higher level. Strategic Environmental Assessment addresses alternatives that are not addressed in the project's Environmental Impact Assessment level. Thus, important environmental decisions are often taken at the level of the Strategic Environmental Assessment, when plans and programs are considered which also examine the project at its early stage. This is often decisions on whether the project should be implemented or not, where it should be implemented, and what type of project should be implemented. However, in Environmental Impact Assessment or at the project level, it is often limited to how the project should be implemented.³⁰⁶ Therefore, this alternative, so-called zero-option, should be assessed at the Strategic Environmental Assessment level as the Environmental Impact Assessment level is not available.

The advantage of Strategic Environmental Assessment is that it can handle cumulative effects more successfully.³⁰⁷ The Scottish fish farming of Atlantic salmon provides a very good illustration of this. Fish farms often do not need an Environmental Impact Assessment if they are under a specific size and are not situated in an environmentally sensitive location. Still, if each is

³⁰¹ João, “Implementing Strategic Environmental Assessment,” 6

³⁰² João, “Implementing Strategic Environmental Assessment,” 4

³⁰³ João, “Implementing Strategic Environmental Assessment,” 4

³⁰⁴ Sheate et al., “Relationship between the EIA and SEA,” 10

³⁰⁵ Riki Therivel, *Strategic Environmental Assessment in Action* (London: Earthscan, 2004), 15

https://books.google.rs/books?id=Talf3_SH6z0C&pg=PR1&hl=ru&source=gbv_selected_pages&cad=2#v=onepage&q&f=false

³⁰⁶ Sibout Nooteboom, “Environmental Assessments of strategic decisions and project decisions: interactions and benefits”, *Impact Assessment and Project Appraisal*, Vol. 18, Issue 2, (2012): 22

<https://doi.org/10.3152/147154600781767510>

³⁰⁷ João, “Key Principles of SEA,” 7

assessed separately and the overall cumulative effects of fish farming are not necessarily taken into account. This is especially important in the case of Scotland's West Coast, where there are numerous fish farms. It would be beneficial to use Strategic Impact Assessment to analyze those projects where cumulative effects are difficult to assess at the project level. Therefore, Strategic Environmental Assessment is useful in excluding or significantly reducing the number of possible alternatives at an earlier stage and is also instrumental in considering cumulative effects at a larger scale.³⁰⁸

Thus, plans and programs are regulated by the Strategic Environmental Assessment Directive while concrete projects are by the Environmental Impact Assessment Directive. However, even though the application area appears to be properly divided, there may be overlaps.³⁰⁹ Potential overlaps between the Directives can occur where:³¹⁰ large projects are made up of sub-projects, or are of such a scale as to have more than local significance; project proposals that require the amendments of land use plans (which normally will require Strategic Environmental Assessment) before a developer can apply for development consent and undertake Environmental Impact Assessment; plans and programs which when adopted or modified, set binding criteria for the subsequent consent for projects, i.e. if a developer subsequently makes an application which complies with the criteria then the consent has to be given.

If such cases arise, Member States can choose to provide coordinated or joint procedures between Strategic Environmental Assessment and Environmental Impact Assessment that are subject to their discretion, according to Article 11(2) of the Strategic Environmental Assessment Directive. Practice shows that the boundaries between the two procedures are not always distinct and tend to overlap.³¹¹ This applies in particular to plans, programs, or projects relating to land use and/or spatial planning. This is because these types of plans, programs, or projects may have the characteristics of both plans and programs and a project.³¹² Meanwhile, land use plans and/or spatial plans should be subject to Strategic Environmental Assessment procedures. In such assessment procedures, it is important to ensure compliance with both Strategic Environmental Assessment and the Environmental Impact Assessment Directive.

Discretionary approaches that Member States may choose as approaches to address overlap are:³¹³ the Environmental Impact Assessment can be replaced by Strategic Environmental Assessment; there could be parallel procedures where Strategic Environmental Assessment can operate in parallel with Environmental Impact Assessment; there could be the joint procedure where both requirements of Strategic Environmental Assessment and Environmental Impact Assessment procedures meet simultaneously; Environmental Impact Assessment supplemented by Strategic Environmental Assessment.

It is possible that adverse environmental effects or environmental considerations excluded from the scope of the Environmental Impact Assessment will not be assessed, when in fact they

³⁰⁸ Study concerning the report on the application and effectiveness of the EIA Directive, European Commission, DG ENV, (COWI, 2009), 155

³⁰⁹ Albrecht, "Legal Context of the SEA Directive," 36

³¹⁰ Study concerning the report on the application and effectiveness of the EIA Directive, European Commission, DG ENV, (COWI, 2009), 155

³¹¹ European Commission, Report from the Commission to the Council and the European Parliament under article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment, 2017, 8

³¹² Sheate et al., "Relationship between the EIA and SEA," 16

³¹³ Sheate et al., "Relationship between the EIA and SEA," 70

have not been adequately addressed in the Strategic Environmental Assessment.³¹⁴ In addition, the CJEU has confirmed that the Environmental Impact Assessment and Strategic Environmental Assessment procedures differ for a number of reasons.³¹⁵ Therefore, it is preferable that assessments at the strategic and project levels are truly complementary, each focusing on effects that may occur at the relevant level (e.g. cumulative or synergistic impacts at the Strategic Environmental Assessment level versus local impacts at the project level).³¹⁶ This is also important with regard to public participation, as the public is deprived of the opportunity to be consulted at an earlier stage when all options are open and alternatives such as the 'zero option' are available (this statement will be discussed later).

2.3. Guarantee the “Right to say no” by local communities: public participation perspective

In this subparagraph, I will discuss whether public participation rights implemented in EU law provide the right to local communities to stop harmful development projects, including mining. As it was discussed earlier, the Aarhus Convention and following its adoption in EU law provides some framework that guarantees public participation in environmental decision-making. However, the most important question of whether the public is expected to play a significant role in decision-making is not clear from the established legal framework. The procedural requirements for public participation, derived from the Aarhus Convention as the main source for them, “to take due account” and early public participation will therefore be analyzed as a possible way of saying “no” by local communities.

The requirement “to take due account” public comments by public authorities during decision-making undoubtedly has legal significance, however, it is open to several interpretations and has to be viewed from critical perspectives. Moreover, the “zero option” as a requirement for early public participation must be analyzed as to whether it means that during the public participation procedure, the public has the option not to implement the proposed development project at all.

2.3.1. Identifying the moment when local communities can say no to mining projects

The Aarhus Convention attempts to address the issue of public involvement too late in the decision-making process, which is one of the major shortcomings of traditional public participation systems.³¹⁷ According to article 6 (4) of the Aarhus Convention, in order to ensure that public participation in environmental decision-making is effective and not a mere formality requires that public participation should take place at an early stage in the decision-making process. The crucial factor in determining whether this requirement has been met is whether the public was offered to participate when all options are still open.³¹⁸ This requirement also refers to the Aarhus Compliance

³¹⁴ João, “Key Principles of SEA,” 8

³¹⁵ Case C-295/10, *Valčiukienė and Others*

³¹⁶ João, “Key Principles of SEA,” 8

³¹⁷ Putting Rio Principle 10 into action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, UNEP, 2015, 72

<https://wedocs.unep.org/bitstream/handle/20.500.11822/11201/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES-Interactive.pdf?sequence=1&isAllowed=y>

³¹⁸ Article 6 (4) of the Aarhus Convention

Committee as a “zero option” that in theory can allow to the public to say “no” to harmful projects. In this sub-subparagraph, I will determine what does it mean “early public participation” and “when all options are open” or “zero option” and analyze whether EU law complies with such requirements.

Article 6 (4) of the Aarhus Convention generally refers to administrative decisions that were made specifically to allow specific projects to proceed, and these decisions might consider different kinds of development consent for such activities as per Annex 1 (e.g. permits for mining operations). The requirements of Article 6 (4) of the Aarhus Convention were incorporated into Article 7. The incorporation of Article 6 (4) into the text of Article 7 means that Parties must provide for early public participation in plans and programs relating to the environment when all options are open as well.

Whereas, the Aarhus Convention does not provide an explicit explanation of what “early participation” and “when all options are open” mean. Therefore, the explanation provided by the Aarhus Compliance Committee and the Aarhus Convention Implementation Guide will be provided. Before starting the discussion of the Aarhus Compliance Committee case law I will explain the relationship between the Aarhus Compliance Committee and EU law.

The EU as a party of the Aarhus Convention has a general obligation for the proper performance of the agreement, as well as a general duty of loyal cooperation in situations involving shared competence.³¹⁹ The Aarhus Compliance Committee in case ACCC/C/2006/18 observed “that, in different ways, European Community legislation does constitute a part of national law of the EU Member States. It also notes that Article 9, paragraph 3, applies to the European Community as a Party and that the reference to “national law” therefore should be understood as the domestic law of the Party concerned.”³²⁰ It has been confirmed through the Aarhus Compliance Committee's findings and recommendations that charges of EU non-respect and non-compliance with the third Aarhus pillar regarding access to justice of environmental NGOs' were justified and have a legal bearing. Even though the Aarhus Compliance Committee's findings and recommendations are unbinding it has gained recognition.³²¹

Thus, according to the Aarhus Compliance Committee, the requirement for “early participation”, when all options are open, first and foremost, should be understood within the context of the concept of tiering decision-making. ³²²The Committee emphasizes the importance of early public participation at each stage in tiering decision-making. In its communication ACCC/C/2006/16 concerning Lithuania the Committee states: “[...]nevertheless, as each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage, the Parties must, to comply with the requirement of article 6, paragraph 4, of the Convention, provide for early public participation in every procedure where some decision concerning relevant options is taken”. Subsequently, the Committee makes clear that “a mere formal possibility, *de jure*, to turn down an application at the latter stage of the tiered decision-making is not sufficient to meet the criteria of the Convention if, *de facto*, that would never or hardly ever happen”.³²³ On this basis, it can be understood, that the aims of the provision of Article

³¹⁹Ali, “The EU and the compliance mechanisms,” 287 - 300

³²⁰ Osleja Marta, “Compliance Mechanism under Aarhus Convention - Effective Legal Instrument for Enforcement of International Environmental Law”, (Master Thesis, Riga Graduate School of Law, 2020), 33

³²¹ *Ibid*

³²² Jendroška, “Public Participation in Environmental Decision-Making Interactions Between,” 136

³²³ Findings of the compliance committee with regard to communication ACCC/C/2007/22 concerning France, para 39 and findings on communication ACCC/C/2009/41 concerning Slovakia, para 63

6 (4) are to guarantee public participation at the earliest stage of the decision-making process, where their inputs can still change or impact the final decision. And only with this condition public participation can be considered effective.

The Aarhus Convention Implementation Guide suggests considering the precondition of early participation as the possibility for the public to be involved in the decision-making process at the screening stage and scoping stage of each impact assessment procedure.³²⁴ It explains, that public authority is not prevented from deciding on their position or making a prior opinion, however, they should be open to persuasion by the public and to alter their viewpoints or opinions. Even if no formal decision has been taken, doing actions that might reduce the range of possibilities for the public to choose during the participative process violates Article 6 of the Aarhus Convention. In addition, the Aarhus Convention Implementation Guide stipulates that public involvement in complex decision-making, or large-scale projects, should occur at each level when a public authority's (main or secondary) choice may have a substantial impact on the environment in order to be effective.³²⁵ At this moment, the Implementation Guide refers to the concept of tiering decision-making which will be further elaborated by the Aarhus Compliance Committee case law.

To sum up, the Aarhus Compliance Committee and the Aarhus Convention Implementation Guide consider that a tiered decision-making procedure has to advance “early public participation”. Therefore, certain options that are considered at one stage without public participation and none of the subsequent stages gives “the public an opportunity to also participate in the consideration of the options adopted at the previous stage” would be incompatible with the Aarhus Convention.³²⁶

When it comes to the provision “when all options are open” or “zero option” in its case ACCC/C/2009/38 the Aarhus Compliance Committee explains how it should work. The Aarhus Compliance Committee establishes that the public should have the right to stop the development of the project at a very early stage of the project, namely at the spatial planning (land-use planning). Thus, according to the Aarhus Compliance Committee, in order to understand whether all options, including the “zero option”, were open during public participation, it is necessary to look at the previous stage. The case says that: “...considering the chronology set out in paragraphs 23 to 40 above, the Committee finds that at several stages, e.g., during the development of the Local Transport Strategies and Modern Transport Strategies and the Aberdeen & Aberdeenshire Structure Plan, as well as the spring 2005 consultations, the public had opportunities to make submissions that the Aberdeen Western Peripheral Route should not be built at all and to have those submissions taken into account”.³²⁷ Therefore, in view of the above, to ensure the public's right to say “no” to projects in the area concerned, it is important to ensure that the public can have an opportunity to participate at the earliest level of the projects, planning level or Strategic Environmental Assessment.

³²⁴*The Aarhus Convention An Implementation Guide*, United Nations Economic Commission For Europe, United Nations, 2014

³²⁵*Ibid*

³²⁶ Report by the Committee to the sixth session of the Meeting of the Parties (Document ECE/MP.PP/2017/32) Meaningful and early participation (article 6, paragraph 4; article 7 in conjunction with article 6, paragraph 4) paragraph 40 of document ECE/MP.PP/2017/32.

³²⁷ Findings and recommendations with regard to communication ACCC/C/2009/38 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, 25 February 2011, para 82

2.3.2. The role of public participation outcomes in decision-making processes and their implications for local communities' right to stop mining projects

In addition to early participation in environmental decision-making, it is also crucial for stopping mining projects so that the public has a chance to influence the final decision in the environmental decision-making process. Pursuant to Article 6(8) of the Aarhus Convention, public authorities must ensure that public comments and views are taken into due account while preparing a final decision on the fate of relevant projects, plans, and programs. This requirement is also enshrined in EU law but is not applied in the same way in all Member States, which will be discussed in more detail in the next chapter. Whereas the notion of due consideration for the outcome of a public participation procedure extends to both perspectives - the scope of public participation influence and procedural requirements. It is therefore important to consider this requirement in detail from both perspectives.

When it comes to the procedural requirements to take into due account public participation outcome, Article 6 (7) of the Aarhus Convention stipulates that the public can submit in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses, or opinions that it considers relevant to the proposed activity.³²⁸ Parties must ensure that during preparing the final decision they “take due account” the results of public participation, according to Article 6 (8). The final decision should explain the reasons behind it, as well as provide detail on how the results of the public participation process were taken into consideration, as per Article 6 (9).

The Aarhus Compliance Committee in its communication ACCC/C/2008/24 states that the obligation to “take into due consideration” under Article 6 (8) is to be read in the light of the obligation under Article 6 (9) to “make the text of the decision, together with the reasons and considerations on which the decision is based, available to the public”. Therefore, the obligation to take due account of the outcome of public participation should be interpreted as an obligation that the written reasoned decision includes a discussion of how public participation has been taken into account. Therefore, the obligation to take de account the outcome of public participation should be interpreted as the procedural obligation of decision-makers to present to the public the written reasoned decision, including a discussion of how the public participation was taken into account.³²⁹

According to the Aarhus Convention Implementation Guide, “the relevant authority is ultimately responsible for the decision based on all information, including comments received, and should be able to show why a particular comment was rejected on substantive grounds”.³³⁰ Aarhus Convention Implementation Guide describes that, in general, it can be said that taking into account the results of public participation involves the appropriate authority giving serious consideration to the substance of all comments received, regardless of their source, and incorporating that consideration into the final decision-making process. The responsible authorities are not required to accept the substance of every comment or to modify the decision in light of each opinion. Nonetheless, the appropriate authority is ultimately in charge of making the decision based on all

³²⁸ Article 6 (7) of the Aarhus Convention

³²⁹ The Aarhus Convention Implementation Guide, United Nations, 2000, 109., Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.100

³³⁰ The Aarhus Convention An Implementation Guide, United Nations Economic Commission For Europe, United Nations, 2014, 101

available information, including the comments received. It must be able to demonstrate why a specific opinion was disregarded for significant reasons.³³¹

The legal meaning of the phrase “take due account” as interpreted above should not limit the scope of this obligation to a purely procedural obligation. In this respect, it is also important to note the communication of the Aarhus Convention Compliance Committee ACCC/C/2008/24 which states that the requirement of Article 6(8) of the Convention for due consideration of the outcome of public participation does not amount to the public having the right to veto a project.³³² Therefore, this provision should not be interpreted as requiring that the local community living nearby the project have the final say on its outcome and design and that their acceptance of the project is always necessary.

At this point, it is feasible to recall the theory of the “ladder of participation” by S.Arnstein. That the form of public participation that is guaranteed by the Aarhus Convention, information, and consultation, is located at the third level of tokenism on this ladder. The level of tokenism is considered according to the “ladder of participation” as symbolic participation because individuals are given the chance to be heard or write comments but they are not given the right to influence the final decision. The reason for this is that both the level of providing information and the level of consultation is primarily made and applied to distributing information from the author to the general public.³³³ Therefore, legislation should be criticized for requiring an insignificant level of public participation at too late stages of the environmental assessment process that cause ambiguity and just creates the appearance that the public can impact the final decision.³³⁴

The importance of giving the public a more active form of participation in decision-making is the Universal Declaration of Human Rights and also the Union’s values. It would be undemocratic and at odds with human rights not to give the public opportunities to in the environmental decision-making process, because environmental issues directly affect everyone's quality of life and can violate fundamental human rights.

Nevertheless, in the legislation terms “participation” and “consultation” apply interchangeably, leading to a mismatch of expectations from different stakeholders of the participatory process.³³⁵ Consultation is a form of public participation under the EU law that serves as a main form of public participation in the decision-making process does not ask for public consent on a proposed project and does not guarantee an impact that the public can have as an outcome of the participative procedure. In general, it is debatable if the EU legal framework regarding decision-making on mining projects gives the public at least some power to influence the final decision.

The provided above analysis shows that public participation rights do not guarantee the “right to say no” to local communities. However, the provision to take into due account the outcome of the public participation procedure should guarantee that public concerns have been given adequate consideration and that they play a significant role during the decision-making process.³³⁶

³³¹ *The Aarhus Convention An Implementation Guide*, United Nations Economic Commission For Europe, United Nations, 2014 p.101

³³² ACCC/C/2008/24 (Spain) (ECE/MP.PP/C.1/2009/8/Add.1, para 98

³³³ Hans Wiklund and Per Viklund, “Public Deliberation In Strategic Environmental Assessment: An experiment with citizens’ juries in energy planning”, *Effective Environmental Assessment Tools critical reflections on concepts and practice*, (2006):45

³³⁴ Wiklund and Viklund, “Public Deliberation In Strategic,”52

³³⁵ Glucker, “Public participation in environmental impact”,104–111

³³⁶ ACCC/C/2008/24 (Spain) (ECE/MP.PP/C.1/2009/8/Add.1, para. 98

Summary

In this Chapter, public participation rights as a legal way to stop mining projects were analyzed. Definitions and the concept of public participation rights were presented. The overview of the legal protection of public participation rights in international and EU law was discussed.

The right to public participation in environmental decision-making differs from other participation rights as it is an explicit right. The public has the opportunity to participate directly in the decision-making process itself, without the help of any representative. Moreover, the public participation right in environmental matters has two dimensions: substantive and procedural. As a substantive right, it can be codified in a constitution or statutory law and may originate from the human right to a healthy environment.³³⁷ Whereas, procedural right relates to the decision-making processes and answer the questions on how decisions are made, what public input should be taken into account in decision-making, what information the public should have access to and when.³³⁸

The EU legal framework contains two directives, on Strategic Environmental Assessment and Environmental Impact Assessment, that regulate decision-making processes in regard to development projects. The relationship between the two Directives is tiered. Even though the application area appears to be properly divided between them, there may be overlaps.³³⁹ Member States have discretion in regard to such overlaps and can substitute two assessments or provide a joint or coordinated procedure. However, the Strategic Environmental Assessment is useful in excluding or significantly reducing the number of possible alternatives at an earlier stage, including zero-alternative, and is also instrumental in considering cumulative effects at a larger scale.

Moreover, important provisions of the Aarhus Convention such as early participation and taking due account of the outcome of public participation are analyzed in order to answer the following question: do public participation rights provide the opportunity for local communities to stop harmful projects?

It was found that public participation rights in decision-making could theoretically give local communities the “right to say no” at the level of Strategic Environmental Assessment. Because the provision of early participation implies a requirement that the public should be involved in the decision-making process when all options are open. Thus, in accordance with established Aarhus Committee case law and the nature of the Strategic Environmental Assessment, a “zero option” or alternative that does not implement the project at all is available at the strategic level in the preparation of plans, programs, and policies. Therefore, the development project that requires consent should be subject to tiered decision-making, and start from Strategic Environmental Assessment, and the public should be involved at this level.

It was also concluded that public participation rights do not provide the veto right for the local communities. However, the requirement to “take into due consideration” implies that public concerns should be assessed and implemented in the final decision. Even though, it is not a clear right to say no, it should be considered as an opportunity for the public to have some degree of influence on the decision. The extent to which the public will be able to influence the final decision

³³⁷ To date, 19 of the 27 EU Member States have entrenched this right in their constitutions and national legislation. The right to a healthy environment has already been legally recognized in those EU member states that have ratified the Aarhus Convention, which specifically mentions it in its language.

³³⁸ Richardson and Razzaque, “Public participation in environmental decision-making”, 167

³³⁹ Albrecht, “Legal Context of the SEA Directive” 36

on a project, and the extent to which their concerns will be taken into account will depend on the implementation of the Aarhus Convention requirements. Therefore, in the third chapter, I will scrutinize the requirement to take the outcome of public participation “into due consideration” in the EU law and how it is implemented in the Member States.

3. EXAMINING OBSTACLES TO ENFORCING PUBLIC PARTICIPATION RIGHTS, INCLUDING THE RIGHT TO SAY NO, IN STRATEGIC ENVIRONMENTAL ASSESSMENT DIRECTIVE UNDER EU LAW

Strategic environmental assessment as one level in the decision-making process establishes a framework for future consent to project development.³⁴⁰ By assessing the cumulative impact of different projects Strategic Environmental Assessment has an objective to ensure sustainable development when planning or guiding future development.³⁴¹ The option for not implementing the project at all is available for consideration at the Strategic Environmental Assessment. To decide not to implement the project at the project level would be unnecessarily inefficient and contradictory.³⁴² Public participation is applicable in Strategic Environmental Assessment. Therefore, in this Chapter, I will analyze the possibility for the public to stop the development of environmentally harmful projects at the Strategic Environmental Assessment level. I will critically evaluate the provisions of the Strategic Environmental Assessment Directive related to the public participation procedure and application of the tiered decision-making process.

The legislation provides for a range of options regarding substantive matters. Member States might choose not to hold a Strategic Environmental Assessment, and alternatives such as “zero option” can be unavailable to the public. The directive does not explicitly identify the point at which the public should be involved and does not elaborate on defining the stages of the assessment, screening, and scoping. Moreover, the lack of enshrined forms of public participation, which are also essential for effective public participation, also leaves gaps.³⁴³ Thus, I will conclude that while EU legislation calls for some harmonization to implement the Aarhus Convention and sets minimum requirements for public participation procedures, it still fails to provide adequate public participation rights for local communities. Therefore, additional measures for harmonization will be analyzed in this Chapter.

3.1. Restrictions of the Tiered Decision-Making Process in Environmental Decision-Making under the EU law

This subchapter will discuss the implementation of a tiered concept in environmental decision-making in EU law. About the discretion that EU law provides to its Member States in this regard. In addition, the effects of discretionary provisions on the public's rights to stop environmentally harmful projects will be established.

In the ideal tiered decision-making process, the Strategic Environmental Assessment should set the framework for future development consent of projects,³⁴⁴ and the Environmental Impact Assessment has to deal with a more narrow range of options, level of uncertainty and details, and nature of impact predictions.³⁴⁵ However, in practice, the relationship between Strategic Environmental Assessment and Environmental Impact Assessment is rather complex, and rarely addressed.³⁴⁶ Thus, Article 11(2) of the Strategic Environmental Assessment Directive

³⁴⁰ Article 3(2) of the Strategic Environmental Assessment Directive

³⁴¹ Norman Lee and Fiona Walsh, “Strategic environmental assessment: an overview”, *Project Appraisal*, 7:3,(1992): 130, DOI: 10.1080/02688867.1992.9726853

³⁴² Leea and Walsh, “Strategic environmental assessment,”

³⁴³ Jendrośka, “*The Aarhus Convention at TEN*,”144

³⁴⁴ Article 3(2) of the Strategic Environmental Assessment Directive

³⁴⁵ Sheateet et al., “Relationship between the EIA and SEA,” 16

³⁴⁶ Jos Arts, Paul Tomlinson and Henk Voogd , “Planning in Tiers? Tiering as the way of linking” in “*Handbook of Strategic Environmental Assessment*”, eds. B. Sadler, et al. (New York: Routledge, 2011), 442

allows the Member States to perform a joint or coordinated procedure, if the project, program, and plan meet the screening criteria of both Directives.

In other words, when in theory both the Environmental Impact Assessment and the Strategic Environmental Assessment should apply, the Strategic Environmental Assessment directive may not be required, leaving an obvious gap as no formal strategic assessment is carried out before a project-level or Environmental Impact Assessment.³⁴⁷ The exclusion of Strategic Environmental Assessment by these provisions may have negative consequences for environmental protection if certain environmental considerations (or effects) are excluded from the scope of the Environmental Impact Assessment, or when they have not been adequately addressed in the Strategic Environmental Assessment.³⁴⁸ Moreover, the joint procedure allows aligning Strategic Environmental Assessment and Environmental Impact Assessment with each other, with the view to avoid duplication, which may lead to some inconsistencies and ambiguity at the strategic level because of the different natures of assessment.³⁴⁹

In terms of public participation, this means that the public is deprived of Strategic Environmental Assessment alternatives that consider “whether,” “why,” and “what” to implement in a particular area when evaluating plans and programs.³⁵⁰ Because the Environmental Impact Assessment has only alternatives, such as “when” and “how” to carry out the project.³⁵¹ Thus, the public or local communities do not have a “zero option” and cannot choose not to implement the project at all, which is available to them at the level of the Strategic Environmental Assessment.

Moreover, plans and programs that specify only small areas and minor modifications to plans and programs can be excluded from Strategic Environmental Assessment obligations, in accordance with Article 3(3) of the Strategic Environmental Assessment Directive. The main criterion for applying Article 3(3) of the Strategic Environmental Assessment Directive is not the size of the area covered, but whether the plan or program is likely to have significant environmental effects.³⁵² Thus, if a plan or program, even if it affects a small area at the local level, has significant environmental effects, a Strategic Environmental Assessment must be carried out. This provision also leads to ambiguity, as the decision on appointment must be made by local authorities on a case-by-case basis, and differences between EU member states must be taken into account. It is, therefore, impossible to define precisely what “small area” means in this context for all Member States.³⁵³

Practice shows that it is difficult for Member States to set clear boundaries because of ambiguous provisions. When conducting a joint procedure or coordinated procedure between Strategic Environmental Assessment with Environmental Impact Assessment. Particularly in relation to plans, programs, or projects related to land use or spatial planning.³⁵⁴ The application of coordinated or joint procedures is subject to Member States’ discretion and has already appeared

³⁴⁷ Sheate et al., “Relationship between the EIA and SEA,” 16

³⁴⁸ João, “*Implementing Strategic Environmental Assessment*,” 9

³⁴⁹ João, “*Implementing Strategic Environmental Assessment*,” 8

³⁵⁰ Nooteboom, “Environmental Assessments,” 22

³⁵¹ *Ibid*

³⁵² Albrecht, “*Implementing Strategic Environmental Assessment*,” 44

³⁵³ Albrecht, *Implementing Strategic Environmental Assessment*, 44

³⁵⁴ Report from the Commission to the Council and the European Parliament under article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment, European Commission, 2017, 8

in various CJEU case laws.³⁵⁵ The CJEU has confirmed that Strategic Environmental Assessment and Environmental Impact Assessment procedures are different for a number of reasons, therefore, the requirements of both directives must be met simultaneously.³⁵⁶ The CJEU suggested to the court which referred to the preliminary ruling, to assess whether the assessment carried out under the Environmental Impact Assessment Directive can be considered the result of a coordinated or joint procedure and whether it already meets all the requirements of the Strategic Environmental Assessment.³⁵⁷

As one level in the decision-making process, the Strategic Environmental Assessment provides the basis for future development consent for a project. The option of not implementing the project at all is available for consideration at the level of strategic environmental assessment at its early stage. A decision to abandon the project at the project level would be unnecessarily inefficient and contradictory. Public participation is applicable in a strategic environmental assessment, but when the public is denied participation at this level, it is also denied the right to say no to a future project at an early stage.

Questions such as whether mining exploitation in a particular location is permitted through land use planning are reviewed repeatedly only in some EU Member States.³⁵⁸ This means that when public authorities issue a development consent to a mining company that has applied to develop a certain area after a land use plan has been approved, authorities cannot undergo a second Strategic Environmental Assessment procedure and make modifications to the plan without public participation. Therefore, exploitation can be carried out anywhere as long as the necessary authorizations have been obtained without the public being involved.³⁵⁹ The broad implementation of the provisions of the Aarhus Convention in the EU law allows the Member States to have this discretion. Therefore, the EU legal framework on the tiered concept in environmental decision-making as currently set out in EU law is deficient.

3.2. Exploring the Various Forms of Public Participation in Environmental Decision-Making and Their Associated Challenges in EU law

What form the public participation in the Strategic Environmental Assessment procedure takes has an impact on the level of public involvement in the decision-making process. Since the Strategic Environmental Assessment Directive does not provide explicit details on the procedures for public consultation, a variety of approaches are employed in different Member States.³⁶⁰ There is still room for creating the best approaches for public participation in the Strategic Environmental Assessment procedure, as is already being done in a few Member States.³⁶¹ Best practices will be provided.

³⁵⁵ Case C-295/10, *Valčiukienė and Others*, para 58-63, Case C-473/14 *Dimos Kropias Attikis*, Case C-160/17 *Raoul Thybaut and others*

³⁵⁶ Case C-295/10, *Valčiukienė and Others*, para 58-63

³⁵⁷ Case C-295/10, *Valčiukienė and Others*, para 58-63

³⁵⁸ Study Legal framework for mineral extraction and permitting procedures for exploration and exploitation in the EU, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs Directorate Industrial Transformation and Advanced Value Chains, MINLEX Final Report, (Brussels, 2017), 149

³⁵⁹ *Ibid*

³⁶⁰ Final report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC), (com(2009) 469)

³⁶¹ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), European Commission, 2016, 211

Thus, all Member States use different procedures in conducting public consultations during the decision-making process. The majority of Member States strictly follow the minimal standards for public consultation set in the Strategic Environmental Assessment Directive. The most typical procedure is to post a notification about the forthcoming procedure on a website.³⁶² Depending on the type of a plan or program, some Member States additionally distribute the material via the press, in national or local media, or official journal/gazette.³⁶³ However, it is not enough for great engagement of the public and to increase the interest of the public in decision-making. Moreover, as far as internet access is concerned, not all communities have access to the internet.³⁶⁴

Some Member States go beyond minimal criteria by holding meetings or public hearings engaging the public effectively and exchanging and disseminating information that seems like good practice.³⁶⁵ But what is more appropriate, as a form of public participation, is an instrument of direct democracy - a referendum. A referendum can foster citizens' involvement to legitimize important decisions on a local level. Another good example of effective public engagement are neighborhood walks.³⁶⁶ Neighborhood walks are a participatory strategy that relies on ordinary people's participation and attentive listening. A small group of individuals is asked to stroll through their neighborhood with planners and evaluators. During the walk, participants point out sites that they believe are important to the community and have specific issues, such as deterioration, lack of accessibility, and safety. Afterwards, all participants will be invited to a workshop where further discussions take place. The data gathered during the walks and workshops are then included in the Environmental Report and successfully used to guide the design of the plan's objectives and activities.³⁶⁷

The survey³⁶⁸ with a series of interviews with Strategic Environmental Assessment practitioners and community-based stakeholders was performed in order to uncover potential causes for poor interest in the participation procedure by the public. Authors discovered that the primary barriers to stakeholder engagement in Scotland's Strategic Environmental Assessment were a lack of awareness of the Strategic Environmental Assessment process and its relationship to the planning process, as well as a lack of capacity, particularly for small groups of local activists³⁶⁹. The research recommended several improvements, including the non-statutory involvement of stakeholders from the beginning of the planning process, making the Strategic Environmental Assessment methodology more accessible to non-technical audiences, and integrating practical consultation processes derived from planning rules.³⁷⁰ Conducting open,

³⁶²European Commission, Report from the Commission to the Council and the European Parliament under article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment, 2017, 8

³⁶³Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), European Commission, 2016, 92

³⁶⁴“Digital economy and society statistics - households and individuals”, Eurostat, 2022
https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals#Internet_access

³⁶⁵Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), (Luxembourg: Publications Office of the European Union, 2016), 203

³⁶⁶Rega, Bonifazi, Gazzola, “Strategic environmental assessment,” 9-37

³⁶⁷ Rega, Bonifazi, Gazzola, “Strategic environmental assessment,” 9-37

³⁶⁸ Carlo Rega and Giorgio Baldizzone, “Public participation in Strategic Environmental Assessment: A practitioners' perspective”, *Environmental Impact Assessment Review* Vol.50, (2014): 105-115
<https://doi.org/10.1016/j.eiar.2014.09.007>

³⁶⁹ Rega and Baldizzone, “Public participation in Strategic Environmental,” 105-115

³⁷⁰ *Ibid*

inclusive, and continuing dialogue with local communities throughout the planning stage is a precondition to creating strong, transparent, trusting, collaborative, and lasting relationships.³⁷¹

To summarise, current practices for public participation in the Strategic Environmental Assessment in the EU are discouraging and leave much room for improvement. It cannot be said that the EU makes a real effort to implement the Aarhus Convention effectively and reflect the spirit of environmental democracy that the Aarhus Convention is intended to foster. For instance, the ferocious opposition to the massive Stuttgart train station project has sparked new discussions regarding citizens' referendums in Germany³⁷². There is a need to support more citizen involvement, enhance local democracy, and give people more clout will also be required. Where the environmental impact of a project is very important, the choice should, if possible, be pre-approved by the public, possibly by referendum.³⁷³

3.3. Evaluating the Implementation of the Strategic Environmental Assessment Directive in the Different Member States

With Strategic Environmental Assessment, public participation mostly begins at the scoping stage or even when the environmental report is ready.³⁷⁴ That gives the public authorities complete monopoly to decide on the plan or programs as plans approved by local authorities are not controlled by higher levels of administration and due to the poor public involvement, municipalities or local authorities have a “planning monopoly”³⁷⁵ within the EU.³⁷⁶ This subchapter will focus on the need to increase public participation and make it more meaningful at the level of strategic environmental assessment. Public opinion should influence the final decision and help disrupt the “planning monopoly” by public authorities³⁷⁷

As per Article 6 (2) of the Strategic Environmental Assessment Directive before the plan or program is adopted or put forth for legislative consideration, the public must be given a prompt and effective opportunity to express their opinions on the draft plan or program and the accompanying Environmental Report.³⁷⁸ According to the Study concerning the preparation of the report on the application and the effectiveness of the Strategic Environmental Assessment Directive³⁷⁹ (hereinafter - Study on the application and effectiveness of the SEA Directive), the Environmental Report is made available to the public in all Member States at the same time as the draft of the plan or programs. The public is provided with the time to raise their thoughts and participate in the Environmental Report's preparation before the plan or program is formally adopted.

³⁷¹ Guzik et al., “Potential Benefits and Constraints,”3

³⁷² Winter, “Theoretical Foundations of Public Participation in Administrative Decision-Making”, 30

³⁷³ Report of the World Commission on Environment and Development: “Our common future”, 49

³⁷⁴ Rega and Baldizzone, “Public participation in Strategic Environmental Assessment,” 105-115

³⁷⁵ *Ibid*

³⁷⁶ *Ibid*

³⁷⁷ Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs*, chapter 1 (Eugene, 2010), 13. <https://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf>

³⁷⁸ (Article 5 (1) of the Strategic Environmental Assessment Directive, Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or program, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or program, are identified, described and evaluated. Information to be given for this purpose is referred to in Annex I.

³⁷⁹ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) (Luxembourg: Publications Office of the European Union, 2016)

The Strategic Environmental Assessment Directive Article 3(7) demands that Member States ensure that the screening decision is made available to the public, including the justifications for not requiring an environmental assessment. The public is not required by the Strategic Environmental Assessment Directive to participate in the scoping stage.

According to the Study on the application and effectiveness of the SEA Directive, the Environmental Report, generally, is made available to the public in all Member States at the same time as the draft plan or program.³⁸⁰ Nevertheless, the plan and the Environmental Report may occasionally be given independently, first the plan and then the report, depending on the specific spatial planning legislation, such as a national water management plan. Only several Member States go above the Directive's criteria for consultation by requiring public participation at the scoping stage and sometimes even at the screening of Strategic Environmental Assessment.³⁸¹

However, Member States and authorities recognized that when consultations are held at the end of the Strategic Environmental Assessment process and there is little space for influencing strategic choices, it has been challenging to involve the public in the consultation procedure.³⁸² Since most issues are already resolved earlier in the process before the public is involved, changing them would entail a lengthy procedure. The public's opinions and comments are usually not taken into account. Public participation is not required in the screening or scoping stage of the Strategic Environmental Assessment. Because of this practice, the public loses interest and is reluctant in participating. This occurrence is known as the decline of participatory culture.³⁸³

The requirement to take due account the outcome of public participation is applied across the EU, according to the Study on the application and effectiveness of the Strategic Environmental Assessment Directive.³⁸⁴ However, they are not always clear or strong enough to ensure that environmental concerns are properly taken into account.³⁸⁵ For instance, in Estonian law³⁸⁶ mandates that when creating a strategic planning document, the results of any transboundary consultations, opinions provided by the public and authorities, and the results of strategic environmental assessments should all be taken into consideration to the greatest extent possible. The phrase “greatest extent possible” does not, however, imply that the results of the consultation would have precedence over other considerations.³⁸⁷

The Aarhus Compliance Committee, in a recent case involving Bulgaria's implementation of a reasoned final decision, stated that the report of the six hearings was presented as a 1-page summary.³⁸⁸ Only eight lines are devoted to a summary of comments received from the public as a result of these six separate hearings. There is no indication of the specific issues and concerns raised by the public or any suggestions made by them. Consequently, even if the decision-making

³⁸⁰ Heiland, *Environmental Protection in the European Union*,

³⁸¹ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC), (Luxembourg: Publications Office of the European Union, 2016), 203

³⁸² *Ibid*

³⁸³ Heiland, *Environmental Protection in the European Union*,

³⁸⁴ Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) (Luxembourg: Publications Office of the European Union, 2016)

³⁸⁵ Assessing environmental impacts of plans and programs. Implementation of key requirements of the SEA Directive in selected EU MS, (Justice and Environment, 2018), 6

³⁸⁶ *Ibid*

³⁸⁷ Assessing environmental impacts of plans and programs. Implementation of key requirements of the SEA Directive in selected EU MS, (Justice and Environment, 2018), 6

³⁸⁸ Study- legal framework for mining extraction and permitting procedures for expiration and exploitation in the EU, Minpol, and partners, (Brussels: European Commission, DG for the internal market, industry, entrepreneurship and SMEs, 2017), 34

bodies had this report at their disposal, they could not rely on it to adequately take into account public participation. Further, the Aarhus Compliance Committee makes the conclusion that in the absence of such information, the public participation procedure appears to have been a mere formality that did not give the public the right to participate effectively.³⁸⁹

These omissions indicate that the Member States wish to allow flexibility in defining the exact procedures for using participation outcomes without being bound as to the examination of all comments and concerns of the public. In other words, without properly taking into account the needs and inputs of the public side, public participation is used as a means for developers and authorities to exercise their power and convince the public to do what they would like to do, which distorts the original intention for integrating public participation.³⁹⁰

However, as a good example where the opinion of local communities is taken into account, consider a case from France in the commune of Nantes. Where, according to the urban planning code regulations, communes have the power to designate particular areas in their town planning documents for quarry exploitation.³⁹¹ The communes have the authority to cancel such specific quarry zones in case of modifications of the town planning. Thus, despite an appeal by the operator and the landowners, the Administrative Court of Appeals of Nantes banned the quarrying activity, upholding the municipality's decision to change the zoning to agricultural instead of quarrying.³⁹²

As I am writing this thesis, a proposal for new regulations for strategic projects³⁹³ has been released. This proposal should ensure a safe and sustainable supply of critical raw materials in the EU, concerning strategic projects. This proposal is consistent with the European Green Deal strategy and European Climate Law, and it is intended to assist the EU in developing the capacities required to meet its targets for producing renewable energy, building strategic manufacturing processes such as electronic components, and achieving climate neutrality objectives.³⁹⁴ This proposal will ease the permit granting process and allow the Member States to start mining projects even in the zone where mining projects before were prohibited.³⁹⁵

Under the proposed regulation, authorities can approve the projects even if they harm the environment if the responsible permitting authority concludes, on a case-by-case basis, that the public interest served by the project prevails over those impacts. Therefore, public participation at the level of Strategic Environmental Assessment or land use planning must be strengthened, and the results of the public participation procedure must be recognized. With the coming energy transition and an increasing amount of CRM mining projects, the EU should maintain environmental and social standards.³⁹⁶

³⁸⁹ The Aarhus Compliance Committee communication ACCC/C/2016/144, 2021, 137-139

³⁹⁰ Jie Zhang, Lone Kørnøv, Per Christensen, "Critical factors for EIA implementation: Literature review and research options", *Journal of Environmental management*, no.114, (2012), DOI: [10.1016/j.jenvman.2012.10.030](https://doi.org/10.1016/j.jenvman.2012.10.030)

³⁹¹ Study- legal framework for mining extraction and permitting procedures for expiration and exploitation in the EU, Minpol and partners (Brussels: European Commission, DG for internal market, industry, entrepreneurship and SMEs, 2017), 34

³⁹² *Ibid*

³⁹³ Strategic Projects which have an adverse impact on the environment, to the extent it falls under the scope of Directive 2000/60/EC, Council Directive 92/43/EEC and Directive 2009/147/EC³⁹ may be authorised where the responsible permitting authority concludes, based on its case-by-case assessment, that the public interest served by the project overrides those impacts https://eur-lex.europa.eu/resource.html?uri=cellar:903d35cc-c4a2-11ed-a05c-01aa75ed71a1.0001.02/DOC_1&format=PDF

³⁹⁴ *Ibid*

³⁹⁵ *Ibid*

³⁹⁶ Fabrice Mathieux et al., Report on Critical Raw Materials in the Circular Economy: Background report European Commission, (Luxembourg, 2018)

Summary

As established in previous chapters, the right to public participation in decision-making can theoretically give local communities the “right to say no” to development projects at the level of Strategic Environmental Assessment. However, in order to do this, the environmental decision-making process must be tiered and consist of two levels - Strategic Environmental Assessment and Environmental Impact Assessment. However, the current practice of public participation in strategic environmental assessment in the EU is dismal and leaves much room for improvement, so it creates barriers to the “right to say no” to local communities.

Due to an inconsistency in EU law, the Strategic Environmental Assessment can be excluded from the decision-making process regarding specific projects. Environmental protection may suffer as a result of the Strategic Environmental Assessment's removal from the decision-making process. The public is deprived of the opportunity to stop harmful development initiatives.

Local communities are often dealing with insufficient awareness about the new Strategic Environmental Assessment procedures, which restricts their capacity for meaningful participation. Only notices on websites are not enough for the great involvement of the public as not all local communities have access to an internet connection. While some Member States arrange meetings or public hearings to increase public participation, a referendum would be a more acceptable form of engagement. It would allow individuals to directly participate and legitimate significant decisions at the local level while lowering disagreements.

Public participation, according to the Strategic Environmental Assessment Directive should be once a draft of the plans or programs are adopted or put into legislative review. The public's capacity to influence land use planning is constrained at this stage because the proposed zoning plan has already been developed. The Strategic Environmental Assessment Directive requires authorities to evaluate the results of consultations, but national regulations aren't always clear or robust enough to guarantee that public concerns are taken into account in the right way. The examples of Estonia and Bulgaria show that flexibility hinders the careful analysis of the public's opinions and concerns.

CONCLUSIONS

1. The first statement that *public participation rights in environmental decision-making, as they are entrenched now in EU legislation, have limitations that cause violations of human rights* is proved by the following conclusions:

1.1. *Environmental protection and the enjoyment of human rights have an undeniable link.*

The ECtHR has recognized in its case law that environmental degradation can affect how well people can enjoy their human rights. Human health, well-being, and quality of life may be seriously threatened by environmental harm, including environmental and noise pollution, a dangerous way of mining, and insufficient environmental control. Especially, the right to respect for private and family life (Article 8), the right to property (Article 1 of Protocol No. 1), and the right to life (Article 2) can all be violated as a result of negative environmental effects under the ECHR. Due to its negative impact on the environment, human health, and fundamental human rights, the mining industry must therefore be seen as a possible source of human rights violations. EU law plays an important role in ensuring the protection of the environment and human rights, although the development and management of natural resources is coordinated by national law, as these rights are enshrined in the Charter and the Treaties.

1.2. *Environment has no voice to protect itself.* In its famous case, *Trianel* the CJEU creates an assumption that nobody “owns” the environment and that the environment does not have a voice to protect itself. Human intervention is required in order to safeguard the environment. State obligations and permitting procedures for projects that may have a potential negative environmental impact are important mechanisms for protecting the environment. However, the ECtHR case, *Taskin and Others v. Turkey* demonstrates a situation in which the state can continue with development activities regardless of environmental harm revealed by an impact assessment if the public interest prevails. Therefore, affected communities must be able to express their opinions and influence decisions regarding projects that may affect the environment and their well-being through the right to public participation. Procedural rights to public participation play an important role and can protect the environment as well as the human rights of those who will be directly affected by the projects.

1.3. *Public participation rights as a legal way to stop mining projects by local communities.*

In theory, the right to public participation can be seen as a legal way that can give local communities the “right to say no” to environmentally harmful projects and protect their human rights. However, in order for the right to public participation in environmental decision-making to guarantee the protection of human rights, the requirements of the Aarhus Convention, such as “early participation” and “due consideration” of the results of public participation, must be properly implemented in EU law. Yet, local communities do not have the ability to stop projects that are environmentally harmful and could lead to violations of their human rights.

2. The second statement that *local communities should be granted more effective public participation rights in the decision-making process for mining projects, which would guarantee effective protection of human rights and the environment during the energy transition in the EU* is confirmed by the following conclusions:

2.1. *Limitations of public participation rights in EU law do not guarantee the protection of the environment and human rights.* Local communities in the EU use direct actions and protests to exercise their *de facto* right to stop mining projects. As a result, the demands of local communities may be recognized, and in certain cases, harmful projects may be stopped. On the other hand, the participation of local communities in decision-making has limitations and does not provide them with influence on the final decision. EU law currently does not transpose the Aarhus Convention well enough and therefore public participation rights are not effective. Such a requirement, as a guarantee of early participation, in a multilevel decision-making process is not adequately implemented. A Strategic Environmental Assessment, which should set the framework for future development consent for projects a multilevel decision-making process can be excluded. This is possible under the provisions of EU law, which allow Member States the discretion to do so. Nevertheless, it is during the Strategic Environmental Assessment process that alternative options, including the option of not implementing the project (zero alternatives), must be analyzed and evaluated. Public participation in the Strategic Environmental Assessment process provides an opportunity for affected communities to advocate for consideration of a “zero alternative.”

2.2. *In general, public participation in the form of consultation is a mere formality.* In EU law public participation has the form of public consultation, which provides an opportunity to be heard, but does not ensure influence on the final decision. Although EU law contains procedural requirements that the results of public consultations must be “taken into account” by decision-makers. This requirement does not guarantee a “right to say no” by affected communities or any level of influence over the decision regarding harming projects. As the possibility of public influence on the final decision may vary depending on the national legislation and practice of Member States. Differences arise because of varied legal requirements, inadequate implementation practices, or a lack of meaningful commitment to transparency and accountability in Member States. However, without the “right to say no” the human rights of community members are now in jeopardy. Due to the energy transition and increasing CRM extraction in the EU, mining projects will be allowed, even if they harm the environment in prohibited areas.

RECOMMENDATIONS

1. The EU must strengthen public participation rights in permitting procedures while maintaining environmental and social standards during the energy transition. In particular, with regard to the Strategic Environmental Assessment Directive, which regulates decision-making on plans and programs related to land use or spatial planning. In order to achieve uniformity, a regulation should be adopted instead of a directive. The legislation should include a definition and explanation of strategic environmental assessment stages such as screening and scoping. With mandatory public participation at each of these stages.
2. The EU legislation should ensure in all cases a multi-level decision-making process using a two-level assessment: Strategic Environmental Assessment and Environmental Impact Assessment. The alternative of not implementing the project at all during the public participation procedure should always be made available to the public.

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ABSTRACT

The Master Thesis is devoted to the study of the “right to say no” by local communities to environmentally harmful projects. More precisely, the Thesis analyzed the question “Is the right of local communities to stop hazardous to human health and environmentally damaging mining projects recognized in law?”

The main objectives of the Thesis were to analyze the range of human rights which can be affected by environmentally harmful projects. Moreover, the Thesis scrutinized the public participation rights in environmental decision-making as a legal instrument for the local communities to say no to mining projects that may violate their human rights. Furthermore, the Thesis analyzed whether the EU legislation on public participation rights in environmental decision-making and answers if it is sufficient to protect the human rights of local communities affected by mining projects during the energy transition in the EU.

The research has shown that public participation rights in environmental decision-making, in theory, can provide the local communities with the “right to say no” to harmful development projects, such as mining. However, this depends on meeting such requirements as “early participation” and “due consideration” of the results of public participation. The EU law provides discretionary to the Member States in regard to early participation, therefore, the local communities are deprived of the “right to say no”. Besides, “due consideration” does not guarantee veto rights to the local communities. Moreover, the implementation of this requirement in EU Member States calls into question whether the community has any influence at all.

Keywords: Aarhus Convention, public participation rights in environmental decision-making, Strategic Environmental Assessment, “right to say no”.

SUMMARY

The Thesis is dedicated to the “EU legal framework on permits for mining projects: right to say no of local communities”. The thesis aimed to conduct a comprehensive analysis and assess the extent to which public participation rights are regulated under EU law to allow local communities to say “no” to mining projects that may have a harmful impact on their human rights.

The thesis has three substantive parts that consist of chapters, subchapters, a bibliography list, an abstract, a summary, and an honesty declaration. The first part discusses two ways that local communities can use to stop harmful development projects, including mining. One way is the *de facto* right to stop projects through protests, and the other is *de jure* through public participation rights. This part presents cases from the ECHR in which human rights are violated by environmentally harmful projects.

In the second part public participation rights in environmental decision-making as a legal way of realizing the right of local communities to say “no” to mining projects" are analyzed. A definition and explanation of the concept of public participation rights are provided. As an overview of the legal protection of public participation rights in environmental decision-making in international and EU law is presented.

The third part discusses obstacles that exist in EU law that do not allow the “right to say no” to local communities. It describes the problematic aspects under the Aarhus Convention in EU law. In the end, Thesis makes some conclusions that while EU legislation calls for some harmonization to implement the Aarhus Convention and sets minimum requirements for public participation procedures, it still fails to provide adequate public participation rights for local communities. Therefore, the local communities do not have the “right to say no” through public participation rights. Additional measures for the possible future and the better application of existing provisions on public participation rights are provided.