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A CASE OF THE EMPEROR'S NEW CLOTHES:

A CRITICAL EXAMINATION OF PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

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ABSTRACT

The purpose of this doctoral research is to critically evaluate the public participation principle in environmental decision-making. Public participation is widely regarded as forming part of the corpus of international environmental law and has been recognised globally by the full breadth of legal doctrine from constitutional provisions, European Directives to human rights treaties. Proponents of the participation concept consider it to be a praised tool of environmental democracy which draws upon the principle's underlying theoretical origins which are rooted in participative democratic theory. Participation is largely seen as an inherently good thing- but this status has not been subject to sufficient academic interrogation, this research will explore whether it is an appropriate tool for meeting the objectives claimed. Proponents of participation, of which there are many, can appeal to three distinct justifications for participation: first, that it is good for government because it can be applied to ensure administrative expedience; further that it is a process that confers democratic legitimacy, encouraging active citizenry; and finally that it can lead to better environmental decisions.

In order to make a rigorous and original contribution to the literature in this field, the discussion is framed around an innovative conceptual analytical framework drawing on the justifications for participatory decision-making indicated by the 1969 Skeffington Report: *People and Planning*. This research interrogates the validity of the justifications by examining the experience of participation for all the major interests; the State, society and the environment. It does so with reference to the extended case study of the 2003 *GM Nation* public debate.

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Chapter One: Introduction

1.0 The Aim of the Research

This research critically examines the public participation principle in environmental decision-making. This includes a detailed examination of the aims of public participation as they concern the 'vertical' relationship between State and citizen, 'horizontal' or inter-community relations, and inter-species relationships, looking beyond purely anthropocentric concerns.

The research has a distinctively theoretical approach given the principle's philosophical origins which are rooted in democratic discourse, outlined later in this introduction. There is nothing new about the debate on factors affecting public engagement in decisions affecting the environment,[1] however the desirability of the application of public participation in environmental matters has largely gone unchallenged.[2] Some scholars writing in a more general context have raised awareness of the possible weaknesses with the concept of public participation in decision making taken beyond the merely consultative paradigm,[3] but there has been little or no discussion of these theoretical weaknesses in the setting of the environment – which is precisely where the 'ideal' of public participation finds its fullest legal expression.

[1] Sherry Arnstein, 'A Ladder of Citizen Participation' (July 1969) 35 Journal of American Institute of Planning 4, 216; Frans H. J. M. Coenen, Dave Huitema and Laurence J. O'Toole Jr. (eds), *Participation and the Quality of Environmental Decision Making* (Kluwer, 1998); Kate Getliffe, 'Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?' (2002) 4 Environmental Law Review 101; Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) Modern Law Review 80; Jens Newig and Oliver Fritsch Environmental Governance: Participatory, Multi-Level – and Effective? (2009) Environmental Policy and Governance 19, 203; Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) Oxford Journal of Legal Studies 415; Eileen Gauna, 'The Environmental Justice Misfit: Public Participation and the Paradigm Paradox' (1998) 17 Stanford Environmental Law Journal 3

[2] As recognised by Steele (ibid) 415

[3] See in particular Julia Black in her seminal critique of 'thick' participation in Julia Black, 'Proceduralising Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 4, 597; Julia Black, 'Proceduralising Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 1, 33

The subject matter of the natural environment in principle raises similar issues relevant to public participation as any other social setting, but it is not simply a case of tailoring the general critique to the field at hand. This is because environmental concerns extend beyond relationships between citizens and governments to include the place of humans within a wider natural order. Certain people within a society experience difficulties in participating equally with others, for reasons of education and many other factors, but it is hard to imagine any circumstances in which non-human beings could even *begin* to participate in environmental decision making. Public participation in environmental decision making thus is potentially inherently problematic, in ways that this thesis attempts to explore.

This is not, however, a narrowly focused critique of conventional wisdom oriented around 'wild law' and other similar 'ecocentric' schools of thought. The broader problem that is explored is the scope for public participation rules excluding not only non-human populations but a variety of human ones also. This is because very little attention in an environmental setting has been given in the literature to the conditions on which members of the public participate 'equally' in decision making, and if they do not, then there is a real risk that participation will be 'regressive'; it will add to the power and influence of certain people and widen the gap in power and influence between these and others.

Thus I aim to question whether public participation in its current form is, in the absence of institutional adjustments, inherently comprehensively flawed and vulnerable to abuse, and that robust, formal modes of representation within participatory opportunities are needed to ensure the inclusion of all but the minority of articulate, influential voices of the elites which can use participation to perpetuate existing advantages.

1.1 Methodology

The research is formalistic in character. It focuses on formal justifications advanced for these within official documentation (as well as extensive theoretical discussion of the issues arising in the literature). The approach is therefore not empirical, although the analysis does address secondary literature as to the results of empirical studies into how participation works in practice. In particular, I draw on studies of the 2003 *GM Nation* public debate throughout the main body of the thesis.[4] The inclusion of a detailed assessment of *GM Nation* provides a key platform to observe many of the theoretical arguments through a critical lens. My concern was that a largely theoretical discussion of participation would have proven to be a dry exercise. Equally, there is not much room to explore many examples of a practical kind, without diluting attention to theory which is fundamental to my approach. The compromise decided on was to have a central, recurring case study. There were various candidates for this case study. The nuclear industry is contentious, and there was an attempt by the government to deal with matters of radioactive waste and future nuclear policy in a deliberative, participatory fashion however the shortcomings of those activities were obvious to all.[5] The *GM Nation* debate stood out as the best case study in the context of this thesis, because it was

[4] GM technology had become a matter of political controversy; at the turn of the 21st century a major government report had indicated that the lack of public inclusion in the GM debate had been to the detriment of policy formation. Polling conducted during the 2000s consistency revealed high levels of public concern towards the UK government's strategy so in 2002 a major public consultation was announced. In 2003 The UK Government commissioned a large scale public engagement exercise in order to assess societal opinion towards genetically modified organisms (GMOs). It remains an unprecedented and unrivalled participatory exercise in Britain. The background and organisation of the exercise is explained in depth in chapter three. DETR, The Government's Response to the Fifth Report of the Select Committee on Environmental Audit—Genetically; Modified Organisms and the Environment: Co-ordination of Government Policy (1999); Michael Cardwell 'The Release of Genetically Modified Organisms into the Environment: Public Concerns and Regulatory Responses' (2002) 4 Environmental Law Review 156

[5] The furore over the UK white paper *The Energy Challenge* is a good illustration of disenchantment stemming from seriously flawed and manifestly inadequate participatory practice. It resulted in a successful judicial review in R (on the Application of Greenpeace Limited) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin); DTI, 'Our Energy Future- Creating a Low Carbon Economy' (White Paper, Cm 5761, February 2003); DTI 'The Energy Challenge: The Energy Review' (Report, Cm 6887, July 2006)

heralded by the Government as a success. It was subject to reflection after the event, and it has been useful to draw upon the extensive commentary.

The author accepts there are limitations on the inferences that can be drawn more generally about participation based purely on the findings of *GM Nation*. The exercise took place in 2003, before the UK ratified the Aarhus Convention. As the findings of chapters three and four will explain, there were infrastructural shortcomings which affected the organisers' ability to use best participatory practice. Arguably had the debate been held in a post Aarhusian landscape the process may have been rather different, certainly in relation to the timeframes of the investigation which may have been extended if held today, possibly altering public confidence in the authenticity of the process.[6] However the completeness of information and documentary evidence in relation to the pre and post-debate circumstances makes *GM Nation* a highly suitable case study upon which arguments and the overall rationale of this research can be interrogated.

There is attention to black letter law in chapter two in particular. This is where the provisions of the Aarhus Convention[7] are outlined. However, the thesis does not engage extensively with the detail of the Convention or litigation beyond that chapter, partly because there has already been significant academic commentary in the area.[8] More importantly, the case law does not engage that explicitly with the justifications for public participation, or at least not as explicitly as this thesis aims to. There is vast case law on this subject which is dealt with selectively in the thesis, where relevant, for example case law which illustrates some aspects

[6] Indeed there have been developments to the legal landscape in relation to GMOs including the amendment to the Aarhus Convention (Article 6(11) (which is pending ratification by a sufficient number of signatories) which will, when in force, stipulate more extensive information access requirements in relation to public participation in decisions on the deliberative release into the Environment and placing on the market of GMOs. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450

[7] Aarhus Convention (ibid)

[8] Karen Morrow 'Worth the Paper That they are Written On? Human Rights and the Environment in the Law of England and Wales' (2010) Journal of Human Rights and the Environment, Vol. 1(1) 66–88

of the theoretical justification for participation in environmental decision making.[9] But it is the seminal policy statements, and through connections with environmental law theory, that the justifications find clearest expression, and it is possible to begin to reflect on what participation aims to do so that it can be judged against identifiable objectives.

To reiterate, greater emphasis is placed on theoretical literature in order to address why participation is desirable, why it has gained such popularity, and what theoretical limitations might stem from its application. [10] Some of the theoretical literature is philosophical in nature. I acknowledge the significant contributions that have been made by eminent political theorists such as John S. Dryzek and Jürgen Habermas who have idealised deliberative discourse.[11] Habermasian concepts of the ideal speech scenario and communicative authority are used to evaluate societal experiences of participation. I also draw upon more recent scholarship from academics such as Jenny Steele and Cormac Cullinan in order to explore the approach taken to solving environmental problems.[12]

[9] Chapter two provides an overview of the operations of the Aarhus Convention Compliance Committee, a selection of communications and case law, such as the recent decision in Walton v The Scottish Ministers [2012] UKSC 44 is discussed in order to illustrate the functions of the Convention.

[10] Examination of socio-legal theoretical scholarship is an established analytical approach to environmental scholarship. It allows for the inclusion of a range of disciplines, indeed legal scholars have said that 'law is inherently weak as an academic field...it is highly susceptible to invasion by other disciplines.' Cotterrell has said that the most successful invasions have comes from 'economics, history, philosophy, political theory, and literary theory.' This is particularly true of the socio-economic and scientific synergies underlying modern environmental discourse. Roger Cotterell, 'Subverting Orthodoxy, Making Law Central: A View of Socio-legal Studies' (2002) 29 Journal of Law and Society 4, 641; Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 2, 171; Jack M. Balkin, 'Interdisciplinarity as Colonization' (1996) 53 Washington and Lee Law Review 949, 96; Richard A. Posner, 'The Decline of Law as an Autonomous Discipline 1962-1987' (1987) 100 Harvard Law Review 761

[11] John S. Dryzek, *Deliberative Democracy & Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000); Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1984)

[12] Steele (n1) 415; Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2nd ed. Green Books, 2011)

1.2 Rationale behind the Thesis

The search for 'better' environmental decisions has forced policy makers at all levels (regional, national and international) to consider innovative solutions to achieve the necessary 'buy-in' required from all influential parties. Bold statements and promises emanate from international environment law, but in the absence of specific provision for robust implementation and consequences for non-compliance, international doctrine is significantly limited in power. The Aarhus Convention by contrast is lauded for its departure from hyperbole and adoption of procedural obligations on States. Furthermore many of the features of the Convention have been adopted by the European Union thereby forcing member states to take positive steps to ensure ratification and implementation in domestic regimes. Without a doubt, Aarhus has had a transformative effect on the landscape of public participation in environmental matters, but as a principle it has acquired prevalence without ever having been subject to probing intellectual challenge. Is it a good thing for the public to participate in decisions affecting the environment? If so, why?

Chapter two establishes the conceptual framework for analysis on the basis of three loosely defined justifications for participation. As the discussion will explain, there is no authoritative narrative from which observers can easily identify the justifications for participation, but often it is connected to democracy in vague non-specific terms.[13] Rossi has said:

> [Like] citizenship, participation is considered tantamount to democracy and democratic processes. Rarely has it been questioned, criticized, or explored.[14]

[13] Reflecting on the sudden international popularity of participation theory, Damer and Hague also noted that the movement behind the theory was not easily susceptible to documentation, although they felt it was characterised by the growing interest in civil rights. Seán Damer and Cliff Hague, 'Public Participation in Planning: A Review' (1971) The Town Planning Review,42(3) 219

[14] Jim Rossi 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making' (1997) 92 Northwestern University Law Review 180

This research argues that without recognising and addressing the systemic vulnerabilities of the processes as arranged by the State the system is open to abuse, manipulation and serves to reinforce existing power structures, social and species inequalities. At the conclusion of the *GM Nation* public debate, the then Secretary of State heralded it as 'decision-making at its best'.[15] This doctorate addresses the fundamental questions surrounding the social phenomenon that is public participation [16]– these are the questions that remain unsatisfactorily addressed by existing literature: [17] Is the State genuinely committed to participatory decision-making with the public? Who are the winners and losers in the participation play? Is participation good for the non-human Environment?

1.3 Scope and Contribution of this Research

It has been acknowledged by other scholars in the field that the majority of academic attention that has been given to participation seeks to focus on the choice of consultation methods. [18] Legal commentary since the ratification of the Aarhus Convention has tended to focus on the narrow details of interpretation of the rules, for example when a consultation should have been conducted, or when it has been improperly administered by local authorities.[19] Insufficient attention has been given to the less visible barriers affecting participation, which sometimes by their very nature do not tend to lead to litigation. This

[15] Sue Mayer, 'Avoiding the Difficult Issues: A GeneWatch UK Report on the Government's Response to the GM Nation? Public Debate' (June 2004)

[16] Cotterrell stresses the advantages of socio-legal methodology allow us to look at the nature, source, consequence and moral groundings of policy. Cotterell 2002 (n10) 633

[17] Cownie stresses the importance for socio-legal research to acknowledge and progress existing relevant academic literature on theory. Fiona Cownie and Anthony Bradney, 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds.) *Research Methods in Law* (Routledge 2013) 38

[18] Marc B. Mihaly, 'Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents' (2009) 27 Pace Environmental Law Review 151

[19] Greenpeace (n5)

research is a comprehensive review of public participation theory which explores what the principle promises, as it were, to offer the major parties to the process- the State, the citizens, and the interests of the Environment. When this research initially began, my intention was to examine the extent to which public participation could be regarded as having universality, and whether it could operate outside of western democratic systems. I had intended to take a comparative approach to the research. However as my investigations progressed I soon came to the conclusion that the application of the principle in the West was anything but 'straight forward' and that the crux of the issue was not whether the principle was loaded with cultural imperialism, but that its very legitimacy should be called into question.

1.4 Limitations

Any study of public participation in environmental decision making is an ambitious undertaking. As the research progressed I began to appreciate the expanse of participation related theory. Participation has appealed to researchers from a variety of disciplines; it is not strictly legal in nature, and it draws upon political science, management studies and communicative theory to name but a few disciplines. Throughout this thesis, I have attempted to distil the issues so that we can move towards an enhanced understanding of the critical factors underlying this principle which has a 'hybrid DNA'. For example, despite an enthusiasm for history I reluctantly resisted the indulgence of any detailed discussion of 18th century democratic philosophy or the development of the modern environmental movement (beyond this introductory chapter). This introduction makes reference to the founding theory and differences between representative and participative democracy – this is necessary to set the context but as there is much scholarship on democratic history an extended discussion within the research is not required. High quality socio-legal research is said to be premised

on an initial selection of the suitable theories which 'can most appropriately throw light upon the relevant topic.'[20] The objective of this doctorate is not to discover where participation comes from – but whether it is worthy of the praise it receives. Careful consideration has been given to the purpose of each limb of the conceptual framework, and the role that each chapter plays in seeking to address the objectives of this doctorate.

There has been much academic commentary on the significance of consultation-methodology and the impact on participant experience and qualitative outputs. For this reason I decided against repetition of that well-chartered area, except that chapter two provides an overview of 'Arnstein's ladder', which remains the most illustrative authority on understanding the significance of participative techniques and the transfer of power from State to the citizen.[21] Participatory mechanisms relating to the *GM Nation* study is outlined in chapter three but this is in the context of evaluating the adequacy of the government's financial support of the arrangements for the public debate.

1.5 A Note on Participative Democratic Theory

> *'Government of the people, by the people, for the people.'*[22]

The justifications for participation will be outlined further in chapter two; however a discussion of participation cannot begin without firstly acknowledging the underlying philosophical origins of this concept. Participation has been described as sacrosanct to the

[20] Cownie and Bradney (n16) 38

[21] Arnstein (n1) 216

[22] Abraham Lincoln, Gettysburg Address (19 November 1863) in Lois J. Einhorn, *Abraham Lincoln the Orator: Penetrating the Lincoln Legend* (Greenwood Press 1992) 177

modern democratic society.[23] The scholarship that has considered the growth of participation in the context of democratic philosophy is vast. The explosion of academic commentary on the question of 'pure democracy' and the growth of public participation in environmental discourse should be understood as part of the ongoing democratic experiment.[24] John Dryzek, writing in a general context, has described the democratic process as an open-ended project, indeed he suggests that the fact we still question what democracy really means is the hallmark of a progressive democratic society.[25] A number of scholars agree that democratisation is an elastic and open process.[26] The advent of public participation in environmental decision-making should not lead us to a premature conclusion that we have reached our destination.[27] It is not the purpose of this socio-legal research to recount the historical or ancient origins of liberal political and democratic theory, for there has already been much academic activity in these fields. For the purposes of the critique contained in subsequent chapters it is however, necessary (and only possible) to provide a synopsis of the fundamental ideas of representative and participative democracy.

[23] Rossi (n14) 181. See also James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (Yale University Press, 1995) 34

[24] Dryzek (n11) 147

[25] Dryzek (n11) 113, 160-161

[26] In chapter two, the Skeffington report is introduced in order to establish the conceptual framework for this research. The Skeffington Committee posited 'It may be that the evolution of the structures of representative government which has concerned western nations for the last century and a half is now entering into a new phase.' People and Planning: Report of the Committee on Public Participation in Planning (1969) (HMSO, reprinted 1972) 3. For support for the rise of participatory democracy see; Terrance Cook and Patrick Morgan, *Participatory Democracy* (Canfield Press, 1971); Benjamin R. Barber, *Strong Democracy: Participatory Politics For a New Age* (University of California Press, 1984); Philip Green, *Retrieving Democracy: In Search of Civic Equality* (Rowman & Allenheld, 1985).

[27] Maria Lee 2008 'The UK Regulatory System on GMOs: Expanding the Debate?' in Michelle Everson and Ellen Vos (eds.) '*Uncertain Risks Regulated'* (Routledge, 2008)

There are clear distinctions that have been drawn between the representative and participative democratic models. In *Federalist No.10* Madison offered an explanation;

> The two great points of difference...are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.[28]

The representative democratic paradigm is often associated with the conceptualisations contained in popularised English works of political theory, such as Hobbes' *Leviathan.*[29] Hobbes posited an absolutist model of representational government, putting the State in a position of guardianship.[30] Along with other political thinkers such as Locke and Rousseau, Hobbes is famous for his contribution to the social contract theory. He and others rationalised the need for individuals to relinquish some freedoms to a body politic which assumes authority to act as a representative,[31] to maintain law and order in society.[32] Within J.S Mill's proposals for representational leadership, he suggested that a competent authority

[28] James Madison, The Federalist No. 10: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued) (*Daily Advertiser*, Thursday, November 22, 1787)

[29] Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London 1651)

[30] Although the theoretical thread can be traced much further back to the ancient philosophers. For example Plato, a proponent of representational decision-making viewed ordinary people as ill-suited to government because they were 'inert and unpractised', and driven by personal passions. Plato, *The Republic*, 96

[31] It should be noted that Rousseau was sceptical of how authentically the State could claim to be *representative;* he considered there was an overrepresentation of a privileged elite in the higher echelons of government. Observers consider there is a vulnerability of representative government to lean towards concentrating efforts of the interests of its members or key supporters, it is suggested to have favoured and furthered corporate interests. The economic tensions underpinning the government's approach to participation and the Environment more generally is discussed in chapter three. The issue of representativeness within the participative paradigm is explored in depth in chapter four. Jean-Jacques Rousseau, *The Social Contract* (1792) book 3, chapter 15. See further Carole Pateman, Participation and Democratic Theory (Cambridge University Press, 1970) 35-42; G. D. H. Cole, *Social Theory* (Frederick A. Stokes, 1920) Chapter 6; Joel D. Wolfe, 'A Defense of Participatory Democracy' (1985) 47 The Review of Politics 3, 372, 381; Ross Thomas, 'Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities' (2012) Cornell Journal of Law and Public Policy 22, 218-230

[32] John Locke, *The Second Treatise of Civil Government* (1690) chapter two; Rousseau (n30)

could be trusted to govern for the majority.[33] The ruling classes considered it was right that only the privileged elite possessed the capacity and education to perform the functions of government,[34] and by implication that the masses were ignorant, apathetic and narrowly self-interested.[35] It has been said that this paternalism is evident in the modern administrative state with the notion of government acting in the 'public interest.'[36] Mill famously cautioned against democracy's capacity to control the masses. The representative democratic model is said to have a taming effect because the public transfers its power to the State in return for subjugation.[37] Some consider the resistance of political representatives to public inclusion in decision-making, has historically been based on a fear of being usurped by the masses.[38] A number of political theorists have considered that participation is a threat to democratic

[33] John Stuart Mill, *Considerations on Representative Government* (1861) Chapter 6 'Of the Infirmities and Dangers to which Representative Government is Liable'

[34] As explored in Chilton Williamson, *American Suffrage from Property to Democracy 1760- 1860* (Princeton University Press 1960) 3, 5-7

[35] Within this is the implication that individuals cannot be trusted to act as virtuous citizens, without the control of the State, if left to themselves people would be overrun by self-interest. These issues are subject to extensive discussion in chapters four and five. Thomas (n31) 219

[36] Within the British planning system, planners were (and arguably are to some extent still) regarded as special guardians of the public interest. This approach came under growing criticism in Britain and America during the 1960s because it was considered to fall short of representing the true pluralism of society. Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon, 1980)11; Damer and Hague (n13) 225. *See further* Paul Davidoff, 'Advocacy and Pluralism in Planning' Journal of the American Institute of Planners, (November 1965); Herbet Gans, *People, Plans and Policies: Essays on Poverty, Racism, and Other National Urban Problems* (Columbia University Press 2013) 139

[37] This is a reoccurring theme of modern discourse of the power balance between State and citizen by democratic political commentators. Barry Hindess, 2000 'Representation Ingrafted upon Democracy?' (2001) 7 Democratization 2, 1

[38] Sewell & O'Riordan suggest power holders are reluctant to enter into a power-share relationship with society and find the idea of mass participation in political culture difficult to contemplate. Further, Hindess explains that professional politicians offer excuses for not subjecting policy issue to participation on the basis that it would be impractical or the issue too complex, he believes these are actually a mask for long-standing western reservations on the ignorance and 'other dubious characteristics' of the majority. See W.R. Derrick Sewell and Timothy O' Riordan, 'The Culture of Participation in Environmental Decision Making' (1976) 16 Natural Resources Journal 1, 16-17 ; Hindess (ibid) 11-12

norms because the people are not fit to take part in matters of the State and that it should be left to the professionals.[39]

The founding commentators of the revolutionary democracies also considered an alternative paradigm to the liberal democratic model- deliberative democracy, where the people have more influence on the actions of the State. Tocqueville considered that popular sovereignty had become a reality in Jacksonian America. He admired the growth of the township where citizens and civil associations were empowered to deliberative collectively on local matters without excessive interference of the federal government: 'in the township, as well as everywhere else, the people are the only source of power.'[40] J.S. Mill had considered the positive educative function of participative democratic practice, whilst he considered that 'every man is a proprietor in government, and considers it a necessary part of his business to understand,'[41] he was optimistic of the developmental consequences of participation, considering it would create an active and interested citizenry.[42]

Even within the liberal democratic model, which by the 1960s had become a prevailing norm in many western societies, publics had grown tired with the level of separation between State and its subjects. As chapter three will explain, tolerance of closed-door decision making had waned, the public sought more transparency into government. In the United Kingdom, the 1969 Skeffington Committee, whose findings help shape the conceptual framework for this

[39] Such theorists include Ortega y Gasset who believed the assent of the masses to social power had led to Europe suffering a deep crisis in the 20th century. Others have drawn links between mass participation and the rise of totalitarianism. Arendt considered that the organising nature of mass participation feeds the environment which breeds totalitarianism, specifically referring to the rise of Nazism and Communism in Europe. José Ortega y Gasset, *Revolt of the Masses* (1930) (trans. W.W. Norton & Co 1985) 5 Hannah Arendt, *The Origins of Totalitarianism* (Schocken 1951)

[40] Alexis de Tocqueville, *Tocqueville On Democracy: Revolution and Society* (University of Chicago Press 1980) 73 (original work published 1849)

[41] Thomas Paine, *Rights of Man.* (reproduced by Viking Penguin 1984) 184

[42] Mill (n33) chapters 1-3; Wolfe (n31) 371-372

doctorate (see chapter two), considered the lack of dialogue with the public within the representational paradigm had encouraged a 'them and us' mentality between authority and people.[43] The political and regulatory systems have increasingly become complex and overly bureaucratic,[44] thereby extending the distance in the chain between those making the decisions and those subject to them.[45] Proponents of deliberative democracy view participation as capable of loosening the traditional vertical separations of state and citizen, diffusing tensions.[46] Bringing the parties closer together is claimed to address the perceived shortcomings of the representative government's ability to satisfactorily address the interests of the public. Increasing opportunities for dialogue with the State through participation is therefore anticipated to extend and diversify the interests represented.

Those in favour of public participation consider that traditional representative government has not been sufficiently proactive in opening itself up to public scrutiny. Participation is viewed as acting as a system of checks and balances against unfettered, command-and-control systems of power.[47] Rose-Ackermann and Halpaap forecast that participation would stand as a formidable challenge to longstanding notions of government authority thus

[43] Skeffington Report (n26) 3

[44] Cullinan (n12) 166

[45] O'Leary has examined the dissatisfaction arising from this distance between government and the people in the context of the US House of Representatives. In the past 200 years since its establishment, the districts' populations to be represented by a lone individual have grown, in some instances, from 30,000 to over 600,000. He suggests the creation of citizen assemblies which would randomly sample the views of constituents as a method of ensuring the concerns of the people were being effectively communicated to the representative. Kevin O'Leary, *Saving Democracy: A Plan for Real Representation in America* (Stanford University Press 2009) 8 - 12

[46] As explained by Cass R. Sunstein, 'Democracy and the Problem of Free Speech' (The Free Press, 1993) at 244. See also Rossi (n14) 210 and Cullinan (n12) 154

[47] Banas states:

Assuming that good governance is a product of openness, its biggest enemy is closed bargaining. The latter denies affected communities the information equity necessary to evaluate and subsequently challenge any administrative or political malpractice.

Pawal Banas, 'International Ideal and Local Practice – Access to Environmental Information and Local Government in Poland' 2010 Environmental Policy and Governance 20, 44

reconnecting with a central democratic principle of accountability.[48] Other commentators also believe government legitimacy and accountability can be secured through deliberative (participative) democracy.[49]

In the nineteenth and twentieth centuries struggles were fought for the franchise. Now that the vote has been extended to every adult, it might be said the one person one vote approach has not significantly influenced the actions of government, contemporary democratic discourse concerns 'how, when and where citizens should participate.'[50] With the advent of the modern environment movement of the 1960s and 70s, civil society mounted pressure for more involvement in decision-making, claiming it would be good for government, lead to better decisions and in the spirit of an egalitarian society, allow for the 'fuller realization of citizen rights and human potentials.'[51]

1.6 An Overview of the Research

Chapter two introduces the public participation principle. The discussion begins by providing an overview of the three pillars of the Convention and the role of the Compliance Committee. Although the Convention does not play a significant role in the research, it is necessary to understand the main provisions to appreciate the way in which the law has been developed to mirror theory. The chapter explains that the emergence of participation in

[48] Susan Rose-Ackerman and Achim A. Halpaap 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights' (September 2001) draft paper for The Law and Economics of Environmental Policy: A Symposium, University College London, 11-12

[49] Rossi (n14) 182

[50] Denise Vitale, 'Between Deliberative and Participatory Democracy: A Contribution on Habermas' (2006) 32 Philosophy & Social Criticism 6, 752

[51] Wolfe (n31) 370

international environmental discourse has received a largely positive reception. There are many supporters and few critics of public participation.

Following the introduction to the Convention, the discussion proceeds to introduce the basis for the conceptual framework for subsequent chapters by drawing on the recommendations of the Skeffington Report 1969. This Committee considered the growth of academic interest in participation theory. It considered that the planning systems could be improved through participation as advantages lay on both sides of the table- for the government, *and* for the people. The justifications for participation are fixed upon the perceived potential for administrative expedience, legitimacy through representativeness, and problem-solving. At this initial stage of the research the case for public participation is made, laying the foundations for the critique of subsequent chapters.

Chapter three critically analyses the State's motivations for adopting participation, looking closely at the relationship between government and people. The discussion considers the extent to which the government seeks to build public trust through participatory mechanisms. The chapter posits whether this activity is embarked upon as a cosmetic exercise in order to reduce opposition, and if understood to be a public relations stunt, the deleterious effect on already fractured relationships. Authentic attempts at participation could be identified through use of more robust participatory mechanisms, as explained by Arnstein's *Ladder of Participation.* It is suggested that state organised participation has a taming effect on civil society which neuters the strength of opposition. These tensions are explored through the experiences of the '*GM Nation'* public debate which is introduced as a case study in the second half of this chapter. The case study is evaluated in light of the institutional arrangements that were put in place and the findings on public attitudes towards government.

The chapter concludes that the imbalance of power between State and citizen leaves participatory exercises open to manipulation.[52]

Chapter four considers the assumption that participation is a legitimate practice because it is more representative than traditional top-down decision making. The image of a vibrant town hall meeting is regarded by participation proponents as 'part and parcel of democracy in practice'.[53] This type of participatory vision was something de Tocqueville's had admired in the infant United States republic of the 19th century, he said:

> Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it.[54]

Habermas has termed this discourse the ideal speech scenario, which is premised on participant equality- he considers that equal communicative power is inherent within the positive vision of deliberative discourse. These concepts are used to frame the chapter's analysis of participant identity, looking at who participates, and those who fall on the side-lines. The discussion examines the extent to which the public that participates is sufficiently representative or whether it is only the self-engagers who dominate these opportunities. The issues at play here have a wider relevance beyond environmental matters and are reflective of the political sphere more generally. These tensions are explored through the experiences of the '*GM Nation'* case study. The chapter concludes that participation is rarely representative of the masses, that it is instead an opportunity for privileged groups to exploit their communicative competency to the marginalisation of vulnerable communities.

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[52] As acknowledged above (at 1.1) if *GM Nation* was conducted today with the same budgetary and time restraints it is possible that the Government would find itself subject to a legal challenge on the basis of flawed participatory practice.

[53] Bende Toth, 'Public Participation and Democracy in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30 Journal of Land Resources & Environmental Law 2, 330

[54] Tocqueville (n40) 87

Chapter five considers the formidable and growing scholarship which makes a case for the recognition and inclusion of non-human interests in environmental decisions. As a final tool of evaluation, this chapter examines the degree to which public participation, a human vehicle designed to advance anthropocentric empowerment- can adequately do justice to the interests of other species. As we are limited by cognitive and communicative differences, Nature is dependent on human representation within participation, but to what extent does participation provide a problem-solving platform to produce environmental outcomes for the good of all species? This is the final illustration of the limitations of public participation.

Chapter six concludes this research as unmasking a litany of problems stemming from the construction and application of public participatory principles. Concluding that it is an inherently vulnerable and flawed tool for environmental decision-making, the research casts doubt on the utility of such methods in the absence of measures to limit the scope for abuse by State actors, reduce the societal inequalities and the undeniable anthropocentricism of the process.

Chapter Two: The Public Participation Principle in a Law and Policy Context

2.0 Introduction to the Chapter

The ultimate objective of this thesis is to critically assess the public participation principle and in particular limitations which have been overlooked in some of the literature. Before we can begin the critique it is first necessary to clarify our understanding of the principle, and what the perceived benefits are which have driven it to international acclaim.

This chapter aims to lay the foundations for the critique by initially setting out the legal interpretation of the public participation principle in the Aarhus Convention.

The second part of the discussion in this chapter will elucidate the dominant theoretical justifications which have served to grant public participatory practice the relatively undisputed status of a praised tool in environmental matters, reinforced by considerable supporting scholarship. This chapter does not seek as such to provide a critique of the principle - that process is reserved for the in-depth discussion in the following chapters. Nonetheless, there has been little in-depth study in the literature of the various policy objectives or philosophical ideas underlying the principle against which to reflect on the ends to which public participation is a means. Identifying the issues relating to the justification for the principle is thus a pivotal preliminary aspect of the thesis.

2.1 The International Drivers of the Aarhus Convention

Today virtually every international environmental treaty makes reference to public participation; such is its popularity that it is widely regarded as 'part of the corpus of...general international law.'[1] The 1972 United Nations Conference on the Human Environment in Stockholm has acquired a significant position within academic scholarship in the field of

[1] Sharon Beder, Environmental Principles and Policies: An Interdisciplinary Introduction (University of New South Wales Press, 2006) 117

environmental law.[2] Although the Stockholm Declaration is not regarded has having made a significant contribution to the participation agenda, [3] Principle 19 of the Declaration recommended the creation of environmental information provisions in domestic laws which, as will be explained, have become part of the participation principle:

> Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminates information of an educational nature on the need to project and improve the environment in order to enable man to develop in every respect.[4]

There were some further infant steps taken in the 1980s in this vein. Principle 23 of the World Charter for Nature declared

> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.[5]

[2] Declaration of the U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416

[3] For Sands, the most useful outcome from Stockholm was the creation of the United Nations Environmental Programme which has since helped support a coherent international framework. Hayward also considers that the Aarhus Convention owes little to the Stockholm Declaration. Phillipe Sands, Principles of International Environmental Law (2nd ed., Cambridge University Press 2003) 35, 38; Tim Hayward, Constitutional Environmental Rights (Oxford University Press, 2005) 180

[4] Principle 19 Declaration of the U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

[5] World Charter for Nature, United Nations General Assembly, G.A. Res. 37/7, U.N. Doc. A/37/51 (1982), at § 23.

This statement can be understood as anticipating two Aarhus Convention limbs, decision making and access to justice. This Charter was the first UN resolution to articulate the need for procedural environmental rights of this kind. However it lacked teeth in the form of legally enforceable rights.[6]

Following the Charter, the UNEP Montreal Protocol on Substances that Deplete the Ozone Layer 1987, which Kofi Annan regarded as 'perhaps the single most successful international agreement to date'[7] called on parties to co-operate in 'promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that deplete the ozone layer.'[8] That same year, the Brundtland Report,[9] known for defining the Sustainable Development principle, was the catalyst for the development of solid principles in environmental law including participation in decision making.[10] The 1996 meeting of the OECD also supporting the creation of toxic release inventories and public participation to some extent.[11]

The 1992 Rio Declaration served as the culmination of the international environmental treaties which had gone before, drawing together experiences to formulate modern environmental policy.[12] Principle 10 of the Rio Declaration articulated the significance of

[6] Marianela Cedeno Bonilla, Edgar Fernandez, Sondes Jemaiel, Rose Mwebaza and Dana Zhandayeva ' Environmental Law in Developing Countries' IUCN Environmental Policy and Law Paper No.43 Vol. II (2004) 24

[7] Kofi Annan, Secretary General of the United Nations on International Day for the Preservation of the Ozone Layer, 16 September 2005

[8] Art 9(2) Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3

[9] World Commission on Environment and Development (WCED) 'Our Common Future'1987

[10] Sands (n3) 48-49. WCED (ibid) at 43 proclaimed:

> Hence new approaches must involve programmes of social development, particularly to improve the position of women in society, to protect vulnerable groups, and to promote local participation in decision making.

[11] Beder (n1) 114

[12] Rio Declaration on Environment and Development, UN. Conference on Environment and Development, UN. Doc. A/CONF.151/5/Rev.l (1992)

public participation and foreshadowed the Aarhus Convention[13] in indicating a commitment to the further development of this legal area:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. 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.[14]

Sands recognises the hallmarks of customary law in Rio but plays down the overall significance of the Declaration's provisions as they were non-binding.[15] Observers have said that in terms of its conception, the Aarhus Convention 'owes everything' to the articulations in Principle 10 of Rio Declaration.[16] This is because it gave 'explicit support in mandatory language to the same category of procedural rights.'[17]

[13] Including; appropriate access to information, opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings (including redress and remedy). See Principle 10, Rio Declaration (n12)

[14] Ibid.

[15] Sands (n3) 54

[16] Hayward (n3) 180; Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2006) 18 Fordham Environmental Law Review 471

[17] Boyle (ibid) 471

2.2 An Overview of the Aarhus Convention

The Aarhus Convention represents Europe's position at the close of the 20th Century as occupying the forefront of innovation in environmental policy. Kofi Annan heralded the Convention as 'the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations' and its adoption as 'a giant step in the development of international law.'[18] It is a celebrated environmental law document, incorporating the principles of freedom of information, citizen involvement in environmental decisions and access to affordable justice in respect of judicial oversights of environmental decision making.

Signed in Aarhus, Denmark on 25 June 1998 and entering into force on 30 October 2001, the Convention aspired to progress the environmental protection agenda by moving procedural rights out of abstract discourse, or soft law, into 'hard' legal norms.[19] The Convention was the project of the UN Economic Commission for Europe rather than the UN Environmental Programme and this may explain why its content is often described as procedural environmental rights, as opposed to the modus operandi of international environment declarations which tend to favour vague ambitious hyperbole or other environmental conventions which focus on a single area of substantive policy (such as transboundary pollution or habitat protection).[20]

[18] 'About the Aarhus Clearing House <http://aarhusclearinghouse.unece.org/about/> accessed 22 July 2013

[19] Ole Pederson 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008-2009) 21 Georgetown International Environmental Law Review 92

[20] Dinah Shelton 'Draft Paper on: Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration'(December 2009) presented at UNEP & OHCHR High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi, 6

2.2.1 Pillar I: Access to Information

The first of the Convention's environmental procedural rights is the public right of access to information. Pillar I, as it is commonly known, feeds into the development of a right-to-know culture and observers consider it to play a fundamental role in public participation in environmental decision making.[21] The Convention's information rights have been described as both extensive and comprehensive.[22]

As mentioned above, the Aarhus Convention does not address specific substantive areas of policy. However in Article 2 we find a broad definition of environmental information which does refer to key policy areas in Art 2(3)a.[23] The definition encompasses a range of components including information on material relating to the 'cost-benefit and other economic analyses and assumptions used in environmental decision-making',[24] as well as information on the

> [State] of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.[25]

The architects of the Convention cast their net as widely as possible in order to include information which may not primarily appear to be related to environmental matters.

[21] Kerstin Tews et al. 'The Diffusion of New Environmental Policy Instruments' (2003) 42(4) European Journal of Political Research 569; Pawal Banas, 'International Ideal and Local Practice – Access to Environmental Information and Local Government in Poland' (2010) 20 Environmental Policy and Governance 44

[22] Susan Rose-Ackerman and Achim A. Halpaap 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights' (September 2001) draft paper for The Law and Economics of Environmental Policy: A Symposium, University College London, 7

[23] Article 2(3)(a) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450

[24] Article 2(3)(b) ibid.

[25] Article 2(3)(c) ibid.

Responsibility for compliance falls on the relevant public authority within the contracting party state.[26] The implications of the information provisions have therefore dramatically increased the obligations for those traditionally regarded as part of the government, as well as some private bodies performing a statutory function.[27]

The provisions relating to access to information require signatory States to invest in the creation of an appropriate infrastructure in order to meet the Convention's obligations. These are described as 'mandatory systems'. This proactive dimension means that the access to information pillar is arguably the most burdensome of the three pillars from the contracting party perspective. The Convention stipulates strict time limits within which public authorities must respond to requests for information.[28] Significantly the Convention removes the procedural barriers that may have historically hindered the accessibility of material, for example, it does away with standing requirements for those seeking information, and there are no eligibility criteria for submitting a request, no reason or special interest is required.[29]

There are however permissible derogations which a public authority can rely upon to prevent the release of information which may have adverse consequences. The examples are contained in Article 4(4) and include derogations on the basis of confidentiality, public security, commercial sensitivity or intellectual property. These exemptions are to be applied restrictively in light of a balancing act between the at-risk interest and the potential public benefit from disclosure.[30] These grounds cannot be relied upon in blanket form, the public body is required to endeavour to release partial information insofar as possible and the State

[26] Article 2(2) ibid.

[27] Sands (n3) 859

[28] Article 4(2) states: 'within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request.' Aarhus Convention (n23). See further Banas (n21) 44

[29] Article 4(1) (a) Aarhus Convention (n23)

[30] Article 4(4)(a)-(h) Article 4(2) Aarhus Convention (n23)

will be scrutinised for reliance on any of the exemptions, in the UK this role would be performed by the Information Commissioner in the first instance. In Export Credit Guarantee Department v Friends of the Earth)[31] the green campaign group had requested the release of interdepartmental documents relating to the Sakhalin II LNG project.[32] The Government resisted arguing these to be privileged internal communications and that disclosure would harm the public interest. This was not the view taken by Mitting J. of the High Court who supported the views of the Information Tribunal who had previously ruled that ECGD had failed to deliver any persuasive evidence that suggested a real risk[33] and conversely that disclosure may have, if anything, actually improved the quality of the negotiations underway for the gas contracts.[34]

The scope for public authorities to charge for providing the information is restricted to the reasonable costs of producing the information. Whereas reasonable charges are permissible in connection with special individual requests under Article 4, under Article 5(2)(c) access to mandatory systems containing lists, registers and files of environmental information must be free of charge. In Markinson v Information Commissioner[35] Kings Lynn and West Norfolk Borough Council's photocopying tariffs, at a rate of £6 per planning decision notice and 50pence for each page of a planning file, proved prohibitively expensive for Mr Markinson. On appeal, the Information Tribunal concurred with Markinson that the Information Commissioner had erred in their interpretation of the test for reasonableness under Regulation 8(3) of the Environmental Information Regulations 2004.[36] Referring to the DCA[37] guidance,

[31] [2008] EWHC 638 (Admin)

[32] The request was pursuant to Regulation 5(1) Environmental Information Regulations 2004 SI 2004/3391 which is a descendent of the Aarhus access to information provisions.

[33] (20.8.07) EA/2006/0073 at 70

[34] (20.8.07) EA/2006/0073 at 76

[35] (28.3.06) EA /2005/0014

[36] Environmental Information Regulations 2004 SI 2004/3391

[37] Department of Constitutional Affairs

the Tribunal reiterated that in providing information to an applicant reasonable charges extended only to the costs of paper, printing and postage-

> Not the charge for the time taken to locate, retrieve or extract the information or to write a covering letter to the applicant explaining that the information is being provided.[38]

And finally, it is not an excuse for the State to refuse to supply information on the grounds that it is too voluminous.[39]

Aarhus provisions relating to information are commonly referred to as reactive and active state obligations.[40] This is because Article 4 relates to reactive duties (responding to an information request from a member of the public) whereas Article 5 is a positive commitment to meeting long term goals of enhanced transparency, active dissemination, and improved communication between the State and citizen. To elaborate on the comment above, Article 5(1) stipulates the obligation to create mandatory systems which will assist in the flow of information. This is perhaps the most resource-intensive and onerous aspect of the information pillar, in addition to the requirement that States must

[38] Para 3.4.3 Department of Constitutional Affairs 'Guidance on the Application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at para 34(c) of the decision.

[39] A communication on this matter was submitted to the Aarhus Compliance Committee for its consideration. The communicants (the NGO Ecopravo-Lviv and Romania) alleged that the Ukraine had failed to provide access to documentation relating to a proposed canal construction involving an area of internationally important wetland. The Compliance Committee found the State to have provided insufficient time for the public to consider the documentation and responding to one of the numerous excuses that the Ukrainian government had advanced, the Committee stressed that information falling under the scope of Article 4 'should be provided regardless of its volume' (at para 33). The Committee ruled that a 'lack of clear domestic regulation of the time frames and procedures for commenting seem to be at the heart of this problem.' (at para 30) Findings and Recommendations with regard to compliance by Ukraine with the obligations under Aarhus Convention in the Case of the Bystre deep-water navigation canal construction, 32, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.3 (February 18 2005)

[40] On the distinction between "reactive" and "active" state obligations see Martin Hedemann-Robinson, Enforcement of European Union Environmental Law (Routledge-Cavendish, London 2007) 330; Bende Toth, 'Public Participation and Democracy in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30 (2) Journal of Land Resources & Environmental Law 299

> [At] regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment.[41]

States should progress towards the adoption of electronic database collections facilitating public access; these measures have prompted the introduction of national pollution inventories and transfer schemes.[42] Interestingly, whilst the Convention provides for obligations for those falling under the definition of public authorities, Signatory parties are also required to encourage private sector operators whose activities bear an environmental dynamic to gradually introduce voluntary eco-labelling or eco-auditing schemes[43] which would empower consumers '…to make informed environmental choices.'[44]

2.2.2 Pillar II: Public Participation in Decision Making

This limb of the Convention is split into three parts; decision making on specific activities (listed in Annex I, many of which are specific areas of substantive policy), environmental plans, programmes and policies, and the preparation of executive regulations and legislation. The provisions are to be applied on a national, regional or local level as deemed appropriate to the nature of the decision being taken. There are explicit linkages between the access to information and the decision making pillars (and also access to justice), the

> Public concerned shall be informed, either by public notice or individually as

[41] Article 5 (4) Aarhus Convention (n23)

[42] As Toth has explained, the majority of the parties to the Aarhus Convention are also signatories to the Pollutant Release Transfer Protocol 2003 (hereafter Kiev Protocol) which represents a functioning mandatory system involving the establishment and upkeep of pollution inventories as well as periodic reporting obligations. This is a similar system to the US Toxic Release Inventory which Toth has said also ties in with the wider objectives stemming from the Emergency Planning and Community Right-to-Know Act 42 U.S.C. § 311-12. Toth (n40) 301-302

[43] Article 5 (6) Aarhus Convention (n23)

[44] Article 5 (8) Aarhus Convention (n23)

> appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner'[45]

of an extensive range of factors to help inform their effective participation.[46] The aim is to transform the status of the public from audience member to actor. Rose-Ackerman and Halpaap suggest that the Convention marked a break with tradition with reference to its definition of the *public concerned* contained in Article 2(5) which has been opened up to include 'non-governmental organizations promoting environmental protection.' This has proven to be particularly significant in light of the role of NGOs in environmental affairs.[47] It also potentially blurs (with significance that will later be examined) the boundary between participation and representation, in that NGOs are sometimes portrayed as *representing* the public in a non-electoral manner.[48]

Article 6 is considered to be the most detailed of the decision-making provisions.[49] A close reading of the subsections indicate the numerous situations where participatory opportunities must be created throughout the life cycle of a decision making process in a timely and meaningful manner well before a decision is made.[50] Article 6 of the Convention relates to public participation in specific activities, of particular importance within this, are the provisions relating to and stemming from environmental assessment (EIA) regime

[45] Article 6(2) Aarhus Convention (n23)

[46] Including the environmental information available to the public and what environmental impact assessment procedures will be conducted.

[47] Rose-Ackerman and Halpaap (n22) 8

[48] See generally Ann Marie Clark, Elisabeth J. Friedman, Kathryn Hochstetler, 'The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women Author(s)' (1998) 51(1) World Politics, 1

[49] Vera Rodenhoff, 'The Aarhus Convention and its Implications for the Institutions of the European Community' (2002)11 Review of European Community and International Environmental Law 354. Bende Toth describes Article 7 as a 'pared-down version of Article 6, while Article 8 operates as a set of guidelines only for implementing public participation mechanisms' Toth (n40) 303

[50] Article 6(2) Aarhus Convention (n23)

procedures.[51] EIA has become a major part of the planning regime across the territories subject to Aarhus and public participation is seen as a fundamental component of EIA.[52] One scholar has referred to the prevalence of participation in EIA as 'governance by disclosure' where due process is understood to be secured through transparency and information dissemination.[53]

Under Article 6 of the EIA Directive[54] the public are to be informed in the early stages of environmental decision-making through the most appropriate form which may be via public notices or electronic media. The public should be directed to sources of further information which would include the identity of the relevant local authorities, an indication of times and places when relevant information will be made available, and throughout the decision-making process of a major development reasonable time-frames for informing and consulting the public must be ensured.[55] The relevant authority must explain how the public input has been taken into consideration, it can be said that the emphasis is on early and effective participatory opportunities.

As an illustration of this provision at play, in 2008 Lithuania was found to have fallen foul of Article 6 because the government had set unsatisfactory time frames for public consultation

[51] Article 6 (n23)

[52] Nicola Hartley, Christopher Wood 'Public Participation in Environmental Impact Assessment- Implementing the Aarhus Convention' (2005) 25 Environmental Impact Assessment Review 319

[53] Aarti Gupta, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) Global Environmental Politics 8 (2) 1–7 in Michael Mason, 'Information Disclosure and Environmental Rights: the Aarhus Convention' (2010) Global Environmental Politics 10(3)

[54] 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

[55] Following a review of the EIA directive the Commission proposed amendments to the EIA Directive which would further cement time-frames for public consultation making this detail clear in the environmental report. Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. COM (2012) 628 at page 5

within the various phases of the decision making process. Minimal effort had been made to supply documentation and subject the decision to public scrutiny.[56] Similarly in R (Greenpeace Ltd) v Secretary of State for Trade & Industry[57] Sullivan J condemned the UK Government's failure to comply with Article 6 provisions in relation to *The Energy Challenge Energy Review Report* involving the future of nuclear policy. Agreeing with Greenpeace, Sullivan J. found the consultation exercise to have been very seriously flawed.[58] The judge noted that

> Given the importance of the decision under challenge- whether new nuclear build should not be supported- it is difficult to see how a promise of anything less than 'the fullest public consultation' would have been consistent with the Government's obligations under the Aarhus Convention.[59]

Furthermore emphasising the significance of the Convention's provisions regarding what was termed by the court 'consultation', Sullivan J explained:

> Whatever the position may be in other policy areas, in the development of policy in the environmental field of consultation is no longer a privilege to be granted or withheld at will by the executive.'[60]

Article 6(8) provides 'each Party shall ensure that in the decision due account is taken of the outcome of the public participation.' Resisting the temptation to engage in a critical analysis of public participation at this stage, it has been described as the vaguest aspect of the Convention and it will certainly be an issue for us to return to, for it is at the heart of the distinction between representative governance (decisions by representative political

[56] At 91, Report by the Compliance Committee with regard to communication ACCC/C/2006/16, Addendum Compliance by Lithuania with its Obligations Under the Convention ECE/MP.PP/2008/5/Add.6 4 April 2008

[57] [2007] EWHC 311

[58] Ibid at 116

[59] Ibid at 48

[60] Ibid at 49. Further comment on the implications arising from the Government's conduct during The Energy Review and the subsequent challenge by Greenpeace is contained in chapter three.

institutions) and what may be termed 'participative governance' (decisions led by the public).[61]

2.2.3 Pillar III: Access to Justice in Environmental Matters

Failure to comply with the access to information commitments, the public participation commitments, and indeed any decision relevant to the environment will serve as a catalyst for invoking the third and final pillar of the Convention, the access to justice measures contained in Article 9. The public are to have '...access to an expeditious procedure established by law that is free of charge or inexpensive.'[62] Commentators believe the aim here is to promote enforcement by eliminating the common impediments that plague private person actions under domestic administrative law, most obviously the difficulties establishing locus standi (the Convention has not completely disposed of standing requirements as it also contains sufficient interest thresholds, the implications of which have been subject to much academic discourse).[63] The grant of locus standi to non-governmental organisations was generally applauded, however the language of Article 9, which has been described as 'porous',[64] unequivocally concedes to the sovereignty of States to determine which litigants might come within the definition of 'sufficient interest'.[65] More to the point, once again, the provision for

[61] Toth (n40) 305

[62] Article 9(1) Aarhus Convention (n23)

[63] Paul Stookes, A Practical Approach to Environmental Law (2nd ed. Oxford University Press, 2009); Paul Stookes: 'Current Concerns in Environmental Decision Making' (2007) Journal of Planning Law 536; Paul Stookes and Phil Michaels 'The Cost of Doing the Rights Thing' (2004) 16 (2) Environmental Law & Management 59; Karen Morrow 'Worth the Paper That they are Written On? Human Rights and the Environment in the Law of England and Wales' (2010) 1(1) Journal of Human Rights and the Environment 66–88

[64] Maria Lee and Carolyn Abbot, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention', 66 Modern Law Review 80 (2003) 106 describing Articles 9(2) and 9(3) as watered down and disappointing. See further Toth (n40) 311.

[65] Article 9(2)(b) provides;

NGOs invites scrutiny of how broadly, and how directly, the public is envisaged as being engaged in environmental decision making (as opposed to being 'represented' by campaign organisations).

Whilst the Convention stipulates the creation of judicial procedures which are not prohibitively expensive,[66] the extent to which the legal landscape can be said to be an even playing field continues to be uncertain for communities who may not possess the financial resources to pursue a claim through the courts. Although the public's access to courts is less central to this thesis than access to 'front line' decision making, the subsequent chapters of

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> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.

Aarhus Convention (n23). The Aarhusian attitude towards the liberalisation of locus standi generally mirrors the view taken by English courts since the 1980s. In R. v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, Lord Diplock said at 644:

> It would...be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

See also R v Sect of State for the Environment ex p Friends of the Earth and Andrew Lees [1996] 1 CMLR 117 and R v Her Majesty's Inspectorate of Pollution ex p Greenpeace (No 2) [1994] 4 All ER 329 in which Justice Otton applied his discretion to acknowledge the respected status of expertise enjoyed by Greenpeace, at 100-101 he stated:

> I have not the slightest reservation that Greenpeace is an entirely responsible and respected body with a genuine concern for the environment. That concern naturally leads to a bona fide interest in the activities carried on by BNFL at Sellafield and in particular the discharge and disposal of radioactive waste from their premises and to which the respondents' decision to vary relates. The fact that 400,000 supporters in the United Kingdom carries less weight than the fact that 2,500 of them come from the Cumbria region. I would be ignoring the blindingly obvious if I were to disregard the fact that those persons are inevitably concerned about (and have a genuine perception that there is) a danger to their health and safety from any additional discharge of radioactive waste even from testing. I have no doubt that the issues raised by this application are serious and worthy of determination by this court. It seems to me that if I were to deny standing to Greenpeace, those they represent might not have an effective way to bring the issues before the court.

For a notable exception see R v Secretary of State for the Environment ex p Rose Theatre Trust [1990] 1 QB 504 which reflects a very restrictive approach to NGO standing in Judicial Review proceedings.

[66] Article 9(4) Aarhus Convention (n23)

this investigation will consider the issues surrounding the duty to establish 'appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'[67]

2.2.4 The Aarhus Convention Compliance Committee[68]

Article 15 lays the basis for the creation of the Aarhus Compliance Committee (ACCC), stipulating that the Meeting of the Parties (MOP)

> [Shall] establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.

This was an attempt to overcome some of the infamous implementation problems that blight international laws; the procedures of the ICJ and the United Nation's preference for unanimous decision making. The decision to establish and elect the first compliance committee was adopted at the first MOP.[69] The panel would consist of eight individual who serve in a personal capacity but represent the geographical range of membership. The ACCC is regarded as a significant part of the Convention's arsenal of procedures which has aided implementation.

[67] Article 9(5) Aarhus Convention (n23)

[68] Some material from this section comes from the perspectives of Veit Koester, (Former Chair, Aarhus Convention Compliance Committee) presentation on 'The Aarhus Compliance Mechanism' (October 2011) Aarhus and Access Rights: the New Landscape Coalition for Access to Justice for the Environment Conference, Kings College London

[69] Report of the First Meeting of the Parties to the Convention of Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Decision 1/7 Review of Compliance (October 2002) ECE/MP.PP/2/Add.8

The Committee are tasked with reviewing communications which allege non-compliance by State parties. The ACCC has developed its own modus operandi[70] and can take communications (which are allegations of non-compliance) from the secretariat, a signatory party or the public.[71] It can request the attendance of Parties to meetings in order to discuss instances of possible non-compliance in a non-confrontational and non-judicial manner. The web pages of the ACCC are truly impressive, documenting the status and outcomes of each communication, and they are kept up to date at almost real-time pace. Since it became operational in October 2003 the ACCC has received in excess of 80 communications from the public.[72] To date the only submission by a Signatory party alleging non-compliance of another State was made by the Ukraine against Romania.[73] This is unsurprising because 'non-performance of Convention obligations rarely affects another State Party,' [74] and the overarching aim of Aarhus is to improve channels of communication and engagement between State and citizen. The United Kingdom is the most frequent party to appear before the ACCC to answer allegations of non-compliance,[75] but this is less a sign of the State's

[70] Stemming from the first MOP and ACCC meetings. Veit Koester, 'The Compliance Committee of the Aarhus Convention, An Overview of Procedures and Jurisprudence' (2007) 37 Journal of Environmental Policy and Law 85 and also ECOSOC, ECE, Meeting of the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters, Annex to the Addendum to the Report of the First Meeting of the Parties: Decision I/7 Review of Compliance, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004)

[71] To date the Secretariat is yet to make a referral to the Committee,

[72] These communications are listed here < http://www.unece.org/env/pp/pubcom.html >accessed 24 July 2013 Eighty may not seem particularly high level of activity over a ten year period, but there is only a single full time secretariat lawyer to manage the case load in preparation for the four annual Committee meetings which are conducted at quick fire by a panel of nine, each serving in a personal pro-bono capacity. There is a further requirement that ACCC members do not belong to an executive branch of the government or NGO can make selection a difficult process.

[73] ACCC/C/2004/1

[74] Veit Koester, 'The Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters (Aarhus Convention)' in Geir Ulfstein ed., Making Treaties Work, Human Rights, Environment and Arms Control (Cambridge University Press 2007) 179, 187

[75] The Aarhus Convention has sustained the interests of the Courts, as recently as last year the Supreme Court reiterated the importance of the Aarhus obligations and the recommendations of the ACCC in Walton v The Scottish Ministers [2012] UKSC 44 which explored the principle of common law fairness and opportunities for the public to make observations on the

reluctance to carry out the obligations under the Convention but more likely attributable to the highly alert NGO community in Britain.[76] A number of communications relating to the UK's compliance with the Convention have been brought in connection with the obligations arising from Article 9, these are discussed in chapter three.

In her study of Aarhus implementation Kravchenko reflected on the significance of the number of communications to the ACCC that had emanated from the former Eastern Bloc.[77] She believes that there are two interpretations to be made from the frequency of non-compliance allegations made against these countries. One the one hand, Kravchenko explains that individuals may want to try out their newly acquired participative roles. However the frequency of non-compliance allegations might also be read as symptomatic of civil society dissatisfaction with the limited extent of government transparency and continued lack of openness.[78] This view is supported by other observers who are also concerned that these new democracies lack the capacity to meet the Convention obligations, that governmental watchdogs in the form of NGOs are few and far between,[79] and in the years which have followed Aarhus a number of state secrecy laws have been passed.[80] In his reflections on the first Aarhusian decade, Viet Koester (Former Chair, ACCC) has suggested that future expansion of membership away from Europe would probably necessitate the

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plans for the Aberdeen Western Peripheral Route. Lord Carnwath at 100 stated:

> although the Convention is not part of domestic law as such (except where incorporated through European directives), and is no longer directly relied on in this appeal, the decisions of the Committee deserve respect on issues relating to standards of public participation.'

[76] Koester (n68)

[77] Of the initial ten communications alleging non-compliance, eight were from eastern Europe and central Asia (four from Kazakhstan, two from Armenia, one from Turkmenistan and the Ukraine)

[78] Svitlana Kravchenko,'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' (2007) Colorado Journal of International Environmental Law and Policy, Vol. 18 (1)

[79] Rose-Ackerman and Halpaap (n22) 6-7

[80] Zaharchenko and Goldenman on the continued tradition of state secrecy consider old habits die hard. Tatiana Zaharchenko & Gretta Goldenman, 'Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia' (2004) International Environmental Agreements: Politics, Law and Economics 235,241; Toth (n40) 327

development of non-binding global guidelines on public participation which would be less threatening than the watchful eye of a compliance committee, alternatively in order to maintain the rigour of the Aarhus architecture, a regional committee model may be more appropriate to monitor implementation.[81]

Koester has said that as the MOP may change the recommendations made by the ACCC one might dismiss them as decisions which are built on sand, but that in its ten year history, the MOP has always supported the findings of the ACCC where a decision of non-compliance has been made. [82] Finally, Signatory Parties are supported through regional Aarhus Centres which focus on awareness and capacity-raising. Many are located in the Eastern European and Central Asian region which reflects the initial view of the parties that the need for capacity-building was greatest in infant democracies but this perception is changing and the establishment of Western European Aarhus Centres may restore the Convention's reputation as truly pan-European.[83]

The purpose of this chapter is not to detail the European experience of Aarhus nor provide a comprehensive account of implementing measures as there is already much scholarship available which reviews the legal instruments implementing the Convention.[84] However it would be appropriate to briefly summarise the measures adopted by the EU (also a signatory to the Convention),[85] which triggered implementation by member states in accordance with

[81] Koester (n68)

[82] Koester (n68)

[83] Koester (n68)

[84] See for example Lee and Abbot (n64); Banas (n21)

[85] The first EU law that might be regarded as participative was the Environmental Impact Assessment *Directive 1985 (*Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment *85*/337/EEC*).* However it is relatively weak on participation despite its efforts to synthesize a framework for public involvement. Although the EIA Directive contains provisions which stipulate the publication of information (Article 3(b)) and the necessity to allow the public to have an opportunity to express their views (Article 6(2)) the Directive is not particularly revolutionary. The European Environment Agency, which was set up in 1990, and the Freedom of Access to Information on the Environment Directive 1990 (Council Directive on the Freedom of Access to Information on the

the obligations stemming from the supremacy of EU law.[86] The Access to Environmental Information Directive[87] provided broad guidelines to public authorities on the requirements for satisfactorily discharging the duties associated with information requests and active dissemination.[88] The Public Participation Directive[89] set out a skeletal framework for procedures to ensure early engagement with the public in the planning stage of environmental programmes,[90] it also amended the Environmental Impact Assessment Directive[91] by providing procedural opportunities for public review. The EU is yet to adopt an Access to

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Environment 90/313/EEC) according to Dietrich Gorny, made disappointing contributions to the field of participatory environmental law in Europe. The period of stagnation was brought to an abrupt conclusion by advent of the Aarhus Convention. Dietrich Gorny, 'The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law' (1991) 14 Boston College International and Comparative Law Review 283-284

[86] Established in the seminal case 6/64 Costa v ENEL. Although there is no explicit reference to the supremacy principle in the main bodies of any of the founding Treaties, it is heavily implied by Article 4(3) TEU which provides;

> Pursuant to the principle of sincere cooperation...Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Furthermore Declaration 17, which was annexed to the TFEU recalled;

> In accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

Available <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF> accessed 24 July 2013

[87] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

[88] Banas (n21) 47

[89] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

[90] Banas (n21) 47

[91] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)

Justice Directive however it is referred to by a 2006 Regulation[92] which is aimed at ensuring the EU Institutions are Aarhus-compliant.[93]

Aarhus is considered as having changed the landscape of environmental governance and continues to encourage further reform of processes. It has been suggested that at the Rio +20 conference,[94] where one of the main themes was improving international environmental governance, public participation was considered central to the discussion. [95] In meeting the Convention's obligations, signatories have proactively extended the degree of involvement by stakeholders who are considered to have an interest in shaping and observing compliance of environmental policy. All three of the Aarhus limbs encourage greater transparency

[92] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

[93] There is however, an ongoing discussion with respect to the degree of Aarhus compliance by the EU institutions. To borrow from Sands, he explains that there are some 'who believe there is something inherently undemocratic about the Community legal order and its institutions, premised on fundamental lack of legal accountability.' Some observers consider the level of non-compliance in Brussels surpasses that of the member states (Rayner). It has been said that ' Promoting an open society and ensuring good governance are essential principles recognised in law by the EU institutions, but not fully realised in practice.' Change will be slow, the ACCC's recent draft finding in relation to restrictive standing requirements for preliminary references (Art 267 Treaty of the Functioning of the European Union) or Judicial Review of EU measures (Art 263 Treaty of the Functioning of the European Union) which presently bar NGO action, were not classed as non-compliance but the ACCC urged that 'that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention' (at para 97 of Draft Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 Concerning Compliance by the European Union) . The 2011 decision of Lesoochranarske zoskupenie VLK v Ministerstvo zivotneho prostredia Slovenskej republiky(Case C-240/09) (unreported 8 March 2011) ruled that the Aarhus Convention did not have direct effect which means individuals cannot attempt to rely on the provisions where their State has failed to correctly implement measures into equivalent national provisions. See further Phillipe Sands, 'Rethinking Environmental Rights- Climate Change, Conservation and the European Court of Justice' (2008) 20 Environmental Law and Management 126; Jonathan Rayner, 'European Union is Subject to Aarhus Convention, UN Rules' The Law Society Gazette (London, 12 May 2011) quoting James Thornton of ClientEarth.

[94] 2012 UN Conference on Sustainable Development in Rio de Janeiro

[95] Jacob Werksman and Joseph Foti, 'Discussion Paper: Improving Public Participation in International Environmental Governance' UNEP: Perspectives (December 2011) Issue 1

thereby enhancing governance, this is because the public and civil society[96] can access information which serves to raise levels of environmental awareness (this has a general educative effect)[97] as well as equipping them with the knowledge to better understand the factors relating to an environmental decision to facilitate *better* participation.[98] As there is enhanced understanding among a wider stakeholder base, there is better monitoring of government compliance of environmental law (both at the national and international level) which is considered by observers to have had a positive impact on State commitment to environmental regulation.[99]

2.3 Arnstein's Ladder of Citizen Participation

Having introduced the leading international Convention which establishes the legal framework for public participation in environmental matters, the remainder of this chapter is devoted to explaining the core justifications for participation. Scholarly critique of participation has often centred on the choice of consultation methods deployed by organisers

[96] See chapter three for an explanation of how the term civil society is used in this research.

[97] Environmental information obligations have encouraged the rise of easy-to-understand guides on various legal instruments such as Your Right to a Healthy Environment: A Simplified Guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (2006), this has helped people understand what participatory opportunities they should expect. Bulkeley and Mol have discussed the important learning component of participation. Harriet Bulkeley and Arthur P.J. Mol, 'Participation and Environmental Governance: Consensus, Ambivalence and Debate' (2003) 12 Environmental Values (2) 151; Jacob Werksman and Joseph Foti, 'Discussion Paper: Improving Public Participation in International Environmental Governance' UNEP: Perspectives (December 2011) Issue 1

[98] The process of informing has been aided considerably by advances in communications technology.

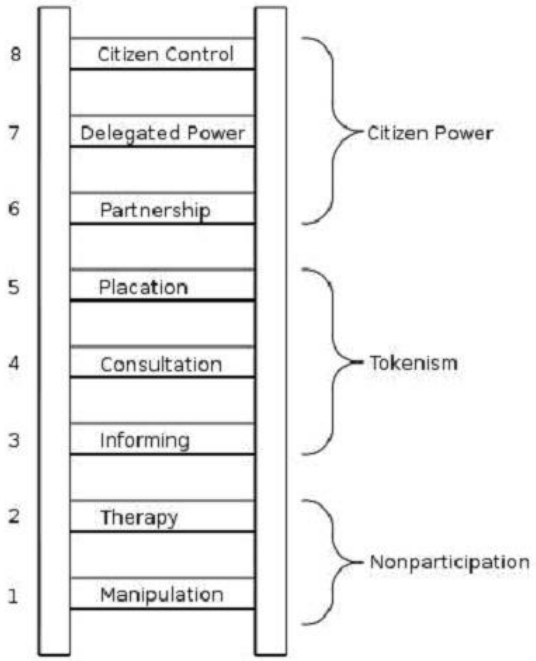
[99] Members of this school of thought include Bulkeley and Mol who consider participation improves implementation and general commitment. Further, Hoare and Tarasofsky believe governance is enhanced through participation because the public act as whistle blowers of the state when there is an allegation of non-compliance with international law. Harriet Bulkeley and Arthur P.J. Mol, 'Participation and Environmental Governance: Consensus, Ambivalence and Debate' (2003) 12 Environmental Values (2) 151; Alison Hoare and Richard Tarasofsky, *International Environmental Governance.* Report of a Chatham House Workshop. Chatham House (July 2007) (The Royal Institute of International Affairs)

of participatory exercises.[100] Within this paradigm, Sherry Arnstein's *Ladder of Citizen Participation* has been described as the benchmark metaphor for evaluating participatory techniques.[101] It is an effective way of explaining the different forms of participatory mechanisms. The rungs of the ladder can be understood as reflecting the uneasy wrestle for control between the powerless-yet-eager citizen and the powerful-but-reluctant State.[102] Genuine participation is an expensive and time intensive activity; this reduces the appeal for the government to subject a decision to public scrutiny.

[100] Research has shown that public bodies are more likely to deploy participatory mechanisms which they have some familiarity. Lee has suggested the written-consultation to be the most common form of canvassing public opinion in the UK. As Kirk and Blackstock have explained, if they are running low on time and money, regulators are unlikely to use expensive methodology to engage with the public in the manner idealised by Habermas where deliberation is extensive and unlimited (Habermas is discussed further in chapter four). Elizabeth Kirk, Alison Reeves and Kirsty Blackstock, 'Path Dependency and Environmental Regulation' (2007) 25 Environment and Planning C 250; Elizabeth Kirk and Kirsty Blackstock 'Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes' (2011) 23(1) Journal of Environmental Law 112-114; Maria Lee, 'The UK Regulatory System on GMOs: Expanding the Debate' in Ellen Vos (eds.) Uncertain Risks Regulated: Law Science and Society (Routledge 2009) 171; Beatrice Hedelin and Magnus Lindh, 'Implementing the EU Water Framework Directive- Prospects for Sustainable Water Planning in Sweden' (2008) 18 European Environment 327, 342; Raymond Geuss, Philosophy and Real Politics (Princeton University Press, 2008), 30-31

[101] Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35 (4) Journal of American Institute of Planning 216; Kevin Collins and Raymond Ison, 'Dare we Jump off Arnstein's Ladder? Social Learning As a New Policy Paradigm' (2006) in Proceedings of PATH (Participatory Approaches in Science & Technology) Conference, 4-7 June 2006, Edinburgh.

[102] Collins and Ison suggest that at each rung of the ladder there is an implicit power struggle with the State attempting to restrict the citizens' ability to assert a degree of influence over decision-making, and it is this institutionalized agenda of control which determines the outcomes of participation (this is a recurring theme in chapter three). Collins and Ison (ibid)



As the diagram illustrates,[103] Arnstein considers there to be eight stages of participative decision-making which see a progressive shift in the distribution of power; manipulation, therapy, informing, consultation, placation, partnership, delegated power and citizen control (to be discussed in more detail below)[104] Although the concept is over 40 years old, Arnstein's ladder remains of one the most useful tools to decipher the exact nature of participation at play. With the proliferation of engagement mechanisms, it has become increasing important (and difficult) to understand what is on offer and what the process and quality of the decisions produced by different deliberative tools might be.[105] She explains that by accepting the existence of gradations, it enables evaluators of participation to 'cut through the confusing hyperbole' of the State.[106] The qualitative and quantitative results are directly dependent on the type of participatory techniques prescribed by State architects.

[103] Image taken from <http://www.cipast.org/bilder/ladder.jpg > accessed 21 May 2012

[104] Arnstein (n101) 216

[105] Collins and Ison consider that understanding the arsenal of mechanisms has become an epistemological science in itself. Engagement exercises may be categorised as participative but they can vary significantly in terms of the extent to which they result in outcomes representative of the public. Collins and Ison (n101)

[106] Arnstein (n101)

However some critics believe that there remains no adequate assessment criteria for evaluating 'best practice' deliberative processes because it is such a complex and value laden field.[107] It is certainly not a straightforward process which is why this doctorate seeks to critically analyse the motivations and experiences of the parties to participation.[108]
The following discussion explains the eight rungs of Arnstein's ladder.

2.3.1 Non-participation

Manipulation

Examples of methods which Arnstein categorises as non-participation (situated at the lowest point of the ladder) include opinion polls and questionnaires. These activities are essentially means of one-way exchange of information which is why Arnstein describes them as a means of power holders to educate or cure participants.[109] They are not deliberative, but can be used to complement (or compensate) the use of focus groups in order to increase the rate of responses. These types of exercises have historically under-represented certain social groups such as the elderly, those living with disabilities, and ethnic minorities.[110] It is not just

[107] Rosener and Beierle have posited that inherent in Arnstein's framing of the power shift is the implication that on any occasion where the highest rung is not reached, the process is imperfect, even though, as Collins and Ison point out, the participants themselves may be satisfied with their experience lower down the ladder. Thomas Beierle, 'Using Social Goals to Evaluate Public Participation in Environmental Decisions' (1999) 16 (3/4) Policy Studies Review 78; Judith Rosener 'User-Orientated Evaluation: A New Way to View Citizen Participation' in Gregory A. Daneke, Margot W. Garcia and Jerome Delli Priscoli (eds.), Public Involvement and Social Impact Assessment (Westview Press 1983) 45; Collins and Ison (n101).

[108] Dryzek suggests that we focus on the epistemic dimensions of deliberation as a means of evaluation but Steele considers this to be anything but straight forward and that the subject-matter of deliberation can also greatly influence the process. John Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations (Oxford University Press 2000) 174; Jenny Steele 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) Oxford Journal of Legal Studies 21 (3) 415

[109] Questionnaires do not allow for interaction or clarification, but Arnstein stated that in some circumstances they could potentially enhance an individual's understanding of an issue. Arnstein (n101)

[110] As indicated in Parliamentary Office of Science & Technology: Open Channels: Public Dialogue in Science and Technology (Postnote) March 2001 Summary of POST Report Number 153

written-responses which are relegated to the bottom of the ladder, Arnstein suggests that there are more perverse forms of manipulation such as advisory committees which are nothing more than rubber stamping exercises designed to engineer support for government action.[111]

Therapy

Focus groups are also condemned by Arnstein to the non-participation category. They provide an opportunity for power holders to study how public attitudes and values are formed and which issues are met with controversy or mistrust.[112] For the power-holders this technique is particularly attractive because it does not threaten the balance of power. Participants are confined to a position of relative vulnerability, they are subjects of study. Organisers have excessive influence and determine the manner in which materials and information is presented. Focus group discussions are usually managed by a facilitator, this individual is briefed with a specific mandate to intentionally lead discussions in a certain direction. Citizen's juries are another form of therapy, they are a relativity cost-effective means of eliciting popular opinion but participants are similarly exposed to undue influence of the organiser's selection of stimulus materials.[113]

[111] Arnstein credits the US inter-war period of urban renewal for the emergence of this form of engineered public. She explains how city housing officials would invite affluent members of society to take up positions on Citizen Advisory Committees (CACs) not as it might have appeared to incorporate their opinion, but in order to educate and persuade them to buy into the whole agenda of the CACs. Arnstein said 'this sham lies at the heart of the deep-seated exasperation and hostility of the have-nots toward the power-holders.' Arnstein (n90)

[112] Science and Technology Select Committee Third Report (HL 1999- 2000) paras 5.15-5.16

[113] In comparison to a consensus conference, the RCEP believe the citizen jury offers more than a focus group. As reported by 'Social Scientists Sum up Decade's Environmental Research' (April 2000) 303 ENDS Report; Science and Technology Select Committee (n112) para 5.18

2.3.2 Tokenism

Informing

Experience of participation for citizens is not radically improved as we ascend the middle rungs of Arnstein's ladder. There may be more opportunity for citizens to 'hear and be heard' but they still lack the power to ensure their opinions will be influential in any measurable way. [114] At the informing stage participants are made aware of their role but this remains a didactic, passive method of communication- from the State to its citizens. Arnstein explains that informing does not involve any channels for providing feedback nor does it provide the public with the power to negotiate with the State. [115]

Consultation

The term consultation (typified by village hall meetings and public hearings) creates the illusion of a greater capacity for active involvement of the public.[116] This is a common form of participation in environmental and planning matters in England.[117] Arnstein however cautioned that unless these forms are accompanied by more authentic collaborative decision-making mechanisms, these can also become window-dressing rituals.[118] Stakeholder dialogues are an example of a method which might sit at this uneasy stage. These exercises are open only to those who have a specific interest in the matter, and what qualifies as an interest is determined by the organisers. More recently, the use of internet dialogues and forums have furthered the opportunity for this form of consultation. Consultation by way of

[114] Arnstein (n101)

[115] Arnstein (n101)

[116] Beierle identifies that there has been '…nearly universal criticism of their ability to provide meaningful participation.' Beierle (n107) 92

[117] Jeremy Rowan-Robinson, Andrea Ross, William Walton and Julie Rothnie, 'Public Access to Environmental Information: A Means to What End?' (1996) Journal of Environmental Law 8, 38; Kirk, Reeves and Blackstock (n100)114

[118] Arnstein (n101). She states 'what citizens achieve in all this activity is that they have 'participated in participation.' And what power-holders achieve is the evidence that they have gone through the required motions of involving 'those people'

modern technology is attractive because of the potential to engage with a greater number of people, they are also relatively inexpensive and the results can be quickly turned into purposeful results of both quantitative and qualitative nature.[119] At this stage individuals may have a heightened expectation of influence but there is still no guarantee that their input will have an effect on the final course of action taken. In line with Aarhus commitments, there is now an obligation to advise participants what use will be made of the information they provide at the start and conclusion of an exercise.[120]

Placation

Placation is regarded as the highest level of tokenism because it enables participants to have a jurisdiction (albeit limited) to advise and select topics for discussion, but power holders still determine the outcomes.[121] Consensus conferences are analogous to this category, affording participants greater opportunity to interact with the debate topics in depth. As a result they are considerably more expensive to conduct than focus groups or citizens juries,[122] but they are regarded as highly suited to scientific and environmental matters.[123] This technique has been utilised in Denmark by the Danish Board of Technology on issues including food safety

[119] Science and Technology Select Committee (n112) para 5.30; HL Committees on Public Administration and Science and Technology have however considered the effect of online forums on participant behaviour. Research has indicated that the internet may attract self-engagers who would take advantage of the anonymity of the Web and would make impulsive rather than considered responses. Graham's investigations into the impact of digital TV also offered muted enthusiasm for the extent to which new technologies would enhance participatory democracy on the basis that 'touch-sensitive screens cannot be part of true participation. All the true power lies with those who design the menus, not with those who touch the screens.' Andrew Graham, 'Policies for Participation: Myth, Reality and the Media in Local Initiatives in the United Kingdom' in Andrew Calabrese and Jean-Claude Burgelman (eds.) Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State (Rowman & Littlefield 1999) 209 ; Science and Technology Select Committee (n112) paras 5.30 – 5.32

[120] Article 6(9) Aarhus Convention (n23); Jane Holder, Environmental Assessment: The Regulation of Decision Making (Oxford University Press 2004) 205

[121] Arnstein (n101)

[122] Science and Technology Select Committee (n112) para 5.20

[123] Science and Technology Select Committee (n112) para 5.19

and the application of gene technology in agriculture.[124] Whilst the use of this participatory method may provide politicians with the opportunity to label a policy decision as publically defensible, it falls short of direct democracy because the Executive has not empowered the public with a veto.[125] One of the first examples of a consensus conference in Britain was conducted by the Biotechnology and Biological Sciences Research Council on GM crops but is considered to have had minimal impact on policy and the lack of follow-through arguably contributed to the public mistrust and dissatisfaction that surrounded *GM Nation*.[126]

2.3.3 Citizen Power

Partnership, Delegated Power and Citizen Control

The top tier of Arnstein's ladder, 'Citizen Power' (distilled into the three rungs of partnership, delegated power and citizen control), is reserved to situations of genuine co-governance between State and public. At this stage, there has been a recognisable transfer of power, citizen groups may be given a veto, their opinions will be directly reflected in the outcome, or they could even have exclusive ownership of the final decision to be taken. The commitment to authentic participation may be further supported and evidenced by the provision of adequate financial resources to facilitate an overall enhanced deliberative experience.[127] Exercises of this nature are by their design often time consuming and expensive, and they may not necessarily be conflict-free.[128] The top of the ladder should not be confused with perfection. This is because the transfer of power to the public can pose a

[124] This participatory process had provided the national parliament with a crucial opportunity to more accurately assess public perceptions going against the forecast of an advisory committee that had incorrectly claimed the public would find the process of irradiating food acceptable. Science and Technology Select Committee (n112) para 5.21

[125] Science and Technology Select Committee (n112) para 5.23

[126] Science and Technology Select Committee (n112) paras 5.24

[127] This could include participant remuneration, funding for facilities and accommodation, and use of expert advisors. Arnstein (n101)

[128] Government Response to the Royal Commission on Environmental Pollution's Twenty-First Report-Setting Environmental Standards (2000) para 9.85

new set of tensions which can distort the conduct of proceedings and the representativeness of outcomes. The individuals who elect to involve themselves in this level of community decision-making are likely to have strong communicative competence and be affiliated with certain interest groups that may hijack the process in pursuit of their own agendas.[129] We will return to this issue in the following chapters.

Other scholars have sought to create an alternative to the ladder. A useful contribution which does not directly engage with Arnstein comes in a two-part publication by Julia Black. [130] Her simple and effective concept of 'thin and thick proceduralisation' provides a helpful barometer to identify what type of participation is on offer to the public. For Black, thin procedure is typical of the liberal democratic paradigm and analogous to the lower rungs of Arnstein's ladder. Decisions are reached in the absence of detailed deliberative discourse and are considered to reflect aggregate preferences acceptable to the majority.[131] The alternative model, thick procedure, falls within the deliberative democratic model and is best understood with reference to the Habermasian concept of the ideal speech scenario where discourse is unrestrained and extensive.[132] It can be said that Black's thick procedure is less to do with the transfer of power from State to citizens for decision making, and focuses more on the extent of in-depth participation that occurs.

[129] Arnstein suggested that citizen control enables '...minority group "hustlers" [to be] just as opportunistic and disdainful of the have-nots as their white predecessors' –we can expand that description of predecessors to encompass power-holders of both State and social-economic standing. Lee has suggested that the 'practical arrangements for meaningful public participation, and the incorporation of its outcomes into decisions, are set to be at least as problematic as was gaining acceptance for the principle of public participation.' Arnstein (n101); Lee (n100)184

[130] Julia Black, 'Proceduralising Regulation: Part I' (2000) 20(4) Oxford Journal of Legal Studies 597; Julia Black, 'Proceduralising Regulation: Part II' (2001) 21(1) Oxford Journal of Legal Studies 33

[131] Black 2000 (ibid) 607

[132] Habermasian theory is discussed in chapter four. See further Black 2000 (n119), Black 2001 (n119); Jurgen Habermas Between Facts and Norms (MIT Press 1984)

2.4 Theoretical Justifications for Public Participation

Since its adoption Aarhus has received an overwhelmingly positive and optimistic reception. The Convention could become more than a continental document as Article 19(3) states that any United Nations party may ratify the Convention, this paves the way for the accession of states outside of the UNECE zone.[133] Whilst it has been slow to attract membership outside of Europe, Aarhus is more than exclusively European in nature. [134] However the statements contained in Aarhus or the Stockholm and Rio declarations do not provide a satisfactory explanation of the theoretical origins of participation and why it is considered a beneficial activity which is why this research is more concerned with the interrogation principal justifications for participation rather than 'participation law'.

In order to critically examine the participation principle, it is important to clearly define the central justifications which support participation. But it is by no means an easy feat to explain how public participation became a praised environmental principle. Scholars have described the birth of participation as a rapid, almost spontaneous evolution.[135] Elucidating the values and ideas justifying the principle is difficult, not least because of the diverse intellectual and social movements which converge around acceptance of this principle.[136]

It has proven difficult to neatly articulate why participation is held in such positive light as many schools claim credit for it and yet there is no authoritative historical narrative to

[133] Shelton (n20) 6

[134] Marc Pallemarts 'Current Environmental Issues and Their Management: Evolving International Legal and Political Discourse on the Human Environment, the Individual and the State' (2008) 2 Human Rights and International Discourse 149, 158

[135] Seán Damer and Cliff Hague, 'Public Participation in Planning: A Review' (1971) The Town Planning Review,42(3) 217

[136] Sean Coyle, 'Anthropocentric Approaches to Human Rights' (June 2011) Global Network for Human Rights and the Environment Workshop, University of the West of England

follow.[137] Sometimes public participation appears to be grounded in theories of 'democracy'.[138] As previously mentioned Kofi Annan referred to it as a major advancement of *environmental democracy* – this underlines the hybridity of public participation theory to be explored in this research. As one scholar has said 'simply calling for participation and for democratisation does not take us very far, for there are competing conceptions of democracy.'[139] The language is loose, and the lines are blurred, which reflects the inadequate attention that has been given to the justification for the rise of the participation paradigm.

On other occasions participation is related more broadly to human rights. Some scholars have discussed whether public participation can be regarded as falling within or across what are now regarded as three generations of human rights (for example Boyle, Pederson, Shelton). [140] Boyle has said that

> Civil and political rights can be used to give individuals, groups and nongovernmental organizations (NGOs) access to environmental information, judicial remedies and

[137] Thomas believes there is no authoritative history, whereas Damer and Hague suggest that public participation made its debut in UK planning discourse in the 1960s. John. N. Jackson's article 'Planning Education and the Public' which appeared in the Journal of the Town Planning Institute in 1964 is cited as one of the first academic assessments on the emergence of the public in planning debate in Britain. Ross Thomas, 'Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities' (2012) 22 Cornell Journal of Law and Public Policy 218-219; Damer and Hague (n124); John. N. Jackson, 'Planning Education and the Public' (June 1964) 50 (6) Journal of the Town Planning Institute

[138] This is no more straightforward than the confusion with 'participation rights' because perceptions of democracy are equally varied. The representative and participative paradigms are discussed further below.

[139] Black 2000 (n130) 606

[140] See Pederson (n19) 75-76, 93; Boyle (n16); Dinah Shelton 'Human Rights and the Environment: What Specific Environmental Rights have been Recognised? (2006-2007) 35(1) Denver Journal of International Law & Policy129; Dinah Shelton 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 Standford Journal of International Law 103; Dinah Shelton 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment, 109

> political processes. On this view their role is one of empowerment: facilitating participation in environmental decision-making. [141]

He is quite firm in his interpretation, and considers that the Aarhus Convention can be aligned with human rights treaties with some of its provisions having been incorporated into the ECHR through case law.[142] Phillipe Sands believes that the Aarhus Convention was 'the first treaty to address in a comprehensive fashion the rights of participation.'[143] This is not a perspective shared by this research because a close reading of the Convention reveals the imposition of obligations upon the State to create avenues which facilitate the participation of their publics- not a right for the individual per se (a view supported by Hayward 2005).[144] However the author acknowledges there is a synergy with the language of those calling for participation in environmental matters and that of human rights theory. This à la mode trend in the literature is possibly a reflection of the ever closer relationship between the Environment and human rights which possibly stems from a history of general political rights acknowledged in major international human rights doctrine.[145] May and Daly's comprehensive review of global constitutional provisions which recognise environmental

[141] Boyle n(n16)

[142] Two notable examples of judgments in this area include Taskin and Oneryildiz both cases in which the European Court of Human Rights emphasised the right to information of those who stood to be affected by an environmental hazard or where there was a risk to life. Taskin 2004-X 42 Eur. Ct. H. R. 50, 1148; Oneryildiz 2004-XII 41 Eur. Ct. H. R. 20

[143] Sands (n3) 64

[144] Hayward (n3) 180

[145] For example the Universal Declaration of Human Rights which at Article 21 provides that 'Everyone has the right to take part in thegovernment of his country directly or through freely chosen representatives.' And also the International Covenenant on Civil and Political Rights stipulates that there should be no unreasonable restrictions on a citizen's right to take part in the conduct of public affairs, directly or through freely chosen representatives.' (at Article 25) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

rights alleviates the need to repeat that discussion here,[146] they believe almost 60 countries have adopted such measures.[147]

Human rights continue to be the dominant 'lingua franca' at every political level and the presence of human rights rhetoric in environmental matters has become more noticeable in recent years.[148] Recalling Justice Weermantry's now famous opinion at the conclusion of the ICJ hearing in *Gabčíkovo-Nagymaros Project*[149] *he said*:

> 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.

One might suggest that there is a universal appeal to the language of human rights, Gearty suggests some environmental activists are acutely aware of the accessibility of 'rights rhetoric', so they (as it were) camouflage their campaigns as a matter of civil rights thereby gaining protection from the State which is reluctant to be stigmatised as infringing the on individuals' political rights.[150] The human rights association with the environmental agenda is not necessarily a bad thing, and 'promises overall to be a salutary one.'[151] In his reflections on the planning system, McAuslan considered the term 'justice' has developed a particularly

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[146] James R. May and Erin Daly 'New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide' Widener Law School Legal Studies Research Paper Series no. 11-09 (IUCN Academy of Environmental Law e-Journal Issue 2011 (1))

[147] For further discussion of the development of environmental human rights see James R. May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace Environmental Law Review 113.; and for regional analysis **Jona Razzaque 'Human Rights and the Environment: the National Experience in South Asia and Africa'** (January 2002) **Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva: Background Paper No. 4**

[148] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' European Journal of International Law (2011), Vol. 22 (1) 141–163, 158

[149] (Hungary *v Slovakia*) [*1997*] *ICJ* Rep 7 at 91

[150] Conor Gearty 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1(1) Journal of Human Rights and the Environment, 13-14, 17;

[151] Coyle (n136).

strong hold on public and political imagination.[152] This explains why Aarhus was heralded by some scholars as the first landmark convention to draw explicit links between the two fields of human rights and environmental protection.[153] It has been helpful for the participation agenda to acquire 'the rights status' as it has allowed for the establishment of formal procedural safeguards which mandate participation as part of, in particular, planning and environmental impact assessment regimes. However even if participation is considered to be a human right, it does not address the question of whether it is an appropriate decision-making tool. It is argued that by grouping participation with rights discourse it has largely exempted it from proper assessment and scrutiny which this research proposes to undertake. Of course, the lack of a debate about the 'instrumental value' of public participation and the predominance of rights based rhetoric need not be interpreted as coincidental. To say that something is a 'right' is often to remove it from public policy scrutiny, at least in some part. Whilst I do not set out to defend one or more of the philosophical traditions within which notions of rights are treated as problematic, it is nonetheless important to examine to look behind the rights rhetoric and 'non-rights based' reasoning through which the idea of public participation was mooted in the UK as explained in relation to the seminal Skeffington Report.

2.4.1 People and Planning: The Skeffington Report

In order to make a significant contribution to this field, it was of vital importance that the analytical framework of this thesis facilitated the critical evaluation of the various parties' experiences. By that, it is meant, that there was a desire to explore the governmental, societal and environmental fortunes through participatory decision-making. Much has already been

[152] Patrick McAuslan 'Towards a Just Planning System: the Contribution of Law' Journal of Planning & Environment Law (2013) 145- 146

[153] Pederson (n19)

written in this area, often with a degree of overlapping approaches, so the method of analysis needed to be innovative as well as purposeful. Therefore the decision was taken to identify justifications from a single source as opposed to a combination of publications.

Having conducted a detailed survey of participation theory, the author contends that three of the justifications underpinning the recommendations of the Skeffington Report, to be explained below, are indicative of the range of arguments capable of supporting public participation in decision making relevant to the environment. It is an appropriate springboard for the evaluation in this research because as an official publication, it summarises the State's perception of the benefits of participation which is important given that formal participation is coordinated by government. The Report has not been subject to much analysis by present day participation scholars.[154] However, it was drafted before public participation became uncritically accepted as a good, as to a large extent it is today, and in its attempt to justify a new departure in regulation, it remains one of the most informative, and candid statements of 'aim' that is available to the scholar in this field.

The People and Planning Report of the Committee on Public Participation 1969[155] was regarded as marking a new age in the UK planning system.[156] The report was the culmination of a period of strategic re-evaluation within government. The Planning Advisory Group (PAG) had initially been appointed in 1964 to examine current approaches to decision-

[154] In fact the report has been subject to criticism. Commentators of the time were disappointed that it did not prescribe mechanisms for giving effect to its recommendations and therefore did not result in immediate legislative reform. Damer and Hague were particularly critical of the absence of any theoretical context in the report. However the suggestions made by the report remain typical of the lingua franca of modern participation theory and could be considered as the birth of the concept in Britain. W.R. Derrick Sewell & Timothy O'Riordan, 'The Culture of Participation in Environmental Decision Making' (1976) 16 Natural Resources Journal 1, 7; Damer and Hague (n135) 223

[155] People and Planning: Report of the Committee on Public Participation in Planning 1969 (HMSO, reprinted 1972). Commonly referred to as the Skeffington Report

[156] Sewell and O'Riordan (n154) 7

making in light of public dissatisfaction with the decisions produced by the urban planning system.[157] A stream of academic publications appeared in Britain at this time, a number drew examined participation-related developments in America which had begun in the 1950s,[158] prompting some to suggest 'there is great scope here at home to operate on similar lines'.[159] Following the preliminary work of PAG, Arthur Skeffington was assigned to head a taskforce to explore ideas for public inclusion in planning matters in 1968.[160] The final report suggested that increased involvement of the public in planning decisions would bring a number of advantages.[161]

The recommendations for greater public participation in land use planning stemming from the Skeffington report, to be expanded in the following sections of this chapter, were justified first on the ground that participation would be good for the expedient administration of government policy; secondly, that it would be good for people, in conferring on the public a legitimate say in decisions of local and/or national interest; and thirdly that it would lead to better policies, that would be better advance the public interest in instrumental terms than would be the case were the public to be continue to occupy a relatively passive role, confined

[157] Sewell and O'Riordan (n154) 6-7 They note in particular that under the systems provided by the Town & Country Planning Act 1947 there was 'limited role of the public in matters relating to preparation of plans for cities, highways, airports, water supply reservoirs, and preservation of the countryside.'

[158] Writing in the years following the Skeffington Report, Damer and Hague remarked that the participation concept evolved from relative obscurity to the policy-making level, gaining the government's attention after a string of academic publications between the 1950s and 60s. Examples given by Damer and Hague include articles which appeared in the Journal of Town Planning Institute in 1958, 1961, 1964 (full citations unavailable). They consider that the commentary at this time had taken inspiration from the wave of participation-related US publications, Jacobs' Death and Life of Great American Cities perhaps the most famous of the era. Others included Martin Meyerson & Edward Banfield, Politics, Planning, and the Public Interest (The Free Press 1955); Peter Rossi & Robert Dentler, The Politics of Urban Renewal (Free Press 1961); Herbert Gans, The Urban Villagers (The Free Press 1962). See further Jane Jacobs, The Death and Life of Great American Cities (Random House, 1961); Damer and Hague (n135) 217 – 218

[159] L. W. Lane, 'Urban Renewal' (1962) Journal of the Town Planning Institute as referred to in Damer and Hague (n135) 217

[160] Joint Parliamentary Secretary of the Ministry of Housing and Local Government

[161] Sewell and O'Riordan (n154) 12

to electing governmental representatives.[162] There is some cross over between these justifications – and also some tensions – that are to be explored. The discussion below seeks to elaborate on the 'Skeffington ends' as they apply to the concerns of this doctoral analysis.

2.4.2 Good for Government – Participation as Administratively Expedient

The Skeffington Report suggested that the planning system had become cumbersome and subject to unreasonable delays. [163] The current mechanisms did not afford the public a sufficient degree of involvement during the early stages of a plan, and as a result, decisions became subject to lengthy protests and appeals, thereby delaying the agreement of development plans.[164] An emphasis was placed on the desire for an efficient system that would 'keep things moving.'[165] The Skeffington Committee considered that participation was a vehicle for administrative expediency; by involving the public in a discussion on policy at an early stage thereby encouraging them to see the virtues in the planning system.[166] The inference to be drawn from the report is the intention to 'diffuse conflict'[167] by bringing the public on board early on, [168] thereby minimizing the risk of time spent dealing with

[162] People and Planning: Report of the Committee on Public Participation in Planning 1969 (HMSO, reprinted 1972)

[163] Addressing the issue of delay in the planning system had become subject of much discussion during the 1960s. Damer and Hague (n135) 219-220

[164] Skeffington Report (n155) 3- 5

[165] Skeffington Report (n155) 5

[166] People and Planning Report of the Committee on Public Participation in Planning (The Skeffington Committee Report) (Introduction by Peter Shapely, Routledge 2013)

[167] Yvonne Rydin, 'Public Participation: Different Rationales; Different Strategies' (November 2006) conference paper to Civil Society and Environmental Conflict; Shapely (n166)

[168] Sunstein and others have also suggested participation has the ability to diffuse tensions. Cass R. Sunstein, 'Democracy and the Problem of Free Speech' (The Free Press, 1993) 244. See also Jim Rossi 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making' (1997) 92 Northwestern University Law Review 210; Cormac Cullinan, Wild Law: A Manifesto for Earth Justice (2nd ed. Green Books, 2011) 154

unexpected and costly opposition at a later stage.[169] The Minister of Housing and Local Government at the time emphasized 'I want to make sure that people can get to know what the planning authority is proposing to include in its plans before attitudes harden.'[170] It was believed that there would be greater acceptability of decisions if the public had been given an opportunity to take part in its formation, the final decision would feel less like an imposition even if it is not the outcome originally sought.[171]

Jürgen Habermas, whose seminal works on communicative theory will be explored further in chapter four, recognises that 'consensus is not essential or even necessarily central to the theory of democratic deliberation,'[172] it is the act of negotiation – of having a say - that improves the position for all parties.[173] There is however a sense of uncertainty towards the effects of adding the public voice to a planning system which had not been designed for that purpose, [174] Skeffington stressed the need for the public to cooperate, the report stated:

[169] The State may be reluctant to introduce a further layer to the decision-making process because deliberative exercises can be expensive and time intensive. Governmental understanding of participatory mechanisms was at an infant stage in the 1960s, but even so the Committee were aware that by introducing participatory methods it may paradoxically delay the decision-making process. Skeffington stressed the need for the public to work within the set timeframes. The government must weigh up the benefits of using what might be regarded as a more advanced participatory technique against the returns (the benefit of having involved the public). In the following chapter, the case study GM Nation will explore the effect of budgetary constraints on the type of methods adopted. Skeffington Report (n155) 5

[170] The Minister of Housing & Local Government, at the second reading of the Town & Country Planning Bill, 1968 in Damer and Hague (n135) 224

[171] Jens Newig and Oliver Fritsch 'Environmental Governance: Participatory, Multi-Level – and Effective?' (2009) 19 Environmental Policy and Governance, 197–214, 206

[172] Jürgen Habermas Between Facts and Norms (MIT Press 1984); Dryzek (n108) 48

[173] Beierle (n107) 84 citing Gail Bingham, 'Resolving Environmental Disputes: A Decade of Experience' (Washington DC: The Conservation Foundation)

[174] Support for participation was far from universal in the 1960s, some scholars (Verney, Damer and Hague) were clearly uneasy about the introduction of increased public involvement;

> We need very badly to give (the planner) a somewhat freer hand, at any rate . . . to the extent of confining lay intervention to the approval of each important in terms of proposed policy and each stage in plan-making, rather than continuing a system which has as an important feature month by month lay dabbling'.

Proponents of participation continue to be aware of the practicalities of involving large numbers of people into government decision-making (Wolfe). It certainly presents a sense of conflict within the administrative expedience justifications for the

> Delays could become worse through the injection of public involvement...it could nullify the Government's expressed intentions to speed up the planning process....the public should work with the authorities to keep to those dates.[175]

The following chapter will analyse the degree to which the desire to increase participation can be reconciled with the concurrent goal of 'keeping things on track'.[176]

The Skeffington report had identified a decline in public confidence in government; this had led to increased levels of public dissatisfaction with decision-making processes.[177] The absence of consultation until the final stages of a plan had caused frustration amongst the public; consequently any offerings of involvement were met with suspicion and distrust.[178] The report explained; 'the authority are then regarded more as an antagonist than as the

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government. This issue is explored further in chapter three. Stephen Verney, People and Cities (Collins 1969) 151. Damer and Hague (n135) 222; Joel D. Wolfe, 'A Defense of Participatory Democracy' The Review of Politics (1985) Vol. 47 (3) 370-389, 373

[175] Despite spurring academic discourses during the years immediately following its publication, the Skeffington report cannot be considered as radically participative. In fact the report cautions that there are limitations to the concept of public participation. It reaffirms that the ultimate responsibility for decisions are retained by the State and that the drafting of plans requires highly skilled expertise and could only be carried out by the professionals within local planning authorities. Skeffington Report (n155) 1, 5

[176] Scholars have suggested this approach is inherently contradictory. The Skeffington report has been described as 'paying lip service' to the participation ideal, Damer and Hague say that a

> Game is being played, that the name of the game is participation that its rules are set by the planners, as is its tempo, and its final result…what the game is all about is public relations -public relations for the planning profession. The purpose of public participation in planning is to make life easier for the planners.

Rossi's contribution to participation scholarship has provided this research with much food for thought. He has viewed participation through the political lens, that it has become an attractive option for the state because of its potential to placate public concerns and smooth the decision-making process. Rossi makes a distinction between participation and deliberation- he considers that participation is used to legitimate the system of agency-led decision-making, whereas deliberation is the drawn-out process of discourse, it is 'something more than the consensus of mere majorities'. If the state is seeking surface level approval to press on with decision-making, participation may occur with little actual deliberation. He calls for deliberative forms of participation in order to secure a deeper and more genuine for of legitimacy. This can be aligned with Black's rational for categorising decision-making as either thin or thick procedure. Damer and Hague (n135) 224; Rossi (n168) 212-213; Black 2000 (n130) 597

[177] Shapely (n166)

[178] The report acknowledged that where information had been disseminated to the public too late in the process there was increased chance of hostility. Skeffington Report (n155) 3

representative of the community and what was started in good will has ended in acrimony.'[179] The move towards increased participation was a way of working to restore public confidence and giving the appearance of openness.[180] It has been said that transparency is inherent in the participatory ideal, the public want the government to open up aspects of their decision-making processes which have historically been guarded by secrecy,[181] consequently the right to information has taken on a significant role in participation literature, it also forms one of the three Aarhus Convention limbs and is regarded as counteracting the perceived undesirable qualities of representative governments which are seen as all-powerful and difficult to challenge.[182] I will explore the theoretical possibility that public trust can be built through participation in chapter three.

2.4.3 Securing Legitimacy through the Representativeness of Participation

The second strand of justifications for participation; that of legitimacy, houses a number of interconnected assumptions. The Skeffington Committee saw the potential to give planning decisions the seal of legitimacy by using participation because of the underlying assumption of enhanced representativeness, that such proposals have been considered by a greater number of people.[183] Legitimacy implies that the focus moves away from the State to the

[179] Parties must believe the consultation process to be legitimate and not sham participation. Where it becomes obvious that a decision has already been made by the State, it can worsen relations between representatives and the public. This is discussed in the context of the 2008 Greenpeace challenge of the UK Energy Review in chapter three. Skeffington Report (n155) 3

[180] Steele (n108)

[181] Beder (n1) 106

[182] Malcolm Russell-Einhorn 'What Kinds of Mechanisms and Conditions Create Effective Citizen Voice?' In Shah A (ed.), Performance Accountability and Combating Corruption (World Bank, 2007) 205–211

[183] The report suggested

> People should be able to say what kind of community they want and how it should develop...it matters to all of us that we should know that we can influence the shape of our community so that the towns and villages in which we live, work, learn and relax may reflect our best aspirations. Skeffington Report (n155) 3

citizenry. Participation, on this reasoning, encourages the government to turn its attention 'from what goes on within the legislature, and instead asking what happens to those who remain outside of it.'[184] By subjecting specific land use proposed plans to the public for deliberation, final decisions which take account of deliberation are validated as legitimate.[185]

Some commentators suggest that the primary purpose of participation is to legitimate the regulator's decisions.[186] Above at 1.4, I mentioned that I initially had considered whether public participation was a derivative of rights discourse; here the arguments for legitimacy, are an example of how participation theory veers close to the edge of rights scholarship as there is a prevalence of commentary suggesting that it is a right that those who stand to be affected by a decision be consulted. Commentators have gone as far to suggest that participation strikes at the heart of the democratic ideal of self-determination. [187] Dryzek has referred to this as the emergence of a 'politics of presence' where affected groups are brought into the public sphere and facilitated into taking a role in central decision-making as of right.[188] Proponents of deliberative decision-making consider participation to have a positive inclusive effect on the community at large.[189] However there is growing scepticism towards

[184] Andrew Rehfeld, The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design (Cambridge University Press 2008) 6

[185] Dryzek, a leading proponent of deliberative democracy, considers that by proactively seeking to widen the scope and opportunity for 'real rather than symbolic' collective decision-making will secure the State's authenticity of control. Dryzek (n108) 29

[186] Wendy Le-Las & Emily Shirley 'Does the Planning System Need a "Tea Party"?' (2012) Journal of Planning Law 3, 239

[187] Rydin (n167) has explained that during the 1960s, public participation was heralded as a vehicle for pluralistic participatory democracy. '[participation] is based on the rationale that citizens have a right to be involved in the decision-making processes which affect their lives.' See further discussion of participation as a right Marc B. Mihaly, 'Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents' 27 Pace Environmental Law Review (2009-2010) 151, 166; Skeffington Report (n155) 1; Damer and Hague (n135); 222

[188] Dryzek (n108) 60

[189] Judith N. Shklar, American Citizenship: The Quest for Inclusion (Harvard University Press, 1991) 25-26; Kevin O'Leary, Saving Democracy: A Plan for Real Representation in America Stanford (Stanford University Press 2006)

the ability of participation to capture public opinion that is genuinely representative.[190] This doctorate will make an extensive contribution to the critique in this regard, by examining the extent to which participation advances the 'right to be represented', such as it exists. A significant underlying theme of this research is the potential of the popularity of participatory decision-making to produce outcomes which pervert ideals of democratic representation.

Within the legitimacy argument is the suggestion that participation is good because it encourages and educates[191] individuals to become active and interested citizens.[192] This is understood to be 'superior to a democracy of politically apathetic citizens' whose role is to infrequently hold representatives to account electorally.[193] The Skeffington Report suggested that participation offered the individual the chance for active service through the involvement and contribution to their community's well-being.[194] The concept of active citizenship has played a significant role in advancing the case for participation; to borrow from Mouffe;

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[190] Gary Johns is one such sceptics, he considers that participatory forms of decision-making lacks the equality of representative democracy's 'one person, one vote.' He says 'in fact, participatory democracy gives two votes to the 'progressives'. These tensions are analysed in chapter four. Gary Johns, 'Participatory Democracy: Cracks in the Façade' (September 2004) Institute of Public Affairs Review, 14

[191] Wolfe goes as far to suggest that participation has a transformative effect on an individual's '...character by strengthening his psychological and practical capacity for political involvement.' Rose-Ackerman and Halpaap posit that there are educative benefits for all parties because they come to understand the other side;

> [The] public may be uninformed about scientific and economic factors...the technocrats may be uninformed or uninterested in the opinions of ordinary citizens... [participation moves us] toward public accountability and toward technical competence.'

Wolfe (n176) 371; Rose-Ackerman and Halpaap (n22) 6-7. See also Carole Pateman, Participation and Democratic Theory (Cambridge University Press, 1970) 42-43

[192] Barber says participation makes people behave as citizens and not lone individuals. An engaged citizenry is generally accepted as preferential to a passive one (Irvin and Stansbury). Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age (University of California Press, 1984) 152, 258-59; Renée Irvin and John Stansbury, 'Citizen Participation in Decision-making: Is It Worth the Effort?' (2004) 64 (1) Public Administration Review 61-62

[193] Johns (n190) 14

[194] The Skeffington Committee explained;

> People should not regard their role as a passive one in which they merely receive proposals and comment on them. They should be ready to give practical assistance in the creation of opportunities to participation...this is a service

> [A] radical, democratic citizen must be an active citizen, somebody who acts as a citizen, who conceives of herself as a participant in a collective undertaking.[195]

This implies that the act of participation is a virtuous one, which reflects the general trend in the literature which presumes the presence and development of certain moral characteristics in those participating.[196]

For Sagoff,

> The ability of the political process to cause people to change their values and to rise above their self-interest is crucial to its legitimacy. Political participation is supposed to educate and elevate public opinion; it is not… merely to gratify pre-existing [sic] desires.[197]

The thesis engages critically with this idea that public participation facilitates the virtuous individual, rising above self-interest.

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to the community; it is important that active members of society should help in this way to secure the involvement of those who might not otherwise respond.' Skeffington Report (n155) 3, 11

[195] Dryzek considers that deliberative decision-making imposes obligations on all of its actors, on the State and also on society. It becomes the individual civic duty to influence the administrative power of government. Chantal Mouffe 'Democratic Politics Today' in Chantal Mouffe ed. Dimensions of Radical Democracy (Verso, 1992) 4; Dryzek (n108) 25

[196] For Sherry 'in the republican vision, a primary function of government is to order values and define virtue, and thereby educate its citizenry to be virtuous.' The concept of the 'good citizen' will become a particularly important theme for this research, particularly in chapters 4 and 5 which explore societal vulnerabilities and the friction between the interests of people and those of Nature. Suzanna Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 Virginia Law Review 543, 552; Jean Leca, 'Questions on Citizenship' in Chantal Mouffe (ed.) Dimensions of Radical Democracy (Verso, 1992) 18

[197] Sagoff believes that people lead double-lives in the sense that they might act as individual consumers, but that they are also capable of divesting themselves of self-interest in order to deliberate as citizens of their community. Therefore he believes participation produces a public culture where legitimate decisions result from rational deliberation. The concept of the virtuous citizen is explored further in chapter four. See Mark Sagoff, The Economy of the Earth: Philosophy Law and the Environment (Cambridge University Press 1988) 96, 198; Steele (n108)

2.4.4 Participation as a Problem-Solving Tool for Better Environmental Decisions

This brings us to the final justification. The Skeffington Committee began a trend in the scholarship which praised the problem-solving capacity of participation,[198] believing that the quality of decisions could be improved through the inclusion of local knowledge and innovative ideas.[199] In many respects this final justification ties into the previous two strands outlined above, because it provides further support for the claim of administrative expediency. This justification implies mutuality between the government and the public; it distances the perception of top-down 'expertocratic'[200] models of decision-making which had encouraged public distrust of government.[201] Inherent in the problem-solving model is the implied rationality of participants- that they set self-interest aside in order to deliberate *reasonably*.[202] A useful explanation of the central tenets of this justification has been made by Jenny Steele in 2001.[203]

Steele is a member of a small minority of scholars to raise searching questions of participation theory; indeed she has remarked:

[198] Whilst it is outside the scope of the research objectives, it is acknowledged that participation theory had gathered pace in the United States before it was imported into Britain. For example, in the 1950s Senator Adlai Stevenson called for greater participation, he said 'government...cannot be wiser than the people.' Adlai Stevenson, 29 September 1952 (quoted in Royal Commission on Environmental Pollution, 10th Report (HMSO 1984) 9

[199] Skeffington Report (n155) 1, 3

[200] Mashaw, perhaps less concerned by the public relations implications, represents the school of thought which is supportive of decision-making by trained experts. He said 'expertise model of administration imagines that over time experience and research will produce increasingly sound administrative judgements.' Jerry L. Mashaw, Due Process in the Administrative State (Yale University Press 1985) 19, 23

[201] Cormac Cullinan, a wild lawyer whose scholarship is the subject of much discussion in chapter five, has said that there is a need to abandon a management model of environmental decision-making, in favour of an approach that is more analogous to democracy. Cullinan (n168) 163

[202] Geuss has reflected on the Habermasian idealism of the problem-solving justifications for participation where issues are discussed by rational, objective participants. But he says

> politics cannot be 'applied ethics' in this sense: for concrete agents operating in the real world of scarce resources and shifting bases (and mandates) of power, the decision to pursue one thing means the failure to choose and pursue another. Geuss (n101) 30-31; Coyle (n136); Steele (n108)

[203] Steele (n108)

> [It] is not entirely clear why participation is considered to be a good or necessary feature of environmental decision-making, and why it should be required by law.[204]

Although she is not wholly in agreement with the suggestion that participation is a robust mechanism for environmental decision-making, she has articulated a possible justification. She explains that participation is viewed as capitalising on the diversity and plurality of society. The citizens are brought into the decision-making realm as deliberators but they are also a source of 'situated knowledge', and become valuable resources.[205]

The argument draws upon the deliberative democratic ideal where diverse perspectives are brought together in order to encourage understanding and consensus.[206] Proponents of participation suggest that it will result in better decisions and improved prospects for implementation.[207] In *Deliberative Democracy & Beyond* Dryzek praises discursive practice as the best means available for tackling complex policy areas because it integrates a number of different but important perspectives.[208] The natural environment is regarded as a complicated policy issue because it involves many factors including; societal, economic and the scientific. Although environmental decision-making may involve the use of technical cost benefit and risk assessment tools, it still demands consideration of societal behaviour and acceptability patterns so there is a strong case to include the subjective voice.[209] Decision-making is a political activity, the inclusion of the lay perspective is seen as legitimising the

[204] Steele (n108)

[205] Situated knowledge is held by those with proximity to an issue. Steele (n108)

[206] Robinson has explained that problem-solving deliberation is more than reaching a series of compromises. David Robinson, 'Regulatory Evolution in Pollution Control' in Tim Jewell & Jenny Steele (eds), Law in Environmental Decision-Making: National, European and International Perspectives (1998) 59

[207] Steele (n108) explains that pro-participatory theorists are firm in their belief that a majoritarian deliberative process will result in a presumptively 'correct' decisions. For an example of this optimism see Nicholas N. Kimani, 'Participatory Aspirations of Environmental Governance in East Africa' (2010) Law, Environment and Development Journal, Vol.6 (2) 200-215, 204

[208] Dryzek (n108) 140

[209] Beierle (n107) 77

process.[210] There are human causes of resource depletion, pollution and climate change which is why scholars consider that participation, as an anthropocentric tool, can offer an valuable contribution to future policy design.[211] However the anthropocentricity of public participation means that individuals view environmental problems through a human lens. It may encourage paternalism or even objectification of the environment. Chapter five examines the relationship between participation and the emergent paradigm in environmental scholarship, wild law, which is principally concerned with non-human interests of the Natural World.[212]

The participation principle is viewed as integral to the attainment of other environmental goals, such as 'sustainable development' where it is believed to play a critical role in modern governance and sustainability.[213] Participation is also considered suitable to environmental matters where there are high levels of public concern about risk to human health, such as genetically modified organisms. It has been suggested by one observer that there are at least two reasons why participation in the GM debate is beneficial; first, as chapter three will explain, science has proven to be a poor arbitrator of conflicting views in this field;[214] secondly there are potential environmental justice considerations produced by the introduction of GM technology which can only be properly understood through participation

[210] Rossi (n168) 197-199

[211] Beierle (n107) 80

[212] Robert Lee 'A Walk on the Wild Side: Wild Law in Practice' (2006) 18 Environmental Law & Management 6; Coyle (n125)

[213] Gunther Handl, 'Sustainable Development: General Rules Versus Specific Obligations' in Winifried Lang (ed.) Sustainable Development and International Law (Graham & Trotman,1995) 35-43; Banas (n21)

[214] Many critics have spoken of the value judgments which have been absent from policy, a trend which has continued to the detriment of public trust in government. Charles E. Lindblom and David K. Cohen, Usable Knowledge: Social Science and Social Problem Solving (Yale University Press1979)47, 81; Rossi (n168) 197-199

of communities who will be affected.[215] This is why the 2003 *GM Nation* public debate proved to be an invaluable analytical tool for this research.[216]

2.5 Conclusion

The adoption of the Aarhus Convention was marked by applause and positivity. Commentators have urged us to consider the Convention as a major milestone in the pursuit of the democratic ideal and improved environmental standards through better decision-making.[217] Many are utterly convinced that participation has a win-win potential.[218] The analysis in this chapter has not sought to evaluate the principle of participation; instead it has navigated through the 'Aarhusian architecture' in order to explain the context within which it operates and the warm international reception received to date. In order to begin the task of critically evaluating the validity of this praise, a conceptual analytical framework is established by borrowing from the findings of the 1969 Skeffington Report. The justifications suggest participation is good for all parties in the paradigm; the State, the citizen and the Environment. Participation is heralded as encouraging administrative expediency, securing legitimacy through representativeness and harbouring an enhanced problem-solving potential. There is a vast scholarship which praises the arrival of participation in environmental discourse, dominated by those who consider citizenship

[215] The relationship between environmental justice and public participation is explained in chapter four. Environmental decisions are not felt equally within society, certain communities bear the brunt of a scarcity of environmental goods. Carmen Gonzalez 'Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology' (2006-2007) 19 Georgetown International Environmental Law Review 583, 640-641

[216] See chapters three and four.

[217] Benjamin Cramer, 'The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention' (2009)14 Community Law & Policy 73, 94 see further The Aarhus Convention: A New International Framework Regulating Public Access to Environmental Information, United Nations Development Programme, Global Conference on Access to Environmental Information, Agenda Item 5, U.N. Doc. UNEP/INF2000/WP/5 (2000), at 1

[218] Newig and Fritsch (n171) 197–214

engagement as tantamount to democracy.[219] The author considers that participation has become one of the untouchables of modern democratic theory enjoying an almost sacrosanct status.[220] The chorus of paeans and publications which praise the arrival of participatory practice have not given sufficient attention to the risks and vulnerabilities of these mechanisms. [221] That is the task of this doctorate and the chapters which follow.

It is clear enough from the exposition of the three justifications that there is the potential for tension between the ends to which the principle is a means. The crux of this is the administrative expediency justification. This is about speeding up the execution of government policy – getting the job of government done – by diffusing public hostility or at least scepticism. However, whilst none of the justifications are antithetical towards the policy of speedy and efficient administration, it is possible that 'meaningful' participation aimed at legitimating decisions, or bettering them, will take time, and also that the policies themselves will change as a result of them. And that may not always be 'expedient'. This tension between the first and the second and third justifications is returned to in chapter three in particular.

[219] Mihaly (n187) 164-165; Rossi (n168) 181

[220] Rossi (n168) 175-6

[221] A view supported by Mihaly (n187) 151, 156

Chapter Three: Public Participation, Administrative Expedience & the State

3.0 Introduction

In this chapter we begin the critical examination of the public participation principle with particular reference to the first of the justifications identified in the previous chapter. Specifically, this chapter of the research examines the implications of public participation for the relationship between State and society, and issues which arise as a result of the State's desire to pursue administrative expediency in order to secure the adoption of the government's preferred (and sometimes pre-determined) political objectives.

The first stage of the chapter sets out, at a formal level, with examples, the subtle boundary between 'genuine' governmental engagement with public participation and a cosmetic exercise in which public participation is seen by the public as lacking sincerity, with the result that the execution of government policy is frustrated. The second part of the chapter introduces the extended *GM Nation* public debate as a case study for exploring this problem area in depth. I contend that contrary to this justification, on the evidence of the case study, it is extremely difficult for political representatives within central government to share decision making with the public it purports to represent, even where the 'carrot' is that government policy will more easily sit with the public (and thus be more easily executed). This case study lends support to the suggestion that the use participation for administrative expediency is

potentially an empty legitimising technique which can diminish the relationship of trust between government and people rather than increasing it.[1]

3.1 Rebuilding Public Trust in Government Decision-Making

Participatory methods have been argued to be capable of strengthening support for government decision making which has been weakened by an extended period of distrust in the elected representatives and associated public servants. There has fairly clearly been a steady decline in public trust in authority over the course of the last 50 years.[2] The BSE[3] crisis left a legacy of low consumer confidence in government in the UK,[4] but it is probably not any specific crisis that has accounted for declining confidence that representatives are trustworthy servants of the public interest. Numerous subsequent controversies, particularly relating to science and technology, such as cloning and genetic modification, are viewed by observers as having deepened public concern over the institutionalisation of scientific

[1] Morgan has observed that in the US and UK societies in their naiveté have been lured by, what he calls, the temptation of (fictitious) inclusion in state decision-making, which has sustained governmental power hold. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W.W. Norton & Co. 1988) 13

[2] This was also noted in the Parliamentary Office of Science & Technology: Open Channels: Public Dialogue in Science and Technology (Postnote) March 2001 Summary of POST Report Number 153

[3] BSE (Bovine Spongiform Encephalopathy) had left a legacy of low confidence in food safety in Britain. Scholars have made links between the BSE crisis and the public's reluctance to accept GM foods. According to research, it is considered that food-related fears are part of a wider shift in globalisation-related public uncertainty. An inquiry into Science and Society in 2000, reported that whilst the public had not necessarily become 'anti-science' they were certainly experiencing a 'crisis of confidence'. Research undertaken on behalf of the government which surveyed public engagement in Science found that there was a direct link between increased public understanding of scientific issues and a corresponding increase in the degree of public concern. Select Committee on Environmental Audit 'Genetically Modified Organisms and the Environment: Coordination of Government Policy' Fifth Report, 13 May 1999; Emma Hughes, 'Dissolving the Nation: Self-deception and Symbolic Inversion in the GM Debate' (2007) 16(2) Environmental Politics 318; House of Lords Select Committee on Science and Technology 1999; Postnote, November 2002, Number 189, Parliamentary Office of Science & Technology

[4] Phillip J. Longman 'The Curse of Frankenfood. Genetically Modified Crops Stir up Controversy at Home and Abroad' *US News and World Report* (26 July 1999) 38–41

knowledge and the manipulation of science in government decision-making for political ends.[5] Beyond the environment, other political controversies such as the 2003 invasion of Iraq, are seen as having further strained public perception of the government's intention to act in the public interest and, specifically, to ostensibly engage in open debate (in that instance within Parliament) when in fact key issues are concealed from discussants.[6]

It is understood that tolerance of closed-door politicking, especially in environmental and health matters has waned across the global North.[7] Public concern over the transparency-deficit in government has forced administrations to court the participation agenda, thereby creating the perception of reducing the dominance of so called 'technocrats'. Reducing the reliance on experts and increasing space for the public voice can be interpreted as shortening the distance between State and society. This has been particularly true of environmental policy which by its multi-disciplinary nature has historically lent itself to domination by experts.[8] This is because environmental policy is often influenced by ecological, scientific, economic and social impact studies. Including public opinion in technical decision-making may have a popular appeal but in political cultures where there are long-standing traditions of

[5] See Michelle Everson and Ellen Vos, 'The Scientification of Politics and the Politicisation of Science', in Michelle Everson and Ellen Vos (eds.), *Uncertain Risks Regulated* (Routledge 2008) 1; Stella G. Uzogara 'The Impact of Genetic Modification of Human Foods in the 21st Century: A Review' (2000) 18 Biotechnology Advances 181-182; 'Social Scientists Sum up A Decade's Environmental Research', (April 2000) *ENDS Report*, Issue No.303; Peter Healey, 'The 2003 UK GM Crops Debate' June 2004 Discussion Paper, University of Oxford. The erosion of public confidence was also highlighted by the UK Select Committee on Science and Technology in 2000. The Committee suggested the series of soft disasters had made the public more assertive and demanding which would force science 'out of the laboratory and into the community'. Select Committee on Science and Technology, Third Report, Prepared 2000, Chapter 5.1

[6] Guy Cook, Peter T. Robbins and Elisa Pieri, 'The Discourse of the GM Food Debate: How Language Choices Affect Public Trust: Impact on Public of UK Policy Debate on Attitudes to GM Foods' Economic and Social Research Council, UK

[7] Parliamentary Office of Science & Technology: Open Channels: Public Dialogue in Science and Technology (Postnote) March 2001 Summary of POST Report Number 153

[8] See generally Roy Macleod, *Government and Expertise. Specialists, Administrators and Professionals, 1860-1919* (Cambridge University Press 1999); Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Harvard University Press, 2009)

established administrative bureaucracy, there may be resistance to this process of opening up.[9] It is a workable (if crude) generalisation to say that in the UK, where the majority of statutory environmental policy has developed almost entirely from Westminster (even local authority powers are defined in Acts of Parliament), environmental management is largely organised in a top-down fashion. [10] This has been reinforced by EU membership, because it is the national administration that is liable for failure to comply with EU law. Thus in areas where regulatory laws have traditionally been implemented at a local authority level (e.g. air quality), it is the national government that is in the first instance held to account in law.

In order to build public trust, the State may use public participation as a 'placating device', arguably this cannot be regarded as the same qualitative endeavour as democratic enhancement in the manner to which deliberative-democratic theorists aspire. Whilst it may lead to be believed by governmental protagonists to expedite decision-making, it is questioned whether participating may, paradoxically, actually further diminish confidence in Government, quite the opposite effect to that intended.[11]

[9] W.R. Derrick Sewell & Timothy O' Riordan, 'The Culture of Participation in Environmental Decision Making' (1976) 16 Natural Resources Journal 1, 10 and also Marc B. Mihaly 'Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents' (2009-2010) 27 Pace Environmental Law Review 166. Flear gives the example of the Institutions of the European Union as often coming under criticism on the basis of the democratic-deficit and the limited public accountability of un-elected Institutions. However there is little commitment for change because that would entail significant restructuring of an architecture never designed to include the public. As noted in Mark L. Flear, 'A Human Rights Perspective on Citizen Participation in the EU's Governance of New Technologies' (2010) Human Rights Law Review Vol.10 (4), 661-688, 673, 676. For commentary on the European Commission see, *European Governance: A White Paper*, COM(2001) 428 final, 25 July 200; Daniela Obradovic and Alonso Vizcaino, 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations', (2006) 43 Common Market Law Review 1049; and Kenneth Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', (2002) 8 European Law Journal 102

[10] As opposed to judicial activism (of which there has been little)

[11] In his investigation of the 19th century Jacksonian system of rotating-government appointments, White noted that public perception in the status of agencies subject to rotation actually diminished. See further Leonard D. White, *'The Jacksonians: A Study in Administrative History 1829-1861'* (MacMillian, 1954), at 329-332

3.1.1 Participation's Transformative-but-Deleterious Effect on Civil Society Opposition

The proliferation of participation in environmental discourse is understood in some of the literature as having had a measurable effect on civil society in the field of environmental protection. There is no universally accepted definition of civil society, its meaning is said to be continually evolving.[12] For the purposes of this discussion it may be understood as the 'arena of social engagement which exists above the individual and below the state.'[13] This research has found that an important distinction is to be made between NGOs and other pressure groups. One commentator has offered a useful explanation of the distinction, stating that NGOs ought to be set apart from other groups within the environmental movement on the basis of their civic and political identity and their commitment to playing by the 'rules of representative politics'.[14] Of course the author accepts the multi-layered plurality within the NGO community as organisational structures and identities vary greatly, however for the purposes of this discussion a degree of generalisation when comparing large NGOs to grass roots groups is used. It has been said that international NGOs are now among the most visible players in global environmental politics.[15] Over the relatively short life-span of international environmental law, NGOs have used their soft power to influence law and policy development at the local, national and international level.[16] That NGOs sometimes

[12] Paul Wapner 'Politics Beyond the State: Environmental Activism and World Civic Politics' (1995) 47 (3) World Politics 312-313

[13] Ibid.

[14]There is a risk of over generalisation, it is accepted that smaller campaign groups also 'play by the rules' but their undeveloped or resourced infrastructure hampers their participation. Marissa A. Pagnani, 'Environmental NGOs and the Fate of the Traditional Nation-State' (2003) 15 Georgetown International Environmental Law Review 795

[15] Maryann K. Cusimano, 'The Rise of Transsovereign Problems' in Maryann K Cusimano (ed.), *Beyond Sovereignty: Issues for a Global Agenda* (2nd ed., Cengage Learning 2009) 46; Pagnani (n14) 807

[16] The status of NGOs has increased over time. Some organizations have gained a more prominent seat at the table at the international stage. At the 1972 Stockholm Conference NGOs were invited but housed separately across the road from politicians (Willetts, 1996) the physical distance matched the (lack of) respect for the campaigners in attendance, one

operate beyond national boundaries has led Dryzek to comment that 'we are witnessing the transnationalisation of civil society'.[17] NGOs have assumed a multi-faceted role which includes lobbying government and corporations,[18] acting as compliance monitors,[19] and embarking upon public interest litigation.

Acknowledging that a 'group difference' exists within civil society is vital to understanding the dynamics created by public participation. The interplay between individuals and associational organisations will be explored further in chapter four. Here the research examines the effect that State-organised participation has on interest groups. The previous chapter documented that the Aarhus regime has received a positive reception because it has

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commentator famously described the 300 or so attendees as 'a colourful collection of Woodstock grads, former Merry Pranksters and other assorted acid-heads, eco-freaks, save-the-whalers, doomsday mystics, poets and hangers-on.' (Wade, 1973 at 1) Attendance at the parallel NGO meeting to the Rio Conference in 1992 grew considerably to approximately 18,000 (Clarke et al., 1998 at 9). The role afforded to NGOs had both formalised and strengthened by the time of drafting the Aarhus Convention in 1998, NGOs were granted a semi-official status that meant they were consulted in both agenda setting and the negotiation process (Gemmill and Bamidele-Izu, 2002 at 6). The NGO experience at the 2009 Copenhagen Climate Change Conference (commonly known as COP-15) is considered to have been less successful due to poor planning on the part of the organisers and copious registration requirements which scholars have said led civil society to be disenfranchised at this meeting (Fisher, 2010 at 11).

Considerable commentary exists on the successes and failures of NGO participation at international environmental conferences. *See* Peter Willetts, 'From Stockholm to Rio and Beyond: The Impact of the Environmental Movement on the United Nations Consultative Arrangements for NGOs' (1996) Review of International Studies 22, 67; Wade Rowland, *The Plot to Save the World: The Life and Times of the Stockholm Conference on the Human Environment* (Clarke, Irwin and Co., 1973); Marie Ann Clark, Elisabeth J. Friedman, & Kathryn Hochstetler (1998) 'The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women' (1998) World Politics, 51(1), 1–35; Barbara Gemmill and Abimbola Bamidele-Izu, 'The Role of NGOs and Civil Society in Global Environmental Governance' (2002) in Daniel C. Esty and Maria H. Ivanova (eds.) *Global Environmental Governance: Options & Opportunities* (New Haven: Yale Center for Environmental Law and Policy 2002) 1; Dana R. Fisher 'COP-15 in Copenhagen: How the Merging of Movements Left Civil Society Out in the Cold' (2010) 10(2) Global Environmental Politics 11

[17] John S. Dryzek, 'Transnational Democracy' (1999) The Journal of Political Philosophy, Vol.7 (1),. 30- 51, 49

[18] Wapner gives the 1991 example of group action against McDonald's. NGOs including; Citizens Clearinghouse, Earth Action Network encouraged McDonald's Corporation to change its packaging materials from foam to paper. The groups had embarked on an innovative 'send-back' campaign which entailed members of the public posting their McDonald's packaging refuse to the corporation headquarters. Wapner (n12) 326-327

[19] On the role of NGO in monitoring implementation see Phillipe Sands, 'The Role of Non-Governmental Organisation in Enforcing International Environmental Law' in William.E. Butler (ed.), *Control Over Compliance With International Law* (Martinus Nijhoff Publishers, 1991) 61-68

increased formal opportunities for engagement. It has led in practice to the establishment of information channels, participatory opportunities and avenues for legal redress which has multiplied the activities of interest groups and their degree of involvement in the political sphere. However where participation is used by the State to repair the credibility of decision-making processes there is a danger that it will have a 'deleterious effect on civil society.'[20] This is because governmental constructs of public participation present groups with a choice, it is a choice which Dryzek believes leads to the 'velvet divorce' of civil society in which environmental groups choose to enter the sphere of the State or remain in the public realm.[21] Groups must decide whether participation in state-administered activities, despite the inherent taming effects, is still worthwhile.[22]

Engagement in formal participatory exercises has an organising effect for groups; they have become increasingly professionalised in order to enhance their status and influence over state practices such that some NGOs are now seen to be political institutions in their own right. The complexity of environmental matters imposes a number of 'unofficial' conditions for groups wishing to engage effectively.[23] Consequently many NGOs have developed a repertoire of tools in order to take full advantage of participatory opportunities, and this is potentially significant, in ways that will be examined below

In order to maximise their influence and gain recognition from governmental bodies some of the large NGOs such as Friends of the Earth and Greenpeace have transformed into highly developed corporation-like entities with infrastructures and hierarchies which mimic those of

[20] Mihaly (n9) 166

[21] Some extremist environmental groups reject the rules of 'playing politics' Timothy Doyle and Doug McEachern, Environment *and Politics* (2nd ed. Routledge 2001) 53, 85; John S. Dryzek, *Deliberative Democracy & Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000) 99

[22] Dryzek (n21) 112

[23] Patrick Kenis and Volker Schneider 'Policy Networks and Policy Analysis: Scrutinizing A New Analytical Toolbox' in Bernd Marin and Renate Mayntz (eds.), *Policy Networks: Empirical Evidence and Theoretical Considerations (Public Policy & Social Welfare)* (Westview Press 1991) 34–36

states.[24] These supra-national NGOs bear the hallmarks of statehood (with some obvious inherent limitations); they have adopted constitutions, clear delineated leadership and a top-down organisational structure in order to enhance their admittance to the political realm.[25] These organisations have the technical know-how of government processes and the advantage of economies of scale. Large NGOs appreciate the discrete avenues through which to exert coercive pressure on the various limbs of government that might be involved in a decision-making process.[26] The author contends that public participation suits large NGOs because of their relatively deep pockets. Financial clout means they have the capacity to dedicate man power not only to campaigns but also to decipher data and statistical trends contained in crude information systems. Financial power has led to the use of in-house counsel which has proven critical in the field of judicial review and environmental interest litigation.[27]

The arsenal of skills and experience outlined above has led to the furtherance of the interests of these particular organisations. This may seem to be an obvious point, but it masks an important question over the ability of large NGOs to adequately articulate public concerns relating to the Environment.[28] It might be said NGOs often benefit from an assumed moral high ground and impression that they act in the general public interest. For example the

[24] Also noted in Dryzek (n21) 97; and Pagnani (n14) 801

[25] This is in contrast to the bottom-up approach taken by grass roots organisations as noted in Doyle and McEachern (n21) 85; Dryzek (n17) 46-47

[26] Green has examined these trends at play in Canadian politics; he explained that in that particular jurisdiction there is a considerable degree of decentralisation, creating potentially eleven governments which need to be accessed, so the need for clear group organisation is particularly vital if a group wants to improve their chances of influence. Andrew J Green, 'Public Participation, Federalism and Environmental Law' (1998-1999) 6 Buffalo Environmental Law Journal 190-191. *See further* Douglas Williams 'Environmental Law and Democratic Legitimacy' (1994) 4 Duke Environmental Law & Policy Forum 8-9

[27] Dowie has reserved any flattery of the professionalised nature of these organisations which he describes as being led by lawyers and entrepreneurial M.B.A's who are more concerned with financing their operations than ostensibly claiming to campaign for the Environment. As discussed in Keith Schneider, 'Earth Day '95: Back to the Grass Roots' *The New York Times* (New York, 23 April 1995)

[28] The issue of representativeness of participants is explored in the next chapter of this thesis.

author considers there to be significantly divergent objectives between the international NGOs and the environmental justice movement (EJM). EJM is principally concerned with environmental ethics and the redistribution of environmental goods amongst communities where there are patterns of socio-economic disadvantage or racial prejudice.[29] However some of the larger NGOs are relatively homogenised in class terms in their membership and have a tendency for promoting single-issue agendas, for example the Worldwide Fund for Nature which advocate the protection of endangered species.[30] These agendas are not necessarily the priorities of EJM so unless these smaller groups are actively facilitated into the political realm their voices may go unheard.[31] Some commentators have been particularly critical of this situation, believing it to have added a layer to the political hierarchy.[32] Participation suits the administratively active, whilst possibly making inclusion harder for others. Early supporters of participation were keen to recognise the role of NGOs in environmental discourse,[33] but it may be argued that they did not consider how to ensure facilitation of and

[29] Dryzek explains these groups are usually made up of members who live areas affected by toxic waste or other environmental threats. Dryzek (n17) 46-47

[30] See Chapter four for analytical discussion of the demographics of the environmental movement. A pertinent example at this juncture is the conspicuous class complexion of the protest against the extension of Fulham Football Club ground, Craven Cottage (litigated as R(Berkley) v Secretary of State for the Environment, Transport and Regions and Fulham Football Club [2001] Env L R 16: see 'But how Green are their Valets?' *The Observer* (London, 27 February 2000)

[31] There are philosophical differences between environmental groups as some green quarters are unwilling to accept the existence of environmental racism, Shepard also points to financially motivated competition stating that large NGOs are often vying for the same limited funding opportunities as community groups which creates a very uneven playing field. Peggy M. Shepard 'Issues of Community Empowerment' (1993) 21 Fordham Urban Law Journal 755

[32] Banas has also cautioned about the dominance of NGOs to the detriment of building stronger and inclusive societies. Pawal Banas 'International Ideal and Local Practice – Access to Environmental Information and Local Government in Poland' (2010) 20 Environmental Policy and Governance 44. *See further* Mark Dowie, *Losing Ground: American Environmentalism at the Close of the 20th Century* (MIT Press 1996); Dryzek (n17) 46-47; Charlemagne 'Are NGOs Really More Democratic than Governments?' *The Economist* (25 June 2009); The Red Green Study Group has also identified that internally groups can suffer from a tyrannical organization in the sense that the hierarchies can be undemocratic. Red Green Study Group 'What on Earth is to be done?' (1995) 38-39

[33] Article 3(4) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450 mandates the recognition and support of associations, organization and groups promoting environmental protection. *See further* Bende Toth, 'Public Participation and Democracy

engagement by smaller actors, and as a result there is a risk that access has merely been extended to the powerful NGOs.[34]

What then is the impact of 'professionalised' participation on the political fate of the groups who do not match the advanced machinery of international NGOs? For community groups who lack developed infrastructure and resources they will meet higher transaction costs in order to form the 'critical mass' required to have real influence.[35] Scholars have suggested that remaining on the outside of the political realm does not necessarily lead to automatic powerlessness because there are other political networks to access.[36] This is a perspective to explore in relation to the *GM Nation* public debate, to see if the case study supports this concern. At this stage the point to mention is that networks which operate at the fringes of civil society and not those organised under the auspices of central government are unlikely to have the same potential for effective challenge of law and policy.

Public scrutiny of the State is part of the fabric of democracy and yet formal public participation may actually weaken traditional civil society engagement. Dismembering the environmental movement into 'included' and 'excluded' limbs is likely to promote hostility which makes it more difficult for government to execute policy. Groups admitted to the political realm are, it is suggested, dismissed by those who are not as having buckled to mainstream political conformity, surrendering their integrity in return for inclusion.

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in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' Journal of Land Resources & Environmental Law (2010) Vol. 30(2) 295-330, 320. For comment on the increasing importance of NGOs internationally Steve Charnovitz, 'Nongovernmental Organizations and International Law', (2006) 100 American Journal of International Law 348, 368

[34] Ole Pederson 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008-2009) 21 Georgetown International Environmental Law Review 73, 99; Walter A. Rosenbaum, 'The Paradoxes of Public Participation'(1976) 8 Administration & Society 355, 374; Jim Rossi, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making' 92 Northwestern University Law Review 173

[35] *Critical mass* is a term Green uses to describe the combination of financial resources, organisation and influence. Green (n26) 190-191

[36] Dryzek is one such scholar who considers all is not lost for less visible groups. Dryzek (n21) 113

Outsiders might believe that participation reduces the strength of opposition amongst actors because they are encouraged to conform in exchange for the potential for influence.[37] Some proponents of the need for governmental control, believe that state-organised participation is an antidote to rampant individualism and for persons who would have otherwise been recruited by anti-democratic demagogues.[38] This 'antidote' can placate the strength of civil society opposition to government action, smoothening the path to policy introduction. The degree of conformity expected of participant groups will differ depending on the political system in which it wishes to operate in,[39] however some scholars consider that:

> The constitutional structures of most West European governments have not produced actors within government with much incentive to encourage disclosure to groups and individuals who might make life difficult for them.[40]

[37] In his examination of the participation phenomenon and democracy , Hindess also considers that there are significant constraints imposed on the behaviour of participants . Barry Hindess, 'Representation Ingrafted upon Democracy?' (2000) 7(2) Democratization 10 - 11

[38] Michael Walzer 'Thick and Thin: Moral Argument at Home and Abroad' (Notre Dame Press, 1994) 189

[39] Dryzek (n21) 113

[40] Susan Rose-Ackerman and Achim A. Halpaap 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights' *The Law and Economics of Environmental Policy: A Symposium*, (September 2001) University College London, 7-8

3.1.2 Participation can deepen the Disillusionment and Cynicism towards Government: 'Seriously Flawed and Manifestly Inadequate', the UK Energy Review 2006

"Your new power station goes here- (what colour would you like the gates?)"[41]

If public participation is used as a cosmetic exercise, or as a stunt in public relations, it can prove counterproductive to the goals of enhancing government credibility and ease of administration (and also citizen engagement, to be returned to in chapter four). Where civil society considers that public participation is used as a short term political device there is a risk that …sincerely motivated citizens may become deeply frustrated, resentful and cynical about the whole political process and the holders of power.'[42]

The furore over the UK white paper *The Energy Challenge* is a good illustration of disenchantment stemming from seriously flawed and manifestly inadequate participatory practice.[43] In 2003, *Our Energy Future – Creating a Low Carbon Economy*[44] was published by the British government, outlining the key determinants for meeting future energy needs and responsibilities. The paper explained that a combination of factors involving economics and unresolved questions of waste disposal made nuclear power an unattractive option.[45] By 2006, with the publication of *The Energy Challenge,*[46] the Government had seemingly made a radical about-turn in policy and now suggested that nuclear power was an important source of low carbon electricity stating 'we have concluded that new nuclear power stations would

[41] Friends of the Earth quoted in Paul Thompson *Major infrastructure projects – where to now?* [2002] JPL (Occasional Papers No 30) 25 at 27

[42] Sewell and O' Riordan (n9)19

[43] The terms used by Sullivan J in R (on the Application of GreenPeace Limited) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) at 117

[44] DTI, *Our Energy Future- Creating a Low Carbon Economy* (White Paper, Cm 5761, 2003)

[45] On Nuclear power, the Government explained;

'its current economics make it an unattractive option for new, carbon-free generating capacity and there are also important issues of nuclear waste to be resolved. These issues include our legacy waste and continued waste arising from other sources.' DTI 2003 (n44) 12

[46] Department of Trade & Industry 'The Energy Challenge: The Energy Review (Report Cm 6887, 2006)

make a significant contribution to meeting our energy policy goals'.[47] The matter became one of interest to observers of participatory practice, as the Government had in its 2003 White Paper, guaranteed the 'fullest public consultation'[48] before a decision was taken on new-nuclear build.

In evidence before the Environmental Audit Committee, the then Secretary of State for Trade and Industry, Alan Johnson had said 'we are genuinely open-minded and there is no pre-determined outcome of this work'. The Committee would, however, later reflect that the review did not bear the hallmarks of a decision resulting from due process or accountability, furthermore that 'the process by which it is being conducted appears far less structured and transparent than the process by which the White Paper itself was reached.'[49] Jonathon Porritt, the Sustainable Development Commission Chairman, was also suspicious, remarking that the Government appeared to be 'hurtling along to a pre-judged conclusion.'[50] Peter Luff, the Chairman of the Select Committee on Trade and Industry commented that 'the review risks being seen as little more than a rubber-stamping exercise for a decision the Prime Minister took some time ago'.[51]

In R (on the Application of Greenpeace Limited) v Secretary of State for Trade and Industry[52] Greenpeace made an application for judicial review of *The Energy Challenge* on the basis that their reasonable expectations of a consultation as promised in 2003 had not

[47] DTI 2006 (n46) at 17

[48] DTI 2003 (n44) at 16 (point 1.24)

[49] House of Commons, 'Keeping the Lights On: Nuclear, Renewables and Climate Change, House of Commons Environmental Audit Committee', Sixth Report of Session 2005-06 March.(16 April 2006) at para 178

[50] Sustainable Development Commission, 'Nuclear Power Won't Fix It' (Press Release 5 March 2006)

[51] Mark Milner and Terry Macalister 'MPs warn Blair against hasty decision on energy strategy' (*The Guardian*, 10 July 2006). The Committee remarked that the process appeared to be a decision which had been made from the outset. House of Commons' Trade & Industry Committee Report 'New Nuclear? Examining the Issues' (6 September 2006) at 7 (point 9)

[52] [2007] EWHC 311 (Admin)

been met. Sullivan J. described the exercise as 'very seriously flawed' that 'something has gone clearly and radically wrong' and that as the proposals were of such importance the review was 'manifestly inadequate'.[53] It was held that information had been presented in such a way so as to disable anyone from providing an intelligent response, and that the issue of nuclear waste had been dealt with in a manner that was seriously misleading, ruling the Government had been procedurally unfair.[54]

The Greenpeace boycott and challenge illustrates the vulnerability of participative exercises to be used to authenticate pre-determined political objectives.[55] In his judgment, Sullivan J. reiterated that environmental consultations were 'no longer a privilege to be granted or withheld at will by the executive'[56] and he reminded the UK of its commitments by recalling the preamble of the Aarhus Convention.[57] Where a promise has been offered which implies that a particular approach will be taken, the State legally binds itself to honouring that expectation.[58] In this case, Greenpeace had a legitimate expectation of 'the fullest

[53] [2007] EWHC 311 (Admin) at 117

[54] [2007] EWHC 311 (Admin) at 116

[55] For further information on the boycott <http://www.greenpeace.org.uk/media/press-releases/governments-key-energy-review-declared-legally-flawed> accessed 24 January 2014. Other boycotts of State organised public deliberation processes have occurred by NGOs in New Zealand and Netherlands in GM food debate. Oral Evidence taken before EFRA Committee 22 October 2003, Malcolm Grant in response to Question 40

[56] [2007] EWHC 311 (Admin) at para 49

[57] Ibid at para 50. Specific attention was also drawn to Article 7 of the Aarhus Convention (n33) (Plans, Programmes and Policies 'To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'

[58] Greenpeace Judicial Review (n56) at para 47 on justiciability Sullivan J. referred to R v North & East Devon Health Authority, *ex parte* Coughlan [2001] QB 213, Lord Woolf MR at 108;

> It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

consultation' and the government had failed to present any mitigating evidence to explain why this had not taken place.[59]

[59] Greenpeace Judicial Review (n56) at para 48.

The damaging effects of 'sham' participation exercises can be repaired if the governmental body redeems itself. In 1993 Hampshire County Council conducted a public consultation on household waste management. The Council was heavily criticised for not taking the public's views into account in the later stages of the decision-making process. The Royal Committee on Environmental Pollution explained that the Council had dismissed the public's input as irrational 'NIMBY-ism' (NIMBY is a popularised acronym which stands for a 'not in my back yard' attitude). That same year the Council launched an extensive two year deliberative process with the public which was contemplated for its thoroughness as genuine consultation. Select Committee on Science and Technology, Third Report, Prepared 2000 at 5.8

3.2 *GM Nation?* A Public Debate on GM Crops in Britain (Part I)

The above discussion has highlighted a number of concerns with the State's application of public participation with the aim of securing administrative expediency. To briefly summarise, one of the main concerns is that public participation is easiest in practice when it is mediated by large organised corporate structures, or NGOs, whose involvement does not so much bridge the gap between state and citizen as widen it, by interposing a further tier of 'representation', and a further layer of 'bureaucracy'. Related to this is the potential for public participation – whether it involves the public directly or (as often) largely NGOs – to be treated by the government as a 'rubber stamping' exercise, rather than a genuine engagement with valued individuals and valuable opinions. The remainder of this chapter will explore some of these issues with reference to the experiences of the 2003 *GM Nation* public debate.

Background to the GM Nation Debate

Although the *GM Nation* debate has been quite extensively covered in the scholarly literature, its origins and general background requires scrutiny. Towards the end of the 1990s the UK announced a public engagement exercise in order to assess societal opinion towards genetically modified organisms (GMOs). The debate entitled *GM Nation* was depicted (surely correctly) as unprecedented with respect to the scale of the investigation and the participatory methods to be employed. GMOs as an issue divided (and continues to divide) public opinion, with the economic benefits of this novel technology figuring prominently among supporters of the GM industry. Trailing only the United States in terms of industry

leadership,[60] the UK's stakes in GM technology at the time were described as 'formidable'. [61] The government view was that the GM Industry had 'great potential to create wealth and jobs...exactly the sort of industry [to promote].'[62] Here, then, we have a scenario, like that alluded to above (e.g. in connection with Ecuador), where an environmentally risky activity is defended by the private and public sector to a greater or lesser extent on economic wealth-generating grounds.

The legal framework in relation to GM crops was provided by the Deliberate Release Directive 90/220/EEC[63] as implemented in the UK by the Environmental Protection Act 1990.[64] However GM policy was anything but uniform across the EU and the UK's actions can be distinguished on two counts. Firstly, some other European states were quick to invoke outright bans on commercial cultivation,[65] whereas the UK instead adopted a de facto moratorium, but simultaneously conducted and funded further scientific investigation through the Farm Scale Evaluations (FSEs). [66] As Maria Lee has explained, the UK was not in favour of a formal ban, however in 1999 it entered into a pact with SCIMAS (The Supply Chain Initiative on Modified Agricultural Crops) which halted commercial GM crop cultivation, pending the outcomes of further scientific investigation.[67] There is commentary that considers that it was a deliberate strategy to use the FSEs as a stalling mechanism in order to observe EU activities and also to find some solid scientific justification for the

[60] Select Committee on Environmental Audit (n3)

[61] The GM Industry generated 6% of the UK's employment market, and 7% of the National GDP. Cunningham, (Cabinet Office Minister and member of the Environmental Audit Select Committee) HC Deb, 17 December 1998

[62] Stephen Byers (Secretary of State for Trade and Industry), Speech to Biotechnology Industry Association, 21 January 1999

[63] As repealed by **Directive 2001/18/EC** of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms

[64] Part VI of the statute deals with GMOs

[65] As provided for by Article 16 of the Directive. Genewatch 'GM Crops: Timeline'

[66] Larry Reynolds and Bronislaw Szerszynski 'Representing *GM Nation?'* (2004)

[67] Maria Lee, 'The UK Regulatory System on GMOs: Expanding the Debate' in Michelle Everson and Ellen Vos (eds.), *Uncertain Risks Regulated* (Routledge, 2008) 165

moratorium.[68] The UK's framing of the issue as primarily scientific, is largely regarded by observers as having served to foster public suspicion.[69] The first form of public engagement in the GMO issue was in the shape of direct action. During the FSEs there were outbreaks of activist crop-trashing and direct action taken against supermarkets. This unrest politicised the issue and fuelled fear and suspicion, by this point the matter had ceased to be solely one of science.[70] The Government had committed to the FSEs but would eventually realise that wider political discussion was unavoidable. As it had initially prioritised the authority of science, the government was viewed as being in cahoots with the biotechnology industry, a label which was a stubborn hangover from the BSE crisis.

Prior to *GM Nation* there was very little scope to formally include public opinion in decision-making. It was the view of the Environment Audit Select Committee that that the regime was 'plainly inadequate'.[71] There was no method of subjecting applications to the rigour of public scrutiny. The only attempt to consider comments received by the public in relation to consent-for-release applications was conducted by the Advisory Committee on Releases to the Environment (ACRE)[72] the chief body responsible for advising the government on GMOs but it is difficult to identify what, if any, impact this had on ACRE's stance.[73] It was accepted that, in light of soft disasters such as BSE, new processes in GM decision-making

[68] Reynolds and Szerszynski (n66)

[69] Ibid

[70] Ibid

[71] These were the findings of the Select Committee on Environmental Audit (n3). The limited public-facing mechanisms prescribed under the Genetically Modified Organisms (Contained Use) Regulations 2000 required publication of all applications for consent to release GMOs in a local newspaper and also the maintenance of a public register to contain further details and status of the applications.

[72] Advisory Committee on Releases to the Environment

[73] Select Committee on Environmental Audit (n3)

had to be introduced in order to engage with the public.[74] Current mechanisms were skewed exclusively towards favouring scientific experts but it was clear that it was time for an environmental 'stakeholders' forum'. Even the Environment Minister recognised the lack of public dialogue as the 'single most important missing dimension.'[75] The exclusion of public or socio-cultural dimensions had encouraged the erosion of trust in government,[76] and this created the conditions for a 'perfect media storm' with a campaign of near hysterical opposition to government policy support for the GM industry and scepticism regarding the objectives of *GM Nation* in the national Press.[77]

As the institutional arrangements for GM collapsed, technocrats were urged by NGOs (if not so much perhaps individual members of the public) to make space for the growing number of interest groups that were being pulled into the discourse.[78] Public engagement methodology was therefore making in-roads in areas that were once the exclusive domain of professional science. This process has been described as the opening up of narrow technical rationality to wider socio-cultural rationality,[79] albeit that there are precedents for this, particularly in relation to the concern of governments in the 1970s and 1980s with the 'tolerability' of risks arising from nuclear power stations.[80] Maria Lee has explained the proliferation of participation exercises during this time to be reflective of a more important and lasting

[74] 'Ministers Unveil Plans to Dampen Unease Over GM Crops' *ENDS Report* October 1998, Issue No. 285

[75] Michael Meacher, 'Review of Biotechnology Regulation' *ENDS Report* December 1998, Issue No. 287

[76] The Science and Society Report 2000; Postnote, November 2002, Number 189, Parliamentary Office of Science & Technology

[77] Select Committee on Environmental Audit (n3)

[78] The full spectrum of interested stakeholders demanded a moratorium (including; English Nature; the RSPB, and activists Urban 75's 'Genetix' campaign).

[79] David Demeritt, Sarah Dyer, James D.A. Millington 'PEST or Panacea? Science, Democracy, and the Promise of Public Participation' 2009 Working Paper No. 10, King's College London; Frank Fischer, Reframing Public Policy: Discursive Politics and Deliberative Practices (Oxford University Press, 2003) 232

[80] Health & Safety Executive 'Tolerability of Risk from Nuclear Power Stations' (1992) HMSO

change within government policy- that being the emergence of risk management as opposed to mere risk assessment- where public engagement falls into the former and science the latter.[81]

Both government and industry had awoken to the reality that decisions that had been subjected to stakeholder input tended to be 'more effective and durable.'[82] Tying in discussions from the early part of this chapter, introducing methods of engagement are here aimed in practice at raising public confidence in executive processes as it gives the impression of openness and transparency.[83] The future of GM now rested not on scientific declarations of zero risk but solely on public acceptability, without which the Government support for a commercial market is perceived to have limited chance of being accepted by the public, and much prospect of being disrupted and frustrated.[84]

On the other hand, the very term 'manageability' (in the sense of 'risk management') is loaded with mixed messages that reveal tensions at the heart of an administrative expedience based justification for public participation. If the public perceive their scepticism to be a problem that requires 'management', there is the danger that the exercise will be seen as lacking a genuine respect for public concerns, and the goal of making policy in relation to GM products 'easier to stick' apt to be frustrated. In other words, the very perception that risks are to be managed can generate hostility and lead to public disengagement, so that the exercise is at best worthless, and at worst counterproductive (in terms of not saving time and money and entrenching opposition). This is developed below, as the case study proceeds.

[81] Lee (n67). *See also* 'No Sustainable Business without Public Debate' ENDS Report August 2000, Issue No. 307

[82] 'Communication of Risks Addressed in New Guide' ENDS Report August 2000, Issue No. 307

[83] Select Committee on Environmental Audit (n3)

[84] 'No Sustainable Business without Public Debate' (August 2000) 307 *ENDS Report*

3.2.1 Motivations for the Debate& the Creation of AEBC

It might be said that ACRE symbolised all that was defective with the pre-2003 structures. It had been established to serve as an impartial advisory body, however it drew heavy criticism for its members' links with the biotechnology industry.[85] The Chair at the time, Professor Beringer was a geneticist, with what critics considered an inherent sympathy for pushing the frontier is this new science, and thus someone who was incapable of giving impartial advice. This is partly explained as an inevitable by-product of increasing competition for research contracts amongst institutions that were progressively since the late 1990s forced to seek and secure funding from alternative sources- thus driving research and industry closer towards one another.[86] This also limited the availability of expertise which could be considered to be free from commercial 'exposure'. ACRE had failed to secure the political legitimacy that its creation had sought.[87] Even after attempts to diversify its membership the fact remained that it had lost the perception of independence and transparency.[88] Here we see an example of the uncomfortably close relationship (from a participation perspective) between industry and government.

In 1999, at the height of anti-GM sentiment, a report on the Advisory and Regulatory Framework for Biotechnology was published by the Cabinet Office.[89] This report underlined three main concerns in current regulatory and advisory arrangements. These were, first that:

[85] The criticisms relating to the Board's lack of impartiality were raised in the Watson case. 'Review of Biotechnology Regulation' (December 1998) 287 *ENDS Report*

[86] Select Committee on Environmental Audit (n3)

[87] Reynolds and Szerszynski (n66)

[88] Select Committee on Environmental Audit (n3). Michael Meacher (Environment Minister) is quoted in the report as having said that the need for ACRE's independence was to be 'above a peradventure of a doubt.' As a consequence the existing policy to recruit two members from the biotechnology sector was scrapped in order to preserve the integrity of the Board.

[89] A Report on the Advisory and Regulatory Framework for Biotechnology: Report from the Government's Review Office of Science and Technology, May 1999

> The arrangements were difficult for the public to understand; secondly that they did not reflect the broader ethical and environmental questions and views of potential stakeholders, and lastly that they were not sufficiently forward-looking for such a rapidly developing technology.[90]

In response to the report's findings, the Government established what they termed a 'strategic advisory structure' which had three visible limbs in the form of the Food Standards Agency, the Human Genetics Commission, and the Agriculture and Environmental Biotechnology Commission (AEBC). The formation of AEBC in 2000 was a response to the need for democratic paradigms that could articulate public values in scientific discourse.[91] The creation of this new body was a targeted attempt to overcome the gulf in public-facing transparency. Whilst AEBC were not given the equivalent powers that ACRE enjoyed they would occupy a more explicitly quasi-moralistic position advising the Government on public acceptability in particular the ethical and social implications of the path towards GM commercialisation.[92] The Commission's practices would reflect the mantra of openness (similar to the operations of the ACCC) with meetings to be held in public, and minutes to be published, it was said to be 'a new form of institutional, multi-stakeholder, consultative body'.[93]

Steele believes the selection of AEBC membership was an attempt to bring legitimacy to the Commission by seeming to represent all sides of the debate.[94] But the Chair was keen to

[90] Ibid.

[91] 'New Advisory Body Enters GM Maelstrom ' (June 2000) 305 *ENDS Report*

[92] ACRE had been given statutory authority under s124 of the Environmental Protection Act 1990 to advise the Government in respect of releases to the Environment. *See* Reynolds and Szerszynski (n66); Agriculture and Environment Biotechnology Commission (AEBC): About Us: Terms of Reference

[93] Lee (n67)

[94] Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving

stress that appointments had been made on the basis of an individual's credentials and that they were not spokespersons for particular constituencies and as such should not be considered as personifications of their respective representations.[95] Details of the twenty-strong membership were considered by Steele and also an ENDS Report article.[96] Professor of Land Economy Malcolm Grant, the Commission's chairman, was referred to as a 'a new star in the constellation dealing with GM'. He defended his own appointment before the House of Commons Select Committee on Agriculture, saying that 'I think my qualifications are self-evident, which is that I have no prior engagement in the debate, that I am not a scientist, that I bring no baggage to it.'[97] He described his attitude to GM as 'benevolent sceptical neutrality.'[98]

AEBC forged a new, distinct voice in their first report entitled Crops on Trial (September 2001) in which they suggested that the development of GM policy had been blighted by a lack of public participation.[99] The report also found that whilst the FSEs would produce data that would contribute to a decision on commercialisation, it could not in itself be determinative.[100] The trials also failed to deliver socio-ecological answers and had

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Approach' (2001) 21 Oxford Journal of Legal Studies 415; Lee (n67)

[95] Malcolm Grant, Minutes of Evidence, Select Committee on Agriculture, 27 June 2000

[96] *ENDS Report* (n91) the report described the formation of AEBC as a rather drawn out process. There was considerable disagreement over who should chair the new Commission. Julie Hill was put forward as a candidate for the role, but having been a member of ACRE she was sidelined in favour of Malcolm Grant who was seen as a break from the past. Steele (n94) has provided invaluable commentary on the choice of members. She states the anti-GM lobby were represented by 'Helen Browning, an organic farmer and Vice-President of the Soil Association, and Dr Sue Mayer, Director of Genewatch, Robin-Grove-White, who heads the Centre for the Study of Environmental Change at Lancaster University and is Chairman of Greenpeace UK, has written piercing analyses of the Government's mishandling of the biotechnology debate.' At the other end of the debate Pro-GM members included 'Dr Roger Turner of the British Society of Plant Breeders, and Dr Philip Dale of the John Inness Centre and another ACRE member. Among the others are farmers, consumer representatives, ecologists and ethicists, including Professor Michael Banner, also a member of the Royal Commission on Environmental Pollution. See also Lee (n67)

[97] Malcolm Grant, Minutes of Evidence, Select Committee on Agriculture, 27 June 2000

[98] *ENDS Report (n91)*

[99] AEBC, Crops on Trial (2001)

[100] Ibid.

exacerbated public scepticism.[101] In their report, AEBC criticised not only the 'unfortunate' choice of FSE trial locations, but it stressed that the absence of consultation and any real notification to the local people where the trials were taking place gave the impression that the process was a secretive imposition.[102]

The Commission's first item of business was to press the Government to expand its decision-making practices and include more interaction with a wider number of stakeholders. Grant believed that the public had been disenfranchised in the GM debate[103] and that '[s]ystematic and large-application' of engagement methods were required in order to remedy the shortcomings in institutional arrangements for handling the social dimension of the GM debate.[104] AEBC had made it clear that a public dialogue was needed in order to avert further 'destabilising conflicts' over GM technology.[105]

On 26 July 2002, having asked AEBC to advise on how participatory methods could be introduced to the GM policy discourse, the Government announced a public debate. The debate would see participant opinion taken into account 'as far as possible',[106] reflected in both the framing of the debate questions and the eventual decisions on GM policy.[107] The Environment Minister suggested that the 'Government [wanted] to provide people with the opportunity to debate the issues openly and reach their own judgements.'[108] There were

[101] 'Advisers Seek Innovative Public Debate for Next Steps on GM Crops' (September 2001) 320 *ENDS Report*

[102] Locations were based on specific scientific criteria. AEBC (n99)

[103] *ENDS Report (n91)*

[104] *ENDS Report* (n101)

[105] *ENDS Report* (n101)

[106] 'Role of Public Opinion in Decisions on GM Crops Still Unclear' (January 2002) 324 *ENDS Report*

[107] Select Committee on Environmental Audit (n3)

[108] 'Public to Choose Issues for GM Debate- Beckett' (Government News and Press Releases 26 July 2002)

repeated assurances that this would be an authentic and credible process, the Government delivered their message in the language of trust, promising open decision-making.[109]

Despite the optimistic hyperbole, commentators remained split on what the actual motivations behind the debate were, and a spectrum of differing expectations emerged which diminished governmental credibility. At the commencement of the process, the Secretary of State for the Environment, Food and Rural Affairs Margaret Beckett affirmed the Government's commitment to providing a written response to the debate[110] and that the findings would inform Government policy making. However it remained unclear just how influential the debate would be[111] and, to raise the deeper issue explored in this thesis, what ends the exercise was a means to. Early on, the Steering Board[112] had accepted that the integrity of *GM Nation* rested on providing honest and consistent messages on what the objectives were so that the public could form reasonable expectations of how their involvement would be represented and taken forward.[113]

But an in depth examination of statements during the debate period evidences that AEBC and DEFRA held divergent aims. Arguably the predominant motivator for AEBC was the value which lay in holding the debate.[114] This was an opportunity to lead a pioneering exercise which would trial new methods that might open up the traditional closed-practices of

[109] The government's choice of language was seen as a deliberate attempt to address AEBC's criticisms that existing mechanisms had lacked any avenues beyond specialist circles for harnessing genuine inclusive debate. ENDS Report (n106)

[110] Margaret Beckett MP - Keynote Speech at Green Alliance/Royal Society Event, 5 June 2003

[111] Sue Mayer, 'GM Nation? Engaging People in Real Debate? A GeneWatch UK Report on the Conduct of the UK's Public Debate on GM Crops and Food, June 2003' (October 2003)

[112] Steering Board included: Chairman Malcolm Grant, six other members of AEBC, a member of the Agricultural Biotechnology Council, an industry body, Claire Devereaux of the Five Year Freeze, Gary Kass of the Parliamentary Office of Science and Technology, and Lucien Hudson, Director of Communications at DEFRA.

[113] Documented in the Steering Board minutes, AEBC stated 'it would be important to be clear about whether the intention was to give people a voice in the debate or simply to establish their attitudes to GM.' GM Public Debate Steering Board, Notes of Main Discussion Points, 23 October 2002.

[114] Select Committee on EFRA Eighth Special Report 30 September 2002 Appendix AEBC at para 26

government decision making. In designing a framework of involvement, AEBC sought to build bridges between the technocrats and the public. [115] Drawing inspiration from the methods promoted by the 21st Royal Commission on Environmental Protection Report and also those trialled in other jurisdictions *GM Nation* claimed to deploy innovative participatory techniques in order to make space for the ethical and social considerations in science.[116] AEBC stated that *GM Nation* would be an important example of public participation in which the public were not simply passive recipients of arguments in support of Government policy but actively engaged in policy formation itself.[117] A carefully executed trial-run in this area would ensure a case for wider application of public participation in the future. [118]

AEBC were keen to maximise the use of participative methods as a means to stimulate knowledge building and encourage discourse driven by the public, whereas the Government may have been attracted to such mechanisms in order 'to win over a sceptical public to a new technology.'[119] Three years prior to *GM Nation* the Select Committee on Environmental Audit had said that the use of environmental stakeholder forums was a means of building consensus.[120] Following a decade of mistrust towards authority this exercise would, this expectation suggested, reveal the degree of public acceptability of commercial GM crop cultivation.[121]That is to say, the Government's intention was to build consensus around its prior policy or convert views which suggests that the Government had clear political

[115] Ibid.

[116] Public engagement exercises were also conducted in Denmark and the Netherlands. With the pledge of transparency underpinning its own protocol, Steering Board meetings were open to the public. Privacy would be granted for commercially sensitive items. Minutes of the First Meeting of the AEBC Sub Group on: Public Debate Steering Board: 13 September 2002; AEBC: Public Attitudes Group: A Debate About the Issue of Possible Commercialisation of GM Crops in the UK

[117] AEBC (n116)

[118] AEBC (n116)

[119] AEBC Steering Board (n163)

[120] Select Committee on Environmental Audit (n3)

[121] AEBC (n116)

objectives to fulfil. In other words the Government sought administrative expediency by diffusing conflict in the same way the Skeffington Committee had posited with the purpose of securing preferred policy outcomes.[122]

AEBC had expected that the debate would serve as a two-way exchange, rather than a conversion to the government cause; aiding government knowledge of how the public 'thinks' and augmenting participant understanding of GM issues.[123] It was seen as an inevitable outcome that if conducted properly, participants would develop a deeper knowledge of GM.[124] It appears that the AEBC were confident that even those who were not directly involved would still benefit by the proliferation of available information surrounding the debate.[125]

GM Nation was an opportunity to restore public faith in both science and the government at large. Re-establishing trust could be achieved by applying ethical political ideals to science and technology. The Prime Minister recalled these ideals as 'openness, transparency and honesty'.[126] However the expectations placed on science and the Government were not considered to be equally weighted. A public survey published in 2000 had shown that the majority of Britons felt positively about science, and that scientists acted in the best interest

[122] People and Planning Report of the Committee on Public Participation in Planning (Introduction by Peter Shapely, Routledge 2013)

[123] EFRA Select Committee (n114)

[124] Becket (n108) had said the Government shared AEBC's optimism that 'the public debate will help deepen public understanding of all the issues surrounding GM.'

[125] AEBC (n116)

[126] Speech to Royal Society in 2002 Tony Blair said

> The fundamental distinction is between a process where science tells us the facts and we make a judgment; and a process where a priori judgments effectively constrain scientific research. (Blair, 2002) In this context, it should be clear that the call for "robust and engaging dialogue with the public" is more about governing the public and "re-establish[ing] trust and confidence" than it is about governing science.
>
> Demeritt et al. (n79)

of the public.[127] However, government involvement in science and certainly promotion of new technology tainted this perception, raising questions of credibility and doubts over independence from corporate pressure.[128] A report published during this time had suggested that where risk is present, transparency in decision making is vital in order to reconcile the 'power struggle between expert and citizen'.[129]

We are now moving away from the optimistic drivers behind the debate toward political motivations for which there are several indicators that *GM Nation* was, from the Government's point of view, to be a surface level exercise aimed primarily at building public confidence in government. Considerable discussion surrounded the role of the FSEs within the context of the public inquiry. These trials would have provided comprehensive data in order to further inform the public analysis, however throughout 2001 and 2002 the Government seemed reluctant to combine the FSEs with *GM Nation.* [130] In July 2002 the Government adamantly redefined the line between the trials and the public exercise stating that they would:

> Ensure a clear separation between this overall dialogue and the much later decision-making process on the very specific issue of possible commercialisation of particular GM crops.[131]

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[127] The Office of Science and Technology in the Department of Trade and Industry commissioned the Welcome Trust to conduct a major survey of public attitudes towards science and technology;

British public has a positive attitude to science 8 out of 10 agree that Britain needs to develop science and technology to enhance its international competitiveness, two thirds of people think that scientists want to make life better for the average person.' Select Committee on EFRA Eight Special Report 30th September 2002 Appendix

[128] Select Committee on Environmental Audit (n3)

[129] ESRC Global Environmental Change Programme, Economic and Social Research Council (Great Britain) 2000, Risky Choices, Soft Disasters: Environmental Decision Making Under Certainty, University of Sussex; *ENDS Report* (n5)

[130] 'Whitehall Wrangle Over National Debate on GM Crops' ENDS Report April 2001 Issue No. 327

[131] Friends of the Earth 'Government Must Not Ignore Public over GM Crop Commercialization', 26 July 2002

Consequently the preliminary plan was to avoid the issue by running and concluding the public debate before the initial findings of the FSEs had been published.[132] The Executive might have feared that by presenting the FSE trials to public review it would commit itself to honouring public opinion.[133] Unsurprisingly this brought government officials into conflict with AEBC who felt the legitimacy of the whole process stood to be undermined by this crucial matter of timing. A decision was subsequently taken to incorporate parts of the FSE results into the public debate.[134]

This reluctance added nothing to the trust the public had in the sincerity of the process as an engagement with public concern, and it remained unclear how the Government would use the findings.[135] In the words of one Minister, it was nothing more than a 'PR offensive',[136] but that was not, of course, what the public were informed it would be. Be that as it may, there had been keen avoidance by the Government of any suggestion that the public's input would serve as a referendum on GM.[137] It was suggested that the only sense in which a public veto would operate, would be in the supermarkets, if consumers boycotted GM produce.[138]

[132] The plan was to publish the results of the public debate in June 2003. 'Terms of National GM Debate Leave Government's Advisers Unhappy' (August 2002) 331 *ENDS Report*

[133] Ibid.

[134] AEBC (n116)

[135] AEBC contacted the Government as late as March 2003 for reassurances that GM Nation was not a waste of time. 'Doubts over GM crops debate' (21 March 2003, *Financial Times* London); Mayer (n111)

[136] Friends of the Earth 'Government must Not Ignore Public over GM Crop Commercialization', 26 July 2002

[137] 'However, we caution that the most optimistic aspirations for such a debate that through it a clearer public consensus in favour or opposed to commercial planting will be formed are unlikely to be fulfilled.' And further at paragraph 26 'The public debate will not establish whether or not public opinion has swung for all time in favour or against the commercial planting of GM crops, and may not even give a clear view of the state of public opinion' EFRA Select Committee (n114) Appendix para 19

[138] Comments made in evidence by Elliot Morley, Minister for Environment and Agri-environment, and Lucian Hudson, Director of Communications, Department for Environment, Food and Rural Affairs. (In response to question 62 'so in other words, the public does not have a veto on this?')

Playing down the importance of the public voice, a government representative stated;

> [it] is helpful to the Government to engage in public opinion [but] it was never meant to be a definitive view or a referendum.[139]

Whilst it might have been clear that the public's conclusions would not be decisive, the extent that the public's view would be taken into consideration remained ambiguous. Recalling the European legal framework, AEBC stressed that it would be Ministers that would make the final decisions on commercial crop cultivation,[140] but this did not discount the need for the Government to effectively manage public expectations. The Government failed to satisfactorily explain how far participant opinions would be taken into consideration.[141]

3.2.2 Participatory Techniques Used in *GM Nation*

The *GM Nation* Steering Board suggested that the success of the debate ought to be measured by the depth of engagement with the public,[142] so the participatory mechanisms used in the debate warrant consideration, to understand how the AEBC pursued this objective.

Framework Discussion Workshops (FDWs)

The public debate events began in November 2002 with nine FDWs which took place in Bromsgrove, Edinburgh, County Down, Ludlow, Manchester, North London, Norwich, Reading, and Swansea.[143] These were organised by Corr Willbourn Research and

[139] Comments made in evidence by Elliot Morley, Minister for Environment and Agri-environment, and Lucian Hudson, Director of Communications, Department for Environment, Food and Rural Affairs. (in response to question 62 'so in other words, the public does not have a veto on this?')

[140] AEBC (n116)

[141] AEBC (n116)

[142] As documented in the GM Public Debate Steering Board- Minutes of Second Meeting 3 October 2002

[143] Department of Trade and Industry 'GM Nation? The Findings of the Public Debate' (2003) 13

Development. The participants met over the course of a fortnight and were given full authority to shape their own discussions,[144] the aim being both the discovery of public attitudes, and the issues which emerged as specific points of concern. The findings of these initial FDWs helped frame the other public events,[145] the stimulus materials and the narrow-but-deep feedback forms.[146] This approach was recognised by the debate Steering Board as an important symbolic departure from traditional top-down market research practices where the experts tend to design the process. In *GM Nation* the participants of the FDWs influenced how the exercise would be carried out.[147]

The majority of *GM Nation* activity centred around the 'open public meetings' which were held during a six week period between 3 June 2003 until 18 July 2003. There was also an interactive website which increased the number of respondents that took part in the overall exercise.

Tier 1 Nation Meetings:

Over 1,000 people are said to have attended these six meetings three of which took place over a course of a ten-day period in England (Birmingham, Harrogate, Taunton), one in Wales (Swansea), one in Scotland (Glasgow) and one in Northern Ireland (Belfast).[148] These were the first run of events in the schedule. The purpose of these meetings were to explain the objective of the GM inquiry and also to hold smaller break-out roundtable groups to begin a basic examination of social attitudes using stimulus materials.[149]

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[144] Reynolds and Szerszynski (n66)

[145] Note of meeting between public debate steering board members and COI Communications 23 September 2002

[146] Reynolds and Szerszynski (n66)

[147] (n145)

[148] Gene Rowe, Tom Horlick-Jones, John Walls, Wouter Poortinga and Nick Pidgeon 'Analysis of a Normative Framework for Evaluating Public Engagement Exercises: Reliability, Validity and Limitations' (2008) Public Understanding of Science 17, 419

[149] It emerged that a high proportion of those who attended these meetings held established views on GM technology. Grant later explained the decision not to vet participants at these meetings, as discussed in chapter four. Grant (n55) in response to

Tier 2 Local Meetings:

Local authorities organised around 40 large scale county-level meetings which ran from 16 June until 18 July 2003. The AEBC Steering Board provided local councils with technical and facilitative support.[150] The costs allocated to Tier 1 meetings had determined the number of Tier 2 meetings that could take place.[151] Expert witnesses also attended these meetings. These were debate-led discussions framed around a specific motion, these moot points had been selected by AEBC.[152]

Tier 3 Group-led Meetings:

These smaller meetings took place in around 630 locations. They were run by and in different organisations including local councils, society groups, workplaces, universities, trade unions, markets and agricultural shows.[153]

Narrow-But-Deep Strand

Whilst the tier meetings were carried out, individuals were selected at random to take part in closed focus group meetings which ran parallel to the other public events. These members of the public were said to have had no specific connection to the GM subject.[154] The groups met on two separate occasions which gave members a chance to explore issues in greater depth.[155] The purpose of this element of the exercise was to act as a control to ensure that the whole

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question 1 <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvfru/uc1220-i/uc122002.htm > accessed 10 November 2013; Reynolds and Szerszynski (n66)

[150] Memo on Revised Detailed Budget Commentary from Simon Hughes, Head of Live Events, COI Communications to GM Public Debate Technical Advisory Group , 12 February 2003

[151] AEBC Update on Work of GM Public Debate Steering Board 3 March 2003

[152] Reynolds and Szerszynski (n66)

[153] COI Memo (n50)

[154] Reynolds and Szerszynski (n66)

[155] Understanding Risk Team, 'A Deliberative Future? An Independent Evaluation of the *GM Nation?* Public Debate about the Possible Commercialisation of Transgenic Crops in Britain 2003'(2004)

process could be as objective, or at least as representative of the public, as possible (this issue will be discussed in more detail in the next chapter). Due to budgetary constraints this strand ran as focus groups rather than as citizens' forums.[156] Although it may not have been AEBC's preferred methodology, the nature and quality of results offered were considered reasonably effective in light of cost and time parameters.[157]

Website

Those who could not attend the tiered public meetings, were invited to provide their responses on an interactive website which contained a library of resources. The DTI results indicated that there were over 24,000 unique visitors to the website (2.9 million hits overall), this was in addition to over 1,000 independent responses (submitted via email or by post).[158] In terms of statistical outcomes the Steering Board estimated that 675 meetings in total had been conducted,[159] in addition to this approximately 37,000 feedback forms were returned (these forms had been posted online and distributed at all meetings).[160]

[156] GM Public Debate Steering Board, Minutes of Seventh Meeting, 21 January 2003

[157] Government Response to the Royal Commission on Environmental Pollution's Twenty-First Report-Setting Environmental Standards at 9.81

[158] DTI Findings of GM Nation (n143) 15

[159] This number is based on COI Communications data which accounts for expressions of intent to hold a meeting, the Board recognised that it was not certain to confirm that every event that actually took place. Briefing Note following meeting of GM Debate Steering Board Agreeing Plans for National GM Debate.

[160] Reynolds and Szerszynski (n66)

3.2.3 Public Attitudes: Findings of the Debate: Cynicism and Distrust

The collective findings from *GM Nation* were published in September 2003 and formed, in the opinion of the Steering Group and others involved, a clear message to the Government regarding the public unease towards GMOs.

The general conclusions based around the scientific, economic, social and ethical issues were more or less mirrored by the narrow-but-deep focus groups.[161] The public had welcomed the opportunity to engage with the issue but felt further research and information was needed to enable them to make sound conclusions.[162] Members of the narrow-but-deep groups also felt they did not possess sufficient subject knowledge in order to express an opinion.[163] However the resources which had been used as stimulus had not led to a change of opinion.[164]Amongst the key findings it had emerged that as participants interacted further with the issues, their concerns toward GMOs intensified and their attitudes hardened.[165] During the submission of his oral evidence before the Commons Select Committee which sought to sum up the findings of the process, Grant said it was 'a legitimate finding, the more people had been engaged in the issues previously the more likely they were to oppose them.'[166]

There was strong opposition towards early commercialisation of GM crops. Over half of those who made up the narrow-but-deep groups 'never [wanted] to see GM crops grown in

[161] DTI Findings of GM Nation (n143)42. The conclusions were similar to the study conducted by the Food Standards Agency (the FSA ran a series of citizen juries) which was published on 17 July 2003. Sue Mayer, 'Avoiding the Difficult Issues: A GeneWatch UK Report on the Government's Response to the GM Nation? Public Debate' (June 2004)

[162] Mayer (n161)

[163] DTI Findings of GM Nation (n143)6

[164] DTI Findings of GM Nation (n143)27

[165] 91% of those surveyed were against, cautious or hostile towards GM cultivation. 66% had no opinion either way at the start of the investigations. Over the course of the weekend residential, 24% had an opinion and this was always hostile towards GM technology. Suggesting more knowledge fuelled more caution towards GM. DTI Findings of GM Nation (n143)6

[166] Grant (n55) in response to question 13

the United Kingdom under any circumstances',[167] and there was criticism from all tiers that the scientific and economic aspects of the GM dialogue were not part of the material for public review.[168] Whilst it is outside the scope of this research, the findings of the Strategy Unit's review on the costs and economic benefits of GM, which were published in July 2003, supported societal attitudes in that 'there was little evidence that the current generation of GM crops would bring much, if any, economic benefit to the UK.'[169] The report also stressed that the marketability of GM produce would be almost entirely dependent on public acceptance.[170] However criticisms were also made of the manner of presenting the findings of cultural attitudes. The Understanding Risk team suggested that although there was overwhelming concern about the safety of GMOs, the extent of public opposition had been overstated in the final report.[171] Here, therefore, is a suggestion of a degree of bias against the Government which highlights that the 'legitimacy' and impartiality of independent bodies overseeing public participation cannot be assumed.

Indeed, *GM Nation* is an especially useful case study for the purposes of this doctoral research not only because it demonstrates the real world limitations of participation, but also for its ability to link the practical shortcomings back to the theoretical barriers established at the beginning of this chapter. If we regard the findings of public opinion on the matter of

[167] DTI Findings of GM Nation (n143)6

[168] Mayer (n161)

[169] With respect to the GM dialogue, the economic review also found weaknesses in the cost benefit model used for this purpose 'because of the impossibility of dealing with incommensurable factors and the inevitable marginalising in the analysis of some important concerns' GM Public Debate Steering Board- Minutes of Second Meeting 3 October 2002; Mayer (n161)

[170] Mayer 2004 (n161). Chapter five examines the extent to which public participation can be regarded as capable of producing better decisions for the Environment. Participative decision-making which is designed to encourage individuals to become active citizens facilitates them to further their own personal interests. The extent to which this means that purely ecological arguments are overlooked is discussed in the next chapter.

[171] Mayer 2004 (n161).

GM as the micro-level outcomes, there are also macro-level observations which reaffirm the difficult relationship between state and citizen. Considerable suspicion stemmed from the tier meetings and the narrow-but-deep focus groups towards possible undisclosed economic pressures which were driving the Government towards this technology.[172] There was 'widespread mistrust of government and multi-national companies,'[173] and significant doubt surrounded the ability, or rather willingness of corporations to act in the public best interest.[174] Some participants believed that these economic giants held sufficient clout to make their profit-driven goals a reality.[175]

A large number of participants believed in the presence, often unspoken, of an external economic force, consequently they doubted their own personal influence on proceedings.[176] GeneWatch, a green interest group and spectator of the *GM Nation* process, collected feedback from participants after they had finished their attendance at the live events. According to the data collected, a frequent response indicated high levels of cynicism doubting what, if any, impact of their contribution would have.[177] This denotes that people began the process with a degree of disillusionment which was then exacerbated. Even in the early Framework Discussion Workshops (which served as experimental trials to guide the plan for the actual exercise), participants were already exhibiting six core attitudes 'passivity, progress, suspicion, possibilities and anxiety.'[178] The DTI had also aligned a set of adjectives to illustrate the mood towards GM, 'caution and doubt, through suspicion and scepticism, to

[172] DTI Findings of GM Nation (n143)42

[173] Mayer (n161)

[174] Mayer (n161)

[175] DTI Findings of GM Nation (n143)42-43

[176] DTI Findings of GM Nation (n143)6

[177] Mayer (n161)

[178] Observations of Corr Willbourn. GM Public Debate Steering Board Minutes of Sixth Meeting 17 December 2002

hostility and rejection.'[179] Those who believed things were less than they seemed searched for examples of manifestations of this government manipulation. Any organisational inadequacies were quickly identified and viewed as evidence of bad faith.[180] Mayer suggests the rushed timescale for the events, the role of the COI Communications, and the overall budget (all of which will be considered below) and even the stimulus materials were, to some, damning evidence of foul play, in the words of one 'I thought the video, booklet and questionnaire were shallow and designed to confuse'.[181]

Disappointingly from the perspective of administrative expedience, mistrust in government was an overriding finding of the consultation. Critics saw the activity as nothing more than window-dressing and an elaborate publicity stunt.[182] According to the DTI this view was so prevalent that AEBC and other organising bodies 'suffered a degree of guilt by association'.[183] However the outcomes of *GM Nation* provide a much larger reflection of modern Britain and the relationship between its people and the State. It is possible that the Government's over reliance on the science behind GM acted as a partial catalyst which quickened the rate of disillusionment. If the purpose of public participation is to bridge the gulf between the technocrats and society, the Executive's preference was certainly positioned with science. Some were left with the impression that the Government did not value society and science equally, they failed to acknowledge real societal concerns about future uncertainties and long term health risks. When faced with public anxieties of this sort, the Government simply

[179] DTI Findings of GM Nation (n143)51

[180] Mayer (n161)

[181] Mayer (n161)

[182] DTI Findings of GM Nation (n143)51

[183] DTI Findings of GM Nation (n143)51

dismissed them by placing its confidence in science, even though the data did not resolve these matters.[184]

Participants likened their weakening faith in the State as analogous to other decisions which have been widely regarded as controversial and unpopular. The BSE crisis was mentioned frequently as having diminished the viability of government to act as a defender of the public's interests, that the Executive were in cahoots with commercial interests, that the BSE crisis had been a lesson that our understanding of science is never complete, and that confidence can be misplaced.[185] Participants also viewed the GM issue as akin to the furore surrounding the decision to invade Iraq in 2003.[186]

These inferences are particularly important to this investigation in terms of the public participation, indeed the public themselves have demonstrated through their involvement in *GM Nation*, that they are well aware of the existence of an 'economic, political and military Power Elite' that is operating an oligopoly of control and domination.[187]

3.2.4 Evaluating the Administration of *GM Nation*

The final part of this chapter's examination of the *GM Nation* case study as an example of the governmental limitations of public participation is the evaluation of the organisation behind the event. The criticisms that began in the planning stages continued to cast a shadow over

[184] DTI Findings of GM Nation (n143)7

[185] DTI Findings of GM Nation (n143)42-43

[186] DTI Findings of GM Nation (n143)51 In fact the public had questioned the Government decision to hold a public debate on GM and not on the war in Iraq- this increased suspicion that the process was being used as a smokescreen for a decision already taken (at 41). Cook et al (n6) explained that GM crops 'symbolised the illusory nature of democracy in Britain, a perception which they regarded as only reinforced by the experience of the war in Iraq'.

[187] As termed by C Wright Mills in the *Power Elite* (Oxford University Press 1956); Cook et al. (n6)

the execution of the live debates. Reynolds and Szerszynski list some of the major criticisms as including:

i. Insufficient time and money;
ii. Government statements undermined credibility;
iii. 'Bland' stimulus materials which had contained unsupported arguments;
iv. Inappropriate selection of engagement methods which did not facilitate genuine deliberation and argumentation;
v. Open nature of some meetings had allowed 'hijacking' by anti-GM networks.[188]

The evaluation of *GM Nation* will continue into the next chapter which examines societal vulnerabilities. As this chapter is framed around the relationship between participation and the State, the roles of AEBC and the COI as well as organisational limitations warrant consideration in this part of the research.

3.2.5 The COI

According to the COI website since 1946 they have been tasked to work in partnership with government to help achieve public sector policy objectives efficiently and effectively- and' to drive best practice and cost effectiveness in the way citizens are informed, engaged and influenced about issues that affect their lives'.[189] But DEFRA's election (without the consultation of the Steering Board) of the COI in September 2002 as primary contractor for the events came under fire on two fronts, doubts related to their competency and sufficient independence from the Executive. The COI's operational costs were far lower than their

[188] Reynolds and Szerszynski (n66)

[189] COI, *About us*

competitors,[190] this made them an attractive option to the Government, by using the COI for the consultation exercise the Government had removed the need to spend time and money on a process to invite outside tenders in accordance with EU regulations.[191] In opting for the easy route the Government under assessed the effect that the COI's involvement would have on the credibility of the process as independent and transparent. One EFRA panel member wondered whether 'what had started out as an attempt to be at arm's length from government had finished with falling into the arms of government.' [192] The COI attended a number of private meetings with DEFRA without the presence of any AEBC Steering Board members. This furthering the perception of a dangerous conflict of interest.[193] To sceptics, the COI seemed a convenient channel (or rather a Trojan horse) through which a pre-determined agenda could be secured, reinforcing the impression that the Government had already taken a decision on GMOs.

The COI drew further complaints on the grounds of mismanagement and incompetency. Their experience had not, it appeared, equipped them with the necessary skill and expertise required of the occasion, contrary to expectations.[194] They were unversed in participatory practices relating to transparency that the Steering Board aspired to, according to Grant, the COI was on a 'significant learning curve'.[195] In addition, the documents prepared for the

[190] Grant (n55) in response to question 25

[191] Professor Grant explained to the Select Committee that COI Communications enjoyed a 'special registered status under EU procurement law which meant that we could through them procure the subcontractors to do the various bits of work that we wanted without having to go through a lengthy OJEC process and so that also weighed with us' Grant (n55) in response to question 25

[192] For David Taylor of the EFRA Committee, the cynicism was understandable in light of careless statements, including those made by the Prime Minister. Taylor paraphrased Brown who had remarked: 'It is important that we do not reach a premature conclusion, but actually I am quite convinced by the evidence myself.' Grant (n55) question 25 by David Taylor

[193] AEBC Steering Board Meeting Minutes (n166)

[194] Mayer (n161)

[195] Grant (n55) in response to question 28

public events were described as disembodied and fragmented, [196] even inaccurate in places. Participants felt the materials were absent of context which made them particularly difficult to follow.[197]

GM Nation was beleaguered by financial problems from the outset.[198] The original budgetary allocation was a mere £250,000 which concerned commentators that this would seriously constrain the project and reduce AEBC's choice of participatory techniques.[199] Grant had recommended at least £1.25 million in order to plan and carry out an enhanced debate, this figure was reflective of comparative studies which had been conducted in other countries.[200] In response to pressure, Margaret Beckett wrote to AEBC in January 2003 to advise that the budget had been doubled to £500,000 in addition to the COI's fees.[201] This new sum by no means remedied the programme's financial limitations, it was still by all reasonable standards unsatisfactory, and meant that preparation of stimulus materials and actual overheads for the public meetings were given priority to the detriment of advertising.[202] In Grant's own words the publicity budget was 'running on empty'.[203]

How should the Government's obvious reluctance to adequately fund this event be interpreted? Financial limitations led AEBC to concentrate efforts on to the Tier 1 meetings,

[196] Individual opinions had misleadingly been allocated the same relevant importance as internationally recognised sources.

[197]GM Public Debate Steering Board, Minutes of the Tenth Meeting, 20 March 2003

[198] The COI Communications informed the Steering Board that the budget allocated was insufficient on 20 November 2002.

[199] *ENDS* Report (n91) 'This will constrain its ability to hold extensive public meetings and, in particular, to experiment with mechanism such as citizen's juries for engaging the public in the GM debate.'

[200] Grant (n55) in response to question 15.

'New Zealand had a Royal Commission and four members who by the end of the period were working full time on this with a large secretariat and their total cost was around £2 million. Likewise with the Netherlands exercise.' In his response to question 40 Grant added that these programmes had also experienced 'fragmentation of stakeholders' a number of the environmental NGOs walked out as they no longer felt committed to the process.

[201]GM Public Debate Steering Board, Minutes of Ninth Meeting, 20 February 2003

[202]Due to the small fund allocation for advertising, the project was unable to draw in diverse crowds.

[203]Grant (n55) in response to question 17

it relied on promotion by regional radio and the support of voluntary organisations to help deliver Tier 2 events.[204] Juxtaposed against approximately £5 million which had been spent on GMO research and development for the FSE trials,[205] the money allocated to *GM Nation* can only be regarded as insignificant.[206]

It is difficult to see how the Government intended to give effect to their assurance that 'public opinion would be taken as far as possible,' in light of a string of organisational failings. An alliance of interest groups lobbied the Government on the eve of the first round of public meetings to express their concerns at the poor resource allocation.[207] Time is an important resource which would have ensured proper advanced planning and would have supported the trialling of new participative methods which can be time consuming. As there was no effective budget for advertising, scheduling meetings to take place within a few days of each other also removed the ability to raise awareness. The public events were to take place within six weeks, a duration which observers knew would severely disable their efforts, and was well below the three month recommended guidelines. Grant explained:

> We had not wished for six weeks but we were working, however, against an iron cast requirement from the Government that we should report by the end of September and our timing came back from there. In my view the right time would have been about three months.'[208]

Some regional meetings took place in the middle of the afternoon so presumably on those

[204] Malcolm Grant's letter to Margaret Beckett 30 January 2003; COI Memo (n200)

[205] Grant (n55) in response to question 20

[206] Grant (n55) in response to question 20 - 23. Grant said 'I have to say were you to ask me would I do it again I would say absolutely not. With those constraints I would not do it' (in response to question 15).

[207] The Consumers' Association, Friends of the Earth, Greenpeace, National Trust, RSPB, Sustain, National Federation of Women's Institutes, and UNISON. 'Public 'Needs Voice' on GM Issue' (BBC News Online, 2nd June 2003); Mayer (n161). Beckett conceded to a minor extension of time, initially requiring the report to be delivered by June 2003. However on 18 February 2003 she agreed to accept the report by September instead.

[208] Grant (n55) in response to question 46

occasions the Government were not expecting working people to attend (representativeness of

participants is discussed in chapter four).[209]

Whether it was poor planning or inexperience that drove the Government to stipulate such an onerous turn-around period, it certainly seemed as if the timing had been 'fixed to minimise difficulties' for the Government.[210] This limited their responsibility to be tied to the outcomes of the public debate. The separation of the three limbs (FSEs, Economic review and *GM Nation*), seem to have been a calculated decision. The Economic Review was published in the final week of the public dialogue which of course meant it was not going to be subject to public scrutiny. Nor was the Science Review which was published the week after the consultation had finished.[211] Preventing the public from evaluating the findings of these concurrent and related studies suggests that the Government was not interested in supporting a meaningful exchange or evidence-based dialogue. [212]

As already explained, AEBC was installed to fulfil a specific and specialist function of an independent advisory committee. Observers considered that freedom and resources would prove key to the Steering Board's ability to positively guide the process. [213] However the Government instead chose to distance themselves from this new body effectively reducing

[209] Ian Sample 'The man in the street gets his forum on GM food - but decides to stay in the street' *The Guardian* (London, 4 June 2003). Sample mockingly remarked that the Birmingham meeting 'is scheduled to start at the helpful time for local working people of 3pm.'

[210] *ENDS Report* (n132)

[211] The report 'Field Work: Weighing up the Costs and Benefits of GM Crops' was published on 11 July 2003. The GM Science Review Panel was published on 21 July 2003.
Minutes of the Public Debate Steering Board 15 April 2003 (at para 5); Mayer (n161)

[212] Interestingly the Strategy Unit's report had indicated that there were no economic benefits of growing GM crops in the UK. Mayer (n161)

[213] *ENDS* Report (n91) in reference to Professor Grove-White (writing in *The Guardian*)

the Board's potential to exert any influence. Recounting their experience, Grant mocked the amount of recognition the Government had placed on AEBC's involvement, joking

> So great is our independence from the ministers that they have not yet written to thank the Steering Board for its work in the debate…they are not gentlemen.'[214]

Grant offered some explanation for the Government's behaviour, noting that the domestic schedule was increasingly falling out of sync with the European agenda which was developing far more rapidly as the European Union had begun deliberating the feasibility of consents for the deliberate release of GMOs into the Environment.[215]

3.2.6 Interpreting the Choice of Participatory Mechanisms

We have already examined the government imposed limitations which affected AEBC's exercise; the modest budget of £250,000, the role of the COI and the onerous time scales within which the exercise had to be conducted. Consequently an evaluation of the participatory methods adopted begins from a position of accepted imperfection. AEBC set out to design an imaginative series of events but they were also aware that there were expectations to deliver value for money.[216] Whilst they had desired to conduct a more in-depth participatory exercise which would have elicited more accurate results, these plans had to be curtailed because of the government's modest extension of resources. The respected evaluation of *GM Nation* conducted by the multi-institute Understanding Risk team also supports the issues identified by this research.[217]

[214] Grant (n55) in response to question 33

[215] Grant (n55) in response to question 31

[216] AEBC (n116)

[217] Understanding Risk, 'A Deliberative Future? An Independent Evaluation of the GM Nation Public Debate about the Possible Commercialisation of Transgenic Crops in Britain' Working Paper (February 2004)

As explained in chapter one, it is beyond the scope of this doctorate to consider in depth the consequence of methodological choice, but it is readily accepted by scholars in the field that there exists a spread of participatory techniques which afford differing levels of citizen empowerment and influence. The choice of mechanism used depends on availability of resources and organiser motivation. All engagement exercises which are heralded as truly deliberative must be properly supported in order to provide the public with real influence. Otherwise Arnstein believes 'it can turn out to be a new Mickey Mouse game for the have-nots by allowing them to gain control but not allowing them sufficient…resources to succeed.'[218] Methodology becomes more expensive as the ladder is climbed; this creates a pressure for techniques to earn their keep in order to justify the added resource allocation.[219] How best should *GM Nation* be understood in light of Arnstein's ladder?

As a first step in the discussion of this, Lee explains (as is quite clear from the overview above) that there was considerable confusion in the wake of proceedings as observers debated what the purpose of the process had been.[220] Furthermore, more specifically, researchers at the University of Nottingham were critical of the choice of questions that had been used in the narrow-but-deep focus groups which they consider to have been leading in nature. [221] The greatest praise for the process has positioned it as; 'a unique, concrete constellation of social forces which is highly revealing about the living body politic of the UK and its

[218] Sherry Arnstein, 'A Ladder of Citizen Participation' Journal of the American Planning Institute (July 1969) Vol. 35(4) 216-224.

[219] Thomas Beierle, 'Using Social Goals to Evaluate Public Participation in Environmental Decisions' (1999) Policy Studies Review 16(3/4) 87

[220] Lee (n67)

[221] The researched also believed that short quantitative surveys ought to have been incorporated as they might have indicated opinions less opposed to GM. The decision not to use this technique was deliberately taken by AEBC, the intention to avoid using questions which required simple yes/no responses was thought to secure more detailed data for evaluation. In this way the responses elicited would give a better understanding of why opinions were given. Mayer (n161).

response to new technologies.'[222] However arguably it is more apt to use AEBC's description of GM Nation as a 'methodological lesson and learning exercise.'[223]

3.3 Conclusion

In the period leading up to *GM Nation*, ministers had sought to raise an air of optimism that it would be public debate like no other, raising the value of citizen opinion and providing a new kind of participatory decision-making process which modified, if not out rightly replaced, the more class representative government model. Reflecting on how matters had developed at the close of the GM dialogue, there is insufficient evidence to definitively conclude the public forced the hand of policy makers. For the time being, because of the strong public rejection towards early commercialisation (and because the Economic review had played down the financial benefits of GM), there is a reduced appeal to use the UK as a GM commercial fairground. At the conclusion of the process, Beckett described it as 'precautionary decision-making at its best' – which suggests that it was the FSEs and Science Review, not public opinion, which had the most influence in slowly the government down.[224]

An evaluation of the exercise has exposed a litany of administrative shortcomings, but some critics who were initially opposed to the process are reluctant to fully dismiss the value of the process because it set the government on an experimental learning curve of participation. As

[222] 'What it revealed was both the hybridity involved in the politics of GM in the United Kingdom, and the stake that the state had in purifying and thereby seeking to make politically manageable that hybridity. If the publics of GM were largely multiple, specialised publics entangled in hybrid networks, the battle over GM in the UK was in part a battle to turn that 'multitude' into a more manageable 'people' – and one that was only partially successful. When placed in the wider cultural and historical context of the ontological politics taking place over GM, the complex performance that was *GM Nation?* can be seen as a contingent convergence of particular historical forces.' Reynolds and Szerszynski (n66)

[223] AEBC (n116)

[224] Mayer (n161).

Mayer explains, 'limitations in methodology and resources provide useful lessons for the conduct of future debates'.[225] Grant hesitantly suggested that *GM Nation* was a qualified success in the sense that it was a 'highly symbolic exercise in public trust.'[226] The pledge for deliberative decision-making would dictate that the Government could not ignore the outcomes of *GM Nation* for fear of further diminishing confidence in its intentions. However the author contends that the commitment to conduct a participatory exercise cannot mask the reality which is a string of seriously inadequate arrangements which crippled the infrastructure of the debate.

Despite protests to the contrary, there is a strong suggestion that this was, at all times, a window-dressing exercise. It would appear that emphasis was placed on taking calculated steps to bolster reputational credibility; installing a new independent advisory body AEBC but depleting the Board of any faculties which would have allowed them to deploy their expertise with full effect. There is no evidential basis upon which we can say that the Government would be obliged to hold consultations in future environmental matters, indeed *GM Nation* was billed as an unprecedented event.[227] If the Government had made an honest commitment to recognising the value of public opinion in environmental matters, why was AEBC disbanded in 2005? [228]

The big picture operating in the background had meant that ministers were being squeezed by commitments stemming from EU Directive 2002/18[229] relating to early licensing, which

[225] Mayer (n161).

[226] Grant (n55) in response to question 41

[227] Lee (n67)

[228] Lee (n67)

[229] Commission Directive 2002/18/EC of 22 February 2002 amending Annex I to Council Directive 91/414/EEC concerning the placing of plant-protection products on the market to include isoproturon as an active substance

meant they continued with a public debate but at the same time had to fulfil the terms of engagement prescribed by the Directive.[230] Before the live events had begun, Grant wrote to Beckett in March 2003 expressing concerns that the continuance of the approval process undermined the credibility of the debate.[231] The licensing process also preceded the results of the FSEs which angered the Scottish Executive and Welsh Assembly to which Beckett claimed that the applications which had been received by the EU were 'unstoppable... and the British government has no alternative but to process them.'[232] AEBC members including Mayer were furious believing it to have been

> '[P]remature, not to say outrageous, to carry on the licensing of GM crops before either the scientific evidence has been gathered or the public consulted. It makes the whole exercise seem pointless.'[233]

The Government faced intense media speculation that they had given the green light to commercial cultivation,[234] and matters were made worse by DEFRA 'spokespersons' who readily revealed that the debate was immaterial to the deciding the fate of the licence applications, given that it was *just* a debate, not a referendum.[235]

This chapter has explored the temptation for the State to use participatory mechanisms as a way of enhancing credibility in its largely pre-determined decision-making outcomes. The goal of administrative expediency encourages the government to use participation as a means of rallying a consensus around the policies it invites the public to participate in helping with,

[230] Grant (n55) in response to question 41

[231] Letter from Malcolm Grant to Margaret Beckett 18 March 2003 GM Public Debate and EC Approvals Process

[232] Paul Brown, 'GM Licensing gets go ahead: Scots and Welsh furious as crop trials are sidelined' *The Guardian* (4 March 2003)

[233] Ibid.

[234] Statement by the Secretary for Environment, Food & Rural Affairs: GM Crops and the Public Debate on GM Issues, 24 March 2003

[235] Brown n282

but this goal is impossible to achieve where the participation is perceived as cosmetic exercise in public placation. As the holder of power, the State will not often proactively seek to undermine its authority, but to some extent it has to accept some transfer of decision making authority for the criticism of cosmetic process to be avoided (and for administrative expedience to be achieved).

In the case study, the public evaluation formed just one strand in a multi-part inquiry, the outcome therefore would not rest solely upon the conclusions drawn in public meetings. By using this approach the Government had afforded itself a flexible position through which to justify eventual decisions, which is not per se untenable. On the contrary, the author considers the idea behind administrative expedience is that participation makes a prior policy easier to implement in a timely fashion.[236]

In this vein, it is telling that Lord Taverne remarked '[s]cience… is not a democratic activity. You do not decide by referendum whether the Earth goes round the Sun.' On this basis the success of the exercise is to be measured in terms of how far society learned through the process to understand the professionalised assessment of costs and benefits of the GM industry. But it has been said there is

'no epistemic foundation for distinguishing warranted claims from mere opinion: debate can always be extended by dissenters, however ignorant, ill-informed, or duplicitous their claims'.[237] Whilst there are ethical, moral and public interest considerations surrounding the application of GM technology, attempting to reconcile heterogeneous

[236] Grant (n55) said that

> [the] public have put their faith in participating in this exercise on the basis of a pledge by ministers that they would be listened to. If that pledge proves worthless how will you persuade your constituents in the future to participate in other exercises? I think there is a fundamental issue of public trust involved in this. (in response to question 39)

[237] Demeritt et al. (n79)

factions in any matter will ultimately be extremely difficult to achieve and may involve at best the brokering of uneasy compromises.[238]

Whilst public participation gives prominence to valid concerns it will not be a convenient tool of decision-making, public opinion rarely takes a monolithic form.[239] It may be difficult to drive motivation towards the discovery of common ground as public and technocrats often share a mutual disinterest in either parties' position.[240] It is the 'hybridity' of this science-based politics which is the root concern, and the author considers this to be a fundamental barrier to the successful application of genuine participation in environmental matters. Yet again we return to the dilemma that it is ultimately left to the judgment of the State to determine when to employ participatory mechanisms and what use to make of the outcomes. It would be undesirable to issue a blanket exemption for scientific topics but including the public in a discourse which is invariably positioned to favour scientific data, will lead only to misplaced expectations.[241]

The next chapter will examine the interaction and experience for *GM Nation* participants and as we move towards the next phase of the research it becomes apparent that there is an inevitable degree of cross over between the assessment of government and society. As individuals we have interactive relationships with the State and also with each other. Whilst it appears that the Government seeks refuge in the reliability of science and economic assessments, what consolation can be offered to the community that puts trust in ministers who deliberately use language to inflate the status and importance of the public engagement

[238] Select Committee on Environmental Audit (n3)

[239] Also noted by Lee (n67)

[240] Reynolds and Szerzynski's identification of this unresolved tension is particularly instructive here, they regard *GM Nation* as an attempt to purify and recombine nature with society 'the two elements of...'the modern constitution' – into separate spaces and discourses, with the final right to recombine them reserved for the apex of central government.' Reynolds and Szerszynski (n66); Rose-Ackerman and Halpaap (n40) 6-7

[241] Demeritt (n129)

exercises? During the planning stages of *GM Nation* an unnamed Minister was quoted as saying 'they're calling it a consultation, but don't be in any doubt that the [commercialisation] decision has already been taken.'[242]

[242] *ENDS Report* (n182)

Chapter Four: The Legitimating Justification for Public Participation – Democracy and Environmental Justice

4.0 Introduction to the Chapter

In the previous chapter the principle of public participation was examined with respect to the goal of efficient execution of government policies. To some extent the goal of administrative expediency was borne out by the findings of the *GM Nation* debate, in the sense that the creation of an independent steering group (AEBC) and by its processes, it distanced the exercise from being justifiably perceived as purely cosmetic. If the public perceive that participation is a device for securing credibility for a pre-determined decision, then that can increase, rather than reduce, public scepticism towards government, making the job of governing more difficult than would otherwise be the case. In this part of the thesis, the research moves away from the vertical relationship between state and citizen to focus on the relationship *between* citizens and examines the identity of the public that participates.

As noted in chapter two, there are many assumptions regarding the public's capacity to participate on an equal footing. Those supportive of participation have continued to replicate the proposals of the Skeffington Report,[1] that it is fundamentally good because it creates an active and virtuous citizenship. If people are involved in the decision-making process, it *must* produce legitimate results which are representative of popular opinion. This research looks critically at these assumptions with reference to the Habermasian concepts of communicative

[1] The Skeffington Committee, People and Planning Report of the Committee on Public Participation in Planning 1969 (The Skeffington Committee report) (reprinted 1972, HMSO)

power within the ideal speech situation and a continuation of the extended *GM Nation* case study.[2]

The core argument that is developed in this chapter is that the participation principle is undermined both in theory and practice by deep-rooted social inequalities. There are significant barriers to participation which have been left unaddressed and consequently affect the engagement of those from marginalised community groups. Side-lined communities (the non-participants) have come to be regarded by critics of participatory decision-making as public participation's silent majority. The discussion will explore the extent to which participatory exercises, such as *GM Nation*, are dominated by semi-professionalised participants who cannot be considered as truly representative of the general public. Public involvement in decision-making, as explained in chapter two, is equated with a better model of democracy whereby the state is able to appeal to the 'good sense' of the public to generate a consensus behind otherwise controversial policies, which are thereby legitimated. That means, in Habermasian terms, that 'reason [is] jointly exercised by autonomous citizens.'[3]

There are two aspects to this statement requiring critical scrutiny: the free and equal citizen and the exercise of reason as central to the form deliberation takes. For the purposes of this research, these aspects subject to interrogation are labelled as issues of identity and capacity. It will be argued that the proponents of the participation principle have not given sufficient attention to the question of accessible and equal participatory opportunities. It seems any public will do. An insufficient attempt to secure the participation of diverse community

[2] Jürgen Habermas Between Facts and Norms (MIT Press 1984)

[3] It is suggested that Habermas understood the original meaning of democracy to have been based around the central image of discourse conducted by autonomous and rational citizens. Scholars such as Bohman also idealise public reasoning as an activity partaken by free and equal citizens. Barry Hindess 'Representation Ingrafted upon Democracy?' (2001) 7(2) Democratization 11; James Bohman, Public Deliberation: Pluralism, Complexity and Democracy Cambridge (MIT Press 1996) 241; John S. Dryzek, Deliberative Democracy & Beyond: Liberals, Critics, Contestations (Oxford University Press 2000) 28

groups undermines the justifications for participation which argue it creates an active and politically conscious citizenry. Once again, there is a paradoxical risk to explore an arrangement in which participation that is unequal is positively counter-productive, making decisions that are intended to be more democratic quite the opposite democracy in the attempt to bring them closer. To what extent can and does public participation perpetuate existing social, economic and political advantages, in the sense of giving those that do well by the classical system of representative democracy an opportunity to do ever better through the addition of new, direct participative processes.

Mirroring the structure of the previous chapter, the discussion will firstly consider the theoretical arguments which question the representativeness of the public, followed by a discussion of the representativeness of *GM Nation* participants. This is done with a view to drawing firm assessments regarding the validity of assumed representativeness and rationality of participants. In the following discussion the term *representative* is used to describe a sufficiently diverse group of public perspectives. Where appropriate, it means electoral representatives of the public, as per a classical electoral-democratic paradigm.

Assumptions about Society Inherent in Public Participation Law

4.1 The Universal Citizen

As noted in chapter two with reference to the Skeffington Report, the public participation principle has drawn support from the theoretical aspiration of the participative democratic ideal. Proponents portray the act of participation as an inherently virtuous one, it is presumed that individuals are driven by certain moral characteristics, and have a civic-

focussed rationality towards the decision-making process.[4] The public is often generalised in the literature as monolithic and public opinion tends to be equated with a moral compass. Is it realistic to assume that individuals transcend their private, self-interested positions in the pursuit of the public good?[5] The expectation that participants act with a degree of civic virtue implies that there is no place for the expression of private interests, or at least to be able to put these as a broader public interest perspective. In this way the rhetoric surrounding participation urges the public to act less like 'themselves' and more like politicians.[6]

A sustained argument for lawyers promoting 'public participation' in these ways is advanced in an important book written in the late 1970s, by Patrick McAuslan.[7] McAuslan posits three ideologies of planning (there are references also to the environment), which broadly correspond with different historical periods. The early ideology (prevalent in the nineteenth century) is that of 'private property'.[8] Decisions affecting the use of land on this ideology are determined largely with regards to the interests of the proprietor. In the twentieth century, and particularly the post war period, a second ideology of government control in the 'public interest' emerged.[9] This is essentially the top down, centrally representative democratic paradigm introduced in chapter one. McAuslan associates it with large (private and public)

[4] Suzanna Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 Virginia Law Review 552; Jean Leca, 'Questions on Citizenship' in Chantal Mouffe (ed.) Dimensions of Radical Democracy (Verso, 1992) 18

[5] Iris Young considers it unreasonable to assume people should behave as universal citizens. Hindess believes that it is implied that participants must restructure their personal opinions in order to put forward 'publicly defensible' reasoning. However Arnstein stressed that within a group there may be a range of 'divergent points of view, significant cleavages, competing vested interests, and splintered subgroups'. For a further discussion of the problems with the concept of the universal citizen see Iris M. Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 (2) Ethics 253; Hindess (n3) 11; Sherry R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Planning Association 216

[6] Rossi says that those who embrace participative democracy consider civic virtue to be a central necessity to participating. Jim Rossi 'Participation Run Amok: The Deliberative Costs of Mass Participation in. Agency Decision Making' (1997) 92 Northwestern University Law Review 204-205

[7] Patrick McAuslan, *Ideologies of Planning Law* (Pergamon 1980)

[8] Ibid, 2.

[9] Ibid, 4.

corporate interests and he sees it as disengaged with key issues of social justice and as perpetuating social and economic inequality.

On McAuslan's account, public participation is a vanguard ideology that is radical and dynamic in its shifting of decision making away from proprietors and corporations and towards *all* individuals, McAuslan does not mince words in describing it as heralding an 'alternative society'.[10] It involves new procedures that engage the whole society, and also changes of 'substance' – new institutions and rules which permit as it were 'bottom up' (not a term McAuslan uses) decisions.[11] McAuslan sometimes depicts the public as a homogeneous group (bar that is proprietors, who are singled out as having once dominated decision-making). But he also recognised profound inequalities, which he sees this ideology as having the potential to overcome.

There are some instances where the government has acknowledged that the public does not think homogenously.[12] Recommendations published within the last decade by the UK Council for Science and Technology recommends that participant selection should aim to recruit individuals who have 'no strong pre-existing interest in the area and so enter...with a fresh perspective.'[13] To borrow Sunstein's assessment; 'in a system of public deliberation

[10] Ibid, 6.

[11] Ibid.

[12] The idea that an individual can leave their personal opinions at the door of the political sphere is ambitious. Whether they will be able to temporarily detach themselves from their personal perspectives is one thing, but participants may be unwilling to forget their experiences and identity. The Red Green Study Group similarly dismiss the notion of the universal citizen because 'emotionally, intellectually and physically, humans are shaped by culture, [and] they are not infinitely malleable.' Gutmann and Thompson have said that whilst deliberation might serve to separate individual and public interests it is not necessary that people should suddenly become publically spirited and abandon self-interest when taking part in political deliberation. Young (n5) 257. Red Green Study Group, What on Earth is to be Done? A Red-Green Dialogue (Red Green Study Group 1995) 19; Amy Gutmann & Dennis Thompson, Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It (Belknap Harvard University Press 1996) 42-43, 126 . See also La Rochefoucauld (Tancock L, translating), Maxims (Penguin Classics 1959) 65.

[13] See Council for Science and Technology 'Policy Through Dialogue: Informing Policies Based on Science and Technology' (March 2005) 6

everyone must speak as if he were virtuous even though he is not in fact.'[14] This is why the author contends that participatory decision-making risks replacing one unelected layer of the political realm (the technocrats) with another (the public).[15]

Participation rhetoric unintentionally acts as a masking label, entrenching the assumption that participatory opportunities are enjoyed universally.[16] The danger with the over simplification of language and a failure to closely monitor the identity of participants can lead the architects of participation to ignore the importance of (and difficulties of) securing representativeness. The outcome of using such labels is the assumption that deliberative processes will elicit a general public opinion, that the public is a singular unit with one voice. Unless people share the same capacities, marginalisation and exclusion may occur in less visible forms where the 'haves' participate but the 'have-nots' do not.[17]

4.1.1 Habermasian Communicative Theory

Communicative theorist Jürgen Habermas has written extensively on the philosophy of rhetoric and exchange, and has theorised two famous concepts: communicative power and the ideal speech situation.[18] The idea of communicative competence is particularly useful to this critique of the participation model, as this refers to the ability of individuals to articulate their

[14] Cass R. Sunstein, Democracy and the Problem of Free Speech (Free Press 1995) 244

[15] Supported by Pawal Banas 'International Ideal and Local Practice – Access to Environmental Information and Local Government in Poland' (2010) Environmental Policy and Governance 44. See further Mark Dowie, Losing Ground: American Environmentalism at the Close of the Twentieth Century (MIT Press 1996) ; John S. Dryzek, 'Transnational Democracy' (1999) 7(1) The Journal of Political Philosophy 46-47; Charlemagne 'Are NGOs Really More Democratic than Governments?' The Economist (25 June 2009);

[16] Dryzek (n3) 40; Jack Knight and James Johnson, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' (1994) 22 Political Theory 289

[17] Marc Galanter, 'Why the Haves Come out Ahead: Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law & Society Review 95

[18] See generally Habermas (n2); For the elements of ISS see Jürgen Habermas Moral Consciousness and Communicative Action (MIT Press 1990) 8; Jürgen Habermas (translation by Thomas McCarthy), Legitimation Crisis (Beacon Press 1975).

opinions with effect and influence. Deliberative discourse which is conducted by individuals possessing equal communicative competence has been conceptualised by Habermas as the ideal speech situation.[19] The author suggests that the ideal of public participation is analogous to the Habermasian ideal speech scenario, it is inherent in the rhetoric of support for public deliberation in decision-making.

Assumptions of equality of access and capacity of individuals inherent in the ideal of participation may have strong exclusionary effects because the State has not identified a need to proactively facilitate the participation of groups who are traditionally underrepresented by the political system. The appeal of public participation as a *community* activity may mask participants that are as a group, narrowly construed and unrepresentative of wider society (and more of the status of an elite, or number of elites as the case may be). Proponents of participation view all individuals and community groups as equally entitled to join in the deliberation, but it is not a natural conclusion that this has universally led to the political empowerment of the public in the manner which supporters have justified.[20] Indeed Habermas recognised that the likelihood of deliberation akin to the ideal speech scenario was remote because he saw societal equality as a fundamental prerequisite.[21]

There are three major forms of inequalities which will be considered as significant barriers to access and participative capacity; socio-economic, racial and gender. These are introduced as

[19] Dryzek explains that in Habermas' communicative theory

> [under] ideal, distortion-free conditions, given long enough to debate, consensus would be achieved on matters of both morality and truth. What distinguishes consensus from mere agreement is that individuals support the outcome for essentially the same reasons.' Dryzek (n3) 48

[20] Joel D. Wolfe, 'A Defense of Participatory Democracy' (1985) 47(3) The Review of Politics 371; Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age (University of California Press, 1984) 152, 258-59; Carole Pateman, Participation and Democratic Theory (Cambridge University Press, 1970) 42-43

[21] David Held, *Introduction to Critical Theory: Horkheimer to Habermas*. (University of California Press 1980) 396

concepts briefly given the vast scholarship which is dedicated to the exploration of inequalities. This research recognises that each of these inequalities is multi-layered and highly complex, but a satisfactory discussion of just how unequal society is in the 21st Century, falls outside of the remit of this doctorate. The primary focus here is to examine the consequence of inequality on participative capacity.

Socio-Economic, Racial and Gender Inequalities

4.1.2 Socio-Economic

An individual's capacity for political activity is considered as existing in a symbiotic relationship with economic empowerment,[22] instituting political equality in the participative sense depends on economic equality and vice versa.[23] There are financial opportunity costs as a consequence of participating and behaving as an active citizen. Individuals must sacrifice their personal time in order to engage in the civic act of participation, they may need to take time off work unpaid in order to organise themselves, conduct research to prepare for a public inquiry which might also include obtaining advice from expert environmental consultants or financially back a campaign group in order to get their views heard.[24] Financial clout also affects the ability to pursue participative justice through the Courts, as idealised by the third limb of the Aarhus Convention, contained in Article 9 (discussed further below). It has been explained:

[22] Wolfgang Sachs 'Environment and Human Rights' 2003 (Wuppertal Institute for Climate, Environment, Energy) 29

[23] Young (n5) 259

[24] Aryeh Botwinick and Peter Bachrach view participation as a transactional activity, for them it is a means for individuals to maximise their personal gain. Dahl posited 'if the rewards do not exceed the costs, [why] participate at all." Aryeh Botwinick and Peter Bachrach, 'Democracy and Scarcity: Toward a Theory of Participatory Democracy' (1983) 4(3) International Political Science Review 366; Robert A. Dahl, After the Revolution? (Yale University Press 1970) 46

> Even if equal access to justice is the primary virtue of the rule of law it is clear that a great majority of people do not enjoy it. Money, knowledge, connections and disparate degrees of familiarity with the ways of the state and economy, ensure that access remains unequal.'[25]

Writing in the 1980s, Young questioned why the extension in rights associated with citizenship had not brought about the expected results in social justice. She believed that it was partly because 'economic life is not sufficiently under the control of citizens to affect the unequal status and treatment of groups.'[26] Participatory techniques do not adequately compensate for disparities in economic and social equality so as to empower and facilitate the inclusion of those marginalised communities who have historically been excluded from public discourse. The situation remains relatively unchanged, as the findings of *GM Nation* will explain, organising body AEBC made admissions relating to the absence of low socio-economic groups from the exercise coupled with an overrepresentation of professionally qualified persons.

In chapter three NGOs were acknowledged as having played an important role in lobbying and influencing policy development in the field of the environment. It was also recognised that effective participation at the governmental level has had an organising effect on campaign groups, forcing them to mould to the political infrastructures which they wish to challenge and influence. This has led to the increasing professionalization of civil society. Groups have had to assume what may be regarded as corporate approaches to securing funding as well as their internal staffing. The demographics of mainstream environmentalism

[25] Yash Ghai and Jill Cottrell 'Conclusions and Reflections' in Yash Ghai and Jill Cottrell (eds.), Marginalized Communities and Access to Justice (Routledge 2010) 232

[26] Young (n5) 251

should not be assumed to be as diverse as the Environment they claim to represent.[27] In fact a considerable body of research has consistently demonstrated the dominance of relatively high income, middle-class white male educated membership in the leading environmental groups.[28] This is an unsurprising trend. Networks of allegiance form between those living and working together where there are common interests- there is a shared group identity. Ruffins has explained:

> E*cological concerns were until very recently a social luxury that only middle-class whites could easily afford. Those of other origins needed to spend their energy on basic concerns like achieving political equality and economic fairness.*[29]

The historical pattern of under-representation of minority and low income communities in the large NGOs has even been argued by some sceptics to be deliberate exclusion and providing evidence of racial prejudice.[30] If the political base of the environmental movement is

[27] Stone notes that the environmental movement could be measured as unrepresentative in more than racial and economic terms. For example, survey results indicate that when questioned, 47% of environmental activists have no religion compared to 6% of all Americans. Only 9% of those polled would fight for their country contrasted with 57% of the American public. Christopher D. Stone' 'Is Environmentalism Dead?' (2008) 38 (19) Environmental Law 43-44

[28] David Horton Smith 'Determinants of Voluntary Association Participation and Volunteering: A Literature Review' (1994) 23(3) Non Profit & Voluntary Sector Quarterly 243; Lynne Manzo and Neil Weinstein, 'Behavioural Commitment to Environmental Protection: A Study of Active and Non-active Members of the Sierra Club' (1987) 19(6) Environment & Behaviour 673; Katheryn Wiedman Heidrich, 'Volunteer Life-Styles: Market Segmentation Based on Volunteers' Role Choices' (1990) 19(1) Non Profit and Voluntary Section Quarterly' 21;

[29] Paul Ruffins, 'Mixing a few More Colors into the Green' (1990) Sustainability in Context 33

[30] It is reported by Jordan and Snow that the Californian chapters of Sierra Club actively prevented Jewish and African American membership, an attempt to adopt a racial inclusion policy in San Francisco failed in 1959. According to Jordan and Snow, there was incredibly, only one BME member of the Sierra Club (the Audubon Society boasted three African American staff members out of a 350 strong team) by 1990. The not-so subtle practices of the Sierra Club were thrown into the spotlight again in 1995 when a senior member of the Club's Legal Defence Fund mocked an appointment of a female African American judge as 'interesting because in the 40 years I have worked intensely in environmental matters, I have found total disinterest among children or adults of your race in environmental matters.' See also Victoria Slind-Flor, 'Amid Board Rancor, Sierra Club LDF Loses 2d Black: Staff Attorney Quits and Rekindles Dispute Over Environmental Racism', National Law Journal (30 October 1995) at A6; Charles Jordan and Donald Snow, 'Diversification, Minorities, and the Mainstream Environmental Movement', in Donald Snow (ed.) Voices from the Environmental Movement: perspectives for a New Era (Island Press 1991) 71, 73, 75-78

dominated by a particular demographic, the white-middle class, their contribution in participative exercises will reflect their selective interests. Mainstream environmentalism has often focussed on the defence of aesthetical or recreational spaces, habitat conservation and species protection.[31] This power base has been less concerned to seek the rebalancing of the distributive paradigm of the disproportionate environmental problems affecting poor BME communities.[32]

In chapter five, the research explores an emergent philosophical debate which recognises Nature's inherent right to exist and is urging for the recognition of non-human legal subjectivity. Critics of this *Wild Law* theory have dismissed this deep green philosophy as a mark of the affluent.[33] A lay observer might assume that the environmental movement acts in a representative manner for society because of presumptive moral high ground that it pursues a *just* cause.[34] But if environmentalist membership does not represent the different corners of society, for the purposes of participation, it may be problematic to claim that their contribution is *public,* but rather the interests of an elite public. As Young explains:

[31] Luke W Cole, 'Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law' (1992) 19 Ecology Law Quarterly 639; Riley Dunlap and Angela Mertig, 'The Evolution of the U.S. Environmental Movement from 1970 to 1990: An Overview' (1991) 4 Society and Natural Resources 209; Teresa A. Martinez, and Steve L. McMullin.' Factors Affecting Decisions to Volunteer in Nongovernmental Organizations' (2004) 36 Environment & Behaviour 113

[32] Shephard explains that the movement has not sought to rebalance the distributive paradigm of environmental bads of poor BME communities. Peggy M. Shepard 'Issues of Community Empowerment' (1993) 21 Fordham Urban Law Journal 739

[33] Cole questions whether the rising popularity of the animal rights agenda is yet another mark of an elitist environmental movement which 'which tends to benefit the upper tail of the distribution of whatever group is to be helped' Cole (n31) 639; concept is further explored in Richard Posner 'Animal Rights: Legal, Philosophical and Pragmatic Perspectives' in Cass R. Sunstein, and Martha Nussbaum (eds), Animal rights: Current Debates and New Directions (Oxford University Press 2004) 71; Cormac Cullinan, Wild Law: A Manifesto for Earth Justice (2nd ed. Green Books 2011)

[34] Lee and Abbott explain that interest group involvement in the participatory process cannot be considered as representing the public view, rather only a specific view. They also note the vastly different and conflicting priorities of environmental groups, also citing the competition between animal rights agendas and the public interest as an example. Maria Lee & Carolyn Abbott, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 Modern Law Review 87, 106; Bende Toth, 'Public Participation and Democracy in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30(2) Journal of Land Resources & Environmental Law 320-21

> As a person of social privilege, I am not likely to go outside of myself and have a regard for social justice unless I am forced to listen to the voice of those my privilege tends to silence.[35]

Economic inequality may not only hamper an individual's fortunes in the political sphere, it also leads to environmental inequality. This uncomfortable relationship has sustained conversations at every policy level for the past 30 years. The 1987 Report from the World Commission on Environmental Development was one of the first international articulations of the relationship between socio-economic inequality and environmental issues.[36] This coupling of social problems has been referred to as a marriage of scarcities.[37] It is the central organising concern of the environmental justice agenda which seeks to highlight the inequitable distribution of socio-economic goods and the incidence of environmental degradation on certain communities.

Natural disasters (and those of anthropogenic origin)[38] often inflict more suffering on lower socio-economic communities because they are the least well protected. Even in their everyday existences the marginalised poor will, due to a lack of alternatives, be subjected to the extremes of environmental pollution.[39] Not only is there a marriage of scarcities, but

[35] Young (n5) 263. Yang considers it even less likely in periods of economic recession that people put their interests to one side in favour of disenfranchised communities. Tseming Yang 'Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation' (2002) 26 Harvard Environmental Law Review 1, 16

[36] Andrew Dobson, Justice and the Environment: Conceptions of Environmental Sustainability and Dimensions of Social Justice (Oxford University Press 1998) 14. Although problems of material inequality and their bearings on the Environment had already been outlined in Stockholm, the 1987 Brundtland Commission emphasised that policy advancements in the field of the environment was contingent upon addressing material inequalities. World Commission on Environment and Development (WCED) 'Our Common Future'

[37] Dobson (ibid) 12

[38] Such as the 1984 Union Carbide disaster in Bhopal India. Dobson (n36) 19; Cullinan also considers that the most harmful consequences of anthropogenic disturbance of ecosystems are borne disproportionately on the poorest communities. Cullinan (n33) 41

[39] Laura A. Pulido 'A Critical Review of the Methodology of Environmental Racism Research' (1996) 28(2) Antipode 142, 149; Dobson (n36) 20.

social inequality is often a cause of environmental degradation.[40] Poverty not only confines the poor to areas of depravation but it forces them to further degrade their surrounding environment through lack of realistic alternatives. This degradation is not done through ignorant destruction as these groups will often be acutely aware of their resource problems.[41] The debilitating nature of socio-economic scarcity leads the poor to exploit and deplete their remaining natural resources thereby worsening standards of living and leading to greater environmental stresses.[42] Studies have also indicated that low income households consume more risk-laden food.[43]

Environmental justice activists often live in the same areas they represent; this is why they are sometimes referred to as grass roots campaigners. It is through their own experiences that such activists unmask the hidden power dynamics of pollution control bodies and environmental laws.[44] These active citizens are different political creatures from the professionalised NGOs that were discussed in the previous chapter. Invariably they are less well organised and resourced and therefore do not have the same powers of influence, nor the know-how to capitalise on participation opportunities as effectively. The grassroots environmental movement, characterised as being community-based by contrast to national NGOs, is often fighting immediate risks to their own health and basic living standards.[45]

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[40] Red Green Study Group (n12) 13

[41] Dobson (n36) 16.

[42] WCED (n36) 27-28; Dobson (n36) 15

[43] Yang's US focussed research indicates the poor consume fish which have been intensively farmed in contaminated waters. Consequently they are exposed to higher levels of toxic pollution through their diet. Yang (n35) 15. See further General Accounting Office 'Pesticides- Improvements Needed to Ensure the Safety of Farmworkers and Their Children' (March 2000) 5-6; Patrick West, J. Mark Fly, Robert Marans, Frances Larkin and Dorrie Rosenblatt, 'Minorities and Toxic Fish Consumption: Implications for Point Discharge Policy in Michigan', in Bunyon Bryant (ed.), Environmental Justice: Issues, Policies and Solutions (Island Press 1995) 122-124

[44] Cole (n31) 643

[45] That is not to say that it is only grass roots campaigners who are directly affected by an environmental issue, this has also been found to be evident in the motivations of mainstream environmental organisations too. Lynne Manzo and Neil Weinstein (n28); Martinez and McMullin (n31) 112-126, 113; Cole (n31) 639

Research has found that such communities' interests in environmental politics are principally concerned with matters such as toxic pollution and environment health, as opposed to conservation and species protection.[46] The disparities between communities' issues which they consider important, challenges the ease with which participatory decision-making can claim to capture representative public opinion. It highlights the necessity for the State to be proactive in recruiting diverse participants in order to retain the legitimacy of the process.

As mentioned earlier in the thesis, environmental law cuts across many disciplines; policy must synthesise solutions which reflect economic, scientific, social and ecological factors. Consequently environmental discourse cannot fully free itself from technical rhetoric, it may remain partially or completely entrenched in complicated language. The formalities and protocol of deliberative exercises can also be (or appear to be) overwhelming so making participation less attractive to some. It is suggested that the act of effective participation requires a particular kind of expertise in order for individuals to capitalise on a participatory opportunity. The exclusionary effects of protocol and language have been described as 'the displacement of democracy through technocracy'.[47]

[46] Sachs (n22) 23. Taking a comparative reflection of the growth of environmentalism in different parts of the world, De Silva explains that in the developed world, the green movement has fixed around matters of recreation and aesthetics whereas in the developing regions such as South Asia, environmentalists are pursuing survival. Whilst the author does not entirely agree with this analysis and considers it an oversimplification, there is a clear link between affluence and the nature of environmental concerns. Lalanath De Silva 'Environmental Law Development in South Asia' (1999) 4 Asia Pacific Journal of Environmental Law 249; Parvez Hassan and Asim Azfar 'Securing Environmental Rights through Public Interest litigation in South Asia' (2003-2004) 22 Virginia Environmental Law Journal 223

[47] Peter L. Strauss, 'Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa' (2006) 12 Columbia Journal of European Law 683. Getliffe also concurs with the narrowing effect of technical language to a narrow participant base. Ghai and Cottrell explain marginalised communities will never be more than spectators, despite the significance of a proposed decision on their personal situation their involvement is fundamentally impeded through their ignorance of law and procedure and the intimidating formalities which are inherent in the different forms of participation (the roundtable and the court room). Kate Getliffe, 'Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-Making Process Lead to More Effective EU Environmental Law?' (2002) 4 Environmental Law Review 105,109; Ghai and Cottrell (n25) 232

This research has already highlighted that the technical nature of participatory exercises has increased competitiveness within civil society. Environmental groups have had to react in order to increase their influence. The effects on individuals may be more marked in the sense that the benefits flowing from a deliberative process are likely to go to those who have exerted most influence on the debate. There is extensive scholarship in support of this assessment which has examined the relationship between social class and participation in political life. Unsurprisingly research has consistently shown higher participation by upper socio-economic groups owing to their economic and educational advantage.[48] The arsenal of skills that such citizens possess over their less-educated counterparts might include the ability to 'adopt opinions, to take stands on issues, and to evaluate ideas and events.'[49]

Economic Barriers to Access to Justice

Access to an inexpensive and timely justice system is a vast area which warrants a thesis in its own right, but it forms part of the public participation model advocated by the Aarhus Convention.[50] This research acknowledges the contribution of Morrow and Stookes for their analysis of cost barriers in case law.[51] Whilst the Aarhus Convention received praise for its

[48] Damer and Hague feared the proposals of the Skeffington Committee would also 'benefit the educated, articulate (middle class) sections of society at the expense of poorer, less articulate groups - the working class.' Seán Damer and Cliff Hague, 'Public Participation in Planning: A Review' (1971) 42(3) The Town Planning Review, 229. The class and education adavantage is consistently noted in participation literature, including; Sidney Verba and Norman Nie, Participation in America: Political Democracy and Social Equality (Harper and Row 1972) 338; Botwinick and Bachrach (n24) 337; Archon Fung & Erik Olin Wright Deepening Democracy: Innovations in Empowered Participatory Governance (2001) Politics Society 34.

[49] Joseph V. Femia 'Elites, Participation and the Democratic Creed' (1979) 28 Political Studies 375

[50] Article 9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450

[51] Paul Stookes, *A Practical Approach to Environmental Law* (2nd ed. Oxford University Press, 2009); Paul Stookes: 'Current Concerns in Environmental Decision Making' (2007) Journal of Planning Law 536; Paul Stookes and Phil Michaels 'The Cost of Doing the *Rights* Thing' (2004) 16(2) Environmental Law & Management 59; Karen Morrow 'Worth the Paper That they are Written On? Human Rights and the Environment in the Law of England and Wales' (2010) 1(1) Journal of Human Rights and the Environment 66

relaxed provisions on locus standi, the language is porous and overly deferential to domestic civil procedure rules.[52] There remain significant financial barriers to justice which arguably demonstrate a lack of government motivation to rebalance the system in favour of the individual petitioner.

In reference to its implementation of Article 9, the UK government in 2010 reported:

> *Any legal person has equal opportunity to access the courts throughout the UK, subject to the requirements laid down in national law'.*[53]

This was far removed from the findings of the Sullivan Report (2008), which had documented that 82% of leading practitioners and NGOs were 'not satisfied' with the current rules on costs.[54] At the time of publication the author Lord Justice Sullivan correctly predicted that the UK would soon be asked to explain its inability to comply with its AC obligations. In the absence of procedural rules specifically designed for environmental suits, there is an over reliance on judicial review which can be slow, uncertain and costly.[55]

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[52] Maria Lee and Carolyn Abbot, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 Modern Law Review 106 (critiquing 'watered-down and disappointing' provisions of Articles 9(2) and 9(3) Aarhus Convention (n50); Toth (n34) 311

[53] Department of Environment Food and Rural Affairs 'Implementing Measure to Achieve Compliance with the UNECE Aarhus Convention' (2010)

[54] The Report of the Working Group on Access to Environmental Justice 'Ensuring Access to Environmental Justice in England and Wales (the Sullivan Report) 2008 is flanked by similar reports all published during this period:
Maria Adebowale, 'Using the Law: Barriers and Opportunities for Environmental Justice' (Capacity Global, 2004); Access to Environmental Justice: Making it Affordable (Coalition for Environmental Justice, 2004); 'A Report by the Environmental Justice Project' (Environmental Justice Project, WWF 2004) <http://www.ukela.org/content/doclib/116.pdf> accessed 4 September 2013; Liberty, 'Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation' (The Civil Liberties Trust, 2006) ; Environmental Law Foundation & The Centre for Business Relationships Accountability, Sustainability & Society, 'Cost Barriers to Environmental Justice' (Environmental Law Foundation, 2006) (This study revealed that 31% of cases were not progressed to court because claimants were dissuaded by the costs of legal action. Furthermore there is a lack of interest in environmental law among the legal profession who perceive it as less profitable than other areas).

[55] The Environmental Justice Project defined the scope of the usage of environmental justice for the purposes of the report as the ability of concerned parties to access the courts in order to seek environmental redress. Environmental Justice was not

It is perhaps unsurprising therefore that the UK has become a frequent visitor of the ACCC with several complaints (and some pending),[56] brought against it on the basis of alleged non-compliance with Article 9. Findings relating to three well-documented communications which questioned the UK's state of compliance with access to justice provisions were delivered in September 2010. In the first of these, Mr Morgan and Mrs Baker[57] had been ordered to pay the costs of approximately £25,000[58] after the High Court discharged an injunction against a waste compositing site that had been emitting offensive odours. Whilst this was evidence of non-compliance the Committee did not make any formal recommendations to the government as there was no evidence of systemic malpractice. Article 9 issues were also raised in a dispute brought by Cultra Residents' Association in relation to the expansion of Bedford Airport. [59] After losing an application for judicial review the association was ordered to pay costs of £39,454 to the public body. The ACCC recommended that in determining what amounted to fair and reasonable costs, the Court should look at the financial position of both parties, not just the successful party, in this instance a government department.[60] And in a general communication by Client Earth which questioned the degree of compliance by the UK system which is overly reliant on judicial

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used by EJP in the traditional sense of the movement concerned with the distribution of social and environment goods although coincidentally one of themes to emerge from the ELF research was social exclusion. Data gathered indicated that 45% of applicants requesting support from ELF came from the low income households where earnings were less than £10,000 per annum. Environmental Justice Project (n54) 2, 6 and 46 and Paul Stookes, Civil Law Aspects of Environmental Justice (ELF 2003) paras 45 and 51

[56] One is currently brought against the UK and the EU in relation to renewable energy plans, this communication alleges a breach of all three AC limbs. See James Maurici, 'The Aarhus Compliance Committee Publishes Draft Findings and Recommendations with Regard to Communication ACCC/C/2012/68 Concerning Compliance by the United Kingdom and the European Union' (30 August 2013).

[57] ACCC/C/2008/23

[58] The costs comprised £5132 for the regulators and £19,190.35 for the defendants

[59] ACCC/C/2008/27

[60] The ACCC also stated the presence of a public interest in a matter as another guiding factor.

review procedures for environmental redress, the ACCC returned a finding of concern in relation to Article 9(2) and 9(3) and inadequate implementation of Article 9(4).[61]

The approach to costs in England & Wales is governed by rule 44.3 of the Civil Procedure Rules 1998 which embodies the loser pays principle. The general rule is the unsuccessful party is ordered to pay the reasonable costs of the successful party with costs following the event. Costs are widely cited as the greatest inhibitor of environmental interest suits in the UK,[62] which has led to the creation of a two tier system whereby only the wealthiest enjoy access to the courts.[63] Parties must consider whether they can tolerate the risks of heavy costs liability before the pursuing a claim. In R (on the application of Burkett) v Hammersmith, Fulham LBC (costs)[64] where the legal costs in a planning dispute had reached £135,000, the judge suggested that there were serious questions regarding Aarhus compliance if this legal bill was typical of environmental disputes.[65] Whilst some exposure to winner's

[61] ACCC/C/2008/33

[62] Stookes (n51) 530 explains that on the face of it, costs associated with litigation may appear reasonable if looking only at the initial court fees (currently £50 to lodge a judicial review application and a further £180 if an applicant is granted permission to proceed to hearing). In other areas the application costs are much higher, for example, injunctive relief application begins at £760. But legal counsel rates at very high in environmental suits. Stookes estimates that in addition to solicitor fees, expert expenses and incidentals, a one-day High Court hearing may result in fees up to £5000 for junior counsel or £6000 for Queens Counsel. As a final example, a 'straightforward' nuisance case which would entail a 3-day hearing in the High Court is likely to result in costs of approximately £50,000 for one party; the unsuccessful litigant is expected to pay these in addition to their own legal fees. Current court fees and guidance lawyer rates are found at www.hmcourts-service.gov.uk

[63] Morrow (n51) 79

[64] [2004] EWCA Civ 1342

[65] Ibid at para 76

The loser pays principle is also flanked by the threat of liability for any incidental third party costs. These parties are usually commercial enterprises such as developers or statutory undertakers (and often the polluters such as waste management companies). In the *US Ghost Ships* judicial review case brought by Friends of the Earth (FoE), the third party Able UK submitted a schedule of costs in excess of £100,000 following a one day preliminary hearing. FoE was ultimately successful in their review and therefore escaped liability for these costs. In R v SSE ex p RSPB [1997] Env LR 431 the RSPB were unable to financially commit to providing an undertaking in damages to protect a developer against economic loss in return for an interim injunction pending the outcome of a challenge mounted against the refusal to designate the Lappel Bank mudflats, a feeding and roosting area for a nationally important number of waterfowl as a Special Area for Birds (SPA) under the Wild Birds Directive EC Directive 79/409/EEC. In the time it took for the European Court of Justice to return a

costs works to discourage vexatious and frivolous applicants, current legal fees are prohibitively expensive and enough to deter most from court. As a result of the concern surrounding costs liabilities and the shortcomings of protective costs orders (PCOs),[66] the government launched a public consultation into cost protection for claimants in Aarhus related judicial review.[67] The results of the consultation were published in August 2012 proposing caps of £5,000 for individual applicants, and £10,000 for organisations. These caps were adopted by the Civil Procedure Rules Committee,[68] and took effect from April

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verdict that the UK had erred in its interpretation of the criteria for determining an SPA, the area had been turned into a car park. For both cases Environmental Justice Project (n54) 38, 42

[66] Protective Costs Orders (PCO), were adopted in order to facilitate public interest litigation. Prima facie a PCO has the appearance of easing the risk by establishing a costs cap thereby reducing the uncertainty towards a party's overall exposure to costs. The objective of a PCO was stated as enabling

> The applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance.

R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 at 76. The obscure standards for awarding a PCO (set out below) established in this case, include a prerequisite that the claimant has no private interest in the matter, have been set far beyond the reach of the ordinary citizen seeking environmental redress. Stating the criteria, Brooke LJ at para. 74 :

A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:

- The issues are of general public importance.
- The public interest requires that those issues should be resolved.
- The Claimant has no private interest in the outcome of the case.
- Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.
- If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.
- If those acting for the Claimant are doing so *pro bono* this will be likely to enhance the merits of the PCO application.

It is for the Court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations. In the recent case of *Garner v Elmbridge Borough Council and others* [2010] EWCA Civ 1006 the Court of Appeal attempted to liberalise the law in favour of the applicant. The rules relating to PCOs in Aarhus judicial review cases have subsequently been codified as of 1 April 2013. However, these developments appear offer no relief for those pursuing private claims in fields such as common law nuisance. See Morrow (n51) for a detailed analysis of precedent relating to PCOs in environmental litigation.

[67] Government portal for the consultation <https://consult.justice.gov.uk/digital-communications/cost_protection_litigants > accessed 3 September 2013

[68] Civil Procedure (Amendment) Rules 2013 (SI 2013/262), 31 January 2013

2013.[69] The situation is very much unresolved because there remains serious cost exposure in other actions such as private nuisance claims.[70] Fresh concerns over the reforms to the Courts and Legal Service Act (CLSA) which stand to further diminish the access to justice landscape have been submitted to the ACCC.[71]

At the risk of excessive detail, the Supreme Court has recently ruled on the legality of a £20,000 adverse cost application.[72] The winning party (whose legal expenses the claimant was liable for) was the Environment Agency for England and Wales, which is a non-departmental public body. Legal practitioners are broadly 'entitled' to a professional living – and in this case it was suggested that the claimant was a person of substantial enough means - but it is arguable that the public interest in the rule of law generally, and in the environmental field in particular, justifies public bodies in particular 'absorbing' the costs of successfully defending legal challenges to the legality of their exercise of a statutory mandate. Potentially the effect of this ruling is to deter the pursuit of arguable judicial review claims, which may have 'upstream' impacts on the public participation earlier in the decision making process.[73]

[69] *See* Rule 45.43 of the Civil Procedure Rules <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#rule45.43> accessed 3 September 2013. Defendants will have their liability to pay claimant's costs limited to £35,000

[70] Christopher Hope, 'New £1,300 charge for High Court challenges against Government Decision' *The Telegraph* (London, 8 April 2013)

[71] The Environmental Law Foundation has submitted a complaint to the ACCC on the basis of section 46 of the Legal Aid and Punishment of Offenders Act 2012 (LASPO) which amends the CLSA and prevents successful parties in private nuisance actions from recovering the cost of ATE insurance premiums as part of their application for costs. ELF suggests that the availability of ATE insurance is a key determinant in an enabling such claims to proceed.: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-85/Communication/CommunicationUKA2J.PDF> accessed 3 September 2013

[72] R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2) [2013] UKSC 78

[73] It is very difficult to obtain comprehensive data on the number of people who are deterred from 'fully' participating in decision making (making representations in e.g. planning inquiries) by perceived costs of 'following up' these representation

4.1.3 Race and Gender

Some commentators, beginning with research in the United States, have alleged that state and corporate attitudes towards environmental issues are racially prejudiced. Considerable empirical scholarship in this area has emerged from the United States where researchers have tracked environmental regulatory enforcement rates to see if they correlate with participation levels. The fact that it has been established that penalties for pollution have typically been higher in white neighbourhoods, is pertinent to this study of participation, because it has been explained by a greater level of public engagement with the political life of their communities.[74] Further claims affix to the correlation of the siting of toxic and municipal waste disposal facilities in BME neighbourhoods.[75] The geographical location of locally

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by way of judicial review. It may be speculated that some people take a defeatist attitude, in which their views will not be taken into account and there will be no opportunity of having 'bias' supervised by the courts.

[74] 'Penalties under hazardous waste laws assessed at [Superfund toxic waste sites] having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population' Yang (n35) 5. See further Robert D. Bullard (ed.) 'Unequal Protection: Environmental Justice and Communities of Color' (Sierra Club Books 1994); Paul Mohai and Bryant Bunyan 'Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards'(1992) 63(4) University of Colorado Law Review 932

[75] A series of empirical investigations have monitored the relationship between race and exposure to environmental pollution. General Accounting Office conducted a review in 1983 'Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities' which found that three out of four hazardous waste sites were located in predominantly black neighbourhoods (at 2). Following that 'Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites' was commissioned by the United Church of Christ Commission for Racial Justice in 1987. At the time of publication this national study found three out of every five black or Hispanic Americans lived in proximity to a toxic waste facility. The worst affected areas were the metropolises of Memphis Tennessee (173 sites), St. Louis, Minnesota (160 sites), Houston Texas (152 sites), Cleveland Ohio (106 sites), Chicago Illinois (103) sites and Atlanta, Georgia (94 sites). (at 14). These two 1980s publications were considered key in raising the prominence of the environmental justice issues from the grass roots level to one of national concern. During the 1980s and 1990s the situation is largely considered to have deteriorated with the percentage of non-white Americans suffering the brunt of risk exposure to toxic pollution having increasing (Goldman & Fitton). More recently UCLA Institute of the Environment published a study in 2001 which examined close trends between the location of Latino communities in Los Angeles and the locations of polluting facilities.
See further Benjamin A. Goldman and Laura Fitton 'Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites (1994) Washington DC Centre for Policy Alternatives 13; Krista Harper and S Ravi Rajan, 'International Environmental Justice: Building the Natural Assets of the World's Poor' in James Boyce, Sunita Narain and Elizabeth Stanton (eds), Reclaiming Nature: Environmental Justice and Ecological Restoration (Anthem Press, 2007) 327; S Ravi Rajan 'Classical Environmentalism and Environmental

undesirable land uses (LULUs) in the United States is regarded as a hangover from formal racial segregation, but 50 years on from the civil rights era the situation remains unchanged.[76] Industry and government are charged with adopting a PIBBY approach (‘*put it in blacks' backyards’)* because these communities are viewed as least likely and least well-resourced to challenge such decisions through the limited participatory channels that are available to them.[77] These arguments were explicitly played out during the political storm surrounding the Bush Administration’s relief response to Hurricane Katrina.[78] The uneven level of

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Human Rights: An Exploration of their Ontological Origins and Differences’ (2011) 2(1) Journal of Human Rights and the Environment 106; Martha Matsuoka (ed.), Building Healthy Communities from the Ground Up: Environmental Justice in California (Asian Pacific Environmental Network Communities for a Better Environment Environmental Health Coalition People Organizing to Demand Environmental & Economic Rights Silicon Valley Toxics Coalition/Health and Environmental Justice Project 2003) 4; Yang (n35).

[76] Vicki Been, ‘What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses’ (1993) 78 Cornell Law Review 1001

[77] Been explains that decision makers often pursue the path of ‘least resistance’ to avoid localised protest and political quagmires which can be timely and costly, choosing sites in neighbourhoods that are least likely to protest effectively. Ibid.

[78] Hurricane Katrina battered the US gulf coast in August 2005 destroying Mississippi fishing towns and the Louisiana city of New Orleans killing 1,800 people. Dilapidated levee systems failed to keep rising flood levels at bay causing catastrophic damage to the below sea-level city of New Orleans. It is regarded as one of the most significant humanitarian disasters in US history. This led to a series of judicial investigations into the government responses. New Orleans and the surrounding wards (in particular the Lower Ninth Ward) are predominantly home to low-income black communities. Verchick (2012 at 136) described Pre-Katrina New Orleans as ‘the poster child of the socially vulnerable’ with approximately 17,000 homeless residents. The city has also historically been plagued by high crime rates. Much of the transport infrastructure had been shut down in the early days of the storm before it had intensified rendering the largely public-transport dependent communities stranded. The national TV networks reported outbreaks of civil unrest across New Orleans, most famously in the Superdome football stadium. The stadium which was used as a relief centre of last resort for people who were unable to reach evacuation points in time was reported as the epicentre of murders, gang rapes and violence. Even the Mayor described his constituents as descending into an ‘animalistic state’. This has since been regarded as largely inaccurate false reporting. The police department subsequently became embroiled in a separate investigation over the shooting of unarmed civilians on Danziger Bridge, the killings and subsequent police cover-up is regarded as indicative of institutional racism which branded stranded residents as criminals as opposed to environmental refugees. Civil Rights advocates attacked the government for falling to recognise the racial element of the incident, criticising the lack of black representation in leadership positions at the highest levels of federal government.

The environmental consequences of the storm rivalled the social and economic effects. The storm caused a number of oil spills from the local refineries and considerable coastal erosion. Part of the evaluation of what went wrong has led to criticism of the disproportionately high number of toxic waste facilities and historically lax environmental regulation in the area. Indeed parts of the Louisiana coastline are known as Cancer Alley in reflection of the chemical plants and refineries (Cole at 622). 180,000 jobs were lost as a result of the Hurricane, black women bearing the brunt of this statistic (Verchick

environmental protection has been described as the distributive paradigm of justice;[79] it suggests that there is an unequal spread of the benefits and burdens of environmental regulation between particular social groups.

It is argued that the credibility of participatory processes depends on the inclusion of the marginalised voice, because these communities have a significantly different lived experience of the Environment.[80] Statistics suggest that ethnic minority groups disproportionately populate low socio-economic and environmentally degraded neighbourhoods.[81] It is understood that this social group is also the most under-represented in terms of attendance at participatory exercises.[82] For some observers, the failure to adequately improve levels of participation by low-income, BME or female participants in environmental deliberation is

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2006 at 768). Lewis (at 235) explains the hard lessons from Katrina and the Media's demonization of victims have further elevated the prominence of environmental justice and environmental racism agendas nationally and internationally. See further; Cole (n31) 622; Brian Thevenot and Gordon Russell, 'Reports of Anarchy at Superdome Overstated' The Seattle Times (26 September 2005); Center for Progressive Reform, 'An Unnatural Disaster: The Aftermath of Hurricane Katrina' 4 (2005); Robert Verchick ' Katrina, Feminism, and Environmental Justice' (2006-2007) 13 Cardozo Journal of Law & Gender 798; Hope Lewis 'Race, Class, and Katrina Human Rights and (Un) Natural Disaster' in Filomina C. Steady (ed.), Environmental Justice in the New Millennium: Global Perspectives on Race, Ethnicity, and Human Rights (Palgrave 2009) 233 – 251, 235; Robert Verchick Facing Catastrophe: Environmental Action for a Post-Katrina World (Harvard University Press, 2012); U.S. Department of Justice, 'Five New Orleans Police Officers Sentences on Civil Rights and Obstruction of Justice Violations in the Danziger Bridge Shooting Case' (4 April 2012)

[79] A term joined by Iris Young and used subsequently by Sheila Foster. Iris M. Young, Justice and the Politics of Difference (Princeton University Press 1990) 16; Sheila Foster 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement' (1998) 86(4) California Law Review 775, 788-789

[80] Kuhn explains that 'meaningful public participation must begin with an understanding of past alienation, discrimination, and exclusion.' Scott Kuhn 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision making Process' (1998) 25 Ecology Law Quarterly 647, 648-649

[81] Deprived and polluted areas in England contain four times as many people from ethnic minority groups as other areas. Maria Adebowale, 'Black, Asian and Ethnic Minority Communities: Tackling Environmental and Social Inequalities' (2006) Capacity Global Report

[82] Adebowale explains black and ethnic minorities (BME) might be consulted in environmental issues but for the sake of a 'tick box' mentality and through processes which typically rest on the lower rungs of Arnstein's ladder. These events do not allow for meaningful deliberation nor are participants supported by the government with any additional resources. Ibid. For US perspectives, see Robert D. Bullard, Glenn S. Johnson, and Angel O. Torres. 'Race, Equity, and Smart Growth: Why People of Color Must Speak for Themselves' (Atlanta Environmental Justice Resource Center, 2000)

seen as a civil rights issue. This is regarded not as an environmental matter but one of political empowerment and ties in closely with the justifications for returning to the spirit of participatory democracy as outlined by chapter two.[83] These groups have less political capital to ensure their interests are heard at the policy level or defended in the courts.[84] Away from the town hall, women and persons of BME background are also under-represented at other influential platforms for environmental policy development, such as regulatory authorities and the boardrooms of polluting corporations.[85]

A number of campaigns are now focussing on the issue of participatory empowerment as a vehicle for addressing environmental racism.[86] Ambitious citizen suits have been launched in the US against municipal and toxic waste contractors alleging infringement of civil rights. The arguments in these legal actions relate closely to the principle of public participation- namely the allegation of deliberate exclusion of minority groups from decision-making exercises.[87] For example a suit brought in the United States by an environmental justice group successfully challenged the practices of *Chemical Waste Management*, a waste company, for routinely siting toxic waste facilities in Black and Latino neighbourhoods. One

[83] Kuhn explains that participation in decision-making is a major objective of the environmental justice campaign. The movement's hybrid foundations draw upon civil rights principles, that individuals have the right to self-determination on matters that threaten one's quality of life. Kuhn (n56) 648

[84] Rajan (n75)

[85] Underrepresentation of racial minorities in environmental departments is discussed in Richard Lazarus, 'Pursuing Environmental Justice: The Distributional Effects of Environmental Protection' (1994) 87 Northwestern University Law Review 820-21, 851. Underrepresentation of racial minorities in environmental organisations is raised by Philip Shabecoff, 'Environmental Groups Told They are Racist in Hiring' NewYork Times (New York, 1 February 1990) at A16; Scott Kuhn 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision making Process' (1998) 25 Ecology Law Quarterly 647, 648; Cole (n31) 619.

[86] For example WE ACT (West Harlem Environmental Action) whose mission statement heralds:

> [to] build healthy communities by assuring that people of color and/or low-income participate meaningfully in the creation of sound and fair environmental health and protection policies and practices.'

Also discussed in Shepard (n32) 752

[87] Cole considers that the environmental justice movement owes much to the civil rights movement although the majority of participation litigation advanced on this basis has been unsuccessful. Luke Cole, 'Remedies for Environmental Racism: A View from the Field' (1992) 90 Michigan Law Review 1993

of the main arguments advanced in this case was that the predominantly non-English speaking residents that lived in these neighbourhoods had been excluded from the decision-making processes consequently violating their participation rights.[88] To some extent this litigation suggests that equality of participation is realistic, as indeed it is up to a point, but on the other hand, it is unclear that the problem is easily addressed by judicial review, when the societal causes are deep.

There is literature which suggests that women are particularly underrepresented in public participation in environmental matters because of socio-economic barriers. This uncomfortable reality has become the focus of an emerging school of environmental scholarship which considers the intersectionality of gender and environmental matters. [89] Some women are considered unable to participate as effectively as men in decision-making because of the existence of power structures which maintain inequitable workloads in the public and private sphere. Equally women are, like any other identity group, incredibly diverse. The experiences of women are not universal, and some women will not relate to the realities facing others because they belong to different social, racial and economic networks. A fuller discussion of these issues falls outside the remit of this research.

4.2 The Impact of Inequalities on Participative Capacity

Having introduced some of the major societal inequalities in environmental matters the discussion will now consider the effects of those limitations on individual and group participative capacity. This research questions whether effective and fair participation can

[88] El Pueblo para el Aire y Agua Limpio v. County of Kings No. 366045 California Super Ct Dec 30 1991

[89] See Andrea Cornwall 'Making a Difference? Gender and Participation Development'(2000) Discussion Paper 378, Institute of Development Studies; Mariama Awumbila and Janet Henshall Momsen 'Gender and the Environment: Women's Time Use as a Measure of Environmental Change' (1995) 5 Global Environmental Change 337; Rajan (n75); Lynn Sanders, 'Against Deliberation' (1997) 25 Political Theory 347

occur in a deeply unequal society. The demographically-narrow public that attends participatory exercises has led some observers to refer to them as the 'usual suspects'.[90] Scholars have conducted research into participatory behaviour to examine why some individuals participate more than others.[91] Non-participation is rarely a conscious choice (or necessarily the result of environmental apathy) but it is the fate of those individuals and interest groups who lack capacity. The term *capacity* is used by this research to stand for the faculties required to empower an individual and group to participate effectively.

In England and Wales, the responsibility to find out about upcoming consultations largely falls on the individual. For example, the Environment Agency announces upcoming consultations via its website.[92] Only the most alert individuals, already monitoring agency websites, are likely to respond.[93] Whilst it would be considerably more expensive, television, radio or newspaper advertisement would reach a larger audience.[94] This illustrates a lack of concern on the part of the State to ensure that the public input into the process is diverse. On the other hand, it should not be assumed that the Government benefits from reaching the usual suspects, such that the process is intentionally discriminatory.

[90] Maria Lee and Carolyn Abbot, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 Modern Law Review 87, 106

[91] A lack of motivation has been found to dissuade some individuals from engaging in environmental discourse. However more often than not it is a lack of awareness and access to resource which stops people from taking part. Sidney Verba, Kay Schlozman & Henry Brady, Voice and Equality: Civic Volunteerism in American Politics (Harvard University Press 1995); Martinez and McMullin (n31) 113; Adebowale (n81)

[92] For full commentary on the Environment Agency's obligations see Elizabeth A. Kirk and Kirsty L. Blackstock 'Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes' (2011) 23(1) Journal of Environmental Law 97

[93] Gary Marchand and Andrew Askland, 'GM Foods: Potential Public Consultation and Participation Mechanisms' (2003) 44 Jurimetrics 99. Furthermore city dwellers often take for granted internet-connectivity; there remain rural areas in the UK which do not have reliable service.

[94] Lack of awareness and information relating to the environmental issues and participatory opportunities is cited as a significant barrier to participation by BME communities. Adebowale (n81)

Vulnerable communities lack effective advocacy skills, in and outside of the courtroom. Although their representations may have substance, all too often success depends on the manner in which the argument is presented. Returning to the Aarhus Convention mechanisms which were outlined in chapter two; members of the public may submit a communication to the Aarhus Convention Compliance Committee (ACCC) in order to allege a breach of Convention commitments. There are procedural steps to be followed to ensure the communication is admissible for consideration by the Committee.[95] Although guidelines to support those wishing to make a communication are available on the ACCC website, the majority of discarded communications are those submitted by members of the public. All too often they are poorly drafted or relate to complaints of minor imperfections of national systems as opposed to wider participatory frameworks.[96]

The significance of capacity is demonstrated elsewhere in environmental matters. Closely linked to the Aarhusian concept of access to justice is the general move to ease locus standi in environmental interest suits. In some circumstances these statutory provisions are subject to exploitation by educated and upwardly mobile citizens as a ruse for their personal economic pursuits. Chapter five will outline constitutional developments in Latin America which have been heralded as significant advancements in the case for Nature rights. One of the first successful test cases to trial the new constitutional provisions, (principally Article 71)[97]

[95] Article 15 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450 states members of the public are allowed to make a communication.

[96] Veit Koester, (Former Chair, Aarhus Convention Compliance Committee) presentation on 'The Aarhus Compliance Mechanism', Aarhus and Access Rights: the New Landscape (October 2011) Coalition for Access to Justice for the Environment, Kings College London

[97] Article 71 of the 2008 Ecuadorian Constitution states

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

widely applauded by the environmental NGO community,[98] was brought by an American couple in Loja, Ecuador. The dispute related to a road-widening operation. The suit was brought on behalf of an adjacent river, Rio Vilcabamba. Appropriate impact assessments, in particular studies on associated flood and erosion risks had not been conducted.[99] The Court fiercely defended the constitutional rights of the river and included in the terms of reparation, ordered the defendant provincial government to:

> Publically apologise on one-fourth of a page in a local newspaper for beginning construction of a road without the necessary environmental license.[100]

On a closer inspection of the facts surrounding the case, it seems the couple may have been less motivated by the spirit of Pacha Mama and more by the threat of a reduction in the value of their nearby property which they have developed into the '*Garden of Paradise'* holiday retreat for American tourists.[101] This demonstrates the vulnerability of the extension in access rights in environmental cases to being hijacked by savvy enterprising individuals for their own advantage. In this case the local Ecuadorian community were not privy to the proceedings, nor were they consulted as amicus curiae, thus by taking a struggle into court it may thus disempower the community.[102] This case touches upon a number of central themes

[98] It is reported that the Global Alliance for Rights of Nature, CEDENMA (Ecuadorian Coordinator of Organisations for the Defense of Nature and the Environment) praised the outcome of the case. Natalia Greene, 'The First Successful Case of the Rights of Nature Implementation in Ecuador' (The Rights of Nature)

[99] Greene Ibid.

[100] Greene Ibid.

[101] All is not as it seems in this Ecuadorian paradise. Ecuador has long been popular with well-to-do American spiritual tourists looking for utopia since the hippy movement of the 1960s. This 'Valley of Longevity' has become a popular destination for 'soul-searchers dabbling in everything from agriculture to shamanism to hallucinogens.' (Smithsonian Magazine 2013). In 1973 two articles appeared in the National Geographic & Scientific American publishing the results of a Harvard medical researcher which reported high concentration of centenarians in the Vilcabambian population. These elderly folk, some of whom claimed to be as old as 127 were exposed as frauds by a team of American professors who later visited the area and conducted medical examinations on the elderly. Alexander Leaf 'Search for the Oldest People' January 1973 National Geographic 99; Alexander Leaf 'Getting Old' 1973 Scientific American 29; Vilcabamba: Paradise Going Bad? (Smithsonian Magazine, 20 February 2013); See further Bella English 'A Fabled Valley' The Boston Globe; Paul Vitello 'Alexander Leaf Dies at 92; Linked Diet and Health' (The New York Times, 6 January 2013)

[102] Questioning the lawyers best interests for their clients or the regard had to affected communities. Cole (n31) 650

explored by this research; in particular the presumption that people participate in a virtuous manner. The Vilcabamba case also suggests that as an activity, participation suits the already privileged members of society to the detriment and exclusion of vulnerable communities.

4.2.1 Communicative Authority- The Forceless Force of the Better Argument

Environmental awareness and procedural know-how supports an individual's preparation for deliberation, but what happens to their fortunes during the debate? Returning to the Habermasian concept of communicative authority is helpful here - that is the ability to formulate and deliver an articulate and persuasive opinion. This form of superior speech is yet another characteristic which is overlooked by the proponents of participation who are apt to ignore the significance of societal inequality. A number of scholars argue convincingly that some social classes are better at articulating their arguments than others.[103] Others specifically identify the usual suspects as white, middle-class men as possessing the highest communicative authority, because they 'assume authority more than others and they are more practiced at speaking persuasively.'[104] This mirrors the earlier discussion of the most-participative social groups. Difference in communicative capacity can however lead to a pernicious situation where the most articulate communicators will dominate discourse because they sound more convincing and are better suited to the form which open deliberation takes.[105] Inherent in the norms of deliberation is this invisible system of power which 'silence[s] or devalue[s] the speech of some people and therefore [favours] the

[103] Sanders (n89)

[104] Young (n5) 258

[105] Plutarch's account of the ancient Spartan system describes different kind of communicative authority. Representatives were elected by the power of 'the shout', this being the level of noise (applause and cheers) a candidate generated on standing before a gathered assembly of citizens. Plutarch (translated by Richard J.A. Talbert), On Sparta (Penguin Books 2005) 31 (Lycurgus). Also explained in Jon Elster, Solomonic Judgments: Studies in the Limits of Rationality (Cambridge University Press 1989) 85

interests of the 'better-educated white middle class'.[106] Dryzek offers the example of the bone-crushing handshake which is used both as a greeting and communicates the power dynamics in a newly forming relationship. [107] The voices of these participants will be heard over those who are less experienced at presenting reasoned and logical arguments. Habermas neatly terms this the forceless force of the better argument.[108] This competition of best opinions detracts from the supposed goal of participation as a vehicle for creating virtuous citizenry yielding mutual understanding. [109]

4.3 *GM Nation?* A Public Debate on GM Crops in Britain (Part II)

In the previous chapter *GM Nation* was introduced and revealed as a political device, designed to smoothen the path for introducing policy which was favourable in principle to GM industry. The debate was designed to help restore trust in Government in response to waning public confidence in the State and the perceived dominance of industry-funded science on government policy. This public debate should be understood in the wider context of the other justifications for participation, notably justification 2, namely, improving

[106] Hindess (n3) 10

[107] Dryzek states 'secret handshakes…presumably designed to mark them off immediately from other people, and establish an exclusive communicative relationship.'

Hindess remarks:

> An obvious example of such exclusiveness in contemporary western societies concerns the standards of dress and personal comportment which are thought to be appropriate in meetings of national and local government organizations, major political parties and in many other areas of public life.

He explains that dress code and etiquette should be viewed as forms of power which can act to silence some and favour others. Dryzek (n3) 64, 68-69; Hindess (n3) 10

[108] Habermas 1975 (n18) 108

[109] Arnstein describes the path towards authentic citizen participation as a dilemma of roadblocks. Marginalised groups can hold higher levels of distrust towards government organised processes. In addition, these communities are hampered by a lack of resources and capability to sufficiently organise themselves or secure representation within current infrastructure. This causes further alienation. Arnstein (n5); Iris Marion Young, Inclusion & Democracy (Oxford University Press 2002) 123; Dryzek (n3) 72; Maria Lee 'The UK Regulatory System on GMOs: Expanding the Debate' in Michelle Everson and Ellen Vos (ed.) Uncertain risks Regulated: Law Science and Society (Routledge 2009) 179

transparency and openness in environmental politics as well as taking necessary steps to move science 'out of the laboratory and into the community'.[110] Promoting the public to joint stakeholders in matters which had previously been reserved for invisible bureaucrats was viewed as a way of encouraging understanding between the public and political spheres. A senior stakeholder said *GM Nation* would deliver the 'social equivalent of informed consent.'[111]

Examination of *GM Nation* in chapter three identified a string of problems in the lead-up to the debate which demonstrated fluctuating governmental commitment towards the process. A litany of shortcomings in the final organisational arrangements hampered the execution of the live events. It was clear that the government had divergent aims from *GM Nation* coordinators AEBC. In this chapter, following on from the theoretical arguments discussed above, the research proceeds to explore the matter of representativeness of participants of *GM Nation*. In the aftermath of the debate it proved to be an issue which was possibly as contentious as the decisions taken in relation to timescale and operational budget.

The legitimacy of a participatory process and the credibility attached to the outcomes must in part rest on the ability to claim that the process has been conducted in a sufficiently representative manner. If the process is branded a *public* consultation then participants must be drawn from disparate groups or communities and social backgrounds, in order to authenticate that the consultation has been substantive rather than symbolic.[112] One of the most frequent questions raised by evaluators of *GM Nation* has been whether the process was

[110] Select Committee on Science and Technology, Third Report, Prepared 2000 citing Firth at 297

[111] Peter Healey Managing Director of the Science Policy Support Group and Co-ordinator of the ESRC Public Understanding of Science Programme, Select Committee on Science and Technology (ibid)

[112] Thomas C. Beierle 'Using Social Goals to Evaluate Public Participation in Environmental Decisions' (1999) 16 (3/4) Policy Studies Review 79. This is also mirrored by Dryzek who suggests the involvement of different parties to be an imperative, Dryzek (n3) 162.

representative.[113] Whilst the overall findings of the consultation revealed an unmistakable hostility toward GM technology, the process was seen to have failed to capture the involvement of a broader public and this allowed the conclusions to be undermined by academic, governmental and corporate observers.[114] In its current form, formal participatory practice will struggle to secure the involvement of a truly representative public given the identity related capacity issues outlined above, and so it proved here.

The published findings of *GM Nation* included data on participants, which illustrated that of those who had taken part, 54% had identified themselves as female and 44% male (2% declined to disclose their gender). In terms of the regional representation; 86% of respondents were from England, 6% from Scotland, 4% from Wales and 0.5% from Northern Ireland.[115] The regional variation can be explained by the location of the events, more public events were held in England.[116] What these statistics do not reveal are the skewed participant demographics which became the subject of much criticism in the months which followed the conclusion of the debate. In defence, Chairman Grant suggested that AEBC had deliberately refrained from dictating who should be included in the public events. In his own words, the organisers were

[113] Gene Rowe, Tom Horlick-Jones, John Walls, Wouter Poortinga and Nick Pidgeon 'Analysis of a Normative Framework for Evaluating Public Engagement Exercises: Reliability, Validity and Limitations' (2008) 17 Public Understanding of Science 419; Susan Mayer 'GM Nation? Engaging People in Real Debate? A GeneWatch UK Report on the Conduct of the UK's Public Debate on GM Crops and Food (June 2003)' (2003)

[114] Critics include Reynolds and Szerszynski, Horlick-Jones et al., and Genewatch. A number of these studies compared the GM Nation methodology with similar exercises and generally concluded less than ideal practices had been deployed. Larry Reynolds and Bronislaw Szerszynski 'Representing GM Nation?' (Participatory Governance and Institutional Innovation 2004); Tom Horlick-Jones, John Walls, Gene Rowe, Nick Pidgeon, Wouter Poortinga, Timothy O'Riordan, 'A Deliberative Future? An Independent Evaluation of the GM Nation? Public Debate about the Possible Commercialisation of Transgenic Crops in Britain, 2003' (2004) Understanding Risk Working Paper; Mayer (n113); DTI 'GM Nation? The Findings of the Public Debate' (2003) 30

[115] In 2003, according to the DTI 84% of the UK's population lived in England, 9% in Scotland, 5% in Wales and 3% in Northern Ireland.

[116] England (Birmingham, Harrogate, Taunton), one in Wales (Swansea), one in Scotland (Glasgow) and one in Northern Ireland (Belfast)

> [Anxious not to try] to vet those who would come but to be as open and as encouraging as we possibly could.[117]

It transpired that as a consequence of this laissez-faire approach, those who attended the tier 1 meetings were people with existing views and knowledge in GM.[118] Indeed an observer of the regional meeting which took place in Glasgow remarked 'if there was anyone present without an agenda, I didn't manage to meet them'.[119] That a specific 'public' attended the meetings is not a phenomenon isolated to *GM Nation*, a suggestion already offered by this research is the reality that often it is the usual suspects that participate. There are growing concerns that attendance and participation in public deliberation engages only self-selectors.[120] Criticism was directed at the choice of locations, venues and timings for many of the public events which meant significant numbers were prevented from attending. Reporting on the Birmingham event, a Guardian reporter explained;

> While those inside the room are eager to get the meeting under way - it is scheduled to start at the helpful time for local working people of 3pm – awareness of the debate outside the building is a little more fuzzy. Just outside the sprawl of the NEC, Nick Skeens, a writer, said he had never heard of the national debate. 'I have to confess to complete and utter ignorance of it.[121]

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[117] Malcolm Grant in response to question 1 from David Curry, Chairman. Oral Evidence taken before EFRA Committee 22 October 2003.

[118] This illustrates a complacent attitude, suggesting the necessity to secure representativeness is not important. Mayer (n113); DTI (n114) 30

[119] Mayer (n113); DTI (n114) 30

[120] Referencing the Understanding Risk Study, Lee suggests the research found

> 'substantial evidence at the public meetings of participation by large numbers who were politically engaged in the issue; in the sense that beliefs about GM appeared to form part of a wider weltanschauung'. Rowe et al. (n113); Lee (n109)

[121] Ian Sample, 'The Man in the Street gets his Forum on GM food - but Decides to Stay in the Street' Government's 10-day Public Road Show Opens with a Whimper' The Guardian (London, 4 June 2003)

During the Select Committee interrogation, a panel member suggested that the setting for some of the meetings had been 'middle class village halls.'[122] The six ticket-only meetings took place in venues which had the capacity for 100- 200 people. According to GeneWatch UK all were fully booked but it was generally accepted that vast numbers had been excluded from the process. As an example of the controversy, a local newspaper in Devon reported on the Taunton meeting which took place in a 100-person capacity room at the Taunton Holiday Inn:

> Hundreds of people across the West Country have been denied access to the national debate on the commercialisation of GM crops in Taunton today.[123]

A second meeting was consequently arranged to accommodate a further 100 people. Furthermore the events had been scheduled to take place at the end of the academic calendar which, by the DTI's own admission meant few young people were able to attend drawing further criticism from those observing the process. Members of the EFRA Select Committee suggested that taking part in *GM Nation* was a specialist activity that had attracted 'cranks, the motivated and opinionated- but not the public'.[124] Statistical research into the demographics of *GM Nation* indicated that respondents were members of the privileged elite.[125] The majority of those taking part were from the educated stratum of society, and whilst Grant was adamant in the early days of organisation that he was not interested in surveying university professors, ultimately AEBC had been unable to reach out to non-

[122] Grant (n117) in response to question 55 (Diana Organ)

[123] 'Hundreds are Denied Access to GM meetings' Western Morning News (Devon 7 June 2003).

[124] Grant (n117) in response to question 11 (Austin Mitchell)

This mirrors Sewell and O'Riordan's 1976 assessment that 'only the most motivated citizens are sufficiently informed and interested to sustain lengthy political commitment' W.R. Derrick Sewell & Timothy O'Riordan, 'The Culture of Participation in Environmental Decision Making' (1976) 16 Natural. Resources Journal 16-17

[125] Reynolds and Szerszynski (n114)

professionals. [126] Studies have shown that this group of self-engagers differ demographically but also intellectually, with intensely held views and pre-existing interest in the subject matter.[127] It was perhaps a consequence of adopting such an open process that the event was overrun by the usual suspects, it also suggests positive steps are required to involve those non-engager communities identified in the previous section of this chapter.[128]

There was an ambivalent silent majority whose views were not captured. This is a reality which was readily acknowledged by AEBC. It appears that once the debate had been announced, there was little informed effort to ensure that it produced 'the very public to whom the state could hold itself accountable' or perhaps there was an absence of expertise to secure a representative public.[129] In the minutes which document the preparatory meetings, it is evident that the organisers gave insufficient consideration to how to ensure that a pure public would be identified and recruited to take part. This suggests an assumption that attendees would perform the role of the universal citizen, or else that it does not really matter who participates for the process to be meaningful. It also implies that organisers significantly underestimated the individuality of participants of the Narrow-but-Deep focus groups. Organisers assumed that participants would respond to the stimulus materials from an objective jury-like stand point. As Reynolds and Szerszynski explain 'a conception of a

[126] Grant (n117) in response to question 55

[127] For example, Larry Reynolds and Bronislaw Szerszynski's 'Representing GM Nation?' which dissected who constituted this 'interested elite'. They found the actors as spanning specific 'cultural or sub-political networks' extending beyond the 'social corporations of Hegel's civil society' to a complex group of consumers, agriculturalists, the 'natural law party' - to name but a few. Reynolds and Szerszynski (n114); Georg W.F. Hegel, Philosophy of Right (Oxford University Press 1942) 182

[128] On the openness of meetings, Professor Grant had in the early stages of planning, already expressed concerns of the risk of potential for abuse, he feared meetings 'might be hijacked or subject to barracking, he feared, and might also encourage 'grandstanding' by members'. 'New Advisory Body Enters GM 'Maelstrom' (June 2000) 305 ENDS Report

[129] Sheila Jasanoff, Designs on Nature: Science and Democracy in Europe and the United States (Princeton University Press 2005) 282; Reynolds and Szerszynski (n114)

'general public' was built in to the process, one which defines this public through its distance from and ignorance of the issue' the need to ensure diversity was not identified. [130]

This returns us to the flawed notion of the universal citizen which assumes that an individual comes to the debate unaltered by personal experiences and unmotivated by personal interest. It was naive to assume the participants were a weightless constituency;[131] these participants would have brought a specific perspective to the debate which may have differed from other social groups. Grant described the task of involving a broader cross-section of the public as an enormous problem.[132] Arguably the prospects for increasing representation would have been improved had the overall budget and time frame been realistic rather than debilitative, this would have allowed AEBC to target event invitations to different socio-economic, racial and age groups and also hold more public events. The unintentional exclusion of a silent majority illustrates the general criticism of the public participation principle proposed by this research that current approaches often fail to respond to additional capacity needs of low socio-economic groups to actively facilitate their engagement.[133]

The credibility of the value of the *GM Nation* findings to a decision on GM commercialisation is diminished by supplementary investigations conducted by AEBC.

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[130] Part of the selection criteria for participants was the requirement to have 'no prior interest or engagement with the issue.' Reynolds and Szerszynski (n114). Rowe et al (n113) 22 have examined this technique of representative sampling whereby a number of demographic and socio-economic characteristics are used as a guide to build a balanced sample which is not dominated by certain pressure groups.

Lezauan and Soneryd note;

> The unengaged, the quiet citizens, are the most useful of publics, because they are the one authoritative source of representative opinions, and the only constituency weightless enough to be moved by the kinds of consultation exercises and deliberative process that governments and their consultants dream up.

Javier Lezaun and Linda Soneryd 'Consulting Citizens: Technologies of Elicitation and the Mobility of Publics' (2007) 16 Public Understanding of Science 294; David Demeritt, Sarah Dyer, James D.A. Millington 'PEST or Panacea? Science, Democracy, and the Promise of Public Participation' (2009) Environment, Politics and Development Working Paper Series, King's College London

[132] Grant (n117) in response to question 58

[133] Reynolds and Szerszynski (n114)

These suggested that the unengaged masses were less opposed to GM than the participants of the debate.[134] Lee offers an alternative interpretation of the Narrow-but-Deep results. She notes that whilst the wider public may hold differing views from the skewed demographic in attendance;

> [The general population] are not a "silent majority" in the original Nixonian sense of being a completely different audience with different values and attitudes from an activist minority.[135]

Lee's opinion, in contrast to AEBC, at the very least reinforces the necessity for reassurances about the representativeness of any process. The end result was less controversial in that the overall findings from the Narrow-but-Deep strand suggested that the more participants engaged with the issues the more their views intensified against GMOs (bringing them closer in opinion with the engaged elite who attended the other events). This has been described as a transformation of the ambivalent into the 'active, interested and potentially mobilised'.[136]

The experiences of *GM Nation* are useful for this doctoral research into the underlying tensions which affect the credibility of the public participation principle. However the results from the debate must surely be qualified on the basis that there was an unrepresented silent majority who did not take part. The DTI acknowledged that the evidence reflects only the view of those who made the conscious effort to take part.[137] Scholars who have risen to the defence of AEBC suggest that reference to other analogous public studies can be used to supplement the *GM Nation* findings and create a more comprehensive picture.[138] But as

[134] Diminished in the sense that the findings reveal how important it was to have a more authentic control group representing the public voice. Reynolds and Szerszynski (n114)

[135] Lee (n109) 154

[136] Reynolds and Szerszynski (n114)

[137] DTI (n114) 36

[138] Mayer (n113); DTI (n114) 30

chapter three discussed, the motivation for consultation exercises vary greatly so the overall picture of public opinion remains imperfect. The late addition of the Narrow-but-Deep focus groups was an attempt to compensate for what ended up being rather exclusive public meetings. This was seen as a political move to appease critics and is another example of troublesome preparations which indicate half-hearted governmental commitment to the process.[139]

4.3.1 Influence of the Press & Friends of the Earth Campaign

Chapter two introduced the popular justifications for participation in environmental politics. Lee has suggested that the media also played a role in this shift in attitude, largely pressing for change so that socially important matters of science were not cordoned off purely on the reductionist argument that certain issues were classified and belonged to the technocrats.[140] Therefore the media should be acknowledged as an active participant of *GM Nation* given its propensity to influence public sentiment.[141]

Cook et al have published unique commentary on the print media's ability to affect the GM public debate. Their observations include an increase in press coverage during the height of the debate period with the broadsheets choosing a particular standpoint. [142] *The Times* for

[139] Reynolds and Szerszynski (n114) state

> 'the ambivalent 'silent majority' accessed via the representative, quantitative survey were deployed as political ballast against the critical, socio-materially entangled 'publics of GM' articulated by the meetings of GM Nation'

[140] Lee (n109) 165

[141] Grant used the term 'hijack'. ENDS Report (n104)

[142] A comprehensive search for articles published between January-July 2003 by the Daily Mail, Guardian, The Sun and the Times which contained the term 'GM' were captured for this study. This was a deliberate selection of newspapers as they have very different readerships and views. They suggest that The Sun and The Times were pro-GM whereas The Guardian and the Daily Mail sat at the other end of the spectrum. Guy Cook, Peter Robbins, Elisa Pieri, 'The Discourse of the GM Food Debate: How Language Choices Affect Public Trust: Impact on Public of UK Policy Debate on Attitudes to GM Foods' (Economic and Social Research Council 2004)

example chose to ignore the 'irrational fears of the ignorant masses' and reflected the traditional preferential approach of government for evidence-based decision-making.[143] On the other hand, *The Guardian* focused on the interplay between the social, political and economic factors; and much of the commentary looked at the inevitable difficulties which lay ahead in reconciling these disparate factions. This perspective of scepticism was represented in a more intensified manner with the launch of *The Daily Mail's* 'Frankenstein Food Watch' campaign. This tabloid generally reported that a pro-GM decision had already been taken, it alleged that the Prime Minister Tony Blair was in the 'pockets' of the United States and Biotechnology Industry, and that 'thousands of people [were] ready to fight this decision in the fields, the streets, the courts and the supermarkets'.[144]

It is also appropriate to reflect on the contribution of the Friends of the Earth (FoE) '*Keep Britain GM Free'* campaign. Addressing the Royal Society in May 2002, Blair suggested that anti-GM campaigners were eroding public trust in the process by using 'emotion to drive out reason.'[145] The government felt FoE were deliberately stirring up public hysteria over food safety. The environmental group pressed the case for a 'GM free' Britain but in actuality there were already established agricultural practices which use GM products.[146] FoE later admitted its rhetoric was somewhat misleading but felt it necessary to rely on the 'symbolic power' and simplicity of the slogan.[147] It is ironic that on this occasion environmental

[143] Lee (n109) 178

[144] Daily Mail, 5 March 2004 cited in Cook et al. (n142) Observations of the GM Nation press coverage have drawn a parallel with Churchill's World War Two speech of 4 June 1940 'we shall fight on the beaches' in response to the threat of imminent German invasion. Hughes has said The Daily Mail '[constructed] a single community of British people, all of whom are opposed to GM and united in an agenda of action within specified sites.' Emma Hughes, 'Dissolving the Nation: Self-Deception and Symbolic Inversion in the GM Debate' (2007) 16(2) Environmental Politics 318; Demeritt et al. (n130)

[145] *Tony Blair, 23 May 2002;* Demeritt et al. (n130)

[146] Hughes (n144)

[147] 'We felt it was pointless trying to direct a campaign at the UK government because they'd already made up their minds, weren't going to listen. So what we did was we deliberately took the campaign back to the local level.' Clare Oxborrow, GM campaigner, Friends of the Earth (28 July 2005) quoted in Hughes (n144)

pressure groups had demanded the inclusion of the public voice, and during the process adopted a particular rhetoric to whip up public sentiment. It is a form of Habermasian communicative authority at play by a highly professionalised NGO. As one study noted, during the course of participation 'all players increasingly realise, linguistic choices and framing devices are likely to prove crucial in determining the eventual outcome.'[148]

Whilst not all issues which have been raised in the theoretical portion of this chapter were explicitly explored by debate evaluations, there was a socio-economic dimension to *GM Nation* which it is important not to overlook. GM produce is often heralded by governments as a cure for food poverty. If one of the leading arguments in support of this technology is price, this will appeal to the poor. Low socio-economic communities may not have had the same self-interest as the elite, and their relative exclusion is a problem in that regard. A case can be made for suggesting that the 'food poor' should have been expressly consulted as they are the prospective consumer base of 'Frankenstein foods'. Even Grant acknowledged that often the first time a member of the public engages with the GM issue is at the supermarket shelf. [149] GM food is an issue of particular concern for the low socio-economic public because they are more likely to be harmed than others. And yet these people were not specifically invited to take part, and did not participate in line with the pattern of underrepresentation by low socio-economic groups. *GM Nation* illustrates the perils of participation; it was a regressive event which perpetuated existing power structures and societal privileges.[150]

[148] Cook et al. (n142). The use of language was also touched upon in the RCEP's 21st Report, at 9.86 where they noted the difficulties of having a truly neutral process because language carries values (giving the example of 'memorable quotes' which can acquire disproportionate importance). Government Response to the Royal Commission on Environmental Pollution's Twenty-First Report-Setting Environmental Standards

[149] Grant (n117) in response to question 58

[150] Red Green Study Group has warned that green tendency to universalise environmental issues disguises class divisions and the unequal burden on certain communities, and countries. (n12) 10

4.4 Conclusion

This chapter has explored the limitations of the participation principle stemming from participant inequalities. Two leading assumptions contained within the justifications for participation have been identified; first that the public has a universal identity therefore participation always secures representative public opinion and secondly that participation is a virtuous activity analogous to a Habermasian ideal speech situation. The fragility of these assumptions casts doubt on participation's reputation as a legitimate decision-making process.

This research has examined the disabling effect of participation's formal grant of equality of access on the basis that everyone is equal. It was noted that such rules have highly exclusionary effects.[151] Legislating (less still litigating) for formal public engagement opportunities does not automatically create a positive culture and environment for participation to occur.[152] On the contrary, legal instruments which fail to respond to societal differences can actually pervert the spirit of the law.[153] It is argued that as society is deeply unequal, therefore participation by the public and the public's experience of participation is unequal, potentially widening inequalities.

The case study in this chapter suggests that there is insufficient recognition of the far-reaching effects that societal differences have on participatory discourse.[154] To borrow from the words of one environmental rights scholar- there is a yawning gap between rhetoric and

[151] For more on the negative consequences of the similarities approach to securing equality see Taimie L. Bryant 'Similarity or Difference as a Basis for Justice: must Animals be like Humans to be Legally Protected from Humans?' (2007) 70 Law and Contemporary Problems 208

[152] Kirk and Blackstock say legislation is not enough. (n92) 115

[153] Ted Benton, 'Wild Law: Why Rights – and Could We Do Without Them?' (2011) 23 Environmental Law and Management 329

[154] This is despite the vast body of scholarship (best exemplified by the work of Iris Marion Young) which has highlighted ongoing oppressions and exclusions facing communities despite prima facie advances in civil rights. Young (n5) 251

reality.[155] More often than not the usual suspects from already privileged positions attend participatory events, their attendance and contribution satisfies the legal requirement for public engagement to take place. Observers of public participation in science and technology have long identified the problem of the silent majority; this was also experienced in the *GM Nation* debate.[156] The upsurge in participatory opportunities, including the avenues of access to justice through the courts, returns the most benefits to the middle-classes.[157] There is an over-representation of this demographic in all aspects of participatory activity, including in the membership of leading environmental NGOs.[158]

Through conducting this research, the author suggests that it is clear that the emphasis on creating space for the public in central decision-making processes has overshadowed satisfactory examination of access and the representativeness of participants. Heavier concentrations of participatory capacity are held by some communities whereas others may have none at all. Uniform rules which apply equally to participants in a society of haves and have-nots serves only to reinforce privilege and heighten vulnerabilities.[159] The interests of

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[155] Sachs (n22) 36

[156] Gene Rowe, Tom Horlick-Jones, John Walls and Nick Pidgeon 'Difficulties in Evaluating Public Engagement Initiatives: Reflections on an Evaluation of the UK GM Nation? Public Debate About Transgenic Crops' (2005) 14 Science, Technology and Human Values 331; Alan Irwin 'The Politics of Talk: Coming to Terms with the 'New' Scientific Governance' (2006) 36 Social Studies of Science 299-320; Henry Rothstein 2007 Talking Shops or Talking Turkey? Institutional constraints to Proceduralising Consumer Representation in Risk Regulation' 32 Science, Technology and Human Values 582-607

[157] Averill considers new forms of environmental litigation will redistribute wealth from the corporations to the socially and politically privileged middle class. She even goes as far to suggest that

> 'Corporations such as power companies that are forced to pay damages [arising from litigation] will pass costs onto their customers through higher prices, which would have disproportionate effects on the poor.'

Marilyn Averill 'Linking Climate Litigation and Human Rights' (2009) 18 (2) RECIEL 146; Sewell and O'Riordan (n100) 17

[158] Dowie (n15) believes the American environmental movement is 'courting irrelevance,' because it is over populated by the middle class. Schneider considers that 'the people leading its largest organisations are too white, too male, too elite, too polite and too involved with Washington.'

[159] Public participation is perceived as an unquestionable good, the quality of discourse is often left as an afterthought, it may be difficult to over throw these norms because the necessary pressure to change must come from those who are currently

the wider community, including those who may bear the environmental brunt of a decision, are pushed to the margins of consideration.[160]

One of the principle justifications for participation outlined in chapter two is the objective of enhancing citizenship through participation, encouraging the individual to distance themselves from self-interest and pursue *il vivere civile*.[161] The ideals of virtuous citizenry are bound up in concepts of participative democratic theory. [162] Participation is supported because it is claimed to raise awareness of disparate interests and encourage consensus building. The promise of transforming the self-interested individual into a state of educated and rationalised civility is central to the legitimacy of pro-participation theory. [163] This idea of civic virtue is difficult to test empirically, within the context of my extended case study.

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powerless. The idealistic philosophy of participation is blind to difference. Young has asserted:

> We cannot develop political principles by starting with the assumption of a completely just society, however, but must begin from within the general historical and social conditions in which we exist. This means that we must develop participatory democratic theory not on the assumption of an undifferentiated humanity, but rather on the assumption that there are group differences and that some groups are actually or potentially oppressed or disadvantaged.' Young (n5) 261, 274.

For the purpose of this research the principal 'vulnerabilities' are the environmental risks associated with government policy. If low-socio economic communities cannot by reason of their poverty afford the opportunity costs of participating in a deliberative exercise then they risk the imposition of an environmental policy which threatens their quality of life and local community. The concept of vulnerability is subject to deeper exploration by followers of Martha Fineman's theory of vulnerability which she considers as a central and intrinsic part of the human condition. Everyone is vulnerable to differing degrees but some individuals have better forms of resilience. Fineman believes the state should strengthen the resilience in the most vulnerable subjects. To apply that principle to this research the State could build resilience by extending and developing stronger representation of low socio-economic individual in a participative democratic model. See Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1; Peadar Kirby 'Vulnerability and Globalisation: Mediating Impacts on Society' (2011) 2(1) Journal of Human Rights and the Environment 86-88; Bryan S Turner, Vulnerability and Human Rights (The Pennsylvania State University Press 2006) 9.

[160] It has been suggested that the slow progression of the environmental justice agenda is in part because of the reliance of lawyers from other communities. These advocates did not have first-hand of the harm their clients were suffering from leading to a disconnect of priorities. Cole (n31) 653

[161] Gerald Frug, 'Why Neutrality?' (1983) 92 Yale Law Journal 1601; *Williams* R. Douglas '*Environmental Law and Democratic Legitimacy' (1994)* 4 Duke Environmental Law & Policy Forum 27

[162] Douglas explains this is a key intellectual move of most civic republican legal theorists. *Douglas (ibid)* 20

[163] Mark Sagoff 'The Economy of the Earth: Philosophy, Law and the Environment (2nd ed. Cambridge University Press 2008) 93

Certainly, the demographics of participation are skewed towards the more affluent and educated sections of society (gender discrimination posited as an issue by some is not borne out in this context),[164] but whether or not that means that civic virtues are fostered and people forced to consider the views of others is uncertain. [165] Individuals are shaped by a web of relationships which operate in the personal and public realm; they cannot temporarily suspend their opinions for public deliberation.[166]

The aspiration of participatory discourse is similar to the ideal speech scenario, as conceptualised by Habermas to describe a purely rationalised, virtuous debate conducted by well-reasoned and equally capable actors.[167] But the reality is far from a *gemeinschaft* sense of community solidarity.[168] In a plural society collective decisions can be supported for a variety of reasons.[169] One observer says that it is more appropriate to view the world as a series of exclusive private clubs.[170] It is clear enough in theory and practice that participation does not make or educate a person to become virtuous; virtue must already exist within the political community in order for people to be conscious and responsive to the needs of others (during deliberation and also with regards to an environmental decision which is in the wider

[164] See above, n 86 and associated text.

[165] Mihaly says impotent participation is unlikely to create a virtuous civil society. Marc B. Mihaly 'Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents' (2009-2010) 27 Pace Environmental Law Review 166

[166] This supports a Hobbesian interpretation of the individual as a pre-conditioned subject that enters the political sphere in order to further their private interests. David Gauthier, 'Thomas Hobbes: Moral Theorist' in Moral Dealing: Contract, Ethics and Reason (1990)11-23; Stephen A. Gardbaum, 'Law, Politics, and the Claims of Community' (1992) 90 Michigan Law Review 733-36; Douglas (n161) 20

[167] Jurgen Habermas (Thomas McCarthy trans.) The Theory of Communicative Action (Beacon Press 1984) 74

[168] This meaning people act with responsibility to each other.

[169] Dryzek (n3) 49. The reasons behind utilising participation vary greatly amongst different social groups. Dowie notes that those from labouring backgrounds are often primarily concerned with health issues raised by toxic chemicals, as opposed to the middle classes who, in a position of relative affluence pursue conservationism. Dowie (n15) 159 see also Dobson (n36) 26; John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 Oxford Journal Legal Studies 1

[170] Richard Rorty, 'On Ethnocentrism: A Reply to Clifford Geertz' (1986) 25 Michigan Law Review 533

interest of society).[171] Self-interest and competitiveness emerge through public deliberation and is illustrated by NIMBY attitudes. People can become even more self-interested in environmental matters because the financial and health stakes can be high.[172] For the author this raises interesting questions of the classical representative democratic paradigm in relation to participation law. On the evidence above it is arguable that electoral democracy is possibly more attuned to the opinion of the 'masses' than participatory democracy. In terms of the case study, those in or near a state of food poverty may be numerous, but their interests are potentially better served by elected representatives on a free and fair elections model than the participatory model. That is to say, elections can involve just the sort of proactive eliciting of 'ordinary' peoples' views that is missing from the *GM Nation* debate. There is no attempt in this comment to idealise the electoral democracy paradigm, but the analysis above strongly cautions against a simplistic view that public participation is an advance on traditional, electoral democratic processes. Indeed, this has wider ramifications relating to the issue of the weight to be given to the results of participation. If participation law is elitist it is arguably a good thing that it is not the key determinant of government policy.

[171] Support for this argument is drawn from Douglas who believes that 'civic republican theory can only work by presupposing that the political community already possesses the virtue that its theorists posit as the end of political discourse.' *Douglas (n161)* 27

[172] Benton considers that the western society paradigms are overrun by unprecedented levels of materialism and competitiveness. Benton (n120) 330. For a discussion of these 'high stakes' in relation to siting decisions of toxic waste facilities see Eileen Gauna, 'The Environmental Justice Misfit – Public Participation and the Paradigm Paradox' (1998) 17 Stanford Environmental Law Journal 49-50

Chapter Five: Problem Solving and the Issue of Nature's Voice within Public Participation

5.0 Introduction to the Chapter

This chapter explores the third possible justification for public participation identified in chapter two that it leads to different and better environmental decisions and policies. In so doing we broaden our attention to explore the significance of wider environmental theories which argue the case for recognising the interests of Nature. At its most extreme, so called 'wild' lawyers demand the recognition of legal subjectivity and the personhood of non-human members of the Earth community and the elevation in status (equality) of all sentient beings' inherent right to exist. In the absence of such commitments, proponents of wild law question whether humans can be regarded as civilised.[1] In the continuing search to develop workable ecological and sustainable policy, many environmental scholars now are calling for a radical reimaging of man's relationship with Nature. As this theme is at the Avant guard of environmental discourse the author considers participation should be evaluated in light of whether it leads to decisions *for* the non-human environmental interest.

Writing the final part of this thesis has proven to be a challenge as a comprehensive examination of this particular 'green' school is beyond the boundaries and purpose of this doctorate. However in order to evaluate the interplay between public participation and nature rights' theory, a considered yet succinct review of the scholarship needed to be undertaken. This investigation has revealed the school's many layers and shades. It has been particularly difficult to handle the vernacular of this stream of environmental advocacy, which can be overly generalised and unspecific.[2] The most recent (and widely popularised) contribution to

[1] Colin Tudge in Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2nd ed. Green Books 2011) 1

[2] Insofar as possible I have refrained from using the umbrella terms of ecocentricism or deep ecology. This is because there are a number of arguments within this paradigm, and they do not necessarily complement each other.

this field is *Wild Law: A Manifesto for Earth Justice* authored by South African lawyer Cormac Cullinan [3] Frequent references are made to this publication and on occasion *wild law* is borrowed as a label to denote the strand of scholarship supporting Nature's interests.

In this chapter wild law and other theories which promote the world view of Nature as being of intrinsic value and deserving of appropriate protection within laws and institutions used by humans are examined for their implications for public participation.

The key problem that requires discussion is that non-humans cannot directly participate on an equal footing with other beings within nature, or to some extent even at all. In comparison with the issues addressed in the previous section, there is a difference in that a society where people are equal such that they have equal opportunities to benefit from participation is an ideal, but at least it is meaningful at that aspiration level. However, earth society in which other members of the Earth Community participate is nonsensical. Nature depends on representation by humans, in nature-sensitive decision-making structures. But is participation compatible with that? Put differently, would decisions be more sensitive to the 'requirements' and 'interests' of nature if the law emphasised the need for adequate representation, rather than direct participation?

After introducing the theories associated with wild law, this chapter explores the relationship between this paradigm and public participation. Conclusions are then drawn which identify further vulnerabilities of public participation.

[3] Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2nd ed. Green Books 2011)

5.1 Human-Orientated Environmental Law

Environmental legislation which aims to conserve and protect habitats might appear to be prima facie 'anti-human' or at least 'extra-human' but wild lawyers would argue such regimes maintain the balance of power protecting human interests in species-rich areas for scientific observation, recreation or aesthetical pleasure. [4] A further indicator of the prioritisation of humans is the recent wave of modern international (and national) [5]doctrine which has sought to create new third generation rights for mankind rather than conferring specific entitlements on non-humans.[6] The emergence of rights of future generations is one such illustration of human-focused environmental policy, although future generations have a similar difficulty of direct participation as non-human beings and this too is a potential problem for participation.[7]

Another illustration of the human orientation is the designation of an area as a site of outstanding beauty. Commentators recognise that this is an anthropocentric quality because '[probably] only humans can conceptualise an environment as beautiful.'[8]Alan Boyle has

[4] Cullinan (ibid) 64

[5] Donnelly and Bishop also consider that the trend underpinning the development of environmental regulation suggests a focus on the preservation of our human quality of life, with many 19th and 20th Century Acts focused on ensuring public health standards. They do not regard the approach taken in the Sandford Committee Report 1974 with regards to conservation as ecocentric because of the importance placed on recreation. The same is said of s.37 Countryside Act 1968 (provisions now contained in the Wildlife & Countryside Act 1981) which compelled public authorities to consider the economic interests of the rural community. As a final example they refer to town and country planning regimes which also protect flora and fauna on the basis of human aesthetical enjoyment. Bebhinn Donnelly & Patrick Bishop 'Natural Law and Ecocentrism' (2007) 19(1) Journal of Environmental Law 95

[6] Public participation although closely associated with these third generation rights cannot be regarded as a right per se as it is a duty for public authorities. Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment'(2007) 18 Fordham Environmental Law Review 484

[7] Principle 1, Stockholm Declaration of the U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

[8] In the nineteenth century, in particular, there developed a strong body of thought converging around the idea of 'natural beauty'. This should not be confused with the idea of nature as an ornament. Rather, it involved a celebration of the autonomy of nature, and what would today be called the ecological inter-connectedness of the one and the whole. This is apparent in the industrial pollution legislation that aimed to protect beautiful country estates from pollution arising from seats of industry. It is most apparent in the wild bird legislation contained in an Act of 1869. 'For birds' sake', was a

conducted an extensive cataloguing of international and domestic constitutional provisions which illustrate this manipulation of the Environment.[9] He believes that some of these third generation rights such as the right to sustainable development or future enjoyment are nothing more than a greening of human rights law, with the emphasis remaining on the rights of the individual. This has led him to ask whether it is now appropriate to have 'real rights' for the Environment.[10] If the aim of public participation is to enhance the quality of environmental decision-making and more specifically for purposes of this chapter the outcomes of decision making, it is logical to ask how it is possible to bring the interests of non-humans within the scope of the decision-making debate in order to advance environmental protection. Steele has articulated the problem-solving qualities of participation, that solutions are better because they are synthesized by an amalgamation of diverse perspectives, surely the addition of true ecological interests is part of this process?[11] But what is the significance for the desirability of participation if it is *not* possible for 'nature' to participate?

Proponents of wild law see the interests of non-human species as equal to humans' which would imply the obligation to legislate to recognise these entitlements and incorporate them

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powerful line in a contemporary poem that was written as part of the campaign for this. The philosophical roots of this can be traced back to Matthew Hales' stewardship' principle, Man looks after wider nature, on this paradigm, because it is mankind's moral duty to do so, arising from its place at the top of a hierarchy of living beings. Donnelly and Bishop (n5)

[9] Boyle (n6)

[10] Boyle provides the following examples; Declaration on the Right to Development, UNGA Res. 41/128 (1986), Article 2(3); Rio Declaration on Environment and Development, Principle 3, U.N. Doc. A/CONF. 151/26/Rev. 1 (June 14, 1992); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 1(1), U.N. Doc. A/6316 (Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966); the 1993 Vienna Declaration on Human Rights, and the Millennium Development Goals, UNGA Res. 55/2 (2000). Boyle (n6)

[11] This was explained in chapter two. Jenny Steele 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) 21(3) Oxford Journal of Legal Studies 415

into environmental decision-making processes.[12] Others contend that there is a clear distinction in importance between human suffering and that of other species, and that it would be impractical to try and ensure the observation of a 'wild' code which is ultimately the product of humans.[13] To reiterate, we do not need to resolve the contested merits of wild law and more anthropocentric approaches, as much as explore the possibility that public participation perpetuates the narrowly human-focus of modern environmental law, for better or for worse, and that it cannot be supported by the critical fringes of environmental law, occupied by Cullinan and others.

5.1.1 'Humaniacs', Environmental Extremists and the Pioneers of Wild Law Philosophy

Wild law signifies the transition from so-called 'anthropocentricism' to a philosophy often associated with 'ecocentricism' or 'deep ecology'. Anthropocentricism is best described as the perspective which places human interest at the centre of the Universe. The importance of the Environment is seen in resource terms, in other words in the degree to which Nature can support human ends as opposed to bearing autonomous rights.[14] Cullinan condemns anthropocentric positioning as the myth of human supremacy. [15] Other staunch advocates of species rights, consider human-centred decision-making as a crisis in western societal norms

[12] Filgueira states the rights for non-humans may be expressed differently from human rights but they would benefit from a ranking of equal value. Begonia Filgueira 'How Wild Did it Get?' (2006)18 Environmental Law & Management 25-26

[13] As argued by Regan and Singer. Casal says it is extravagant to argue for the elevation in status of animal rights as akin to our own. Timothy Regan, *The Case for Animal Rights* (University of California Press, 1983); Peter Singer, *Animal Liberation* (Avon Books, 1990); Paula Casal 'Is Multiculturalism Bad for Animals?' (2003) The Journal of Political Philosophy 11(1) 1-22

[14] Sean Coyle, 'Anthropocentric Approaches to Human Rights' (June 2011)Global Network for Human Rights and the Environment Workshop, University of the West of England

[15] Cullinan (n3) 35- 36, 82

which favour 'humaniacs',[16] meaning engineered institutions which produce decisions that sustain the objectification of nature and the separation of human beings from the Earth community.[17] Albert Einstein is invoked for his description of anthropocentricism as a feature of the 'optical delusion of human consciousness.'[18] On the other hand those advancing the recognition of species equality (including ecocentrics and deep ecologists) prioritise the environment over narrow anthropocentric interest. There is an unmistakable undercurrent of metaphysical spirituality at the extreme end of this philosophical spectrum. Humphrey for example, explains that ecocentricism dispels the assumption that humans occupy the centre of the 'cosmic drama'.[19] This Gaia imagery is nothing new- from early romantics to the modern era, ecocentrics have sought to reposition human relationships with Nature. This form of a philosophy which emphasises an affinity with the Natural World is more explicitly evident in some indigenous cultures.[20]

During the 20th century some key publications gained popularity and are regarded as having pioneered an early form of wild law, which implicitly raise the question of the desirability of

[16] Berry assessed of the division between man and other beings as a cultural problem. Peter Burdon, 'Wild Law: The Philosophy of Earth Jurisprudence' (2010) 35 (2) Alternative Law Journal 62. In reference to Hearne's use of 'humaniacs' see Stephen Clark 'Beasts Like Us' *Times Literary Supplement* (London 20 February 1987) 175

[17] Cormac Cullinan, Sowing Wild Law (2007) 19 Environmental Law & Management 71

[18] Albert Einstein, quoted in Klaus Bosselmann, 'The Way Forward: Governance for Ecological Integrity' in Laura Westra, Klaus Bosselmann & Richard Westra (eds), *Reconciling Human Existence with Ecological Integrity* (Earthscan, 2008) 319. Also discussed in Burdon (n16)

[19] Kumar focuses on the current usage of 'the spirit of the law', a phrase he says is only taken to mean the purpose behind a legislative act, rather than potentially standing to represent the spirit of sentient beings , such as rivers or beings which could be represented by law. Satish Kumar 'Economics and Ecology- Which Comes First?' (2007) 19 Environmental Law and Management 82; Matthew Humphrey, *Preservation Versus the People: Nature, Humanity and Political Philosophy* (Oxford University Press, 2002) 18.

[20] Kyle Powys Whyte, Indigenous North American Ethics and Aldo Leopold's Land Ethic: A Critical View of Comparison and Collaboration (March 14, 2012). (SSRN paper, no citation available)

public participation in environmental decision making. In *The Land Ethic*, Leopold suggests a reformation of society,[21] guided by the following ethical code:

> A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.'[22]

Leopold advocated an Earth-centred philosophical repositioning, changing 'the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it.'[23] In *Silent Spring*, Rachel Carson cautioned against mans' unfettered interference with eco-systems and she is credited with popularising the concept of species interdependency (and also for spurring the wider American Environmental movement).[24] Christopher Stone's essay *'Should Trees Have Standing?'* impacted on both the academic and juridical spheres in 1972.[25] Carson and Stone drove the agenda for recognising Nature's interests forward into the 1960s and 70s. In fact in the landmark case of *Sierra Club v Morton*[26] Stone's thesis captured the attention and curiosity of a dissenting Supreme Court Justice who considered whether in the future it would be possible, and right, to reform approaches to standing in order to protect environmental interests, Douglas J. Said:

> The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be

[21] Ibid

[22] Aldo Leopold *A Sand County Almanac* (Ballantine Books 1966) 262. The British contribution during the Land Ethic period (1940s) came from L.T.C Rolt's *High Horse Riderless* (George Allen & Unwin 1947) which examined the reconcilability of industrial advances and the natural world. Like Leopold, Rolt lamented the loss of bucolic living.

[23] Leopold (n22)240

[24] See Benjamin Pontin, Fourth Assessment Report of the Intergovernmental Panel on Climate Change: Key Developments in the Science of Global Warming Editorial, (2006) 18 Environmental Law & Management 25; Rachel Carson, Silent Spring (Houghton Mifflin Company 1962)

[25] Christopher Stone 'Should Trees have Standing? (1972) 45 Southern California Law Review 450

[26] Sierra Club v Morton 405 U.S. 727 (1972)

> despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.[27]

The subjects of Stone's attention were non-animal but natural beings.[28] He supported the creation of species-specific entitlements,[29] recognising that equality based on rigid uniform rights would be impractical. He reasoned that;

> Corporations have rights, but they cannot plead the fifth amendment...thus to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have.[30]

Cullinan regards Thomas Berry to have been his mentor and a paternal figure of what he terms a new 'Earth Jurisprudence'.[31] Towards the end of his life, Berry sought to establish a set of fundamentals, proclaiming *'Ten Principles for Jurisprudence Revision'* which address

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[27] 405 U.S. 727 (1972) Douglas J. at 741–2. Stone's essay was not met with universal respect by juridical circles, in Fisher v Lowe, No. 60732 (Mich, CA), 69 A.B.A.J., 436 (1983) involving a suit brought on behalf of a tree which has suffered injury following a motor accident a Michigan Court dismissing the claim, resorted to a comic judgment:

We thought that we would never see
A suit to compensate a tree.
A suit whose claim is prest
Upon a mangled tree's behest.
A tree whose battered trunk was prest
Against a Chevy's crumpled chest.
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three
We must uphold the court's decree

Christopher Stone Should Trees Have Standing? And Other Essays on Law, Morals and the Environment, (Oceana, New York) 1996; Cullinan (n3) 95

[28] Stone (n25) 456

[29] Stone (n25)

[30] This is similar to Berry's support for a qualitative body of rights for Nature. Stone (n25) 450

[31] Cullinan (n3). Berry's influence is also noted in Burdon (n16) 5

the different stages of rights conferral. [32] Berry had a Carsonian perspective of species-interdependency; to him the Universe was a 'communion of subjects, not a collection of objects.'[33] Starting with a declaration that all living creatures are beings and therefore rights holders, [34]he justified rights on the basis of an inherent moral value of all beings, and the scope of the rights – to exist, to a habitat and fulfilment.[35]

Wild Law: A Manifesto for Earth Justice is the latest popularised contribution which champions an Earth-centred jurisprudence. First published in 2002, Cormac Cullinan's assessment of governance systems are that they are rooted in overt anthropocentricism, encouraging an undesirable 'uniformity of monoculture'[36] which supports the continued separation of humans from the rest of the 'Earth community' and is overrun by human norms.[37] He claims the structures of law and government go against the grain of Nature, causing climatic change and ecological imbalance. [38] Wild law calls for a paradigm shift away from the prevailing political and legal systems which is seen as having barred societal membership to other species, towards recognition of Nature's inherent right to exist and flourish.[39] The wild law that Cullinan principally suggests is an Earth Jurisprudence. This would recognise all species as rights holders. This Jurisprudence, he explains, is necessary to articulate the responsibilities flowing from each of these rights,[40] and to implement legal mechanisms which prevent the human infringement of the fundamental Earth rights of

[32] Thomas Berry, *Evening Thoughts: Reflections on Earth as Sacred Community* (Sierra Club Books 2006) 149-150

[33] Referred to as 'The Origin Differentiation and Role of Rights' see Cullinan (n3) 63

[34] Berry (n32)150

[35] Ibid.

[36] Cullinan (n3) 30

[37] Cullinan (n3) 44

[38] Preface to Cullinan (n3) 7

[39] Cullinan (n3) 64

[40] Cullinan (n3) 116

others.[41] Earth governance is used by Cullinan interchangeably with Earth Jurisprudence, suggesting that a legal response (a *wild law*) is key to repositioning the status of 'the other' within the Earth Community. Cullinan wishes to abandon prevalent political practice which prioritises short term goals, he explains that Earth democracy is 'government of people, by the people, that is for Earth.'[42] Those deconstructing Cullinan's thesis have questioned whether the idea should be presented as a form of new natural law, an ethical code which recognises the moral value and equality of non-human beings. Mahatma Gandhi once said that "the greatness of a nation and its moral progress can be judged by the way its animals are treated."[43]

George Monbiot has made the most recent contribution to scholarship in this field. Monbiot has made the (philosophical) case for *rewilding* which can be understood as having two aspects, firstly the mass restoration of living systems (which he explains is similar to Lovelock's Gaia hypothesis),[44] and the rewilding of human life – freeing us from 'ecological boredom'[45] returning us to a raw and feral state.[46] He is aware of the criticism he attracts, mocking those who would regard his love for the Earth as 'crypto-fascism of the

[41] Cullinan (n3) 105-108

[42] Cullinan (n3) 117

[43] Mahatma Gandhi, quoted in Christopher C. Eck and Robert E. Bovett, 'Oregon Dog Control Law and Due Process' (1998) 4 Animal Law95. Unlike traditional natural law the motivation for wild law theory is not based on religious scripture however the central driving force behind this scholarship is certainly spiritual and emotional. Benjamin Pontin 'Wild Law: Sustainable Development and Beyond?' (2007) 19 Environmental Law and Management 59

[44] Lovelock considered that the Earth, if free from undue anthropocentric interference would be a self-regulating system. James Lovelock 'Gaia as Seen Through the Atmosphere' (1967); James Lovelock & Lynn Margulis 'Atmospheric Homeostasis by and for the Biosphere: the Gaia Hypothesis' (1974)

[45] Public address (2013, audience and date unknown, see bibliography)

[46] George Monbiot G, *Feral: Searching for Enchantment on the Frontiers of Rewilding* (Penguin 2013)

Bourgeoisie' (the author would direct him to the label of environmental fundamentalism as possibly more appropriate).[47]

5.1.2 'Naturalising' the Law

Within the past five years, infant steps have been taken towards the establishment of specific rights for the environment. South America has proven to be the most fertile ground for the emergence of nature laws.[48] The most notable development in the field of *wild* laws has been the adoption of the 2008 Ecuadorian Constitution which proclaimed 'a new form of public coexistence, in diversity and in harmony with nature'.[49] In the second edition of *Wild Law*, Cullinan rejoices at the Ecuadorian ambition to embrace the fluid spiritual tones reflective of Pacha Mama (an ancient Incan term for Mother Earth). It marks a break from the traditional parlance of constitutional law; it signifies that the provisions were to be seen as innovative and less anthropocentric by recognising the spirit of other beings. The goddess Pacha Mama is revered by some South American communities' cosmology for her agricultural bounty.

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[47] George Monbiot 'I Love Nature. For this I am called bourgeois, romantic – even fascist' *The Guardian* (London 8 July 2013)

[48] North of the border, the US Endangered Species Act 1973 has long been respected as the avant-garde of its generation of laws, some have even described its provisions to have been 'anti-human' for its capacity to protect wildlife in the face of competing commercial interests, the Act was used to delay a large dam building project due to the threat posed to a school of Snail Darter fish (as noted in Ronald Dworkin, *Law's Empire* (Oxford University Press, 2000) 20–23. Also noted in Donnelly and Bishop (n5) 94. Scholars such as Sunstein claim that US legislation 'guarantee[s] a robust set of animal rights' (although he accepts enforcement continues to be problematic) Cass Sunstein 'Can Animals Sue?' in Cass Sunstein, and Martha Nussbaum (eds), *Animal rights: Current Debates and New Directions*, (Oxford University Press, 2004) 252

[49] The **Constitution of the Republic of Ecuador, 20 October 2008** The Pennsylvanian action group CELDF having promoted the case for municipal ordinances across the US, assisted with the Ecuadorian drafting process. This group is also involved with a 'Community Bill of Rights' voter initiative in the Washington city of Spokane. Envision Spokane is a multi-party initiative; the third version of the proposal appears on the 2013 ballot and seeks to amend the City Charter to grant the community the ability to consent to new development zones, safeguard river quality, revoke legal personality of the corporation and restrict their rights where they conflict with the interests of the communitySee further http://www.celdf.org and discussed by Burdon (n16)9

Notable provisions of the Ecuadorian constitution include Articles 71, 277 and 395(4). Article 71 states;

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.[50]

Article 277 provides; The general duties of the State in order to achieve the good way of living shall be to guarantee the rights of people, communities and nature. [51]

Article 395(4);

In the event of doubt about the scope of legal provisions for environmental issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail.[52] These provisions are amongst the first attempts to declare the inalienable rights of Nature in a national constitution.[53]

The impact of this ambitious gesture is possibly diminished in light of the frequency of constitutional reform in the country, the waves of each passing presidential term signalling change.[54] A 2009 Ecuadorian presidential address which renewed Correa's commitment to capitalising on the country's natural resources for economic enrichment; these comments

[50] Article 71 Rights of Nature: The **Constitution of the Republic of Ecuador, 20 October 2008**

[51] Article 277. Ibid.

[52] Art 395(4) Ibid.

[53] Thomas Linzey & Anneke Campbell *Be the change: How to Get What You Want in Your Community* (Gibbs Smith, Utah 2009) 134-135; Burdon (n16) 10

[54] Cordeiro states that Latin America has a 'convoluted constitutional history, Ecuador currently ranks 4th in the world for most constitutions according to Jose Cordiero **'Latin America: Constitution Crazy' Latin Business Chronicle (6 October 2008, Coral Gables)**

immediately undermined the constitutional developments.[55] In an act of bitter irony, Fundación Pacha Mama, a leading Ecuadorian campaign group, is reported to have been shut down in December 2013 by police acting on the instructions of the President. The group had been vocal opponents of the government's plans for large-scale (some 2.6 million hectares) drilling in rainforests belonging to indigenous peoples.[56]

Elsewhere in 2010 the nine Latin American and Caribbean member states of ALBA[57] adopted the Universal Declaration of the Rights of Mother Earth beholding Nature's 'right to exist, to persist and to continue the vital cycles, structures, functions and processes that sustain all beings.'[58] In July 2013 India declared dolphins to be non-human persons.[59] But these legal developments, whilst more than purely academic in form, are ultimately still visionary in substance rather than robust instruments of protection and enforcement. The Ecuadorian experience reiterates the difficulties in brokering harmony between economic and environmental imperatives.

[55] President Correa made unequivocal public statements which renewed government commitment to economic imperatives in complete contradiction to the new Constitution. The President expressed his intention to capitalise on the considerable national oil reserves, in an address to the Ecuadorian people he said 'it is absurd that some want to force us to remain like beggars sitting atop a bag of gold.' *See* Mary Elizabeth Whittemore 'The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why The 2008 Environmental Amendments have no Bite' (2011) 20 (3) Pacific Rim Law & Policy Journal Association 660-661; Daniel Denvir, 'Resource Wars in Ecuador: Indigenous People Accuse President Rafael Correa of Selling out to Mining Interests,' *In These Times* (28 February 2009) ; Nikolas Kozloff, 'Ecuador's Rafael Correa: Copenhagen Climate Hero or Environmental Foe?'

[56] See further website of Pachamama Alliance 'Stand with us in solidarity and defend the Amazon and the collective Rights of Nature and humankind'

[57] *Alianza Bolivariana para los Pueblos de Nuestra América* (Bolivarian Alliance for the Peoples of Our America) – membership includes: Antigua & Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, St. Vincent and the Grenadines, Venezuela

[58] Article 2 Universal Declaration of the Rights of Mother Earth, World Peoples Conference on Climate Change and the Rights of Mother Earth, April 2010, Bolivia

[59] Paul Fernandez 'Greens hail ministry of environment and forests move to protect dolphins' *Times of India* (Mumbai, 23 May 2013)

5.2 Nature's Voice, Lost in the Wilderness of Public Participation?

Having outlined the principal features of wild law and related philosophy, the following discussion examines how satisfactorily the interests of non-humans can be accommodated within public participatory practice. This is an investigation to consider what might happen when these two modern environmental theories, both purporting to improve environmental standards, collide. As the legal subjectivity of the natural world remains a largely conceptual debate, conducted at some distance from the statute books, it is helpful to begin to consider where the potential friction would occur in practice and how this may be addressed within the law – including how it may be addressed within a legal paradigm emphasising participation.

The cognitive differences between humans and all other species means that people cannot exchange full dialogue with other members of the Earth community (to borrow from Cullinan's parlance). Any decisions taken in relation to the environment are therefore based on a human interpretation of what is right, and what is deemed important. Francoine considers that the rights of animals can only be recognised in terms of ensuring their protection and ethical treatment, not in terms of full societal citizenship which would include the right to vote or participate in political life.[60] Obvious communicative difference is suggested by Francoine as '[precluding] the creation of full parity'.[61] Rights as presently understood are quite specifically a human construct. A right could be understood as having three aspects; the entitlement to something, the ability to enforce that entitlement (or have it upheld by public authorities when infringed), and the responsibility to respect the corresponding right of another.[62] In the absence of moral agency and voice, non-human

[60] Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press, 2000) 50

[61] Ibid.

[62] Stone considers there are three criteria of a 'right'. Stone (n25) 458

beings cannot have regard for the interests of others, nor can they participate in deliberative decision-making, and their own interests can only be included or considered by way of representation.

Likewise, Cripps has questioned our ability to do justice to animals through human institutions because of communication barriers and a human-centred worldview;[63] it is at the very least 'troublesome'.[64] Modifying the meaning of the term so that it is not exclusively 'human' (to include animals, trees and rivers) may not be helpful, for participative purposes, it could result in overly complex discourse on interpretation, this could produce two undesirable side effects. First complicated rhetoric and expanded terms are likely to extend the length and nature of deliberation required. This would hamper the efforts for administrative expediency. Secondly, complex discourse will further affect the communicative capacity of participants, further reducing the appeal of participation to communities who are still trying to secure basic living standards.[65] As the proceeding analysis will illustrate, there are complex risks associated with using a purely human perception of Nature's interest within participative deliberation. And that is the key in this chapter, which addresses the quality of decision making outcomes (or the problem-solving capacity of participation).

[63] Elizabeth Cripps E 'Saving the Polar Bear, Saving the World: Can the Capabilities Approach do Justice to Humans, Animals and Ecosystems?' (2010) 16 (1) Res Publica 1

[64] Holmes Rolston 'Rights and Responsibilities on the Home Planet' (1993) 18 Yale Journal of International Law 257

[65] Ibid

5.2.1 In Nature's Best Interest

Humans have no way of accurately determining what it is that non-humans want,[66] nor indeed does it make easy sense to speak of Nature's wants, by analogy to those of humans. The environment is a silent client. This forces, or if not forces invites, us to take on a paternalistic stewardship role more aligned with traditional representational activity– it is not a relationship of equals. Benton has considered the consequence stemming from insurmountable cognitive barriers noted in parts throughout this chapter.[67] He makes the comparison with marginalised human groups who have pressed the case for equality; initially they have relied on an external advocate but eventually progress to self-representation. He suggests this to be a significant milestone for these movements, once liberated their voice '...frequently speaks a different language from the one used on their behalf by erstwhile advocates.'[68] This will not happen for the environment, the need for representation is a permanent and a lasting responsibility that humans shoulder.[69]

A further break down in the analogy here is that the plight of minority communities is not the same as the environment's. Even representation will be challenging because rights discourse tends to promote the grouping of all non-human species as a homogenous singular entity, Nature is anything but monolithic, indeed *Nature* is arguably an underwhelming term which does not reflect the diversity of the Biosphere. Feminist legal theorist Catherine MacKinnon has written at length on the shortcomings of male-designed devices for addressing gender inequality. She is also cautious whether justice can be done to other species if using methods

[66] *Wild Law* criticises our perception of communicative issues as an 'insuperable problem' which leads us to believe we must be the managers of Nature, Cullinan (n3) 89

[67] Ted Benton 'Wild Law: Why Rights – and Could We Do Without Them?' (2011) 23 Environmental Law and Management 328

[68] Ibid 328

[69] Ibid.

(in this case participation) which encourage people to humanise other beings as a grounds for justifying rights.[70]

The diversity of the ecosystem creates innumerate and irreconcilable claims between species; this poses a persistent problem for humans to see that justice be done to the different members of the Earth Community. [71] Take for example the gazelle and the wild cat. The life of one is sacrificed to allow the other to flourish and fulfil its natural state of being. It would seem unreasonable to interfere to protect the gazelle's welfare on the basis that it disturbs ecosystem flows. In the same way one critic has used the example of feral pigs ravaging the tropical rainforests of Hawaii,[72] and ultimately the rights of one must be compromised in furtherance of another. Of course carnivorous behaviour is not reserved for 'the Wild', humans also play their part in feeding poultry and fish to household pets.[73] This demonstrates that decisions regarding non-humans could be wholly based on human bias towards those beings which can demonstrate a greater degree of human traits or those that hold more favour.[74] If the environment is given rights, must humans police habitats to ensure the rights are adhered to by all beings in the same way that we expect human rights to be upheld?[75] This would be plainly nonsensical and so there seems to already be an acceptance of the limitations placed upon us as co-citizens with the Wild. These risk factors all support

[70] Chapter four also considered the advantage for white middle-class males in public participation and the extent to which it is suited to antiquated notions of masculinity. David Fraser, 'Animal Behaviour' Vol. 68 (6) 1470-1472 (December, 2004) reviewing Cass Sunstein and Martha Nussbaum (eds.) *Animal Rights: Current Debates and new Directions* (Oxford University Press, 2004)

[71] Cripps (n63)

[72] Anderson (n15)277-79; Cripps (n63)

[73] Regan considers the idea of intervening to sacrifice an individual for the good of another group synonymous to fascism, for him individual members of a species and a community are of equal value. In Benton (n67)

[74] Kumar (n19)

[75] Cripps (n63)

the use of the traditional representation model to ensure that non-human interests are properly considered as separate to any human connection. Arguably this would better encourage an enhanced problem-solving approach to environmental matters than the participation agenda.

5.2.2 In Our Best Interest

Popular perceptions of good and bad in environmental matters sees companies pitted against the community. Developers and corporations are vilified as emotionally barren and ruthless, and on the other hand community involvement in decision-making presumes that a higher moral, virtuous standard will be applied in favour of the Environment. But as earlier sections of this thesis have examined, participants debating the future of the Environment cannot fully divest themselves of personal interests. We have considered the competing objectives of individuals in depth in chapter four, to introduce a further layer to the dimensions at play Petrinovich has spoken of 'speciesism' to describe behaviour which leads to decisions taken in the protection of the human species.[76] Animal experimentation serves as perhaps the best illustration of the inconsistencies in approach towards animal welfare- humans are empowered to ignore ethics when they want because there exists an explicit system of laws and institutionalised objectification of animals which support a continuous and convenient dominance over Nature.[77] Furthermore, current patterns of consumption and human population growth increase the pressure on ecosystems causing trophic cascades.

[76] Lewis Petrinovich, *Darwinian Dominion: Animal Welfare and Human Interests,* (MIT Press, 1999)217-222. It is also a term used by Kumar (n19)

[77] (for scientific, aesthetical or agricultural purposes) Gary Francoine 'Animals – Property or Persons?' in Sunstein C, Nussbaum M, (eds), *Animal rights: Current Debates and New Directions,* (Oxford University Press, 2004) 117

Experimentation on non-humans in the name of research and modern medicine highlights the tragic conflict between the interests of humans and Nature. Such practices on humans have drawn the strongest international condemnation, some favour an absolutist stance, that in recognising the rights of beings, they cannot be overridden on the basis of 'progression' for the human community- 'rights are meant to act as moral limits on what can be done to an individual in the name of the social good.'[78] The author suggests this to be a simple but effective illustration of the irreconcilable tensions between human and non-human interests; you cannot on the one hand establish that non-humans are worthy of rights recognition and then claim to rationalise derogating against them in favour of our own needs.[79] Scientific experimentation on animals demonstrate the ease with which different ethical standards of treatments are applied to non-humans, perhaps it is a symptom of a moral schizophrenia in which Nature is too often objectified. [80]

If non-human interests are included in participatory discourse, via the campaign groups that tend to make use of participatory channels, it is predictable which species' interests would prevail. It is probably obvious to state that the public imagination is more easily captured, as a prerequisite for a successful campaign group, by some non-human species than others. Some normalise ethically questionable conduct on the premise that nothing is more important than the survival of the human race. Steinbock argues that human lives are more valuable 'because humans are morally autonomous and so enjoy a privileged position within the moral community'.[81] The resulting implication is that all other species are relegated to a

[78] Alasdair Cochrane 'Animal Rights and Animal Experiments: An Interest-Based Approach' *Res Publica* (2007) 13

[79] Anders Schinkel, 'Martha Nussbaum on Animal Rights' Ethics & the Environment' (2008) 13(1) Ethics and the Environment 41

[80] Francoine (n77)108

subordinate class. Cochrane, less radical than Steinbock, argues that animals should not be killed or made to suffer through human experimentation, but he states that it is acceptable to use them for science as they do not have a 'fundamental interest in liberty'.[82] This is an unhelpful distinction (not to mention unclear), furthermore whilst animals may not have moral agency they can express a sensory preference – reacting to pain as humans do and signalling that they wish to roam freely- these are emotions they can communicate. All of these issues demonstrate the difficulties of adequately assessing non-human interests to participatory exercises.

Plants, for example, would not easily find an influential voice through an NGO, yet it is this species-area that is central to the GM debate. The initial licence applications, after the debate, were for invasive, altering of the DNA of crops beyond a singular life cycle, changing an evolutionary path.[83] The farm scale evaluations were about that species group too. Maize did not have any voice in this process nor, for reasons explained in this chapter, could it have.

It is relevant to return to the criticism, expressed well by Lee, that the debate was an example of unabated corporate social dominance which permits artificial legal subjects to wield power over 'the Wild'.[84] Most of the opposition to a government policy welcoming of GM technology was based on the threat of this technology posed to human food chains and public health. In the previous chapter we have questioned the rationality of participants, and doubted the extent to which those participating are concerned with reaching commonly

[83] Cullinan (n3) 157

[84] Lee has said the exorbitant extension of patent rights to the GM Industry (which has been facilitated by the courts), thereby permitting them to monopolise staple food markets such as rice is regrettable. Robert Lee 'A Walk on the Wild Side: Wild Law in Practice' (2006) 18 Environmental Law and Management 6; Eran Binenbaum 'South-North Trade, Intellectual Property Jurisdictions, and Freedom to Operate in Agricultural Research on Staple Crops' (2003) 51 Economic Development and Cultural Change 309, 316

acceptable, virtuous decisions. The *GM Nation* debate was there argued to be an exercise in participatory deliberation which was overrun by humans furthering self-interest; the interests of Nature are unlikely to emerge as being as important as those of humans.

5.2.3 Will Representation Promote Non-Human Interests More Satisfactorily?

There is clearly, therefore, an uneasy relationship between the principles of wild law and those of public participation in environmental matters. Ultimately the interests of the Earth's non-human members can only be supported via representational methods. It is suggested that traditional representation is not necessarily a consolation prize or compensatory measure; instead it may in fact elevate the significance attributed to the interests of other species. Cullinan's form of environmental extremism may be seen as vilifying mankind. However this is to overlook the unique human capacity of compassion for others. The body of environmental law demonstrates moral and ethical coding, and the aspiration to be better members of the Earth community and move beyond short-term self interests.[85] Humans are alone in their moral agency but try to apply it to all living beings, humans have assumed the stewardship of the Earth, and the body of wild law philosophy demonstrates a consciousness to view the eco-system as deserving of fair treatment. The debate on legal subjectivity of all species is an example of human potential, these are not dialogues or processes which produce perfect solutions but they symbolise the application of moral judgement towards better environmental decisions. Those interest groups who advocate on behalf of the Environment within the institutional framework perform a significant role for the muted Ecosystem they represent because their input can be assimilated into normative political and public dialogue, with far greater likelihood for influence and positive outcomes.

[85] Donnelly and Bishop (n5) 95

5.3 Conclusion

To some extent it is difficult to separate out the question of the legitimacy of public participation (as explored in chapter four) from its problem solving capacity. If they are fundamentally distinct, then one is faced with awkward logical propositions in which a decision can be *better* but may lack legitimacy. For most of the time, therefore, we would understand a decision that is the most legitimate to be good in an instrumental sense, and possibly best, and as a corollary that a best decision will have legitimacy. Nonetheless, an attempt in this chapter has been made to focus on the problem solving aspect, with reference to the scope for including, as it were, the environment as a participant in decision making.

The chapter has approached the idea of the environment as a protagonist in decision making through the lens of wild law and variations of a more 'moderate' character. Public participation is a radically anthropocentric activity – that is built into the very idea of *public*.[86] Perhaps this is why Cullinan avoids practicable suggestions on how to reconcile Nature rights with public interest environmental litigation and community-based environmental decision-making, and regardless, it is difficult to discern any common ground here.[87] A wild lawyer cannot easily support participation as a step in a progressive direction of recognising interconnected earth interests.

[86] The granting of species-specific rights is also considered by Warren to be anthropocentric. As discussed in Filgueira (n12)

[87] The other obvious absentee in Wild Law is any substantive discussion of Sustainable Development. Lee queries whether this omission is because, as with Public Participation, the principle of Sustainable Development *is hopelessly anthropocentric*. It is frustrating that Cullinan chooses to hide behind the excuse that he is only 'consciousness-raising' - this is not an exercise reserved to deep ecologists, the overarching drivers of these principles of international environmental law also aim to re-examine human behaviour and social inequalities in order to inform and improve our relationship with Nature. Pontin describes Sustainable Development as the 'central organising concept of environmental law around the globe today'. The success of Sustainable Development principles in remobilising the international debate on the state of the Environment, even if as with Wild Law it is a difficult concept to translate into workable laws, merits exploration by

If we imagine how participation in the context of Earth Jurisprudence might be carried out, it would require some of the human participants to compromise their desires in order to elevate those of other beings (even though selflessness is not an act demanded of any other species). This is not easy, and regardless, it is more close to representation than participation. Nature is not participating, but is being represented, and potentially with all the problems of social injustice being perpetuated addressed in the previous chapter. As a human-centric principle, participation maintains the separation of Man from Nature. It is unlikely to repatriate humans to the Earth community because it is hinged upon the expression of anthropocentric faculties, including; reason, advocacy and negotiation (to name but a few). There is nothing in the GM debate, or elsewhere, to indicate that public participation is a better means than representation (electoral or otherwise) in safeguarding nature.

The American entrepreneurial couple at the centre of the Vilcabamba River case illustrate the enterprising uses of constitutional Earth rights and relaxed locus standi rules,[88] As well as the wider use of participatory mechanisms for self-interest. This will be limitations on the extent to which non-human interests can find a voice in deliberations which are dominated by humans exercising their participatory voice. And finally, discussion of Nature rights is prone to careless generalisation which assumes the Environment to be a homogenised entity when in fact it is a vast and diverse community of species which have competing interests including the desire to kill and eat each other. Nussbaum has said that Nature is unjust, so applying human theories of justice and equal rights may in fact be an unhelpful (not to mention problematic) strategy.[89]

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ecocentrics who seem to have a preponderance for neglecting the needs of humans in favour of other beings. Pontin (n43) see also Lee (n84) Schinkel (n79)

It is suggested by this thesis that public participation is less to do with the search for better environmental decisions, but is focussed on addressing fractured human relationships, restoring trust in Government, enhancing the agency of individuals and empowering social groups that may have otherwise been excluded from discourse or denied their day in court. Public participatory action is validated on the premise that its outcomes support the Environment (which they may). However there is a danger that it may become an insidious opportunity to soothe egos and give the impression that humans are acting *for* Nature.[90]

Flora and fauna are dependent on human representation because of cognitive and communicative barriers. Nature cannot participate in debate or litigation so the need for a surrogate representative voice is permanent. There are inherent risks in human ability to make the right choices and give necessary importance to the interests of non-humans which is why special representation is necessary. Nature is vulnerable to marginalisation in participatory activities which are dominated and engineered by and for people. The experience of the Environment is analogous to the realities of vulnerable humans who are unable to engage effectively. Some individuals by reason of disability or infancy lack the fundamental capabilities required to participate as equals, and as chapter four has detailed there are further groups who are unable to engage in participation due to invisible capacity inequalities. The exploration of wild law approaches in the participatory context serves as a final illustration that public participation cannot take the place of traditional representation. Whilst there are risks in acting on behalf of another it is not a futile exercise given the positive human capacity to apply moral judgment and ethical objectivity.[91]

Chapter Six: Conclusion

6.0 Final Evaluations

I began my doctoral research by questioning the universality of public participation; it struck me as a culturally relative concept, suited only to western democracies. But from an initial assessment of the literature I became curious of the possibility that participation was in fact a game of winners and losers, and that its credibility, irrespective of cultural setting, warranted further critical assessment than the existing scholarship had provided. In reviewing the commentary in the field, I observed that most participation analysis had been conducted through narrow lens, for example by looking at the quality of discourse afforded by different participatory techniques or methods, examining the benefits for the State, or identifying disengaged communities. But few observers had connected these disparate lines of inquiry to challenge the overarching validity of the principle. I felt it was important to undertake a comprehensive assessment of the justifications for participation, including the interests of the major parties to environmental participation; State, citizen and the Environment. By adopting a multipronged approach, this research has mounted a challenge to the popular assumption that public participation can improve the quality of decision making in regard to the environment leading to better protection of the environment to the benefit of society.

The following section considers and discusses the conclusions drawn by the research.

6.1 Conclusions on the Contingent and Inherent Limitations of the Public Participation Principle in Environmental Matters

Chapter two introduced the modern definition of public participation. Its status as a normative principle of international environmental law was confirmed by the adoption of the

Aarhus Convention 1998. The Convention established three pillars which create a binding framework for States to provide individuals access to environmental information, create opportunities for public participation in environmental decision-making and a system of access to justice in environmental matters. The scope of the Convention is broad and far reaching; it is regarded as having had a transformative and positive effect on environmental decision making. The discussion in the chapter then progressed onto providing an overview of Sherry Arnstein's seminal contribution to participation theory, the *Ladder of Citizen Participation*. The ladder is typical of the trend in participation literature, predominantly focussed on measuring the quality of discourse produced by a particular participatory technique and the transfer of power from State to citizen. Arnstein was less concerned with the motives behind participation. This chapter therefore also sought to identify overarching theoretical justifications for participatory decision-making; these were drawn from the 1969 *People and Planning* Skeffington Committee Report. The justifications for participation are understood as administrative expediency, legitimacy through representativeness and better environmental decisions.

Chapter three explored the relationship between State and citizen, critically evaluating the government's desire to use participatory exercises for administrative expedience. This term is understood in the literature to represent the State's motivation to push policies through with minimal delay. By involving the public early on, proponents argue that participation can build public trust and reduce the level of potential opposition. The government's decision to hold the *GM Nation* exercise illustrates a deliberate attempt to diffuse the heightened levels of conflict surrounding commercial GM crop cultivation by adopting a participatory approach. The expected reduction in opposition makes public participation an attractive device for building political credibility. However mal-administration of participatory

exercises which render them patently tokenistic rather than real, can lead to a deterioration in the relationship between State and the people, as evidenced by Greenpeace's successful judicial challenge of the UK Energy Review 2006.

Environmental interests groups must weigh up the opportunity for influence within government participatory opportunities or whether it would be better to mount a challenge to policy from outside. Over a period of time, increased use of participatory practice has led to the velvet divorce of civil society. Participation has become a highly professionalised activity suiting the well-resourced NGOs. These large environmental groups who have patiently waited to be accepted into the political realm may, at the opportunity for real influence, pursue their particular interests, on occasion exacting the same inequality on the have-nots which in this instance may include less-well-resourced grassroots groups. [1]

The pursuit of administrative expediency carries an underlying implication that the government is not really concerned with encouraging the growth of a genuine participative democratic culture. Arnstein warned that without the redistribution of power, State orchestrated engagement would remain an empty rubber-stamping exercise, the status quo remains unaltered, yet power holders can boast that participation has taken place.[2] Paradoxically the position of society is not improved through participation because the State is not interested in sharing power with the public. Participation entrenches the power division between State and citizen to the detriment of civil society who surrender their tactics of scrutiny and protest for the illusion of inclusion. As a political device it is inherently

[1] Sherry R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Planning Association 216; Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?'(2006) 2(1) Law, Environment and Development Journal 48

[2] Arnstein Ibid.

vulnerable to manipulation by the State; and threatens to have a debilitating effect on democracy. In practice the *GM Nation* case study provides a mixed picture, the shortcomings were obvious to all observers, that the decision-making process on GM policy was a fait accompli. But arguably it acted to reduce the strength of public opposition towards government policy in this particular area. It smoothened the process for the strict GM licensing policy that emerged at the close of 2003.

Chapter Four interrogated the assumption that participation is a legitimate practice because it produces decisions which are more representative of the public. Much of the scholarship in the field has adopted a generalised masking rhetoric which sees the public as a homogenous, monolithic unit. The objective of this research was not to repeat the considerable work that has already been devoted to social inequality, nor does has it served as an exposé of the already well-pronounced elitism in the political realm, but these are recurring themes which impact the credibility of the justifications for participatory decision-making. The problems of legal frameworks which offer formal equality on the basis of generalised group identity but which ignore the vulnerability of specific communities are well documented in other fields of study (gender and race as examples). [3] The inequalities based around community identity are

[3]A useful example of the problem of using generalised rhetoric for the basis of seeking equal opportunity comes from the feminist movement. Some feminist legal theorists lament the manner in which early activists framed the case for equality on the simple terms of like-treatment-for-like entities. This approach is known as the similarity argument and is considered as having driven the social rights campaigns of the 20th Century which were organised around group identities (including gender, race, sexual orientation). In the 1970s feminists sought to emphasise the similarity in capabilities between the genders in order to break into the male dominated workplace. In her discussion on the utility of the similarities approach for the case for animal rights Bryant reflects on the early models of formal equality with reference to women's experience of employment. These she states were (and arguably are still) usually based around male-derived standards so women have had to prove they are similar to men in order to compete equally (see also Eskridge). This formal equality meant that women were initially expected to do the same jobs in the same way as their male counterparts. In related terms it has been argued that immigrants have had to prove their likeness to citizens and conform to prevailing cultural traditions in order to integrate (Newman). *See further* Taimie L. Bryant 'Similarity or Difference as a Basis for Justice: must Animals be like Humans to

complex and multidimensional, they include; racial and gender barriers, socio-economic power and environmental inequalities. Each of these factors affects an individual's capacity to participate, leading to an overrepresentation of a particularly narrow public within participatory activity.[4]

Participation's propensity to act as a platform for the privileged and the furtherance of their narrow interests prompts the criticism that perhaps the principle's status and association with democratic progress is unjustified.[5] The dominance of the elite is invariably detrimental to the interests of the silent majority; it adds an unaccountable and unelected layer which satisfies the label of public participation, exacerbating the distance between the ordinary citizen who lacks participative capacity and the decision-makers.[6] In failing to address the societal barriers, and using the misleading language of universality and access, proponents of participation implicitly reinforce these divisions in society.[7] Disadvantaged groups are no better off as a result of the increased use of public participation; they remain powerless. Their powerlessness is inherent in their identity but also in their lack of communicative

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be Legally Protected from Humans?' (2007) 70 Law and Contemporary Problems 208; William Newman, *American Pluralism: A Study of Minority Groups and Social Theory* (Harper & Row 1973) 59. William N. Eskridge, 'Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century' (2002) 100 Michigan Law Review 2071; William N. Eskridge, 'Channelling: Identity-Based Social Movements and Public Law', (2001) 150 University of Pennsylvania Law Review 419. *See further* Nancy Levit, 'A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory' (2000) 61 Ohio State Law Journal 867

[4] The equality banner fails to recognise that people do not have equal cognitive abilities. Richard A. Epstein 'Animals as Objects, or Subjects, of Rights.' in Cass R. Sunstein, and Martha Nussbaum (eds), *Animal rights: Current Debates and New Directions,* (Oxford University Press 2004) 151

[5] Maria Lee and Carolyn Abbot, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 Modern Law Review 86-87; Bende Toth, 'Public Participation and Democracy in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30(2) Journal of Land Resources & Environmental Law 320-21

[6] Cole says 'These laws created complex administrative processes that exclude most people who do not have training in the field and elevate the expert to glory' Luke W Cole, 'Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law' (1992) 19 Ecology Law Quarterly 636; David Demeritt, Sarah Dyer, James D.A. Millington 'PEST or Panacea? Science, Democracy, and the Promise of Public Participation' (2009) Environment, Politics and Development Working Paper Series, King's College London

[7] Iris M. Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) Ethics 252

authority, this is perhaps the most debilitative social barrier to participation. The Habermasian ideal speech situation provides a litmus test against which to assess the lived reality of marginalised groups within public deliberation.[8] Proponents of participation consider that societal deliberation encourages individuals to act as virtuous citizens,[9] but it is more likely that, given the costs of participation, people pursue self-interest. The reality is far removed from the ideals of Dryzek's deliberative democratic model or Black's thick procedure.[10] In terms of the GM debate, the organisers confessed that little attention had been given to securing a representative public which bears out the theoretical arguments of the chapter.

Finally, in chapter five the research examined the third justification drawn from the Skeffington Report, that participation has the capacity to deliver better environmental decisions on the basis that participants adopt a problem-solving approach. The chapter examined the likelihood of the principle's capacity to secure better environmental decisions by contrasting it with wild law theory. Scholars of this new and growing school seek to recognise Nature's inherent rights as separate and as important as those of humans. Such theory prioritises the interests of the Environment, this research casts doubt on the ability of public participation, an ultimately anthropocentric activity, to deliver outcomes which *favours* Nature, nor can it be assumed that human participations have the same interests as non-humans. The findings of the research in both chapter four and five underlines that public

[8] Julia Black, 'Proceduralising Regulation: Part I' (2000) 20 (4) Oxford Journal of Legal Studies 612

[9] Lynn Sanders, 'Against Deliberation' (1997) 25 Political Theory 347. Douglas says it is an 'utterly romantic assumption that deliberation can actually yield un-coerced, universal commitments on environmental policy.' *Williams* R. Douglas '*Environmental Law and Democratic Legitimacy' (1994)* 4 Duke Environmental Law & Policy Forum 22

[10] Black (n8) 597

opinion rarely pulls in the direction of consensus,[11] if it is accepted that marginalised groups are disadvantaged by participation, then we can imagine just 'how much more precarious is the position of [non-human]'[12] interests? Cognitive and communicative barriers mean that Nature, ironically the subject matter of participation in this context, remains a mute observer. The environment's interests can only be considered through representation. Not only does wild law theory cast doubt on using participation as a means to secure better environmental decisions it leads us to question its appropriateness as a tool of environmental law.

6.2 The Participation Paradox

Through the course of this research it has become apparent that the justifications for participation are contradictory and irreconcilable. Of the three, administrative expediency seems to be the most attainable goal under current approaches. However securing a genuinely representative public or producing better decisions entails time and cost which delays the decision-making process.[13] Better decisions would be synthesized from unrestricted deliberation conducted by autonomous, diverse actors. Administrative

[11] Steele accepts that there is no expectation of shared values but that there needs to be a shared commitment towards problem solving. Jenny Steele 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 (3) Oxford Journal of Legal Studies 415

[12] Ted Benton (2011) 'Wild law: why rights – and could we do without them?' (2011) 23 Environmental Law & Management 330

[13] The desire for expedient policy making may be overtaking the political kudos of participation. The current Conservative Prime Minister David Cameron has demonstrated a loyalty to science over society with respects to Climate Change promising 'to take the politics out of the issue' and take legislative steps to 'constrain future governments in the face of the natural tendency to put short-term electoral considerations above the long-term interests of the country and the planet.' Perhaps this spells a departure from participatory practice for the time being. David Cameron 2005, cited in Demeritt, et al. (n6)

expediency is incongruent with Habermasian communicative theory, the State wants to consult, find solutions to problems and avoid their exacerbation.[14]

Interest in participative democracy grew significantly during the 1960s as the public had become dissatisfied with the limited opportunities for engagement with traditional representative government. People demanded increased opportunities for dialogue about the matters affecting them. Forty years later the Aarhus Convention was heralded as an ambitious venture in environmental democracy.[15] Participation has falsely assumed acclaim on the basis that will extend the democratic ideal. This research has by contrast, shown the potentially regressive effects of participation in practice for the relationship between State, society and the environment.[16]

The appeal of participation continues to spread leading policy-makers to consider that pushing government systems towards participation will lead to egalitarian outcomes.[17] But this research has shown that a more unequal society may be created through increased use of participation. [18] This is most clearly illustrated in the case of Nature. There is no place for

[14] 'One can discuss for only so long, and then one has to make a decision, even if strong differences of opinion should remain.' Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge University Press 1983) 38; Jim Rossi 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making' (1997) 92 Northwestern University Law Review 212-213

[15] Kofi Annan, About the Aarhus Clearing House <http://aarhusclearinghouse.unece.org/about/> accessed 22 July 2013

[16] Participation as part of modern western political culture deserves the same criticism that Habermas directs towards mass culture. He says 'Serious involvement with culture produces facility, while the consumption of mass culture leaves no lasting trace; it affords a kind of experience which is not cumulative but regressive.' Callicott's condemns 'western ideas have become a pervasive cognitive ether that nearly everyone breathes in—more or less deeply' without considering the effects of such ideas. Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society 166 (Thomas Burger trans., MIT Press 1989); J. Baird Callicott, *Earth's insights: a survey of ecological ethics from the Mediterranean basin to the Australian Outback* (University of California Press 1994) 187, 189; Wendy Le-Las & Emily Shirley 'Does the Planning System Need a "Tea Party"?' (2012) 3 Journal of Planning Law 243

[17] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon, 1980) 272-274

[18] There is an unfounded romanticism towards participation, it is claimed that it is that social differences can be addressed through deliberation. For Gutmann and Thompson the aim is not necessarily reaching a consensus but participation's ability 'to yield understanding and mutual respect.' Beierle accepts the issue of usual suspects but he remains optimistic that it allows the State to gain an insight into public values and therefore leads to better outcomes. Dryzek ever the source of

Nature at the participation table, arguably more research is required to explore the case for quality and effective representation, which will protect non-human vulnerabilities within the participatory decision-making paradigm.

As this investigation has articulated, there is a difference between formal opportunities for participation and the ability to enjoy them. [19] Participation has not delivered a 'politics of presence' because political empowerment and environmental protection are 'drastically different problem paradigms.' [20] Socio-economic problems need not be cured in order for participatory decision-making to be more credible, but participation can never be equal in a society of haves and have-nots. Further research is needed to critically assess whether the interests of society's most vulnerable (which include non-humans) may be more adequately heard and addressed via traditional representation, future research in this area would also help determine whether it is time to abandon participation in its current form.

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reason, is much more cautious, he urges the necessity to include currently excluded groups not just to raise awareness of their perspectives but to legitimise democratic politics as a whole. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It* (Belknap Harvard University Press 1996); John S. Dryzek *Deliberative Democracy & Beyond: Liberals, Critics, Contestations* (Oxford University Press 2000) 17; Thomas C. Beierle 'Using Social Goals to Evaluate Public Participation in Environmental Decisions'(1999) 16(3/4) Policy Studies Review 95; John S. Dryzek *Deliberative Democracy & Beyond: Liberals, Critics, Contestations* (Oxford University Press 2000) 57-60

[19] Iris M. Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 16; Sheila Foster 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement' (1998) 86(4) California Law Review 788-789, 833

[20]Tseming Yang 'Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation' (2002) 26 Harvard Environmental Law Review 1, 2

Bibliography

Books

A

- Allott P, *Eunomia: New Order for a New World* (Oxford University Press 1990)

- Arendt H, *The Origins of Totalitarianism* (Schocken 1951)

- Athanasiou T, *Divided Planet: The Ecology of Rich and Poor* (University of Georgia Press, 1996)

- Audi R, (ed.) *The Cambridge Dictionary of Philosophy* (2nd ed Cambridge University Press 1999)

B

- Bailyn B, *Ideological Origins of the American Revolution* (Cambridge University Press 1967)

- Barber B, *Strong Democracy: Participatory Politics For a New Age* (University of California Press 1984)

- Beder S, *Environmental Principles and Policies: An Interdisciplinary Introduction* (University of New South Wales Press 2006)

- Berry T, *Evening Thoughts: Reflections on Earth as Sacred Community* (Sierra Club Books, 2006)

- Bentham J, *An Introduction to the Principles of Morals and Legislation* (Nabu Press 1948)

- Bohman J, *Public Deliberation: Pluralism, Complexity and Democracy Cambridge* (MIT Press 1996)

- Bullard RD, (ed.) *Unequal Protection: Environmental Justice and Communities of Color* (Sierra Club Books 1994)

- Bullard RD, Johnson GS, and Torres SO, '*Race, Equity, and Smart Growth: Why People of Color Must Speak for Themselves*' (Atlanta Environmental Justice Resource Center 2000)

- Burke E, *Reflections on the Revolution in France* (1790)

C

- Carson R, Silent Spring (Houghton Mifflin Company 1962)

- Coenen F, Huitema D, O'Toole Jr. L, (eds), *Participation and the Quality of Environmental Decision Making* (Kluwer 1998)

- Cole GDH, *Social Theory* (New York: Frederick A Stokes 1920)

- Cook T, Morgan P, *Participatory Democracy* (Canfield Press 1971)

- Cullinan C, *Wild Law: A Manifesto for Earth Justice* (2nd ed Green Books 2011)

D

- Dahl RA, *After the Revolution?* (Yale University Press 1970)

- Dietz T, Stern PC, (eds.) *Public Participation in Environmental Assessment and Decision Making* (National Academies Press 2008)

- Dobson A, '*Justice and the Environment: Conceptions of Environmental Sustainability and Dimensions of Social Justice'* (Oxford University Press 1998)

- Dowie M, *Losing Ground: American Environmentalism at the Close of the Twentieth Century* (MIT Press 1996)

- Doyle T, McEachern D, *Environment and Politics* (2nd ed. Routledge 2001)

- Dryzek JS, *Deliberative Democracy & Beyond: Liberals, Critics, Contestations* (Oxford University Press 2000)

- Dworkin R, *Law's Empire* (Oxford University Press 2000)

E

- Einhorn LJ, *Abraham Lincoln the Orator: Penetrating the Lincoln Legend* (Greenwood Press 1992)

- Ellington J (Trans), *Immanuel Kant: Grounding for the Metaphysics of Morals* (3rd ed Hackett Publishing Co 1981)

- Elster J, *Solomonic Judgments: Studies in the Limits of Rationality* (Cambridge University Press 1989)

- ESRC Global Environmental Change Programme, Economic and Social Research Council (Great Britain), *Risky Choices, Soft Disasters: Environmental Decision Making Under Certainty* (University of Sussex 2000)

F

- Fischer F, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford University Press 2003)

- Fishkin JS, *The Voice of the People: Public Opinion and Democracy* (Yale University Press, 1995)

- Francione G, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000)

G

- Gans H, *People, Plans and Policies: Essays on Poverty, Racism, and Other National Urban Problems* (Columbia University Press 2013)
- Gans H, *The Urban Villagers* (The Free Press 1962)
- Gauthier D, *Moral Dealing: Contract, Ethics and Reason* (Cornell University Press1990)
- Geuss R, *Philosophy and Real Politics* (Princeton University Press, 2008)
- Golan T, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Harvard University Press, 2009)
- Green P, *Retrieving Democracy: In Search of Civic Equality* (Rowman & Allenheld 1985)
- Greene J, *The Constitutional Origins of the American Revolution* (Cambridge University Press 2011)
- Gutmann A, Thompson D, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It* (Belknap Harvard University Press 1996)

H

- Habermas J, *Between Facts and Norms* (MIT Press 1984)
- Habermas J, *Legitimation Crisis* (Beacon Press, 1975)
- Habermas J, (McCarthy T, trans.) *The Theory of Communicative Action* (Beacon Press 1984) 74
- Hayward T, *Constitutional Environmental Rights* (Oxford University Press 2005)

- Hedemann-Robinson M, *Enforcement of European Union Environmental Law* (Routledge-Cavendish 2007)

- Hegel GWF, *Philosophy of Right* (Oxford University Press 1942)

- Held D, *Introduction to Critical Theory: Horkheimer to Habermas*. (University of California Press 1980)

- Hobbes T, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill*. (London 1651)

- Holder J, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press 2004)

- Humphrey M, *Preservation Versus the People: Nature, Humanity and Political Philosophy* (Oxford University Press 2002)

J

- Jacobs J, *The Death and Life of Great American Cities (*Random House 1961)

- Jasanoff J, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press 2005)
- Jean-Jacques Rousseau, *The Social Contract* (1792)

L

- Leopold A, *A Sand County Almanac* (Ballantine Books 1966)

- Lindblom CE, Cohen DK, *Usable Knowledge: Social Science and Social Problem Solving* (Yale University Press 1979)

- Linzey T, Campbell, A *Be the change: How to Get What You Want in Your Community* (Gibbs Smith 2009)

- Lloyd D, *The Idea of Law* (Penguin Books 1991)

- Locke J, *The Second Treatises of Government* (1690)

- Locke J, *Two Treatises on Government* (Cambridge University Press 1967)

M

- Macleod R, *Government and Expertise. Specialists, Administrators and Professionals, 1860-1919* (Cambridge University Press 1999)

- McAuslan P, *The Ideologies of Planning Law* (Pergamon, 1980)

- Mashaw JL, *Due Process in the Administrative State* (Yale University Press 1985)

- Meyerson M, Banfield E, *Politics, Planning, and the Public Interest* (The Free Press 1955)

- Mill JS, *Considerations on Representative Government* (1861)

- Monbiot G, *Feral: Searching for Enchantment on the Frontiers of Rewilding* (Penguin 2013)

- Morgan ES, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W.W. Norton & Co. 1988)

N

- Nash R, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989)

O

- O'Leary K, *Saving Democracy: A Plan for Real Representation in America* (Stanford University Press 2009)
- Ortega y Gasset J, *Revolt of the Masses* (1930) (trans. W.W. Norton & Co 1985)

P

- Paine T, *Rights of Man.* (reproduced by Viking Penguin1984) (original work published 1791)

- Pateman C, *Participation and Democratic Theory* (Cambridge University Press, 1970)

- Plato, *The Republic* (380 BC)

- Petrinovich L, *Darwinian Dominion: Animal Welfare and Human Interests,* (MIT Press 1999)

- Plutarch (translated by Talbert RJA), *On Sparta* (Penguin Books 2005)

R

- Red Green Study Group *What on Earth is to be Done? A Red-Green Dialogue* (Red Green Study Group 1995)

- Regan T, *The Case for Animal Rights* (University of California Press, 1983)

- Rehfeld A, *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* (Cambridge University Press 2008)

- Rolt LTC, *High Horse Riderless* (George Allen & Unwin 1947)

- Rossi P, Dentler R, *The Politics of Urban Renewal* (Free Press 1961)

- Rowland, W *The Plot to Save the World: The Life and Times of the Stockholm Conference on the Human Environment* (Clarke, Irwin and Co., 1973)

- La Rochefoucauld Tancock L, translating), *Maxims* (Penguin Classics 1959)

S

- Sagoff M, *The Economy of the Earth: Philosophy, Law and the Environment* (2nd ed Cambridge University Press 2008)

- Sands P, *Principles of International Environmental Law* (2nd ed., Cambridge University Press, 2003)

- Seed J, Macy J, Fleming P, Naess A, *Thinking Like A Mountain: Towards a Council of All Beings* (New Society Press 2001)

- Shklar JN, *American Citizenship: The Quest for Inclusion* (Harvard University Press 1991)

- Singer P, *Animal Liberation* (Avon Books, 1990)

- Sunstein CR, *Democracy and the Problem of Free Speech* (The Free Press, 1993)

- Stone C, *Should Trees Have Standing? Law, Morality, and the Environment*, (3rd ed Oxford University Press 2010)

- Stookes P, *A Practical Approach to Environmental Law* (2nd ed. Oxford University Press, 2009)

T

- de Tocqueville A, *On Democracy: Revolution and Society* (University of Chicago Press 1980) 73 (Original work published 1849)

- Turner BS, *Vulnerability and Human Rights* (The Pennsylvania State University Press 2006)

W

- Waldron J (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987)

- Walzer M, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame Press 1994)

- White LD, *'The Jacksonians: A Study in Administrative History 1829-1861* (MacMillian, 1954)

- Williamson, C *American Suffrage from Property to Democracy 1760- 1860* (Princeton University Press 1960)

- Wright-Mills C. *The Power Elite* (Oxford University Press USA 1956)

V

- Verba S, Schlozman K, Brady H, *Voice and Equality: Civic Volunteerism in American Politics* (Harvard University Press 1995)

- Verba S, Nie N, *Participation in America: Political Democracy and Social Equality* (Harper and Row 1972)

- Verchick R, *Facing Catastrophe: Environmental Action for a Post-Katrina World* (Harvard University Press 2012)

- Verney S, *People and Cities* (Collins 1969)

Y

- Young IM, *Inclusion & Democracy* (2002 Oxford University Press)

- Young IM, *Justice and the Politics of Difference* (Princeton University Press 1990)

Contributions to Edited Books

A

- Anderson E, 'Animal Rights and the Values of Nonhuman Life' in Sunstein C, and Nussbaum M, (eds), *Animal rights: Current Debates and New Directions*, (Oxford University Press 2004)

B

- Beder S, 'Moulding and Manipulating the News', in White R, (ed.) *Controversies in Environmental Sociology* (Cambridge University Press, 2004)

- Bosselmann K, 'The Way Forward: Governance for Ecological Integrity' in Westra L, Klaus Bosselmann K, Westra R, (eds), *Reconciling Human Existence with Ecological Integrity* (Earthscan 2008)

C

- Cownie F, and Bradney A, 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in Watkins D, and Burton M, (eds.) *Research Methods in Law* (Routledge 203)

- Cusimano MK, 'The Rise of Transsovereign Problems' in Cusimano MK, (ed.) *Beyond Sovereignty: Issues for a Global Agenda* (2nd ed Cengage Learning 2009)

E

- Epstein R, ‘Animals as Objects or Subjects of Rights’ in Sunstein C, and Nussbaum M, (eds) *Animal rights: Current Debates and New Directions,* (Oxford University Press 2004)

- Everson M, and Vos E, 'The Scientification of Politics and the Politicisation of Science', in Everson M, Vos E, (eds.) *Uncertain Risks Regulated* (Routledge 2008)

F

- Francoine GL, ‘Animals – Property or Persons?’ in Sunstein C, Nussbaum M, (eds), *Animal rights: Current Debates and New Directions,* (Oxford University Press, 2004)

G

- Gemmill B Bamidele-Izu I, ‘The Role of NGOs and Civil Society in Global Environmental Governance’ (2002) in Esty DC, Ivanova MH, (eds.) *Global Environmental Governance: Options & Opportunities* (New Haven: Yale Center for Environmental Law and Policy 2002)

- Ghai Y, and Cottrell J, ‘Conclusions and Reflections’ in Ghai Y, Cottrell J, (eds.), *Marginalized Communities and Access to Justice* (Routledge 2010)

- Graham A, ‘Policies for Participation: Myth, Reality and the Media in Local Initiatives in the United Kingdom’ in Calabrese A, and Burgelman J, (eds.), *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield 1999) 209

H

- Handl G, ‘Sustainable Development: General Rules Versus Specific Obligations’ in Lang W, (ed.) *Sustainable Development and International Law* (Graham & Trotman 1995)

- Harper K, Ravi Rajan S, 'International Environmental Justice: Building the Natural Assets of the World's Poor' in Boyce J, Narain S, and Stanton E, (eds), *Reclaiming Nature: Environmental Justice and Ecological Restoration* (Anthem Press 2007)

- Heller C, 'For the Love of Nature: Ecology and the Cult of the Romantic' in Gaard G, (ed.) *Ecofeminism: Women, Animals & Nature* (Temple University Press1993)

J

- Jordan C, and Snow D, 'Diversification, Minorities, and the Mainstream Environmental Movement', in Snow D, (ed.) *Voices from the Environmental Movement: perspectives for a New Era* (Island Press 1991)

K

- Kenis P, and Schneider V, 'Policy Networks and Policy Analysis: Scrutinizing A New Analytical Toolbox' in Marin B, and Mayntz R, (eds.), *Policy Networks: Empirical Evidence and Theoretical Considerations (Public Policy & Social Welfare)* (Westview Press 1991)

- Koester V, 'The Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters (Aarhus Convention)' in Ulfstein G, (ed.), *Making Treaties Work, Human Rights, Environment and Arms Control* (Cambridge University Press 2007)

L

- Leca L, 'Questions on Citizenship' in Mouffe C, (ed.) *Dimensions of Radical Democracy* (Verso, 1992)

- Lee M, 'The UK Regulatory System on GMOs: Expanding the Debate?' in Everson M, and Vos E, (eds.), *Uncertain Risks Regulated* (Routledge, 2008)

- Lewis H, 'Race, Class, and Katrina Human Rights and (Un) Natural Disaster' in Steady FC, (ed.), *Environmental Justice in the New Millennium: Global Perspectives on Race, Ethnicity, and Human Rights* (Palgrave 2009)

M

- Mosandl R, Günter S, Stimm, B, and Weber M, "Ecuador Suffers the Highest Deforestation Rate in South America", in Beck E, Bendix E, Kottke I, *et al.* (eds.), *Gradients in a Tropical Mountain Ecosystem of Ecuador*, (Springer 2008).

- Mouffe C, 'Democratic Politics Today' in Mouffe C, (ed.), *Dimensions of Radical Democracy* (Verso 1992)

P

- Posner R, 'Animal Rights*:* Legal, Philosophical and Pragmatic Perspectives' in Sunstein C, Nussbaum M, (eds), *Animal rights: Current Debates and New Directions*, (Oxford University Press 2004)

R

- Robinson D, 'Regulatory Evolution in Pollution Control' Jewell T, Steele J, (eds), *Law in Environmental Decision-Making: National, European and International Perspectives* (Oxford University Press 1998)

- Rosener J, 'User-Orientated Evaluation: A New Way to View Citizen Participation' in Daneke GA, Garcia MW, and Priscoli JD, (eds.), *Public Involvement and Social Impact Assessment* (Westview Press 1983)

- Russell-Einhorn M, 'What Kinds of Mechanisms and Conditions Create Effective Citizen Voice?' In Shah A, (ed.), *Performance Accountability and Combating Corruption* (World Bank, 2007)

S

- Sands P, 'The Role of Non-Governmental Organisation in Enforcing International Environmental Law' in Butler WE, (ed.), *Control Over Compliance With International Law* (Martinus Nijhoff Publishers, 1991)

- Sunstein C, 'Can Animals Sue?' in Sunstein C, Nussbaum M, (eds), *Animal rights: Current Debates and New Directions*, (Oxford University Press, 2004) 252

W

- West P, Fly M, Marans R, LarkinF and Rosenblatt D, 'Minorities and Toxic Fish Consumption: Implications for Point Discharge Policy in Michigan' in Bryant B, (ed.), *Environmental Justice: Issues, Policies and Solutions* (Island Press 1995)

- Wise S, 'Rattling the Cage' in Sunstein C, and Nussbaum M, (eds) *Animal rights: Current Debates and New Directions,* (Oxford University Press 2004)

Journal Articles

A

- Armstrong K, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' [2002] 8 European Law Journal 102

- Arnstein S, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of American Institute of Planning 216

- Averill M, 'Linking Climate Litigation and Human Rights' (2009) 18(2) RECIEL 139

- Awumbila M, and Momsen JH, 'Gender and the Environment: Women's Time Use as a Measure of Environmental Change' (1995) 5 Global Environmental Change 337

B

- Balkin JM , 'Interdisciplinarity as Colonization' (1996) 53 Washington and Lee Law Review 949

- Banas P, 'International Ideal and Local Practice – Access to Environmental Information and Local Government in Poland' [2010] Environmental Policy and Governance 20

- Been V, 'What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses' (1993) 78 Cornell Law Review 1001

- Beierle T, 'Using Social Goals to Evaluate Public Participation in Environmental Decisions' (1999) 16(3/4) Policy Studies Review 78

- Benton T, 'Wild Law: Why Rights – and Could We Do Without Them?' (2011) 23 Environmental Law and Management 328

- Binenbaum E, 'South-North Trade, Intellectual Property Jurisdictions, and Freedom to Operate in Agricultural Research on Staple Crops' (2003) 51 Economic Development and Cultural Change 309
- Black J, 'Proceduralising Regulation: Part I' (2000) 20 (4) Oxford Journal of Legal Studies 597

- Black J, 'Proceduralising Regulation: Part II' (2001) 21(1) Oxford Journal of Legal Studies 33

- Botwinick A, Bachrach P, 'Democracy and Scarcity: Toward a Theory of Participatory Democracy' (1983) 4(3) International Political Science Review Politics and Scarcity 361

- Boyle A, 'Human Rights or Environmental Rights? A Reassessment' (2006) 18 Fordham Environmental Law Review 471
- Bryant TL, 'Similarity or Difference as a Basis for Justice: must Animals be like Humans to be Legally Protected from Humans?' (2007) 70 Law and Contemporary Problems 208

- Bulkeley H, and Mol A, 'Participation and Environmental Governance: Consensus, Ambivalence and Debate' (2003) 12 Environmental Values (2) 151

- Burdon P, ‘Earth Rights: The Theory’ (2011) 1 IUCN Academy of Environmental Law e-Journal 9

- Burdon P, ‘Wild Law: The Philosophy of Earth Jurisprudence’ (2010) 35(2) Alternative Law Journal 10

C

- Cardwell M, ‘The Release of Genetically Modified Organisms into the Environment: Public Concerns and Regulatory Responses’ (2002) 4 Environmental Law Review 156

- Casal P, ‘Is Multiculturalism Bad for Animals?’ (2003) 11(1) The Journal of Political Philosophy 1

- Charnovitz S, ‘Nongovernmental Organizations and International Law’, (2006) 100 American Journal of International Law 348

- Clark MA, FriedmanEJ, Hochstetler K, ‘The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women’ (1998) 51(1) World Politics 1

- Cochrane A, ‘Animal Rights and Animal Experiments: An Interest-Based Approach’ (2007) *Res Publica* 13

- Cole LW, ‘Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law’ (1992) 19 Ecology Law Quarterly 619

- Cole LW, ‘Remedies for Environmental Racism: A View from the Field’ (1992) 90 Michigan Law Review 1991

- Cooper DE, ‘Human Sentiment and the Future of Wildlife’ (1993) 2 Environmental Values 335

- Cotterell R, ‘Subverting Orthodoxy, Making Law Central: A View of Socio-legal Studies’ (2002) 29(4) Journal of Law and Society 641

- Cotterrell R, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25(2) Journal of Law and Society 171

- Cramer B, ‘The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention’ (2009) 14 Community Law & Policy 73

- Cripps E ‘Saving the Polar Bear, Saving the World: Can the Capabilities Approach do Justice to Humans, Animals and Ecosystems?’ (2010) 16 (1) Res Publica 1

- Cullinan C, Sowing Wild Law (2007) 19 Environmental Law and Management 71

D

- Damer S, Hague C, ‘Public Participation in Planning: A Review’ (1971) 44(3) The Town Planning Review 219

- Davidoff P, ‘Advocacy and Pluralism in Planning’ (1965) 31(4) Journal of the American Institute of Planners 331

- Day M, ‘The Environment: Modernising Justice’ (2001) 3 Environmental Law Review 163

- De Silva L, ‘Environmental Law Development in South Asia’ (1999) 4 Asia Pacific Journal of Environmental Law 243,

- Donnelly B, Bishop P ‘Natural Law and Ecocentrism’ (2007) 19(1) Journal of Environmental Law 89

- Dryzek JS, 'Transnational Democracy' (1999) 7(1) The Journal of Political Philosophy 30

- Dunlap R, Mertig A, 'The Evolution of the U.S. Environmental Movement from 1970 to 1990: An Overview' (1991) 4 Society and Natural Resources, 209

E

- Eck CC, Bovett RE, 'Oregon Dog Control Law and Due Process' (1998) 4 Animal Law 95

- Ellis H 'Planning and the People Problem' (2008) 13 Journal of Planning & Environment Law 75

- Engle K, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) European Journal of International Law 141

F

- Femia J, 'Elites, Participation and the Democratic Creed' (1979) 27 Political Studies 1

- Filgueira F, 'How Wild Did it Get?' (2006) 18 Environmental Law & Management 24

- Fineman M, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism

- Fisher DR, 'COP-15 in Copenhagen: How the Merging of Movements Left Civil Society Out in the Cold' (2010) 10(2) Global Environmental Politics 11
- Flear ML, 'A Human Rights Perspective on Citizen Participation in the EU's Governance of New Technologies' (2010) 10(4) Human Rights Law Review 661

- Foster S, ‘Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement’ (1998) 86(4) California Law Review 775

- Fraser D, ‘Animal Rights: Current Debates and New Directions’ (2004) 68(6) Animal Behaviour 1470
- Frug G, ‘Why Neutrality?’ (1983) 92 Yale Law Journal 1591

- Fung A & Wright EO, ‘Deepening Democracy: Innovations in Empowered Participatory Governance’ (2001) Politics Society 5

G

- Galanter M, ‘Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) Law and Society Review 95

- Gardbaum SA, ‘Law, Politics, and the Claims of Community’ (1992) 90 Michigan Law Review 685

- Gauna E, ‘The Environmental Justice Misfit: Public Participation and the Paradigm Paradox’ (1998) 17 Stanford Environmental Law Journal 3

- Gearty C, ‘Do human rights help or hinder environmental protection? (2010) 1(1) Journal of Human Rights and the Environment 13

- Getliffe K, ‘Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?’ (2002) 4 Environmental Law Review 101

- George R, ‘A Defense of the New Natural Law Theory’ (1996) 41 American Journal of Jurisprudence 47

- Gonzalez C, ‘Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology’ (2006-2007) 19 Georgetown International Environmental Law Review 583

- Green AJ, 'Public Participation, Federalism and Environmental Law' (1998-1999) 6 Buffalo Environmental Law Journal 169

- Gorny D, 'The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law'(1991) 14 Boston College International and Comparative Law Review 279

- Gunningham N, 'Environmental Law Regulation and Governance: Shifting Architectures' (2009) 21 Journal of Environmental Law 179

- Gupta A, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) *Global Environmental Politics* 8 (2) 1

H

- Hartley N, and Wood C. 'Public Participation in Environmental Impact Assessment-Implementing the Aarhus Convention' (2005) 25 Environmental Impact Assessment Review 319

- Hassan P, Azfar A, 'Securing Environmental Rights through Public Interest litigation in South Asia' (2003-2004) 22 Virginia Environmental Law Journal 215

- Hedelin B, Lindh M, 'Implementing the EU Water Framework Directive- Prospects for Sustainable Water Planning in Sweden' (2008) 18 European Environment 327

- Heidrich KW, 'Volunteer Life-Styles: Market Segmentation Based on Volunteers' Role Choices' (1990) 19 Non Profit and Voluntary Section Quarterly' 1

- Hindess B, 'Representation Ingrafted upon Democracy?' (2001) 7(2) Democratization 1

- Hughes E, 'Dissolving the Nation: Self-Deception and Symbolic Inversion in the GM Debate' (2007) 16(2) Environmental Politics 318

I

- Irwin A, 'The Politics of Talk: Coming to Terms with the 'New' Scientific Governance' (2006) 36 Social Studies of Science 299
- Irvin R, Stansbury J, 'Citizen Participation in Decision-making: Is It Worth the Effort?' (2004) 64(1) Public Administration Review 55

J

- Jackson JN, 'Planning Education and the Public' (1964) 50(6) Journal of the Town Planning Institute

- Johns J, 'Participatory Democracy: Cracks in the Façade' (September 2004) Institute of Public Affairs Review 14

K

- Kellet P. 'Better Regulation: What the Modernising Agenda Might Mean for UK Environmental Laws' (2006) 18 Environmental Law & Management 169.

- Kimani NM, 'Participatory Aspirations of Environmental Governance in East Africa' (2010) 6(2) Law, Environment and Development Journal 200

- Kirby P, 'Vulnerability and Globalisation: Mediating Impacts on Society' (2011) Journal of Human Rights and the Environment 2(1) 86

- Kirk E, Reeves A, Blackstock A, 'Path Dependency and Environmental Regulation' (2007) 25 Environment and Planning 250

- Kirk E, Blackstock, K 'Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes' (2011) 23(1) Journal of Environmental Law 112

- Knight J, Johnson J, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' (1994) 22 Political Theory 277

- Koester V, 'The Compliance Committee of the Aarhus Convention, An Overview of Procedures and Jurisprudence' (2007) 37 Journal of Environmental Policy & Law 83

- Kravchenko S, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' (2007) 18(1) Colorado Journal of International Environmental Law and Policy

- Kuhn S, 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision making Process' (1998-1999) 25 Ecology LQ 647

- Kumar S, 'Economics and Ecology- Which Comes First?' (2007) 19 Environmental Law and Management 82

L

- Lane LW, 'Urban Renewal' (1962) XLVni Journal of the Town Planning Institute 196

- Lazarus R, 'Pursuing Environmental Justice: The Distributional Effects of Environmental Protection' (1994) 87 North Western University Law Review 787

- Leaf A, ' Search for the Oldest People' January (1973) National Geographic 99
- Leaf A, 'Getting Old' (1973) Scientific American 29

- Lee M, Abbot C, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80

- Lee R 'A Walk on the Wild Side: Wild Law in Practice' (2006) 18 Environmental Law and Management 6

- Le-Las W, Shirley E, 'Does the Planning System Need a "Tea Party"?' (2012) 3 Journal of Planning Law 239

- Lezaun J, Soneryd L, ‘Consulting Citizens: Technologies of Elicitation and the Mobility of Publics’ (2007) 16 Public Understanding of Science 279

M

- Manzo L, Weinstein N, ‘Behavioural Commitment to Environmental Protection: A Study of Active and Non-active Members of the Sierra Club’ (1987) 19 (6) Environment & Behaviour 673

- Marchand G, Askland A, ‘GM Foods: Potential Public Consultation and Participation Mechanisms’ (2003) 44 Jurimetrics 99

- Martinez TA, McMullin SL, ‘Factors affecting decisions to volunteer in nongovernmental organizations’ (2004) 36 Environment & Behaviour 112

- Mason M, ‘Information Disclosure and Environmental Rights: the Aarhus Convention’ (2010) Global Environmental Politics 10 (3) 10

- May JR, ‘Constituting Fundamental Environmental Rights Worldwide’ (2006) 23 Pace Environmental Law Review 113

- McAuslan P, ‘Towards a Just Planning System: the Contribution of Law’ Journal of Planning & Environment Law (2013) 145

- Mihaly MB, ‘Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents’ (2009) 27 Pace Environmental Law Review 151

- Mohai P, Bunyan B, ‘Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards’ (1992) 63(4) University of Colorado Law 921

- Morrow K, ‘Worth the Paper That they are Written On? Human Rights and the Environment in the Law of England and Wales’ (2010) 1(1) Journal of Human Rights and the Environment 66

N

- Newig J, Fritsch O, ‘Environmental Governance: Participatory, Multi-Level – and Effective?’ (2009) 19 *Environmental Policy and Governance* 197

O

- Obradovic D, Vizcaino A, 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations' (2006) 43 Common Market Law Review 1049

- Ortega-Pacheco DV, Manzano-Torres IM, ‘Institutional Change and Climate Policy in Ecuador’ (2009) 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593771&download=yes> accessed 31 August 2013)

P

- Pagnani MA, ’Environmental NGOs and the Fate of the Traditional Nation-State’ (2003) 15 Georgetown International Environmental Law Review 791

- Pallemarts M, ‘Current Environmental Issues and Their Management: Evolving International Legal and Political Discourse on the Human Environment, the Individual and the State’ (2008) 2 Human Rights and International Discourse 149

- Pederson O, ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008-2009) 21 Georgetown International Environmental Law Review 73

- Pontin B, ‘Wild Law: Sustainable Development and Beyond?’ (2007) 19 Environmental Law and Management 59

- Pontin B, ‘Fourth Assessment Report of the Intergovernmental Panel on Climate Change: Key Developments in the Science of Global Warming Editorial’ (2006) 18 Environmental Law and Management 25

- Posner RA, 'The Decline of Law as an Autonomous Discipline 1962-1987' (1987) 100 Harvard Law Review 761

- Pulido LA, ‘A Critical Review of the Methodology of Environmental Racism Research’ (1996) 28(2) Antipode 142

R

- Ravi Rajan S, ‘Classical Environmentalism and Environmental Human Rights: An Exploration of their Ontological Origins and Differences’ (2011) 2(1) Journal of Human Rights and the Environment 106

- Rawls J, ‘The Idea of an Overlapping Consensus’ (1987) 7 Oxford Journal Legal Studies 1

- Razzaque J, ‘Linking Human Rights Development, and Environment: Experiences from Litigation in South Asia’ Symposium on ‘Environmental Protection and Human Rights in the New Millennium: Perspectives, Challenges and Opportunities’ (2007) 18 Fordham Environmental Law Review 587

- Rodenhoff V, ‘The Aarhus Convention and its Implications for the Institutions of the European Community’ (2002) 11 Review of European Community and International Environmental Law 354

- Rolston H, ‘Rights and Responsibilities on the Home Planet’ (1993) 18 Yale Journal of International Law 257

- Rorty R, ‘On Ethnocentrism: A Reply to Clifford Geertz’ (1986) 25 Michigan Law Review 525

- Rosenbaum WA, 'The Paradoxes of Public Participation'(1976) 8 Administration & Society 355

- Rossi R, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making' (1997) 92 Northwestern University Law Review 180

- Rothstein H, 'Talking Shops or Talking Turkey? Institutional constraints to Proceduralising Consumer Representation in Risk Regulation' (2007) 32 Science, Technology and Human Values 582

- Rowan-Robinson J, Ross A, Walton W, Rothnie J, 'Public Access to Environmental Information: A Means to What End?' (1996) 8 Journal of Environmental Law 38

- Rowe G, Horlick-Jones T, Walls J, Poortinga W, Pidgeon N, 'Analysis of a Normative Framework for Evaluating Public Engagement Exercises: Reliability, Validity and Limitations' (2008) 17 Public Understanding of Science 419

- Rowe G, Horlick-Jones T, Walls J, Pidgeon N, 'Difficulties in Evaluating Public Engagement Initiatives: Reflections on an Evaluation of the UK GM Nation? Public Debate About Transgenic Crops' (2005) 14 Science, Technology and Human Values 331

- Ruffins P, 'Mixing a few More Colors into the Green' [1990] Sustainability in Context 33

S

- Sanders L, 'Against Deliberation' (1997) 25 Political Theory 25, 347 available <http://faculty.virginia.edu/lsanders/SB617_01.pdf > accessed 20 September 2013

- Sands P, 'Rethinking Environmental Rights- Climate Change, Conservation and the European Court of Justice' (2008) 20 Environmental Law and Management 120

- Schinkel A, 'Martha Nussbaum on Animal Rights' Ethics & the Environment' (2008) 13(1) Ethics and the Environment 41

- Schofield P, 'Jeremy Bentham's Nonsense upon Stilts' (2003) 15(1) Utilitas 2

- Sewell WRD, O'Riordan T, 'The Culture of Participation in Environmental Decision Making' (1976) 16(1) Natural Resources Journal 16

- Shepard PM, 'Issues of Community Empowerment' (1993) 21 Fordham Urban Law Journal 739

- Sherry S, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 Virginia Law Review 543

- Shelton D, 'Human Rights and the Environment: What Specific Environmental Rights have been Recognised? (2006-2007) 35(1)Denver Journal of International Law & Policy129

- Shelton D, 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 Standford Journal of International Law 103

- Shelton D, 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment 89

- Slind-Flor V, 'Amid Board Rancor, Sierra Club LDF Loses 2d Black: Staff Attorney Quits and Rekindles Dispute Over Environmental Racism' (30 October 1995) National Law Journal

- Smith DH 'Determinants of Voluntary Association Participation and Volunteering: A Literature Review' (1994) 23(3) Non Profit & Voluntary Sector Quarterly 243

- Steele J, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' [2001] Oxford Journal of Legal Studies 415

- Stone CD, 'Is Environmentalism Dead?' (2008) 38 Environmental Law 19

- Stone C 'Should Trees have Standing? (1972) 45 Southern California Law Review 450
- Stookes P, 'Current Concerns in Environmental Decision Making' [2007] Journal of Planning Law 536

- Stookes P, Michaels P, 'The Cost of Doing the *Rights* Thing' (2004) 16(2) Environmental Law & Management 59

- Strauss PL, 'Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa' (2006) 12 Columbia Journal of European Law 645

T

- Tews K, Busch P, et al. 'The Diffusion of New Environmental Policy Instruments' (2003) 42(4) European Journal of Political Research 569

- Thompson P, 'Major infrastructure projects – where to now*?* [2002] Journal of Planning Law (Occasional Papers No 30) 25 http://www.publications.parliament.uk/pa/cm200910/cmselect/cmenergy/memo/nps/uc4802.htm
- Thomas R, 'Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities' (2012) 22 Cornell Journal of Law and Public Policy 205

- Toth B, 'Public Participation and Democracy in Practice- Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30(2)Journal of Land Resources & Environmental Law 295

U

- Uzogara SG 'The Impact of Genetic Modification of Human Foods in the 21st Century: A Review' (2000) 18 Biotechnology Advances 179

V

- Verchick R 'Katrina, Feminism, and Environmental Justice' (2006-2007) 13 Cardozo Journal of Law & Gender 791

- Vitale D, 'Between Deliberative and Participatory Democracy: A Contribution on Habermas' (2006) 32(6) Philosophy & Social Criticism 752

W

- Wagner WE, 'Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment' (2004) 53 Duke Law Journal 1619

- Wapner P, 'Politics Beyond the State: Environmental Activism and World Civic Politics' (1995) 47(3) World Politics 311

- White R 'Stifling Environmental Dissent: On SLAPPS and GUNNS' (2005) 30 Alternative Law Journal 268

- Whittemore ME, 'The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why The 2008 Environmental Amendments have no Bite' (2011) 20(3) Pacific Rim Law & Policy Journal Association 659

- Willetts P, 'From Stockholm to Rio and Beyond: The Impact of the Environmental Movement on the United Nations Consultative Arrangements for NGOs' (1996) 22 Review of International Studies 67

- *Williams RD, 'Environmental Law and Democratic Legitimacy' (1994)* 4 Duke Environmental Law & Policy Forum 1

- Wolfe JD, 'A Defense of Participatory Democracy' (1985) 4 (3) The Review of Politics 370

Y

- Yang T, 'Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation' (2002) 26 Harvard Environmental Law Review 1

- Young IM, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) Ethics 250

Z

- Zaharchenko T, Goldenman G, 'Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia' [2004] Int'l Env Agreements: Politics, Law and Economics 229

Conference and Other Papers

B

- Berry T, 'The Origin, Differentiation and Role of Rights' (2001) Airlie Center

- Bonilla MC, Fernandez E, Jemaiel S, Mwebaza R, Zhandayeva D 'Environmental Law in Developing Countries' (2004) IUCN Environmental Policy and Law Paper No.43 Vol. II

C

- Collins K, and Ison R, 'Dare we Jump off Arnstein's Ladder? Social Learning As a New Policy Paradigm' (2006) in Proceedings of PATH (Participatory Approaches in Science & Technology Conference, 4-7 June 2006) Edinburgh.

- Cook G, Robbins P, Pieri E, 'The Discourse of the GM Food Debate: How Language Choices Affect Public Trust: Impact on Public of UK Policy Debate on Attitudes to GM Foods' (Economic and Social Research Council 2004)

- Cornwall A, 'Making a Difference? Gender and Participation Development'(2000) Discussion Paper 378, Institute of Development Studies < http://www.eldis.org/vfile/upload/1/document/0708/DOC8652.pdf> accessed 12 September 2013;

- Coyle A, Anthropocentric Approaches to Human Rights (1), Environmental Law, GNHRE, Workshop 12, University of the West of England, June 2011

D

- Demeritt D, Dyer D, Millington JDA, 'PEST or Panacea? Science, Democracy, and the Promise of Public Participation' 2009 Working Paper No. 10, King's College London < http://www.kcl.ac.uk/sspp/departments/geography/research/epd/Demeritt10.pdf> accessed 26 January 2014

G

- Grear A, *Mind the Gap: A Reflection on Legal Subjectivity in the Age of Globalization* (Presentation: Emory University, Atlanta, GA 29 July 2011)

- Goldman BA, FittonnL, 'Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites' (1994) Washington DC Centre for Policy Alternatives.

H

- Healey P, 'The 2003 UK GM Crops Debate' June 2004 Discussion Paper, University of Oxford

- Horlick-Jones T, Walls J, Rowe G, Pidgeon N, Poortinga W, O'Riordan T, 'A Deliberative Future? An Independent Evaluation of the GM Nation? Public Debate about the Possible Commercialisation of Transgenic Crops in Britain, 2003' (2004) Understanding Risk Working Paper

K

- Koester V, (Former Chair, Aarhus Convention Compliance Committee) presentation on 'The Aarhus Compliance Mechanism', Aarhus and Access Rights: the New Landscape Coalition for Access to Justice for the Environment, 10 October 2011, Kings College London

L

- Lovelock J, 'Gaia as Seen Through the Atmosphere' (1967) < http://link.springer.com/chapter/10.1007%2F978-94-009-7944-4_2#page-1> accessed 26 January 2014

- Lovelock J, Margulis L, 'Atmospheric Homeostasis by and for the Biosphere: the Gaia Hypothesis' (1974) <http://www.gps.caltech.edu/classes/ge148c/pdf%20files/lovelock.pdf> accessed 26 January 2014

M

- May JR, Daly E 'New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide' Widener Law School Legal Studies Research Paper Series no. 11-09 (IUCN Academy of Environmental Law e-Journal Issue 2011 (1)) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766085> accessed 26 January 2014

- Mayer S, 'GM Nation? Engaging People in Real Debate? A GeneWatch UK Report on the Conduct of the UK's Public Debate on GM Crops and Food, June 2003' (October 2003) <http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/GM_Nation_Report.pdf> accessed 28 October 2013

R

- **Razzaque J, 'Human Rights and the Environment: the national experience in South Asia and Africa' Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 4 <**http://www2.ohchr.org/english/issues/environment/environ/bp4.htm> accessed 13 August 2013

- Reynolds L, Szerszynski B, 'Representing *GM Nation*?' (Participatory Governance and Institutional Innovation 2004) <http://www.macaulay.ac.uk/PATHconference/outputs/PATH_abstract_1.2.3.pdf > accessed 10 November 2013

- Rose-Ackerman S, Halpaap AA, 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights' draft paper for *The Law and Economics of Environmental Policy: A Symposium*, Faculty of Laws, University College London, September 5-7, 2001

- Rydin R, 'Public Participation: Different Rationales; Different Strategies' 3 paper to Civil Society and Environmental Conflict conference, Helsinki 17 November 2006 <www.ymparisto.fi/download.asp?contentid=60431> accessed 20 September 2013

S

- Sachs W 'Environment and Human Rights' 2003 (Wuppertal Institute for Climate, Environment, Energy)

- Shelton D, 'Draft Paper on: Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration', presented at UNEP & OHCHR High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi 30 November – 1 December 2009

- Trachtenberg Z, 'This Habitable Earth of Ours': Locke on Humanity in the Environment' (2011) Working paper series, University of Oklahoma

- Werksman J, and Foti J, 'Discussion Paper: Improving Public Participation in International Environmental Governance' UNEP: Perspectives (December 2011) Issue 1

- Whyte KP, Indigenous North American Ethics and Aldo Leopold's Land Ethic: A Critical View of Comparison and Collaboration (March 14, 2012).

Reports

- Adebowale M, 'Black, Asian and Ethnic Minority Communities: Tackling Environmental and Social Inequalities' (2006) Capacity Global Report

- Adebowale M, 'Using the Law: Barriers and Opportunities for Environmental Justice' (Capacity Global, 2004) < http://www.capacity.org.uk/downloads/EJUsingtheLaw009Capacity04.pdf> accessed 4 September 2013

- Environmental Law Foundation & The Centre for Business Relationships Accountability, Sustainability & Society, 'Cost Barriers to Environmental Justice' (Environmental Law Foundation, 2006) <http://www.endsreport.com/docs/20100126.pdf > accessed 4 September 2013

- Environmental Justice Project, WWF, 'A Report by the Environmental Justice Project' 2004 <http://www.ukela.org/content/doclib/116.pdf > accessed 4 September 2013

- Hoare A, and Tarasofsky R, '*International Environmental Governance* Report of a Chatham House Workshop' Chatham House (July 2007) The Royal Institute of International Affairs

- Liberty, 'Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation' (The Civil Liberties Trust, 2006) < http://liberty-human-rights.org.uk/policy/reports/litigating-the-public-interest-july-2006.pdf> accessed 04 September 2013

- Mayer S, 'Avoiding the Difficult Issues: A Gene Watch UK Report on the Government's Response to the GM Nation? Public Debate' (June 2004) <http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/GMNationReport2.pdf> accessed 28 October 2013

- Report of the Working Group on Access to Environmental Justice 'Ensuring Access to Environmental Justice in England and Wales (the Sullivan Report) 2008 <http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf > accessed 04 September 2013

- Stookes P, 'Civil Law Aspects of Environmental Justice' (Environmental Law Foundation 203)

- Understanding Risk Team, 'A Deliberative Future? An Independent Evaluation of the *GM Nation?* Public Debate about the Possible Commercialization of Transgenic Crops in Britain 2003'(2004)

- United Nations Economic and Social Council 'Access to Environmental Justice: Making it Affordable (Coalition for Environmental Justice, 2004)' <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexFCAJEBriefingFINAL.pdf> accessed 2 September 2013

Government Publications

- Better Regulation Task Force, 'Executive Summary' in Regulation - Less is More: Reducing Burdens, Improving Outcomes (March 2005) <http://www.dti.gov.uk/files/file22967.pdf > accessed 4 September 2013

- Cabinet Office, 'Field Work: Weighing up the Costs and Benefits of GM Crops' 11 July 2003

- Council for Science and Technology, 'Policy Through Dialogue: Informing Policies Based on Science and Technology' (March 2005) < http://webarchive.nationalarchives.gov.uk/+/http://www2.cst.gov.uk/cst/reports/files/policy-through-dialogue/report.pdf >accessed 12 September 2013

- Cunningham, (Cabinet Office Minister and member of the Environmental Audit Select Committee) HC Deb, 17 December 1998

- DETR, The Government's Response to the Fifth Report of the Select Committee on Environmental Audit—Genetically; Modified Organisms and the Environment: Co-ordination of Government Policy (1999)

- Department of Environment Food and Rural Affairs, 'Implementing Measure to Achieve Compliance with the UNECE Aarhus Convention' (2010) <http://archive.defra.gov.uk/environment/policy/international/aarhus/pdf/compliance-summary.pdf >Accessed 4 September 2013

- Department of Environment, Food and Rural Affairs 'Statement by the Secretary of State for Environment, Food & Rural Affairs 'GM Crops and the Public Debate on GM Issues' 24 March 2003 < <http://webarchive.nationalarchives.gov.uk/20081023141438/http://www.defra.gov.uk/environment/gm/crops/debate/sofs-240303.htm> accessed 26 January 2014

- Department of Trade & Industry, *Our Energy Future - Creating a Low Carbon Economy* (White Paper, Cm 5761, 2003

- Department of Trade & Industry *The Energy Challenge: The Energy Review Report* (Cm 6887, 2006)

- Department of Trade and Industry 'GM Nation? The Findings of the Public Debate' (2003)

- The GM Science Review Panel 'First Report' (21 July 2003)

- Government Response to the Royal Commission on Environmental Pollution's Twenty-First Report- Setting Environmental Standards <http://www.rcep.org.uk/reports/21-standards/documents/2000-21response.pdf > accessed 27th March 2011

- Health and Safety Executive *The Tolerability of Risk From Nuclear Power Stations* (1992) HMSO London.

- House of Commons' Environmental Audit Committee, *Keeping the Lights on: Nuclear, Renewables and Climate Change* (HC, 2005-2006, 584-I)

- Ministry of Justice 'Cost protection for litigants in Environmental Judicial Review Claims <https://consult.justice.gov.uk/digital-communications/cost_protection_litigants > accessed 3 September 2013

- Office of Science and Technology *A Report on the Advisory and Regulatory Framework for Biotechnology: Report from the Government's Review Office of Science and Technology* (May 1999) <http://www.bis.gov.uk/files/file14498.pdf> last accessed 28 October 2013

- Parliamentary Office of Science & Technology: 'Open Channels: Public Dialogue in Science and Technology (Postnote) November 2002, Number 189' < www.parliament.uk/briefing-papers/POST-PN-189.pdf> accessed 26 January 2014

- Parliamentary Office of Science & Technology 'Open Channels: Public Dialogue in Science and Technology (Postnote) March 2001 Summary of POST Report Number 153' <http://www.parliament.uk/documents/post/pn153.pdf > accessed 8 December 2013

- Royal Commission on Environmental Pollution, *Tackling Pollution, Experience and Prospects* (Comd 9149, 1984) <http://webarchive.nationalarchives.gov.uk/20100916111534/http://www.rcep.org.uk/reports/10-pollution/1984-10pollution.pdf > accessed 17 December 2013

- Science and Technology Committee, *Third Report: Science and Society* (HL 1999-2000 38)

- Select Committee on Agriculture 'Minutes of Evidence: Professor Malcolm Grant. 27 June 2000' <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmagric/625/0062702.htm> last accessed 28 October 2013

- Select Committee on Environment, Food and Rural Affairs 'Minutes of Evidence: Pofessor Malcolm Grant, 22 October 2003' <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvfru/uc1220-i/uc122002.htm> accessed 10 November 2013

- Select Committee on Environment, Food and Rural Affairs, 'Oral Evidence taken before EFRA Committee 22 October 2003: Malcolm Grant' <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvfru/uc1220-i/uc122002.htm >accessed 10th November 2013

- Select Committee on Environment, Food and Rural Affairs, *Eighth Special Report: Appendix* (HC, 2001-2002, 1222)

- Select Committee on Trade and Industry, *New Nuclear? Examining the Issues* (HC, 2005-2006, 1122)

- The Skeffington, Committee, *People and Planning Report of the Committee on Public Participation in Planning 1969 (The Skeffington Committee report)* (reprinted 1972, HMSO)

- The Skeffington Committee *People and Planning Report of the Committee on Public Participation in Planning (The Skeffington Committee report): Introduction by Peter Shapely* (Routledge 2013 (HMSO))

- Select Committee on Environmental Audit, *Genetically Modified Organisms and the Environment: Coordination of Government Policy Fifth Report*, (HC 1998-1999 384-I)

- Sustainable Development Commission, 'Nuclear Power Won't Fix It' (Press Release 5 March 2006)

Newspaper and Magazine Articles

- Bland A, 'Vilcabamba: Paradise Going Bad?' *Smithsonian Magazine* (20 February 2013)< http://blogs.smithsonianmag.com/adventure/2013/02/vilcabamba-paradise-going-bad/ >accessed 20 September 2013

- Brown P, 'GM Licensing gets go ahead: Scots and Welsh furious as crop trials are side-lined' *The Guardian* (London 4 March 2003)

- 'But how Green are their Valets?' *The Observer* (London, 27 February 2000)

- Clark SRL'Beasts Like Us' *Times Literary Supplement* (London 20 February 1987) 175

- Cordiero J, 'Latin America: Constitution Crazy' *Latin Business Chronicle* (6 October 2008, Coral Gables) <http://www.latinbusinesschronicle.com/app/article.aspx?id=2799> accessed 24 January 2014

- Denvir D, 'Resource Wars in Ecuador: Indigenous People Accuse President Rafael Correa of Selling out to Mining Interests,' *In These Times* (28 February 2009), <http://www.inthesetimes.com/article/4252/resource_wars_in_ecuador/> accessed 24 January 2014

- 'Doubts over GM crops debate' *Financial Times* (21 March 2003, London)

- ENDS Report, 'Ministers Unveil Plans to Dampen Unease Over GM Crops' *ENDS Report* October 1998, Issue No. 285)

- ENDS Report, 'Communication of Risks Addressed in New Guide' *ENDS Report* (August 2000, Issue No. 307)

- ENDS Report, 'No Sustainable Business without Public Debate' *ENDS Report* (August 2000, Issue No. 307)

- ENDS Report, 'New Advisory Body Enters GM Maelstrom' *ENDS Report* (June 2000, Issue No. 305)

- ENDS Report, 'Advisers Seek Innovative Public Debate for Next Steps on GM Crops' *ENDS Report* (September 2001, Issue No. 320)

- ENDS Report, 'Whitehall Wrangle Over National Debate on GM Crops' *ENDS Report (*April 2001 Issue No. 327)

- ENDS Report, 'Terms of National GM Debate Leave Government's Advisers Unhappy' *ENDS Report* (August 2002 Issue No. 331)

- ENDS Report, 'Role of public opinion in decisions on GM crops still unclear' *ENDS Report* (January 2002 Issue No. 324)

- ENDS Report, 'Social Scientists Sum up Decade's Environmental Research' *ENDS Report* (April 2000, Issue No.303)

- ENDS Report 'Review of Biotechnology Regulation' ENDS Report December 1998, Issue No. 287

- English B, 'A Fabled Valley' The Boston Globe < http://www.boston.com/travel/articles/2010/06/27/a_fabled_valley/?page=full > accessed 20 September 2013;

- Fernandez P, 'Greens hail ministry of environment and forests move to protect dolphins' *Times of India* (Mumbai, 23 May 2013) available <http://articles.timesofindia.indiatimes.com/2013-05-23/developmental-issues/39474496_1_dolphinariums-indian-animal-protection-organisations-fiapo> accessed 29 July 2013

- Hope C, 'New £1,300 charge for High Court challenges against Government Decision' *The Telegraph* (London, 8 April 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/9977294/New-1300-charge-for-High-Court-challenges-against-Government-decisions.html> accessed 3 September 2013

- Longman PJ, 'The Curse of Frankenfood. Genetically Modified Crops Stir up Controversy at Home and Abroad' *US News and World Report* (26 July 1999)

- Madison J, The Federalist No. 10: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued) *Daily Advertiser* (Thursday, November 22, 1787

- Meacher M, 'Review of Biotechnology Regulation' *ENDS Report* (December 1998, Issue No. 287)

- Milner M, and Macalister T, 'MPs warn Blair against hasty decision on energy strategy' (*The Guardian*, 10 July 2006)

- Monbiot G 'I Love Nature. For this I am called bourgeois, romantic – even fascist' *The Guardian* (London 8 July 2013)
- Rayner J, 'European Union is Subject to Aarhus Convention, UN Rules' The *Law Society Gazette* (London, 12 May 2011)

- Sample I, 'The Man in the Street gets his Forum on GM food - but Decides to Stay in the Street' Government's 10-day Public Road Show Opens with a Whimper' *The Guardian* (London, 4 June 2003)

- Shabecoff P, 'Environmental Groups Told They are Racist in Hiring', New York Times (New York, 1 February 1990)

- Schneider K, 'Earth Day '95: Back to the Grass Roots' *The New York Times* (New York 23 April 1995)

- Schwarz W, 'Obituary: Arne Naess' The Guardian (London 15 January 2009) http://www.guardian.co.uk/environment/2009/jan/15/obituary-arne-naess accessed 16 July 2013

- Thevenot B, and Russell G, 'Reports of Anarchy at Superdome Overstated' *The Seattle Times* (Seattle 26 September 2005) <http://seattletimes.com/html/nationworld/2002520986_katmyth26.html> accessed 14 September 2013

- Vitello P, 'Alexander Leaf Dies at 92; Linked Diet and Health' (The New York Times, 6 January 2013) <http://www.nytimes.com/2013/01/07/us/alexander-leaf-dies-at-92-linked-diet-and-health.html?ref=obituaries&_r=0 > accessed 20 September 2013

- 'Hundreds are Denied Access to GM meetings' *Western Morning News* (Devon 7 June 2003)

Speeches and Statements

- Annan K, Secretary General of the United Nations on International Day for the Preservation of the Ozone Layer, 16 September 2005 < http://www.un.org/en/events/ozoneday/background.shtml > access 18 December 2013

- Beckett M 'Keynote Speech at Green Alliance/Royal Society Event, 5 June 2003 <http://www.defra.gov.uk/corporate/ministers/speeches/mb030605.htm> accessed 28 October 2013
- *Blair T, 23 May 2002 text available* <http://www.ukpolitics.org.uk/node/1863> accessed 25 September 2013

- Byers S, (Secretary of State for Trade and Industry), Speech to Biotechnology Industry Association, 21 January 1999

- Churchill W, 4 June 1940 'we shall fight on the beaches' speech

- Monbiot G, Public address (audience and date unknown) <http://vimeo.com/68575611> accessed 17 July 2013

Websites

- Agriculture and Environment Biotechnology Commission (AEBC), 'About Us: Terms of Reference' <http://webarchive.nationalarchives.gov.uk/20100419143351/http://www.aebc.gov.uk/aebc/about/terms.shtml> last accessed 28 October 2013

- Envision Spokane 'Community Bill of Rights' < http://envisionspokane.org/2011/08/17/community-bill-of-rights.> accessed 20 July 2013.

- Community Environmental Legal Defense Fund 'Community Environment Legal Defense Fund' <http://www.celdf.org> accessed 26 January 2014

- BBC News 'Public 'Needs Voice' on GM Issue' (BBC News Online, 2nd June 2003). <http://news.bbc.co.uk/1/hi/uk_politics/2955150.stm>accessed 10 November 2013

- Charlemagne 'Are NGOs Really More Democratic than Governments?' *The Economist* (25 June 2009) <http://www.economist.com/blogs/charlemagne/2009/06/are_ngos_really_more_democratic > accessed 4 September 2013

- Central Office of Information, 'About us' <http://coi.gov.uk/aboutcoi.php >last accessed 14 July 2011

- Center for Progressive Reform, 'An Unnatural Disaster: The Aftermath of Hurricane Katrina' 4 (2005) <http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf > accessed 15 September 2013

- Friends of the Earth 'Government Must Not Ignore Public over GM Crop Commercialization', 26 July 2002 <http://www.foe.co.uk/resource/press_releases/0726gm.html> last accessed 28 October 2013

- Garden of Paradise 'About Us' http://www.gardenofparadise.net/Garden_of_Paradise/About_Us.html> accessed 20 September 2013

- Genewatch 'GM Crops: Timeline' < http://www.genewatch.org/sub-568798> accessed 28 October 2013

- Government News and Press Releases 'Public to choose issued for GM debate' < http://www.gov-news.org/gov/uk/news/public_to_choose_issues_for_gm_debate_beckett/22538.html > accessed 28th October 2013

- Greenpeace UK 'Government's key energy review declared 'legally flawed'' <http://www.greenpeace.org.uk/media/press-releases/governments-key-energy-review-declared-legally-flawed> accessed 26 January 2014

- Kozloff N, 'Ecuador's Rafael Correa: Copenhagen Climate Hero or Environmental Foe?' <http://www.sosyasuni.org/en/index.php?option=com_content&view=article&id=137&catid=1&Itemid=34 > accessed 26 January 2014

- Maurici J, 'The Aarhus Compliance Committee Publishes Draft Findings and Recommendations with Regard to Communication ACCC/C/2012/68 Concerning Compliance by the United Kingdom and the European Union' (30 August 2013) <http://www.landmarkchambers.co.uk/cel/blog-print/planning_policy_and_the_courts_after_tesco_stores_v._dundee_city_council> accessed 4 September 2013.

- United Nations Economic Commission for Europe 'About the Aarhus Clearinghouse' <http://aarhusclearinghouse.unece.org/about/> accessed 22 July 2013

- U.S. Department of Justice, 'Five New Orleans Police Officers Sentences on Civil Rights and Obstruction of Justice Violations in the Danziger Bridge Shooting Case' (4 April 2012) < http://www.fbi.gov/neworleans/press-releases/2012/five-new-orleans-police-officers-sentenced-on-civil-rights-and-obstruction-of-justice-violations-in-the-danziger-bridge-shooting-case > accessed 15 September 2013

- WE ACT (West Harlem Environmental Action) 'Achieving Environmental Justice by Building Healthy Communities Since 1988' <http://www.weact.org/> accessed 15 September 2013.

Other Sources

- Agriculture and Environment Biotechnology Commission 'Crops on Trial < http://webarchive.nationalarchives.gov.uk/20100419143351/http://www.aebc.gov.uk/aebc/pdf/crops.pdf> accessed 26 January 2014

- Agriculture and Environment Biotechnology Commission 'Public Attitudes Group: A debate about the issue of possible commercialisation of GM crops in the UK' <http://webarchive.nationalarchives.gov.uk/20100419143351/http://www.aebc.gov.uk/aebc/reports/public_attitudes_advice.shtml > accessed 28 October 2013

- Agriculture and Environmental Biotechnology Commission 'Update on Work of GM Public Debate Steering Board 3 March 2003' <www.aebc.gov.uk/aebc/about/papers/aebc0303.htm > accessed 10 November 2013

- CIPAST 'Ladder' <http://www.cipast.org/bilder/ladder.jpg > accessed 21 May 2012

- *European Governance: A White Paper*, COM (2001) 428 final, 25 July 2001

- General Accounting Office 'Pesticides- Improvements Needed to Ensure the Safety of Farmworkers and Their Children' (March 2000) <http://www.gao.gov/new.items/rc00040.pdf> accessed 16 September 2013

- General Accounting Office 'Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities' (June 1983) < http://www.gao.gov/assets/150/140159.pdf> accessed 26January 2014

- GM Public Debate 'Briefing Note following meeting of GM Debate Steering Board Agreeing Plans for National GM Debate' <www.gmpublicdebate.org/press/press_26022003.htm> accessed 1 March 2011.

- GM Public Debate Steering Board 'Minutes of Second Meeting 3 October 2002'

- GM Public Debate Steering Board 'Minutes of Sixth Meeting 17 December 2002'

- GM Public Debate Steering Board, 'Minutes of Seventh Meeting, 21 January 2003'

- GM Public Debate Steering Board, 'Minutes of the Tenth Meeting, 20 March 2003'

- GM Public Debate Steering Board, 'Minutes of Ninth Meeting, 20 February 2003'

- GM Public Debate Steering Board 'Minutes of meeting 15 April 2003' http://www.gmnation.org.uk/docs/minutes_15042003.doc > accessed 10 November 2013

- GM Public Debate 'Letter from Malcolm Grant to Margaret Beckett 18 March 2003 GM Public Debate and EC Approvals Process' <www.gmpublicdebate.org/latest/letters07.asp > accessed 21 April 2003

- Greene N, 'The First Successful Case of the Rights of Nature Implementation in Ecuador' (The Rights of Nature) < http://therightsofnature.org/first-ron-case-ecuador/ > accessed 20 September 2013

- Malcolm Grant's letter to Margaret Beckett 30 January 2003

- Matsuoka M (ed.), *Building Healthy Communities from the Ground Up: Environmental Justice in California* (Asian Pacific Environmental Network Communities for a Better Environment Environmental Health Coalition People Organizing to Demand Environmental & Economic Rights Silicon Valley Toxics Coalition/Health and Environmental Justice Project 2003)

- Memo on Revised Detailed Budget Commentary from Simon Hughes, Head of Live Events, COI Communications to GM Public Debate Technical Advisory Group , 12 February 2003

- Note of Meeting between public debate steering board members and COI Communications 23 September 2002

- Pachamama Alliance 'Stand with us in solidarity and defend the Amazon and the collective Rights of Nature and humankind' <http://www.pachamama.org/advocacy/defend-the-amazon#sthash.pEultoiQ.dpuf > accessed 22 December 2013

- Public Debate Steering Board 'Minutes of the First Meeting of the AEBC Sub Group on: Public Debate Steering Board: 13 September 2002' <http://www.gmfoodnews.com/minutes_20020913.htm> accessed 10 November 2013

UN Documents

- Meeting of the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters, Annex to the Addendum to the Report of the First Meeting of the Parties: Decision I/7 Review of Compliance, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004) <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> accessed 24 July 2013

- United Nations Environment Programme 'The Aarhus Convention: A New International Framework Regulating Public Access to Environmental Information, United Nations Development Programme, Global Conference on Access to Environmental Information, Agenda Item 5, U.N. Doc. UNEP/INF2000/WP/5 (2000) <http://www.unep.org/infoterra/infoterra2000/Wates-rev.pdf > accessed 13 August 2013

- United Church of Christ Commission for Racial Justice 'Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites' 1987 < http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf> accessed 14 September 2013

- United Nations Economic and Social Council 'Findings and Recommendations with regard to compliance by Ukraine with the obligations under Aarhus Convention in the Case of the Bystre deep-water navigation canal construction' 32, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.3 (February 18 2005), <http://www.unece.org./env/pp/compliance/C2004-03/C03findings.doc> accessed 23 July 2013

- United Nations Economic and Social Council 'Report by the Compliance Committee with regard to communication ACCC/C/2006/16, Addendum Compliance by Lithuania with its Obligations under the Convention ECE/MP.PP/2008/5/Add.6 4 April 2008 <http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf> accessed 23 July 2013

- World Commission on Environment and Development (WCED) 'Our Common Future' (1987) http://www.un-documents.net/our-common-future.pdf > accessed 2 November 2013

- World Charter for Nature, United Nations General Assembly, G.A. Res. 37/7, U.N. Doc. A/37/51 (1982), at § 23.