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LEGISLATION

The Usual Suspects? Public Participation Under the Aarhus Convention

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Introduction

Something of a consensus on the importance of public involvement in environmental decision-making has been achieved in recent years. The emphasis on public involvement is one of a range of responses to a certain disillusionment with the authority of the state (or the EC) to regulate for environmental protection, and is increasingly reflected in international, European and domestic environmental law.¹ The Aarhus Convention, the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*,² referred to by the UN Secretary-General as '... by far the most impressive elaboration of principle 10 of the Rio Declaration',³ is perhaps the most significant international innovation in this area.⁴

The purpose of this article is to examine, from the perspective of the Aarhus Convention, mechanisms for public involvement in English environmental law. Although this area has traditionally been relatively closed to outside influence, the introduction of the public into decision making fits within a trend towards the 'proceduralisation' of environmental (and other) regulation, which has been much

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- 1 Although we will not discuss the experience in the United States in any detail here, the long-standing experience with public involvement in decision making in that jurisdiction will be well-known to readers. See in particular M. Shapiro, *Who Guards the Guardians?* (Athens, GA: University of Georgia Press, 1988); and R. Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harv L Rev* 1669.
- 2 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) available at <<http://www.unece.org/env/pp/documents/cep43e.pdf>>
- 3 K. Annan in S. Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (New York and Geneva: United Nations / Economic Commission for Europe, 2000), foreword. *Rio Declaration on Environment and Development*, 13 June 1992, adopted by the UN Conference on Environment and Development (UNCED) at Rio de Janeiro. UN Doc. A/CONF.151/26 (vol. 1) (1992). Principle 10 states that 'Environmental issues are best handled with the 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 ... 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.'
- 4 International law on public participation is discussed in G. R. Pring and S. Y. Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development' in D. Zillman, A. Lucas and G. Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002).

remarked upon recently.⁵ 'Public participation' in environmental law and policy could range from the basic democratic right to vote in European, national and local elections, to possible rights to express a view, vote on or even veto a particular project. We do not propose to attempt to define public participation, nor is it defined in the Convention. Broadly, however, we are concerned here with mechanisms that allow the public to evaluate, comment on or influence regulatory decisions, at a broad policy level or in respect of individual projects.

We begin this paper with an analysis of some of the aims of public participation. John Dryzek examines mechanisms of public involvement (including access to information, consultation, dispute resolution) as a particular environmental discourse, 'democratic pragmatism'.⁶ Although we will not be examining discourse analysis in this article, Dryzek's approach allows us to see participation as an alternative to more traditional autonomous bureaucracy, providing a response to actual and perceived failures of expert regulation by the public administration.⁷ Dissatisfaction with the performance of existing regulatory arrangements might question both the effectiveness and quality of decisions, and the democratic legitimacy and fairness of those decisions.⁸ A turn to increased public involvement for a solution can be compared with a market-based response to regulatory failures (for example, taxing, pricing, privatising⁹), which, at least as currently practised, may tend to exclude the public from decision-making.¹⁰

After discussing some possible rationales for public participation, we turn to the Aarhus Convention itself. The Convention has received a generally positive response from NGOs and governments.¹¹ Although it is a fairly weak legal document, given its quite vague and permissive¹² character and the absence of adequate enforcement mechanisms, the Convention makes a potentially powerful

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- 5 See J. Black, 'Proceduralizing Regulation' (2000) 20 OJLS 597 and (2001) 21 OJLS 33; J. Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 OJLS 415; J. Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU', in J. Scott and G. de Búrca (eds), *Constitutional Change in the European Union* (Oxford: Hart Publishing, 2000). C. Harlow and R. Rawlings, *Law and Administration* (London: Butterworths, 1997) discuss the development of administrative procedure more generally. The Aarhus Convention concentrates on procedure as a requirement of the regulator, but 'proceduralisation' can also concentrate on imposing procedural requirements on the regulated.
- 6 J. Dryzek, *The Politics of the Earth* (Oxford: Oxford University Press, 1997), Chapter 5.
- 7 Which Dryzek terms 'administrative rationalism', *ibid.*, Chapter 4.
- 8 R. Summers, 'Evaluating and Improving Legal Processes – A Plea for Process Values' (1974) 60 *Cornell Law Review* 1, makes a distinction between the evaluation of processes according to their good result efficacy or alternatively, according to their capacity to serve process values *per se*. Similarly, Pring and Noé, n 4 above, and B. Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Zillman, Lucas and Pring, n 4 above, discuss participation by reference to *substantive* or *process* legitimacy.
- 9 J. Scott, *EC Environmental Law* (London: Longman, 1998), Chapter 2, discusses the decline in the popularity (although not necessarily the incidence) of 'command and control' regulation in environmental law.
- 10 See J. Rowan-Robinson and A. Ross, 'Non-Regulatory Instruments and Public Access to Environmental Information' in K. Bosselmann and B. Richardson (eds), *Environmental Justice and Market Mechanisms – Key Challenges for Environmental Law and Policy* (London: Kluwer Law International, 1999). S. Kuhn, 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision-making Process' (1999) 25 *Ecology Law Quarterly* 647 discusses the problems of ensuring public participation in pollution trading.
- 11 S. T. McAllister, 'The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters' [1998] *Colorado Journal of International Environmental Law and Policy* 187. Note that a large number of NGOs participated in the conferences leading to the Aarhus Convention: see European Eco-Forum, *Brussels Declaration* (Brussels, 2002, available at: <<http://www.eeb.org/Brussels%20Declaration.pdf>>); and Stec and Casey-Lefkowitz, n 3 above, 1–2.
- 12 The phrase 'meeting any requirements under national law', and similar phrases, arises a number of times and is not defined in the Convention. It may indicate a certain deference to State

statement on the importance of public participation in a wide range of decisions. Moreover, some of the weak international obligations under the Aarhus Convention itself are likely to be given some real bite through eventual EC legislation.¹³ The EC is a signatory to the Convention, and the European Commission is committed to ensuring its implementation,¹⁴ the signature of the Aarhus Convention by all Member States gives the Commission a strong hand in proposing legislation.¹⁵ The possible implementation of the Aarhus Convention via EC legislation also reflects the view that the style of EC environmental Directives has shifted in recent years, from a reliance on formal centrally determined standards, to a more procedural approach. Proceduralisation seems to be used as a mechanism to balance against greater Member State independence on substantive environmental standards.¹⁶

Procedure under the Aarhus Convention has three closely related 'pillars': access to information; public participation; and access to justice. After looking at possible rationales for the Aarhus Convention, we will discuss each of these pillars in turn.

Possible rationales for the Aarhus Convention

In this section we will look more closely at some of the benefits claimed for public participation. The incorporation of different perspectives may aim at improving substantive outcomes and/or improving the procedural legitimacy of these decision-making procedures.¹⁷ We will suggest that although the Aarhus Convention appears to have mixed motives, its focus on a strong role for non-governmental organisations might indicate that increasing levels of environmental protection takes precedence over either improving substantive outcomes more generally or enhancing democratic procedure.

Dryzek's analysis of 'democratic pragmatism' looks at improving the substantive output of regulation.¹⁸ Jenny Steele similarly, although concentrating on a more ambitious deliberative scheme, looks at the problem solving potential of introducing a plurality of perspectives into a decision-making process.¹⁹ Participation might improve the quality of decisions by input from a wide range of participants, who either have specific expertise, or can provide useful information on matters such as public fears and values. The indeterminate nature of decisions in the environmental sphere, which arises both out of the inherently political

procedure, but, Stec and Casey-Lefkowitz, n 3 above, argue that although flexibility is introduced by these provisions, they do not change the nature of the obligation, 30.

13 S. Rose-Ackerman and A. A. Halpaap, 'The Aarhus Convention and the Politics of Process' *Paper prepared for the Symposium on Law and Economics of Environmental Policy*, available at: <<http://www.cserge.ucl.ac.uk/news.html>> discusses the likely reluctance of western democracies to implement the Aarhus Convention independently.

14 European Commission, *Proposal for a Directive of the European Parliament and the Council providing for Public Participation in respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending Council Directives 85/337/EEC and 96/61/EC*, COM (2000) 839. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Public Access to Environmental Information*, COM (2000) 402.

15 See generally M. Lee, 'Public Participation, Procedure and Democratic Deficit in EC Environmental Law' (2002) 3 *Yearbook of European Environmental Law*, forthcoming.

16 J. Scott, n 5 above; R. Macrory and S. Turner, 'Participatory Rights, Transboundary Environmental Governance and EC Law' (2002) 39 *CML Rev* 489.

17 See n 8 above.

18 See Dryzek, n 6 above.

19 See Steele, n 5 above.

nature of the decisions and from scientific²⁰ and technical²¹ uncertainties that need to be resolved by the exercise of judgement, emphasises the potential contribution of public participation to the quality of final decisions. A commitment to participation is embedded in the rhetoric of sustainable development,²² where objective criteria by which to make decisions are elusive, and indeed the very meaning of the term is contentious.

The added dimension of the substantive approach to public participation in environmental law, is that the public is required to participate in *solutions* as well as decisions. There is frequently an educational, awareness-raising element to environmental participative democracy.²³ We should also mention here that some regulation scholars see third party involvement and transparency as a way essentially to keep regulators on the straight and narrow, again potentially improving outcomes.²⁴

As well as potentially improving results, public participation might be used to improve procedural legitimacy, tempering unease with the democratic condition of environmental decision-making.²⁵ Participation is particularly attractive in the environmental sphere because of the historically fraught relationship between democracy and 'green' politics. The temptation of authoritarianism when faced with a belief in impending ecological catastrophe has loomed large, and even for greens who do not feel that temptation, there is an apparent inconsistency between a belief in a single set of acceptable ends, and the value pluralism normally associated with representative democracy.²⁶ Various 'participative' or 'deliberative' alternatives or supplements to representative democracy have become very influential in the effort to reconcile green thought and democracy.²⁷

More prosaically, real world environmental decisions, both at a general standard setting and an individual level, are frequently taken by a non-

20 Proving cause and effect, let alone predicting effects, is notoriously difficult in this area. For example, research may not have been carried out, or might rely on uncertain epidemiological studies, or might have to draw conclusions in respect of human or ecological systems from animal experimentation.

21 For example, quantifying costs and benefits for a cost benefit analysis will be fraught with uncertainty. See generally, A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994), 154–159.

22 See, for example, *Agenda 21* (1992), available at <<http://www.unep.org/Documents/Default.asp?DocumentID=52>>, which states that 'one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making', chapter 21.2. The emphasis of sustainable development on questions of justice and equity also implies participative structures. See generally the seminal report on sustainable development, the Brundtland Report: World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

23 J. Barry, 'Sustainability, Political Judgement and Citizenship: Connecting Green Politics and Democracy' in B. Doherty and M. de Geus (eds), *Democracy and Green Political Thought – Sustainability, Rights and Citizenship* (London: Routledge, 1996). Note also the importance of this perspective to access to information, C. Kimber, 'Understanding Access to Environmental Information: the European Experience' in T. Jewell and J. Steele (eds), *Law in Environmental Decision-making* (Oxford: Oxford University Press, 1998); J. Rowan-Robinson *et al*, 'Public Access to Environmental Information: A Means to What End?' (1996) 8 *JEL* 19.

24 I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford: Oxford University Press, 1992). They propose, for example, the empowerment of public interest groups as a means of countering capture and corruption within regulatory agencies, Chapter 3.

25 See n 8 above.

26 See generally A. Dobson, *Green Political Thought* (London: Routledge, 2000) who urges that the linking of green thought with authoritarianism should be treated with caution, 114–124. Doherty and de Geus n 23 above.

27 For a review see B. Doherty and M. de Geus, 'Introduction' in Doherty and de Geus (eds), n 23 above. J. Dryzek, n 6 above sees 'ecological democracy' as essentially deliberative, 200–201; see also M. Mason, *Environmental Democracy* (London: Earthscan, 1999).

majoritarian body, such as the Environment Agency in England and Wales. There is a real tension between, on the one hand, a genuine need for the independent exercise of expert judgment by agencies in very technical areas of environmental protection and, on the other, the recognition that controversial decisions cannot be made solely by the exercise of such expertise. Environmental problems and solutions are complex, and must frequently be mediated by scientific and technical expertise. But there is also necessarily a value judgment to be made in individual decisions. That value judgment may fill gaps in knowledge; determine appropriate levels of safety; distribute the costs and benefits of pollution; decide between fundamentally divided interests. The political nature of environmental decisions, together with their frequent delegation to unelected experts, requires public participation to enhance the procedural legitimacy of decisions, since electoral legitimacy is weak.

Other attempts to ensure the accountability of independent regulators, however, might point in the opposite direction. Providing a benchmark by which to assess regulator performance, for example, by imposing very clear formal standards, or an obligation to carry out cost benefit assessment or to apply a particular risk assessment framework emphasises the *expert* element of decision-making, and could be at the expense of public involvement.²⁸ Highly technical decision-making can crowd out public participation, both because it might be difficult to engage with an esoteric debate, and because there may be no room for values and concerns that do not fit within the technical perspective.²⁹ The more technical the discussion, the less likely it is that outsiders will be properly involved. To think of the three Aarhus Convention pillars: the usefulness of access to information depends on the information being understood by the lay public; participation depends partly on being able to take part in dialogue; access to justice may depend on challenging technical information on its own terms. The technical approach attempts to de-politicise decisions by making them appear objective, neutral and inevitable. Introducing participation acknowledges both that this is impossible if fundamental questions of value are at stake, and that permanent scientific truths are frequently unattainable in this area.

Participation not only has to face countervailing trends towards both market mechanisms in environmental regulation³⁰ and highly technical risk assessment procedures. There are also competing perspectives on public involvement itself. 'Democratic pragmatism' is not really a threat to existing institutions, since it operates within those institutions.³¹ Other arguments in favour of participation have a far more radical intent, challenging the adequacy of existing democratic institutions. For example, many environmental decisions in English law are formally taken by locally elected democratic bodies – local planning authorities. Whatever the practical limitations of local representative democracy, we are not

28 E. Fisher, 'Drowning by Numbers: The Pursuit of Accountable Public Administration' (2000) 20 *OJLS* 109.

29 M.A. Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford: Clarendon Press, 1995) discusses the ways in which politics in this area can be dominated by science. Note also that part of risk society thesis emphasises the undemocratic nature of ceding decisions to technical experts, and the growing dominance of such judgments, U. Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992). See also S. Bray, 'Scientific Decision-making: A Barrier to Citizen Participation in Environmental Agency Decision-making' (1991) 17 *Wm Mitchell L Rev* 1111.

30 As mentioned in the introduction.

31 We could consider Dryzek's distinction between 'democratic pragmatism' and 'a more radical participatory democracy' of 'ecological democracy', n 6 above, Chapter 11, 199.

then purely concerned with the legitimacy of non-majoritarian bodies. Whilst improved problem solving might be an important rationale here, imposition of public participation obligations on local authorities is also an important reminder that participation can have a quite radical tinge. Some elements of modern democratic thinking are moving away from the view that representative democracy adequately confers legitimacy and accountability on all decisions through periodic elections. Less radically, the acceptability of decisions might be improved by participation, if even those who disagree with a result feel that they have been fully involved in reaching it.³²

Whether the aim of public involvement is improved decisions or increased legitimacy, public participation can take radically different forms. We might be looking at bargaining between private interests of the participants. Alternatively, ideals of 'deliberation'³³ rest broadly on the notion that through the rational debate of citizens, arguments are refined and preferences are transformed, leading both to improved solutions and real democratic engagement with decisions. The deliberative approach is supposed to curb the most selfish instincts of the individual or group; the requirement to consider, reflect and argue has a civilising effect. Deliberation focuses on values, arrived at through reason and reflection, rather than exogenous private preferences or interests. Even without looking at the complications of different theories of deliberative democracy, this distinction between interests and values, and the role of innovative participatory mechanisms to bring out the latter, is familiar to environmental lawyers from a number of sources. An influential discussion of values appears in the Royal Commission on Environmental Pollution's study on *Setting Environmental Standards*,³⁴ which understands 'values to be beliefs, either individual or social, about what is important in life, and thus about ends or objectives which should govern and shape public policies ... they may be both formed and modified as a result of information and reflection.'³⁵ This is contrasted with a 'stakeholder model' (which the Royal Commission accepts is still important), which 'rather than seeking to

32 Increasing the chance of consensus is often put forward as an advantage of increased public participation. Even if it is a desirable side-effect however, as an *objective* of participation, a search for consensus is problematic: see C. Coglianese, 'Is Consensus an Appropriate Basis for Regulatory Policy?' in E. W. Orts and K. Deketelaere, *Environmental Contracts: Comparative Approaches to Regulatory Innovation* (Boston: Kluwer Law International, 2000), arguing that the benefits claimed for consensus are about participation rather than consensus, and that on the contrary, seeking consensus has pathological effects.

33 The seminal work on deliberation is probably found in Rawls and Habermas, see for example J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972) and J. Habermas, *Towards a Rational Society* (London: Heinemann Educational, 1971). See also J. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000). J. Rossi, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking' (1997) 92 *Nw U L Rev* 173, sets out the distinction between pluralism (essentially competition between interest group preferences) and deliberation.

34 Royal Commission on Environmental Pollution, 21st Report *Setting Environmental Standards*, Cm 4053 (1998). This distinction is also a crucial element of the environmentalist critique of cost benefit assessment in the environmental field. To simplify, one way of attributing a monetary value to environmental goods for which there is no market, is finding out what people would be willing to pay/accept to receive/forgo the environmental benefit. It is argued that this instrumental approach fails to capture citizen values with respect to the environment. See M. Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge: Cambridge University Press, 1988); L. Tribe, 'Ways Not to Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83 *Yale LJ* 1315. C. S. Sunstein, particularly 'Preferences and Politics' (1991) 20 *Philosophy and Public Affairs* 3 and 'Endogenous Preferences, Environmental Law' (1993) 22 *Journal of Legal Studies* 217 also provides an important analysis of these issues in the context of American regulation.

35 Royal Commission on Environmental Pollution, *ibid*, 101.

articulate and challenge values ... places the emphasis on negotiation between interested parties'.³⁶ We do not intend to add to the literature on 'deliberative democracy' here, or enter into the debate among and between the different notions of deliberation. It suffices for now to appreciate that deliberation would require more extensive mechanisms than traditional 'consultation', since it moves beyond models of decision-making based on expertise, which use consultation primarily to provide information for decision-makers.

Participation has a very strong pull on environmental policy making, but its meaning and aims are rarely made clear. The Aarhus Convention is certainly ambiguous in its objectives, with the recitals recognising diverse, yet interrelated motivations.³⁷ The recitals refer to rights and duties to an 'environment adequate to ... health and well-being',³⁸ and posit that rights advocated in the Convention enhance 'the quality and the implementation of decisions' and 'public awareness of environmental issues'. In addition, they state the need for 'public authorities to be in possession of accurate, comprehensive and up-to-date environmental information'. The Convention also aims 'to strengthen public support for decisions on the environment'. In process terms, 'accountability of and transparency in decision-making' is mentioned and more radically, the Convention 'will contribute to strengthening democracy'.

Although the Aarhus Convention has very mixed motives, perhaps the clearest and strongest link is with improving environmental protection. So far, we have mentioned that procedure might improve problem solving, but the level of environmental protection is still potentially open-ended. In the Aarhus Convention, the understanding seems to be that public participation actually improves environmental protection, implying *more* environmental protection. Given the fundamental controversy over claims as to the state of the environment,³⁹ or what constitutes environmental protection, that is not a straightforward objective. And it is by no means clear that general public involvement will prioritise long term environmental protection over, say, short term economic benefits. The involvement of environmental interest groups is probably crucial, and indeed the distinct role for NGOs is perhaps the most significant innovation of the Convention. The Aarhus Convention defines the 'public concerned' as 'the public affected or likely to be affected by or having an interest in, the environmental decision-making ... non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.⁴⁰

Whether this relative privileging of NGOs is helpful for the process-focussed objectives of the Aarhus Convention is a separate question, since the potential role of the general public is far less clear. Even if environmental interest groups represent one particular view of the public interest, arguably creating a public

36 *Ibid.*, 102.

37 J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law*, 51 identifies three motivations: improving decisions; furthering international human rights; and legitimacy. J. Steele, n 5 above, as already discussed, emphasises problem solving.

38 This link with substantive rights to environmental quality is reiterated in Article 1 of the Convention.

39 See for example B. Lomborg, *The Skeptical Environmentalist* (Cambridge: Cambridge University Press, 2001), and the controversy it created, S. Pimm and J. Harvey, 'No Need to Worry About the Future' (2001) 414 *Nature* 149; C. Lavers, 'You've Never Had it so Good', *The Guardian*, 1 September 2001; M. McCarthy, 'A Cool Head in the Hot Air', *The Independent*, 31 August 2001.

40 Article 2(5).

interest in their involvement, they cannot claim to represent the public.⁴¹ This is particularly problematic where decisions are made by elected representatives who are expected to consider all of their constituents and have a more multi-faceted conception of the public interest than single issue campaigning groups. What we can say is that since industry or developers are undoubtedly involved in any decision-making process, environmental interest groups provide an invaluable alternative input, particularly since negotiation with the regulated industry is the starting point for much contemporary regulatory reform.⁴² Disparity of resources makes it difficult for environmental NGOs to exert the same influence as industry on decision-making.⁴³ Although the Aarhus Convention clearly establishes NGOs among the 'stakeholders' in a process, there is a risk that their often necessarily limited involvement might disguise the actual dominance of economic interests. Moreover, empowering only larger, well resourced NGOs (inevitable if smaller groups are not given specific attention) brings with it clear dangers of capture and exclusion. We should beware of seeing the tri-partite relationship between industry, government and privileged NGOs as necessarily unproblematic, or indeed as a manifestation of greater 'public participation'. As experts, established NGOs have a special role where participation is designed to improve results. Since decision-making in this field is rarely value free, however, a 'good' decision or a 'good' outcome is equally predicated upon the contribution of non-expert views and values.

The optimum conditions for deliberation (or more general public participation) are notoriously controversial and in any event difficult to achieve, particularly in respect of questions of power and exclusion. We should be aware of who is allowed or willing to participate, and how the grounds of the debate might work to exclude some ideas and some people. In particular, in the current context, the specialism of many debates, framed in overwhelmingly technical or scientific terms, might tend to limit the discussion to competing experts. The Aarhus Convention attempts to mitigate the dominance of economic interests by involving NGOs, but does little to encourage more general public involvement.

Although there is little empirical information available, the normative arguments in favour of increasing participation are undoubtedly persuasive, and cumulatively more so. The limitations of public participation should however be acknowledged, and perhaps lie behind some of the ambiguity in the Aarhus Convention. Involving the 'ordinary' public is often extremely difficult, and there are also problems of cost, in time and money. Moreover, there is something of a

41 The potential division of interests between NGOs and the general public tends to be particularly problematic in developing countries, since the membership and funding of NGOs generally comes from the industrialised north. Note also the potential for conflict between interest groups. For example, animals rights groups and environmental groups might have very different notions of the public interest in chemicals regulation.

42 Think for example of the fashion of 'negotiated rule making' and 'co-regulation', in which regulators and regulated (with or usually without external input) agree regulatory standards. See Orts and Deketelaere, n 32 above; J. Verschuuren, 'EC Environmental Law and Self-Regulation in the Member States: in Search of a Legislative Framework' (2000) 1 *Yearbook of European Environmental Law* 103; European Commission, *White Paper on European Governance*, COM (2001) 428, 21.

43 Article 3(4) of the Aarhus Convention does however provide that 'each party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection'. There is however no discussion of *financial* support. This is in contrast to the position in, for example, Canada, where energy and related EIA agencies have developed a series of participant funding programmes. For a discussion of these programmes see A. Lucas, 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?' in Zillman, Lucas and Pring, n 4 above.

dilemma if participation turns out, empirically, not to improve outcomes (assuming we are not looking purely at process objectives of participation). Those who argue that the bulk of environmental decisions really are expert, technical decisions, would assert precisely that irrational and ignorant publics should be kept out of those decisions.⁴⁴ Again, we can only reiterate that decisions are rarely value free – as such, output as well as process legitimacy requires contributions from a range of sources. The most pressing difficulty appears to be that we overstate the potential of participation, if, as seems likely, it actually favours elite groups rather than the general public.

Access to information

Access to information is the clearest obligation in the Aarhus Convention, and is the necessary starting point for any public involvement in decisions. It also supports any formal or informal enforcement rights held by the public.⁴⁵ We return to formal enforcement below, but informally, open access to information can embarrass both polluters and public regulators,⁴⁶ contributing to environmental probity. More generally, access to information is a crucial element of far more basic elements of a democratic society – the right to vote, the right to free speech.

The right to be informed is codified in the domestic legislation of many states and is reflected in a plethora of international and European initiatives. Directive 90/313 on Freedom of Access to Information on the Environment represented the EC's commitment to safeguarding the rights of citizens to request access to information held by public authorities in EC Member States.⁴⁷ The Aarhus Convention, although its provisions on the right to information are subject to the constraints of national law,⁴⁸ goes further than both the Directive and the UK implementing Regulations.⁴⁹ In common with most access to information regimes, subject to a number of exceptions, there is a right of access to information without an interest having to be stated.⁵⁰ However, the Convention strengthens the right of access to information in a number of respects; we will focus on the broader definitions of 'public authority' and 'environmental information', the approach to exclusions, and the review procedures.

The application of the Directive is limited to 'public authorities' defined as bodies within 'public administration at national, regional or local level with

44 See for example S. Breyer, *Breaking the Vicious Circle* (London: Harvard University Press, 1993). This provides a perspective on American regulation that conflicts with that provided by Sunstein, n 34 above.

45 European Commission, *Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313 on Freedom of Access to Information on the Environment*, COM (2000) 400 final sees this as central.

46 Adverse publicity is an important consequence of prosecution, P. de Prez, 'Beyond Judicial Sanctions: the Negative Impact of Conviction for Environmental Offences' (2000) 2 *Env L Rev* 11, 13.

47 [1990] OJ L135/40.

48 For example, an exception is provided for 'the confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law', Article 4(4)(1); 'the confidentiality of personal data ... where such confidentiality is provided for in national law', Article 4(4)(f).

49 Environmental Information Regulations 1992 (SI 1992/3240) as amended by the Environmental Information (Amendment) Regulations 1998 (SI 1998/1447).

50 Article 4.

responsibilities, and possessing information, relating to the environment'.⁵¹ The Directive also covers bodies with 'public responsibilities for the environment and under the control of public authorities',⁵² and that wording has proved to be controversial when extended to privatised entities such as water and sewerage authorities.⁵³ The Aarhus Convention has attempted to remedy this problem, and to make it clear that privatisation 'cannot take public services or activities out of the realm of public involvement, information and participation'.⁵⁴ Article 2(2)(c) covers 'any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a [governmental or administrative] body or person.' By comparison with existing law, this appears more clearly to include public utilities, and may even be interpreted to cover publicly or privately owned entities that provide a public service such as waste collection.⁵⁵

The second key area in which the Convention differs from the Directive is in the definition of the phrase 'environmental information'. Article 2(a) of the Directive defined environmental information as encompassing any information on the state of the various aspects of the environment and 'measures adversely affecting or likely to affect' those aspects. Although Member States sometimes interpreted 'environmental information' narrowly, it was made clear, in the case of *Mecklenburg v Kreiss Pinneberg der Landrat*⁵⁶ that the concept was broad and all-embracing. Article 2(3)(b) of the Aarhus Convention goes further, however, explicitly including information *inter alia* on 'biological diversity and its components, including genetically modified organisms', energy, noise and radiation in its definition.⁵⁷ The Convention, recognising the importance of economic evaluation in environmental decision-making, also includes 'cost-benefit analysis and other economic analyses and assumptions used in environmental decision-making' in its definition of information to which access should be provided. This background information could be crucial in the evaluation of decisions by third parties.

As is common with access to information regimes, the Aarhus Convention contains a number of exemptions. In the Directive, where information falls within

51 Directive Article 3.

52 Directive Article 6.

53 The 156 complaints lodged with the European Commission by individuals and organisations on the basis of the Directive highlighted this as one of the main concerns. European Commission, n 45 above, paragraph 3. It has been argued that the fact that water companies have been found to be 'emanations of the state', see *Griffin v South West Water* [1995] IRLR 15, should make it more difficult to argue that they are not also subject to the Directive, see P. Roderick, 'United Kingdom' in R. Hallo (ed), *The Implementation and Implications of Directive 90/313* (London: Kluwer Law International, 1996).

54 *Stec and Casey-Lefkowitz*, n 3 above, 32.

55 See *Stec and Casey-Lefkowitz*, n 3 above, 32–34, for a detailed analysis of the definition of 'public authority' in the Convention. However, it remains the case that the Aarhus Convention is a resolutely *public* document. As is generally the case with the move to public participation, the focus is on governmental decision-making, and the potential of innovations such as environmental management and audit schemes or private sector environmental reporting is not mentioned. See for example Regulation 761/2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme OJ [2001] L 114/4.

56 Case C-321/96, [1998] ECR I – 3809. In this case, the applicant was refused access to a copy of the statement of views by the competent countryside authority in connection with planning approval for the construction of the 'western by-pass'. The ECJ held that such information did fall within the definition of 'information relating to the environment' and was not covered by the exemption relating to proceedings of a 'judicial or quasi-judicial nature'.

57 This has been problematic in the UK, see the examples given in Roderick, n 53 above, and P. Davies, 'The Aarhus Convention and the European Community' in Zillman, Lucas and Pring, n 4 above, 159.

an exemption, Member States have discretion in providing for non-disclosure.⁵⁸ However, in exercising their discretion, states are under no explicit obligation to demonstrate that the public interest in non-disclosure outweighs the public interest in disclosure.⁵⁹ Article 4(4) of the Convention states that a request may be refused only if 'the disclosure would adversely affect' interests covered by the exemptions, which include international relations, intellectual property rights and the confidentiality of commercial and industrial interests.⁶⁰ Furthermore, Article 4(4) goes on to state that 'the aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served in disclosure [...]'. Whilst introducing a welcome element of proportionality into the process,⁶¹ there is no explicit requirement that information is disclosed where it is in the public interest to do so.

The Convention's review procedure following denial of access is also potentially more liberal than that provided for under existing law. Although we consider the provisions of the Convention on access to justice later, it seems appropriate at this point to discuss the main provisions applicable to review for non-disclosure of information. The Directive states that a response from the authority must be forthcoming within two months, reasons for a refusal to provide information must be given and the individual may then 'seek a judicial or administrative review of the decision in accordance with the relevant national legal system.'⁶² Although a number of member states, including the UK, established special procedures to deal with complaints,⁶³ many countries provided only for judicial review of a public authority's decision.⁶⁴ According to the Commission, experience shows that individuals would be more inclined to seek review of the reasons for refusal if the procedures adopted include the possibility of seeking prompt, low cost access to a review procedure.⁶⁵ The Convention reflects this thinking. First, a refusal of a request for information must be issued within one month, extendable to two months where the nature of the request justifies it and, as before, must be accompanied by reasons for the decision.⁶⁶ And secondly, under Article 9, a party who has requested information must have 'access to a review procedure before a court of law or other independent and impartial body established by law.' This would appear, on the face of it, to replicate the Directive's provisions by giving parties the choice of adopting judicial or administrative review procedures. However, the Convention recognises the limited effectiveness of judicial review,

58 Directive Article 3(2) and (3). See also section 4 of the Regulations as amended.

59 Although note that in *Mecklenburg*, n 56 above, the ECJ did recognise that the exemptions in the Directive 'may not be interpreted in such a way as to extend its [the Directive's] effects beyond what is necessary to safeguard the interests which it [the Directive] seeks to secure,' paragraph 25.

60 It should be noted that Article 4(3) of the Convention states that in some instances, for example, where the public authority does not hold the information requested or the request is manifestly unreasonable or formulated in too general a manner, the request for information may be refused without demonstrating 'adverse affects'.

61 D. Wilsher, 'Freedom of Environmental Information: Recent Developments and Future Prospects' (2001) 7 *European Public Law* 671, 683.

62 Article 4.

63 Department of the Environment, *Guidance on the Implementation of the Environmental Information Regulations 1992* (1992). Whilst the UK Regulations themselves provided only for normal judicial review, the Guidance urged any aggrieved applicant to try and resolve any dispute using administrative procedures. Some, but not all government departments set up special arrangements to deal with the complaints and if those arrangements failed, the dispute, in appropriate circumstances, would be referred to the relevant Ombudsman.

64 See European Commission, n 45 above, 11.

65 European Commission, n 45 above.

66 Article 4(7).

for Article 9(1) goes on to state that in providing such review, Member States ‘... shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.’ Final decisions made by such a body will be binding on the public authority holding the information. Although the wording is ambiguous, it would appear that the Convention is attempting to ensure that a dissatisfied party has an alternative means of review other than formal court proceedings, a welcome development in administrative justice, although one that will require little change in the UK’s existing review mechanisms.⁶⁷

As well as the broad access provisions in the Regulations, other national legal instruments impose access to information obligations. We discuss two of these; environmental impact assessment⁶⁸ and the European Convention on Human Rights. As we shall see in the next section, the environmental impact assessment (EIA) procedure enables the public to participate in environmental decision-making. However, the system is also important when considering access to environmental information since a developer is required to provide an environmental statement that should be made available to the public. In *Berkeley v Secretary of State for the Environment*,⁶⁹ the House of Lords, quashing a grant of planning permission to rebuild part of a football stadium in London, held that the Secretary of State should have considered whether the application was subject to EIA. One issue was whether the provisions of the Regulations were satisfied by the availability elsewhere of the information which would have been included in an environmental statement. Rejecting this argument, Lord Hoffman emphasised that the EIA Directive did not allow ‘Member States to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the ... information which should have been provided by the developer.’⁷⁰ To comply with EIA, information must be collated and presented in the manner required by the Directive. This includes the provision of a non-technical summary and the indication of any difficulties encountered by the developer in compiling the required information. The prescription on the presentation of environmental information in the EIA Directive goes much further than either the Aarhus Convention, or more general access to (environmental) information provisions. A major limitation on access to information by the lay public is the possibility that information is presented in a way that only a specialist can make sense of, or that relevant information is buried in a mass of data.

A second important development concerns the impact of the Human Rights Act 1998. In *Guerra v Italy*⁷¹ the European Convention on Human Rights (ECHR) was applied by the European Court of Human Rights to the issue of access to environmental information. The applicants in this case lived approximately one kilometre from a ‘high risk’ chemicals factory which produced fertilisers and other

67 It would appear that a revised regime will use the Information Commissioner, established under the Freedom of Information Act 2000. DEFRA, *Proposals for a Revised Public Access to Environmental Information Regime Consultation Paper* (October 2000), paragraphs 28–30.

68 Directive 85/337 on the Assessment of the Effects of Certain Private and Public Projects on the Environment [1985] OJ L 175/40, as amended by Directive 97/11/EC [1997] L 073/05, implemented by Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, SI 1988 No. 1199 as amended by SI 1999/293.

69 [2001] 2 AC 603.

70 *Ibid.*, 617.

71 (1998) 26 EHRR 357.

chemicals. Following a series of accidents (one of which resulted in 150 people being admitted to hospital with acute arsenic poisoning), the inhabitants had unsuccessfully sought information from the local authority relating to the emissions from the site and safety procedures for local people. The European Court of Human Rights, restating its opinion in *Lopez Ostra v Spain*,⁷² held that the environmental effects of the factory affected the applicants' well being and prevented them from enjoying their homes, in such a way as to affect their private and family life adversely. Taking this argument one step further, the Court held that the failure to provide information which would allow the applicants to assess the risks of living in the area amounted to a breach of their right to a private and family life under Article 8 of the ECHR. In extreme cases such as this, then, established human rights law provides a right of access to information.

The provisions discussed so far provide for rights of access to *existing* information. Although the Access to Environmental Information Directive imposes a limited obligation on member states to 'provide general information to the public on the state of the environment by such means as the periodic publication of descriptive reports',⁷³ the Aarhus Convention gives further impetus to the active collection and dissemination of environmental information.⁷⁴ In particular, there is a requirement to publish a 'national report on the state of the environment'⁷⁵ and 'where appropriate' to establish 'a coherent, nationwide system of pollution inventories or registers on a structured, computerised and publicly accessible database compiled through standardised reporting'.⁷⁶ Although there is only limited prescription as to the contents of the reports and registers,⁷⁷ such a positive obligation has the potential to empower the public, especially NGOs, in their formal or informal enforcement role. Much environmental regulation in the UK already imposes obligations on the regulating body to maintain public registers⁷⁸ of information on environmental matters, although their usefulness and accuracy has been criticised.⁷⁹

Whilst access to *environmental* information has been provided under external pressure from EC and human rights law, only recently has the Freedom of Information Act 2000 provided a more general right of access to information in the UK. However, it is anticipated that the Act will be of little relevance to environmental information.⁸⁰ Section 74 allows the Secretary of State to make

72 (1995) 20 EHRR 277. The applicant in this case lived close to an unlicensed waste treatment plant which released fumes, smells and contamination into the local environment. The European Court of Human Rights held that the state, by failing to take action against the plant, had not struck a fair balance between the area's economic interest in having such a plant and the applicant's effective enjoyment of her right to respect for her home and private and family life.

73 Article 7.

74 Article 5. N. Popovic, 'The Right to Participate in Decisions that Affect the Environment' (1993) *Pace Environmental Law Review* 683 distinguishes 'right to know', that is positive provision of information, and 'access to information', with respect to existing information.

75 Article 5(4).

76 Article 5(9).

77 Note that this is one of the elements of the Convention being developed by a Working Group. The progress of the various working groups is available at: <<http://www.unece.org/env/pp/tfwg.htm>>.

78 See, for example, Environmental Protection Act 1990, s 64, and Pollution Prevention and Control Regulations 2000 (SI 2000 No.1973), regulation 29.

79 Rowan-Robinson, n 23 above. See also de Prez, n 46 above. Recorded visits to the registers suggest that only 1,000 checks are made per year, although it is more usual for the Environment Agency to check them as a response to enquiries. The Environment Agency makes approximately 10,000 checks annually, de Prez, *ibid.*, 15–16.

80 For an interesting insight into the Aarhus Convention and Freedom of Information Act 2000, see Wilsher, n 61 above, 692–695.

regulations implementing the 'information provisions' of the Aarhus Convention, and coupled with section 39, exempting any information subject to those regulations from the Act itself, this means that all environmental information will be subject to a separate, free-standing regime. The Department of the Environment, Food and Rural Affairs (DEFRA) envisages that environmental information will continue to be dealt with under the specific regulations, with the freedom of information legislation acting as a top up.⁸¹

Before we move on to discuss the public participation provisions of the Aarhus Convention, it is useful to pause and consider the EC's reaction to the access to information provisions. The EC has issued a proposed Directive on public access to environmental information,⁸² to replace Directive 90/313.⁸³ Interestingly, some of the Commission's proposals go further than Aarhus,⁸⁴ and convert qualified obligations into requirements.⁸⁵ However, the proposal for a wider definition of 'public authority', which sparked some unfavourable reactions within the UK Government, has been amended. Initially, Article 2(2)(c) of the proposed Directive extended the definition of a public authority to include 'any legal person entrusted ... with the operation of services of general economic interest which affect or are likely to affect the state of elements of the environment'. The Commission envisaged that private sector firms in, for example, the gas, telecommunications and transport sectors (including rail operators and freight hauliers) and the construction industry would be included. The Aarhus Convention refers to 'responsibilities', 'functions' and 'public services' relating to the environment, rather than affecting the environment.⁸⁶ The definition of 'public authority' is now in line with the Convention.⁸⁷

Although access to information is the strongest, and perhaps least controversial, pillar of the Aarhus Convention, it is by no means completely straightforward. The relevant articles are ambiguous in places, leaving room for state (or EC) discretion, and its interaction with the range of existing provisions may be awkward. And the Convention, although it advocates access via electronic sources and the internet,⁸⁸ provides us with no way through the dilemma of presentation. Raw data may be useful only for experts; explaining data provides opportunities for manipulation and the 'selling' of a project, a problem occasionally raised with respect to environmental statements provided by developers in EIA.⁸⁹

81 DEFRA, n 67 above.

82 European Commission COM (2000) 402, n 14 above.

83 Note that the aim of the revision of Directive 90/313 is not only to pave the way to ratification by the EC of the Aarhus Convention, but also to correct the shortcomings identified in the practical application of Directive 90/313 and to adapt the information provisions to reflect development in information technologies, thus making a 'second generation' Directive, European Commission, *ibid.*, explanatory memorandum.

84 For example, Article 2(1) of the proposed Directive includes information on waste and radioactive waste as 'environmental information'. For further details, see DEFRA, n 67 above, section 2.

85 For further details see, *ibid.*, section 2.

86 See text at nn 51-55 above.

87 European Commission, *Amended Proposal for a Directive of the European Parliament and of the Council on public access to environmental information* COM (2001)303 final.

88 Article 5(3). This should make the physical access problems outlined in Rowan-Robinson *et al*, n 23 above, seem dated.

89 This point is illustrated by the controversy surrounding the Thanet Way Bypass, see S. Ellworthy and J. Holder, *Environmental Protection - Text and Materials* (London: Butterworths, 1997), Chapter 10. See also D. R. Hodas, 'The Role of Law in Defining Sustainable Development: NEPA Reconsidered' [1998] *Widener Law Symposium Journal* 1, arguing that the environmental impact statement procedure in United States law 'allows decisionmakers to dress up unsustainable proposals with a veneer of sustainability', 7.

Public participation

The Aarhus Convention deals with participation in decision-making at three stages: 'decisions on specific activities',⁹⁰ 'plans, programmes and policies relating to the environment',⁹¹ and 'the preparation of executive regulations and/or generally applicable legally binding normative instruments'.⁹² Consideration of the latter two types of decision goes well beyond familiar techniques of consulting neighbours over siting decisions.

Before examining the participation provisions of the Aarhus Convention, it is apt to consider public participation in current UK environmental law and policy. A detailed examination of government policy is not necessary here, but we should note the resurrection in recent years of the rhetoric of public participation.⁹³ A whole range of government publications have emphasised the role of participation. The Government's *Sustainable Development Strategy*, for example, states that 'Transparency, information, participation and access to justice' is one of its ten principles or approaches to decision-making.⁹⁴ Encouragement of increased participation applies beyond environmental issues, and there is now a considerable amount of central government advice and guidance on consultation and other forms of participation.⁹⁵ A particular motivation for openness and public involvement in the UK has been the serious concern in recent years about the loss of public confidence in scientific advice from government.⁹⁶ This came to the fore in the aftermath of the BSE crisis, in which the link between BSE in cattle and new variant CJD in humans was announced following some years of denial by government.⁹⁷ One of the solutions to this loss of trust is thought to be more openness and participation.⁹⁸

The controversy surrounding the deliberate release of genetically modified organisms (GMOs), views on which are currently dramatically polarised, neatly illustrates the trend towards extra-legislative participatory processes. At the same time, it illustrates the dilemma that arises if the substantive legal background does not allow decision-makers to recognise fully the concerns expressed by the public. Procedure is not an alternative to making hard decisions on substantive regulation.

In 2000 the government set up the Agriculture and Environment Biotechnology Commission (AEBC) to look at the social and ethical issues relating to

90 Article 6.

91 Article 7.

92 Article 8.

93 Publications such as House of Lords Select Committee on Science and Technology, Session 2000–2001, 3rd Report, *Science and Society* and Royal Commission on Environmental Pollution, n 34 above have undoubtedly played their part in stimulating this thinking.

94 UK Sustainable Development Strategy, *A Better Quality of Life* (1999), paragraph 4.1. this is also picked up by Department of Environment, Food and Rural Affairs, *Foundations for our Future* (2002), available at <<http://www.defra.gov.uk/corporate/sdstrategy/contents.htm>>.

95 Available at <<http://www.cabinet-office.gov.uk/servicefirst/2000/consult/Index.htm>>. Note also that the Local Government Act 1999 requires participation in many circumstances.

96 House of Lords Select Committee on Science and Technology, n 93 above, goes as far as to speak of 'an apparent crisis of trust', paragraph 2.2. See also Royal Commission on Environmental Pollution, n 34 above.

97 See generally Phillips Report, *BSE Inquiry Report* (2000), available at <<http://www.bseinquiry.gov.uk>>; for a review see G. Little, 'BSE and the Regulation of Risk' (2001) 64 MLR 730. This episode also emphasised the importance of accurate and open risk communication (not saying a risk is 'remote' if what is meant is that it is uncertain, for example).

98 Royal Commission on Environmental Pollution, 23rd Report, *Environmental Planning Cm 5459* (2002), Chapter 5 identified 'strengthening public confidence' as a key objective of enhancing direct public participation in decisions.

developments in biotechnology with implications for agriculture and the environment. The composition of the AEBC is itself quite interesting from a participative point of view, since it includes members with diverse perspectives on the GM issue, including organic and GM farmers, GM scientists and anti-GM activists,⁹⁹ and it also makes an effort to consult widely on its reports. More specifically, the AEBC has recently published advice to government on *A Debate About the Possible Commercialisation of GM Crops*.¹⁰⁰ The Government has responded positively, announcing a 'public dialogue' on this issue.¹⁰¹ The terms of reference for the dialogue include the identification of the public's questions on GM issues, and informing the public. The dialogue should also provide opportunities for the public to debate the issues and to form their own independent judgments.¹⁰²

The public debate is to be managed by a steering board independent of government, and will be chaired by the chair of the AEBC. As a 'core programme', the AEBC has recommended 'grass roots debates in local community and *ad hoc* groups, stimulated by a specially made film and other material,' linked to 'regional and national events involving representatives from local groups', supplemented by focus groups to 'give depth to the analysis and to act as a 'control' to test the information coming out of the more diffuse local debates'.¹⁰³ There seems to be a real intention to move beyond the 'usual suspects', since the AEBC expressly advises that in certain parts of the exercise, participants should not be traditional stakeholders (NGOs and industry).¹⁰⁴ The Government response also concentrates on the grass roots, but states that 'although the primary focus of the dialogue will be to reach and engage the general public, the Government hopes that stakeholder bodies will also participate'.¹⁰⁵ Moreover, a study of the costs and benefits of GM cultivation, and a review of the scientific issues are to take place alongside, or as part of, the dialogue.¹⁰⁶ There is a real danger that 'expert' groups able to engage with these technical aspects will dominate the debate. Although the nationwide public debate has the potential to be a very significant innovation in UK environmental decision-making, it seems ultimately to require considerable expert input.

Although the AEBC is of the view that there is sufficient latitude within the legal framework to take account of public attitudes in the management of GM crop cultivation,¹⁰⁷ the real difficulty here is the UK Government's lack of independence to respond to the results of the process in the fullest way. Even without looking at international free trade implications of a limitation on GMO commercialisation, and the World Trade Organisation issues that are currently

99 See Steele, n 5 above, who suggests that this may introduce a 'representative element' in participative structures, and that as well as providing potential for 'productive conflict', it will also allow competing groups to be told that their views have been heard, 435.

100 Available at: <<http://www.defra.gov.uk/environment/gm/debate/index.htm>>.

101 DEFRA, 'Public Dialogue on GM', available at: <<http://www.defra.gov.uk/environment/gm/debate/index.htm>>.

102 DEFRA, *ibid.*, paragraph 5.

103 AEBC, n 100 above, paragraph 15. Possible additions to the core programme include consensus conferences, analysis of contributions from stakeholder organisations, a UK wide event for local representatives, interactive television debates and support for local initiatives.

104 AEBC, *ibid.*, paragraph 18, with respect to initial workshops to 'frame the issues'. *Excluding* NGOs is not really consistent with the spirit of the Aarhus Convention.

105 DEFRA, n 101 above, paragraph 8.

106 DEFRA, n 101 above, paragraphs 16–17.

107 AEBC, n 100 above, paragraph 8.

simmering away in the background,¹⁰⁸ this whole area is regulated by EC law. Under the Deliberate Release Directive,¹⁰⁹ decisions on the authorisation of the deliberate release of GMOs (planting crops) are taken by qualified majority voting at EU level. The UK government has obviously limited potential to control that process. And although the Deliberate Release Directive and related policy documents make some minor provision for public involvement in decision-making on individual authorisations, the final decision is made on the basis of a scientific assessment of risk to the environment or public health. If public concern is not framed in relatively narrow scientific or technical terms relating to the environment or public health (for example if it highlights our incomplete understanding of the technology, ethical issues, socio-economic impacts, for example on existing farming practices, or the commercial imperative driving the technology), its impact on the decision is at best uncertain,¹¹⁰ at least without stepping beyond the framework of the Directive.¹¹¹ This legal background is quite clearly in the Government's mind: 'Government wants to 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. That process will be based on an objective assessment of all the available evidence including ... scientific evidence and information about the costs and benefits to the UK.'¹¹²

The public debate on GMOs may be indicative of changing government attitude to public participation on broad questions of policy, and seems to accept that GMO regulation is not simply a technical issue, amenable to objective expert resolution. The Government response to the AEBC advice seems to envisage primarily a simple exchange of information between government and public. The legal background is crucial, and reminds us that public participation must not be used to deflect attention from the aims and objectives of regulation. The substantive legal background against which public participation operates is ultimately determinative of the response to public views.

Moving on from GMOs, there is undoubtedly, as already noted, an increasing trend in the UK, matching international and EC initiatives, to accept the importance of public participation in environmental decisions. There is however

108 Any difficulties are likely to be resolved under the WTO dispute settlement procedure, and the result is not readily predictable. As is well-known, a state must rely on scientific information derived from formal risk assessment to justify measures necessary to protect human, animal or plant life or health under the Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, 15 December 1993, available at <http://www.wto.org/english/docs_e/legal_e/15-sps.pdf>). The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000 available at <<http://www.biodiv.org/biosafety/protocol.asp>>) arguably takes a broader perspective in provisions on its system of 'advance informed agreement' for the import of GMOs. See S. Zarilli, 'International Trade in Genetically Modified Organisms and Multilateral Negotiations: A New Dilemma for Developing Countries'; and T. J. Schoenbaum, 'International Trade in Living Modified Organisms', both in F. Francioni (ed) *Environment, Human Rights and International Trade* (Oxford: Hart, 2001); G.E.C. York, 'Global Foods, Local Tastes and Biotechnology: The New Legal Architecture Of International Agriculture Trade' (2001) 7 *Columbia Journal of European Law* 423.

109 Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1.

110 Lee, n 15 above; M. Lee and R. Burrell, 'Liability for the Escape of GM Seeds: Pursuing the "Victim"?' (2002) 65 *MLR* 517.

111 There is currently a *de facto* moratorium on authorisation, but outside the framework of the existing directive.

112 DEFRA, n 101 above, paragraph 9.

no general obligation in the UK to allow the public to participate in decisions, environmental or otherwise. Many individual environmental regulatory regimes provide for some form of participation. Planning law, with its clear basis in the exercise of political discretion has long had a rhetoric, and a basic but evolving legislative framework, of participation at its core.¹¹³ Pollution control, by contrast, has tended to be viewed as a technical endeavour, with non-technical considerations being taken into account when the polluting activity seeks planning permission. This runs rather counter to the contemporary understanding of environmental decisions as relying very heavily on values, and is beginning to change.

Article 6 of the Aarhus Convention applies to decisions permitting certain activities listed in the Convention,¹¹⁴ or other activities likely to have a 'significant effect' on the environment. Under this article, 'the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner' of a number of matters relating to the permit application. The information to be provided includes: the proposed activity and the application on which a decision will be taken; the nature of possible decisions or the draft decision; the public authority responsible for making the decision; the envisaged procedure including opportunities for public participation; the fact that the activity is subject to a national or transboundary environmental impact assessment procedure. Article 6(6) requires the provision of detailed information on the proposed development. The need for reasonable time frames is stressed in Article 6, and there must be 'early public participation, when all options are open and effective public participation can take place.'¹¹⁵ Article 6(8) provides that 'due account' must be taken of the outcome of the public participation. Requiring that 'due account' be taken of the results of public participation means that public views cannot be simply ignored, whilst giving the public only a limited stake in the final decisions. Whether 'due account' provides some enhanced status for the outcome of public participation, or simply provides that they are 'material considerations' is open to debate.¹¹⁶ In any event, Article 6(9) reinforces the obligation to take due account of public participation by providing that reasons be given for the final decision. In environmental law currently, reasons do not have to be given for the *grant* of a permission, other than in applications subject to EIA.¹¹⁷ Similarly, it is Environment Agency practice to provide written reasons only if an application is refused. Introducing a more general obligation to give reasons has some support at the moment. It is argued first of all that developments

113 P. McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon Press, 1980) argues that there are competing ideologies in planning law. The advancement of public participation competes with the traditional ideology that law exists to protect private property, and the ideology that law exists to advance the (public administration's understanding of the) public interest. He dates the move to public participation to the Franks Report, *The Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd. 218 (1957).

114 Annex I.

115 Article 6(4).

116 Consider the ongoing debate in respect of Article 4 of Directive 75/442/EEC on Waste [1975] OJ L 194/39, which provides that waste is to be recovered or disposed of without endangering human health or the environment. See *Thornby Farms Ltd v Daventry DC* [2002] Env. LR 28; C. Abbot, 'Controlling Environment Agency Discretion: A Public Law Perspective' (2001) 13 *Environmental Law and Management* 232.

117 Note however that Article 6 applies mainly to developments already subject to EIA, as well as to IPPC procedures.

under the Human Rights Act will require reasons to be given for any decision in at least planning law,¹¹⁸ and Government seems amenable to introducing such a change in its ongoing reform of the planning system.¹¹⁹ A duty to give reasons is however fundamentally linked with review of the decision, on which there is less progress – giving reasons enables such review and is most effective if review is possible. We will return to this in the next section.

The Commission intends to amend the EIA and Integrated Pollution Prevention and Control (IPPC) processes in the light of Article 6, particularly to affirm the importance of public interest groups.¹²⁰ The IPPC Directive¹²¹ is indicative of the new approach of EC directives,¹²² which in the early days of EC environmental law tended to provide very specific formal standards at a central level.¹²³ The IPPC Directive by contrast provides a flexible pollution standard (best available techniques),¹²⁴ decisions relating to which are exercised at the discretion of the appropriate regulatory body. But, in exercising such discretion, the Directive also requires that ‘... Member States shall take the necessary measures to ensure that applications for permits ... are made available for an appropriate period of time to the public, to enable it to comment on them before the competent authority reaches its decision’.¹²⁵ Some minor amendments to this minimalist form of public participation, which was nevertheless quite an innovation in UK pollution regulation, will allow compliance with the Aarhus Convention.

EIA is a wholly procedural mechanism that provides information to both the regulator and to the public, and imposes no environmental targets or objectives. Lawyers tend to concentrate on the enforceable procedural rights granted to the public through EIA, although the formal framework for obtaining information also provides for an environmental statement to be prepared by the developer, and for the consultation of interested public bodies. This part of an EIA provides for expert input into the decision, and may well concentrate primarily on scientific and technical elements of risk assessment. Some tension is possible between this technical approach, and adequate lay participation. The English courts have, however, begun to protect the procedural requirements for participation quite

118 This is linked to the likely emergence of more stringent judicial review by reference to the principle of proportionality. See the House of Lords decision in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, particularly paragraphs 51–52, per Lord Slynn of Hadley. *Hatton v UK* (2002) 34 EHRR 1 and *South Buckinghamshire District Council v Porter* [2002] 2 All ER 425, may constitute a move towards a duty to give reasons, see G. Jones and J. Pike, ‘Proportionality and Planning – A Difficult and Nice Point to be Decided’ [2002] *JPL* 908.

119 Office of the Deputy Prime Minister, *Sustainable Communities - Delivering through Planning*, 18 July 2002, available at <<http://www.planning.odpm.gov.uk/consult/greenpap/greenind.htm>> (as is the initial Green Paper, *Planning: Delivering a Fundamental Change*) suggests that a requirement to give reasons for the grant of planning permission will be introduced, paragraph 62.

120 The Commission proposes introducing the Aarhus Convention definition of ‘public’ and the ‘public concerned’ into the EIA and IPPC Directive. European Commission COM (2000) 839, n 14 above, 9 and 13. New paragraphs to reflect the detailed provisions of Article 6 of the Aarhus Convention are also proposed, *ibid.*, 9–11, 13–14.

121 Council Directive 96/61/EC on Integrated Pollution Prevention and Control [1996] OJ L257/26.

122 Scott, n 5 above.

123 R. Macrory, ‘Shifting Discretions and the New Formalism’ in O. Lomas (ed), *Frontiers of Environmental Law* (London: Chancery Law Publishing, 1991).

124 Although note that it is also argued that this simply shifts the locus of formal standard setting, to even less accountable committees, see C. Hey, *Towards Balancing Participation* (Brussels: European Environmental Bureau, 2000).

125 Article 15.

carefully.¹²⁶ The House of Lords has confirmed that the opportunity for public participation in decision-making is a crucial part of the EIA process, which is not simply about 'a right to a fully informed decision on the substantive issue', but far more fundamentally also 'requires the inclusive and democratic procedure [...] in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues'.¹²⁷ This is a strong statement from the House of Lords. The procedural elements of EIA are seen not simply as a means to an end (better informed decisions) but as crucial in themselves. The right to participate is clearly not based on expertise or on the ability to frame the contribution in technical or scientific terms, even if the language in this quotation does not provide much hope for the effect of inappropriately framed interventions.

Article 6 provides for the most closely specified form of participation in the Convention. The provisions are clearly underwritten by the aim of increasing participation within otherwise closed processes. The detail on timing, provision of information, taking due account of contributions, and an obligation to give reasons for a decision, although they leave a great deal in the hands of the public decision-makers, suggest that the Convention envisages 'real' participation, with the potential to exert a genuine influence on decisions. However, even under Article 6, minimal changes to existing procedures would be required to comply with the letter of the Convention. Traditional 'consultation' mechanisms would presumably suffice, where varied views are collected and given 'due account'. Neither existing requirements nor Article 6 provide much support for more extensive public participation in specific decisions, and we cannot assume that the mechanisms of participation will be deliberative, or elicit values. Both EIA, and particularly IPPC, concentrate largely on consultation and the exchange of information, rather than on more active efforts to enable real engagement with decisions. Just as there is a danger that decision-makers will not engage fully with responses to consultation, consultees may not engage fully with the problem at issue, or its public interest perspective.

One step beyond consultation is apparent in the Aarhus Convention's provision that 'as appropriate', a 'public hearing or inquiry with the applicant' should be held.¹²⁸ English planning law has well established, albeit much criticised, procedures for public inquiries on major development proposals. The government is discussing changes in this area on the basis of claims that the current system is too adversarial, time consuming and expensive.¹²⁹ More extensive negotiative processes are also suggested by a requirement in Article 6(5) to 'encourage prospective applicants to identify the public concerned, to enter into discussions' before they apply for a permit, again, 'where appropriate'. Legislative provisions tend not to take this step beyond traditional consultation in the UK. There have

126 Implementation of the Directive has been a protracted affair, see for example M. Stallworthy, 'Planning Law as a Tool of Environmental Protection: the United Kingdom's Slow Embrace of Environmental Assessment' (1998) 10 *JEL* 361.

127 *Berkeley*, n 69 above, 615 per Lord Hoffmann.

128 Article 6(7).

129 The government has now rejected the proposal that Parliament, rather than a public inquiry should decide on major development proposals, but intends instead to make public inquiries more efficient. See Office of the Deputy Prime Minister, n 119 above. Although the Government claim that public involvement should remain central to planning (for all decisions, not just major infrastructure decisions), it is feared that this is not apparent in the detail of the initial Green Paper, n 119 above. See P. Stookes and J. Razzaque, 'Community Participation: UK Planning Reforms and International Obligations' [2002] *JPL* 786.

however been occasional interesting experiments in consensus building in certain areas, particularly in the increasingly contentious task of siting new waste facilities.¹³⁰ It is also often recommended that developers or regulators encourage participation throughout the process, even if regulation such as EIA only requires participation at a relatively late stage.¹³¹ The Aarhus Convention does not seem to require any formal change, but it may reinforce good practice, both in its emphasis on timeliness in the provision of information, and in this weaker provision on early discussion.

Article 6 concentrates on individual authorisations, where the underlying policy decisions have generally already been taken, and participation is reactive to particular development proposals. Article 7, however, requires 'appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.' As well as long standing provisions for public involvement in procedures to draw up development plans under planning law,¹³² we have European legislation in this area. The Strategic Environmental Assessment (SEA) Directive¹³³ comes into play at an earlier stage than EIA. Under the SEA Directive, when 'plans and programmes' likely to have a significant impact on the environment are being drawn up, an environmental assessment should be carried out. Members of the public and NGOs must be given 'an early and effective opportunity within appropriate time frames to express their opinion'¹³⁴ on the draft plan or programme and accompanying environmental statement. As under the Aarhus Convention, it is the Member State which identifies the relevant 'public', and detailed arrangements on the provision of information and consultation are to be determined by the state. The Water Framework Directive¹³⁵ also requires public participation in plan making, here in the drawing up of River Basin Management Plans. As well as a requirement for provision of information and consultation, this Directive requires member states to 'encourage the active involvement of all interested parties',¹³⁶ a potentially much deeper form of participation, although there is little compulsion here.¹³⁷

130 See J. Petts, 'Waste Management Strategy Development: A Case Study of Community Involvement and Consensus-Building in Hampshire' (1995) 38 *Journal of Environmental Planning and Management* 519; N. Stanley, 'Contentious Planning Disputes: An Insoluble Problem' [2000] *JPL* 1226.

131 J. Petts, 'Public Participation and Environmental Impact Assessment' in J. Petts (ed), *Handbook of Environmental Impact Assessment* (Oxford: Blackwell Science, 1999).

132 Again this area is subject to change. For current purposes the most relevant changes is the requirement that the 'core strategy' contains a 'Statement of Community Involvement' which will set out benchmarks for community participation in the preparation of plans and significant planning applications. Changes to the inquiry process would also be relevant here. Inspectors are to have more control over the procedures to be used, which could include 'consideration of written representations, an examination conducted on a round table basis or a hearing. The hearing would be non-adversarial and inquisitorial with no right of formal advocacy and cross-examination unless the Inspector or Panel decides it is necessary'. See Office of the Deputy Prime Minister, n 119 above, paragraphs 36–37.

133 2001/42 OJ 2001 L197/3.

134 Article 6(2).

135 Council and European Parliament Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy [2000] OJ L 327/1.

136 Article 14. At least six months must be provided for comment, *ibid.* The Water Framework Directive provides perhaps the clearest indication of a shift in EC legislation, since the detailed standards and objectives in earlier water directives have been supplanted by more open-ended, state driven, environmental objectives, coupled with public participation requirements.

137 Macroy and Turner, n 16 above.

It is interesting that neither of these Directives extends beyond 'plans and programmes' to the broader notion of 'policies'. In respect of the 'policies relating to the environment', Article 7 of the Aarhus Convention simply imposes an obligation to 'endeavour' to provide opportunities to participate 'to the extent appropriate'. The European Commission is of the view that this is 'soft law', and does not require any Community legislation.¹³⁸ It seems unlikely that any binding requirement for participation will be implemented at national level without such an imperative. The GMO debate discussed above, however, could be an interesting experiment with public participation in the realm of broad policy on the commercialisation of GMOs.

Article 8 on 'executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment' provides that 'each party shall strive to promote effective public participation at an appropriate stage, and while options are still open'. This provision is quite novel, relating not just to individual decisions, or decisions by independent agencies, but also to wide ranging legislative decisions. There are provisions to allow for time-frames sufficient for effective participation, publication of draft rules, and the opportunity to comment directly or through representative consultative bodies. 'The result of the public participation shall be taken into account as far as possible.' Moreover, the notion of an 'environmental' decision is not explored in the Convention, but Article 8 extends well beyond classic pollution or conservation law, and could easily embrace, for example, decisions on agriculture, energy or transport. Although this provision is negligible in terms of formal obligation, it could be a significant political tool in the 'integration' of environmental concerns into other policy areas.¹³⁹

The obligations undertaken in the Aarhus Convention are likely to require no more than marginal changes to public participation procedures in the UK. Nevertheless, increased opportunities for public participation at all levels is very clearly the overriding objective of the Convention, which seems to envisage real influence rather than token measures. The Convention's capacity to put regulatory procedure on the political agenda may be at least as important as its formal requirements. Moreover, EC law is likely to translate some of the more precise commitments in the Aarhus Convention into binding legal obligations.

Access to justice

Finally, the Aarhus Convention imposes obligations in respect of 'access to justice'. By guaranteeing that participation and access to information rights provided by the Convention can be exercised, the access to justice provisions are closely related to the other two limbs of the Convention. As we have already seen, Article 9(1) of the Convention requires the establishment of a review procedure to address a refusal to disclose 'environmental information'. In this section, we focus on the broader scope of Article 9 as it applies to public participation and environmental decision-making in general.

¹³⁸ European Commission COM (2000) 839, n 14 above, 7.

¹³⁹ On institutions for integrating the environment into decision-making in the UK, see A. Ross, 'Greening Government: Tales from the Sustainability Watchdog' (2000) 12 *JEL* 175; K. Hollingsworth, 'Environmental Monitoring of Government' (2000) 20 *Legal Studies* 241.

Article 9(2) provides that members of the public having a 'sufficient interest' or who maintain 'impairment of a right where the administrative procedural law of a Party requires this as a precondition', are able to 'challenge the substantive or procedural legality of any decision, act or omission' subject to Article 6, and also, 'where so provided for under national law' any decision subject to 'other relevant provisions' of the Convention. In determining the 'standing' of the public concerned, the Convention defers to national law, but emphasis is given to 'the objective of giving the public concerned wide access to justice'. Furthermore, bodies that comply with the Convention definition of 'the public concerned', which includes 'non-governmental organisations promoting environmental protection and meeting any requirement under national law'¹⁴⁰ are explicitly deemed to have a 'sufficient interest' or 'rights capable of being impaired.' Persons or groups who satisfy these conditions must have access to 'a review procedure before a court of law and/or another independent and impartial body established by law'. The courts' involvement is provided as a necessary complement to participation, suggesting that, at least in respect of Article 6, formal legal rights are envisaged.

The extent to which Article 9(2) will impact on current UK practice must be assessed by reference to existing review and appeal mechanisms in the UK, which are somewhat limited. There is generally a 'first party' right of appeal on the merits where, for example, a public authority refuses to authorise the carrying out of a potentially polluting activity, or a local authority refuses to grant planning permission to a developer. As third party (i.e. objector) rights of appeal against such decisions¹⁴¹ are not permitted, the limited action of judicial review is at the core of administrative justice in the UK. Judicial review of public law decisions only considers the lawfulness of the decision, where the controls of purpose and relevancy are used to decide what ends can legitimately be pursued and what considerations must be taken into account; the court does not perform its own consideration on the merits. Furthermore, the application of *locus standi* to environmental law disputes has been problematic. An applicant for judicial review must have a 'sufficient interest' in the subject-matter being reviewed. The lack of private rights in the unowned environment and the fact that environmental disputes are centred around broader societal values has led to calls for broader rights of access. Whilst the courts have recently demonstrated a willingness to relax the *locus standi* requirements to enhance the standing of groups and individuals representing environmental interests,¹⁴² this area of law remains somewhat uncertain.¹⁴³

Despite the limitations of judicial review in its application to environmental decisions, it is suggested that, in most cases, the provisions of Article 9(2) will be satisfied by the judicial review procedure. As we have seen, judicial trends in interpreting the *locus standi* requirements are in line with Article 9(2)'s approach to the position of environmental interest groups. What may be problematic is the fact that Article 9(2) provides not only for the review of 'procedural legality' but

140 Article 2(5).

141 Although section 288 of the Town and Country Planning Act 1990 provides for the 'statutory review' of certain decisions by third parties, this is a review rather than an appellate process.

142 See *R v HMIP ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All ER 329 and *R v Secretary of State for Foreign Affairs ex parte World Development Movement* [1995] 1 WLR 385.

143 See, for example, the contrasting approaches of the High Court to *locus standi* in two recent cases: *R v North Somerset District Council ex parte Garnett* [1998] Env LR 91 and *R v Somerset District Council ex parte Dixon* [1998] Env LR 111.

also of 'substantive legality'. Procedural legality, which concerns the characteristics of the decision-making process fits within the English courts' traditional supervisory jurisdiction, where they do not interfere with the substance of a decision. Substantive grounds of review in traditional English common law, including illegality (*ultra vires*) and *Wednesbury* unreasonableness, enable the courts to confine discretion. This substantive review, however, does not go as far as the statutory appeal on the merits to which an applicant for planning permission or a pollution licence is entitled. The introduction of merits review by the courts would in fact be a constitutional innovation that requires much more attention. It is unclear what substantive review under the Aarhus Convention requires. It may well be satisfied by the proportionality test that seems to be emerging out of Human Rights Act litigation,¹⁴⁴ illegality, or even *Wednesbury* unreasonableness. However, even if no changes to judicial review are required by the Aarhus Convention, the Convention might add to mounting pressure in favour of third party rights of substantive appeal, particularly in planning. Rather than the Court substituting its own view for that of the original decision-maker, this would probably involve review by the Secretary of State or an inspector, as is currently the case for disappointed applicants, or a new 'environmental' tribunal.¹⁴⁵

Two further issues deserve consideration. Practically, Article 9(4) provides that access to justice shall be 'fair, equitable, timely and not prohibitively expensive', whilst judicial review is notoriously slow and expensive. Moreover, it is debatable whether the judicial review procedure complies with the remainder of Article 9(4) which requires that 'the procedures shall provide adequate and effective remedies, including injunctive relief as appropriate'. In the UK, even if the court finds the public authority has acted unlawfully, judicial review remedies, including prerogative orders, declarations and injunctions, are discretionary, and the Courts can refuse a remedy where the damage caused to the public interest by granting a remedy would outweigh the injury the applicant would suffer as a result of the refusal of the remedy.¹⁴⁶ Furthermore, it is arguable that in cases of environmental degradation or harm, the term 'adequate and effective remedies' would encompass interim relief. However, one of the overriding shortcomings of judicial review is its lack of suspensory effect. Interim relief is only available if the applicant gives an undertaking in damages for any loss suffered if the application is unsuccessful in the main action. All in all, it is compliance with these practical aspects of Article 9 that could prove most demanding.

As we have seen, one of the main purposes of the Aarhus Convention is to encourage public participation in environmental decision-making and provide access to justice where a Party fails to adhere to the principles of the Convention. Article 9(3) takes this one step further and recognises the importance of the public enforcement of environmental law in general, by providing for direct action

144 See n 118 above.

145 Royal Commission on Environmental Pollution, n 98 above, recommends the introduction of a limited right of third party appeal, 68–71. This is linked to a proposal for environmental tribunals to hear appeals on the merits, *ibid.*, 67–68. A right of appeal probably implies also the introduction of an obligation to provide reasons for the *grant* as well as the refusal of a permit/licence, discussed text at nn 118–119 above. ODPM, n 119 above, suggests that a requirement to give reasons for the grant of planning permission will be introduced, paragraph 62, but in the Green Paper, n 119 above, rejected the option of third party rights of appeal on the merits of a decision, paragraph 6.20. See also DEFRA, *Environmental Court Project – Final Report* (2000), available at <<http://www.planning.odpm.gov.uk/court/>>, Chapter 13.

146 See *R v Bristol Corporation ex parte Hendy* [1974] 1 WLR 498 and *R v Secretary of State for the Home Department ex parte Bindel* [2001] Imm AR 1.

against polluters or regulators. '[M]embers of the public' are to have access to 'administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.' The philosophy seems to be that participation is beneficial throughout the environmental regulation process, right up to enforcement. Combined with the access to information provisions, this suggests a continued 'monitoring' type role for the public.¹⁴⁷ The *Implementation Guide* states that public enforcement of the law, 'besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries.'¹⁴⁸

The enforcement of environmental law in the UK generally lies in the hands of regulatory authorities who have the power to bring criminal actions and impose administrative sanctions. However, this system has not been entirely successful, as evidenced by the substantial criticism levied at bodies such as the Environment Agency.¹⁴⁹ The premise of Article 9(3) is that direct or indirect citizen enforcement will help government to expand its limited law enforcement resources to detect deviance and to ensure compliance with the law. In direct citizen enforcement, citizens are given standing to go to a court or another review body to enforce the law rather than simply to redress personal harm. At present, direct citizen enforcement in the form of a 'citizen suit' is not well-developed in Europe. In the UK, a number of judicial actions provide citizens with a form of legal redress. Judicial review allows citizens to be directly involved in judicial procedures against administrative acts or governmental action/non-action, and tort protects private interests against public or private bodies. More significant for current purposes is the use of criminal private prosecutions.¹⁵⁰ Although used relatively rarely in environmental protection,¹⁵¹ we should note its potential residual effect. Friends of the Earth claim that the Environment Agency prosecution of the notorious Sea Empress case, which led to serious oil pollution of Milford Haven in 1996, only took place as the result of their threat to bring a private prosecution.¹⁵² Alternatively, indirect citizen enforcement entails the participation of citizens in the enforcement process through, for example, citizen complaints. Such non-judicial avenues of enforcement are reasonably well established in the UK through regulatory authorities' internal complaints procedures, the Local Government Ombudsman and the Parliamentary Commissioner for Administration. However, 'for indirect citizen enforcement to satisfy the provisions of this Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status'.¹⁵³

What impact will Article 9(3) have on the enforcement of environmental law in the UK? The answer is probably very little. First, the fact that members of the public have to 'meet the criteria, if any, laid down in its national law', gives

147 Ayres and Braithwaite, n 24 above. See also Stanley, n 130 above.

148 Stec and Casey-Lefkowitz, n 3 above, 130.

149 See, for example, House of Commons Select Committee on the Environment, Transport and the Regions, HC Session 1999–2000, 34 I–II.

150 The use of private prosecution is expressly preserved by the Prosecution of Offences Act 1985, s 6(1). Law Commission Report No. 255, *Consents to Prosecution*, discusses the procedural limitations on private prosecutions, 12.

151 The most prolific private prosecutor in the UK is the RSPCA who regularly brings actions relating to offences under the Wildlife and Countryside Act 1981.

152 See Friends of the Earth press release, 13 May 1997 'Sea Empress Prosecution Welcomed by FoE', available at <<http://www.foe.co.uk/pubsinfo/infoteam/pressrel/index.html>>. The Court of Appeal decision on sentence is *R v Milford Haven Port Authority* [2000] Env LR 632.

153 Stec and Casey-Lefkowitz, n 3 above, 130.

considerable discretion to state parties and does not place them under any obligation to improve standing for individuals and NGOs. Second, although Article 9(3) has been interpreted as providing a 'citizen suit',¹⁵⁴ it is debatable whether Article 9(3) provides a right to initiate private civil enforcement proceedings against an individual or firm acting in breach of environmental law. Providing that there is recourse to a judicial or administrative review, a complaint to a prosecutor or a regulatory authority may satisfy the obligation. All in all, although Article 9(3) states that parties 'shall' permit members of the public to initiate such challenges, it is unlikely to mean much in practice. The *practical* barriers to access to justice are in any event at least as significant as the legal barriers – and the Convention, perhaps not surprisingly given the sensitivity of these issues, says nothing about the question of legal aid, or the distribution of costs between successful and unsuccessful parties.

Moreover, whilst broader access to justice is to be welcomed in the context of collective environmental rights, we must caution against idealism. Wider access, implying greater judicial intervention, could lead the courts into areas of policy which are not suited to judicial intrusion, and of course expansion of standing goes hand-in-hand with the extension of grounds of review discussed above. The financial burden of litigation has clear implications for who can influence these decisions. Industry and developers have the greatest potential to use access to justice provisions, not only because they have the resources to do so, but also because they can set off the costs against clear economic benefits from the granting of regulatory permission. Public interest groups are probably more likely to take advantage of access to the courts than individuals. The fact that NGOs are campaigning, explicitly political, groups makes their role in litigation even more ambiguous than elsewhere in decision-making.¹⁵⁵ There is a danger the courts will cease to be (or to appear to be) adjudicators of a dispute argued and resolved on objective legal grounds, and will become a more obviously political forum leading to the 'partial colonisation of the legal by the political process'.¹⁵⁶ The diffuse nature of 'environmental interests' probably makes this area a special case since the claiming of the interests by individuals is often all but impossible. The presence of NGOs is an important counterweight to the presence of industry.¹⁵⁷ What is still worrying is that interest groups are gaining apparently greater influence than individuals with minimal reflection on this problem.

By way of completion, it is important to note action at EC level. The Commission has proposed additions to the EIA and IPPC Directives to reflect the access to justice provisions in the Convention.¹⁵⁸ The European Commission has also produced a *Draft Directive on Access to Justice in Environmental Matters*.¹⁵⁹ This focuses on the enforcement of law relating to the environment by members of the public. A two-stage approach for those 'who consider that a public authority is or may be in breach of legislation relating to the environment'. Members of the

154 Rose-Ackermann and Halpaap, n 13 above; Pring and Noé, n 4 above.

155 Discussed above at text to nn 41–44.

156 C. Harlow, 'Public Law and Popular Justice' (2002) 65 *MLR* 1, 2.

157 P. Cane, 'Standing, Representation, and the Environment' in I. Loveland, *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995) discusses the standing of environmental interest groups as representatives of the public interest.

158 European Commission COM (2000) 402, n 14 above.

159 European Commission Second Working Document 22-07-2002, *Access to Justice in Environmental Matters*. Available at <<http://www.europa.eu.int/comm/environment/aarhus/index.htm>>.

public with legal standing¹⁶⁰ would be able to lodge a request for action with the public authority and, during a 60 day period,¹⁶¹ that person could not progress to the second stage – an application to a court or other impartial body.¹⁶² The *Draft Directive* does not provide for actions against private parties, which a previous *Working Document* had said ‘has to be considered.’¹⁶³ Interesting in this context are the changing fortunes of ‘environmental liability’ in EC policy. A Commission White Paper in February 2000¹⁶⁴ proposed a very extensive scheme of environmental liability, which would ease tort claims against (private) defendants where ‘traditional damage’ is brought about by an industry regulated under EC environmental law. The scheme would also provide a claim in respect of the restoration of ‘environmental damage’, primarily in the hands of public authorities, but with a subsidiary claim (‘if the State does not act at all or does not act properly’) resting on public interest groups.¹⁶⁵ The draft Directive on environmental liability published in 2002¹⁶⁶ by contrast deals only with the restoration of environmental damage, and liability is very much an administrative tool in the hands of regulators. There is no independent claim for individuals or public interest groups, although there are strong judicial review (substantive and procedural) provisions.

To conclude, the obligations in Article 9(2) and (3) of the Aarhus Convention are disappointing and provide only a watered down guarantee of access to justice. Due to the continuing references to ‘national law’, implementation will depend on the extent to which states advocate and support more wide-ranging access to the courts. The main impact of Article 9 on current practice within the UK will probably concern the nature of the review procedure, the fact that it has to be ‘fair, equitable, timely and not prohibitively expensive’. The provisions on substantive review may influence the long running debate on third party rights of appeal in planning and pollution law.

Conclusion

The Aarhus Convention’s focus on procedure rather than substantive environmental standards is an approach that is increasingly familiar in EC and domestic environmental regulation. Although the Convention suffers from vague and weak

160 This is defined as members of the public concerned, within the framework of national legislation ‘who have a sufficient interest or alternatively who maintain the infringement of a right where the administrative procedural law of a Member State requires this as a precondition.’ The definition also includes ‘qualified entities’, encompassing NGOs and local resident groups. The Draft Directive gives detailed criteria which must be satisfied in order for such groups to have legal standing. See Second Working Document, *ibid.*, for further details.

161 Extendable to four months.

162 Such a procedure can be classed as ‘formal review’ where an appeal or review to an external body is subject to a prior requirement of internal review. This can be contrasted with ‘informal review’ where the right of appeal to an external body is capable of being pursued as soon as the original decision has been made. For a discussion of the such procedures (in the context of social security law) see M. Harris, ‘The Place of Formal and Informal Review in the Administrative Justice System’, in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart Publishing, 1999).

163 European Commission Working Document 11-04-2000, *Access to Justice in Environmental Matters*, section 5.2.

164 European Commission, *White Paper on Environmental Liability* COM (2000) 66 final.

165 *Ibid.*, 22.

166 European Commission, *Proposal for a Directive on Environmental Liability with regard to the prevention and restoration of environmental damage* COM (2002) 17 final.

language, and the absence of enforcement mechanisms emphasises its relative lack of compulsion, its adoption and ratification does at least suggest some political if not legal commitment to real and genuine public engagement with environmental problems.¹⁶⁷ As well as being a tool of persuasion, parts of the Aarhus Convention are likely to be given some force in English law by the introduction of EC legislation. The European Commission, and indeed the ECJ, has long seen third parties (individuals, industry and NGOs) as an ally against recalcitrant Member States, and the empowerment of these groups in the Aarhus Convention fits in well with that perspective. We should probably question the legitimacy of introducing what we would argue are fundamental interventions into Member State democratic processes by means of EC legislation, although the signature of the Aarhus Convention by all Member States may allow that question to be side-stepped. In any event, that discussion moves beyond the scope of this paper. More striking for current purposes is the relative absence of any real self-reflection by the Community institutions, particularly given the reform process set in motion by the EU governance debate.¹⁶⁸ EC decision-making processes are hardly a model of democratic accountability and openness.

A serious limitation of the Aarhus Convention, which reflects a more general failure in the movement towards participation, is the lack of engagement with the real nature of participation. Public participation is potentially a very radical innovation, and even in its more modest guises, challenges not only expertise based administrative decision-making, but also the appropriate role and the legitimacy of representative democracy. There is little sign that these challenges are recognised, as a problem or an opportunity.

Concern about public cynicism and disillusionment with traditional mechanisms of representative democracy probably encourages attempts to organise more direct participation, but it is far from a straightforward solution. Whatever the benefits of multiple perspectives on environmental problems, moves to participation suffer from a failure to consider the quality of the process. If public participation 'simply holds a mirror up to the pattern of power in the community; if the rich and well-organised are heard, while the poor and minorities are weakly represented',¹⁶⁹ the wisdom of devaluing or at least de-emphasising the institutions of representative democracy must be doubted. Whilst we must not be naïve about the real-life weaknesses of representative democracy or expert decision-making on environmental issues, this question of power is central to how public participation works. A move to participation needs to be informed by an awareness of the existing distribution of power and how participation will affect that power. We need to think about who (or what, perhaps the environment really is the winner) benefits most from the practical manifestation of public participation. International discussions of public participation often emphasise traditionally marginalised groups for special inclusion in public participation

167 Note that most of the ratifying nations are newly independent states with poorly developed administrative systems, where the Aarhus Convention might serve far more usefully as a guide to development, see Rose-Ackerman and Halpaap, n 13 above.

168 European Commission, n 42 above. The definition of governance in the White Paper is: 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence', 8. See further Lee, n 15 above. Davies, n 57 above suggests that some minimal progress is being made on access to information.

169 B. Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Zillman, Lucas and Pring, n 4 above, 109.

mechanisms – ‘indigenous peoples, local communities, women, youth’, as well as NGOs.¹⁷⁰ Whatever the problems and ambiguities in that list, it is notable that the Aarhus Convention makes no comparable attempt to broaden participation. The real emphasis in the Aarhus Convention is on the involvement of NGOs. Since industry involvement is not likely to whither away (and we would not suggest that it should), the involvement of NGOs in environmental regulation provides an important balance. However, we should always be aware of the dangers of claiming that NGOs ‘represent’ anybody, and of the possibility that a small (even if larger than before) number of participants will wrap up important decisions. More generalised public participation of course faces real obstacles. There has been provision for public participation in planning law for over three decades, but it is still dominated by professional planners, statutory consultees such as the Environment Agency, and organised special interest groups, rather than the general public.¹⁷¹ The Aarhus Convention does not address this phenomenon, and given low levels of participation in even the most basic form of political participation at a local level – voting –¹⁷² we perhaps should not be too optimistic about change.

It is to be hoped that the ratification process for the Aarhus Convention brings out some of these difficult issues. The move to participation in environmental law is really rather unreflective, and responses are, on the whole, relatively uncritical. As a mode of regulation, proceduralisation is in part a wholly appropriate response to the well-known challenges to the authority of the state in regulation. Its attempts to improve the legitimacy of environmental decision-making become increasingly urgent given the contemporaneous and possibly countervailing response of moving to the market for environmental regulation. Even if public participation is in general terms a ‘good thing’, it is not without its problems. A range of inputs is vital for the resolution of largely indeterminate environmental questions, and contributions from interest groups (NGOs and industry) are as important any other. However, even if there are powerful and legitimate incentives to empower NGOs, we must not mistake their involvement for improved democracy.

170 Pring and Noé, n 4 above, 59.

171 A. Davies, ‘Hidden or Hiding?’ (2001) 72 *Town Planning Review* 193 discusses this phenomenon.

172 Turn out was about 28% in local elections in England and Wales in 1999 and 2000, see House of Commons Public Administration Select Committee, Session 2000–2001 Sixth Report *Innovations in Citizen Participation in Government*, paragraph 12.