

**PUBLIC PARTICIPATION IN DECISION-MAKING ON WIND ENERGY
INFRASTRUCTURE:
RETHINKING THE LEGAL APPROACH BEYOND PUBLIC ACCEPTANCE**

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I, Chiara Armeni, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract:

The right of the public to participate in decisions affecting their environment is institutionalised in environmental and planning law. But its meaning and rationales are interpreted in different ways, affecting the influence of participation in practice. A growing body of social science, environmental law and planning scholarship engages with the complexities and ambiguities of participation in wind energy infrastructure, including its relationship with the multiple factors shaping people's attitude towards them. This thesis argues that the policy and regulatory framework in this field remains anchored to a view of participation as an instrument to reduce objections and achieve public acceptance of decisions already made elsewhere, with little ability to influence the outcome.

This thesis is concerned with the gap between a model of public engagement aimed to achieve public acceptance of pre-determined decisions ("acceptance model") and a model of participation aimed at constructing a deeper dialogue between decision-makers and the local community about options, values and expectations ("participatory model"). In so doing, it explores the scope for public participation in decision-making and benefit-sharing related to major offshore wind energy projects in England. It analyses participation in the authorisation process for two offshore wind energy Nationally Significant Infrastructure Projects (NSIPs) - the Rampion Offshore Wind Farm Project and the Navitus Bay Wind Park - , which were selected due to the high number of Interested Parties' representations made during their examination. This thesis then looks at the extent to which local communities can participate in decisions on the design and management of developer-led community benefit schemes from these projects.

The thesis argues that, in the light of the increasing pressure towards deployment of low-carbon energy infrastructure, the space for substantive participation in decisions for large-scale offshore wind farms in England tends to be limited by overarching policy objectives and expert knowledge. The ways in which the regulatory process understands and institutionalises the meaning and functions of participation requires a more careful consideration. Community benefits schemes from wind energy infrastructure can create additional spaces for participation of local communities, outside the planning process. However, without a stronger effort towards their institutionalisation in law, the "participatory potential" of community benefits is likely to remain undeveloped.

Impact Statement:

This thesis develops a theory of public acceptance in regulatory decision-making for wind energy infrastructure, and applies it to the regulatory framework for siting of, and provision of community benefits in respect of major wind energy infrastructure in England. This research explores the 'public acceptance' model of participation, where participation is an instrument simply for reducing objections and achieving a shallow public acceptance, without creating the potential for real public influence. This work focuses on the area of community benefits in the planning regime, framing this as part of the process for public participation in regulatory decision-making on wind energy infrastructure.

As required by UCL's Guidance on the format of the thesis, this Impact Statement describes how the expertise, knowledge, analysis, discovery or insight presented in my thesis could be put to a beneficial use, inside and outside academia.

By offering an analysis of the acceptance model and the potential of community benefits schemes, this thesis presents legal scholars with currently under-explored perspectives on the role and meaning of public participation on wind farms, within and beyond planning. Further, while embedded in law, this thesis is interested in how social science, environmental law and planning scholars engage with the complexities of participation. The aim of this research is to contribute to the multidisciplinary academic inquiry on the debate of these issues. I intend to maximise the potential impact of this work within academia by publishing work based on, and building on, this thesis, in scholarly articles and monographs.

The theory and analysis presented in this thesis also has the potential to make an impact outside academia. It intends to (re)shape dialogue between academics, policymakers, planners, developers and the public around the role and meaning of public participation in decisions on wind energy infrastructure. It also has the potential to stimulate fresh thinking around the role of benefit sharing in English renewable energy development. This potential for impact shall be developed through reaching out beyond academia, both in publications (such as journals aimed at planning law practitioners, and blogs) and events (such as appropriate seminars and conferences attended by the professions), as I progress through my academic career.

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Acknowledgments

This PhD thesis had a long gestation. It was developed as a part-time project while I was juggling being a lecturer at University of Sussex and a mum. The fact that it has been completed is due to far more than one person.

First thanks are owed to Professor Maria Lee. I would have never embarked in, let alone finished, this doctoral project without her mentorship and extraordinary supervision. I will always be profoundly grateful for her intellectual and emotional support and her incredible generosity with time and feedback. Her trust in my work and encouragement kept me going in the darkest moments of my PhD.

I am also hugely thankful to my second supervisor, Professor Joanne Scott for her always enthusiastic encouragement throughout these years and her precious feedback on the final draft of this thesis. My deep thanks also go to Professor Donald McGillivray for his generosity in providing careful feedback on early drafts of the case studies presented in the thesis and for asking challenging – but important - questions. I thank Professor Yvonne Rydin, Dr Lucy Natarajan and Professor Nuno Ferreira for offering valuable comments on earlier drafts of individual chapters.

I owe much to my partner, Matteo de Bellis, for his love and constant backing, and for all the time he spent alone with our daughters during my countless working weekends.

Thanks to the UCL Faculty of Laws for its financial support to the initial stages of this project.

Finally, I am thankful to my family, friends, colleagues and fellow PhD students, whose support (by showing interest in my research, offering childcare or a quiet working space, or simply listening) during these years has been invaluable.

To Livia and Caterina.

List of Abbreviations

AONB: Area of Outstanding Natural Beauty
CCA: Climate Change Act
CCC: Committee on Climate Change
DBEIS: Department for Business, Energy and Industrial Strategy
DCLG: Department for Communities and Local Government
DCO: Development Consent Order
DECC: Department for Energy and Climate Change
EIA: Environmental Impact Assessment
ES: Environmental Statement
EU: European Union
ExA: Examining Authority
FLOWW: Fisheries Liaison with Offshore Wind and Wet Renewables
GHG: Greenhouse Gas
IP: Interested Party
IPCC: Intergovernmental Panel on Climate Change
LPA: Local Planning Authority
NIMBY: Not-In-My-Backyard
NP: National Park
NPPF: National Planning Policy Framework
NPS: National Policy Statement
NSIP: Nationally Significant Infrastructure Project
PINS: Planning Inspectorate
PPG: Planning Practice Guidance
RCEP: Royal Commission on Environmental Pollution
SDNP: South Downs National Park
SoCG: Statement of Common Ground
SoS: Secretary of State
TCPA: Town and Country Planning Act
UK: United Kingdom
UNECE: United Nations Economic Commission for Europe
WHS: World Heritage Site

INTRODUCTION

1. Introduction

Technological solutions represent an inescapable, although contested,¹ element of the current global climate strategy.² Climate change technologies comprise a variety of techniques and infrastructure that tackle different aspects of climate change mitigation: from energy generation (e.g. wind, solar, geothermal and tidal energy, biomass, waste to energy, carbon capture and storage) to industrial production (e.g. methane destruction, climate-friendly cement, energy-efficiency in industry); from housing (e.g. energy efficiency in buildings, thermal insulation) to transport (e.g. electric and hybrid cars).³

But ending our entrenched carbon dependency is not simply a scientific or technological enterprise. It is also, and fundamentally, a societal challenge that encompasses profound disagreement and contestation.⁴ Climate change mitigation inevitably engages with the 'tensions that arise when the impersonal, apolitical and universal imaginary of climate change projected by science comes into conflict with the subjective, situated and normative imaginations of human actors engaging with nature'.⁵ While the scientific imaginary of climate change frames it as a technically fixable environmental issue, climate change mitigation requires a deeper consideration of individual and societal values and responses to policy objectives and infrastructural transformation.

These tensions are apparent in the United Kingdom (UK)'s climate change mitigation and energy policy. In this context, the development of renewable energy infrastructure is presented as an essential component of the UK's climate change and energy strategy to achieve both energy security and climate change mitigation.⁶ Yet

¹ David G Victor, *The Global Warming Gridlock* (CUP 2012).

² Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°* - Summary for Policymakers (2018) [D.5.5]. See also Stephen Pacala and Robert Socolow, 'Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies' (2004) 305 *Science* 968.

³ See IPCC, *Climate Change 2014: Mitigation of Climate Change* - Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2014).

⁴ Michael Hulme, *Why We Disagree About Climate Change* (CUP 2009).

⁵ Sheila Jasanoff, 'A New Climate for Society' (2010) 27 *Theory, Culture & Society* 233, 233.

⁶ Department of Energy of Climate Change (DECC), *The UK Renewable Energy Strategy* (Cm 7686, 2009). See also Department of Trade and Industry, *The Energy White Paper: Meeting the Challenge* (White Paper, Cm 7124, 2007); DECC, *The UK Low Carbon Transition Plan*:

public attitudes to this infrastructure are hugely problematic. This is evident in a wind energy context. The dominant understanding of how local communities relate to this infrastructure is that, while in principle wind energy is supported for its decarbonisation potential, specific projects are often opposed in practice for their negative or uncertain local impact (on e.g. biodiversity, sea- and landscape and visual amenities, tourism and socio-economic expectations), with some differences between offshore and onshore infrastructure.⁷ However, the 'gap' between national and local responses to energy technologies is contested, partially because the factors shaping public attitudes in this context are complex.⁸ These include important concerns affecting the materiality and symbolism of places where people live, construct social relationships, and with which they build emotional bonds.⁹ This complexity of public attitudes towards wind energy projects is typically reflected in the participatory process for consenting the development of this infrastructure. The right of those affected by environmental and planning decisions to participate in the decision-making process is institutionalised in law.¹⁰ But there are nuances and conflicts associated with its meaning and function. Participants' multiple rationalities are complex and difficult to translate in the regulatory process. It is within this process that tensions between technical arguments and people's values and opinions arise more visibly. These conflicts are not necessarily unworthy,¹¹ as it is through participation and contestation that knowledge claims are constructed through the regulatory process.¹² However, as this thesis will show, the current urgency and need for new climate change infrastructure has put the space for participation within the regulatory decision-making process under huge pressure.

Based on this background, this thesis looks into the challenges of governing climate change technologies from the perspective of public participation in decision-making for large-scale offshore wind energy infrastructure. Major wind energy

National Strategy for Climate and Energy (July 2009); and DECC, *Planning Our Electric Future: A White Paper for Secure, Affordable and Low Carbon Electricity* (White Paper, Cm 8099, 2011)

⁷ See Derek Bell, Tim Gray and Claire Haggett, 'The 'Social Gap' in Wind Farm Siting Decisions: Explanations and Policy Responses' (2005) 14 *Environmental Politics* 460.

⁸ In particular, Susana Batel and Patrick Devine-Wright, 'A Critical and Empirical Analysis of the National-Local 'Gap' in Public Responses to Large-scale Energy Infrastructures' (2015) 58 *Journal of Environmental Management & Planning* 1076. See also Christopher R Jones and J Richard Eiser, 'Understanding 'Local' Opposition to Wind Development in the UK: How Big is a Backyard?' (2010) 38 *Energy Policy* 3106. For a full review of the arguments, see chapter 3 below.

⁹ Patrick Devine-Wright, 'Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action' (2009) 19 *Journal of Community and Applied Social Psychology* 426.

¹⁰ Maria Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP 2017).

¹¹ Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (2nd edn, Routledge 2011).

¹² Yvonne Rydin and others, 'Local Voices on Renewable Energy Projects: The Performative Role of the Regulatory Process for Major Offshore Infrastructure in England and Wales' (2018) 23 *Local Environment* 565.

infrastructure is a distinctive example of climate change technologies for at least three reasons. First, it has an 'atypical and prominent physical presence' that constitutes the 'focus of disagreement in relation to wind energy', both in terms of decision-making and dispute resolution.¹³ According to Cowell and Devine-Wright, the physical nature of different energy technologies 'can affect how and why certain things become political, in the sense of becoming open to contingency and debate, while other do not, and co-construct the publics involved'.¹⁴ Second, its consenting process is not simply technical, but 'political' in nature as it inevitably deals with 'the ways in which artefacts, activities or practices become objects of contestation'.¹⁵ Finally, it is a 'legally disruptive' regulatory object as 'a new infrastructure and its consequences need to be reconciled with existing legal concepts and practices'.¹⁶ Wind farms pose new issues (e.g. prediction of bird collision risk,¹⁷ calculation of duration and cumulative noise impact,¹⁸ interface with place attachment values¹⁹) for which 'existing law does not always provide templates for how decisions should be made' or disputes resolved.²⁰ And it is this physical, political and legally disruptive character that makes exploring the space for public participation in decision-making for wind energy infrastructure fascinating.

I am specifically interested in the extent to which lay public arguments are able to substantially influence decisions about development consent and provision of community benefits from wind energy Nationally Significant Infrastructure Projects (NSIPs) in England. Building on an emerging body of academic research, my main argument is that, in the light of the urgency of climate change mitigation, the participatory process for offshore wind energy NSIPs in England seems to tend more towards achieving passive acceptance of decisions already made, rather than towards

¹³ Elizabeth Fisher, 'Law and Energy Transition: Wind Turbines and Planning Law in the UK' (2018) 38 *Oxford Journal of Legal Studies* 528, 531-532.

¹⁴ Richard Cowell and Patrick Devine-Wright, 'A "Delivery-Democracy Dilemma"? Mapping and Explaining Policy Change for Public Engagement with Energy Infrastructure' (2008) 20 *Journal of Environmental Policy & Planning* 499, 502.

¹⁵ Andrew Barry, *Political Machines: Governing a Technological Society* (Bloomsbury Academic 2001) 6.

¹⁶ Fisher (n 13) 532

¹⁷ See Maria Lee and others, 'Techniques of Knowing in Administration: Co-Production, Models, and Conservation Law' (2018) 45 *Journal of Law and Society* 427 using the example of the Rampion Offshore Wind Farm.

¹⁸ See Yvonne Rydin and others, 'Black-Boxing the Evidence: Planning Regulation and Major Renewable Energy Infrastructure Projects in England and Wales' (2018) 19 *Planning Theory and Practice* 218.

¹⁹ See Patrick Devine-Wright and Susana Batel, 'My Neighbourhood, My Country or My Planet? The Influence of Multiple Place Attachments and Climate Change Concern on Social Acceptance of Energy Infrastructure' (2017) 47 *Global Environmental Change* 110. For a full review, see chapter 3 and 6 below.

²⁰ Fisher (n 13) 534.

fostering substantive influence to improve the outcome of the decision.²¹ This tendency is expressed through what I call an ‘acceptance model’ of public engagement, which is constructed around the pursuit of passive acceptance by the public of prior decisions, without genuine recognition of the importance of people’s lay knowledge and values in contributing to such decisions. As discussed in chapter 3, I draw a clear line between “real and genuine public acceptance” as active support, and “passive public acceptance” as acquiescence of decisions already made.²² Real and genuine public acceptance is a good thing, but a model of public engagement focused on passive acceptance is problematic. This model is little discussed in law. It contrasts with a model of deliberative participation, where local voices are heard and used to improve the quality and legitimacy of the outcome, recognising the regulatory planning process as the legal and institutional forum for such a dialogue.

In this thesis, the prevalence of the acceptance model in public engagement is found not only in relation to the regulatory decision-making for consenting wind energy NSIPs (chapters 4, 6 and 7), but also in respect of decisions associated with the design and management of developer-led community benefits schemes for this infrastructure (chapter 8). Community benefits schemes are relatively under-explored in the legal scholarship. I argue that the absence of an institutional right to participate in community benefit design and management results in the pursuit of an acceptance model in decision-making related to these schemes. Of course, legal rights are not a simple answer, because even when the right to participate is institutionalised in law, decision-making can end up – perhaps unintentionally - pursuing an acceptance model (as I explain in this thesis). However, although imperfect, recognising legal rights to participate in decision-making regarding community benefits offers better chances to move beyond a model of public acceptance than not recognising them. Building on Cowell and colleagues, I argue that, by understanding the provision of community benefits in respect of wind energy projects from a perspective of justice, these mechanisms show a participatory potential in themselves.²³ But I also add to this literature the insight that community benefits encompass not only a theoretical potential

²¹ In particular: Maria Lee and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 25 *Journal of Environmental Law* 33; Chiara Armeni, ‘Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 *Journal of Environmental Law* 415; Lucy Natarajan and others, ‘Navigating the Participatory Process of Renewable Energy Infrastructure Regulation: A “Local Participant Perspective” on the NSIPs Regime in England and Wales’ (2018) 114 *Energy Policy* 201; Rydin and others (n 12).

²² In particular: Susana Batel, Patrick Devine-Wright, Torvald Tangeland, ‘Social Acceptance of Low Carbon Energy and Associated Infrastructures: A Critical Discussion’ (2013) 58 *Energy Policy* 1; Daniel Barben, ‘Analyzing Acceptance Politics: Towards an Epistemological Shift in the Public Understanding of Science and Technology’ (2010) 19 *Public Understanding of Science* 274.

²³ Richard Cowell, Gill Bristow and Max Munday, ‘Viewpoint – Wind Energy and Justice for Disadvantaged Communities’ (May 2012).

for equitable and fair distribution of costs and benefits between the developer and the local community (distributional justice), but also an opportunity to engage the public in decisions about how such distribution might occur (procedural justice). It is in this context that I suggest that efforts towards institutionalisation of the right for the public to participate in decisions associated with community benefit schemes for wind energy NSIPs might offer a way to realise such potential and move beyond an acceptance logic to a model of deliberative participation in public engagement.

Through the discussion of the acceptance model and the model of deliberative participation in planning and community benefits decisions, this research contributes to the literature by offering a conceptual lens to rethink the legal approach to public participation in decision-making on climate change infrastructure. It is intended to open new areas of research for legal scholars interested in public participation in environmental decision-making and planning, as I explain in the concluding chapter.

This chapter offers a preliminary explanation of the key debates and themes engaged within this research. In Section 2, I introduce the complexities of the meaning and rationales for participation and its relationship with the notion of acceptance, which I further explore in chapters 2 and 3. Section 3 offers a brief outline of the convergence between climate change and energy law and policy in the UK. This convergence is important as it constitutes the foundation of the government narrative of “urgency” and “need” for new wind energy infrastructure motivating the streamlined planning regime for wind energy Nationally Significant Infrastructure Projects (NSIPs), discussed in chapter 4. Although important from a climate change perspective, this thesis argues that this narrative has limited the scope for substantive participation and reframed the role of planning law in decisions associated wind energy NSIPs (section 4). In section 5, I then move on to explain the multiple conceptions of justice as a foundation of the conceptual framework that supports this thesis’s argument on the participatory potential of community benefits in chapter 8. Having addressed these key themes, the chapter explains the scope (section 6), methodology (section 7) and structure (section 8) of the research.

2. Public Participation and the Acceptance Model

Public participation in environmental decision-making is ‘inextricably linked to environmental issues and can be considered both as an indicator and a motor of political change’.²⁴ People have a democratic expectation and a legal right to

²⁴ Jan PM Van Tatenhove and Pieter Leroy, ‘Environment and Participation in a Context of Political Modernization’ (2003) 12 *Environmental Values* 155, 156.

participate in decisions that affect their life and environment.²⁵ But the rationales and forms of such participation are rarely spelled out, making its conceptual understanding ambiguous. While participation is an essential element for the procedural legitimacy of the regulatory process, its conceptual meaning and ability to influence decisions escape legal definition. What participation means - and what contribution it brings to democratic decision-making - has been widely discussed in the political philosophy and legal scholarship.²⁶ Different, and at times conflicting, interpretations have drawn a multiform picture of the theoretical framework for participation. Anticipating a detailed discussion in chapter 2, the right to participate follows different rationales. From a procedural perspective, participation is an end in itself, being a condition of legitimacy of the process and its outcomes.²⁷ From a substantive perspective, it is a means towards better decisions by allowing a richer set of values and multiple knowledge(s) to be taken into account.²⁸ These justifications are mutually supportive and overlap in practice. But it is through a nuanced instrumental rationale - as a means to attain faster and less controversial implementation of decisions already made - that participation becomes particularly problematic. This is because what this rationale tends to offer is simply a cynical impression of participation, while aiming at obtaining passive public acceptance of decisions already made.²⁹ A careful reflection upon these intersecting rationales for participation sets the basis for determining what model of public engagement is dominant in a particular regulatory decision-making context.

In chapter 3 of this thesis, I distinguish a “participatory model” as a dialogic interaction between procedural and substantive rationales for engagement aimed at a deliberative outcome; from an “acceptance model” grounded on an instrumental

²⁵ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) UNTS 2161, 446. At EU level: Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE [2003] OJ L 41/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17; and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L264,13. For a full discussion, see chapter 4 below.

²⁶ For an analysis of this literature, see chapter 2.

²⁷ Jonas Ebbesson, ‘The Notion of Public Participation in International Environmental Law’ (1997) 8 Yearbook of International Environmental Law 51.

²⁸ Franciscus Coenen, D Huitema, Laurence O’Toole (eds), *Participation and the Quality of Environmental Decision Making* (Springer 1998); Mary O’Brien, *Making Better Environmental Decisions: An Alternative to Risk Assessment* (MIT Press 2000).

²⁹ Dan Bloomfield and others, ‘Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance?’ (2001) 19 Environmental and Planning C 501; Andy Stirling, ‘Opening Up or Closing Down? Analysis, Participation and Power in the Social Appraisal of Technology’ in Melissa Leach, Ian Scoones and Brian Wynne (eds), *Science and Citizens - Globalization and the Challenge of Engagement* (Zed Books 2005).

rationale, where what matters is the pacification of the public. This binary distinction should not be entirely surprising, as it builds upon the tension between an instrumental 'information-deficit model' of public engagement, assuming that public opposition to change is the result of ignorance and lack of information, and 'the civic model' arguing for a more inclusive and deliberative approach to decision-making.³⁰ Nor is the separation between these models always so sharp or explicit, as sometimes the intention is to pursue a participatory model, but we end up with an acceptance model.³¹

The distinction between the participatory model and the acceptance model proves valuable, yet delicate, in a regulatory context for wind energy infrastructure. While the notion of public acceptance of energy infrastructure is embedded - and at times contested³² - in social science and planning scholarship, it is little explored and understood in the legal literature.³³ While genuine and profound public acceptance is a positive objective, some caution is needed in casually using the rationale and language of 'public acceptance' in a regulatory context. Policymakers often refer to 'public acceptance' as a factor determining whether a project will be easily implemented, without engaging with its multifaceted elements and complexities.³⁴ The notion of public acceptance escapes any definition as a fixed, uniform target. It is instead the result of a combination of intricate factors (e.g. concerns about landscape and visual impact, place attachment and perceived fairness of the outcome and of the process) that vary over time and space, and differ in intensity among people within the same local community, however defined.³⁵

Therefore, the assumption that the participatory process should aim to achieve public acceptance has fundamental consequences for people's ability to influence the outcome of participation. A simplistic narrative of acceptance is likely to hide disengagement with the reasons and multi-layered attitudes of people towards wind

³⁰ For a review of these arguments, Harriet Bulkeley and Arthur PJ Mol, 'Participation and Environmental Governance: Consensus, Ambivalence and Debates' (2003) 12 *Environmental Values* 143. From a broader perspective, this theoretical framework aligns with Fisher's rational-instrumental and deliberative-constitutive views of administrative constitutionalism. See Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007).

³¹ Armeni (n 21).

³² Batel and Devine-Wright (n 22)

³³ E.g. Rolf Wüstenhagen, Maarten Wolsink and Mary Jean Burer, 'Social Acceptance of Renewable Energy Innovation: An Introduction to the Concept' (2007) 35 *Energy Policy* 2683.

³⁴ E.g. Oliver Todt, 'The Limits of Policy: Public Acceptance and the Reform of Science and Technology Governance' (2011) 78 *Technological Forecasting and Social Change* 902, 904; Frank van Rijnsoever, Allard van Mossel and Kevin Broecks, 'Public Acceptance of Energy Technologies: The Effects of Labelling, Time and Heterogeneity in a Discrete Choice Experiment' (2015) 45 *Renewable and Sustainable Energy Reviews* 817.

³⁵ Patrick Devine-Wright, 'Reconsidering Public Acceptance of Renewable Energy Technologies: A Critical Review' in Michael Grubb, Tooraj Jamasb and Michael G Pollitt (eds), *Delivering A Low-Carbon Electricity System – Technologies, Economics and Policy* (CUP 2008). For a detailed discussion, see chapter 3. On the meaning of community, see chapter 1 section 5.

energy infrastructure development, perhaps favouring the assumed persuasive effect of expert advice and science-based policy goals.³⁶

This critique does not sit in a theoretical vacuum as the examination of the scope of participation in public decision-making intersects with the debate about the – often overemphasised³⁷- dichotomy between science and democracy,³⁸ facts and values,³⁹ experts and the lay public’s knowledge.⁴⁰ Indeed, if one were to ask what it is that people are expected to “accept”, the answer is likely to be found in a public decision based on expert advice, techno-scientific evidence and predetermined policy objectives. Of course, expertise and technical knowledge are essential in taking informed regulatory and policy decisions, but they are not enough, as science and society co-produce each other. As Jasanoff explains, the notion of co-production in this context expresses the idea that:

‘[t]he ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it. [...] Scientific knowledge [...] both embeds and is embedded in social practices, identities, norms, conventions, discourses, instruments and institutions’.⁴¹

An institutional inability to recognise the close relationship between the “technical” and the “social” leads to frustration, mistrust and political disillusionment from the part of the public. This is connected with what Fiorino called the ‘participatory dilemma’: while the contemporary expansion in scope of government action generates broader opportunities for participation in political decisions, it also increases reliance on expertise to cope with complexity and rapid technological development, which in return reduces the influence of the lay public and elected representatives on the individual decisions.⁴² Such a dilemma perpetuates ‘the spiral of alienation, apathy, distrust of

³⁶ Batel and Devine-Wright (n 22).

³⁷ Fisher (n 30) 11-13.

³⁸ Among many, Frank Fischer, *Democracy and Expertise: Reorienting Policy Inquiry* (OUP 2009).

³⁹ E.g. Maria Lee, ‘Beyond Safety? The Broadening Scope of Risk Regulation’ in Colm O’Cinneide (ed), *Current Legal Problems 2009* (OUP 2010).

⁴⁰ In particular, Sheila Jasanoff, *Science and Public Reason* (Routledge 2012). See also, Angela Liberatore and Silvio Functowitz, ‘“Democratising” Expertise, “Expertising” Democracy: What Does This Mean, and Why Bother?’ (2003) 30 *Science and Public Policy* 146.

⁴¹ Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004) 2-3. Within the vast literature on co-production, see also Sheila Jasanoff, ‘Science and Citizenship: A New Synergy’ (2004) 31 *Science and Public Policy* 90. For a climate change angle to this debate, Brian Wynne, ‘Strange Weather Again: Climate Science as Political Art’ (2010) 27 *Theory, Culture & Society* 289.

⁴² Daniel Fiorino, ‘Environmental Risk and Democratic Process: A Critical Review’ (1989) 14 *Columbia Journal of Environmental Law* 501, 534 (referring to Marvin E Olsen, *Participatory Pluralism: Political Participation and Influence in the United States and Sweden* (Burnham Inc Pub 1982) Chap 2).

politicians and political institutions'.⁴³ This resonates in decisions on consenting large-scale wind energy projects in England explored in this thesis where, despite opportunities for participation, technical expertise and policy objectives play a primary role in decisions, potentially leading to public disengagement and lack of trust in decision-makers and developers.⁴⁴

Whereas the participatory dilemma looks at public engagement primarily from a procedural angle, my theory of the two models of engagement is concerned with the substance of participation. This is because a formal legal commitment to more participation - or to participation alone - is unlikely to solve the issue. As Jasanoff nicely puts it:

[w]hat has to change is the *culture* of governance, within nations as well as internationally; and for this we need to address not only the mechanics, but also the substance of participatory politics. The issue, in other words, is no longer *whether* the public should have a say in technical decisions, but *how* to promote more meaningful interaction among policy-makers, scientific experts, corporate producers, and the public'.⁴⁵

As this thesis suggests, a first step for changing 'the culture of governance' and addressing 'the substance of participatory politics' is to understand how the participatory model and the acceptance model shape participants' substantive ability to influence regulatory decisions in practice. The analysis of the relationship and untidy overlap between these models is useful to rethink how regulators and decision-makers decide and what counts in their decisions.

The issue of public participation in science and technology governance is not novel.⁴⁶ But here I argue that the regulatory decision-making process for consent of large-scale wind energy projects in England offers an interesting case to explore these issues. There is something particularly challenging in ensuring public engagement and influence in decisions on climate change infrastructure in general, and wind energy in particular. This is certainly linked to the "physical", "political" and "legally disruptive

⁴³ *ibid.*

⁴⁴ Lucy Natarajan and others, 'Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation' (2019) 90 *Town Planning Review* 117; Rydin and others (n 18) and Rydin and others (n 12). See also more generally, Mhairi Aitken, 'Why We Still Don't Understand the Social Aspects of Wind Power: A Critique of Key Assumptions Within the Literature' (2010) 38 *Energy Policy* 1834.

⁴⁵ Sheila Jasanoff, 'Technologies of Humility – Citizen Participation in Governing Science' (2003) 41 *Minerva* 223, 238 (emphasis in the original). Similarly, from a planning perspective, Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of American Institute of Planners* 216.

⁴⁶ Lee (n 10). See also Alan Irwin, 'Constructing the Scientific Citizen: Science and Democracy in the Biosciences' (2001) 10 *Public Understanding of Science* 1.

nature” of this infrastructure, discussed above. But in an English context, it is also related to two interconnected policy paradigms: a) the convergence between energy and climate change policy and b) the narrative of “urgency” and “need” for new wind energy infrastructure, which derives from it. I discuss these two themes in the next two sections.

3. The Convergence of Energy and Climate Change Policy in the UK

The UK started to develop a policy (and political) response to climate change relatively early.⁴⁷ This resulted in a complex climate change strategy. Such complexity is not only due to the fact that climate change action requires a radical transformation in virtually every aspect of the economy, but also to the way in which climate mitigation objectives have been consolidated within the UK energy policy agenda.⁴⁸

Until the late 1990s, energy and climate change were two distinct and independent policy areas. Following the liberalisation and privatisation of the 1980s, energy was considered an ordinary commodity and the market became the most efficient vehicle to ensure energy supply, with little State intervention.⁴⁹ In this context, UK energy policy was characterised by a ‘pro-market paradigm’, whereby the main goal was to establish a competitive and free energy market to drive security and affordability of energy supply.⁵⁰ In 1992, competence for designing energy policy was relocated from the Department of Energy to the Department for Trade and Industry, while their implementation was delegated to the Office for Gas and Electricity Markets, an independent regulator. During this period, despite the UK and (then) EC’s ratification of the United Nations Framework Convention on Climate Change, climate change was more of a political concern than a driver for policy action.⁵¹

In the early 2000s, pressure for decarbonisation started to penetrate this paradigm, eventually leading to the convergence of climate and energy policy.⁵² In

⁴⁷ For a review of early climate action, Tim Rayner and Andrew Jordan, ‘The United Kingdom: A Paradoxical Leader’ in Rüdiger Wurzel and James Connelly (eds), *The European Union as a Leader in International Climate Change Politics* (Routledge 2010).

⁴⁸ Heather Lovell, Harriet Bulkeley and Susan Owens, ‘Converging Agendas? Energy and Climate Change Policies in the UK’ (2009) 27 *Environment and Planning C* 90.

⁴⁹ Department for the Environment, Transport and the Regions, *This Common Inheritance - Britain’s Environmental Strategy* (White Paper, Cm 3556, 1990).

⁵⁰ Florian Kern, Caroline Kuzemko and Catherine Mitchell, ‘Measuring and Explaining Policy Paradigm Change: the Case of UK Energy Policy’ (2014) 42 *Policy and Politics* 513, 530. See also Ian Rutledge, ‘New Labour, Energy Policy and ‘Competitive Markets’ (2007) 31 *Cambridge Journal of Economics* 901.

⁵¹ United Nations Framework Convention on Climate Change (New York, 9 May 1992) UNTS 1771, 107

⁵² See Department for the Environment, Transport and the Regions, *Climate Change: The UK Programme* (Cm 4913, 2000); Royal Commission on Environmental Pollution (RCEP), *Energy –*

2002, the Energy Review conducted by the Cabinet Office's Performance and Innovation Unit (PIU) recommended that 'energy policy trade-offs affecting the period to 2012 should generally give priority to carbon reduction if there is a material risk of failing to meet internationally-agreed emission targets'.⁵³ Importantly, the Review made it clear that 'climate change objectives must be achieved through the energy system'⁵⁴ and emphasised the role of renewables. These recommendations were downplayed in the 2003 Energy White Paper.⁵⁵ Although the White Paper marks the official convergence between energy and climate change, it remains generic on targets. Key policy instruments introduced to drive climate change action (e.g. the climate change levy,⁵⁶ the renewables obligation,⁵⁷ the UK Emission Trading System⁵⁸ and climate change agreements⁵⁹) continued to firmly implement a pro-market policy paradigm.

Between 2006 and 2008, the pillars of the current UK climate change strategy were set out, based on three objectives: an ambitious legally binding greenhouse gas (GHG) emission reduction target; energy security; and competitiveness, cost-efficiency and affordability of energy supply.⁶⁰ To meet national and EU targets, 15% of total energy consumption (transport, electricity and heat) is to come from renewable sources by 2020.⁶¹ In 2008, the Department for Energy and Climate Change (DECC) was established as the institutional promoter of the convergence. Full convergence was legally institutionalised with the adoption of the Climate Change Act 2008 (CCA), the first climate change-dedicated national legislation worldwide, representing the legal

The Changing Climate (22nd Report, 2000) (recommending a 60% CO₂ emissions reduction target by 2050 compared to 1990 levels); Department for Energy and Climate Change (DECC), *Climate Change – The UK Programme 2006* (Cm 6764, 2006).

⁵³ Cabinet Office, *The Energy Review* (February 2002) 52. For analyses, John Surrey, 'The Energy Review: A Performance and Innovation Unit Report to Government' (2002) 13 *Energy and Environment* 465; Michael Laughton and Bert Whittington, 'Our Energy Future? A Commentary on the PIU's Energy Review' (2002) 13 *Energy and Environment* 469. See also Environmental Audit Committee, *A Sustainable Energy Strategy? Renewables and the PIU Review* (HC 2001-02, 582-I).

⁵⁴ Cabinet Office (ibid) 5.

⁵⁵ Department of Trade and Industry, *Our Energy Future – Creating a Low Carbon Energy Economy* (White Paper, Cm 5761, 2003).

See also Environmental Audit Committee, *Energy White Paper – Empowering Change?* (HC 2002-03, 618).

1. ⁵⁶ Introduced by the Finance Act 2000. See David Pearce, 'The Political Economy of an Energy Tax: the United Kingdom's Climate Change Levy' (2006) 28 *Energy Economics* 149.

⁵⁷ Introduced in 2002 as a support scheme for renewable electricity projects. See House of Commons, 'Energy: The Renewables Obligation' (Briefing Paper No 05870, 22 July 2016).

⁵⁸ Introduced by the First Climate Change Programme 2000 and operating between 2002 and 2006. See Stephen Smith and Joseph Swierzbinski, 'Assessing the Performance of the UK Emissions Trading Scheme' (2007) 37 *Environmental and Resources Economics* 131.

⁵⁹ Climate change agreements are voluntary agreements between UK industry and the Environment Agency to reduce energy use and CO₂ emissions.

⁶⁰ See DECC (n 52). Committee on Climate Change (CCC), *Building a Low-Carbon Economy: the UK's Contribution to Tackling Climate Change* (December 2008); CCC, *The Fourth Carbon Budget: Reducing Emissions through the 2020s* (December 2010); DECC, *The Carbon Plan: Delivering our Low Carbon Future* (December 2011).

⁶¹ See n 6 above.

basis for action on climate change mitigation and adaptation in England and Wales.⁶² The Act sets a legally binding GHG emission reduction target of 80% by 2050 compared to 1990 levels.⁶³ The Secretary of State is legally responsible for ensuring that the target is achieved through compliance with a series of five-year carbon budgets, as recommended by the Committee on Climate Change, an independent statutory body established by the Act.⁶⁴ The Committee advises the UK Government and Devolved Administrations on emissions targets set in the Carbon Budgets and reports to Parliament on progress made in reducing GHG emissions and preparing for climate change via annual publication of Progress Reports. These documents have stressed the importance of the energy sector - and of renewables within it - in achieving all three climate policy objectives.⁶⁵ According to the Committee, wind energy technologies represent one of the most promising options for decarbonising electricity generation, together with carbon capture and storage and nuclear energy.⁶⁶

But it is with the adoption of the Planning Act 2008 that the UK Government showed that the link between climate and energy moved away from a merely market approach to encompass a more centralised policy paradigm.⁶⁷ As chapter 4 further explains, the Act establishes a new streamlined planning process for the development of Nationally Significant Infrastructure Projects (NSIPs) within five categories: Energy, Transport, Water, Waste Water and Waste. The Secretary of State is responsible for granting development consent, following the conclusions and non-binding recommendation from the Examining Authority (ExA) within the Planning Inspectorate.⁶⁸ The ExA conducts the examination and gives its recommendation based on the policy objectives set out in the relevant National Policy Statements (NPS). The Government has thus far designated (i.e. published) 12 NPSs, of which half relate to the energy sector, including new large-scale wind energy infrastructure. These documents provide the framework for the ExA's recommendation and, therefore, the Secretary of State's decision. They represent a key reference to understand the

⁶² Climate Change Act 2008. The Act was followed in 2009 by the Climate Change (Scotland) Act 2009 (2009 asp 12). As of September 2019, Northern Ireland is yet to adopt equivalent legislation.

⁶³ Climate Change Act 2008, s 1. In 2019, the CCC recommended strengthening the UK target to net-zero greenhouse gases by 2050. See CCC, *Net Zero – The UK's Contribution to Stopping Global Warming* (May 2019).

⁶⁴ Climate Change Act, ss 1 and 3.

⁶⁵ See e.g. Committee on Climate Change (CCC), *Reducing UK Emissions – 2018 Progress Report to Parliament* (June 2018).

⁶⁶ CCC (n 63) (recommending all power to be produced from low-carbon sources by 2050, requiring an increase in offshore wind energy generation from 3 to 75 GW [23]). See also CCC, *Progress in Preparing for Climate Change – 2015 Report to Parliament* (June 2015) 88 and CCC, *The Renewable Energy Review* (May 2011).

⁶⁷ Planning Act 2008, as amended by the Localism Act 2011 (hereinafter 'Planning Act 2008').

⁶⁸ Planning Act 2008, s 104.

contours of participation and the weight given to different reasons expressed in the examination process, as I explain in the next section.

Subsequent policy shifts in 2015-16 softened the centralised approach for wind energy infrastructure, at least partially, by removing onshore wind from the NSIPs regime and relocating it under ordinary planning.⁶⁹ This shift was on the basis that it would allow for more participation in decisions on onshore wind, but has perhaps led to onshore applications drying up in the face of unsupportive policy.⁷⁰

This brief outline shows that the swing between market and government intervention is a key factor shaping the UK climate change legal and policy framework. Unsurprisingly, the simultaneous pursuit of energy security, climate change mitigation and economic efficiency is still a challenge.⁷¹ But the Government's attempt to reconcile climate change and energy policy objectives through policy convergence is important to understand the narrative affecting participation in decisions on large offshore wind energy infrastructure in England and its implications for the role of planning law, on which I now concentrate.

4. The Narrative of Urgency and the Role of Planning Law in Decisions on Offshore Wind Farms in England

The convergence between climate and energy policy in the UK is not casual. Nor should it be considered unexpected, as a similar approach is adopted elsewhere.⁷² It is certainly a key choice to drive the decarbonisation of the electricity generation. The Committee on Climate Change has emphasised that the success in offshore wind energy deployment in the UK 'exemplifies how clear goals, an ambitious strategy and well-designed mechanisms, can encourage and enable the market to reduce cost and

⁶⁹ House of Commons: Written Ministerial Statement (HCWS42) - DCLG Written Statement made by Secretary of State for Communities and Local Government (Greg Clark), 18 Jun 2015. See also Infrastructure Planning (Onshore Wind Generating Stations) Order 2016, SI 306/2016. See further Energy Act 2016, s 78.

⁷⁰ *ibid.* On deprioritizing onshore wind energy projects, see Infrastructure and Projects Authority, *National Infrastructure Delivery Plan 2016-2021* (March 2016). For this reason, this thesis concentrates on offshore wind energy NSIPs, although it refers to the ordinary regime for onshore wind projects, where appropriate.

⁷¹ Malcom Keay, 'UK Energy Policy – Stuck in Ideological Limbo?' (2016) 94 *Energy Policy* 247 (arguing that – as of 2016 – the UK's energy policy was still unable to reconcile these objectives as 'it [was] stuck in an uncomfortable half-way house between markets and central control, without a clear way forward' at 248). See also, Rayner and Jordan (n 47) arguing that this has led to a paradoxical situation in which the UK is seen as a leading international actor on climate change, but its action on decarbonisation has been fragmented and contradictory.

⁷² E.g. Commission, '20 20 by 2020 - Europe's Climate Change Opportunity' (Communication) COM (2008) 30 final.

help to build wider economic co-benefits'.⁷³ But at a deeper level the convergence between climate change and energy policies has affected the balance between multiple policy objectives involved in the transition to a low-carbon energy system. This is explicit in the context of offshore wind energy infrastructure, and perhaps represents the reason for the success the Committee refers to. Due to the convergence paradigm, the “urgency” and “need” for climate mitigation action has now become the dominant government narrative justifying a fast development of new, large-scale (offshore) wind energy infrastructure.⁷⁴ This rhetoric has profound implications for the regulatory process and the space of participation within it, as I explain in chapter 4 of this thesis. This narrative shapes the priorities and the weight of multiple reasons in the decision-making process. Legacy argued that, depending on how it affects infrastructure development, this narrative ultimately ‘subverts the relationship between urban infrastructure planning, implementation and planning process’, affecting the wider space for public engagement.⁷⁵

With respect to offshore wind energy infrastructure, climate change mitigation, energy security, economic efficiency and growth are core objectives, while landscape, visual impact, nature conservation and place-based values in the areas affected are inevitably downplayed, especially if they jeopardise the development or the maximisation of energy output of the project.⁷⁶ The balance of interests in a narrative of urgency and need is pre-determined. This predetermination of what counts as a key reason is embedded within the National Policy Statements for Energy (EN-1) and Renewable Energy Infrastructure (EN-3), which the Examining Authority must take into account in deciding on development consent for wind energy NSIPs in England.

Two important considerations derive from this. The first relates to the scope for public influence. This thesis explains how the narrative of urgency and need validates a presumption in favour of development, which limits the ability of non-technically framed reasons to influence the decisions.⁷⁷ This means that, although the planning process provides opportunities for participation, the lay public’s ability to influence is limited.⁷⁸ And while the NPS documents are subject to public consultation, national decarbonisation priorities and the discourse about local impact and expectations are

⁷³ CCC (n 65) 11, although masking ‘a marked failure to decarbonise other sectors’ [11].

⁷⁴ DECC, *Overarching National Policy Statement for Energy (EN-1)* (July 2011) (hereinafter “EN-1”) and DECC, *National Policy Statement for Renewable Energy Infrastructure (EN-3)* (July 2011) (hereinafter “EN-3”).

⁷⁵ Crystal Legacy, ‘Infrastructure Planning: In A State of Panic?’ (2017) 35 *Urban Policy and Research* 61, 61.

⁷⁶ DECC, EN-3 [2.6.10].

⁷⁷ Claire Haggett, ‘“Planning and Persuasion”: Public Engagement in Renewable Energy Decision-Making’ in Patrick Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011).

⁷⁸ Lee and others (n 21); Yvonne Rydin, Maria Lee and Simon Lock, ‘Public Engagement in Decision-Making on Major Wind Energy Projects’ (2015) 27 *Journal of Environmental Law* 139.

treated separately, making local community's engagement with the wider policy questions more difficult.⁷⁹ In this thesis, I argue that this narrative favours an acceptance model over a participatory model. The factors that shape people's attitudes towards energy infrastructure development are not regarded as legitimate reasons to reject the application, as the cases of the Rampion Offshore Wind Energy Project (chapter 6) and the Navitus Bay Wind Park (chapter 7) illustrate.

The second consideration is broader and pertains to the role of planning law. Planning law takes centre stage in regulatory decision-making on wind energy infrastructure. As Fisher explains, its role is twofold as it relates to 'the creation of frames that regulate what a wind energy development is and when, where and how it can be built; and the resolution of disputes that arise in relation to wind energy development'.⁸⁰ Here I argue that, although central, the framing role of planning law in decision-making for wind energy NSIPs is particularly fragile vis-à-vis other parallel framing forces, such as the National Policy Statement (NPS) process. And in decisions on wind energy NSIPs consent, the narrative of urgency and need has meant that the role of planning itself 'has been reframed to foster the delivery of energy infrastructure and other forms of development rationalised as vital in tackling climate change'.⁸¹ This reframing could be seen as a sanction of the 'legally disruptive nature of climate change',⁸² and of wind energy infrastructure.⁸³ It could also represent a natural consequence of the complex relationship between climate law and environmental law.⁸⁴

However, political concerns about climate change have sometimes challenged the sustainability discourse on planning.⁸⁵ According to Owens and Cowell, this reframing of the role of planning for NSIPs has two consequences: on the one hand, it defines and facilitates 'a whole new category of "essential developments" in the absence of wider reflection on human values, duties and priorities'.⁸⁶ On the other hand, it shrinks reflexivity by reducing the possibility of contestation and challenge of carbon reduction policies. As a result, the role of planning as an institutional process for 'deciding whose voice should be heard in determining these issues and, ultimately,

⁷⁹ With respect to NSIPs more generally, Phil Johnstone, 'Planning Reform, Rescaling and the Construction of the Postpolitical: the Case of The Planning Act 2008 and Nuclear Power Consultation in the UK' (2014) 32 *Environment and Planning C* 697.

⁸⁰ Fisher (n 13) 536.

⁸¹ Owens and Cowell (n 11) 13.

⁸² Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *Modern Law Review* 173 (especially focusing on climate change adjudication).

⁸³ Fisher (n 13).

⁸⁴ Chris Hilson, 'It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law' (2013) 25 *Journal of Environmental* 359.

⁸⁵ Owens and Cowell (n 11) 13.

⁸⁶ *ibid.*

whose voice should count⁸⁷ is 'underplayed' in the light of the compelling policy objectives of climate change mitigation and infrastructure development.⁸⁸ A sense of frustration with the delays in project consent, together with the idea that local resistance is a barrier to development (especially for onshore projects) led to relegating the planning process to a mere instrument to speed up implementation and provide institutional support for policy decisions. And this has an impact on the scope for participation and the model of engagement. When its primary function is to implement decisions already taken at national policy level, planning becomes the institutional mechanism to implement an acceptance model of public engagement. This process of reframing opens up questions that go beyond the role of planning within the regulatory process for wind energy infrastructure to challenge how to reconcile urgency and participation in tackling climate change more widely.⁸⁹

Some scholars have argued that, rather than downplaying its role for the delivery of emissions reductions, planning should play a more active function by recognising its 'important role in delivering opportunities for wider public and interest group involvement, which necessarily becomes attenuated when priority is allocated to particular outcomes'.⁹⁰ Others have emphasised the role of the regulatory process in constructing the reasons for a decisions.⁹¹ But again the question remains as of which factors can or should be taken into account in such construction, as explained in chapter 3.

5. Participatory Potential of Community Benefits: A Justice Perspective

The limitation in substantive lay public participation resulting from streamlining the planning process is problematic. Particularly from the point of view of participants, it generates frustration, alienation and disengagement, ultimately affecting the healthy functioning of the democratic process.⁹² But this situation can also lead to the exploration of alternative spaces for participation. Citing Jasanoff's work, Owens and Cowell have explained this through the image of 'squeezing a balloon': 'when contentious issues are squeezed out of the system in one place, working democracies

⁸⁷ Yvonne Rydin, *The Purpose of Planning – Creating Sustainable Towns and Cities* (Policy Press 2011) 10.

⁸⁸ Owens and Cowell (n 11) 9.

⁸⁹ On this point, Gordon MacKerron, 'Lessons from the UK on Urgency and Legitimacy in Energy Policymaking' in Ivan Scrase and Gordon MacKerron (eds), *Energy for the Future: A New Agenda* (Palgrave Macmillan 2009).

⁹⁰ Owens and Cowell (n 11) 15.

⁹¹ Rydin and others (n 12).

⁹² See n 44 above.

tend to find ways of dealing with them in another'.⁹³ This metaphor is useful here as this thesis looks into the practice of community benefits provision as an additional, complementary space for participation, other than the planning process (chapter 8). I am interested in the extent to which the local community can participate and influence decisions about the design and management of voluntary, developer-led community benefits, in parallel with the authorisation process.

Community benefits in respect of infrastructure projects are 'non-standardised, non-institutionalised, locally varying and voluntary gestures' offered by the developer to the local community.⁹⁴ They are intended to provide positive contributions to an area and people affected by a project, but their practice is contested in part because the reasons for offering them are also problematic. The possible rationales range from re-localising benefits and sharing rewards ("re-localisation rationale") to being 'good neighbours with the community' ("corporate social responsibility rationale"); from increasing local acceptance of projects ("local acceptance rationale") to recognising a symbolic (not legal) ownership of the resources by the community ("host recognition rationale"). I argue in chapter 8 that community benefits should be understood as having the potential to contribute to environmental justice. I contend first, and in common with Cowell and others, that community benefits can offer a platform to reopen the debate on the distribution of benefits and impacts from the project.⁹⁵ Second, I build on this literature by arguing that the process by which community benefits are defined in any particular case can contribute to addressing some of the limits of participation in the regulatory process by which development consent has been granted. This "participatory potential" of community benefits can be understood by locating their function within a conception of environmental justice. However, I note that despite the potential of this conceptual framework, the English experience of policy and practice of community benefits is unable to effectively and consistently develop such potential, in large part because local community's participation is not factored into the process of deciding the design and management of community benefits. I therefore see the current practice of community benefits as another example of an acceptance model of decisions about the distribution of costs and benefits. While the full argument is developed in chapter 8, here I briefly introduce the academic debate on the multiple

⁹³ Owens and Cowell (n 11) 17 citing Sheila Jasanoff, *Ungoverned Reason: The Politics of Public Rationality*, Leverhulme Lectures, University of Cambridge, 16, 17 and 18 May 2007.

⁹⁴ David Rudolph, Claire Hagggett and Mhairi Aitken, 'Community Benefits From Renewables: The Relationship between Different Understanding of Impact, Community and Benefit' (2018) 36 *Environment and Planning C* 92 (citing Marianna Markantoni and Mhairi Aitken, 'Getting Low-carbon Governance Right: Learning from Actors Involved in Community Benefits' (2016) 21 *Local Environment* 969).

⁹⁵ Cowell, Bristow and Munday (n 23).

conceptions of environmental justice as the background to my reasoning on the participatory potential of community benefits.

There are manifold theories of justice and a detailed examination of the vast environmental justice literature is beyond my scope. However, a brief explanation of the main, intertwined conceptions of justice as distributive, recognitional and procedural is in order here. Some have pointed to the limitations of the notion of environmental justice.⁹⁶ However, I claim that through a justice framework an understanding of how the multiple conceptions of justice are reflected in the rationales for community benefits is conducive to appreciate the participatory potential of these mechanisms.

The dominant theory of environmental justice refers to fairness in the distribution of environmental goods and bads (i.e. distributive justice / justice as fairness).⁹⁷ This means that 'environmental inequality occurs when the costs of environmental risk, and the benefits of good environmental policy, are not shared across the demographic and geographic spectrums'.⁹⁸ For Shrader-Frechette, distributive justice 'requires a fair and equitable distribution of society's technological and environmental risks and impacts'.⁹⁹ In other words, '[i]t refers to the morally proper apportionment of benefits and burdens'.¹⁰⁰ This conception of justice is easily recognised in the justification for community benefits where a distributive justice intent is entrenched in the idea of re-locating benefits and sharing costs with the community.¹⁰¹

However, critics of a purely distributive conception of justice have argued that this does not capture the social context in which injustices occur.¹⁰² A focus on the reasons for misdistribution and their social context is therefore a necessary precondition for attaining justice (i.e. recognitional justice / justice as recognition). Some authors capture this point, arguing that '*lack of recognition in the social and political realms [...] inflicts damage to oppressed individuals and communities in the*

⁹⁶ Ole Pedersen, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law' (2010) 31 *Legal Studies* 279. Cf Mark Stallworthy, 'Environmental Justice Imperatives for an Era of Climate Change' (2009) 36 *Journal of Law and Society* 55.

⁹⁷ Mostly derived as a support or critique to John Rawls. Although outside my scope here, see John Rawls, *The Idea of Justice* (Harvard University Press 1971); John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 223-51; John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001).

⁹⁸ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007) 56.

⁹⁹ Kristin Shrader-Frechette, *Environmental Justice: Creating Equity, Reclaiming Democracy* (OUP 2002) 24-25.

¹⁰⁰ *Ibid.*

¹⁰¹ Richard Cowell, Gill Bristow, and Max Munday, 'Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development' (2011) 54 *Journal of Environmental Planning and Management* 539; Cowell, Bristow and Munday (n 23).

¹⁰² Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) chapter 1.

political and cultural realms'.¹⁰³ Although recognitional justice claims are often overshadowed by distributive justice approaches, these two conceptions of justice are mutually supportive. The theory of recognition is little addressed in the environmental justice literature.¹⁰⁴ But I would argue that it is an important concept when dealing with issues of alienation, frustration and marginalisation identified in Fiorino's participatory dilemma, illustrated earlier. Much of this is also evident in people's arguments about wind farm proposal and the sense of victimisation or marginalisation of a community affected by the impact of a project, as the cases studies in chapters 5 and 6 show.¹⁰⁵ Recognitional justice claims can help understand community benefits as a matter of being good neighbours and identifying the recipient community as a peer and experienced interlocutor. This conception of justice also speaks to the multidimensional concept of 'public acceptance' and the complex nature of the idea of 'community'.¹⁰⁶

Of course, the notion of "community" has been seen as a 'political ideal' or a 'myth' in both the political philosophy and environmental conservation literature.¹⁰⁷ As a main criticism, the concept of "community" is considered to give an idealistic picture of an aggregation of people linked by uniform interests and harmonious social relations. However, this notion is widely used in planning and land-management to refer to a group of people affected or in other ways engaged with the positive and negative effects of an infrastructure development. But even in this more specific domain, the meaning as well as the physical and social boundaries of the concept remain problematic.¹⁰⁸

The debate on local participation and social acceptance of renewable energy and climate change infrastructure has engaged with the complexities and nuances of this concept, stressing the risks of a one-size-fits-all solution.¹⁰⁹ Recognition of a community's identity and diversity in needs, expectations and values are indeed essential factors to enable a fair distribution of benefits and impacts associated with the

¹⁰³ Schlosberg (n 98) 14 (emphasis in the original) referring to Young, *ibid*

¹⁰⁴ But see Brad Jessup, 'Justice, Recognition and Environmental Law: The Weilangta Forest Conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5.

¹⁰⁵ Similar framing emerged in the examination of the Clocaenog Onshore Wind Farm (Wales) and the Burbo Bank Offshore Wind Projects (England) discussed in Armeni (n 21).]

¹⁰⁶ On 'public acceptance', see chapter 3 below.

2. ¹⁰⁷ Iris Marion Young, 'The Ideal of Community and the Politics of Difference' (1986) 12 *Social Theory and Practice* 1; Arun Agrawal and Clark Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resources Management' (1999) 27 *World Development* 629.

¹⁰⁸ Heather Campbell, 'The Darker Side of Local Communities: Is this the Real World of Planning?' (2005) 6 *Planning Theory & Practice* 517; Emily Talen, 'The Problem with Community in Planning' (2000) 15 *Journal of Planning Literature* 171.

¹⁰⁹ Gordon Walker and Patrick Devine-Wright, 'Viewpoint – Community Renewable Energy: What Should it Mean?' (2008) 36 *Energy Policy* 497; Dan van der Horst, 'NIMBY or not? Exploring the Relevance of Location and the Politics of Voiced Opinions in Renewable Energy Siting Controversies' (2007) 35 *Energy Policy* 2705; Gordon Walker, 'The Role for "Communities" in Carbon Governance' (2011) 2 *Climate Change* 6.

projects. To this end, the meaning of “community” is central to the question of who the recipient of community benefits in respect of wind energy infrastructure is, which I develop in chapter 8. Across the thesis I take an open-ended approach to what a community is, building on Brown and Pitcher’s suggestion that ‘at its simplest, a community is a set of people who are brought together by choice or force of circumstance, and who have learned to live, work and play together’.¹¹⁰

Another significant approach to environmental justice is to focus on procedural justice understood as fair and equitable institutional processes (i.e. procedural justice / justice as participation).¹¹¹ Procedural justice sees ‘the political process as a way to address both the inequitable distribution of social goods and the conditions undermining social recognition’.¹¹² Schlosberg explains its significance well by saying that:

‘while material distribution and recognition are two absolutely key notions of justice in the contemporary political realm, the focus on the *process* of justice, including demands for more broad and authentic public participation, is often seen as the tool to achieve both distributive equity and political recognition’.¹¹³

‘Broad and authentic’ participation in the political and institutional decision-making process is necessary for procedural justice.¹¹⁴ Not only does participation respond to procedural as well as substantive claims for inclusion, but it also plays a connecting function between distributive and recognitional justice claims. As Young notes, ‘democratic and participatory decision-making procedures are then both an element of, and a condition for, social justice’.¹¹⁵ From this perspective, lack of participation opportunities impacts on the ability of the process to substantially respond to distributive and recognitional claims. In the context of environmental justice, Schlosberg reinforces this point, highlighting that:

‘The construction of inclusive, participatory decision-making institutions – speaking for ourselves, a ‘place at the table’, equal, informed, respectful participation – has consistently been at the center of environmental justice

¹¹⁰ Valerie Brown and Jennifer Pitcher, ‘Linking Community and Governments: Islands and Beaches’ in Meg Keen, Valerie A Brown and Rob Dyball (eds), *Social Learning in Environmental Management: Towards a Sustainable Future* (Earthscan 2005) 124.

¹¹¹ Schlosberg (n 98) 27. See also in this point, David Schlosberg, ‘Reconceiving Environmental Justice: Global Movements And Political Theories’ (2004) 13 *Environmental Politics* 517.

¹¹² *ibid* 26.

¹¹³ *ibid*.

¹¹⁴ See discussion on procedural rationale of participation in chapter 2 below.

¹¹⁵ Young (n 102) 23.

demands. Environmental activists call for policymaking procedures that encourage active community participation, institutionalize public participation, recognize community knowledge, and utilize cross-cultural formats and exchanges to enable the participation of as much diversity as exists in a community'.¹¹⁶

Framing participation through the lens of environmental justice is therefore a useful way to assess both participation in development consent decisions and the participatory potential of community benefits. This potential refers to the ability of community benefits to empower a community to engage in decisions associated with the design and management of these schemes. The justice framework conceptualises this potential as a matter of fair distribution of costs and benefits, of ability to have one's voice heard in the decision-making process, as well as of recognition of the local community within the participatory space associated with community benefits mechanisms. However, as I explain, this potential is not fully reflected in the policy and practice of community benefits in respect of wind energy infrastructure in England. I suggest that this disconnection between the theory and practice of these schemes reiterates an acceptance of public engagement in decisions on the design and management of these schemes taken by the developer (sometimes based on expert advice).

Operationalising the participatory potential of community benefits would allow a shift from an acceptance model to a participatory model. This is based on the idea that simply associating community benefits with distributive justice is likely to dismiss important recognitional and procedural justice elements. These elements would enable community benefits to rebalance the shortcomings of participation in regulatory decision-making for wind energy projects discussed in the previous section, like Owens and Cowell's image of 'squeezing a balloon'.¹¹⁷

6. Scope of the Research

This thesis addresses two primary research questions. First, it explores the nature and space for public participation in decision-making on planning for climate change infrastructure in England. In this context, I am particularly interested in how the Examining Authority explains its decision. I look at the way in which participation is reflected in the decision and the reasons for the decision, which should also speak to

¹¹⁶ Schlosberg (n 98) 65-66 (emphasis added).

¹¹⁷ n 93.

the outcome of the process. Second, this thesis investigates the role of planning law and other processes, such as community benefit provision, in facilitating or restricting spaces for public participation. These two strands of the research engage with the conceptual nature of public participation and its implications for models of engagement in decision-making on wind energy infrastructure. They also address the regulatory issues associated with the distinctiveness of decision-making on wind energy infrastructure, at the crossroad between calls for urgency and claims for legitimacy of mitigation action.

I argue that when regulatory decision-making is driven by urgency and necessity, the weight of the lay public's views and expectations about the direction of technological development in the decisions is likely to be reduced. The conventional assumption underlying decision-making in this context is that climate change mitigation leaves no time nor legitimate ground for substantive public influence beyond the legal (procedural) space for participation. This thesis reflects on the regulatory approach to participation in offshore wind energy Nationally Significant Infrastructure Projects (NSIPs) in England. It frames this approach as characteristic of a model of public engagement as a mere instrument to achieve passive public acceptance of decisions already made and speed up implementation ("acceptance model"), compared to a model of deliberative participation based on exchange of views about alternatives ("participatory model"). This model is not only visible with respect to decisions on consenting the infrastructure, but also in decisions on the design and management of community benefits routinely attached to the implementation of wind energy projects.

I suggest that the limitations in the influence of participation in these decisions require regulators and legal scholars to rethink the way the regulatory process constructs such influence and how community benefits are understood and justified. Considering the wider context in which climate change and wind energy infrastructure 'disrupt' law and regulation, such a rethink requires a re-consideration of the role of planning law in facilitating participation in a climate change context.¹¹⁸ I do not suggest that people should have a veto right or give prior consent on decisions on climate change technologies. As Owens and Cowell have argued, 'local communities cannot be permitted a monopoly of interpretation simply by virtue of being local'.¹¹⁹ However, both the legal and the regulatory process should give more weight to the factors shaping people's engagement with this technological shift, if we are committed to the value of participation, as I further illustrate in chapter 3.

3. ¹¹⁸ Fisher, Scotford and Barritt (n 82); Fisher (n 13).

¹¹⁹ Owens and Cowell (n 11) 73. On this point also, Adrian Smith and Andy Stirling, 'Moving Outside or Inside? Objectification and Reflexivity in the Governance of Socio-Technical Systems' (2007) 9 *Journal of Environmental Policy & Planning* 351.

The purpose of this research is to offer a new lens to frame the nature of the issue as a question of models of public engagement in regulatory decision-making and community benefits provisions. It also aims to instigate the way environmental legal scholars understand the regulatory process and the factors shaping people's expectations for participation in such a complex policy and legal landscape.

The research questions explored in this thesis have deep interconnections with a range of academic debates associated with public participation and regulatory decision-making in energy infrastructure development. Concerns about scale as well as the nature of expertise and experts are perhaps the most significant ones. Although important and interesting, these are not areas I focus on. However some scene-setting is useful here to show how my research questions intersect with these broader discussions.

6.1. Scale

First, the concept of scale has been explored in a vast multidisciplinary literature.¹²⁰ To simplify the definitional debate, 'scale' can refer to the size and spatial extent of a phenomenon,¹²¹ as well as to specific governance levels and their interrelations.¹²² Scale as level of governance is an important analytical tool for environmental law scholars.¹²³ But the dialogue and interchange between scales is difficult and a sharp divide between scales is contested.¹²⁴ The notion of scale is often seen as a social construction¹²⁵ or a political creation.¹²⁶ However, scalar reframing is constantly used in

¹²⁰ For a review: Frans Padt and Bas Arts 'Concepts of Scale' in Frans Padt, Paul Opdam, Nico Polman and Catrien Termeer (eds) *Scale-Sensitive Governance of the Environment* (Wiley 2014); Neil Brenner, 'The Limits of Scale? Methodological Reflections on Scalar Structuration' (2001) 25 *Progress in Human Geography* 591.

¹²¹ E.g. Rob Raven, Johan Schot and Frans Berkhout, 'Space and Scale in Socio-Technical Transition' (2012) 4 *Environmental Innovation and Societal Transition* 63.

¹²² See David W Cash and others, 'Scales and Cross-scales Dynamics: Governance and Information in a Multilevel World' (2006) 11 *Ecology and Society* 8.

¹²³ E.g. Joanne Scott, 'The Multilevel Governance of Climate Change' (2011) 5 *Carbon and Climate Law Review* 25; Hari Osofsky, 'Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen' (2010) 25 *Maryland Journal of International Law* 64.

¹²⁴ Harriet Bulkely, 'Reconfiguring Environmental Governance: Towards a Politics of Scales and Networks' (2005) 24 *Political Geography* 875; Richard Cowell, 'Substitution and Scalar Politics: Negotiating Environmental Compensation in Cardiff Bay' (2003) 34 *Geoforum* 343; Marleen Buizetr, Bas Arts and Kasper Kok, 'Governance, Scale and the Environment: The importance of Recognising Knowledge Claims in Transdisciplinary Arenas' (2011) 16 *Ecology and Society* 21.

¹²⁵ Sallie A Marston, 'The Social Construction of Scale' (2000) 24 *Progress in Human Geography* 219. Cf Brenner (n 120).

¹²⁶ David MacKinnon, 'Reconstructing Scale: Towards a New Scalar Politics' (2011) 35 *Progress in Human Geography* 21.

environmental discourses resisting local framings and replacing them with national or global ones,¹²⁷ and vice versa.¹²⁸

Although not discussed in this thesis, issues of scale are inevitably entrenched in decision-making on renewable infrastructure and planning.¹²⁹ Devine-Wright and Batel illustrate this well, explaining how ‘[[l]ow carbon energy infrastructure are not just local projects. Whilst having obvious local materiality and impact, they implicate relationships and concerns at multiple spatial scales, notably the national and the global’.¹³⁰ References to “urgency”, “need” and “national significance” of wind energy infrastructure projects also ‘have implications for discourses on objections’ at a local level.¹³¹ Moreover, scale is an interesting framing to understand the staging of public participation on decisions about national priorities, ‘sidestepping the possibility for the return to in-principle discussions’ at local level.¹³² The scale debate is also relevant in the context of policy shift in decision-making on onshore wind farms to local authorities under ordinary planning, discussed later in the thesis.

6.2. Nature of Expertise

Second, the questions discussed in this thesis also have deep interconnections with the academic debate over the nature of expertise and who is an expert. The academic literature around the nature and the role of ‘experts’ in public decision-making is vast and stimulating.¹³³ The job of the experts has traditionally been the one of ‘speaking

¹²⁷ Chris Hilson, ‘Framing the Local and the Global in the Anti-nuclear Movement: Law and the Politics of Place’ (2009) 36 *Journal of Law and Society* 94.

¹²⁸ For example through a ‘localism turn’. See within the vast literature: Nancy Holman and Yvonne Rydin, ‘What Can Social Capital Tell Us About Planning Under Localism’ (2013) 39 *Local Government Studies* 71; Antonia Layard, ‘Law and Localism: the Case of Multiple Occupancy Housing’ (2012) 32 *Legal Studies* 551; Antonia Layard, ‘The Localism Act 2011: What is “Local” and How Do We (Legally) Construct It?’ (2011) 14 *Environmental Law Review* 134.

¹²⁹ Patrick Devine-Wright and Susana Batel, ‘My Neighbourhood, My Country or My Planet? The Influence of Multiple Place Attachments and Climate Change Concern on Social Acceptance of Energy Infrastructure’ (2017) 47 *Global Environmental Change* 110. See also Gavin Bridge and others, ‘Geographies of Energy Transition: Space, Place and the Low-Carbon Energy Economy’ (2013) 53 *Energy Policy* 331; Ainoha González, Gavin Daly and Justine Gleeson, ‘Congested Spaces, Contested Scales – A Review of Spatial Planning for Wind Energy in Ireland’ (2016) 145 *Landscape and Urban Planning* 12; Andreas Goldthau, ‘Rethinking the Governance of Energy Infrastructure: Scale, Decentralisation and Polycentrism’ (2014) 1 *Energy Research and Social Science* 134; Richard Cowell, ‘Decentralising Energy Governance? Wales, Devolution and the Politics of Energy Infrastructure Decision-Making’ (2017) 35 *Environment and Planning C* 1242.

¹³⁰ Devine-Wright and Batel (n 129) 111.

¹³¹ *ibid.*

¹³² Johnstone (n 79) 708. See also Richard Cowell and others, ‘Rescaling the Governance of Renewable Energy: Lessons from the UK Devolution Experience’ (2017) 19 *Journal of Environmental Policy and Planning* 480.

¹³³ E.g. Reiner Grundman, ‘The Problem of Expertise in Knowledge Society’ (2017) 55 *Minerva* 25; Harry Collins, *Are We All Experts Now?* (Polity 2014); Frank Fischer, *Democracy and*

truth to power'.¹³⁴ Expert advice is relied upon to provide 'the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in the consideration, and expeditiousness in their disposition'.¹³⁵ But while decision-making relies heavily on expert advice in many fields, who is an expert, how to mediate conflicts among experts and how to ensure that the best available expertise is used remain hugely problematic.¹³⁶ This is in part because the idea of expertise – and expert knowledge – as universally valid, impartial and objective is contested.¹³⁷ As knowledge is contingent, partial and fragile, so is expertise.¹³⁸ In this sense, 'expertise is not so much *found*' as an apolitical and neutral input, but rather '*made*' by its socio-political context.¹³⁹ This poses the key issue over the authority of the 'experts' and, ultimately, the democratic legitimacy of expert-based decision-making.¹⁴⁰ These issues complement the debate on the relation between expertise and the public participation, and the weight attributed to technical expertise and lay public knowledge in decision-making, as I illustrate in the next chapter.¹⁴¹

My intention, as a part-time PhD candidate, has been to ensure that the case studies presented in this thesis are up to date as at 1 September 2018 (when I went on maternity leave). The law, policy and scholarship is up-to-date as of May 2019. Some later developments have been included.

Expertise: Reorienting Policy Inquiry (OUP 2009). For an overview, Monica Ambrus and others, *The Role of 'Experts' in International and European Decision-making Process* (CUP 2014). In specific contexts: Mhairi Aitken, 'Wind Power Planning Controversies and the Construction of "Expert" and "Lay" Knowledges' (2009) 18 *Science as Culture* 47; Brian Wynne 'Creating Public Alienation: Expert Cultures of Risk and Ethics on GMOs' (2001) 10 *Science as Culture* 446; Judith Petts and Catherine Brooks, 'Expert Conceptualisation of the Role of Lay Knowledge in Environmental Decision-Making: Challenges for Deliberative Democracy' (2006) 38 *Environment and Planning A* 1045.

¹³⁴ Sheila Jasanoff, *The Fifth Branch-Science Advisers as Policymakers* (Harvard University Press 1990); Sheila Jasanoff, 'Contested Boundaries in Policy-Relevant Science' (1987) 17 *Social Studies of Science* 195; David Collingridge and Colin Reeve, *Science Speaks to Power: The Role of Experts in Policymaking*, (St Martins' Press 1986).

¹³⁵ Giandomenico Majone, 'Regulation and its Modes' in Giandomenico Majone (ed) *Regulating Europe* (Routledge 1996) 16 cited in Jacqueline Peel, *Science and Risk Regulation in International Law* (CUP 2010) 51.

¹³⁶ Sheila Jasanoff (n 40) 11.

¹³⁷ See in particular the debate in Science and Technology Studies (STS): Harry Collins and Rob Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (2002) 32 *Social Studies of Science* 235, 296 (who reject co-production and claim that expertise should be separated from experience). Cf Brian Wynne, 'Seasick on the Third Wave? Subverting the Hegemony of Propositionalism: Response to Collins and Evans (2002)' (2003) 33 *Social Studies of Science* 401.

¹³⁸ Brian Wynne, 'Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventing Paradigm' (1992) 2 *Global Environmental Change* 111.

¹³⁹ Sheila Jasanoff, '(No) Accounting for Expertise?' (2003) 30 *Science and Public Policy* 157, 159 (emphasis in the original). On the wider claim, Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Harvard University Press 1997); Sheila Jasanoff, 'Breaking the Waves in Science Studies: Comment on HM Collins and Robert Evan, "The Third Wave of Science Studies"' (2003) 33 *Social Studies of Science* 389.

¹⁴⁰ E.g. Stephen Turner, 'What is the Problem with Experts?' (2001) 31 *Social Studies of Science* 123.

¹⁴¹ See chapter 2.

7. Research Methodology

This thesis presents research conducted in three stages, between September 2013 and May 2019. The first stage involved a detailed review of the political philosophy, legal and socio-legal literature on participation in environmental decision-making as a basis for the construction of a theory of public acceptance. I focused on the conceptual meaning, function and rationales for participation in decision-making and democratic models. This has led me to engage with the framing of citizens' participation in the liberal and deliberative political philosophy, as well in environmental decision-making and planning. Building on this literature, I then concentrated on the specific issues arising when looking at participation in regulatory decision-making and planning for wind energy developments in England and the multifaceted idea of "public" or "social acceptance" of energy infrastructure. Here, I have engaged with the social science scholarship (i.e. human geography, sociology and planning theory) explaining and challenging the notion of, and factors shaping, public acceptance. Building on this debate, I constructed a theory of public acceptance as a limited approach to people's influence in decision-making. To this end, I explained and confronted the different approaches to public engagement and decision-making offered by an acceptance model and a participatory model.

In the second phase, I conducted an analysis of the legal and policy framework. This examination concentrated primarily on the Planning Act 2008;¹⁴² policy documents governing decision-making on wind energy infrastructure¹⁴³; and policy guidance on community benefits from wind energy developments.¹⁴⁴ This provided insights in the manner in which law and policy understand and frame the nature and scope of public participation in decision-making on climate change infrastructure. Testing the legal and policy regime for offshore wind energy NSIPs against an acceptance framework, the research has shown that the regulatory decision-making for wind projects in England tends to implement an acceptance model by limiting the substantive influence of individuals' arguments, in the light of pressing energy and climate mitigation objectives.¹⁴⁵

In the third stage, the research evolved into a desk-based qualitative empirical analysis of two case studies of offshore wind energy NSIPs applications: the Rampion

¹⁴² as amended by the Localism Act 2009.

¹⁴³ i.e EN-1 and EN-3 (n 74); Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (February 2019) (hereinafter "NPPF"); DCLG, *Planning Practice Guidance* (2016) (hereinafter "PPG") <<https://www.gov.uk/government/collections/planning-practice-guidance>> accessed 26 August 2019.

¹⁴⁴ i.e. DECC, *Community Benefits from Onshore Wind Developments: Best Practice Guidance for England* (October 2014) (hereinafter "DECC Guidance").

¹⁴⁵ Lee and others (n 21).

Offshore Wind Farm Project (consented in 2014) and the Navitus Bay Wind Park (rejected in 2015). My methodology is discussed in detail in chapter 5 below.

8. Structure

This thesis is structured as follows. In chapter 2, I explore the meaning and justifications of public participation in environmental decision-making from a theoretical perspective. I engage with how participation is framed in political philosophy, environmental law and planning theory, also engaging with the relationship between expertise and democratic participation as evidence for a decision. I then move to the formulation of a theory of acceptance and the distinction between the two models of engagement in decision-making in chapter 3. Here, I explore the notion of acceptance and the factors shaping it, as a starting point to explain the differences between the two models and their implications for the opportunities for the public to influence decisions on energy infrastructure development. In chapter 4, I link the theoretical discussion and the analytical framework of the theory of acceptance to the legal and policy regime governing development consent for wind energy NSIPs in England. In that context, I explain the elements that make the approach to participation within this regulatory process align more with an acceptance model than with a participatory model. In chapters 6 and 7, I illustrate how the acceptance model works in practice through the analysis of the examination for the Rampion Offshore Wind Farm and the Navitus Bay Wind Park, respectively. Chapter 8 shifts the focus from the regulatory decision-making to the policy and practice of community benefits provision. It explores the scope for community participation in decisions on the design and management of the benefits schemes and argues for their participatory potential through the justice framework. The final chapter 9 pulls the threads of the research together, discussing its findings, offering some solutions and pointing at areas for further research.

9. Conclusions

The regulatory decision-making process for consenting new wind energy infrastructure offers a preferential angle to explore issues of democratic participation in decisions on climate change infrastructure. It exposes the inevitability and complexities of the interaction between law, society and technology in environmental law and climate

change mitigation.¹⁴⁶ It is within this forum that the interface and delicate balance between legal and policy requirements, scientific evidence, technological necessities and societal expectations is constructed, often as a matter of contestation.¹⁴⁷ This thesis engages with the space for participation within the decision-making process for large-scale wind energy infrastructure to explore the meaning and scope of people's influence vis-à-vis the imperative of climate change mitigation and the urgent transition to low-carbon energy systems. This is an area of increasing interest for environmental law scholars concerned with participation in environmental decision-making, climate change mitigation and planning for infrastructure development. It is a fascinating and challenging field. On the one side, it demands a conceptual reconsideration of the role of planning law and regulatory processes in reconciling environmental and social pressures and conflicting policy objectives. On the other side, it prompts a structural critique of the model of public engagement entrenched in the regulatory and policy processes driving the transition to a low-carbon energy future.

¹⁴⁶ Elizabeth Fisher, 'Imagining Technology and Environmental Law' in Brownsword, Scotford and Yeung (n 10).

¹⁴⁷ Alex Faulkner, Bettina Lange and Christopher Lawless, 'Introduction: Material Worlds: Intersection of Law, Science, Technology, and Society' (2012) 39 *Journal of Law and Society* 1.

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING AND PLANNING: THEORETICAL FOUNDATIONS AND DEBATES

1. Introduction

Citizens' participation in environmental decision-making is generally considered a condition for the democratic legitimacy of decisions, as well as a means to improve their quality and effectiveness.¹ Despite these merits, the conceptual nature and normative function of participation in democratic systems remain vague and contested.² Participation means different things to different people.³ It can take various forms depending on the underlying democratic model in which it is situated: from voting and public consultation; to deliberation, through dialogue and communication. Within these models, the role of participation varies, affecting the way in which law and regulation embrace calls for democratization.⁴ But the complexity of participation is not limited to the ways in which citizens are engaged in democratic processes. It reaches much deeper into the consideration of what contributions represent "legitimate" reasons for a good decision. This often means that, while citizens' participation acquires central stage in theory, people's rationality within the decision-making process is repeatedly challenged by the authority of "experts". When 'facts' and 'values' are presented as irreconcilable grounds for a decision, the tension between expertise and participation becomes problematic.⁵

This chapter engages with these issues, looking at the rationales and theoretical foundations for citizens' participation in environmental law and planning, as

¹ On participation and legitimacy, Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51. On participation and quality of the decision, Franciscus Coenen, D Huitema, Laurence J. O'Toole (eds), *Participation and the Quality of Environmental Decision Making* (Springer 1998); Mary O'Brien, *Making Better Environmental Decisions: An Alternative to Risk Assessment* (MIT Press 2000).

² By conceptual nature, I mean the meaning of participation and its justifications; by normative function, I refer primarily to the role and forms of participation within a specific political or administrative decision-making framework. The two notions are, however, interconnected and their boundaries are nuanced.

³ E.g. Daniel Fiorino, 'Environmental Risk and Democratic Process: A Critical Review' (1989) 14 *Columbia Journal of Environmental Law* 501,523.

⁴ Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of American Institute of Planners* 216 (arguing that there are significant graduations in the citizens' ability to affect the outcome of the decision-making through participation). See also Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in Benjamin Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing 2006).

⁵ Frank Fischer, *Democracy and Expertise: Reorienting Policy Inquiry* (OUP 2009).

well as the scholarly debate on the role of expertise and lay public participation in decision-making. First, it outlines the multiple and nuanced justifications for participation in environmental decision-making, focusing on its procedural, substantive and instrumental rationales (section 2).⁶ Second, building on the idea of public participation as a democratic necessity, the chapter is concerned with the foundations of public participation in democratic theories (section 3).⁷ Here I am interested in how liberal and deliberative democratic theories articulate different, but intersecting, conceptions of the normative function of participation in the polity. It is against this backdrop that calls for deliberative participation found their way into environmental law and green political theory scholarship, mostly as a critique to liberal models.⁸ Although contested and difficult, deliberative participation is often considered to better reflect the pluralism of environmental values, enhance problem-solving, and foster social learning and a sense of environmental citizenship (section 4).

The arguments in favour of deliberative participation in environmental decision-making reverberate within the planning scholarship (section 5). However, planning theorists appear to have developed a relatively distinctive approach. They have tended to focus on clarifying the purpose of planning and the role of professional planners within it, as a starting point for explaining the nature and normative function of public participation in planning decisions.⁹ This scholarship has seen a transformation in the theoretical framing of planning in society, from a technical activity aimed at education and persuasion, to a relational process for emancipating and empowering individuals and communities, influencing the nature and function of participation.¹⁰ And also here, arguments for deliberation have been persuasive, although not exclusive.

Finally, in the last section, I reflect on the wider context of participation and its implications for environmental decision-making. It engages with the academic debate surrounding the weight of, and relationship between, expert knowledge and lay public rationality in environmental decision-making. This is because the merits of public

⁶ Barry Barton, 'Underlying Concepts and Theoretical Values in Public Participation in Resources Development' in Donald Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development - Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002); Andy Stirling, 'Analysis, Participation and Power: Justification and Closure in Participatory Multi-Criteria Analysis' (2006) 23 *Land Use Policy* 95.

⁷ I do not engage here with all democratic theories and critiques. Nor I develop all aspects of liberal and deliberative democratic thought. My approach is inevitably more selective, as I exclusively address the way in which liberal and deliberative theories conceptualise participation.

⁸ On a critique, Fiorino (n 3). See also Graham Smith, 'Liberal Democracy and the Shaping of Environmentally Enlightened Citizens' in Marcel L J Wissenburgh and Yoram Levy (eds), *Liberal Democracy and Environmentalism: The End of Environmentalism?* (Routledge 2004).

⁹ Marcus B Lane, 'Public Participation in Planning: An Intellectual History' (2005) 36 *Australian Geographer* 283.

¹⁰ Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (Routledge 2005).

participation are often confronted by a legal and policy context where technical assessment and cost-benefit analysis are framed as more authoritative decision-making tools. Such context reinforces assumptions about knowledge and the idea that the public lacks expertise and misunderstands science.¹¹ This inevitably makes the conceptual nature of public participation in decision-making deeply contested and poses challenges to its practice.¹² While the chapter acknowledges that expertise is needed and used as “evidence” in different ways, it also highlights the limits and fragility of common assumptions about the divide between experts’ and lay public’s reasons in environmental decision-making and planning.

2. Rationales for Public Participation in Environmental Decision-making

Public engagement in environmental decision-making is almost uncontroversially considered a “good thing”. However, its rationales are multiple and nuanced, generally based on overlapping justifications.¹³ The core justifications for participation in decision-making are procedural and substantive, pointing in turn to the legitimacy of the decision-making process or the quality of the decision. But there is also a more subtle way in which participation has been conceptualised, centred on an instrumental rationale. This refers to a situation where participatory opportunities are viewed to, sometimes cynically, support and facilitate social acceptance and implementation of decisions. As Stirling notes, ‘[f]rom a normative view, participation is just *the right thing to do*. From an instrumental perspective, it is a better way to achieve particular ends. In substantive terms, it leads to *better ends*’.¹⁴ In this section, I analyse the main arguments and challenges for these justifications.

2.1. Procedural Rationale

A focus on participatory procedures is inherent in the quest for democratic legitimacy of decision-making processes and their outcomes.¹⁵ In democratic systems, people have

¹¹ Brian Wynne, ‘May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Public Divide’ in Scott Lash, Bronislaw Szerszynski and Brian Wynne (eds), *Risk, Environment and Modernity: Towards a New Ecology* (SAGE 2004).

¹² Ebbesson (n 1) arguing that issues of implementation and conceptual nature remain unsettled.

¹³ Barton (n 6); Stirling (n 6).

¹⁴ Andy Stirling, ‘Opening Up or Closing Down? Analysis, Participation and Power in the Social Appraisal of Technology’ in Melissa Leach, Ian Scoones and Brian Wynne (eds), *Science and Citizens - Globalization and the Challenge of Engagement* (Zed Books 2005) 220 (emphasis in the original).

¹⁵ Robert Summers, ‘Evaluating and Improving Legal Processes A Plea for Process Values’ (1974) 60 *Cornell Law Review* 1. See also Daniel Fiorino, ‘Citizen Participation and

the legal right to be informed and participate in shaping decisions that will affect their environment.¹⁶ Some have taken this rationale even further, arguing that those affected by a proposed project should grant their prior consent.¹⁷ Without going thus far, it is generally admitted that participation in environmental decision-making constitutes a principle of good governance and agency practice.¹⁸

As a mechanism for democratising the environmental decision-making process, participation is therefore an end in itself. It is viewed as a tool to democratically restrain executive power and catalyse transparency and public accountability, while at the same time creating a sense of public “ownership” of the outcome.¹⁹ This procedural rationale for public participation is a key tenet of procedural justice, as discussed in the previous chapter. It also contributes to the theoretical debate on proceduralization of law. Although the details of the theories of proceduralization of law are complex and outside my scope here, proceduralization trends in law can be explained as embracing a concern with the way norms are created, rather than about their substance.²⁰ The shift towards proceduralization focuses on both the conditions of involving actors in the decision-making process and norm-creation, as well as the criteria for norm-evaluation.²¹ Calls for proceduralization react in various forms to the failure of command and control regulation, societal complexities and the increasingly decentralised nature of decision-making power with respect to collective action problems, such as climate change.²² In increasingly complex areas of environmental law and risk regulation, where law and policy-making are pervaded by uncertainties and tensions between factual and normative justifications, the function of

Environmental Risk: A Survey of Institutional Mechanisms’ (1990) 15 *Science Technology and Human Values* 226.

¹⁶ See discussion in Chapter 4.

¹⁷ Barton (n 6). For examples of Free, Prior Informed Consent (FPIC) obligations in international environmental law treaties, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (CUP 2012).

¹⁸ E.g. Commission, ‘European Governance - A White Paper’ COM (2001) 428 final; UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) UNTS 2161, 446; Science and Technology Committee, *Science and Society* (HL 1999-2000, 38-I); Department for Environment, Food & Rural Affairs (DEFRA), *Securing the Future: Delivering UK Sustainable Development Strategy – The UK Sustainable Development Strategy* (Cm 6467, 2005); DEFRA, *A Better Quality of Life – A Strategy for Sustainable Development in the United Kingdom* (Cm 4345, 1999).

¹⁹ E.g. RCEP, 23rd Report, *Environmental Planning* (2002) Chapter 5.

²⁰ For key sources, see Rudolf Wiethölter, ‘Materialisation and Proceduralisation of Modern Law’ in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (European University Institute 1985); Duncan Kennedy, ‘Comment on Rudolf Wietholter’s “Materialization and Proceduralization in Modern Law,” and “Proceduralization of the Category of Law,”’ in Christian Joerges and David Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos Verlagsgesellschaft 1988); Karl-Heinz Ladeur, ‘Proceduralization and Its Use in Post-Modern Legal Theory’ European University Institute (EUI LAW 1996/05).

²¹ Seminally, Jürgen Habermas, *Legitimation Crisis* (Beacon Press 1975).

²² On climate change as a collective action problem, Elinor Ostrom, ‘A Multi-Scale Approach to Coping with Climate Change and Other Collective Action Problems’ (2010) *Solutions* 27.

proceduralization of law has been viewed to 'precisely [hide] those tensions and contradictions as a means of immunizing society against terminal indecision'.²³ The effects of proceduralization of law upon the conceptual meaning of participation in regulation are important.²⁴ In her account of the implications of a shift toward procedure and participation in regulation, Black notes how proceduralization of participation could take two forms: bargaining and compromise, characteristic of liberal democracy ('thin proceduralization') or mutuality, consensus and inter-subjective understanding of deliberative democracy ('thick proceduralization').²⁵ She argues that deliberative forms of proceduralization enable fuller participation and should be strengthened, as I further explain later in this chapter. Although occasionally challenged,²⁶ proceduralization of environmental regulation has been extensively discussed as an attractive mechanism to enable participation, regulatory flexibility and responsiveness.²⁷

From the participants' perspective, engagement in the process is a way to foster critical attitudes and democratic capacity.²⁸ This means that, through public participation, citizens become more knowledgeable and inclined to challenge policy decisions. In an environmental decision-making context, the right to participate has been seen to generate a sense of "environmental citizenship" that might catalyse behavioural change and enhance the collective understanding of social, environmental and governance challenges.²⁹ Participation in this sense absolves an educational function, by stimulating social learning and awareness, as I discuss further below.³⁰

²³ John Paterson, 'Trans-Science, Trans-Law and Proceduralisation' (2003) 12 *Social and Legal Studies* 525, 534.

²⁴ Ian Ayres and John Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (Oxford Socio-Legal Studies 1995); Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *American Journal of International Law* 211.

²⁵ Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597.

²⁶ Robert Goodin, *Green Political Theory* (Polity Press 1992). Cf Andrew Dobson, *Green Political Thought* (4th edn, Routledge 2007) and Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship* (Routledge 1996).

²⁷ See Joanne Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU' in Grainne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000); Karl-Heinz Ladeur, 'Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law' in Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility: the Concept and Practice of Ecological Self-Organisation* (Wiley-Blackwell 1994).

²⁸ E.g. Walter F Baber and Robert Bartlett, *Deliberative Environmental Politics: Democracy and Ecological Rationality* (MIT 2005) 171; John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestation* (OUP 2000) 21; Adolf G Gundersen, *The Environmental Promise of Deliberative Democracy* (University of Wisconsin 1995).

²⁹ Andrew Dobson, 'Environmental Citizenship: Towards Sustainable Development' (2007) 15 *Sustainable Development* 276.

³⁰ See Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP 2004) (drawing a connection between social learning through participation and growing concerns for environmental justice, at 198). See also Daniel Fiorino, 'Rethinking Environmental

It is primarily from this procedural perspective that that the right to participate in environmental decision-making is institutionalised in international, EU and national law as a - primarily - procedural environmental right, although with a substantive aim (as I explain in chapter 4).³¹

2.2. Substantive Rationale

Public participation is as much about the substantive quality of a decision, as it is concerned with democratising the process. As Ebbesson notes, '[p]rocedures and participation matter for legitimacy, but legitimacy is also dependent upon outcomes'.³² From a substantive perspective, public participation enables better decisions.³³ Participation by those who might be more likely to be affected by environmental measures may indeed 'be expected to condition more rigorously preventive (and, in this sense, "higher quality") outcomes'.³⁴ It is primarily a means to an end, rather than an end in itself.³⁵

Good environmental decisions of course depend on problem-solving capacity and require knowledge and information.³⁶ This is why environmental decision-making has increasingly relied on economic, scientific and technical analysis and assessment to support decision-making, as I will explain in section 6 below. But although technical framings are important, the substantive rationale for participation implies that environmental decision-making is not a merely technical exercise. It involves political judgment and balance of multiple reasons and values, other than merely technical arguments.³⁷ Participation provides decision-makers with a richer set of reasons and rationalities, beyond scientific and technical input.³⁸ Local knowledge and non-economic values from a variety of actors (including the lay public and local communities) allow not only to bridge the decision-makers' 'knowledge gap', but also to improve the substantive quality of the decision through better understanding of

Regulation: Perspective on Law and Governance' (1999) 23 Harvard Environmental Law Review 441, 452.

³¹ Maria Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP 2017).

³² Ebbesson (n 1) 79.

³³ O'Brien (n 1). See also Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 Oxford Journal of Legal Studies 415 (arguing that the standard of 'improved' or 'enhanced' environmental protection remains controversial).

³⁴ Stirling (n 14) 222, citing O'Brien (n 1).

³⁵ cf Steele (n 33) who seems to suggest that means and ends overlap.

³⁶ See definitions of 'knowledge' in section 6 below.

³⁷ Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart Publishing 2014) 178.

³⁸ Sheila Jasanoff, 'Technologies of Humility – Citizen Participation in Governing Science' (2003) 41 *Minerva* 223, 238; Michael Sandell, *What Money Can't Buy – The Moral Limits of Markets* (Penguin 2013).

environmental problems, social contexts, alternatives and values.³⁹ As Lee notes, '[o]pen participation assumes the relevance of a range of reasons, rather than a prioritisation of particular expert technical criteria'.⁴⁰ Of course, as Pieraccini points out, participants' perspectives are also ambivalent, as they have 'multiple knowledges to draw upon and offer to the decision-making process'.⁴¹ But this is an opportunity, instead of a limitation, as it erases 'the fictitious division between the ecological and the socio-economic, between nature and society'.⁴²

But the judgement about the substantive quality of a decision – and consequential success or failure of regulation – is ultimately normative.⁴³ The literature on the space for public participation in Environmental Impact Assessment (EIA) offers a good example of this claim and of the complexities of participation in environmental decision-making.⁴⁴ In discussing a substantive rationale for participation in EIA processes, Glucker and others highlight its ability to improve the quality of the outcome, by 'harnessing local information and knowledge', 'incorporating experimental and value-based knowledge' and 'testing the robustness of information from other sources'.⁴⁵ However, Holder observes that a dominant understanding of environmental assessment as primarily focused on technical information-generation might restrict the public's role 'to reviewing the generation of "good data" and the most scientific and technical information possible'.⁴⁶ This supports Lee and Abbot's more general concern that technicist approaches to environmental decision-making can "crowd out" public participation'.⁴⁷ Somehow these arguments dig deeper than the substantive justification of participation, looking into the extent to which participants are able to ultimately influence decisions.⁴⁸ But even if influence is difficult, the input from participation should not be discounted. Tracing the routes of participation on impact assessment in democratic pragmatism, Dryzek argues that, although information from multiple sources are included,

³⁹ Elizabeth A Kirk and Kirsty L Blackstock, 'Enhanced Decision Making: Balancing Public Participation Against "Better Regulation" in British Environmental Permitting Regimes' (2011) 23 *Journal of Environmental Law* 97.

⁴⁰ Lee (n 37) 164.

⁴¹ Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 *Journal of Environmental Law* 45, 50.

⁴² *ibid* 66.

⁴³ Steele (n 33). See also Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.

⁴⁴ Holder (n 30).

⁴⁵ Anne Glucker and others, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) 43 *Environmental Impact Assessment Review* 104, 107-108.

⁴⁶ Holder (n 30) 233.

⁴⁷ Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 80, 84.

⁴⁸ Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 *Journal of Environmental Law* 415.

'[t]his information will rarely have direct, traceable impacts on agency decisions; but more subtly it may alter the context in which administrative decisions are made and implemented, by changing the discourse surrounding policy determination in a way that makes both environmental and democratic values more legitimate and more visible'.⁴⁹

From a substantive perspective, participation is not only justified to improve the outcome, but also its implementation. By reducing conflicts and catalysing behavioural change, participation and consensus on regulation has the potential of enabling better implementation.⁵⁰ This argument rightly points to the positive contribution of participation to environmental protection, as it gives a sense of ownership of the outcome, encouraging compliance and facilitating implementation. But, although better implementation is a core concern, some have critically seen it as an instrumental, rather than a substantive, justification for participation, as I explain next.⁵¹

2.3. Instrumental Rationale

According to an instrumental rationale, public participation is presented as a way to improve the acceptability of decisions and speed up their implementation.⁵² Broad participation is seen to generate credibility and public trust. In this sense, participation 'should produce a greater level of satisfaction, even among parties who have not got what they want'.⁵³ But this rationale is not straightforward. Lee criticises it as an approach where 'public involvement may aim to enhance public acceptance of a decision that is considered self-evidently necessary, either reducing conflict in infrastructure development (such as wind energy projects), or persuading individuals to change their behaviour'.⁵⁴ Under an instrumental rationale for participation, the lay public's ability to influence is often limited by the 'considered' self-evident necessity of the decision under discussion. It is also problematic as the relation between participation and acceptance is itself nuanced, as I will describe in chapter 3. On this

⁴⁹ John S Dryzek, *The Politics of the Earth* (3rd edn, OUP 2012) 101.

⁵⁰ Ayres and Braithwaite (n 24); Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon 1998).

⁵¹ E.g. Stirling (n 6); Glucker (n 45); Fiorino (n 15).

⁵² D Bloomfield and others, 'Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance?' (2001) 19 *Environmental and Planning C* 501. Cf Elizabeth Fisher, 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Administration' (2000) 20 *Oxford Journal of Legal Studies* 109.

⁵³ Barton (n 6) 105. See also Glucker (n 45) on generating legitimacy, reduce conflicts and engender reflection in EIA.

⁵⁴ Lee (n 37) 178-179.

point, Woolley clarifies that the extent to which participation is able to improve acceptability 'will of course depend on the nature of the decision concerned and whether it is relatively clear cut or raises matters over which prior debate is required, if a consensus position is to be identified'.⁵⁵

Within an instrumental rationale, Stirling sees public participation as a tool to provide social intelligence and strategic information 'for the shaping, presentation and implementation of pre-committed policy choices, [and] as guidance on how best to forestall or mitigate negative social reactions'.⁵⁶ Although important, this rationale is more likely to frame participation within the boundaries of established practices and policy objectives, and 'tend[s] uncritically to accept a particular set of instrumental ends'.⁵⁷ This might render the position of multiple knowledges and alternative rationalities within the final decisions more problematic. Similarly to substantive approaches to participation, the role of information here is central. Participation is still viewed as an opportunity to gather information and public input. But it is the weight given to the reasons expressed in the participatory process that often makes instrumental rationales problematic.⁵⁸ Within an instrumental rationale for participation, issues are debated as technical, rather than involving broader questions about the public good and conceptions of society.⁵⁹ While instrumental approaches do recognise the value of participation (often as sham consultation), they tend to prioritise scientific and technical rationalities, cost-benefits analysis and policy objectives, as both framing discourses and justifications for the final decision.⁶⁰

An instrumental rationale for participation often makes the position of situated knowledge and alternative rationalities more problematic. This has two consequences: on the one hand, foreclosing on other, non-technical knowledges is sometimes presented as 'a failure on the part of the participatory exercise itself' to offer policy-relevant contributions.⁶¹ On the other hand, this approach might restrict either the group of participants – "the experts" or "public concerned" - or the range of legitimate arguments to those framed as "technical". Both an instrumental rationale,

⁵⁵ Olivia Woolley, *Ecological Governance: Reappraising Law's Role in Protecting Ecosystem Functionality* (CUP 2014) 196.

⁵⁶ Stirling (n 14) 221.

⁵⁷ Stirling (n 6) 97.

⁵⁸ Armeni (n 48).

4. ⁵⁹ Julia Black, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 *Modern Law Review* 621.

⁶⁰ In an environmental context, Chris Hilson 'Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?' (2015) 27 *Journal of Environmental Law* 177 (discussing the power of discourses and framings in the context of fracking in the UK). See also Julia Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163 (on discourse analysis in regulation).

⁶¹ Stirling (n14) 222. See also Anna Wesselink and others, 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43 *Environment and Planning A* 2688 (discussing the failing political uptake of results from participation as an issue in instrumental and legalistic rationales for participation).

and an overemphasis on legal compliance with procedures as a bureaucratic hurdle to be overcome or a “ticking-box” exercise, have the potential to provide the setting for a public acceptance model of engagement, which I explore in the next chapter.

3. Theoretical Foundations and Forms of Participation

Public participation has strong theoretical foundations in political theory. The multiple justifications for public participation in environmental decision-making discussed above are reflected in the variety of forms of participation within democratic systems. Theories of democracy are of course manifold and conceptualise the role and forms of citizens’ participation in different ways. Yet environmental law and planning scholars have frequently understood the nature and function of public participation in decision-making primarily against either the liberal or the deliberative democracy frameworks. These approaches are particularly interesting for their reflection on how individual preferences and environmental values are (or should be) accounted for in environmental decision-making. The weight given to individual preferences in these democratic systems shapes the forms of participation. As a detailed analysis of political philosophy literature is outside my scope (and expertise), I merely outline here the key aspects and critiques of the liberal aggregative model and the deliberative model. In this context, I first showcase Rawls’s approach as an example of the liberal approach to the function of participation and public reason in political decisions.⁶² Secondly, I introduce the deliberative democracy perspective focusing on Habermas’s critical perspective. Notwithstanding their distinct traditions and theoretical frameworks, both Rawls and Habermas emphasise citizens’ participation as a procedural condition of the democratic legitimacy of public decisions.⁶³

3.1. Liberal Democracy: Politics as Aggregation

The fundamental tenet of liberal democracy is the protection of individual’s autonomy and freedoms from the interference of the State, through the establishment of legal rights and constitutional guarantees.⁶⁴ The classical liberal model of democracy

⁶² Rawls’ work is complex and vast. I focus here on the liberal features of Rawls’s work rather than on his theory of deliberative democracy. For a critique, in general, Dryzek (n 28), describing Rawls as a ‘deliberative democrat in a very thin sense’ (16). See also James Bohman and William Rehg (eds), *Deliberative Democracy – Essays on Reason and Politics* (MIT Press 1997) and Baber and Bartlett (n 28) chapter 4.

⁶³ On the links between liberal constitutionalism and critical theory, e.g. Dryzek (n 28) and, in an environmental context, Baber and Bartlett (n 28) chapter 3.

⁶⁴ David Held, *Models of Democracy* (3rd edn, Stanford University Press 2006).

considers citizens' preferences as the basis of the political system.⁶⁵ This model relies on 'the assumption that individuals are mostly motivated by self-interest rather than any conception of the common good, and that they themselves are the best judges of what this self-interest entails'.⁶⁶ The function of participation is then to express and aggregate such interests in the political and policy arena. This aggregative model assumes that people's preferences are fixed and exogenous to the political process. Through voting in elections and public consultation, private preferences are aggregated and, in principle, the majority decides. The interchange between self-interested voters and self-interested politicians produces decisions that are intended to reflect 'a balanced aggregation of individual interests'.⁶⁷ Liberal democratic participation is often seen to have an educational effect, making 'better citizens'.⁶⁸

The liberal model has been widely discussed and contested.⁶⁹ Opponents have argued that preferences are by their nature 'shifting and endogenous' - rather than fixed and exogenous - because they form and change in response to the regulatory and political environment, market signals and culture.⁷⁰ Being endogenous to the political process, preferences are generally transformed by interacting with others or simply participating in the political process. Even if we endorse aggregative approaches to citizens' political engagement, critics have considered them thin on the normative reasons for participation.⁷¹ The success of preferences as legitimate arguments for a political decision is simply based on how many people support them. This suggests that preferences in liberal systems are, as a rule, not ordered in relation to their moral value or ethical rationality: they are normatively neutral. As Young observes, the liberal (aggregative) system offers 'no criteria for distinguishing the quality of preferences by either content, origin, or motive', hence offering 'no way to evaluate the moral legitimacy of the substance of decisions'.⁷² This has led Sunstein to claim that, in this system, 'no special premium is placed on citizen participation'.⁷³ As I

⁶⁵ James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund 1962).

⁶⁶ Dryzek, (n 28) 9.

⁶⁷ Jane Mansbridge, *Beyond Adversarial Democracy* (Basic Books, 1980) 17.

⁶⁸ For a review of this argument, Jane Mansbridge, 'On the Idea that Participation Makes Better Citizens' in Stephen Elkin and Karol Soltan (eds), *Citizen Competence and Democratic Institutions* (Pennsylvania State University 1999) arguing that this effect has however gradually waned the origins of liberal democratic thought.

⁶⁹ E.g. Iris Marion Young, *Inclusion and Democracy* (OUP 2000); Benjamin Barber, *Stronger Democracy* (University of California Press 1984) 132-143; John S Dryzek, *Discursive Democracy* (CUP 1990).

⁷⁰ Cass Sunstein, 'Preferences and Politics' (1991) 20 *Philosophy and Public Affairs* 3. Such critique is shared by Jon Elster, *Sour Grapes - Studies in the Subversion of Rationality* (CUP 2016, first published in 1983) and John Rawls, *The idea of Justice* (Harvard University Press 1971).

⁷¹ Dryzek (n 28) 20. See also Black (n 27).

⁷² Young (n 69) 20 and 21.

⁷³ Sunstein (n 70) 4.

discuss below, this critique is echoed by green political theorists, calling for a reshaping of the theory of value in more ecologically-inclusive terms.⁷⁴

Critics have also argued that, in a liberal perspective, maximising individual utility can take precedence over the pursuit of the public interest.⁷⁵ Individuals do not come together as 'public', conceived as a collective body. Preferences are pre-formed within the private sphere, without a necessary relation with the public sphere.⁷⁶ Public decisions are reached by means of an instrumental and strategic reasoning through which individuals realise their preferences, rather than through a deliberative process for the solution of collective action problems.⁷⁷ This explains why most liberal theorists are suspicious of any objective ideal of public interest.⁷⁸ Undoubtedly, the notion of "public interest" and its objectivity are widely contested, not only by liberal democrats.⁷⁹ However, an emphasis on private self-interest in liberal democratic systems results in a muddle between political and consumption choices. This means that liberal theories of participation have been seen to depict an image of participants as apolitical consumers, motivated by individual interests and interacting within market logic.⁸⁰ On this point, Sagoff clarifies that 'consumer preferences reflect conceptions of the good life individuals seek for themselves, while citizen preferences reflect conceptions of the good society offered for the consideration and agreement of others'.⁸¹ From a liberal perspective, political participation is a procedure to acknowledge and aggregate consumer preferences, but its normative value in contributing to the quality of public decisions is limited.

Another important critique to liberal democracy relates to how to move from the self-interested individual to a collective public engaged in decisions affecting the common good. As one of the most influential political theorists, Rawls addresses this issue by grounding its theoretical framework of liberal constitutional democracy upon

⁷⁴ John O'Neill and Clive L Spash, 'Conceptions of Values in Environmental Decision-making' (2000) 9 *Environmental Values* 521. For a review on the different perspectives, Terence Ball, 'Green Political Thought' in Terence Ball and Richard Bellamy (eds), *The Cambridge History of Twentieth-Century Political Thought* (CUP 2007).

⁷⁵ Aryeh Botwinick and Peter Bachrach, 'Democracy and Scarcity: Toward a Theory of Participatory Democracy' (1983) 4 *International Political Science Review* 361 (noting that the limits of the private sphere require a participatory conceptualization of democracy).

⁷⁶ Cass Sunstein, *Free Markets and Social Justice* (OUP 1997) chap 10. In general, Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press 2007).

⁷⁷ Young (n 69) 20-21. See also Thomas Sprangens, *Reason and Democracy* (Duke University Press 1990).

⁷⁸ For a review, Heather Campbell and Robert Marshall, 'Utilitarianism Bad Breath? A Re-Evaluation of the Public Interest Justification in Planning' (2002) 1 *Planning Theory* 163.

⁷⁹ E.g. Mike Feintuck, *The 'Public Interest' in Regulation* (OUP 2004).

⁸⁰ Mark Sagoff, *The Economy of the Earth - Philosophy, Law, and the Environment* (2nd edn, CUP 2008).

⁸¹ Mark Sagoff, 'Aggregation and Deliberation in Valuing Environmental Public Goods: A Look Beyond Contingent Pricing' (1998) 24 *Ecological Economics* 213, 215.

the notion of 'public reason'.⁸² This is the relation of free and equal citizens who exercise ultimate political power, as a collective body within society. Public reason is expressed through voting, as the ordering force for the selection of the reasonable political arguments concerning the good of the public and matter[s] of basic justice.⁸³ Rawls is a liberal in his reference to an aggregative model, but moves away from the self-interested consumer in the private sphere to focus on equal citizens acting as a collective body. For Rawls, 'public reason' operates as a filter of political arguments that can only be legitimised if it pursues 'interests based on the common humanity of free and equal citizens'.⁸⁴ He argues that public reason should only be promoted with respect to issues concerning the Constitution and questions of basic justice, instead of every aspect to public life. While being a liberal constitutional democrat, Rawls acknowledges the value of deliberation, which provides for 'public occasions of orderly and serious discussion of fundamental questions and issues of public policy'.⁸⁵ This approach departs from the liberal assumption that preferences are fixed and exogenous, connecting Rawls with the deliberative democracy ideals (discussed next).⁸⁶ But, despite its influence, Rawls's approach has been repeatedly contested.⁸⁷ Some have considered his notion of 'public reason' too weak and not applicable to complex issues.⁸⁸ Others have questioned it for not fully reflecting the pluralistic nature of society, insofar as he suggests that multiple rationalities and cultural values might be simply dismissed as 'non-public' reasons.⁸⁹ Indeed, by framing the public reason as a reflexive, rather than a dialogic process, Rawls sees no need for the deliberation to expand into the arena of political interaction, making his normative construction of participation to some extent narrow.⁹⁰

⁸² See John Rawls, 'The Idea of Public Reason' in Bohman and Rehg (n 62), 93; John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review*, 765. See also John Rawls, *The Law of the People –with "The Idea of Public Reason Revisited"* (Harvard University Press 2002).

⁸³ John Rawls, *Political Liberalism* (Columbia University Press 1993).

⁸⁴ Dryzek (n 28) 11 referring to Rawls (n 83).

⁸⁵ Rawls, 1997 (n 82) 772.

⁸⁶ See discussion in Baber and Bartlett (n 28) chapter 3 and 4.

⁸⁷ For comprehensive critiques, John Gray, *The Two Faces of Liberalism* (Polity 2000); William A Galston, *Liberal Pluralism The Implications of Value Pluralism for Political Theory and Practice* (CUP 2002); Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733.

⁸⁸ James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 2000). However, Rawls addresses these criticisms in 'The Idea of Public Reason Revisited' (n 83).

⁸⁹ Young (n 69).

⁹⁰ Dryzek (n 28) 15 -16.

3.2. Deliberative Democracy: Politics as Transformation

As its main point of departure from the aggregative model, the deliberative approach recognises a prominent role to the transformation of preferences and consensus through participation.⁹¹ Transformation enables participants to become 'more public-spirited, more tolerant, more knowledgeable, more attentive to the interests of others, and more probing of their own interests'.⁹² Elster illustrates the main features of deliberative democracy, in contrast with liberal models, stating that:

[...] the core of the political process is the public and rational discussion about the common good, not the isolated act of voting according to private preferences. The goal of politics should be unanimous and rational consensus, not an optimal compromise between irreducibly opposed interests. The forum is not to be contaminated by the principles that regulate the market, nor should communication be confused with bargaining'.⁹³

In general terms, deliberation means 'debate and discussion aimed at producing reasonable, well-informed opinion in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants'.⁹⁴ Deliberative democracy theories are complex and extremely diverse, and I will not go into their details and nuances.⁹⁵ But, at risk of over-simplifying, most authors develop their theoretical framework as a critique or modulation of Habermas's critical theory.⁹⁶

For Habermas, norms and principles are legitimate and just if they emerge from an unconstrained discourse of all those affected. The result should be mutually acceptable if conforming to the conditions of an 'ideal speech situation'.⁹⁷ This is a position where equal and free participants are willing to exchange and, importantly, transform their own opinions, based on reciprocity and mutual understanding. The

⁹¹ E.g. Elster (n 70) contending that 'the central concern of politics should be the *transformation of preferences* rather than their aggregation' (at 34 emphasis in the original).

⁹² Mark Warren, 'Democratic Theory and Self-Transformation' (1992) 86 *The American Political Science Review* 8.

⁹³ Elster (n 70) 34-35.

⁹⁴ Simone Chambers, 'Deliberative Democracy Theory' (2003) 6 *Annual Review of Political Science* 307, 309. For the origin of the concept, Joseph Bessette, 'Deliberative Democracy: the Majoritarian Principle in Republican Government' in Robert Goldwin and William Shambra (eds), *How Democratic is the Constitution?* (American Enterprise Institute 1980).

⁹⁵ For a collection of perspectives: Bohman and Regh (n 62) and Dryzek, (n 28).

⁹⁶ Dryzek (n 28) 21.

⁹⁷ On this notion, Jürgen Habermas, 'Reflections on the Linguistic Foundations of Sociology: The Christian Gauss Lectures' (Princeton University 1971), collected in his *On the Pragmatics of Social Interaction - Preliminary Studies in the Theory of Communicative Action* (MIT Press 2001).

transformation and exchange is guided by the force of the better argument. In his early work, Habermas developed a rather radical notion of deliberative decision-making based on communicative rationality in an 'ideal speech situation'.⁹⁸ Within this theoretical framework, decisions should be secured by consensus, implemented by those involved in reaching that consensus and complied with on the basis of free consent. However, this theoretical model has been considered by some as inadequately reflected in practice.⁹⁹ Habermas's later work therefore reflects on the pluralistic complexity of society and its political and economic structure.¹⁰⁰ The central point of his theory of deliberative democracy becomes the role of public reason and the forms in which it influences the administrative state.¹⁰¹ In other words, it focuses on the normative function of deliberative participation in shaping law and administrative decision-making. While the procedural legitimacy of decisions remains the objective of participation, substantive rights are essential to enable participatory spaces to form (i.e. 'the free speech situation'). In this respect, mutual recognition of participants is enabled by the legal system from which those rights are derived. For Habermas, procedurally legitimate law must therefore be the result of a deliberative discourse based on communication and enabled by a legal and political infrastructure.

The ideal of deliberative participation has been criticised from both a philosophical and practical stand.¹⁰² In broad terms, the tie between deliberation and participation is not necessarily automatic: deliberation might not promote participation, and participation could not necessarily require deliberation. On a theoretical ground, the main critiques relate to the ambiguous goal of deliberative decision-making; the difficult relation between process and substance; the conditions for deliberation to be democratic; and how to engage with pluralism and social context.¹⁰³ Although contested, voices supporting a deliberative approach have been expressed within the debate on participation in both environmental law and planning theory, as I illustrate next.

⁹⁸ Jürgen Habermas, *The Theory of Communicative Action I: Reason and the Rationalisation of Society* (Beacon Press 1984).

⁹⁹ Dryzek (n 28).

¹⁰⁰ Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996).

¹⁰¹ *Ibid*, 486-7. For an analysis, Dryzek (n 28) 25-27.

¹⁰² E.g. Susan C Stokes, 'Pathologies of Deliberation' and James Johnson, 'Arguing for Deliberation: Some Skeptical Considerations' in Jon Elster, *Deliberative Democracy* (CUP 1998) 123-139 and 161-184, respectively.

¹⁰³ For a discussion, Bohman and Regh (n 62). See also section 4.3 below.

4. Deliberative Promise in Environmental Law and Politics

The capacity of liberal systems to provide an adequate response for environmental protection has been widely questioned.¹⁰⁴ Within the environmental law and politics scholarship, few scholars have expressly supported a theoretical understanding of public participation in environmental decision-making based on liberal positions.¹⁰⁵ This is due to the limitations of the aggregative model and the complex reality of administrative decision-making.¹⁰⁶ Liberal aggregative models generally understand participation as public consultation, which 'is more likely to confirm individuals in their preferences and values (where these are in conflict with governmental proposals)' rather than engender reflection.¹⁰⁷ Consultation's outcomes are generally "validated" against the results of impact assessment and Cost-Benefit-Analysis (CBA), pursuing a rational-instrumental conception of environmental policy.¹⁰⁸ As such public consultation practices are more vulnerable to 'the narrowing of deliberation to consider only a specific set of predetermined policy options; and the conversion of environmental entities into commodities'.¹⁰⁹ It is then unsurprising that the discussion in the literature on the aggregative forms to participation (and more specifically public consultation) in environmental decision-making generally overlaps with, and is merged into, a broader critique of the rationalist-instrumental paradigm in administrative decision-making.¹¹⁰ In response to these limitations, the notion of deliberative participation resonates powerfully within environmental law and governance, mostly as a reaction to the liberal aggregative model.¹¹¹ While deliberative theories cannot be easily reduced to a single elaboration, Habermas's procedural theory of democracy has been repeatedly used as

¹⁰⁴ E.g. Robyn Eckersley, 'Ecological Democracy and the Rise and Decline of Liberal Democracy: Looking Back, Looking Forward' (2019) *Environmental Politics* 1.

¹⁰⁵ E.g. Daniel Fiorino, 'Environmental Risk and Democratic Process: A Critical Review' (1989) 14 *Columbia Journal of Environmental Law* 501. Some discussion on citizenship might provide some input here: Derek Bell, 'Liberal Environmental Citizenship' (2005) 14 *Environmental Politics* 179; S Haliwood, 'Environmental Citizenship as Reasonable Citizenship' (2005) 14 *Environmental Politics* 195.

¹⁰⁶ Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007).

¹⁰⁷ Woolley (n 55) 209

¹⁰⁸ Simon Niemeyer, 'Environmental Valuation Analysis, Public Deliberation and their Pragmatic Synthesis: A Critical Appraisal' (2001) 19 *Environmental and Planning C* 567. On the rationalist-instrumental and deliberative-constitutive paradigm of administrative constitutionalism, Fisher (n 106).

¹⁰⁹ Niemeyer (n 108) 583.

¹¹⁰ For a review, Lee (n 37) chapter 2.

¹¹¹ In particular: Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003); Baber and Bartlett (n 28); Walter Baber, 'Ecology and Democratic Governance: Towards a Deliberative Model of Environmental Politics' (2004) 41 *Social Science Journal* 331; John Parkins and Ross Mitchell, 'Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management' (2005) 18 *Society and Natural Resources* 529; John S Dryzek, *Rational Ecology: Environment and Political Economy* (Basil Blackwell, 1987); Steele (n 37); James Meadowcroft, 'Deliberative Democracy' in Robert Durant, Daniel Fiorino and Rosemary O'Leary (eds), *Environmental Governance Reconsidered: Challenges, Choices and Opportunities* (MIT Press 2004).

the theoretical starting point for thinking about deliberative participation in environmental law and governance.¹¹²

In this section, I am primarily concerned with the arguments that deliberative participation has two main benefits, in terms of a) enabling the transformation of preferences and internalization of environmental values and b) entailing a substantive problem-solving capacity and educational effects. I will also briefly address some of the main critiques. This section is important to set the theoretical advantages of a deliberative participation model of public engagement in decision-making, illustrated in the next chapter.

4.1. Transformation of Preferences and Internalisation of Environmental Values

The primary contribution of deliberative democracy to a theory of participation in environmental decision-making relates to its focus on transformation of individual preferences.¹¹³ Barry understands such transformation as 'a willingness to accommodate the interests of others within an expanded conception of the ecological common good, a common good within which one's own good is located'.¹¹⁴ As Woolley observes with respect to ecological governance, 'the broadening of perspectives should engender consciousness of shared interests in the healthy functioning of natural systems'.¹¹⁵ This proposes a way to internalise environmental considerations within political arrangements and decision-making. Within a deliberative framework, participants are more likely to develop a sentiment of environmental citizenship, reflecting on both environmental rights and responsibilities.¹¹⁶ This intends to re-shape the type and nature of values that are expressed in the political arena, away from individual self-interest. Here participation is framed as '[p]ublic engagement with deliberative processes in which equal participants provide relevant knowledge, make known their views and values, and have opportunities to persuade each other with a

¹¹² Baber and Bartlett (n 28); Robert Brulle, 'Habermas and Green Political Thought: Two Roads Converging' (2002) 11 *Environmental Politics* 1; Kevin De Luca, 'Rethinking Critical Theory: Instrumental Reason, Judgment and the Environmental Crisis' (2001) 23 *Environmental Ethics* 307. Cf in planning, Yvonne Rydin, *Conflict, Consensus, and Rationality in Environmental Planning – An Institutional Discourse Approach* (OUP 2003).

¹¹³ John Barry, *Rethinking Green Politics: Nature, Virtue and Progress* (SAGE 2009); Michael Jacobs, 'Environmental Valuation, Deliberative Democracy and Public Decision-Making Institutions' in John Bellamy Foster (ed), *Valuing Nature? Economics, Ethics and Environment* (Routledge 1997); John Barry, 'Sustainability, Political Judgement and Citizenship: Connecting Green Political Thought and Democracy' in Brian Doherty and Marius De Geus (eds) (n 26).

¹¹⁴ Barry 1996 (n 113) 231-232, cited by Woolley (n 55) 191.

¹¹⁵ Woolley (n 55) 191.

¹¹⁶ Dobson (n 29), Barry 2009 (n 113); Smith (n 111).

view to identifying outcomes that would address matters under consideration'.¹¹⁷ From this perspective, Smith highlights that '[t]he promise of deliberative democracy for those on the green side of environmental politics is that the plurality of environmental values will be voiced and considered in the political process'.¹¹⁸ Although there is no unescapable relation between deliberative democracy and environmental values, he argues that '[d]eliberative democracy at the very least opens up the political space for the plurality of values to be articulated and to be considered in the policy process'.¹¹⁹ In a deliberative approach, opening up the political space to multiple perspectives is then a necessary, although not sufficient, condition to enable political influence through participation.

While the quality of the outcome cannot be guaranteed and can be contested, a deliberative approach to public participation allows 'green values' to be expressed, and plays an important role in setting the agenda and in framing the questions and general legal principles.¹²⁰ Beyond providing mere engagement in the process, participation fundamentally enables 'a critical voice, e.g. by revealing what is seen as unjust consequences of existing social arrangements and norms', linking its rationale to environmental justice ideals.¹²¹

4.2. Problem-Solving Capacity and Learning

Through deliberative participation, participants will share and reflect upon environmental knowledge and values, making them more likely to be internalised within their practices and behaviour.¹²² This is because the participant's role is the one of 'problem solver rather than powerless critic of executive action'.¹²³ Indeed, even in a deliberative perspective that emphasises the legitimizing function of a public debate, public participation presents an 'enhanced problem-solving' capacity.¹²⁴ Steele notes

¹¹⁷ Woolley (n 55) 193.

¹¹⁸ Smith (n 111) 72.

¹¹⁹ *ibid.*

¹²⁰ See RCEP, 21st Report, *Setting Environmental Standards* (1998); Department for Environment, Food & Rural Affairs (DEFRA), *The Government's Response to the Royal Commission on Environmental Pollution's 21st Report* <<http://webarchive.nationalarchives.gov.uk/20011108030624/http://www.defra.gov.uk/environment/rcep/21/index.htm>> accessed 27 August 2019. See also Walter F. Baber and Robert V. Bartlett, *Consensus and Global Environmental Governance: Deliberative Democracy in Nature's Regime* (MIT Press 2015).

¹²¹ Jonas Ebbesson, 'Introduction: Dimensions of Justice in Environmental Law' in Jonas Ebbesson and Phoebe Okowa, *Environmental Law and Justice in Context* (CUP 2009) 1, 2-3. See environmental justice discussion in Chapter 1 section 5 above and – more specifically – Chapter 8 below.

¹²² Smith (n 8) 145-146.

¹²³ Woolley (n 55) 194 referring to *ibid.*

¹²⁴ Steele (n 33) explaining the concept as 'advancing the cause of environmental protection' (at 416).

how deliberation 'is meant to foster a reasoned form of communication about values, distinct from mere compromises between clashing interests and competing preferences, and in this way to allow resolution of the most intractable problems'.¹²⁵ As such she sees deliberative theory to provide 'the right basis for participation in environmental law'.¹²⁶ This focus on co-producing definitions of problems and solutions to them suggests that procedural and substantive justifications for public participation are inevitably interlinked and mutually reinforcing. Indeed, Dryzek's discussion of democratic pragmatism frames participation as a way to improve the substantive outcome of the decision through interactive problem-solving, as well as the democratization of environmental administration.¹²⁷

Reflecting on the effects of deliberation in global climate change governance, Stevenson and Dryzek claim that 'the kinds of effects deliberative theorists identify can make a difference when it comes to the incidence of environmentally desirable outcomes – even in the absence of guarantees'.¹²⁸ They convincingly argue that deliberative democracy supports environmental rationality as it is better positioned to democratically (as opposed to economically or administratively) deal with the complexity that overwhelms the capacity of a single actor by integrating perspectives of multiple actors. The value of deliberation in global climate change is – they argue - to ensure: feedback on the conditions of social-ecological systems through inclusion from all those affected; prioritization of environmental goods; recognition of interests of future generations and non-humans and promotion of ecological citizenship.¹²⁹ Deliberative participation therefore adds something more than a sense of democratic legitimacy to the process, as '[it] can produce coherent collective responses from [the participants'] partial perspectives'.¹³⁰

Both green political theorists and environmental law scholars have acknowledged that deliberative participation also provides an educational effect.¹³¹ For Barry, deliberation instigates a 'process of mutual learning' as participants are encouraged to reflect on others' views and values and submit it to a process of validation.¹³² This process contributes to develop critical democratic skills to engage and challenge top-down policy solutions.¹³³

¹²⁵ *ibid* 423.

¹²⁶ *ibid*.

¹²⁷ Dryzek, (n 49).

¹²⁸ Hayley Stevenson and John S Dryzek, *Democratising Global Climate Change Governance* (CUP 2014) 16.

¹²⁹ *ibid*.

¹³⁰ *ibid* 14.

¹³¹ For a review, Woolley (n 55) 194-195.

¹³² Barry, *Rethinking* (n 113) 228-229. See also Jacobs (n 113) 229.

¹³³ Dryzek (n 28).

4.3. Critiques

Although significant, the call for deliberative participation in environmental law and politics is not without critiques. First, scepticism has come in particular from those arguing that the theory could not be implemented in practice.¹³⁴ Many have seen its ideal of reaching consensus on controversial environmental decision as mere utopia.¹³⁵ To those pointing to the empirical weaknesses, Fischer in particular has offered rich evidence of the successes of deliberative participatory experiments.¹³⁶ But the generally small scale of these exercises has raised concerns. While Niemeyer claims that experience from small-scale deliberative events ('mini-publics') 'might be articulated to the broader public sphere so that the benefits might be scaled up', large-scale deliberation is inevitably challenging.¹³⁷ In this respect, the inclusion of deliberative participation at different governance scales might offer a valid response.¹³⁸ Calls for deliberative participation in global climate change governance have advanced the discussion in this direction.¹³⁹

Another difficulty comes from issues of representativeness and power structure in deliberative participation.¹⁴⁰ Leach and Scoones contend that 'deliberative forums remain couched within a particular framework, silencing other perspectives and agendas' and that the free speech situation 'betrays naivety about the politics and power relations of such encounters'.¹⁴¹ Similarly, Wynne is critical of the optimism of deliberation, arguing that it merely enables a downstream approach to participation on immediate risks, rather than an upstream participation on wider policy choices.¹⁴² Others have, unsurprisingly, pointed to the risk of manipulation of discourse by interest groups and powerful participants, and the distortive effect of uneven distribution of power between participants, as well as between participants and experts (on which I expand in section 6 below). Yet, even for supporters of deliberative democracy in

¹³⁴ E.g. John Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 18. For an early review of the main arguments, James Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) 6 *Journal of Political Philosophy* 400.

¹³⁵ E.g. Barber and Bartlett (n 120).

¹³⁶ E.g. Fischer (n 38); Frank Fischer, *Citizens, Experts and the Environment* (Duke University Press 2000).

¹³⁷ Simon Niemeyer, 'The Emancipatory Effects of Deliberation: Empirical Lessons from Mini-Publics' (2011) 39 *Politics and Society* 103, 103.

¹³⁸ E.g. Karin Backstrand and others (eds), *Environmental Politics and Deliberative Democracy – Examining the Promise of New Modes of Governance* (EE 2010). See, among many, Grainne de Búrca, Robert O. Keohane and Charles F. Sabel 'Global Experimentalist Governance' (2014) 44 *British Journal of Political Science* 477.

¹³⁹ Barber and Bartlett (n 120). See also Hayley Stevenson and John S Dryzek, 'The Discursive Democratisation of Global Climate Governance' (2012) 21 *Environmental Politics* 18.

¹⁴⁰ Woolley (n 55).

¹⁴¹ Melissa Leach and Ian Scoones, 'Science and Citizenship in a Global Context' in Leach, Scoones and Wynne (n 29) 25. See also Dobson (n 26). This issue has emerged strongly in deliberative approaches in planning theory, as discussed in section 4.

¹⁴² Wynne (n 11).

environmental law and politics, the lack, or inadequacy, of the institutional framework is a barrier to deliberative participation.¹⁴³ Interesting, some of these arguments have also been developed in the context of thinking about deliberative participation in planning theory and practice, to which I now turn.

5. Public Participation in Planning Theory and Practice

The ambiguities surrounding the nature and function of public participation in environmental decision-making also permeate into theories of planning.¹⁴⁴ A legal and policy commitment to participation in planning derives from the idea that '[p]lanning shapes the places where people live and work' and '[s]o it is right that people should be enabled and empowered to take an active part in the process'.¹⁴⁵ This makes expectations for public involvement unsurprising. However, while planning is no exception to the challenges outlined thus far, it shows two distinctive features. First, the theoretical debate on participation in planning has constantly referred to the purpose of urban and land-use planning, as a necessary starting point.¹⁴⁶ This explains Lane's observation that '[i]t makes little sense to evaluate public participation in terms that are not shared by the planning model itself'.¹⁴⁷ Indeed this suggests that public participation comes to the core of what planning is. But it also means that the boundaries between theories of participation, function of planning and role of planners are blurred.

Second, and perhaps because of this, planning theory is profoundly interlinked with practice. This "practical preoccupation" explains why the discussion on participation in planning has been prominently framed as a contestation of expert knowledge.¹⁴⁸ These two characteristics have led to higher emphasis on reframing and re-evaluating the nature of planning - as well as the role of planners - than on developing an autonomous theory of participation. Here I will focus on two, radically different theoretical streams in planning: rationalist and pluralist planning. Although there are many other theoretical approaches to planning, these offer important

¹⁴³ Smith (n 111).

¹⁴⁴ E.g. Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (2nd edn, Routledge 2011).

¹⁴⁵ Office of the Deputy Prime Minister, *Community Involvement in Planning: The Government's Objectives* (2004), Introduction.

¹⁴⁶ See also Yvonne Rydin, *The Purpose of Planning – Creating Sustainable Towns and Cities* (Policy Press 2011)

¹⁴⁷ Lane (n 9) 297 (noting that '[t]he role of participation in planning is largely determined by the nature of the planning enterprise being undertaken' at 283).

¹⁴⁸ E.g. Yvonne Rydin 'Re-examining the Role of Knowledge Within Planning Theory' (2007) 6 *Planning Theory* 82.

reflections and responses to the issues of expertise, social inclusion and democracy in planning.¹⁴⁹

The next subsections will explore the relationship between rationalistic / pluralistic planning and liberal / deliberative participation.

5.1. Rationalist Planning

Until the 1960s, a rationalistic approach dominated modern planning theory. Planning was presented as a technical process for governing the land and property markets, acting as a restriction on individual property rights in the public interest. From this perspective, the purpose of planning was to stipulate general goals in advance within a democratic political process; formulate means to achieve these goals; and implement those means through the expertise of independent, appointed officials.¹⁵⁰ The main concern was how to pursue a single, uniform vision of the public interest, through a scientific and rational methodology. The nature of planning in rationalistic tradition is that of an apolitical and objective activity, based on comprehensive, technical blueprints. This approach 'relegated public input to the goal-setting process, after which experts would reach a decision using the tools of modern statistical and economic analysis'.¹⁵¹

From a theoretical perspective, participation in rational planning is at best a device aimed at educating and persuading the public of technical reasons for a decision, rather than a forum for contributing to it. Rationalistic planning sees participation as a means to speed the decision-making and implementation through the education of the public. Here participation is instrumentally conceived as a condition to make the planning process smoother and less conflictual. It is highly criticised for trying to make pretences at consensus.¹⁵² In this sense, the purpose of the planning system is to 'assert the national interest over unwilling local host communities' rather than support participation.¹⁵³ As McAuslan highlights, '[b]oth context and law place the emphasis on the ideology of public interest rather than, and at the expenses of, the

¹⁴⁹ For a review, Susan Fainstein and Scott Campbell, *Readings in Planning Theory* (3rd edn, Wiley Blackwell 2011). See also Lane (n 9).

¹⁵⁰ Susan Fainstein, 'New Direction in Planning Theory' in *ibid* 173.

¹⁵¹ Susan Fainstein, 'Planning Theory and the City' (2005) 25 *Journal of Planning Education and Research* (25) 121, 123.

¹⁵² Bent Flyvbjerg, 'The Dark Side of Planning: Rationality and "Realrationalität"' in Seymour J Mandelbaum, Luigi Mazza and Robert W Burchell (eds), *Explorations in Planning Theory* (Center for Urban Policy Research Press 1996) 383.

¹⁵³ John Barry and Geraint Ellis, 'Beyond Consensus? Agonism, Contestation, Republicanism and a Low Carbon Future' in Devine-Wright (ed) *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011) 29. See also David Toke and Peter Strachan, 'Ecological Modernisation and Wind Power in the UK' (2006) 16 *European Environment* 155.

ideology of public participation'.¹⁵⁴ From a practical perspective, a rationalistic approach to planning favours the position of landowners and their rights, contributing to this substantially sceptic vision of wider participation. This view sees public engagement to impose limitations upon protected property right and interests, constitutes a burden to expert planners and causes delays in implementation.¹⁵⁵

A good example of how this vision of planning has shaped participation can be seen in the UK 1969 Skeffington Report on Public Participation in Planning.¹⁵⁶ The report defined public participation as 'the act of sharing in the formulation of policies and proposals'.¹⁵⁷ Participation was channelled within a technical planning process, ultimately guided by professional planners.¹⁵⁸ The report emphasised the educational dimension of participation to enable people to learn about the planning process, rather than anything more ambitious. The impact of the report is still being debated in the UK.¹⁵⁹ In general terms, it marked the first time any government took people's actual involvement in planning seriously and represented a key driver for growth in participatory practices. However, the report was criticised for depicting planning as an 'apolitical activity operating in a culturally and politically homogenous society'.¹⁶⁰ By some, it was considered a missed opportunity to 'devise new institutions of participation'.¹⁶¹ These criticisms should be understood within a pluralist contestation of rationalism in planning, to which I now turn.¹⁶²

5.2. Pluralist Planning and Deliberation

A quest for democracy, inclusion and a 'social ethic' turn in planning are the main factors leading to re-think the role of participation in planning theory.¹⁶³ According to pluralist conceptions, planning has a social and ethical significance, promoting a value-

¹⁵⁴ Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980) 265.

6. ¹⁵⁵ Eloise Scotford and Rachel Walsh, 'The Symbiosis of Property and Environmental Law – Property Rights in a Public Law Context' (2013) 76 *Modern Law Review* 949.

¹⁵⁶ Committee on Public Participation in Planning, *People and Planning: Report of the Committee on Public Participation in Planning* (HMSO 1969) ('The Skeffington Committee Report').

¹⁵⁷ *ibid* 1.

¹⁵⁸ *ibid* stating that 'the completion of plans – the setting into statutory form of the proposals and decisions – is a task demanding the highest standards of professional skill, and must be undertaken by the professional staff of the local planning authority'.

¹⁵⁹ Sue Brownhill and Andy Inch, 'Framing People and Planning: 50 Years of Debate' (2019) 45 *Built Environment* 7.

¹⁶⁰ Sean Damer and Cliff Hague, 'Public Participation in Planning: A Review' (1971) 42 *Town Planning Review* 217, 223.

¹⁶¹ Patrick McAuslan, 'Planning Law's Contribution to the Problems of an Urban Society' (1974) 37 *Modern Law Review* 184.

¹⁶² For a comprehensive review, Heather Campbell and Robert Marshall, 'Ethical Frameworks and Planning Theory' (1999) 23 *International Journal of Urban and Regional Research* 464.

¹⁶³ Damer and Hague (n 160).

laden theory of public participation.¹⁶⁴ Rydin clarifies how the purpose of planning should be aligned to its original role of 'deciding whose voice should be heard in determining [the] issues and, ultimately, whose voice should count'.¹⁶⁵

As a pioneer of ethical planning theory, Arnstein views participation as 'the means by which [citizens] can induce significant social reform which enables them to share in the benefits of the affluent society'.¹⁶⁶ She frames participation in terms of control over power, and discusses the types of participatory relationship between citizens and decision-makers. Meaningful participation must empower citizens to influence the outcome of decisions, rather than giving an illusion of it through non-participatory and tokenistic processes. Although acknowledging the merit of Arnstein's ethical approach to participation in planning, some have criticised her theory for lack of practical adequacy and narrow empirical grounding.¹⁶⁷

Reflecting on the political and social nature of planning, collaborative planning represents a core contribution to the debate on deliberative participation in planning theory.¹⁶⁸ Building on deliberative democracy ideas, collaborative planning supports a reconsideration of the nature and role of reason in planning.¹⁶⁹ This approach seeks to operationalise the emancipatory potential of participation in planning through deliberative practices.¹⁷⁰ From this perspective, planners lose their privileged position as experts.¹⁷¹ Their primary role is one of mediator of the participants' positions within

¹⁶⁴ In general, Sue Hendler (ed), *Planning Ethics: A Reader in Planning Theory, Practice and Education* (CUPR Press 1995).

¹⁶⁵ Rydin, (n 146) 10. This ties with a constructivist vision of planning law where the regulatory process 'constructs' the influence of the lay public.

¹⁶⁶ Arnstein (n 4) 216.

¹⁶⁷ Liz Sharp and Stephen Connelly, 'Theorising Participation: Pulling Down the Ladder' in Yvonne Rydin and Andrew Thornley (eds), *Planning in the UK – Agendas for the New Millennium* (Ashgate 2002) 40 (arguing that 'citizen power, taken to its limits could result in exclusion and conflict between groups, and disempowerment through disconnection between citizen groups and the state' at 43).

¹⁶⁸ There are variations of the collaborative/communicative planning theory. See: Patsy Healey, *Collaborative Planning* (2nd edn, Palgrave Macmillan 2006); John Forester, *Planning in the Face of Power* (University of California Press 1989); Frank Fischer and John Forester (eds), *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press 1993). See also: Frank Fischer and Herbert Gottweis, *The Argumentative Turn Revisited – Planning Policy as Communicative Practice* (Duke University Press 2012).

¹⁶⁹ Its theoretical foundations can be found in Habermas's communicative rationality (n 98), Dryzek's discursive democracy (n 69) and Giddens's dialogic democracy (Antony Giddens, *Beyond Left and Right: The Future of Radical Politics* (Polity Press 1994).

¹⁷⁰ E.g. John Forester, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (MIT Press 1999); Judith Innes, 'Planning Theory's Emerging Paradigm: Communicative Action and Interactive Practice' (1995) 14 *Journal of Planning Education and Research* 183.

¹⁷¹ For a critique of professionalism in collaborative planning, M Tewdwr-Jones and P Allmendinger, 'Deconstructing Communicative Rationality: A Critique of Habermasian Collaborative Planning' (1998) 30 *Environment and Planning A* 1975. Cf Patsy Healey, 'Deconstructing Communicative Planning Theory: A Reply to Tewdwr-Jones and Allmendinger' (1999) 31 *Environment and Planning A* 1129.

communicative fora.¹⁷² Rydin explains the changing role of professional planners in pluralist theories as an effect of theories of co-production, where planners become co-producers of knowledge.¹⁷³ This, as Rydin suggests, 'opens the way to rethinking some of the claims of contemporary planning theory about multiple epistemologies, allowing for planning to hear multiple voices in the name of democratic participation and empowerment but also arguing for specific spaces within planning to test out multiple knowledge claims'.¹⁷⁴ Accordingly, the value-laden and political nature of planning requires a more careful consideration of participation and the diversity of publics.¹⁷⁵

However, like deliberative democracy, collaborative planning theory has been criticised on several theoretical and practical grounds. In particular, some have rejected this normative framework based on its unconditioned faith in reaching consensus through communicative reason.¹⁷⁶ Goodspeed has seen in its 'internal diversity and limited scope' the reason for its failure to achieve 'a total revolution in thinking'.¹⁷⁷ Others have criticised its inability to resolve the power and conflict dimensions in planning.¹⁷⁸ Dynamics of power are certainly central to understanding participation in planning.¹⁷⁹ They result in social divisions and marginalisation of minorities and vulnerable groups or opinions.¹⁸⁰ Taken to an extreme, the disruptive effect of power in participation has led some to frame public participation as a 'new tyranny'.¹⁸¹ Despite these claims, the weight and distribution of power in planning remains unresolved. Sharp and Connelly suggest that the emphasis on power dynamics in planning risks to oversimplify public participation in two respects: on the one hand, complexities are

¹⁷² Healey (n 168). On this point, cf with discussion on the role of 'intermediaries' as experts in chapter 8 and 9.

¹⁷³ Rydin (n 148). On co-production, see in particular Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004) and Sheila Jasanoff, 'Science and Citizenship: A New Synergy' (2004) 31 *Science and Public Policy* 90. For a climate change angle to this debate, Brian Wynne, 'Strange Weather Again: Climate Science as Political Art' (2010) 27 *Theory, Culture & Society* 289.

¹⁷⁴ Rydin *ibid* 66.

¹⁷⁵ Heather Campbell, 'Planning: An idea of Value' (2002) 73 *Town Planning Review* 271; Anna Davis, 'Hidden or Hiding? Public Perceptions of Participation in the Planning System' (2001) 72 *Town Planning Review* 193.

¹⁷⁶ E.g. Miche Neuman, 'Communicate This: How Does Consensus Lead to Advocacy and Pluralism?' (2000) 19 *Journal of Planning Education and Research* 343; Margo Huxley and Oren Yiftachel, 'New Paradigm or Old Myopia? Unsettling the Communicative Turn in Planning Theory' (2000) 19 *Journal of Planning and Education Research* 333.

¹⁷⁷ Robert Goodspeed, 'The Death and Life of Collaborative Planning Theory' (2016) 1 *Urban Planning* 1.

¹⁷⁸ Tracey Bedford, Judy Clark and Carolyn Harrison, 'Limits to New Public Participation: Practices in Local Land Use Planning' (2002) 73 *Town Planning Review* 311.

¹⁷⁹ Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (University of Chicago Press 1998). See also Oren Yiftachel and others (eds), *The Power of Planning: Spaces of Control and Transformation* (Kluwer Academic 2001); Gary Bridge, *Reason in the City of Difference* (Routledge, 2005); Patsy Healey, 'Collaborative Planning in Perspective' (2003) 2 *Planning Theory* 101. The ambiguity of consensus is also contested in environmental decision-making, see Lee (n 37) 179.

¹⁸⁰ Arnstein (n 4); Forester (n 168).

¹⁸¹ Bill Cooke and Uma Kothari, *Participation: A New Tyranny?* (Zed Books 2001).

reduced to simple issues of power; and on the other hand, treating participation as a binary, antagonistic event between a community and other actors (e.g. State, business) ignores the wider social and institutional context in which they operate.¹⁸² As a result, public participation might get isolated from policy processes.¹⁸³ Even where procedures for deliberative participation can be put in place, there is a risk that participants are not given the substantive ability to influence outcomes. Within this debate, Bedford and colleagues argue that collaborative practices show ‘a basic disjunction between what the public wished to object to and what was on the table for negotiation’.¹⁸⁴ They therefore claim that, through collaborative planning, ‘expectations are raised, but meaningful outcomes are not delivered’.¹⁸⁵ The case studies below will reiterate this point.

Of course, reducing the theoretical justifications for participation in planning to a binary division between rationalistic and pluralist perspectives appears simplistic.¹⁸⁶ Some have rejected this division, arguing that ‘the interplay between rationality/ies, planning and power are crucial to debates about participation in planning’.¹⁸⁷ Other scholars have tried to reconcile the emancipatory potential of collaborative planning, with the reality of power dynamics and its effectiveness in practice. From this perspective, Forester argues that a theory of planning must meet key requirements to reflect the nature of planning as ‘a value-laden activity’.¹⁸⁸ As he explains,

‘[n]ot only must an adequate account of planning practice be *empirically fitting*, it must also be both *practically appropriate* to the settings in which planners work and *ethically illuminating*, helping planners and citizens understand and assess the ethical and political consequences of various possibilities of action, policy, or intervention’.¹⁸⁹

Although originating from his communicative planning scholarship, these requirements represent useful signposts for an approach that seeks to develop the social and ethical

¹⁸² Sharp and Connelly (n 167).

¹⁸³ On rescaling participation, see chapter 4 section 6.2 below.

¹⁸⁴ Bedford, Clark and Harrison (n 178) 326 (referring to D Wilson, ‘Exploring the Limits of Public Participation in Local Government’ (1999) 52 *Parliamentary Affairs* 246).

¹⁸⁵ *Ibid* I will come back to this mismatch between expectations and outcomes with respect to the regulatory process for wind energy Nationally Significant Infrastructure Projects (NSIPs) in chapter 4, 5 and 6.

¹⁸⁶ Campbell and Marshall (n 162).

¹⁸⁷ Sue Brownill and Juliet Carpenter, ‘Participation and Planning – Dichotomies, Rationalities and Strategies for Power’ (2007) 78 *Town Planning Review* 401, 402. This dichotomy has also been criticised by others e.g. Bridge (n 179).

¹⁸⁸ John Forester, *Critical Theory, Public Policy and Planning Practice: Toward a Critical Pragmatism* (SUNY Press 1993) 15.

¹⁸⁹ *ibid* 16 (emphasis in the original). By ‘empirically fitting’, Forester means ‘an account of planning practice [that fits] the experiences of real planning practice’ at 16.

stand of participation, while acknowledging its practical conflicts.¹⁹⁰ Participation must then become an element of the 'process of policy generation and implementation'.¹⁹¹ In line with this argument, Stoker considers public involvement as meaning 'taking part in any of the processes of formulation, passage and implementation of public policies'.¹⁹² This might seem to take us back to a rationalistic approach to participation, or instrumental rationales. However, the 'ethically illuminating quality' of the theory is intended to avoid it.

6. Expertise and Politics

As discussed in chapter 1, the nature of expertise and role of the experts are important and interesting questions, but I am not dealing with it here. However, in this section I want to touch on the relation between expertise and the participatory issues I have discussed thus far. The legal and policy background is hugely influential upon the space and effects of public participation in decision-making. As suggested in the introduction to this thesis, the tensions between public rationality and techno-scientific arguments are entrenched in the reasons given for a decision. These pressures are at the centre of an intense scholarly debate about the contested dichotomy between expertise and democratic participation as evidence and reasons in the decision-making.¹⁹³ A simplistic dichotomy between the two often constructs and opposes 'facts' to 'values' at the expenses of participation.¹⁹⁴ As such it underestimates the contribution of socio-cultural contexts and non-technically framed arguments to what counts as 'knowledge'.¹⁹⁵ Far from being sharply opposed, the boundaries between science and democracy are blurred.

In the light of the complexity of environmental governance, decision- and policy-makers have increasingly called upon experts in many areas of law and regulation.¹⁹⁶ As clarified above, technical information is needed to take decisions, but decision-makers habitually lack relevant knowledge. Expertise is often internalised within

¹⁹⁰ Brownill and Carpenter (n 187).

¹⁹¹ *ibid.*

¹⁹² Gerry Stoker, 'Local Political Participation' in R Hambleton and others, *New Perspectives on Local Governance: Reviewing the Research Evidence* (Rowntree Foundation 1997) 157.

¹⁹³ E.g. Fischer (n 38); Fischer (n 136); Sheila Jasanoff, *Science and Public Reason* (Routledge 2012). See also, Fisher (n 107) 11-13.

¹⁹⁴ Paul Slovic, 'Informing and Educating the Public about Risk' (1986) 6 *Risk Analysis* 403 (noting that public opinion could 'harm' scientific and technological development).

¹⁹⁵ Jasanoff (n 193).

¹⁹⁶ For a review, Monika Ambrus and others, *The Role of Experts in International and European Decision-Making Processes: Advisors, Decision-Makers or Irrelevant Actors?* (CUP 2014). See also, Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Harvard University Press 1997). Cf Giandomenico Majone, *Regulating Europe* (Routledge 1996).

administrative bureaucracies (e.g. though independent regulatory agencies, committees, commissions) to infuse decision-making with what is presented as “independent and authoritative” expert rationality.¹⁹⁷ Expertise is used in multiple ways. As experts are praised for their neutrality and qualifications to provide knowledge and data for impact assessment, their expertise is *instrumentally* utilised to obtain (allegedly) objective and value-free evidence for a course of action. This is often considered to enable “better” and “smarter” regulation.¹⁹⁸ But expertise can also be used *strategically* to support decisions already made, as well as *symbolically* to ‘strengthen the [decision-maker’s] reputation and legitimacy’.¹⁹⁹ Recourse to technical and scientific knowledge is conveniently relied upon as the main strategy to prove the substantive quality of decision through irrefutable ‘facts’, validated by methodology and quantitative assessment, and subject to peer-review.

Despite its merits, an unmitigated confidence in experts is problematic. First, technocratic approaches to environmental decision-making might close down the space and influence of public participation in decision-making. In the case of opposition to wind energy infrastructure, Burningham and Walker have explained the deficit argument as encompassing multiple deficit framings: a deficit of correct knowledge, of right experience, of rationality and objectivity, and of legitimacy.²⁰⁰ Holding that the lay public lacks expertise and misunderstands scientific facts fundamentally challenges (and repeatedly discredits) the space for expressing public concerns, making their values and rationalities ill-suited to justify decisions.²⁰¹ These technocratic approaches often squeeze out socio-cultural values from the realm of what counts as ‘good reason’ for a decision.²⁰² Any form of overreliance on technical expertise is likely to refute values with facts.²⁰³ Although important for the quality of the outcome, uncritical faith in

¹⁹⁷ E.g. Susan Owens, *Knowledge, Policy, and Expertise: The UK Royal Commission on Environmental Pollution 1970-2011* (OUP 2015).

¹⁹⁸ On this point, e.g. Robert Baldwin, ‘Is Better Regulation Smarter?’ (2005) Public Law 485; Robert W. Hahn and Paul C. Tetlock, ‘Has Economic Analysis Improved Regulatory Decisions?’ (2008) 22 *Journal of Economic Perspectives* 67 (advocating for a central role of economics in regulatory decision-making). See also, Commission (n 18); Commission, ‘Better Regulation for Growth and Jobs in the European Union’ (Communication) COM (2005) 97 final.

¹⁹⁹ Lorna Schrefler, ‘Reflections on the Different Roles of Expertise in Regulatory Policy Making’ in Ambrus and others (eds) (n 196) 63.

²⁰⁰ Kate Burningham, Julie Barnett and Gordon Walker ‘An Array of Deficits: Unpacking NIMBY Discourse in Wind Energy Developers’ Conceptualization of Their Local Opponents’ (2015) 28 *Society and Natural Resources* 246.

²⁰¹ Fischer (n 136). Cf Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (CUP 2002) (supporting the democratic justification of cost-benefit requirements in regulation). See also Brian Wynne, ‘Public Engagement as a Means of Restoring Public Trust in Science - Hitting the Notes but Missing the Music?’ (2006) 9 *Community Genetics* 21.

²⁰² Sheila Jasanoff, *Design on Nature – Science and Democracy in Europe and the United States* (Princeton University Press 2007).

²⁰³ Lee (n 37) chapter 2. In a risk regulation context, Maria Lee, ‘Beyond Safety? The Broadening Scope of Risk Regulation’ in Colm O’Cinneide (ed), *Current Legal Problems 2009* (OUP 2010). See also Steve Rayner and Robin Cantor, ‘How Fair is Safe Enough? The Cultural Approach to Societal Technology Choice’ (1987) 7 *Risk Analysis* 3.

experts and technical framings will always tend to limit the lay public's ability to influence.²⁰⁴ Yet, as Lee notes, '[s]imply adding participation to a technocratic process without examining the underlying assumptions in the process [...], a belated consideration of 'other' issues, is inherently limited'.²⁰⁵

Second, but connected to the first argument, a bold reliance on techno-scientific expertise as justification for a decision has been widely challenged as naïve.²⁰⁶ As briefly noted in the introduction, at the route of this claim is the precarious reality of 'knowledge'. Knowledge is rarely complete, as some elements remain unknown, while others are subject to scientific controversies, or evolve too rapidly to pin them down with conclusive certainty.²⁰⁷

Due to the incompleteness, inconclusiveness and contingency of knowledge, the regulator's trust in the ability of scientific experts to 'speak truth to power' is at best ingenuous.²⁰⁸ Knowledge is not only contested for its ambiguity and uncertainty, but also for its impossible objectivity and separation from values.²⁰⁹ Among others, science and technology studies (STS) scholars have repeatedly pointed out that knowledge and society 'co-produce' each other.²¹⁰ As illustrated earlier, this means that there are profound interactions between science and society as they constantly define and shape each other. At the same time, the lay public is not ignorant and incapable of rational argumentation and reasoning, but is able to express value and alternative knowledge. So science and democracy are not in a dichotomy, but in an essentially complementary relationship.

There is a great deal of literature emphasising the impossibility of dividing expertise and politics.²¹¹ And this reinforces the importance of participation. A deliberative framing opens up a space for cooperation between the public and the experts towards more inclusive and participatory forms of decision-making. It

²⁰⁴ Mariano-Fiorentino Cuéllar, 'Rethinking Regulatory Democracy' (2005) 57 *Administrative Law Review* 411.

²⁰⁵ Lee (n 31) 636.

²⁰⁶ Francis Sandbach, *Environment, Ideology and Policy* (Blackwell 1980).

²⁰⁷ Brian Wynne, 'Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventing Paradigm' (1992) 2 *Global Environmental Change* 111. See also Ulrich Beck, *The World at Risk* (Polity 2009) describing contemporary society as 'non-knowledge society' being the contradictory 'product of more and better knowledge' (at 115.)

²⁰⁸ David Collingridge and Colin Reeve, *Science Speaks to Power: The Role of Experts in Policymaking*, (St Martins' Press 1986). On the relationship between knowledge and power as 'speaking truth to power', Don K. Price, *The Scientific Estate* (Harvard University Press 1965).

²⁰⁹ See Sheila Jasanoff 'The Practices of Objectivity in Regulatory Science' in Charles Camic, Neil Gross and Michèle Lamont (eds), *Social Knowledge in the Making* (University of Chicago Press 2011), viewing objectivity in regulatory science as 'culturally situated and contested' (at 308).

²¹⁰ In particular, Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004) and Sheila Jasanoff, 'Science and Citizenship: A New Synergy' (2004) 31 *Science and Public Policy* 90.

²¹¹ In an EU context, Maria Lee, 'Experts and Publics in EU Environmental Law' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

conceptually shifts the role of experts from a technical to a political realm. It often includes actors from the regulated industry and other economic actors, whose role as “participants” as well as “experts” raises important questions about the legitimacy of the decision.²¹² The dichotomy between expertise and society thus becomes reductive. Going beyond the simplistic science/democracy divide means that we move from seeking an understanding of ‘which’ knowledge counts, to focusing on different views of ‘what’ counts as ‘knowledge’.²¹³

In a co-production perspective, public participation acquires a renewed significance as a platform for cooperation between science and society.²¹⁴ As knowledge is dispersed, contingent and constructed,²¹⁵ decisions based on a wider set of values and experiences, beyond mere “facts”, tend to be qualitatively superior in terms of responsiveness of the decision and its environmental performance.²¹⁶ Here deliberative participation places the role of multiple knowledge(s), rationalities and values at the centre of decision-making. This is more sympathetic of the transformation of opinions in democratic processes, rather than to liberal models of aggregation of individual preferences in a market logic. Fischer indeed highlights how deliberative practices have reshaped the role of experts away from omniscient elites, to work with the public as mediator, facilitator and interpreter of knowledge for the deliberation of the public.²¹⁷ While some have questioned the theory of co-production, a sharp divide between the narratives of expertise and democracy in participation literature remains contested, as I will reiterate at different moments in the thesis.²¹⁸

7. ²¹² Carolyn Abbot and Maria Lee, ‘Economic Actors in EU Environmental Law’ (2015) 34 *Yearbook of EU Law* 1. See also Carolyn Abbot, ‘Bridging the Gap - Non-state Actors and the Challenges of Regulating New Technology’ (2012) 39 *Journal of Law and Society* 329. In another context, Julia Black, ‘Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation’ (2003) *Public Law* 63.

²¹³ Fisher (n 106) 16.

²¹⁴ Angela Liberatore and Silvio Functowitz, “‘Democratising’ Expertise, “‘Expertising’” Democracy: What Does This Mean, and Why Bother?’ (2003) 30 *Science and Public Policy* 146. See also, Fischer 2000 (n 136) discussing the example of deliberative conferences as platforms for cooperation between public and experts.

²¹⁵ Jasanoff (n 210). See also Pieraccini (n 41) emphasising the multiplicity and fluidity of knowledge.

²¹⁶ Alan Irwin, *Citizen Science: A Study of People, Expertise and Sustainable Development* (Routledge 1995).

²¹⁷ Fischer 2000 (n 136).

²¹⁸ Harry Collins and Rob Evans, ‘The Third Wave of Science Studies: Studies of Expertise and Experience’ (2002) 32 *Social Studies of Science* 235 (who reject co-production and claim that expertise should be separated from experience). Cf Brian Wynne, ‘Seasick on the Third Wave? Subverting the Hegemony of Propositionalism: Response to Collins and Evans’ (2002) (2003) 33 *Social Studies of Science* 401.

7. Conclusions

The justifications for public participation in environmental decision-making and planning are certainly convincing, both on substantive and normative grounds. But it is perhaps the aptitude of environmental and planning decisions to awake a plurality of environmental values and knowledges, and shake expectations to exercise environmental citizenship, that makes the argument in favour of participation even more compelling. Indeed, 'to argue that environmental decisions can be made well without some breadth of participation, involves a mistaken understanding of environmental issues, which are rarely one-dimensional technical decisions'.²¹⁹ This inevitably suggests that simply affirming its merits only scratches the surface of the challenges that participation in environmental decision-making might entail.

Despite their differences, a reflection on the extent to which environmental law and planning scholars have engaged with the theoretical foundations of participation, and the relationship between expertise and lay public rationality, provides the necessary background to comprehend key challenges related to decision-making for large offshore wind energy infrastructure. As this chapter has outlined, the conceptual nature and normative function of participation in law and politics have taken a variety of connotations, depending on the underlying theory of participation in the polity and public decision-making. The ambiguities and multiple understandings of the space for people's voice in decision-making explain why its contours remain contested and its practice is often problematic. This suggests that the conceptual nature and normative function of public participation is not only shaped by its underlying theoretical framework, but also by its legal and policy context. Eventually, the weight of experts' rationality in decision-making and dynamics of power profoundly affect the space for people's influence. It is therefore unsurprising that '[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process'.²²⁰ It is from this perspective that the next chapter addresses the nuanced distinction between a participatory model and a model of 'acceptance' in environmental decision-making.

²¹⁹ Lee (n 37) 202.

²²⁰ Arnstein (n 4) 216.

A THEORY OF PUBLIC ACCEPTANCE IN DECISION-MAKING ON WIND ENERGY PROJECTS

1. Introduction

This chapter builds on the rationales and theoretical foundations for public participation in environmental decision-making and planning, illustrated in chapter 2. Here I focus on the distinction and relationship between the notion of 'public participation' and the notion of 'public acceptance'. As illustrated in the previous chapter, public participation is a complex concept and I will not attempt to offer a uniform, prescriptive definition here. Similarly, the notion of 'public acceptance' of various energy technologies and infrastructure has been explained and contested by a rich social science literature, and I will not reduce this multifaceted debate into a monolithic definition.¹ However, as participation and acceptance are the two 'labels' around which my thesis develops, they require an explicit discussion. Although others might mean something different, by public participation I mean a substantive engagement with the reasons and values presented by the public in a participatory decision-making process, when all options are still open and participants have an opportunity to influence the decision. It rests on a mutually supportive interaction between normative / procedural and substantive rationales for participation. Building on critical perspectives of the notion of 'acceptance' as support for energy technology or infrastructure development, by 'public acceptance', I mean a shallow public support for, or passive acquiescence to, a decision that has already been taken.² My idea of 'public acceptance' of wind energy infrastructure refers to the expectation of lay public acquiescence to decisions already

¹ Patrick Devine-Wright, 'Reconsidering Public Acceptance of Renewable Energy Technologies: A Critical Review' in Michael Grubb, Tooraj Jamasb and Michael G Pollitt (eds), *Delivering A Low-Carbon Electricity System – Technologies, Economics and Policy* (CUP 2008); Paul Upham, Christian Oltra and Àlex Boso, 'Towards A Cross-paradigmatic Framework of the Social Acceptance of Energy Systems' (2015) 8 *Energy Research & Social Science* 100; Susana Batel, 'A Critical Discussion of Research on the Social Acceptance of Renewable Energy Generation and Associated Infrastructure and An Agenda for the Future' (2018) 20 *Journal of Environmental Policy and Planning* 356; Maarten Wolsink, 'Social Acceptance Revisited: Gaps, Questionable Trends, and An Auspicious Perspective' (2018) 46 *Energy Research and Social Science* 287.

² In particular: Susana Batel, Patrick Devine-Wright, Torvald Tangeland, 'Social Acceptance of Low Carbon Energy and Associated Infrastructures: A Critical Discussion' (2013) 58 *Energy Policy* 1; Daniel Barben, 'Analyzing Acceptance Politics: Towards An Epistemological Shift in the Public Understanding of Science and Technology' (2010) 19 *Public Understanding of Science* 274.

made by policy-makers or developers. I argue that the *pursuit* of public acceptance is different from meaningful public participation, and it often leads to narrow engagement.

The language of ‘acceptance’ is generally used in social science to refer to the response of society, local communities and individuals to technological development and innovation. Research on the meaning and drivers of acceptance of renewable energy technology and infrastructure constitutes a significant aspect of the debate on wind infrastructure development.³ Public acceptance is a multidimensional and multi-actor concept that manifests itself differently depending on the governance scale and the actors involved.⁴ It has been described as society’s response to a technology in general (‘social acceptance’), or local community’s reaction to its implementation in a specific socio-cultural and geographic space (‘community acceptance’).⁵ But, the social and local dimensions of acceptance are interconnected, calling into question the desirability of boundaries between them.⁶ Assumptions about their meaning and function in the decision-making process are therefore contested, making the lay public’s response to infrastructure development a ‘recurrent governance, regulatory and policy issue’.⁷

The meaning and role of public acceptance in policy and decision-making is little discussed in the legal scholarship.⁸ This is surprising as public acceptance is generally seen as a key condition for technology development and implementation, while a lack thereof in the form of public opposition is considered a barrier to them.⁹ Moreover, local opposition is often framed as an issue for the planning system and the decision-making process, making the idea of acceptance interesting to lawyers and legal scholars.¹⁰ What makes this concept obscure for lawyers is not only the fact that it

³ Devine-Wright (n 1).

⁴ Upham and others (n 1).

⁵ E.g. Rolf Wüstenhagen, Maarten Wolsink and Mary Jean Burer, ‘Social Acceptance of Renewable Energy Innovation: An Introduction to the Concept’ (2007) 35 *Energy Policy* 2683.

⁶ Batel (n 1); Batel and Devine-Wright (n 2); Susana Batel and Patrick Devine-Wright, ‘A Critical and Empirical Analysis of the National-Local “Gap” in Public Responses to Large-scale Energy Infrastructures’ (2015) 58 *Journal of Environmental Management & Planning* 1076; Patrick Devine-Wright and Bouke Wierma, ‘Opening Up the “Local” to Analysis: Exploring the Spatiality of UK Urban Decentralised Energy Initiatives’ (2013) 18 *Local Environment* 1099.

⁷ Oliver Todt, ‘The Limits of Policy: Public Acceptance and the Reform of Science and Technology Governance’ (2011) 78 *Technological Forecasting and Social Change* 902, 902.

⁸ In different contexts, see e.g. Thomas C Hansford and Chealsie Coe, ‘Linguistic Complexity, Information Processing, and Public Acceptance of Supreme Court Decisions’ (2018) 40 *Political Psychology* 395; Soili Nysten-Haarala, Elena Klyuchnikova and Heidi Helenius, ‘Law and Self-regulation – Substitutes or Complements in Gaining Social Acceptance?’ (2015) 45 *Resources Policy* 52.

⁹ E.g. David Toke, ‘Explaining Wind Power Planning Outcomes: Some Findings from a Study in England and Wales’ (2005) 33 *Energy Policy* 1527.

¹⁰ Geraint Ellis and others, ‘Wind Power: Is There A Planning Problem?’ (2009) 10 *Planning Theory & Practice* 521; Anita Rønne, ‘Opposition to Wind Farms and the Possible Responses of the Legal System’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity Legal Change and Impact on Communities* (OUP 2016).

is volatile and hard to measure,¹¹ but also that its deep meaning and drivers remain unclear.¹² Yet, in the light of renewable energy targets, there is a sense of “institutional urgency” to achieve public acceptance of wind energy projects.¹³ As discussed in this chapter, the flip side of this policy concern for achieving public acceptance can be passivity from the part of the public, as opposed to active public engagement and contribution to the decision-making.¹⁴ It also suggests that the reasons for rejection are likely to be dismissed as simply lack of acceptance, potentially assimilating public rejection with the Not-In-My-Backyard’ (NIMBY) logic. Such conceptualisation of public acceptance as passive acquiescence, more or less directly, challenges the procedural and substantive rationales for public participation in decision-making.

The chapter explores the notion of public acceptance of wind energy technology and infrastructure projects in the social science literature (section 2). It focuses on critical views about its assumptions and discusses the multiple dimensions of acceptance and their relationship.¹⁵ My interest is in public acceptance of infrastructure projects and its relationship with participation. In section 3, I look at what I call the “factors of acceptance”, i.e. factors that generally influence, both positively and negatively, public attitudes towards large-scale infrastructure. While the literature identified a number of drivers for public acceptance, I focus on three discrete aspects.¹⁶ I argue that 1) landscape and visual impact of the proposed project, 2) place attachment and 3) the perceived fairness of the outcome as well as of the decision-making process, play an important role here (section 3). I suggest that they shape the relationship between public acceptance and participation in decisions on major wind energy infrastructure.

¹¹ Barben (n 2) (arguing that ‘[w]hat sufficient or lacking acceptance means depends on an actor’s expectations and the social domain concerned’ at 278).

¹² Frank van Rijnsoever, Allard van Mossel and Kevin Broecks, ‘Public Acceptance of Energy Technologies: The Effects of Labelling, Time and Heterogeneity in a Discrete Choice Experiment’ (2015) 45 *Renewable and Sustainable Energy Reviews* 817 (arguing that ‘[i]t is often unclear what the concept of public acceptance entails, since it has a dual meaning. It variably refers to an attitude towards a technology or to a form of behaviour that supports or resists the implementation of a technology’ at 827).

¹³ As I will further clarify in chapter 4, this “institutional urgency” can be found in the renewable and wind energy policy and law at EU level, as well as the national level in England. This suggests that lawyers should not ignore the traction of the concept as immaterial to law, especially in cases where the legal and policy system maintains its logic. See Maria Lee and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 25 *Journal of Environmental Law* 33; Yvonne Rydin, Maria Lee and Simon Lock, ‘Public Engagement in Decision-Making on Major Wind Energy Projects’ (2015) 27 *Journal of Environmental Law* 139.

¹⁴ Batel and Devine-Wright (n 2).

¹⁵ *ibid*; Barben (n 2).

¹⁶ Devine-Wright (n 1). See also Nicolas C Bronfman and others, ‘Understanding Social Acceptance of Electricity Generation Sources’ (2012) 46 *Energy Policy* 246 (developing a trust-acceptability model); Jed J Cohen, Johannes Reichl J and Michael Schmidthaler, ‘Re-focussing Research Efforts on the Public Acceptance of Energy Infrastructure: A Critical Review’ (2014) 76 *Energy* 4.

While landscape and visual impact are likely to be always considered ‘important and relevant’ matters for the Secretary of State’s decisions, place attachment and fairness might be contested as material considerations in a planning decision.¹⁷ However, I argue below, necessarily tentatively, that having regard to these issues would be lawful within the system established by the Planning Act 2008 (section 4). This is important because, depending on the importance recognised to them in the decision-making process, an emphasis on public acceptance can either obstruct or reinforce participation (section 5).

It is against this background that the chapter constructs a theory of acceptance in decision-making on wind energy infrastructure. This is articulated by describing the rationale and features of a public acceptance-based model of engagement in decision-making (‘acceptance model’), as opposed to a model of engagement that pursues deliberative participation (‘deliberative-participatory model’) (section 5). While in a deliberative-participatory model, ‘all options are open’¹⁸ and participants are able to influence outcomes, in an acceptance model, engagement is rhetorically sought, but the ability to influence is restricted. In the chapter, I compare the two models by focusing on their theoretical underpinning, the underlying relationship between acceptance and participation, and the importance they attribute to my three “factors of acceptance”. I conclude that, by simply offering a shadow of participation, the acceptance model is problematic and makes the normative and substantive justification of the decision inevitably more fragile.¹⁹

2. The Notion of Public Acceptance and its Critiques

Public acceptance is frequently presented as a pre-condition for technological innovation and implementation.²⁰ However, what scholars and policy-makers exactly

¹⁷ Planning Act 2008, s 104.

¹⁸ Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L26/2 (amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April [2014] OJ L124/1) (“EIA Directive”), art 6 (4); UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) UNTS 2161, 446, art 6 (4).

¹⁹ Iris Marion Young, *Inclusion and Democracy* (OUP, 2000); Benjamin Barber, *Stronger Democracy* (University of California Press 1984) notes that ‘[i]f citizens have no means of positively influencing state policy then such policies cannot claim normative democratic legitimacy’ (at 177).

²⁰ Sheila Jasanoff, ‘Constitutional Moments in Governing Science and Technology’ (2011) 17 *Science and Engineering Ethics* 621.

mean by 'acceptance' varies, as the concept and its drivers remain contested.²¹ As Devine-Wright noted, 'genuine understanding of the dynamics of public acceptance remains elusive'.²² This is partially due to little systematic consideration of the factors shaping public acceptance; but also to the fact that terms used to describe the notion – i.e. 'public or social acceptance, support, positive perceptions, beliefs or attitudes as well as terms like objection, resistance and opposition' – 'are rarely defined'.²³

In this section, I explore the multifaceted notion of public acceptance of renewable energy technologies and wind infrastructure siting. I concentrate on a critique of the meaning and dimensions of public acceptance (section 2.1), the – argued – gap between the 'social' and 'public' dimensions of acceptance (section 2.2) and the rejection of the Not-In-My-Backyard (NIMBY) as a paradigm to explain public opposition to infrastructure development (section 2.3).

2.1. The Meaning and Dimensions of Public Acceptance

Like public participation, the concept of public acceptance is ambiguous and difficult to pin down. Its meaning and function are often taken for granted, but are not straightforward.²⁴ In an attempt to offer a neutral working definition, Upham and colleagues framed 'acceptance' as 'a favourable or positive response (including attitude, intention, behaviour and – where appropriate – use) relating to a proposed or in situ technology or socio-technical system, by members of a given social unit (country or region, community or town and householder, organization)'.²⁵ Others have defined it as 'lack of noticeable opposition to a project'.²⁶

While definitions vary, public acceptance is generally understood in the literature as to imply some level of public support for a policy decision or proposed development, such a new technology or infrastructure project. Without this support, the implementation of a given technology or infrastructure is deemed harder to justify in practice. Acceptance is then necessary for policy development and technical operation. In simple terms, it means that we have people on board to pursue the policies or projects proposed. However, defining 'acceptance' as 'support' is not intuitive, nor unquestioned. Batel, Devine-Wright and Tangeland claim that, at a close scrutiny,

²¹ Frank van Rijnsoever, Allard van Mossel and Kevin Broecks, 'Public Acceptance of Energy Technologies: The Effects of Labelling, Time and Heterogeneity in a Discrete Choice Experiment' (2015) 45 *Renewable and Sustainable Energy Reviews* 817.

²² Devine-Wright (n 1) 455.

²³ *ibid.*

²⁴ Batel, Devine-Wright and Tangeland (n 2).

²⁵ Upham and others (n 1) 103.

²⁶ Cohenen and others (n 16).

‘acceptance’ and ‘support’ show different origins and implications.²⁷ They convincingly explain that:

‘while ‘acceptance’ seems to involve a reaction *to* something – external – and one which is mainly characterised by passivity and non-decision, ‘support’ seems more clearly to be action-oriented, to imply agency *for* and engagement with something’.²⁸

By the same token, Barben notes that:

‘[a]cceptance only highlights a very narrow aspect of how individuals and groups evaluate phenomena relevant to them: acceptance does not express affirmation, approval or conviction; and it presupposes a passive rather than an active relationship (the latter emphasising that people make sense of things themselves)’.²⁹

In decisions about energy projects, discourses on acceptance then evoke a situation in which ‘energy infrastructures are being proposed or given by authorities or companies to individuals and communities for them to receive without contestation’.³⁰ Arguing that acceptance implies passivity and acquiescence might appear overcritical, but it certainly stimulates much-needed reflection about decision-making on energy technologies, as a social phenomenon. In this light, the policy concern over public acceptance has been contested as ‘ultimately disinterested in people’s actual motivations and reasoning’.³¹ A policy emphasis on acceptance can then easily culminate in what Barben describes as ‘acceptance politics’, which uses social science research to legitimize specific technologies and ‘pacify the public’.³² This critique shows how the language and logic of ‘acceptance’ might depart from the rationales of public participation and deliberation. The interest for achieving public acceptance implicitly presents itself as a (potential) hurdle to participation. As opposed to ‘opening-up’,

²⁷ Batel, Devine-Wright and Tangeland (n 2).

²⁸ *ibid* 2 (emphasis in the original), citing Irina Rau, Petra Schweizer-Ries and J. Hideland, ‘The Silver Bullet for the Acceptance of Renewable Energies?’ in Sigrun Kabish, Anna Kunath, Petra Schweizer-Ries and Annett Steinfuehrer (eds), *Vulnerability, Risks and Complexity: Impacts of Global Change on Human Habitats* (Hogrefe Publishing 2012) 177.

²⁹ Barben (n 2).

³⁰ Batel, Devine-Wright and Tangeland (n 2) 2.

³¹ Barben (n 2) 278.

³² Daniel Barben and others, ‘Anticipatory Governance of Nanotechnology: Foresight, Engagement and Integration’ in Edward J. Hackett and others (eds), *The Handbook of Science and Technology Studies* (MIT Press 2008) 993.

rhetoric of acceptance 'closes-down' engagement, offering a narrow and limited vision of how people make choices.³³

The literature also focuses on the multiple dimensions of public acceptance of renewables and wind energy.³⁴ The widely-cited framework designed by Wüstenhagen and colleagues explains how 'public acceptance' relates not only to decisions on energy policy objectives and the type of technology more suitable to achieve them ('socio-political acceptance'), but also to proposals for the siting of the turbines ('community acceptance') and to the conditions for market adoption of the technology ('market acceptance').³⁵ Here, I am interested in the relationship between - what they call - 'socio-political' and 'community' acceptance, as labels for upstream and downstream levels of public acceptance.

The upstream level of public acceptance refers to the uptake of energy policies and technologies by the public, stakeholders and policy-makers. This dimension of acceptance engages with the merit of the energy policy paradigm and the direction of policy shifts. Typical questions engaging upstream acceptance are, for instance, the ambition of the renewable energy targets, the share of a specific energy source in the energy portfolio. As I further explain in chapter 4, this meaning of acceptance feeds into the debate about the scale at which participation occurs, or should occur.³⁶ Yet, upstream public acceptance cannot be separated from - and has wide implications for - downstream acceptance. Downstream acceptance of renewable energy primarily relates to responses to individual projects. It refers to 'the specific acceptance of siting decisions and renewable energy projects by local stakeholders, particularly residents and local authorities'.³⁷

My focus in this thesis is on the downstream dimension of acceptance, which I will refer to as 'public acceptance', more generally. I find the term 'public' acceptance to be more able to capture and engage with an open-ended series of relationships,

³³Andy Stirling, 'Opening Up or Closing Down? Analysis, Participation and Power in the Social Appraisal of Technology' in Melissa Leach, Ian Scoones I and Brian Wynne (eds) *Science and Citizens - Globalization and the Challenge of Engagement* (Zed Books 2005) 220. Cf with Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003) 72 on deliberative democracy opening up the political space to multiple perspectives.

³⁴Scholars often use 'social', 'local' and 'community' acceptance as synonyms, without (always) explicitly qualifying their contours and relationship. Variations in terminology are explained by reference to their subjects and objects; that is, to who is asked to accept and what is open for acceptance. Society, developers and individuals might be asked to accept different things or make ambivalent choices. Among others, Maarten Wolsink, 'Contested Environmental Policy Infrastructure: Socio-political Acceptance of Renewable Energy, Water, and Waste Facilities' (2010) 30 *Environmental Impact Assessment Review* 302; and van Rijnsoever and others (n 21).

³⁵Wüstenhagen and others (n 5). Building on their framework, see also Upham and others (n 1).

³⁶Most of the issues I discuss in this thesis can be reconceptualised as issues of scale. While important and interesting, I do not engage in this conceptualisation in the thesis. See Chapter 1 para 6.1.

³⁷Wüstenhagen and others (n 5) 2685.

beyond the ambiguous notion of ‘community’ (discussed in chapter 1).³⁸ In this context, the pluralistic notion of ‘publics’, as ‘groups of people characterised by membership of different kinds of community and with different concerns as part of wider society’, appears more inclusive.³⁹ As my theory of acceptance is discussed in contrast with public participation, I also consider the reference to ‘*public* acceptance’ more practical to explain the interrelations and differences between the two concepts.

Acknowledging the differences between levels of acceptance is important to clarify what is open for public support in each context. However, while wind energy policy and infrastructure consent inevitably imply different choices from different actors, they are located within an interlinked, multilevel governance system.⁴⁰ As a result, a sharp divide between the upstream and downstream dimension of acceptance should be taken with caution, as I explain next.⁴¹

2.2. The ‘Acceptance Gap’

The – contested - conceptual divide between levels of acceptance provides the basis for the argued ‘attitude-behaviour gap’ in public acceptance of wind energy technologies.⁴² This is a gap between high support for wind energy policy and technology (attitudes) and active rejection of individual projects (behaviour). Focusing on wind energy, Bell and others have described this gap at two levels: at a social level, there is a gap between the ‘*high* public support for wind energy expressed in opinion surveys and the *low* success rate achieved in planning applications for wind power developments’ (‘social gap’).⁴³ At an individual level, they pointed to a gap that ‘exists

³⁸ On this point: Batel (n 1) (on communities of relevance); Gordon Walker and Patrick Devine-Wright, ‘Community Renewable Energy: What Should It Mean?’ (2008) 36 *Energy Policy* 497; Mhairi Aitken, Claire Haggett and David Rudolph, ‘Practices and Rationales of Community Engagement with Wind Farm: Awareness Raising, Consultation and Engagement’ (2016) 17 *Planning Theory and Practice* 557; and Julie Barnett, Kate Burningham and Gordon Walker, ‘Imagined Publics and Engagement Around Renewable Energy Technologies in the UK’ (2012) 21 *Public Understanding of Science* 36.

³⁹ Patrick Devine-Wright, Hanna Devine-Wright and Richard Cowell, ‘What Do We Know About Overcoming Barriers to Infrastructure Siting in Local Areas?’, Report for the Department of Energy and Climate Change (2016) 8 (<http://orca.cf.ac.uk/93905/1/DECC_Infrastructure_PlacewiseLtd.pdf> accessed 30 August 2019).

⁴⁰ Adrian Smith, ‘Emerging in Between: The Multilevel Governance of Renewables in the English Regions’ (2007) 35 *Energy Policy* 6266.

⁴¹ Batel and Devine-Wright (n 6). Cf Wolsink (n 1) arguing that the fact that social and public acceptance are used interchangeably in the literature causes ‘great confusion’ (288).

⁴² In particular, Derek Bell, Tim Gray and Claire Haggett, ‘The “Social Gap” in Wind Farm Siting Decisions: Explanations and Policy Responses’ (2005) 14 *Environmental Politics* 460; Derek Bell and others, ‘Revisiting the “Social Gap”: Public Opinion and Relations of Power in the Local Politics of Wind Energy’ (2013) 22 *Environmental Politics* 115. On the foundations of the argument, James Blake, ‘Overcoming the ‘Value–Action Gap’ in Environmental Policy: Tensions Between National Policy and Local Experience’ (1999) 2 *Local Environment* 257.

⁴³ Bell and others, ‘The “Social Gap”’ (ibid) 461 (emphasis in the original).

when an individual person has a *positive attitude* to wind power in general but *actively opposes* a particular wind power development' ('individual gap').⁴⁴ I claim that this gap could be more intuitively explained as an 'acceptance gap' between high upstream acceptance of national renewable energy policy objectives by the public, stakeholders and policy-makers (which might be a profound and active acceptance, including those who are actively committed to wind energy in principle); and low downstream acceptance (or lack thereof) of individual projects by local stakeholders.

The attitude-behaviour gap hypothesis has been criticised.⁴⁵ The high social support for wind energy has been viewed as 'largely unsubstantiated', making the gap potentially overstated.⁴⁶ The problem with the 'acceptance gap' is that it tends to polarise assumptions about national and local choices.⁴⁷ Arguing that there is a conflict between national needs and local interests has been seen as 'inadequate and misleading'.⁴⁸ An overemphasis on the disconnection between upstream and downstream acceptance might mask a misunderstanding of the relationship between dimensions of acceptance, and of scales of decision-making. Such relationship is likely to be much more nuanced and interdependent than the gap suggests.⁴⁹

A good example of the fragility of the acceptance gap can be seen in the context of consenting of large infrastructure, where the policy landscape and the specific siting controversies are profoundly interconnected.⁵⁰ Owens convincingly argues that substantial policy shifts have been 'inextricably bound up' with siting conflicts and the way they are dealt with within planning, making them intertwined with the political and policy process.⁵¹ This explains why siting controversies are more than mere planning issues, having much wider national policy implications.⁵² As discussed in the next chapter, such wider implications could have led, for instance, to the 2016 amendment that moved decision-making for large-scale onshore wind infrastructure in

⁴⁴ *ibid.*

⁴⁵ E.g. Mhairi Aitken, Seonaidh McDonald and Peter Strachan, 'Locating "Power" In Wind Planning Processes: The (Not So) Influential Role of Local Objectors' (2008) 51 *Journal of Environmental Planning and Management* 777; Mhairi Aitken, 'Why We Still Don't Understand the Social Aspects of Wind Power: A Critique of Key Assumptions Within the Literature' (2010) 38 *Energy Policy* 1834.

⁴⁶ Aitken, 'Why' (*ibid.*) 1835.

⁴⁷ Batel and Devine-Wright (n 6).

⁴⁸ Susan Owens and Louise Driffill, 'How to Change Attitudes and Behaviours in the Context of Energy' (2008) 36 *Energy Policy* 4412, 4414. See also Susan Owens, 'Commentary: A Collision of Adverse Opinions? Major Projects, Planning Inquiries and Policy Change' (2002) 32 *Environment and Planning A* 1141.

⁴⁹ Wüstenhagen and others (n 5). See further discussion in section 3.3. below.

⁵⁰ Batel and Devine-Wright (n 6) (arguing that there should be more connection between national policy and local engagement to reduce the likelihood of the national- local gap).

⁵¹ Susan Owens, 'Siting, Sustainable Development and Social Priorities' (2004) 7 *Journal of Risk Research* 101, 105.

⁵² Alain Nadai 'Planning, Siting and the Local Acceptance of Wind Power: Some Lessons from the French Case' (2007) 35 *Energy Policy* 2715.

England back to the ordinary planning process.⁵³ From the perspective of a critique of the acceptance gap, Owens and Driffill conclude that '[...] questions about the desirability of technologies *in principle* become entangled with issues that relate to specific localities. This calls into question the assumption that “generic” and “local” issues can readily be separated [...].'⁵⁴

This deeper reflection helps understand the complexity of the notion of public acceptance, not only as a passive engagement, but also as a measurable pre-condition for successful policy-making and implementation. This appreciation assists in rethinking public resistance and opposition in a normative perspective. It is precisely this normative perspective that is missed by an uncritical recourse to the 'acceptance gap' as a justification for failure to implement wind energy projects.

2.3. The Shadow of NIMBY

An uncritical reading of 'public acceptance' and of the 'acceptance gap' sits in the shadow of the Not-In-My-Backyard (NIMBY) paradigm. This is because both public acceptance, as passive acquiescence and pacification of rejection, and the NIMBY logic tend to perpetuate a vision of public opposition as an irrational, selfish or ignorant reaction to infrastructure development.⁵⁵

The NIMBY paradigm is a recurrent – and criticised – discourse in the context of siting of renewable energy infrastructure.⁵⁶ It is a pejorative buzzword to explain individuals and communities' opposition to siting energy infrastructure in their locality, as an expression of a deficit model of the public knowledge.⁵⁷ Claims of NIMBYism simplify the complexity of rejection and present lack of (sufficient) acceptance as irrational, ignorant, selfish or simply too prudent.⁵⁸ In this light, a NIMBY paradigm in decisions on siting infrastructure is more likely to fit within 'hierarchical beliefs about

⁵³ Infrastructure Planning (Onshore Wind Generating Stations) Order 2016, SI 306/2016. See also Energy Act 2016, s 78. For Wales, consenting powers were subsequently transferred to the Welsh Ministers to align with the Planning (Wales) Act 2015. See Developments of National Significance (Specified Criteria and Prescribed Secondary Consents (Wales) (Amendment) Regulations 2016, SI 358/2016. This has effectively re-centralised decision-making for large wind farms in Wales. See discussion in chapter 4 below.

⁵⁴ Owens and Driffill (n 48) 4414 (emphasis in the original).

⁵⁵ Alan Irwin and Brian Wynne, *Misunderstanding Science? The Public Reconstruction of Science and Technology* (CUP 2009).

⁵⁶ See Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011).

⁵⁷ Kate Burningham, Julie Barnett and Gordon Walker 'An Array of Deficits: Unpacking NIMBY Discourse in Wind Energy Developers' Conceptualization of Their Local Opponents' (2015) 28 *Society and Natural Resources* 246. See also Kate Burningham, 'Using the Language of NIMBY: A topic for Research, not an Activity for Researchers' (2000) 5 *Local Environment* 55.

⁵⁸ William Freudenberg and Susan Pastor, 'NIMBYs and LULUs, Stalking the Syndromes' (1992) 48 *Journal of Social Issues* 39.

planning'.⁵⁹ Scholars have consistently refuted the NIMBY hypothesis.⁶⁰ They not only contested the connection between proximity with the turbines and opposition, but also fundamentally condemned NIMBYism as a framework for institutional disengagement with the reasons and rationality of local opposition.⁶¹ Indeed, the reasons for opposition are more complex than this hypothesis suggests, requiring a change in the conceptual framework used to understand people's attitude towards renewable energy infrastructure.⁶²

In the light of this critique, Devine-Wright proposes an alternative framework based on the 'socially constructed, symbolic attributes of places, and how these are interpreted by residents to "fit" with development proposals'.⁶³ He conceptualises a multi-stage analytical framework to reflect 'the dynamic nature of the individual and collective responses to place change over time, encompassing identification (becoming aware of change), interpretation (making sense of the change by creating and adopting symbolic meanings), evaluation (judging change to be positive or negative, with emotional attitudinal responses), coping (e.g. denying or accepting change) and acting'.⁶⁴

As I will further explain in the next section, this framework reflects a deeper understanding of, and engagement with, public acceptance and the factors shaping it, beyond a simplistic NIMBY narrative. Crucial to Devine-Wright's framework is how people interpret change (i.e. negatively or positively). It is an empowering framework as people's response to change, such as the siting of wind energy infrastructure, actually 'depends on whether change is considered enhancing or disrupting a place', rather than on selfish motives and information deficit.⁶⁵

⁵⁹ Maarten Wolsink, 'Invalid Theory Impedes Our Understanding: A Critique on the Persistence of the Language of NIMBY' (2006) 31 *Transactions of the Institute of British Geographers* 85, 89 (calling for an abandonment of the term).

⁶⁰ Particularly: Patrick Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 *Wind Energy* 125; Patrick Devine-Wright, 'Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action' (2009) 19 *Journal of Community and Applied Social Psychology* 426. See also Id; Maarten Wolsink, 'Wind Power and the NIMBY-Myth: Institutional Capacity and the Limited Significance of Public Support' (2000) 21 *Renewable Energy* 49; Maarten Wolsink, 'Entanglement of Interests and Motives: Assumptions Behind the NIMBY-Theory on Facility Siting' (1994) 31 *Urban Studies* 851.

8. ⁶¹ Dan van der Horst, 'NIMBY or Not? Exploring the Relevance of Location and the Politics of Voiced Opinions in Renewable Energy Siting Controversies' (2007) 35 *Energy Policy* 2705 (also because opponents might not necessarily live in proximity of the proposed site).

⁶² Susana Batel and Patrick Devine-Wright, 'Towards A Better Understanding of People's Responses to Renewable Energy Technologies: Insights from Social Representations Theory' (2015) 24 *Public Understanding of Science* 311; Devine-Wright, 'Beyond' and 'Rethinking' (n 60).

⁶³ Patrick Devine-Wright and Yuko Howes, 'Disruption to Place Attachment and the Protection of Restorative Environments: A Wind Energy Case Study' (2010) 30 *Journal of Environmental Psychology* 271.

⁶⁴ *ibid* 272 referring to Devine-Wright, 'Rethinking' (n 60).

⁶⁵ *ibid* 272-273.

NIMBY discourses are embedded in the different ways in which opposition and support to wind energy projects are treated.⁶⁶ In a NIMBY-dominated discourse, while the motives and reasons of the opponents are discussed and challenged, the level of scrutiny of the reasons of supporters is much less intense. Both developers and scholars interested in public acceptance have often overlooked the merit of arguments made by supporters.⁶⁷ Wolsink clarified that this focus on objectors rests on the bias ‘that the position of support is apparently taken for granted and considered as the “natural” position. Consequently, the supportive position does not seem to need an explanation, whereas the position of refusal becomes deviant’.⁶⁸ As an expression of a deficit model embodied with the NIMBY discourse, supporters are perceived as having the “correct” knowledge and the “right” experiences, as opposed to the opponents’ “wrong” knowledge and experiences. This changes the way supporters and opponents are constructed as ‘publics’. As Burningham and others note, ‘supporters are a somewhat abstract general public “out there” known only through statistics, in contrast to opponents, who are specific local publics known through experience to be problematic’.⁶⁹ Some have concluded that these different approaches to the two sides of the wind energy infrastructure conflict ‘reflect both poor research and a pro-development bias’.⁷⁰ In my research, I have investigated both supportive and opposing views in the Interested Parties’ representations made to the Examining Authority in the authorisation for the Rampion and Navitus Bay Wind and found the developer and ExA’s engagement with supporters to reiterate a pro-development bias or, to put it differently, an acceptance model of public engagement.⁷¹

Overall, when lack of public acceptance is framed as NIMBYism, we overlook the deep-rooted factors and discourses shaping people’s attitudes and perception of technology development and siting, which I focus on in the next section.⁷²

⁶⁶ Carly McLachlan, ‘Technologies in Place: Symbolic Interpretation of Renewable Energy’ in Bob Carter and Nickie Charles (eds), *Nature, Society and Environmental Crisis* (2010).

⁶⁷ On the importance of analysing support, Aitken (n 45) and Wüstenhagen and others (n 5).

⁶⁸ Maarten Wolsink, ‘Wind Power: Basic Challenge Concerning Social Acceptance’ in Robert Meyers (ed), 17 *Encyclopedia of Sustainability Science and Technology* (2012) 12218 (draft chapter

<https://www.researchgate.net/profile/Maarten_Wolsink/publication/331732972_Wind_Power_Basic_Challenge_concerning_Social_Acceptance/links/5c8a2ca1299bf14e7e7b619b/Wind-Power-Basic-Challenge-concerning-Social-Acceptance.pdf?origin=publication_detail> accessed 28 August 2019).

⁶⁹ Burningham and others (n 57) 256.

⁷⁰ Geraint Ellis, John Barry and Clive Robinson, ‘Many Ways to Say “No”, Different Ways to Say “Yes”: Applying Q-Methodology to Understand Public Acceptance of Wind Farm Proposals’ (2007) 50 *Journal of Environmental Planning and Management* 517, 520.

⁷¹ See chapter 6 section 2.

⁷² Among others Ellis, Barry and Robinson (n 70) discussing the ‘idealised discourses’ of opposition (at 546) and support to wind (at 549).

3. “Factors of Acceptance”

Building on a critical view of ‘acceptance’ in the previous section, my main argument in this chapter is that an emphasis on achieving public acceptance of wind infrastructure development, viewed as passive acquiescence and “pacification” of the public, is likely to offer limited capacity to engage with people’s multiple (negative and positive) attitudes towards wind development projects. The pursuit of this vision of acceptance builds on an instrumental-technocratic approach to participation and decision-making, which generally restricts the space for individual and community (non-technical) influence upon decisions.⁷³

Acceptance is a complex phenomenon and there are multiple factors shaping it. People’s attitudes towards wind energy are determined by a variety of social, cultural and personal factors and values, beyond just technical facts. Devine-Wright gave one of the most comprehensive picture of how public acceptance of renewable energy technologies is shaped by multiple factors.⁷⁴ These include: ‘personal factors’ (i.e. socio-demographic characteristics such as age, gender and social class or income); ‘social-psychological factors’ (i.e. knowledge and direct experience, perceived impacts, environmental and political beliefs, place attachment and ‘perceived fairness of the development process and levels of trust in key actors’⁷⁵); and ‘contextual factors’ (i.e. technology type and scale, institutional structure, such as ownership structures, the distribution of benefits and the use of participatory approaches to public engagement; and spatial context, such as regional and local context, spatial proximity and NIMBYism).⁷⁶

A deeper analysis of how individuals and groups construct attitude and behaviour towards wind farms, and the acknowledgement of the multiple factors that shape them, constitute a much-needed contribution to the regulatory decision-making process. This aligns with the argument that the incorporation of cultural and emotional dimensions of environmental change is essential to understand how society addresses and shapes transformations, risks and uncertainties.⁷⁷ In practice, though, these

⁷³ John Barry, ‘From Environmental Politics to the Politics of the Environment: The Pacification and Normalisation of Environmentalism?’ in Marcel J L Wissenburgh and Yoram Levy (eds), *Liberal Democracy and Environmentalism* (Routledge 2004).

⁷⁴ In particular: Devine-Wright, ‘Beyond’ and ‘Rethinking’ (n 60). See also Geraint Ellis and Gianluca Ferraro, *The Social Acceptance of Wind Energy: Where We Stand and the Path Ahead*, Technical Report (Publication Office of the European Union 2017) <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC103743/jrc103743_2016.7095_src_en_social%20acceptance%20of%20wind_am%20-%20gf%20final.pdf> accessed 28 August 2019.

⁷⁵ Devine-Wright (n 1) 450.

⁷⁶ *ibid.* See also Aitken (n 32) on social aspects.

⁷⁷ Katrina Brown and others, ‘Empathy, Place and Identity Interactions for Sustainability’ (2019) 56 *Global Environmental Change* 11.

aspects are difficult to “translate” in regulatory terms. From a participatory perspective, I argue that the importance attributed to factors, such as landscape concerns; place attachment and perceived fairness, influences whether the decision-making embodies a (passive) acceptance model or a deliberative-participatory model of engagement (further discussed in section 5).

For this reason, here I focus on three factors that are often seen as influencing public reactions to wind projects, and eventually their acceptance.⁷⁸ As noted earlier, I am particularly concerned with: a) landscape and visual impact; b) place attachment; and c) perceived fairness of the development outcomes and of the decision-making process. While other factors might be equally important in specific contexts, I find these three factors especially interesting. While their specific influence upon public acceptance has been explored in the social science and planning scholarship, they have been little discussed in the environmental law literature.⁷⁹ They have also been addressed by participants in public consultations and other participation opportunities. This has made some of them an object of examination by planning authorities in the authorisation process for large wind farms in England (as shown in the case studies in chapters 5 and 6).⁸⁰

3.1. Landscape and Visual Impact Concerns

The impact on landscape and visual amenities is a fundamental issue with respect to wind farm development, both onshore and offshore.⁸¹ For convenience, I will refer to “landscape” here as including “seascape”. The Overarching National Policy Statement for Energy (EN-1) provides that landscape effects ‘depend on the existing character of the local landscape, its current quality, how highly it is valued and its capacity to accommodate change’.⁸² The National Policy Statement for Renewable Energy

⁷⁸ n 74.

⁷⁹ But see: Maria Lee, ‘Knowledge and Landscape in Wind Energy Planning’ (2017) 37 *Legal Studies* 3; Jane Holder, ‘Law and Landscape: The Legal Construction and Protection of Hedgerows’ (1999) 62 *Modern Law Review* 100.

⁸⁰ In particular: Maria Lee and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 25 *Journal of Environmental Law* 33; Yvonne Rydin, Maria Lee and Simon Lock, ‘Public Engagement in Decision-Making on Major Wind Energy Projects’ (2015) 27 *Journal of Environmental Law* 139; Lee (n 79).

⁸¹ Within the vast literature: Maarten Wolsink, ‘Planning of Renewable Schemes: Deliberative and Fair Decision-making on Landscape Issues Instead of Reproachful Accusations of Non-Cooperation’ (2007) 35 *Energy Policy* 2692; Michael Woods, ‘Conflicting Environmental Visions of the Rural: Windfarm Development in Mid-Wales’ (2003) 43 *Sociologia Ruralis* 271; L Shore, ‘Wind Energy and English Landscape Identity’ in Martin Pasqualetti, Paul Gipe and Robert Righter (eds), *Wind Power in View – Energy Landscapes in A Crowded World* (2002); Charles Warren and others, “Green on Green”: Public Perceptions of Wind Power in Scotland and Ireland’ (2003) 48 *Journal of Environmental Planning and Management* 853.

⁸² DECC, *Overarching National Policy Statement for Energy (EN-1)* (July 2011) (hereinafter “EN-1”) [5.9.8].

Infrastructure (EN -3) states that '[s]eascape is an important resource and economic asset'.⁸³ Nevertheless, a clear explanation of what constitutes landscape is difficult and generally underexplored in the legal literature.⁸⁴ Here Lee's work is useful and important.⁸⁵ As she explains,

'it is largely accepted that "landscape" is not only human-made, but historically, culturally and socially (we might add 'legally') constructed, and that landscape in turn contributes to the shaping of cultural and social (and legal) life'.⁸⁶

The literature on landscape and its constructed nature is vast and sophisticated. This is primarily because landscape exceeds "the view", although arguably encompassing it.⁸⁷ In engaging with a deeper idea - and knowledges - of landscape, Lee offers two important points, which I will come back to later in the thesis.⁸⁸ First, within this more sophisticated understanding of landscape as constructed and beyond "the physical" and "the visual", landscape connects with place attachment(s). As Lee describes:

'Questions of home and belonging, "a passionate attachment to the places of childhood", and spiritual, emotional and social matters, pervade discussion of landscape. In this, landscape resonates with "place attachment"'.⁸⁹

As she suggests, people's lived experience represents the link between landscape and place attachment, shaping people's attitudes toward wind energy infrastructure.⁹⁰

Second, and connected to the previous point, this more profound understanding of landscape is hard to reflect in the decision-making process in planning.⁹¹ This is apparent in how the Examining Authority (ExA) interprets and engages with knowledge claims about landscape in its examination of the application for development consent for wind energy Nationally Significant Infrastructure Projects in England. However, while Lee argues that the ExA largely reduces landscape to a merely physical entity,⁹²

⁸³ DECC, *National Policy Statement for Renewable Energy Infrastructure (EN-3)* (July 2011) (hereinafter "EN-3") [2.6.200].

⁸⁴ n 79. See also Deborah G Martin and Alexander Scherr, 'Lawyering Landscapes: Lawyers as Constituents of Landscape' (2005) 30 *Landscape Research* 73.

⁸⁵ Lee (n 79).

⁸⁶ *ibid* 8-9. See also Simon Schama, *Landscape and Memory* (Harper Collins 2004).

⁸⁷ *ibid*.

⁸⁸ Chapters 5 and 6.

⁸⁹ Lee (n 79) 9 (references omitted).

⁹⁰ *ibid* 19.

⁹¹ *ibid* 10.

⁹² *ibid*.

my analysis of the Navitus project examination in chapter 7 suggests a slightly more open approach to the role of experience.⁹³

3.2. Place Attachment

As explained above, there is arguably a strong relation between a deeper understanding of landscape and the notion of place attachment. People and their environment are inextricably linked in many ways, creating dynamic spatial and social relationship and bonds. A 'place' is 'a geographic area that has meaning to people'.⁹⁴ In one of the first academic works in this area, Tuan explains how the attribution of meaning and value is what distinguishes a 'space' from a 'place' to which people feel emotionally attached.⁹⁵ Seamon describes it as 'any environmental locus in and through which individual or group actions, experiences, intentions, and meanings are drawn together spatially'.⁹⁶ However, what a place physically is remains undefined, as it can refer to tangible, symbolic or imagined spaces.⁹⁷

Building on the idea of place and meaning,⁹⁸ Altman and Low defines 'place attachment' as the 'bonding of people to places'.⁹⁹ This relationship is articulated in different forms. It is dynamic and socially constructed¹⁰⁰ as well as multidimensional.¹⁰¹ This has led Batel and Devine-Wright to focus on the pluralistic idea of 'place attachments' based on the fact that a place has multiple attributes (physical coordinates, social relations, emotional bonds) that provoke multiple attachments.¹⁰² Place attachment is 'a state of psychological well-being experienced by a person as a

⁹³ See Chapter 7 section 4 below.

⁹⁴ Steven Galliano and Gary Loeffler, *Place Assessment: How People Define Ecosystems* (US Department of Agriculture General Technical Report PNW-GTR-462 September 1999) 1.

⁹⁵ Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Edward Arnold 1977).

⁹⁶ David Seamon, 'Place Attachment and Phenomenology: The Synergistic Dynamism of Place' in Lynne Manzo and Patrick Devine-Wright (eds), *Place Attachment: Advances in Theory, Methods and Applications* (Routledge 2014) 11. On the link with experience, see Chapter 7 section 6 below.

⁹⁷ Maria Lewicka, 'Place Attachment: How Far Have We Come in the Last 40 Years?' (2011) 31 *Journal of Environmental Psychology* 207, 211.

⁹⁸ On their relationship, Joan Brehm, Brian Eisenhauer and Richard Stedman, 'Environmental Concern: Examining the Role of Place Meaning and Place Attachment' (2012) 26 *Society and Natural Resources* 522.

⁹⁹ Irwin Altman and Setha Low (eds), *Place Attachment* (Springer 1992) 2.

¹⁰⁰ Andrés Di Masso, John Dixon and Kevin Durrheim, 'Place Attachment as Discursive Practice' in Manzo and Devine-Wright (n 96).

¹⁰¹ Daniel Williams, "'Beyond the Commodity Metaphor" Revisited: Some Methodological Reflections on Place Attachment Research' in Manzo and Devine-Wright (n 96).

¹⁰² Patrick Devine Wright and Susan Batel, 'My Neighbourhood, My Country or My Planet? The Influence of Multiple Place Attachments and Climate Change Concern on Social Acceptance of Energy Infrastructure' (2017) 47 *Global Environmental Change* 110, 110. See Bregje van Veelen and Claire Hagggett, 'Uncommon Ground: The Role of Different Place Attachments in Explaining Community Renewable Energy Projects' (2017) 57 (S1) *Sociologia Ruralis* 533 showing the different dimensions of place attachments, leading to either supporting a project or opposing it.

result of the mere presence, vicinity, or accessibility of the place¹⁰³ or 'a positive affective bond between an individual and a specific place, the main characteristic of which is the tendency for the individual to maintain closeness to such a place'.¹⁰⁴ It can refer to both the process of attachment as well as the outcome of that process.¹⁰⁵ The notion encompasses individual attachment, as well as community¹⁰⁶ or groups place attachment, spanning from 'local' to 'global' place attachment(s).¹⁰⁷ The feeling of attachment can originate 'with familiarity and ease, with the assurance of nurture and security, with the memory of sound and smells, of communal activities and homely pleasures accumulated over time'.¹⁰⁸ It encompasses 'the experience of living or spending time in a particular place'.¹⁰⁹ A sentiment of attachment can develop over time, as well as through intense and meaningful experiences. Some have defined place attachment as 'an affective relationship between people and the landscape that goes beyond cognition, preference or judgement'.¹¹⁰ Others have found that 'the relationship between landscape values and place attachment shows that the landscape perceptions of spiritual importance, wilderness and attractive scenery, sights, sounds or smells (aesthetic values) were associated with place attachment, scale of place identify and place dependence'.¹¹¹ This notion is connected to other constructs or processes, such place identity,¹¹² sense of place, or place meaning, but there is a lack of consensus on the structure of such relationship and how to measure it.¹¹³

Place attachment is separate from environmental concerns per se, but it can affect pro-environmental behaviour in a positive or negative way.¹¹⁴ People who value a

¹⁰³ Kalevi Korpela, 'Place Attachment' in Susan Clayton (ed), *Oxford Handbook of Environmental and Conservation Psychology* (OUP 2012) 149 (references omitted).

¹⁰⁴ Maria C Hidalgo and Bernardo Hernandez, 'Place Attachment: Conceptual and Empirical Questions' (2001) 21 *Journal of Environmental Psychology* 273, 274.

¹⁰⁵ Maria Vittoria Giuliani, 'Theory of Attachment and Place Attachment' in Mirilia Bonnes, Terence Lee and Marino Bonaiuto (eds), *Psychological Theories for Environmental Issues* (Ashgate 2003).

¹⁰⁶ Carla Koons Trentelman, 'Place Attachment and Community Attachment: A Primer Grounded in the Lived Experience of a Community Sociologist' (2010) 22 *Society and Natural Resources* 191.

¹⁰⁷ Devine-Wright and Batel (n 102). On scale, see Chapter 1, section 6.1 above.

¹⁰⁸ Tuan (n 95) 159.

¹⁰⁹ Bell and others, 'Revisiting' (n 42) 123.

¹¹⁰ Robert B Riley, 'Attachment to the Ordinary Landscape' in Altman and Low (n 99) 13.

¹¹¹ Korpela (n 103) 152 referring to Gregory Brown and Christopher Raymond, 'The Relationship Between Place Attachment and Landscape Values: Toward Mapping Attachment' (2007) 27 *Applied Geography* (27) 89.

¹¹² Seamon (n 96) referring in this sense to 'the process whereby people living in or otherwise associated with a place take up that place as a significant part of their world' (at 17). For an early elaboration, Harold Proshansky, Abbe K Fabian and Robert Kaminoff, 'Place Identity: Physical World Socialisation of the Self' (1983) 3 *Journal of Environmental Psychology* 57.

¹¹³ Bernardo Hernandez, Maria C Hidalgo and Cristina Ruiz, 'Theoretical and Methodological Aspects of Research on Place Attachment' in Manzo and Devine-Wright (n 96) 125.

¹¹⁴ See Giuseppe Carrus and others, 'Place Attachment, Community Identification, and Pro-Environmental Engagement' in Manzo and Devine-Wright (n 96).

particular place are more likely to become 'place protectors' rather than 'environmentalists', more generally.¹¹⁵

As introduced above, Devine-Wright suggests that 'so-called "NIMBY" responses should be re-conceived as place-protective actions, which are founded upon processes of place attachment and place identity'.¹¹⁶ His research shows that local residents with strong place attachment (i.e. 'place-protectors') are likely to reject an energy project that is perceived as out of place as it would be seen as "industrialise" an otherwise rural place considered for its natural beauty and remoteness.¹¹⁷ On the contrary, when a proposal is seen to maintain or enhance the distinctiveness, character and historical continuity of a place, those with strong place attachment feelings are likely to give support.¹¹⁸ This does not necessarily require promotion of the environmental character of the place, as attachment can also be positively reinforced by the socio-economic advantage that might derive from an infrastructure development to the place one is attached to.¹¹⁹ In sum, place attachment can induce either public support or opposition to energy infrastructure development, depending on whether the technology is perceived as a threat or an opportunity to the locality.¹²⁰ For instance, wind turbines can be seen as a threat or disruption to the place as well as to the identities of the people who feel attached to it.¹²¹

Against this background, it should not be surprising that people's emotional and affective attachment to places constitute an important factor in shaping public responses to climate change in general¹²² and energy infrastructure in particular.¹²³

¹¹⁵ Bell and others, 2013 (n 42).

¹¹⁶ Devine-Wright, 'Rethinking' (n 60) 432.

¹¹⁷ This attitude emerges vividly from the case studies in chapters 5 and 6. On this point, Devine-Wright and Y Howes (n 63); Susana Batel and others, 'The Role of (De-)Essentialisation Within Siting Conflicts: An Interdisciplinary Approach' (2015) 44 *Journal of Environmental Psychology* 149.

¹¹⁸ See Patrick Devine-Wright, 'Place Attachment and Public Acceptance of Renewable Energy: A Tidal Energy Case Study' (2011) 31 *Journal of Environmental Psychology* 336; Patrick Devine-Wright, 'Enhancing Local Distinctiveness Fosters Public Acceptance of Tidal Energy: A UK Case Study (2011) 39 *Energy Policy* 83; Dan Venables and others, 'Living With Nuclear Power: Sense of Place, Proximity, and Risk Perceptions in Local Host Communities' (2012) 32 *Journal of Environmental Psychology* 371.

¹¹⁹ *ibid.*

¹²⁰ Devine-Wright (n 1) 450. Cf Carrus and others (n 114) arguing that the impact of place attachment can be negative especially when decisions involve a trade-off between advantages to single person and those of an entire group (at 160-161).

¹²¹ Devine-Wright and others (n 39) 8.

¹²² See Patrick Devine-Wright, 'Dynamics of Place Attachment in a Climate Change World' in Manzo and Devine-Wright (n 96); Patrick Devine-Wright, 'Think Global, Act Local? The Relevance of Place Attachments and Place Identities in a Climate Changed World' (2013) 23 *Global Environmental Change* 61. For an early elaboration, Eran Feitelson, 'Sharing the Globe: The Role of Attachment to Place' (1991) 1 *Global Environmental Change* 396.

¹²³ See Patrick Devine-Wright, 'Explaining "NIMBY" Objections to a Power Line: The Role of Personal, Place Attachment and Project-related Factors (2013) 47 *Environment and Behavior* 761; Devine-Wright, 'Place' (n 118). See also Noel Cass and Gordon Walker, 'Emotion and Rationality: The Characterisation and Evaluation of Opposition to Renewable Energy Projects' (2009) 2 *Emotion, Space and Society* 62. In a wind energy context, Claire Haggett and Geoff

Reiterating the relation between place attachment and landscape, Lee argues that 'place attachment can [...] be an important way of analysing resistance to renewable energy projects, and its rootedness is helpful in understanding the profundity of responses to even apparently mundane landscapes'.¹²⁴ This is primarily because the bond between people and places shapes their reaction to environmental change and infrastructure development that can affect such relation. As Devine-Wright concludes, thinking about place attachment as a factor of acceptance 'suggests fruitful avenues for future research, to use the concept of place to better understand local responses to the siting of renewable energy technologies "in place", and to specifically focus upon the affective bonds between person and environment that may influence public acceptance'.¹²⁵

A deeper consideration of place attachment as a factor influencing social acceptance of low carbon technologies permits to overcome the NIMBY syndrome, shifting 'attributions of responsibility for low-carbon technology conflicts away from local residents towards a more relational account that encompasses both developers and public actors'.¹²⁶ Yet despite its impact upon attitudes towards wind energy, the role of place attachment is often underestimated, as the bond between people and places are rarely taken into account by developers and decision-makers.¹²⁷ This results in a generally negative effect upon the quality of public engagement and public acceptance of infrastructure, where NIMBY rhetoric remains dominant.¹²⁸ Yet, internalising place attachment within the decision-making process might expand the space for participation and help catalyse a shift from an acceptance model to a deliberative-participatory model of public engagement.¹²⁹

3.3. Fairness for Participating Publics

Finally, one of the most slippery issues affecting public acceptance of wind turbines decisions is their perceived fairness.¹³⁰ Liebe and colleagues convincingly point out that

Vigar, 'Tilting at Windmills? Understanding Opposition to Windfarm Applications' (2004) 73 *Town and Country Planning* 288.

¹²⁴ Lee (n 79) 9.

¹²⁵ Devine-Wright (n 1) 450. See also Devine-Wright, 'Beyond' (n 60).

¹²⁶ Patrick Devine-Wright, 'Local Attachments and Identities: A Theoretical and Empirical Project Across Disciplinary Boundaries' (2015) 39 *Progress in Human Geography* 527, 528.

¹²⁷ E.g. Cass and Walker (n 123) 63; Etienne Bailey, Patrick Devine-Wright and Susana Batel, 'Using a Narrative Approach to Understand Place Attachments and Responses to Power Line Proposals: The Importance of Life-place Trajectories' (2016) 48 *Journal of Environmental Psychology* 200.

¹²⁸ Devine-Wright and others (n 39) 8.

¹²⁹ Cass and Walker (n 123) (in particular at 68).

¹³⁰ Among others: Catherine Gross, 'Community Perspectives of Wind Energy in Australia: The Application of A Justice and Community Fairness Framework to Increase Social Acceptance' (2007) 35 *Energy Policy* 2727; Maarten Wolsink, 'Wind Power Implementation: The Nature of

'a turbine is [...] not only a turbine, but a technology that's [sic] acceptance is socially embedded and affected by fairness concerns'.¹³¹ Borrowing from Natarajan and others, by 'fairness' here I mean both fairness of 'development outcomes' (e.g. environmental and socio-economic effects of the wind NSIPs and their distribution) and fairness in 'procedural openness and inclusivity of the participatory process'.¹³² Devine-Wright suggests that social acceptance is influenced by the locals' 'perceptions and awareness of both the outcomes of a new development, and the procedures of the development process'.¹³³ Fairness, as an ethical concept, lays at the core of the environmental justice debate.¹³⁴ As explained in chapter 1, the concept of justice is multidimensional and is generally seen to embody the idea of fairness.¹³⁵ Fairness of the development outcomes and of the procedure can be understood as concerns about distributive justice or procedural justice, respectively.¹³⁶ Instead of attempting to oversimplify the complex theoretical debate on justice as fairness, in this thesis I will simply refer to 'fairness' and 'justice' interchangeably.¹³⁷ However, because of the way these concepts are most commonly used in the literature on wind energy infrastructure, I will tend to use 'fairness' mostly in relation to the perception of the public of the process and of the outcomes of participation (chapters 6 and 7), and 'justice' in relation to the justification for community benefits (chapter 8).

From a development outcome perspective, the impact of wind turbines (e.g. environmental, landscape and visual and socio-economic) are often considered to disproportionately fall upon local communities, whereas the benefits are deemed to concentrate at the societal (e.g. energy security and climate change mitigation) and corporate level (e.g. developer and operator's profits). Some local communities have

Public Attitudes: Equity and Fairness Instead of "Backyard Motives" (2007) 11 *Renewable and Sustainable Energy Reviews* 1188; Maarten Wolsink, 'Planning of Renewables Schemes: Deliberative and Fair Decision-making on Landscape Issues Instead of Reproachful Accusations of Non-cooperation' (2007) 35 *Energy Policy* 2692; Vivianne Visschers and Michael Siegrist, 'Fair Play In Energy Policy Decisions: Procedural Fairness, Outcome Fairness and Acceptance of the Decision to Rebuild Nuclear Power Plants' (2012) 46 *Energy Policy* 292.

9. ¹³¹ Ulf Liebe, Anna Bartczak and Jürgen Meyerhoff, 'A Turbine is Not Only a Turbine: The Role of Social Context and Fairness Characteristics for the Local Acceptance of Wind Power' (2017) 107 *Energy Policy* 300, 300-301.

¹³² Lucy Natarajan and others, 'Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation' (2019) 90 *Town Planning Review* 117, 121.

¹³³ Devine-Wright, 'Enhancing' (n 118).

¹³⁴ E.g. Andrew Dobson, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (OUP 1999); Vicki Been, 'What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses' (1993) 78 *Cornell Law Review* 1001.

¹³⁵ Seminally, John Rawls, *The Idea of Justice* (Harvard University Press 1971). In planning, e.g. Stephen McKay, Michael Murray and Sean Macintyre, 'Justice as Fairness in Planning Policy-Making' (2012) 17 *International Planning Studies* 147.

10. ¹³⁶ Wolsink (n 60); Katharina Langer, Thomas Decker and Klaus Menrad, 'Public Participation in Wind Energy Projects Located in Germany: Which Form of Participation is the Key to Acceptance?' (2016) 112 *Renewable Energy* 63.

¹³⁷ See HLA Hart, *The Concept of Law* (OUP 1961) suggesting that fairness and justice can be used interchangeably and that justice can be considered to be 'maintaining or restoring a balance or proportion' (at 155, emphasis in the original) cited by Gross (n 130) 2729.

felt that the burden of siting new turbines or expanding existing projects is unfairly distributed, especially when affecting areas that are already socio-economically deprived or marginalised.¹³⁸ As a result, public acceptance can be negatively influenced by perceptions of distributive injustice. This debate has given rise to an emerging literature on cost-benefit sharing in energy activities.¹³⁹ With respect to wind energy consent, this general discussion has been particularly focused on the implications of the practice of community benefits and ownership structure, beyond legal compensation when required, as I explain in detail in chapter 8.¹⁴⁰ Here it suffices to note that community benefits and community ownership are questioned from an acceptance perspective.¹⁴¹ They have been described as ‘a means for closing the “gap” between high societal support for wind energy but strong opposition to specific schemes’.¹⁴² Nevertheless, while these are part of the ‘economic solution to siting problems more generally’,¹⁴³ they remain problematic, partially because the space for public participation in decisions on the types and distribution of benefits is generally limited and the perception of “bribery” persists.¹⁴⁴

From a procedural perspective, the ability of the public to have their voices heard in a fair and transparent decision-making process influences how people construct their attitudes and behaviour towards the technologies. In an onshore context, Gross found that issues of fairness and equity in the decision-making process shape people’s response, as much as concerns about impact.¹⁴⁵ Procedural fairness of the process is as much about public consultation conducted by the developer (e.g. in the context of pre-application consultation for NSIPs applications), as it is about participation in the examination. Haggett notes that issues associated with rationales for participation, efficacy and inclusiveness, and the identification of participants

¹³⁸ Liebe and others (n 131).

¹³⁹ E.g. Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016).

¹⁴⁰ E.g. Fleur Goedkeep and Patrick Devine-Wright, ‘Partnership or Placation? The Role of Trust and Justice in the Shared Ownership of Renewable Energy Projects’ (2016) 17 *Energy Research and Social Science* 135; Cowell and others (n 40).

¹⁴¹ Charles Warren and Malcom McFadyen, ‘Does Community Ownership Affect Public Attitudes to Wind Energy? A Case Study from South-West Scotland’ (2010) 27 *Land Use Policy* 204; Aileen McHarg, ‘Community Benefit through Community Ownership of Renewable Generation in Scotland’ in Barrera-Hernández and others (n 139).

¹⁴² Richard Cowell, Gill Bristow, and Max Munday, ‘Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development’ (2011) 54 *Journal of Environmental Planning and Management* 539, 541.

¹⁴³ *ibid* (references omitted).

¹⁴⁴ E.g. Sandy Kerr, Kate Johnson and Stephanie Weir, ‘Understanding Community Benefit Payments from Renewable Energy Development’ (2017) 105 *Energy Policy* 202; Aitken, Haggett and Rudolph (n 38); Devine-Wright and others (n 39). See also Peter Strachan and others, ‘Navigating a Minefield? Wind Power and Local Community Benefit Funds’ in Szarka and others (n 66) and Patrick Devine-Wright, ‘Fostering Public Engagement in Wind Energy Development: The Role of Intermediaries and Community Benefits’ in Szarka and others (n 66).

¹⁴⁵ Gross (n 130) in an onshore context.

determine the perception of procedural fairness.¹⁴⁶ This aligns with Devine-Wright's conclusion that "how" renewable energy technologies are sited, in addition to "what" technologies are sited, are important factors shaping public acceptance and responses [...].¹⁴⁷

But participation is difficult and the sense of frustration with its limits often leads to negative reactions towards specific projects. As the case studies in chapters 5 and 6 will reveal, the engagement process is often perceived as unfair.¹⁴⁸ This finding is in line with empirical research on participants' experience of regulatory decision-making in NSIPs. Natarajan and others have found that fairness of procedures is key in the participants' experience of the engagement process for NSIPs. In particular, they noted how '[t]he location, timing and format of the opportunities for in-person participation had created frustration for those wishing to make oral representations during the examination. Moreover, the barriers were unfair as they would only be experienced by certain groups'.¹⁴⁹ Interesting, however, perception of unfair procedures were counterbalanced by a positive assessment of the engagement led by the ExA.¹⁵⁰

Overall, research on the factors of public acceptance of wind energy infrastructure might provide a significant contribution to the debate on public participation in decision-making on climate change technologies.¹⁵¹ The factors of acceptance discussed in this section –landscape concerns, place attachment and fairness claims – potentially play an important role in directing decision-making towards an acceptance or a deliberative-participatory model of engagement, as I illustrate in section 6 below. I argue that a deeper consideration of factors of acceptance as legitimate reasons for a decision would allow the idea of acceptance to be constructively embraced in the legal and policy framework for participation, rather than limiting its scope.

4. "Factors of Acceptance" and the Determination Process

While important, the lawfulness of considering these factors in the consenting of wind energy NSIPs is potentially problematic. This is because the extent to which the

¹⁴⁶ Claire Haggatt 'Over the Sea and Far Away? A Consideration of the Planning, Politics, and Public Perceptions of Offshore Wind Farms' (2008) 10 *Journal of Environmental Policy and Planning* 289.

¹⁴⁷ Devine-Wright (n 1) 451.

¹⁴⁸ In another context, Jorgen K Knudsen and others, 'Local Perceptions of Opportunities for Engagement and Procedural Justice in Electricity Transmission Grid Projects in Norway and the UK' (2015) 48 *Land Use Policy* 299.

¹⁴⁹ Natarajan and others (n 132) 128.

¹⁵⁰ *ibid* 129.

¹⁵¹ E.g. Devine-Wright (n 56).

Secretary of State (and by implication the ExA) could be legally allowed to have regard to these factors in determining the application is not straightforward.

In this section, I address this point by briefly discussing how planning applications are determined and what factors must be (or may not be) taken into account in the determination process. I focus on the meaning of the ‘important and relevant matters’ that the Secretary of State ‘must have regard to’ in deciding on NSIPs under the Planning Act 2008.¹⁵² Given the lack of clarity as of its meaning in the Act, my interpretation of these ‘matters’ builds on the judicial interpretation of “material considerations” under ordinary planning (section 5.1). From this discussion, I suggest that place attachment and fairness concerns are – at least - capable in law of being ‘important’ matters, although their ‘relevance’ to specific applications depends on the circumstances and the balancing exercise of the Secretary of State in determining the application.

4.1. “Important and Relevant” Matters as Material Considerations

Section 104 of the Planning Act 2008 provides:

‘In deciding the application the Secretary of State must have regard to—

- (a) any national policy statement which has effect in relation to development of the description to which the application relates (a “relevant national policy statement”),
- (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009;
- (b) any local impact report (within the meaning given by section 60 (3)) submitted to the Secretary of State before the deadline specified in a notice under section 60 (2),
- (c) any matters prescribed in relation to development of the description to which the application relates, and
- (d) *any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision*.¹⁵³

The Act does not define what ‘important’, ‘relevant’ and ‘matter’ means. Nor is there judicial interpretation on them. However, in *R (on the application on Mynydd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy*, the Planning Court dealt with the way in which the Secretary of State determined an application. The

¹⁵² Planning Act 2008, s 104.

¹⁵³ *ibid* (emphasis added).

facts of the case are irrelevant here, but the Court's view on the elements considered in the Secretary of State's decision is important. The language of the Courts is ambiguous, noting that:

'The Secretary of State's decision [...] specifically dealt with each element of the Claimant's case, all of the major issues that had been raised by the Claimant [...] and all the information relevant to the balancing exercise she had to perform in making the appropriate assessment'.¹⁵⁴

However, elsewhere in the judgement, the Court is more precise referring to the Secretary of State's balancing and 'evaluative judgement'¹⁵⁵ of 'all material factors'¹⁵⁶ or 'all material considerations'.¹⁵⁷ This suggests that the distinction between 'matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision' under the Planning Act 2008 and 'material considerations' under the Town and Country Planning Act 1990 is perhaps blurred.

I maintain that an argument can be made for interpreting the former as at least including the latter. This is also based on their purposive reading as elements that the Secretary of State 'must have regard' in determining the decisions, in addition to any specific consideration to be taken into account by an enactment.¹⁵⁸ Certainly, it can be contended that, by using a different language, the legislator must have intended to give to these categories a different - although broader and more flexible – meaning. In any event, it is realistic that the Court might resort to its long history of interpreting the meaning of "material considerations" in planning, when required to interpret section 104 of the Planning Act.

4.2. Material Considerations and their Relevance

'Material considerations' are the factors that the decision-maker (i.e. local planning authority; Secretary of State or Planning Inspector) must take into account in determining a planning application under ordinary planning. The Town and Country Planning Act (TPCA) 1990 states that:

¹⁵⁴ *R (on the application of Mynydd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2016] EWHC 2581 (Admin) [65].

¹⁵⁵ *Ibid* [54]

¹⁵⁶ *Ibid* [51]

¹⁵⁷ *Ibid* [54] and [61]. The subsequent Court of Appeal decision did not engage with 'material considerations' or 'important and relevant' matters. See *R (on the application of Mynydd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231.

¹⁵⁸ *Baroness Cumberlege of Newick and another v Secretary of State for Communities and Local Government and another* [2017] EWHC 2057 (Admin) [51].

'In dealing with [...] an application, the [local] authority shall have regard to:
(a) the provisions of the development plan, so far as material to the application,
(b) any local finance considerations, so far as material to the application,
and
(c) *any other material considerations*'.¹⁵⁹

The meaning of 'material considerations' is not legally defined, but it has been widely elaborated in the case law. In *Stringer v Minister of Housing and Local Government*, Cooke J noted that:

'In principle...any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances'.¹⁶⁰

This means that material considerations must be genuine planning considerations and relevant to the application concerned.¹⁶¹ In *Westminster City Council v Great Portland Estates*, Lord Scarman expanded the *Stringer's* definition, arguing:

'Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance'.¹⁶²

Over time, the Court has taken a liberal approach to what constitutes material considerations, leaving the decision-maker considerable discretion in determining a planning application in any given case.

¹⁵⁹ Town and Country Planning Act 1990, s 70 (emphasis added). See Planning and Compulsory Purchase Act 2004, s 38(6).

¹⁶⁰ Cook J in *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281, 1294.

¹⁶¹ See *Regina v Westminster City Council ex parte Monahan* [1989] 1 PLR 188; *Tesco Stores Ltd v Secretary of State for the Environment* [1995]; *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 (where Lord Justice Carnwath held that 'material' in ordinary language is the same as "relevant" '[26].

¹⁶² *Westminster City Council v Great Portland Estates* [1985] A C 661, 670.

While the interpretation of what amounts to ‘material consideration’ is a matter of law for the court to determine, the weight to be accorded to it is a matter of planning judgement for the decision-maker.¹⁶³ This poses the question of which material considerations are ‘relevant’ in any given situation. In *Bolton BC v Secretary of State for the Environment*, LJ Glidewell suggested the principles that:

[...] the decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb ‘might’ I mean where there is a real possibility that he would reach a different decision if he did take that consideration into account.

[...] if the matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision maker ought to take into account’.¹⁶⁴

This illustrates that whether a material consideration is relevant in the circumstances of determining a specific application is ‘subject to review by the court on conventional public law grounds’.¹⁶⁵

Coming back to s 104 of the Planning Act, an ‘important’ matter could be interpreted as ‘material’ in planning terms, while a ‘relevant’ matter could be defined on a case-by-case basis by the decision-maker following the principles set out in *Bolton*.

4.3. Factors of Acceptance as “Important and Relevant”

Based on this discussion, my concern is the extent to which my factors of acceptance can constitute matters that are ‘important and relevant to the Secretary of State’s decision’, and therefore something he or she must give weight in determining the application. The Planning Inspectorate’s Advice Note 8 provides minimal guidance, stating:

¹⁶³ *Tesco* (n 161).

¹⁶⁴ *Bolton Metropolitan District Council and Others v Secretary of State for the Environment and Others* [1995] 1 WLR 1176 [p]. Cf *R (John Watson) v London Borough of Richmond upon Thames LBC* [2013] EWCA Civ 51.

¹⁶⁵ (n 158).

'Careful consideration is given by the Examining Authority to all the important and relevant matters, including the representations from Interested Parties'.¹⁶⁶

This is useful indication of the potential for arguments expressed by the lay public to be considered as 'important and relevant' matters. In the light of the significance of place attachment and fairness issues – especially when presented in the representations from Interested Parties – there is an argument to be made for these concerns to fall into the category of 'important and relevant' matters. However, the consideration of a matter being 'important' does not necessarily imply that it is also 'relevant' for the decision in a specific circumstance (i.e. it needs to be given weight).

Whether weight is given to them in determining an application is a matter of planning judgement and is case specific. Perhaps, the fact that place attachment and fairness find a difficult way into the ExA report means that they are not considered 'important and relevant' to the decision. If this was the case, they would amount to 'immaterial' considerations, making giving weight to them unlawful.

Nevertheless, I make a different argument here. I suggest that, based on the experience, knowledge and reasons from the lay public in engaging with wind energy infrastructure, issues associated with place attachment and fairness should in fact be considered 'important and relevant', or in other words 'material' in a broad sense. However, their relevance remains subject to a balancing exercise in the same way as other factors taken into account in the ExA report and regarded as important and relevant by the Secretary of State.

As Fisher and others conclude, '[i]n practice, determining planning applications is a messy and very issue-specific process in which many different factors can come into play'.¹⁶⁷ I argue that these factors could potentially include concerns about place attachment and fairness. In the light of my interpretation of the legal provisions and case law above, I suggest that place attachment and fairness are at least capable of being 'important and relevant' matters for a decision. Under this reading, the Secretary of State (and by implication the ExA) would be legally allowed to have regard to these factors in determining an application for NSIPs, depending on the circumstances and his/her balancing exercise.

¹⁶⁶ Planning Inspectorate, 'Advice Note 8: Overview of the Nationally Significant Infrastructure Planning Process for Members of the Public and Others' (December 2016) [6.2.] <<https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2013/04/Advice-note-8.0.pdf>> accessed 5 September 2019.

¹⁶⁷ Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (2nd edn, CUP 2019) 671.

5. Relationship between Public Acceptance and Participation

In this section, I move from focusing on the notion of public acceptance to concentrating on what the pursuit of acceptance entails for the legal right to participate in environmental decision-making and planning. Here I am interested in the relationship between public acceptance and public participation. Given the critiques and challenges discussed thus far, I am particularly concerned with the extent to which the policy interest in pursuing public acceptance might obstruct, or reinforce, the scope of participation in decision-making.

The relationship between acceptance and participation is not without difficulties. It is fragile and can easily be manipulated. Todt suggests that participation and acceptance remain different and do not always align. He notes that:

‘[...] contrary to the suggestion - sometimes encountered in policy documents - of a relatively straightforward or even readily manageable link between information, participation, acceptance and trust, recent analyses indicate that this relationship may be far more complex’.¹⁶⁸

I argue that the relationship between public participation and public acceptance can be of two types. The first type implies a close and mutually reinforcing conceptual relationship. On the one side, an understanding of why and how people tend to respond to policy and technological changes is crucial for successfully engaging with individuals and communities’ expectations in the participation process. Appreciating what influences a positive or negative attitude towards wind energy projects is likely to inform better participation. On the other side, the ability to participate and influence the planning process is in itself a factor that drives positive public attitudes towards projects.¹⁶⁹ However, when the interest in increasing public acceptance of wind energy infrastructure becomes a self-standing policy objective to enable implementation of decisions already made, the understanding and function of acceptance in the decision-making is likely to be different.

This leads to a second type of relationship, which is – I argue – more common in decisions on consenting large energy infrastructure. Here, public acceptance conforms to the idea of passive acquiescence, instead of with the one of active engagement within a participatory process. In this context, opportunities to influence

¹⁶⁸ Todt (n 7) 904. On trust and acceptance, see also Oliver Todt, ‘Designing Trust’ (2003) 353 *Futures* 239. Julie Barrett, Harris Cooper and Victoria Senior, ‘Belief in Public Efficiency, Trust and Attitudes Toward Modern Genetic Science’ (2007) 27 *Risk Analysis* 921.

¹⁶⁹ Joyce McLaren Loring, ‘Wind Energy Planning in England, Wales and Denmark: Factors Influencing Project Success’ (2007) *Energy Policy* 35 2648.

through participation can be obstructed, rather than reinforced. This aligns with instrumental rationalities, when participation is primarily used to achieve (passive) public support for policy or project implementation and legal compliance purposes, as explained in chapter 2 above. This tends to reveal a top-down, technocratic approach to decision-making, rather than an inclination towards deliberative participation. It dismisses the complex and delicate dynamics of public attitudes and dimensions of acceptance towards technological development.

I maintain that considering public acceptance in terms of passive acquiescence, and framing its function as *the* objective of participation, misunderstands the relationship between the factors of acceptance and the normative function of participation in decision-making. It suggests that the standards – and judgement - of (sufficient) acceptance is to be set and pre-framed at policy level to allow implementation of pre-committed policy decisions. This is what makes the scope for public participation limited, within a merely instrumental perspective (in the forms I have explained in chapter 2). As I noted above, this is problematic as it perpetuates NIMBY arguments and does not improve the substantive quality and procedural legitimacy of the decision.

From this perspective, some suggest that the assumptions and functions of public acceptance research should be re-assessed, to foster a mutually reinforcing relationship between acceptance and participation (i.e. the first type of relationship).¹⁷⁰ In this respect a more sophisticated and nuanced consideration of the factors that shape people's reactions to wind energy proposals is useful. A critical reflection on the factors that determine people's attitudes towards wind energy infrastructure – such as landscape, place attachment and perceived fairness – would allow participation to be more than a technocratic exercise.¹⁷¹ Understanding factors of acceptance and “translating” them into the regulatory decision-making allows non-technical arguments and local knowledge to become important elements for the decision. This is in line with Owen and Driffill's emphasis on ‘the need for more interactive, deliberative communication between decision-makers, technical experts, other stakeholders and the public’.¹⁷² And in a regulatory context, the twofold relationship between discourses on ‘participation’ and ‘acceptance’ becomes significant, as it points to a distinction between two models of public engagement in decision-making’, which I illustrate next.

¹⁷⁰ Jed J Cohen, Johannes Reichl and Michael Schmidthaler, ‘Re-focussing Research Efforts on the Public Acceptance of Energy Infrastructure: A Critical Review’ (2014) 76 *Energy* 4. See also Sara Aaen, Soren Kerndrup and Ivar Lyhne, ‘Beyond Public Acceptance of Energy Infrastructure: How Citizens Make Sense and Form Reactions by Enacting Networks of Entities in Infrastructure Development’ (2016) 96 *Energy Policy* 576.

¹⁷¹ On this point, Charles Warren and Richard Birnie, ‘Re-powering Scotland: Wind Farms and the “Energy or Environment?” Debate’ (2009) 125 *Scottish Geographical Journal* 97.

¹⁷² Owens and Driffill (n 48) 4414.

6. Public Acceptance and Participation: Two Models of Public Engagement in Decision-Making

The type of relationship between acceptance and participation reverberates around the legal approach to public engagement in decision-making. Based on the twofold relationship between acceptance and participation illustrated in the previous section, I suggest that two models of engagement in decision-making might arise. On the one side, a model that pursues participatory, deliberative engagement (i.e. 'deliberative-participatory model'); and, on the other side, a model that implements a more limited policy objective of achieving public acceptance, as passive acquiescence to decisions already made (i.e. 'acceptance model'). While both models acknowledge the importance of citizens' engagement in the process, they fundamentally differ in terms of the rationales and objectives of such engagement.

In the light of the dialectic between liberal and deliberative theories to participation, as well as of rationalist and collaborative turns in planning theory,¹⁷³ the existence of two, different models to public engagement in environmental decision-making should not be surprising.

Thinking about the legal approach to participation through the lenses of the acceptance and deliberative-participatory models helps reflect upon the functioning and assumptions of public participation within the legal and policy framework. These models do not intend to provide a detailed analytical framework for assessment of participation mechanisms and techniques. Others have embarked in that exercise with mixed results.¹⁷⁴ Instead, I describe and compare the models by focusing upon a) their different theoretical underpinning in terms of rationale and nature of the engagement; b) the way in which public acceptance is understood and interacts with the participatory process; and c) how they deal with the factors of acceptance, that I have introduced in section 3 above.

6.1. The Acceptance Model of Engagement

In the acceptance model of engagement, participation is instrumentally framed as a means to validate decisions already made. It is a way to enhance social awareness and help accelerate implementation. Under this model, participation is also justified for

¹⁷³ See chapter 2 section 5 above.

¹⁷⁴ On indicators and matrixes for public participation, Gene Rowe and Lynn J Frewer, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 *Science, Technology and Human Values* 3; Jacquelin Burgess and Judy Clark, 'Practitioners Evaluation of Participatory Processes in Environmental Decision-Making' in W Neil Adger and Andrew Jordan, *Governing Sustainability* (CUP 2009).

the purpose of legal compliance with public participatory requirements under environmental and planning law and regulation.¹⁷⁵ The instrumental and legal compliance rationales are therefore the core theoretical justifications for public engagement within an acceptance model.

Depending on what we mean by public acceptance and its relationship with participation, it is conceivable that a public acceptance model might be deliberative.¹⁷⁶ However, my acceptance model lacks deliberative character, as it builds on a relationship between participation and acceptance, where acceptance obstructs participation (i.e. second type of relationship). In an acceptance model, public engagement is rhetorically sought for transparency and accountability reasons, but the ability to influence is restricted. In an acceptance model of engagement, there is little space for individual rationalities and motives to count. This is perhaps because a public acceptance model may implicitly view the lay public as irrational, scientifically ignorant and emotional.¹⁷⁷ This model might be more likely to frame public rejection as an expression of NIMBY and a barrier to implementation. Instead, the model relies primarily on technical-scientific knowledge and expertise as legitimate evidence. This inevitably tends to downplay lay public situated knowledge.¹⁷⁸

As a result, despite opportunities for procedural engagement, the possibility to contemplate and opt for alternatives is narrow. Here the decision has already been made and participants are fundamentally engaged to 'accept' it, in the light of pre-framed policy objectives and expert knowledge.¹⁷⁹ Therefore, the meaning of acceptance is the one of passive acquiescence, with a limited ability of active creation of support or indeed disagreement. While in this model there is space for public participation, such participation is instrumentally 'streamlined to achieve acceptance'.¹⁸⁰ It is a model that pursues validation of policy decisions and regulatory choices that have been made at another scale and in another context, rather than deliberation through a consensus-based public dialogue.¹⁸¹ Following this interpretation, the nature of participation within a model based on achieving public acceptance entails a mere

¹⁷⁵ Discussed in the next chapter 4.

¹⁷⁶ See Rob Flynn and Paul Bellaby (eds), *Risk and the Public Acceptance of New Technologies* (Palgrave Macmillan 2007) 17; Mhairi Aitken, 'Wind Power Planning Controversies and the Construction of 'Expert' and 'Lay' Knowledges' (2009) 18 *Science as Culture* 47.

¹⁷⁷ Brian Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Public Divide' in Scott Lash, Bronislaw Szerszynski and Brian Wynne (eds), *Risk, Environment and Modernity: Towards a New Ecology* (SAGE 2004).

¹⁷⁸ On this point with respect to knowledge, Wolsink (n 18).

¹⁷⁹ Claire Haggett, 'Planning and Persuasion': Public Engagement in Renewable Energy Decision-Making' in Devine-Wright (n 56).

¹⁸⁰ Batel, Devine-Wright and Tangeland (n 2).

¹⁸¹ Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (OUP 2003) 191-200. In a scale of participation in public policy, public acceptance models stop at Fischer's first step of 'validation' of problems, rather than engaging in a more fundamental discourse on societal contexts and values, which requires further deliberative steps.

contextual discourse about facts. It tends to focus on public understanding and social persuasion around facts and overarching policy objectives, as conditions for public acceptability of decisions. By pursuing passive acquiescence, the acceptance model confines the scope for participation within predefined policy boundaries, thereby preventing other views and values from being regarded in the decision.

In an acceptance model, landscape concerns are taken into account, as part of the consultation process. However, their weight in the decision-making is limited. In some cases, while their importance is recognised and significant impact will be mitigated and addressed via an Environmental Impact Assessment (EIA), their ability to influence the decisions (both positive or negative) about consenting wind energy infrastructure will be primarily determined by their framing within recognised policy objectives. Place attachment claims will be even more difficult to consider in the decision, as the bond between people and places tends to be hard to translate into the legal and policy context. In some cases, place attachment claims and the legal context might even be in opposition, leading to breach of law in the name of one's attachment to a place.¹⁸² Finally, issues of fairness are also considered in the acceptance model. As the ability to influence decisions is reduced, the acceptance model is likely to privilege procedural fairness over fairness of the development outcomes. An acceptance model offers a mechanism for participants' voices to simply be expressed in an institutional process of decision-making, rather than necessarily influence its outcome.

6.2. The Deliberative-Participatory Model of Engagement

In contrast with the acceptance model, in a deliberative-participatory model, all options are (at least formally) open and participants are able to influence outcomes. Based on a substantive and procedural rationale for participation, this model presents the conceptual nature of participation as a consensus-based public dialogue aimed at reaching better-quality decisions through the value of individual rationalities. Here, citizens' views and situated knowledge are evaluated for their merit and ability to sustain the debate on the common good, as a legitimate – or at least complementary – response to technocratic arguments.¹⁸³

¹⁸² Bernardo Hernández and others, 'The Role of Place Identity and Place Attachment in Breaking Environmental Protection Laws' (2010) 30 *Journal of Environmental Psychology* 281.

¹⁸³ Frank Fischer, *Citizens, Experts and the Environment* (Duke University Press 2000). On the notion of 'multiple knowledges', Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 *Journal of Environmental Law* 45, 50.

From this perspective, the meaning of public participation has an active connotation, potentially leading to support through engagement.¹⁸⁴ It implies public endorsement of the proposal through deliberative transformation of participants' preferences.¹⁸⁵ In this model, acceptance and participation show a mutually reinforcing relationship (i.e. first type of relationship). On the one hand, the ability to influence outcomes catalyses trust and support. On the other hand, the understanding of, and engagement with, factors of acceptance allows a richer set of arguments, knowledge(s) and values to shape the quality of the decision.

This means that relevant knowledge for a decision is not only the expert-led technical, scientific knowledge, but also the local, situated, value-led knowledge of the community and individual affected by the decision. This openness towards other perspectives also makes the decision-making process much more receptive to landscape and place attachment concerns. In so doing, the administrative discretion to evaluate concerns and representations made during the public consultation process, for instance, is potentially broadened to allow the decision to consider wider perspectives. Finally, a deliberative-participatory model is concerned with fairness of both the development outcome (in terms of benefit sharing) and the participatory process. A procedural consideration should not be surprising in the light of the theoretical framework for deliberative participation (chapter 2), being it essentially based on a procedural rationale for participation. Deliberative participation provides the forum and the mechanism for guiding a discourse that is more inclusive of all perspectives in a procedural sense. Procedural fairness concerns are therefore the main framework under which fairness is reflected in the deliberative participatory models. However, a concern for fairness of the development outcome is also important here. Deliberation on how the development outcomes can be shared in a fair way across actors is not only important to understand the deliberative-participatory model of engagement in regulatory decision-making in planning. As I will explain in chapter 8, this distributive justice framework is also a useful perspective to re-conceptualise the role of community benefits and their participatory potential in a deliberative participation perspective.¹⁸⁶

¹⁸⁴ See point on the difference between 'acceptance' and 'support' in section 2.2. above.

¹⁸⁵ See discussion in chapter 2 above.

¹⁸⁶ See chapter 8 section 5.

Two Models of Public Engagement in Decision-Making

	Acceptance Model	Deliberative-Participatory model
Theoretical Underpinning		
Participatory Rationale	Instrumental / Legalistic	Normative /Substantive
Formation of Public Reason	NIMBY and Information Deficit	Deliberation and Dialogue ¹⁸⁷
Nature of Participation	Discourse about Facts	Discourse about Facts and Values
Notion of Public Acceptance		
Meaning of Public Acceptance	Passive Acquiescence	Active Support through Engagement
Relationship with Participation	Obstructive	Supportive
“Factors of Acceptance” in NSIP Decisions		
Landscape and Visual Impact	Important as physical	Important “beyond the view”
Place Attachment	Not Important	Capable of Being Important
Fairness	Process - Important Outcome - Not Important	Process - Important Outcome – Capable of Being Important

Table 1- The Acceptance and Deliberative-Participatory Models of Engagement in Decision-Making on Wind Energy Projects.

This relatively simple description and comparison between these models gives a picture of the public acceptance model as a problematic and inevitably more fragile paradigm than the deliberative- participatory model. It is problematic because, despite the institutionalisation of procedural rights to participate in environmental decision-making, the notion of public acceptance itself tends to mislead the public with respect to what is open for debate and the extent to which they can influence a decision by exercising that right. This notion and its associated model of engagement do not necessarily match expectations with respect to the breath of participation. Lee and others have made this point with respect to participation in decisions on wind energy NSIPs, arguing that ‘[i]t should in any event at least be made clear to those invited to participate in decision making that only the ‘how’ is open to debate, not the ‘whether’,

¹⁸⁷ On dialogue, Kathleen Regan, ‘The Role of Dialogue in Communication About Climate Change’ in Susanne Moser and Lisa Dilling (eds), *Creating A Climate For Change* (CUP 2009).

along with an explanation of why that is the case. (i.e. 'how-not-whether' argument)¹⁸⁸. The public acceptance model is also more fragile than the deliberative-participatory one because, by closing down the decision-making process to wider rationalities, the procedural and substantive legitimacy of the decision appears weaker.

7. Conclusions

This chapter has offered a reflection on public participation in decision-making on wind energy infrastructure through a theory of public acceptance. While the contested notion of public acceptance is primarily explored in social science, it has been little explored in environmental law. The notion embodies controversial assumptions about the ways in which people make sense of wind energy technologies as a social phenomenon that shapes their natural, social and emotional environment. I suggested that an appreciation of key factors shaping public acceptance – i.e. landscape, place attachment and fairness – within the decision-making process could improve the quality of participation as a dialogue beyond technical matters, making the relationship between acceptance and participation mutually reinforcing. Conversely, in a policy context where a public acceptance logic is used to drive technological implementation of decisions already made, the scope and space for participation in decision-making is often obstructed. It is against this background that my theory of acceptance, which distinguishes the acceptance model from the deliberative-participatory model of public engagement, is a useful theoretical perspective for analysing the space for public participation in decision-making. In the next chapter, I explore this theory in the context of participation opportunities in decision-making for major wind farms in England.

¹⁸⁸ Lee and others (n 80) 61.

REGULATORY DECISION-MAKING FOR MAJOR WIND ENERGY

1. Introduction

This chapter develops the discussion of the acceptance model of public engagement from theory to practice. The focus here is on the legal and regulatory framework for consenting major wind energy infrastructure in England, and the model of public engagement that it embeds. Over recent years, the tension between participation and “other objectives” (e.g. economic growth, energy security, climate change mitigation or new infrastructure development) in decisions on major wind farms has grown.¹ This has led to the UK government’s ambiguity between streamlining decision-making and supporting local communities’ engagement.² Of course, balancing efficiency and democratic participation is not a new challenge, especially in planning and environmental decision-making.³ But an emergent body of legal and social science scholarship suggests that, although legislation embeds enforceable rights to participate, the policy urge for more and faster development of energy infrastructure in England often tends to constrain people’s ability to influence.⁴ Here I argue that, despite changes in the decision-making process to ensure more participation at local level, the scope for participation remains limited. This is linked to the implicit tendency

¹ For a review of the issues, Patrick Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011); Joseph Szarka, Richard Cowell and Geraint Ellis (eds), *Learning from Wind Power - Governance, Societal and Policy Perspectives on Sustainable Energy* (Palgrave MacMillan 2012).

² Richard Cowell and Patrick Devine-Wright, ‘A “Delivery-Democracy Dilemma”? Mapping and Explaining Policy Change for Public Engagement with Energy Infrastructure’ (2018) 20 *Journal of Environmental Policy and Planning* 499.

³ Christopher Groves, Max Munday and Natalia Yakovleva, ‘Fighting the Pipe: Neoliberal Governance and Barriers to Effective Community Participation in Energy Infrastructure Planning’ (2013) 31 *Environmental and Planning C* 340; Elizabeth A Kirk and Kirsty L Blackstock, ‘Enhanced Decision Making: Balancing Public Participation Against ‘Better Regulation’ in British Environmental Permitting Regimes (2011) 23 *Journal of Environmental Law* 97.

⁴ In particular: Maria Lee and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 25 *Journal of Environmental Law* 33; Yvonne Rydin, Maria Lee and Simon Lock, ‘Public Engagement in Decision-Making on Major Wind Energy Projects’ (2015) 27 *Journal of Environmental Law* 139; Maria Lee, ‘The Legal Institutionalisation of Public Participation in the EU Governance of Technology’ in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP 2017). See also Lucy Natarajan and others, ‘Navigating the Participatory Process of Renewable Energy Infrastructure Regulation: A “Local Participant Perspective” on the NSIPs Regime in England and Wales’ (2018) 114 *Energy Policy* 201; Lucy Natarajan and others, ‘Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation’ (2019) 90 *Town Planning Review* 117.

of the current regulatory framework for wind energy projects to pursue an acceptance model.

As explained in the previous chapter, within an acceptance model, public engagement is rhetorically sought, but the ability to influence decisions is restricted. This is not to underplay the potential significance of participation in influencing mitigation measures.⁵ Similarly, it is of course the case that projects may be changed (or even withdrawn) as a result of the pre-application consultation, and that would not necessarily be visible in the decision-making process.⁶ This model formally complies with the legal requirements for participation, as it creates a space for consultation as mandated by the Planning Act 2008.⁷ Within this space, in theory 'all options are open'.⁸ However, in reality non-technical arguments expressed by the lay public during consultations tend to be outweighed by pre-determined, technically-framed, policy objectives. Nor is participation necessarily more effective in national consultations on what these policy objectives should be.⁹

In this chapter, I first explore the legal context of the right of individuals and non-governmental organisations (NGOs) to participate in environmental decision-making in English law (section 2). The chapter then goes on to discuss the regulatory decision-making process for consenting major wind energy infrastructure paying specific attention to the space and timing for participation within it (section 3). Originally conceived as a unitary regime under the Planning Act 2008, this is now constituted by two different regimes: the Nationally Significant Infrastructure Projects (NSIPs) regime for consenting offshore infrastructure under the Planning Act 2008; and the planning permission regime for consenting onshore infrastructure under the Town and Country Planning Act 1990.¹⁰ This distinction is the consequence of policy shifts, unresolved tensions between streamlining consent and fostering participation, as well as political ambiguity towards wind energy.

I am interested in offshore wind energy NSIPs in England. In this chapter, I rely heavily on the early work of Lee and colleagues (in which I was involved as a co-

⁵ Lee and others (id) and Rydin, Lee and Lock (id).

⁶ Lee and others (id).

⁷ Planning Act 2008, ss 42 (pre-application consultation), 88, 90 and 93 (interested parties representations during the examination of the application by the Examining Authority).

⁸ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) UNTS 2161, 446 ("Aarhus Convention"), art 6 (4); Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L26/2 (amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April [2014] OJ L124/1) ("EIA Directive"), art 6 (4).

⁹ On this point, Lee and others (n 4). For a justice perspective on this point, Stephen McKay, Michael Murray and Sean Macintyre, 'Justice as Fairness in Planning Policy-Making (2012) 17 International Planning Studies 147.

¹⁰ Planning Act 2008, as amended by the Localism Act 2011; Town and Country Planning Act 1990 (hereinafter "TCPA").

author) and of Rydin, Lee and Lock.¹¹ A strong narrative of “urgency” and “need” for more wind energy is embedded in the national policy for NSIPs, resulting in an explicit presumption in favour of development to guide decision-makers.¹² As explained in section 4 below, the national policy justification for this infrastructure cannot be challenged by participants in decisions on individual projects. But this narrative goes deeper in the regulation of decision-making, as the national policy gives direction on the weight that specific facts should have in individual decisions.¹³ These include issues that are most likely to shape public attitudes towards energy infrastructure (i.e. “factors of acceptance”), as I note in section 5.¹⁴ This is rooted in two parallel policy processes. On the one side, it embeds a restriction to the discretion of the examining authority to consider “other arguments” in decisions on individual applications through a policy presumption in favour of development. On the other side, it entrenches a rescaling of participation between national and local level, which tends to separate what is open for discussion, at which scale and by whom. Both processes can be criticised as generating a *de facto* democratic deficit in the planning system for wind energy developments (Section 6).

My examination of the regulatory and policy framework for decision-making in this chapter takes this work further by suggesting that the scope for participation in decision-making for wind energy infrastructure in England represents an example of how an acceptance model works in practice.

2. The Legal Framework

At the international level, the right to participate in environmental decision-making finds its roots in Principle 10 of the 1992 Rio Declaration, which states that:

‘[e]nvironmental 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

¹¹ Lee and others (n 4) and Rydin, Lee and Lock (n 4).

¹² Lee and others (id) and Lee (n 4).

¹³ Maria Lee, ‘Knowledge and Landscape in Wind Energy Planning’ (2017) 37 *Legal Studies* 3.

¹⁴ See chapter 3.

available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.¹⁵

Undoubtedly, the most ambitious legal operationalisation of this soft law principle can be found in the 1998 UNECE Aarhus Convention.¹⁶

The Convention requires Parties to 'guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters'.¹⁷ By acknowledging the contribution of these rights to 'the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being', the Convention recognises the linkage between human rights and environmental rights.¹⁸ Although its three pillars – access to information, public participation and access to justice - are mutually reinforcing, my focus here is limited to public participation.

The right to participate applies to decision-making on specific activities (article 6); on the preparation of plans, programmes and policies (article 7); and – in a softer form - on the preparation of 'executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment' (article 8). This approach reflects a sophisticated understanding of environmental decision-making as a multistage, complex process covering a wide and diverse spectrum of decisions.¹⁹ Procedural safeguards are stronger with respect to specific activities, while becoming gradually more flexible in relation to the other stages.²⁰ Article 6 applies to activities listed in Annex I of the Convention as well as activities not specifically listed, but that 'may have a significant effect on the environment'.²¹ For the latter, public participation is required as part of the environmental impact assessment (EIA) procedure in accordance with national law.²² Participatory rights under the Convention are granted

¹⁵ UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (1992) U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874, Principle 10. For an analysis, Jonas Ebbesson, 'Principle 10: Public Participation' in Jorge E Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015).

¹⁶ (n 8). Although this is a regional Convention, its art 19 (3) makes it clear that a non-ECE State may accede to the Convention, as long as it is a Member of the United Nations and 'upon approval by the Meeting of the Parties'.

¹⁷ Aarhus Convention, art 1.

¹⁸ Ibid. See also Aarhus Convention, Recital 6. For details, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Addendum 'Lucca Declaration' (ECE/MP.PP/2/Add.1, 2 April 2004) [5-6]. Cf Birgit Peters, 'Unpacking the Diversity of Procedural Rights: The European Convention of Human Rights and the Aarhus Convention' (2018) 30 *Journal of Environmental Law* 1 (noting that human rights and environmental rights are substantially different in objective, content and scope).

¹⁹ For a discussion, UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, June 2014).

²⁰ However, Parties are allowed to adopt or maintain more stringent provisions.

²¹ Aarhus Convention, art 6 (1) (b). Annex I includes installations for the provision of energy, the production of minerals, metal and chemicals, waste management, transport infrastructure, water abstraction and treatment and intensive farming activities.

²² *ibid* Annex I, [20] but exceptions are available (see art 6 (1) (c) and Annex I [21]).

to the 'public concerned', that is 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.²³ This qualifier ensures that those most likely to experience the (negative or positive) impact of the activity are able to engage in and contribute to the decision-making. Through a legal presumption, the 'public concerned' includes environmental NGOs 'promoting environmental protection and meeting any requirements under national law'.²⁴ This is one of the Convention's most innovative aspects as environmental NGOs have traditionally offered 'an invaluable alternative input', as opposed to the contribution of industry and developers, who are generally better-resourced and more influential.²⁵

The public concerned must be informed 'early in the decision-making procedure' and in 'an adequate, timely and effective manner' of proposed projects.²⁶ The competent public authority must also 'give the public concerned access for examination upon request [...] to all information relevant to the decision-making'.²⁷ Public participation procedures must include 'reasonable time-frames' to allow the public to be informed, prepare and actively participate in the environmental decision-making.²⁸ This provision is strengthened by an obligation to ensure that participation occurs 'when all options are open and effective public participation can take place'.²⁹ This submits that, although focused on procedural rights, the Convention has a substantive orientation. It acknowledges that participation is aimed at allowing participants to discuss alternatives and, ultimately, influence decisions.

The Convention leaves discretion to the Parties in deciding the form of participation. However, it sets minimum consultation criteria by requiring that participation procedures 'allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity'.³⁰ The competent authority must take 'due account' of the outcome of public participation in the decision, but the ways in which it can comply with this obligation are not specified.³¹ Whether 'due account' provides some enhanced status in the outcome of public participation, or

²³ *ibid* art 2 (5).

²⁴ *ibid*.

²⁵ Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 80, 87 (but criticising the Convention for doing little to improve public participation as such, not least as these groups might not be representative of the wider public and can have different agendas).

²⁶ Aarhus Convention, art 6 (2).

²⁷ *ibid* art 6 (6).

²⁸ *ibid* art 6 (3).

²⁹ *ibid* art 6 (4). See also art 6 (2).

³⁰ *ibid* art 6 (7).

³¹ *ibid* art 6(8).

simply provides that they are ‘material considerations’, remains open to debate.³² As a minimum, it means that the outcome of participation cannot be ignored. But the discretion left to the Parties might result in limited influence of arguments from lay public participants.³³ This is partially balanced by the obligation to ‘make accessible to the public the text of the decision’ and give reasons.³⁴

While wind farms might appear to unambiguously fall within the provisions related to ‘specific activities’, whether development consent for this infrastructure relates to ‘specific activities’ under Article 6 or to ‘plans, programmes or policies’ under Article 7 has proven contentious in practice.³⁵ Yet, participation in the latter type of decisions is considered as a ‘subset of the public participation requirements for decision-making on an activity covered by article 6’, requiring the application of the same legal guarantees.³⁶ The Convention does not define plans, programmes and policies, leaving it to the national legislature. It requires Parties to make provisions for public participation, ‘within a transparent and fair framework, having provided the necessary information to the public’.³⁷ The requirements to provide for reasonable time frames, for early participation and due account to be taken of the outcome of participation also apply to article 7-type decisions.³⁸ This provision also requires - ‘to the extent appropriate’ - that each Party ‘endeavour to provide opportunities for public participation in the preparation of policies relating to the environment’.³⁹ Given the soft language, the stringency of this obligation is heavily qualified, providing broad flexibility to the Parties.

³² On this point, the Aarhus Convention Compliance Committee (ACCC) clarified that, although the public has no right to veto a decision, ‘the relevant authority must still seriously consider all the comments received’ (UNECE, Report of the Compliance Committee on its twenty-sixth meeting – Addendum - Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain (ECE/MP.PP/C.1/2009/8/Add.1, 8 February 2011) [99].

³³ Lee and Abbot (n 25).

³⁴ Aarhus Convention, art 6 (9).

³⁵ See UNECE, 11th Meeting of the Compliance Committee – Addendum to the Report (ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006) [28].

³⁶ UNECE, 16th Meeting of the Compliance Committee – Addendum to the Report (ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007) [70].

³⁷ Aarhus Convention, art 7.

³⁸ *ibid* art 6.8. The Convention does not mandate to also apply art 6.9 (obligation to give reasons and consideration for a decision), but the ACCC clarified that ‘[...] in the process of preparing a plan this obligation could be fulfilled by following the procedure set out in article 6, paragraph 9, or any other way the Party concerns chooses to demonstrate that it has taken “due account” of the outcome of the public participation’. (UNECE, 45th Meeting of the Compliance Committee – Findings and Recommendations with regard to communication ACCC/C/2012/70 concerning compliance by the Czech Republic (ECE/MP.PP/C.1/2014/9, 4 June 2014) [62].

³⁹ Aarhus Convention, art 7.

The Convention has made a substantial impact upon the legal construction and implementation of procedural environmental rights at national,⁴⁰ regional⁴¹ and international level.⁴² Whilst participatory requirements have been embedded in EU and UK law since well before the negotiation of the Aarhus Convention, the Convention's ratification 'influenced the way in which environmental law is both written and applied in England and Wales'.⁴³

In this respect, it is important to note that, although influential, the Aarhus Convention is not enforceable in English law. This was clarified by the Court of Appeal, which held that '[f]or the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts [...]'.⁴⁴

Nonetheless, the Convention is not irrelevant, as its provisions 'may be taken into account in resolving ambiguities in legislation intended to give it effect'.⁴⁵ But,

⁴⁰ Lee and Abbot (n 25) discussing its influence in English environmental law. For a UK overview, Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Bloomsbury Publishing 2015).

⁴¹ At EU level: EIA Directive (n 8); Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE [2003] OJ L 41/26 ("Freedom of Access to Information Directive"); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17("Public Participation Directive"); Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L264/13 ("Aarhus Regulation"). See also, UN Economic Commission for Latin America and the Caribbean (CELAC), Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean ('Santiago Decision', November 2014) deciding to 'commence negotiations on the regional instrument on rights of access to information, participation and justice regarding environmental matters' [2].

⁴² See Sebastian Duyk, 'Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime' (2015) 24 *Review of European, Comparative & International Environmental Law* 123; Eric Dannmaier, 'A European Commitment to Environmental Citizenship: art 3.7 of the Aarhus Convention and Public Participation in International Forums' (2008) 18 *Yearbook of International Environmental Law* 32; Elisa Morgera, 'An Update on the Aarhus Convention and its continued Global Relevance' (2005) 14 *Review of European, Comparative & International Environmental Law* 138; Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51; Leslie-Anne Duvic-Paoli, 'The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence' (2013) 23 *Yearbook of International Environmental Law* 80.

⁴³ Brian K Ruddle, 'The Aarhus Convention in England and Wales' in Banner (n 40) 13.

⁴⁴ *Morgan v Hinton Organics (Wessex) Limited* [2009] EWCA Civ 107 [22]. Although not directly effective part of EU law, a duty of consistent interpretation applies, so national courts have to interpret national law in conformity with it so far as possible. See Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255 [50].

⁴⁵ *Ibid* This position was confirmed in *Forbes v Aberdeenshire Council, Trump International Golf Link*, Court of Session (Outer Court) [2010] CSOH 142, where the Court stated that '[a]lthough, for the purposes of domestic law, the Aarhus Convention has only the status of an international

although not incorporated in domestic law, the Convention becomes part of domestic law 'where incorporated through European directives'.⁴⁶

The legal incorporation of the provisions of the Aarhus Convention within EU directives has been a key driver to the entrenchment of the procedural environmental rights of the Convention in English law. In particular, the provisions of the Aarhus Convention on public participation (articles 6 and 7) are implemented in particular within the Public Participation Directive and Regulation,⁴⁷ Environmental Impact Assessment,⁴⁸ Strategic Environmental Assessment⁴⁹ and Industrial Emissions directives.⁵⁰ As Hilson notes, through its implementation in the EU law, 'Aarhus has made EU legislative procedural environmental rights more *visible* in part, no doubt, because the legislation uses the explicit language of rights and hence a case based on it will naturally also use rights framing'.⁵¹

In compliance with its obligations under EU law, the UK has transposed these directives under domestic law through a series of provisions, including planning law provisions.⁵² As a result of this implementation process, the enforceable right of the 'public concerned' to participate in the consenting process for wind energy NSIPs in England is primarily established in the Planning Act 2008, to which I now turn.

3. Regulatory Decision-making for Major Wind Energy Projects

In this section, I am concerned with the legal and regulatory framework for decisions on consenting major wind energy infrastructure in England. The Planning Act 2008 governs the regulatory process for NSIPs by streamlining consent for large energy infrastructure (i.e. fossil fuel generating electricity, renewable energy, gas supply, gas and oil pipelines, electricity network and nuclear energy generation infrastructure).⁵³ The Act originally applied uniformly to all major onshore and offshore wind energy

treaty, the provisions of which have not yet been formally incorporated into national law, its provisions are not irrelevant' [11].

⁴⁶ *Walton v Scottish Ministers* [2012] UKSC 44 [100].

⁴⁷ (n 41).

⁴⁸ (n 8).

⁴⁹ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the Environment [2001] OJ L197/30 ("SEA Directive").

⁵⁰ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ L 334/17.

⁵¹ Chris Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25 *Journal of European Public Policy* 1589, 1602 (emphasis added).

⁵² For a full list of implementing provisions, UNECE, 'Implementation Report Submitted by the United Kingdom: 2014-2017' (ECE/MP.PP/IR//GBR, undated).

⁵³ For all NPSs, see <<https://www.gov.uk/government/publications/national-policy-statements-for-energy-infrastructure>> accessed 11 January 2018.

infrastructure, but subsequent policy shifts and regulatory changes resulted in two different processes, depending on the type, location and energy generating capacity of the proposed project.

Here I outline the main stages to obtain planning consent under these two regimes, with special attention to the procedural space and time for participation. Although this thesis is solely concerned with large offshore infrastructure, a brief description of the regime currently governing consent for onshore wind farms is in order here. This is because while enhanced local communities' participation was the official driver for going back to ordinary planning for major onshore wind energy infrastructure, I suggest that issues remain with respect to people's ability to substantially influence decisions in that context. This shows that changing the level of decision-making (from national/centralised to local/decentralised) is not inherently more participatory, in the absence of a concurrent shift from an acceptance model to a deliberative-participatory model of public engagement.

3.1. Nationally Significant Infrastructure Projects Regime

In England, an offshore wind energy development with an overall energy generating capacity equivalent to or above 100MW is considered an NSIP under the Planning Act 2008. The Act lacks a definition of what 'nationally significant infrastructure project' means as a concept. As Fisher notes, '[t]he adjectival phrase "nationally significant" is thus doing much of the work, embodying as it does assumptions about what is a justification for reconfiguring the consent discourse'.⁵⁴

The siting of an NSIP requires a development consent order (DCO) from the Secretary of State (SoS) for Business, Energy and Industrial Strategy.⁵⁵ A DCO automatically removes the need for obtaining a series of separate consents, including planning permission from the local authority and the compulsory purchase order. The process is triggered when an application is accepted by the National Infrastructure Planning Unit at the Planning Inspectorate (PINS). The Examining Authority (ExA) must complete the examination of the application within six months from the start of the examination and must publish its report on findings and conclusions and recommendation⁵⁶ within three months from the completion of the examination, unless

⁵⁴ Elizabeth Fisher, 'Law and Energy Transition: Wind Turbines and Planning Law in the UK' (2018) 38 *Oxford Journal of Legal Studies* 528, 539.

⁵⁵ Planning Act, s 31. Wind farms and associated infrastructure also need a lease from the Crown Estate, which owns all the seabed up to 12 nautical miles and has vested sovereign rights to explore and exploit the natural resources of the UK continental Shelf (Planning Act, s 135 (a)).

⁵⁶ *ibid* s 74.

a different deadline is set by the SoS.⁵⁷ The SoS must decide on the application within three months from the publication of the ExA's report, unless a different deadline is set.⁵⁸ Overall this means that the consenting process should last no more than 12 months from the acceptance of the application until the DCO is granted or refused by the SoS, unless otherwise decided by the SoS.⁵⁹

Before the application is formally submitted, the developer must inform PINS and carry out a public consultation on the project proposal.⁶⁰ A number of statutory consultees (e.g. Natural England, the Environment Agency and local planning authorities⁶¹), any relevant person with a right or interest in the land relevant to the proposed project, and the local community must be consulted during this pre-application phase, for which there is no legally prescribed timeframe.⁶² The Local Planning Authority (LPA) must be consulted on the developer's draft Statement Of Community Consultation (SOCC). This constitutes the main document informing the consultation process with people living in the vicinity of the land where the project might be sited.⁶³ The LPA potentially plays an important role here, but could be stronger in practice.⁶⁴ The applicant must take into account the responses to the consultation and publish the proposal, as well as the SOCC, with the application documents.⁶⁵

Once the application is submitted, the PINS has 28 days to decide whether it meets the formal requirements, in which case the application is formally accepted for examination and an ExA is appointed within the PINS. Before starting the examination, the public must register with the PINS in order to submit representations during the examination.⁶⁶ A preliminary meeting is held between the Inspector and those who have registered to express their views. In the examination phase, 'Interested Parties' can make representations to the ExA.⁶⁷ The LPA can submit a Local Impact Report

⁵⁷ *ibid* s 98 (1), (3) and (4).

⁵⁸ *ibid* s 107 (1) and (3).

⁵⁹ *ibid* s 98 (8). Under s 98 (4) if a different deadline is set, the SoS 'must make a statement, to the House of Parliament of which that Secretary of State is a member, announcing the new deadline'.

⁶⁰ *ibid* s 42. See also, Department for Communities and Local Government (DCLG), *Planning Act 2008: Guidance on the Pre-Application Process* (March 2015).

⁶¹ Local Planning Authorities (LPAs) in England are District Councils, London Borough Councils, Broads Authorities, National Park Authorities and the Greater London Authority.

⁶² Planning Act, ss 42 and 43.

⁶³ *ibid* s 47. See also Planning Inspectorate, *The Role of Local Authorities in the Development Consent Process – Advice note two, version 1* (February 2015) <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2015/03/Advice_note_2.pdf> accessed 27 December 2017.

⁶⁴ UCL, *Evidence, Publics and Decision-Making for Major Renewable Energy Infrastructure* (December 2017) <https://www.ucl.ac.uk/nsips/pdfs/Final_Findings_Recommendations> accessed 29 April 2019) which recommends stronger engagement by the LPA in the pre-application consultation, 'emphasising the importance of full inclusion of local Communities' [13].

⁶⁵ Planning Act, s 49.

⁶⁶ *ibid* s 98(1).

⁶⁷ *ibid* s 88, 90 and 93.

(LIR) giving details on the likely impact of the project on the LPA's area, and Interested Parties are entitled to comment on it.⁶⁸ However, research shows that LPAs 'do not invest adequately in the LIR'.⁶⁹

The examination is primarily based on written documents and evidence, but the ExA can ask questions, hold hearings and conduct site visits. Unlike the regime applicable to onshore wind infrastructure (discussed below), the Planning Act has abolished the possibility of conducting public inquiries during the examination of NSIPs. After the examination is concluded, a report is produced, including a summary of the process, the views expressed in the examination, the ExA's 'findings and conclusions' and the final recommendation to the SoS as to whether the project should be authorised or rejected. The SoS will then decide on the application by order within six months from the closure of the examination, having regard to the ExA report, any LIR and any other matters that the SoS thinks are 'important and relevant' to the decision.⁷⁰ The decision on consent or refusal is subject to judicial review within 6 weeks from its notification.

3.2. Ordinary Planning Regime

In the light of local opposition to onshore wind energy developments, in 2015 a policy change led to a reform that re-localised decision-making for onshore wind development to, allegedly, give more voice to local communities.⁷¹ Under this reform, onshore wind developments with an energy generating capacity equivalent to or above 50MW in England were removed from the NSIP regime and returned to ordinary planning under the Town and Country Planning Act 1990 (TCPA).⁷² This Act now requires planning

⁶⁸ *ibid* s 56 and 60. See details, Planning Inspectorate, *Local Impact Report Advice Note One* (Version 2, April 2012) <<https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2013/04/Advice-note-1v2.pdf>> accessed 27 December 2017.

⁶⁹ UCL (n 64) [8] (recommending that LPAs 'develop better intelligence on their local area, especially the local economy' [and] 'take seriously their obligations to monitor and enforce compliance with the DCO' [13].)

⁷⁰ Planning Act, s 104. S 107(1) provides for 3 months for the Planning Inspectorate to make recommendation and a further 3 months for the Secretary of State to make a decision.

⁷¹ House of Commons: Written Ministerial Statement (HCWS42) - DCLG Written Statement made by Secretary of State for Communities and Local Government (Greg Clark), 18 Jun 2015. See also Infrastructure Planning (Onshore Wind Generating Stations) Order 2016, SI 306/2016. See further Energy Act 2016, s 78. This policy shift on onshore wind energy is accompanied by the government decision to end new subsidies for onshore wind farms by legislating the closure of the Renewables Obligation across Great Britain for new onshore wind generating stations, which shows a wider political ambiguity towards onshore wind energy (House of Commons: Oral Statement made by Secretary of State for Energy and Climate Change, Amber Rudd, on Monday 22 June 2015 on onshore wind subsidies <<https://www.gov.uk/government/speeches/statement-on-ending-subsidies-for-onshore-wind>> accessed 28 August 2019).

⁷² Infrastructure Planning (Onshore Wind Generating Stations) Order 2016, SI 306/2016. See also s 78 Energy Act 2016.

permission from the LPA for siting of large-scale onshore wind farms, rather than development consent from the SoS.⁷³ For ‘the most significant’ onshore projects, before submitting the application for planning permission, the applicant must publicise and carry out a compulsory public consultation with the local community and with persons having an interest in the land.⁷⁴ It is also common practice to hold consultation with the LPA before submitting the application.⁷⁵ When applying for planning permission, the applicant will need to demonstrate how the pre-application consultation has been carried out, set out any response and show how they have been dealt with, in the same way as required under the NSIP regime.⁷⁶ To allow access to information, the LPA must keep a register of applications for planning permission to be available for inspection by members of the public, containing the application, all related documents, plans and drawings.⁷⁷ Upon submission and validation, the application for major developments must be publicised by the LPA by site display in at least one place on, or near the land to which the application relates for not less than 21 days, as well as the LPA’s website.⁷⁸ Consultation with statutory consultees must be carried out by the LPA before deciding on the planning application.⁷⁹ Representations can be made to the LPA within 21 days from the date of publicity. This constitutes a difference with the NSIP regime, which leaves discretion as to the deadline for submitting representations to be agreed between the ExA and Interested Parties registered at the first meeting within the pre-examination phase that lasts approximately three months. From the validation, the LPA has 13 weeks for deciding applications for major developments, which includes developments ‘carried out on a site having an area of 1 hectare or more’.⁸⁰ If the project is subject to an EIA, the statutory time limit for the decision is 16 weeks.⁸¹ In deciding on the application, the LPA must take these representations into account.⁸² When permission is granted, a summary of the reasons, policies and proposals for the development accompanies the notice of the determination of the planning permission.

⁷³ See Town and Country Planning Act 1990 (“TCPA”) and the Town and Country Planning (Development Management Procedure) (England) Order 2015, SI 2015/595 (“DMPO”).

⁷⁴ TCPA, s 61W (2-4) and Localism Act 2011, s 122. The ‘most significant onshore applications’ are those that ‘involve the installation of more than 2 turbines or the hub height of any turbine or height of any other structure exceeds 15 metres’. Town and Country Planning (Development Management Procedure and s 62A Applications) (England) (Amendment) Order 2013, SI 2932.

⁷⁵ See DCLG, *Planning Practice Guidance* (2016) (hereinafter “PPG”) <<https://www.gov.uk/government/collections/planning-practice-guidance>> accessed 26 August 2019.

⁷⁶ TCPA, s 61 X. See also s 61Y stating that the SoS can set out further provisions as to how the consultation required under s 61W should be undertaken in practice. The account of the consultation undertaken must accompany the application for planning permission to which these new duties apply.

⁷⁷ TCPA, s 69 and DMPO, s 36.

⁷⁸ DMPO s 21 (1). See also s 13 (7) (as amended).

⁷⁹ *ibid* s 18. See also ss 16 and 22.

⁸⁰ *ibid* s 2 (1) “major development” (e).

⁸¹ Planning and Compulsory Purchase Act 2004, s 52 and DMPO, s 34 (e).

⁸² TCPA, s 70 (1).

Full reasons must be stated for the grant subject to conditions, as well as in case of refusal.⁸³ An appeal can be lodged by the applicant within six months from the decision notice.⁸⁴

3.3. Space and Time for Participation

To draw some conclusions on the space and timeframe for participation in decision-making for major wind farms, it is useful to keep article 6 of the Aarhus Convention in mind, as a benchmark for the procedural safeguards. This sheds some light on the features, as well as assumptions, of participation opportunities in the regulatory context for wind energy infrastructure in England.

Publicity, access to information and early participation opportunities are provided in both the NSIP and ordinary planning regimes discussed above, in compliance with article 6. In particular, the compulsory pre-application provides space to discuss issues and alternatives to allow adjustments before the application is submitted. This enables participation ‘when all options are still open’,⁸⁵ as once the application is submitted there is generally little opportunity for amendments. By making the pre-application consultation mandatory, this provision could even be seen to go further than the Aarhus Convention’s requirement to ‘[...] where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit’.⁸⁶ However, the extent to which this public consultation amounts to effective participation is much more difficult to assess and can only be judged on a case-by-case basis. Cowell and Devine-Wright argue that this new space for participation in the pre-application phase must be evaluated ‘alongside the ways in which particular issues have been opened or closed for discussion’ more generally.⁸⁷

The NSIP regime provides ‘in principle for a high level of “presence” of local people’ within the regulatory decision-making.⁸⁸ This presence is enabled through the construction of an enhanced institutional space for participation. Local people can participate by engaging in the pre-application consultations and by making written representations (e.g. submission of written statements, photographs or maps) and/or oral submissions at hearings (e.g. on compulsory acquisition matters, specific issues or general purposes). However, from a participatory perspective, Natarajan and

⁸³ DMPO, s 31.

⁸⁴ TCPA, s 78.

⁸⁵ Aarhus Convention, art 6 (2).

⁸⁶ *ibid* art 6(5).

⁸⁷ Cowell and Devine-Wright (n 2) 508.

⁸⁸ Natarajan and others 2019 (n 4) 120. This point is in line with early literature, in particular: Lee and others (n 4) and Rydin, Lee and Lock (n 4).

colleagues suggested that the NSIP regime in reality ‘reduces the opportunities for dialogue and prioritises the provision of information over discussions of value’.⁸⁹ Whilst the language of ‘Interested Parties’ is a very expansive category in law,⁹⁰ from the viewpoint of potential participants, Rydin and colleagues pointed out how it ‘positions actors within the regime on the basis of their interests as opposed to values or principles or feelings, say’.⁹¹ This – they claim – ‘further emphasises their position as having personal interests as compared to the national interest represented by the National Policy Statements, and being an individual actor rather than part of a community’.⁹² But it has been suggested that for NSIP projects, extensive public hearing will not happen in practice, as there is an emphasis on written examination.⁹³ This inquisitorial approach is a change from the adversarial approach of public inquiries. Both are subject to criticism.⁹⁴

Whether the statutory timeframes for participation comply with the criteria of ‘reasonableness’ required by article 6 is less clear.⁹⁵ The idea of streamlining the decision-making process for major wind farms aims to reduce delays. There is often an assumption that public participation causes delays in implementation, which often means that the time for participation gets reduced when speed and efficiency are prioritised.⁹⁶ But this is not evident in the NSIPs regime. Compared to ordinary planning, the NSIPs regime does not limit the time for submitting representations to any stringent deadline. Instead, it envisages the timeframe to be decided on a case-by-case basis, in relation to the complexity of the proposed application and the specific circumstances of the decision. Conversely, ordinary planning seems to take a more radical approach to cutting delays, by imposing more stringent deadlines. It might be argued then that the approach of the Planning Act 2008 in dealing with NSIPs is to streamline permitting procedures (i.e. the number and type of permits required within

⁸⁹ *ibid.*

⁹⁰ Planning Act, s 102.

⁹¹ Yvonne Rydin and others, ‘Local Voices on Renewable Energy Projects: The Performative Role of the Regulatory Process for Major Offshore Infrastructure in England and Wales’ (2018) 23 *Local Environment* 565, 569.

⁹² *ibid.*

⁹³ Tim Marshall and Richard Cowell, ‘Infrastructure, Planning and the Command of Time’ (2016) 34 *Environment and Planning C* 1848 (noting also that ‘it is planning and associated processes like public inquiries that were often the focus of narratives of delay, and it is these public-led components of decision-making processes that have been subject to greatest temporal regulation’ at 1858).

⁹⁴ In a wider context, Phil Johnstone, ‘Planning Reform, Rescaling and the Construction of the Postpolitical: The Case of the Planning Act 2008 and Nuclear Power Consultation in the UK’ (2014) 32 *Environment and Planning C* 697.

⁹⁵ Aarhus Convention, art 6(3).

⁹⁶ Philip Booth, ‘A Desperately Slow System? The Origins and Nature of the Current Discourse on Development Control’ (2002) *Planning Perspectives* (17) 309. For a critique: Kirk and Blackstone (n 3) and Marshall and Cowell (n 93) 1859 showing that in reality most cases of delays in approval relate to non-planning considerations, such as securing financial investment and parallel permits.

one single application process), rather than timeframes, including the timing of participation, allegedly softening the argument about tensions between speed and participation.⁹⁷ However, some scholars have found that ‘the considerable time pressure within the examinations [...] can create problems for the production of convincing evidence and the resolution of conflicts around evidence’.⁹⁸ This means that ‘the aspirations towards an inquisitorial approach are constrained by the strict time limits’.⁹⁹

Finally, in both regimes public consultation requirements are part of the Environmental Impact Assessment (EIA) procedure.¹⁰⁰ Under the EIA procedure, the developer must provide information on the environmental impact of the proposed project.¹⁰¹ This information and a non-technical summary must be made available to the public within a reasonable time in order to provide them with opportunities to express their opinions before the development consent is granted.¹⁰² The results of such consultation and all information provided must be taken into account in the decision-making process, together with the reasons and proposed mitigation measures.¹⁰³ Under the 2017 EIA regulations, wind farms are Schedule 2 developments likely to have significant effects on the environment by virtue of factors such as its nature, size or location.¹⁰⁴ This means that an EIA can either be required by the ExA as a result of a screening request from the developer, or can be conducted voluntarily by the developer. In practice, for all major wind farms an EIA is generally conducted and an Environmental Statement needs to be included in the application documents. The Environmental Statement must include at least the information reasonably required to assess the likely significant environmental effects of the development, and requires public consultation on the proposed Environmental Statement.¹⁰⁵

Overall, it can be concluded that the current system is formally in compliance with the legal requirements. But simply providing time and institutional space for participation tells little about the effectiveness of participation in terms of the ability to

⁹⁷ See e.g. Stephen Thomas, ‘The Hinkley Point Decision: An Analysis of the Policy Process’ (2016) 96 Energy Policy 421.

⁹⁸ UCL (n 64) 9.

⁹⁹ *ibid.*

¹⁰⁰ EIA Directive (n 8). The Directive has been implemented in England through the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, SI 2009/2263 and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571 regulating the procedure and consultation requirement in this case.

¹⁰¹ EIA Directive, art 6.

¹⁰² *ibid.*

¹⁰³ *ibid* arts 6(2), 8 and 9.

¹⁰⁴ Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571), Schedule 2 covering ‘installations for the harnessing of wind power for energy production (wind farms)’, when ‘(i) [t]he development involves the installation of more than 2 turbines; or (ii) the hub height of any turbine or height of any other structure exceeds 15 metres’.

¹⁰⁵ *ibid* reg 18.

influence the final decision when ‘all options are open’.¹⁰⁶ For wind energy developments, the scope for participation is to be judged not only based on the statutory provisions related to the procedural space and time provided for it, but also on the importance given to the arguments made in the public consultation for the decision. The next section explores this aspect, looking primarily to the role of national policy in decisions on offshore wind energy NSIPs and on onshore wind energy infrastructure.

4. National Policy and its Weight in Decision-making

The regulatory framework for decision-making on wind energy infrastructure cannot be considered in isolation from its policy context. There is a close, mutually supportive relationship between the Planning Act 2008 and the National Policy Statements (NPSs) for energy infrastructure. The Act explicitly establishes the role of the NPSs in deciding on NSIPs; legalises the conditions for their formulation and designation (including public consultation requirements and Parliamentary scrutiny before designation) and prescribes their content.¹⁰⁷ At the same time, the NPSs are essential to the implementation and operation of the legal regime for NSIPs, by containing key guidance on what counts in the decision-making process. This not only shows that the formal boundary between law and policy here is nuanced, but also that the NPSs might represent an example of what Scotford and Robinson called a ‘legislatively constructed and constrained’ environmental policy.¹⁰⁸ It is in this light that I explore the weight of national policy on the regulatory decision-making process for wind energy infrastructure. This is important because the legal and policy context of a decision ‘always contributes to the shaping of the ways in which public participation might affect a decision’.¹⁰⁹

4.1. National Policy Statements and Wind NSIP Decisions

The policy context of the NSIP regime is crucial to understand the breath of the participation opportunities within the system, as the early work of Lee and colleagues and of Rydin, Lee and Lock clearly illustrates.¹¹⁰ The Planning Act 2008 provides that the SoS must decide the application for development consent for an NSIP ‘in

¹⁰⁶ Aarhus Convention, art 6 (4).

¹⁰⁷ Planning Act, Part 2.

¹⁰⁸ Eloise Scotford and Jonathan Robinson, ‘UK Environmental Legislation and Its Administration in 2013’ (2013) 25 *Journal of Environmental Law* 397.

¹⁰⁹ Lee and others (n 4) 53.

¹¹⁰ *ibid* and Rydin, Lee and Lock (n 4). I heavily rely on this early scholarship in this section.

accordance with any relevant national policy statement', unless he/she 'is satisfied that the adverse impact of the proposed development would outweigh its benefits'¹¹¹ or the proposed development is 'unlawful' under other (e.g. human rights) provisions.¹¹² The Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy Infrastructure (EN-3) are the relevant NPSs for decisions on wind farms, as they set the policy context for evaluating applications.¹¹³ NPS EN-1 builds on a narrative of 'need' and 'urgency' for new energy infrastructure in general, and of wind energy development in particular.¹¹⁴ It embraces this approach stating that '[t]he need for new renewable electricity generation projects is [...] urgent'.¹¹⁵ This infrastructure is needed to contribute to climate change mitigation and achieve energy security.¹¹⁶ NPS EN-1 states that the ExA 'should give substantial weight to the contribution which projects would make towards satisfying this need'.¹¹⁷ NPS EN-3 reiterates this emphasis.¹¹⁸ In particular, the Statement places this need in the context of the 15% renewable energy target by 2020, making the development of new renewable energy infrastructure necessary.¹¹⁹

Based on this narrative of an urgent need for more energy infrastructure, both NPSs embed a 'presumption in favour of granting consent to applications for energy NSIPs'.¹²⁰ Notwithstanding subsequent government's withdrawal of support for onshore wind,¹²¹ EN-1 notes that such a presumption in favour of development applies, 'unless any more specific and relevant policies set out in the relevant NPSs clearly indicate

¹¹¹ Planning Act, s 104 (7).

¹¹² *Ibid* s 104 (4-6 and 8), as amended.

¹¹³ DECC, *Overarching National Policy Statement for Energy (EN-1)* (July 2011) (hereinafter "EN-1") and DECC, *National Policy Statement for Renewable Energy Infrastructure (EN-3)* (July 2011) (hereinafter "EN-3"). EN-1 states that to reach its decision, the SoS may include Development Plan Documents or other documents in the Local Development Framework, but in case of conflict with the NPSs, the latter prevails 'given the national significance of the infrastructure' [4.1.5]. Marine Policy Statements and marine plans are also relevant in offshore wind decisions, but in case of a conflict the NPS prevails. [4.1.5]. It also clarifies that '[t]he energy NPSs have taken account of relevant Planning Policy Statements (PPSs) and older-style Planning Policy Guidance Notes (PPGs) in England and Technical Advice Notes (TANs) in Wales where appropriate [4.1.6].

¹¹⁴ EN-1 Part 3 and Part 5. See discussion earlier in chapter 1 section 4.

¹¹⁵ *ibid* [3.4.5] and [2.3.2]. See also [3.4.1].

¹¹⁶ *ibid* [2.2.11] and [3.1.1].

¹¹⁷ *ibid* [3.1.4]. In this context, it states that '[t]he weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure', but 'it will not be possible to develop the necessary amount of such infrastructure without some significant residual adverse impact' [3.2.3].

¹¹⁸ EN-3 [1.3.1].

¹¹⁹ *ibid* [1.1.1]. See also [3.4]. On this point, Lee and others (n 4).

¹²⁰ *ibid* [4.1.2].

¹²¹ Infrastructure and Projects Authority, *National Infrastructure Delivery Plan 2016-2021* (March 2016) where, on the one hand, offshore wind developments are viewed as a priority for 2020-21, while, on the other hand, the Government expressly dismisses support to onshore wind projects as 'no longer reflect[ing] government policy' [1.25]. See also (n 71).

that consent should be refused'.¹²² It is difficult to ascertain whether this presumption alone led to the generally high rate of approval of NSIPs in the first years since adoption of the Planning Act. But it certainly constituted an important factor. As the ExA is legally required to decide in accordance with NPSs objectives, the weight of the NPS is eventually reflected in the SoS decision to grant consent.

But the NPSs go deeper than a general presumption in favour of approval. They give precise indications to the ExA on how different technical, environmental and socio-economic considerations should be weighed. This means that in practice the NPSs 'anticipate many possible local objections, and often go on to explain why these various concerns need not (or less commonly cannot) outweigh the need for energy infrastructure development'.¹²³ Although the official intention was to move away from the government setting national priorities on individual decisions, Sheate argues that '[i]n reality, the NPS process allows the government to draw the decision-making framework very narrowly'.¹²⁴ This narrow approach has direct implications for the participation opportunities in decision-making and the model of engagement it embeds, as I illustrate later in this chapter.

The strong link between national policies and planning decisions on individual projects is not surprising.¹²⁵ To some extent it is conceived to provide certainty and consistency in the context of the government's ambition and commitment to the national and international climate change agenda. But it is challenging when it comes to the scope for considering people's views and concerns.¹²⁶ First, participants in the consenting process for individual NSIPs cannot challenge the content of the national policy. As a decision on the need for this infrastructure has already been taken and is reflected in the NPS, the ExA 'may... disregard' representations that 'relate to the merits of policy set out in a national policy statement'.¹²⁷ Lee and colleagues note that although this is not a stringent legal requirement (i.e. 'may...disregard'), 'the philosophy of the Planning Act is to emphasise strategic policy making over discretion in respect to individual projects'.¹²⁸ On this point, Cowell and Devine-Wright argue that this approach is not unexpected: 'the NPS represent an intensification and formalisation of this

¹²² EN-1 [4.1.2].

¹²³ Lee (n 13) 6 referring to Lee and others (n 4) and Rydin, Lee and Lock (n 4).

¹²⁴ William R Sheate, "'Streamlining" the SEA Process' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Impact Directive – A Plan for Success?* (Hart Publishing 2017) 188.

¹²⁵ On the contested relationship between policy and individual projects: *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL); *R (Wandsworth) v Secretary of State for Transport* [2005] EWHC 20; *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); *Barbone v Secretary of State for Transport* [2009] EWHC 463; *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin). This case law is discussed in Lee and others (n 4).

¹²⁶ Lee and others (n 4).

¹²⁷ Planning Act s 87 (3). See also s 106 (1).

¹²⁸ Lee and others (n 4) 57.

position, creating a “planning cascade” for major infrastructure projects in which need is resolved before individual projects consents come forward, in order to reduce consenting processes to details of siting choices and impact’.¹²⁹

Secondly, as the arguments made in the public consultation are weighted against the presumption in favour of development embedded in the NPSs, the scope for other considerations and values is limited. Decisions based on arguments that do not align with the narrative of need, speed and urgency for new energy infrastructure development will be difficult to justify (a point to which I come back in section 5 below).

4.2. National Planning Policy Framework and Ordinary Planning

As major onshore wind farms are no longer considered NSIPs under the Planning Act, the National Policy Statements – and the presumption in favour of development embedded within them – are no longer relevant policy for onshore wind energy projects.¹³⁰ The regulatory decision-making for onshore wind energy projects in England traditionally recognises a primary role to policy objectives and development plans. The LPA should produce a Local or Neighbourhood Plans containing policies related to renewable energy in that particular area.¹³¹ Under the Town and Country Planning Act, decisions on local development applications must be taken having regard to the provisions of the development plan, unless material considerations indicate otherwise.¹³² The LPA must decide on the authorisation taking into account the National Planning Policy Framework (NPPF) and the Planning Practice Guidance (PPG) for renewable and low carbon energy.¹³³ When it comes to the balance of priorities in deciding on wind energy infrastructure, the NPPF clarifies that:

‘a proposed wind energy development involving one or more turbines should not be considered acceptable unless it is in an area identified as suitable for wind energy development in the development plan; and, following consultation, it can be demonstrated that the planning impacts identified by the affected local community have been fully addressed and the proposal has their backing’.¹³⁴

¹²⁹ Cowell and Devine-Wright (n 2) 508 (citing Susan Owens, ‘Siting, Sustainable Development and Social Priorities’ (2004) 7 *Journal of Risk Research* 101).

¹³⁰ This is notwithstanding the fact that ‘[n]ational policy statements form part of the overall framework of national planning policy, and may be a material consideration in preparing plans and making decisions on planning applications’ Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* February 2019 (hereinafter “NPPF”) [5].

¹³¹ PPG (n 75) [3].

¹³² TCPA, art 70 (2).

¹³³ NPPF (n 130) and PPG (n 75).

¹³⁴ NPPF [154 fn 49]. See also PPG (n 75) para 33. First debated in House of Commons (n 71).

In this context, ‘whether the proposal has the backing of the affected local community is a planning judgement for the local planning authority’.¹³⁵ Decisions on wind farm developments must take particular planning considerations into account, including the ability of the public to have a final say in the decision; cumulative landscape impacts¹³⁶ and cumulative visual impact;¹³⁷ and the likely energy output of the turbines.¹³⁸

Interpreting this policy is a complex exercise.¹³⁹ Although the decision to localise decision-making for major onshore wind energy was justified by the idea of giving more voice to local communities, the NPPF implicitly shows hostility to wind farms development. Given the different sources of policy, and the ultimate planning judgment, LPAs have a lot of discretion where local views are mixed. This ends up easily as a tendency towards rejection. As I noted elsewhere, at first sight the re-localisation of the decision-making for onshore wind infrastructure within ordinary planning and the NPPF requirement that the proposal has the ‘backing’ of the local community might suggest a stronger commitment to local community participation.¹⁴⁰ Yet, effectively this policy does not deal with people who disagree with consent, but rather with people who disagree with the centralisation of participation. In other words, this shift is primarily about ‘transferring decision-making at a local level, without fundamentally engaging with the conceptual nature of participation and the ways in which the public can influence decisions at that level’.¹⁴¹ This fits with Cowell and Owens’ point on how decisions on projects make their way into policy.¹⁴²

5. Factors of Acceptance

To unpack the complexity and nuances of public participation and its relationship with public acceptance, in chapter 3 I claimed that both the acceptance model and the deliberative-participatory model of public engagement are concerned with what I called

¹³⁵ *ibid.*

¹³⁶ This refers to ‘the effects of a proposed development on the fabric, character and quality of the landscape; it is concerned with the degree to which a proposed renewable energy development will become a significant or defining characteristic of the landscape’. (PPG (n 75) [22]).

¹³⁷ This refers to ‘the degree to which proposed renewable energy development will become a feature in particular views (or sequences of views), and the impact this has upon the people experiencing those views’. (*ibid.*)

¹³⁸ The PPG however stresses that this ‘will vary with location and even by turbine in an individual wind farm’ *ibid* [21].

¹³⁹ E.g. Cowell and Devine-Wright (n 2).

¹⁴⁰ Chiara Armeni, ‘Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 *Journal of Environmental Law* 415, 418.

¹⁴¹ *Ibid*

¹⁴² Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (2nd edn, Routledge 2011).

'factors of acceptance'.¹⁴³ These are core issues that generally influence, both positively and negatively, public attitudes towards large-scale energy infrastructure. Borrowing key concepts from social science and human geography scholarship, I explained that issues such as landscape and visual impact concerns, place attachment, as well as perceived fairness (of the development outcome and of the decision-making process) play a defining role in people's attitude towards a development. Depending on the weight attributed to these factors in the decision-making process as reasons for a decision, I suggested that an emphasis on achieving public acceptance can either obstruct or reinforce participation, and determine which model is likely to prevail.

Moving to the practical manifestation of this theory, here I am concerned with how factors of acceptance are dealt with in the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy Infrastructure (EN-3). In the light of the statutory role of NPSs in guiding decisions on authorisation, the weight that NPSs EN-1 and EN-3 give to factors of acceptance offers an indication of the model of engagement embraced within the regulatory decision-making for major wind farms. I am interested in the way in which national policy makes regulatory-relevant assumptions about, and predetermines the influence of, technical information and situated knowledge; local community's landscape and visual concerns; place attachment; and perceived fairness claims.

During the drafting of the NPSs, technical information and "facts" were presented to justify the "need and urgency" narrative and to educate the public. In the consultation on the NPS, questions about this narrative were asked, but the government explained that this framing was not open for consultation.¹⁴⁴ Similarly, the argument that consultation documents were too long and too technical to be analysed by the public within a short period of time did not lead to any mitigating action from the government.¹⁴⁵

Within the guidance in the NPSs to make decisions about these projects, priority is given to technical arguments (e.g. contribution to energy generating capacity) and agreed technical methodologies for assessing impact (e.g. noise¹⁴⁶ assessment and collision risk modelling for birds and bats¹⁴⁷) over value judgements and other

¹⁴³ See Chapter 3, section 5 above.

¹⁴⁴ DECC, *The Government Response to the Consultation on the Draft National Policy Statements for Energy Infrastructure* (October 2010) [question 4]. See also DECC, *Appraisal for the Sustainability of the Revised Draft Overarching National Policy Statement for Energy (EN-1): Main Report* (October 2010).

¹⁴⁵ *ibid* [1.151].

¹⁴⁶ The ExA should use the Assessment Rating of Noise from Wind Farms (ETSU-R-97) 'to satisfy itself that the noise from the operation of the wind turbines is within acceptable levels'. EN-3 [2.7.57].

¹⁴⁷ EN-3 [2.6.104 and 2.7.33-35]

concerns.¹⁴⁸ This makes the provisions of facts and technical data an instrument to justify decisions already made and reduce the ability to challenge their construction. Values are always difficult to account for in highly complex and technically-framed decision-making processes, such as those related to energy technology futures.¹⁴⁹ Such reliance on technocratic frameworks represents the context in which the role of participation is understood here. This is not unusual.¹⁵⁰ Yet, it is interesting to see how discourses about facts are explicitly prioritised over arguments centred on ‘values’. This is reflected in the examination, where ‘[t]here is a strong preference, when explaining and justifying its recommendations, for the Examining Authority to rely on technical forms of knowledge, especially when methodologies have been accredited by government or professional guidance’.¹⁵¹

Second, landscape and visual impact are more controversial, both for their significance as factors of acceptance, and for their inability to be easily mitigated. As Lee explained, priority is still given to technical expertise of what constitutes landscape, the professional planning judgement and ‘prior institutional knowledge claims’ of designated areas, rather than lay public knowledge expressed through participation.¹⁵² But the impact of wind energy infrastructure on seascape and landscape is discussed in the policy and has become subject to concerns in public consultations and examination with respect to several NSIPs, as the case studies in this thesis will demonstrate.¹⁵³ The NPSs are clear that landscape and visual impact are inevitable effects of the siting of wind turbines, but this should not in itself be a reason for turning down the application.¹⁵⁴ Nor is the fact that a project is visible from within a designated area or that there is a local landscape designation a reason for refusal.¹⁵⁵ For offshore wind projects applications, the ExA ‘should not refuse to grant consent for a development solely on the ground of an adverse effect on the seascape or visual amenity’, unless alternatives ‘could be reasonably proposed’ or the harmful effects

¹⁴⁸ Maria Lee and others, ‘Techniques of Knowing in Administration: Co-Production, Models, and Conservation Law’ (2018) 45 *Journal of Law and Society* 427.

¹⁴⁹ Nick Pidgeon and others, ‘Creating a National Citizen Engagement Process for Energy Policy’ (2014) 111 *Proceedings of the National Academy of Sciences of the United States of America* 13606. See also Karen A Parkhill and others, *Transforming the UK Energy System: Public Values, Attitudes and Acceptability* – Synthesis Report (UK Energy Research Centre 2013)

¹⁵⁰ To reinforce this point, EN-1 emphasises that ‘[i]n determining the planning policy set out in Section 3.1, the Government has considered a range of projections and models that attempt to assess what the UK’s future energy needs may be. Figures referenced relate to different timescales and therefore cannot be directly compared. Models are regularly updated and the outputs will inevitably fluctuate as new information becomes available’. EN-1, [3.1.4], fn 16.

¹⁵¹ UCL (n 64) 8.

¹⁵² Lee (n 13).

¹⁵³ Lee and others (n 4) and Rydin, Lee and Lock (n 4).

¹⁵⁴ EN-1 [5.9].

¹⁵⁵ *ibid* [5.9.14 – 5.9.15].

outweigh the benefits.¹⁵⁶ The landscape effects are linked to the design and scale of the project and efforts should be made to minimise them. But any change in the design and scale of the project is seen to ‘significantly’ affect the electricity generating output of the wind turbines.¹⁵⁷ This is important as, given the presumption in favour of development and need to maximise energy generating output, the ExA ‘should expect it to be unlikely that mitigation in the form of reduction in scale will be feasible’.¹⁵⁸

In chapter 3, I also explored the notion of ‘place attachment’ as a distinct factor of acceptance. Although it shares some qualities with concerns over landscape and visual impact, this notion concentrates on the emotional bond of people to a place.¹⁵⁹ The NPSs do not explicitly refer to place attachment in the same way than the social science scholarship does. However, the concept of ‘historic environment’ might be helpful. It ‘includes all aspects of the environment resulting from the interaction between people and places through time, including all surviving physical remains of past human activity’.¹⁶⁰ Although this has a focus on constructions and buildings of historical and artistic interest (i.e. listed buildings), the definition of heritage asset given in EN-1 includes ‘elements of historic environment that hold value to this and future generations’.¹⁶¹ These are not only listed buildings, monuments or sites, but also ‘a place, area or landscape, or any combination of these’.¹⁶² As opposed to the presumption in favour of granting consent, in this case EN-1 explicitly establishes ‘a presumption in favour of conservation’.¹⁶³ In so doing, the ExA ‘should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution they can make to sustainable communities and economic vitality’.¹⁶⁴

Interestingly, and in contrast with the weight given to landscape designations, the ExA should also consider factors such as ‘heritage assets having an influence on the character of the environment and an area’s sense of place’, as considered in the

¹⁵⁶ EN-3 [2. 6. 208]. Alternatives must be judged considering other constraints (ecological effects, safety and economic viability of the application).

¹⁵⁷ *ibid* [2.6.10].

¹⁵⁸ *ibid* For onshore, see [2.7.51]. This issue has also arisen with respect to the examination of the Clocaenog Forest onshore Wind Farm application (See Planning Inspectorate, The Planning Act 2008 - The Clocaenog Forest Wind Farm - Examining Authority’s Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change’ (12 June 2014).

¹⁵⁹ See chapter 3, section 3.3 above.

¹⁶⁰ EN-1 [5.8.2].

¹⁶¹ *ibid*. Much of this is based on statutory protection: Planning (Listed Buildings and Conservation Areas) Act 1990 s 66(1) establishing a duty for the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting[...]. See also *R (on the application of Williams) v Powys CC* [2017] EWCA Civ 427.

¹⁶² *ibid*.

¹⁶³ *ibid* [5.8.14]. See discussion in Lee (n 13).

¹⁶⁴ *ibid* [5.8.13].

LPA development plans and the Local Impact Report.¹⁶⁵ Although focused on physical structures (e.g. listed buildings) and their settings, the reference to ‘sense of place’ is interesting. But in the technology-specific NPS, the presumption in favour of development is reiterated. The NPS EN-3 states that:

‘[i]n considering the impact on the historic environment [...] and whether it is satisfied that the substantial public benefits would outweigh any loss or harm to the significance of a designated heritage asset, the [ExA] should take into account the positive role that large-scale renewable projects play in the mitigation of climate change, the delivery of energy security and the urgency of meeting the national targets for renewable energy supply and emissions reductions’.¹⁶⁶

Finally, perception of fairness tends not to enter the NPS narrative. The closest the NPSs get to this factor is through consideration of socio-economic impact, in terms of distribution of costs and benefits. Although such impact must be taken into account, EN-1 notes that the ExA ‘may conclude that limited weight is to be given to assertions of socio-economic impacts that are not supported by evidence (particularly in view of the need for energy infrastructure [...])’.¹⁶⁷

From this close analysis of the resonance of factors of acceptance within decision-making, it becomes apparent that the weight given to some of the most common concerns that the lay public presents in public consultation is limited by predetermined policy objectives. This provides some support to interpret the space of public participation in major wind energy projects in England as an example of an acceptance model, rather than a participatory model. The next section further explains my argument.

6. The Acceptance Model in Decision-making for Wind Energy Projects in England

As Lee and others and Rydin, Lee and Lock have increasingly contended, although space and time for participation is provided in planning for large-scale energy infrastructure in England, the wider policy context tends to constrain people’s ability to

¹⁶⁵ *ibid* fn 122.

¹⁶⁶ EN-3 [2.5.34].

¹⁶⁷ EN-1 [5.12.7].

influence.¹⁶⁸ My analysis of the regulatory and policy context for decision-making for major wind farms thus far supports this view. From this perspective, here I suggest that this limited scope for participation is the result of a wider tendency in the current regulatory framework regarding wind projects to pursue an acceptance model of public engagement. The core of this model is the construction of participation as an instrumental and legalistic exercise to achieve acceptance in a regulatory and policy space where decisions have already been taken, and the scope for public influence is reduced. There are two mechanisms through which this model can be seen to be operating in the regulatory decision-making for major wind energy projects in England: a presumption in favour of development (section 6.1) and a process of rescaling of participation (section 6.2).

6.1. Presumption in Favour of Development

The first mechanism limiting participation and pursuing acceptance is the presumption in favour of development embedded in the NPSs. This is arguably stronger than the general presumption in favour of sustainable development in decision-making,¹⁶⁹ and of the requirement that, in dealing with applications, the LPA must 'have regard to the provisions of the development plan, so far as material to the application'.¹⁷⁰ This presumption is made explicit in the policy and is effectively 'legalised' through the regulatory status given to the NPS by the Planning Act 2008.¹⁷¹ This is problematic as, while on the one hand this practice of legalisation redirects government policy within the sphere of law and judicial control, it also 'raises important questions about who is issuing the environmental policy documents, when they are doing this, and how accountable these processes are'.¹⁷² This inevitably calls for scrutiny of the opportunities for democratic participation. By being 'legalised', this presumption has regulatory weight, making people's expectations to shape decisions likely to be frustrated. The NPS narrative for 'urgent need' for more wind energy substantially frames the discretion of the decision-maker within the boundaries of the national policy objectives and their presumption in favour of major wind energy infrastructure. It is in this respect that the regulatory decision-making process for wind NSIPs effectively has

¹⁶⁸ Lee and others (n 4) and Rydin, Lee and Lock (n 4). See also Lee (n 4) and Lee (n 13).

¹⁶⁹ NPPF [11-14].

¹⁷⁰ TCPA, s 70 (2).

¹⁷¹ Here I understand 'legalisation' by reference to the classic international relations (IR) definition of 'a particular form of institutionalization characterized by three components: obligation, precision and delegation' to independent authorities to interpret, apply and enforce the rules. (Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54 *International Organization* 401, 401). However, their simultaneous presence and strength in any given case vary.

¹⁷² Scotford and Robinson (n 108) 397.

been criticised for the limited space it provides for public participation in the authorisation process.¹⁷³ The strong policy preference for increased wind energy capacity in the NPS suggests that local community concerns about development are still considered a hurdle to be overcome, rather than one deserving meaningful engagement.¹⁷⁴ In constructing a legal space for participation when opportunities for substantial influence are restricted by pre-determined national policy objectives, the regulatory framework for major wind energy projects in England operationalises a public acceptance-based model of engagement in decision-making ('acceptance model'). While participation is pursued as a statutory requirement, we end up with an acceptance model through the legalisation of policy objectives. As illustrated in chapter 3, in an acceptance model of engagement, participation is instrumentally framed as a means to validate decisions already made, while the space for substantial influence is restricted. The legal requirement to make the contribution of the project to pre-determined national policy priorities a guiding criterion for consent is an indication of the operation of an acceptance model. Although space and time for participation are provided, a merely procedural and legalistic approach suggests that participation is deprived of its normative rationale of enabling better substantive decisions. So – despite two exceptions where consent was refused¹⁷⁵ – decisions on NSIP development have somehow already been taken and the public will need to 'accept' them.¹⁷⁶

A 'pro-development bias' is not a new phenomenon in planning law and raises complex issues, especially from a public participation perspective.¹⁷⁷ Within the presumption in favour of development, participation is used within this model to persuade and pacify public opposition. So the meaning of acceptance embraced by this model is the one of passivity and acquiescence, instead of active support through engagement. In the determination of the policy objectives, two rounds of national public consultations were undertaken.¹⁷⁸ But the Government's consideration of the arguments made in this process led to few adjustments, showing a determination

¹⁷³ (n 4).

¹⁷⁴ Armeni (n 140).

¹⁷⁵ As of August 2018 these are: the Navitus Bay Wind Park project (offshore) in England and the Mynydd Y Crounry Wind Farm project (onshore) in Wales. I discuss the Navitus project in chapter 7.

¹⁷⁶ Claire Haggett, "Planning and Persuasion": Public Engagement in Renewable Energy Decision-Making' in Devine-Wright (n 1).

¹⁷⁷ See Antonia Layard, 'Planning and Environment at a Crossroads' (2002) 14 *Journal of Environmental Law* 401, 402 (referring to the Heathrow's Terminal 5 case). See also Owens and Cowell (142) (discussing this presumption in UK planning in the 1990s).

¹⁷⁸ DECC, *The Government Response* (n 144) and DECC, *The Government Response to the Consultation on the Revised Draft National Policy Statements for Energy Infrastructure* (June 2011).

toward specific outcomes, representing an example of how contested political decisions can squeeze out public influence.¹⁷⁹

6.2. Rescaling of Participation

As explained in chapter 1, issues of scale are inescapable in the debate on decision-making and participation with respect to wind energy infrastructure. This is important and interesting, but limited space does not allow me to explore this aspect in this thesis. In this section, I simply explain how the legal and policy context for wind energy NSIPs channelled participation within pre-defined scales and how this might affect the model of public engagement.

Looking beyond decisions on individual projects, a perhaps even stronger case for an acceptance model is presented through the mechanism of rescaling and staging public participation in debates about national priorities more generally. Rescaling refers to ‘the dissection of policy into contained scales, sidestepping the possibility for the return to in-principle discussions’.¹⁸⁰ In other words, this process separates publics and decisions within predefined national and local scales. There is a formal division between national consultation on National Policy Statements and local participation in decisions on individual infrastructure projects. As with respect to the presumption in favour of development, the rescaling is achieved by law. Here, the Planning Act allows the ExA to disregard representations that challenge the merit of the national policy, as illustrated in section 4.1 above.¹⁸¹ Rescaling isolates debates and divides participants between those interested in national in-principle problems and those only interested in local issues. As discussed in chapter 3 in relation with public acceptance, this approach has been criticised in the literature: this fixed idea of who is interested in participating and at what scale of decision-making takes over, at the expense of a more nuanced idea of ‘publics’ and interconnection between groups and scales of participation.¹⁸² It might also reinforce arguments about NIMBYism, as local public is precluded from the ability to engage in wider national policy processes due to their selfish attitude toward the public interest. According to Johnstone, through the rescaling of participation, ‘the [Planning] Act has radically altered the ways in which public can engage with

¹⁷⁹ Lee and Abbot (n 25). See also Kirk and Blackstock (n 3).

¹⁸⁰ Johnstone (n 94) 708. See also Richard Cowell and others, ‘Rescaling the Governance of Renewable Energy: Lessons from the UK Devolution Experience’ (2017) 19 *Journal of Environmental Policy and Planning* 480.

¹⁸¹ Planning Act, ss 87(3) (b) and 106(1) (b). See also Planning Inspectorate, ‘Advice Note 8.1: How the Process Works’ (2012) 5.

¹⁸² For a review, Johnstone (n 94).

government policy'.¹⁸³ Reflecting on the relationship between efficiency and rescaling of participation, Marshall and Cowell have criticised the way in which NPSs:

'seek to define the national need for certain categories of infrastructure, and thereby provide a supportive policy basis for the centralised determination of infrastructure projects and a mechanism for containing and staging discussion, with the expectation that they can make the determination of individual infrastructure consents more efficient'.¹⁸⁴

This – they argue – poses the fundamental question of 'what is open for deliberation and at what scale'.¹⁸⁵ Ultimately the process of rescaling might also help understand recent policy shifts where people's ability to make their voices heard is limited for offshore wind energy NSIPs, while allegedly expanded for onshore wind farms regulated under ordinary planning. However, by presenting the scales of participation and groups of participants as fixed, disconnected and self-centred, this approach is likely to impede more deliberative and collaborative forms of participation. In exploring rescaling in planning, some authors have referred to it as part of a wider process of 'depoliticisation' or 'post-politicisation' of decision-making, away from people's influence and bureaucratic delay.¹⁸⁶ As Cowell and Devine-Wright argue, rescaling participation is an important tool through which States try to compromise between conflicting conceptions of the common good entrenched in decision-making on wind energy infrastructure.¹⁸⁷ But, with respect to decisions on energy infrastructure, the extent to which the State seeks to standardise public engagement processes at national level or foster participation at local level remains potentially problematic.¹⁸⁸ From a participatory perspective, this certainly prevents a broader and collaborative formulation of the issues and their solutions, by promising participation where solutions and decisions have already been made elsewhere. In short, it presents an acceptance model rather than a deliberative-participatory model of public engagement.

¹⁸³ *ibid* 697.

¹⁸⁴ Marshall and Cowell (n 96)

¹⁸⁵ *ibid*.

¹⁸⁶ Peter Newman, 'Markets, Experts and Depoliticising Decisions on Major Infrastructure' (2009) 2 *Urban Research and Practice* 158; Johnstone (n 94).

¹⁸⁷ Cowell and Devine Wright (n 2) 503-504.

¹⁸⁸ *Ibid*.

7. Conclusions

This chapter has drawn a detailed analysis of the law and policy governing decision-making for major wind energy projects to explain the practical implications of the acceptance model in planning. The legalisation of policy processes that implies a limited role for participation, as well as the practice of rescaling it between national and local level, pose some difficult democratic challenges. There is little doubt that the climate change imperative requires new and more wind energy infrastructure, but people's expectations to participate and influence cannot be sidestepped. In a context where the national policy debate is difficult to reopen, the responsibility to strike the balance between efficiency, development and participation might be ultimately delegated to the ExA's interpretation of the evidence and the boundary of its discretion. This is what I explore in the case studies presented in the next two chapters.

METHODOLOGY

1. Introduction

This chapter sets out the research methodology for this thesis. I first clarify the nature of my research methodology (Section 2) and my broader methodological choice (Section 3). I then illustrate the specific research questions that triggered my empirical work and their function in addressing the wider research questions of the thesis (Section 4). In section 5, I discuss my research design and case selection. I finally describe my data set (Section 6) and qualitative data analysis method (Section 7).

2. Nature of the Research Methodology

Epistemology is the branch of philosophy that deals with the ‘nature, sources and limits of knowledge’.¹ While this thesis is not concerned with the complex philosophical debate about the nature of knowledge and expertise,² a clarification on where a researcher stands epistemologically is ‘a preliminary to all research’.³ This is important because one’s epistemological stand shapes ‘the way in which one conducts research, interprets data, and reports findings’.⁴

My epistemological position broadly aligns with social constructivism. Social constructivism asserts that that what we know - and its meaning in lived experience - is constructed by societal institutions and practices.⁵ For constructivists, reality can only be explained through intersubjective socialisation and constructed understanding, rather than through objective facts and truths. In particular, constructivists argue that science does not discover reality, but it constructs subjective representations for it. As reality and knowledge are subjectively and socially constructed, ‘humans not only interpret, construct, and invent their knowledge of the material world, but also allow this

¹ Peter Klein, *Routledge Encyclopedia of Philosophy* (Routledge 2005) 362.

² See Chapter 1 section 6.2. above.

³ Donatella Della Porta and Michael Keating, *Approaches to Methodologies in the Social Science – A Pluralist Perspective* (CUP 2008) 20.

⁴ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 929.

⁵ First elaborated by Peter L. Berger and Thomas Luchman, *The Social Construction of Reality – A Treatise in the Sociology of Knowledge* (Penguin Books, 1966).

constructed perception to influence their political actions and social thinking at both the normative and political level'.⁶

From my perspective, a constructivist position better reflects the challenges of exploring public participation in regulatory decision-making processes for three reasons. First, public participation is a messy and ambiguous space where subjective values are constantly contrasted with – and often challenged by - the argued authority of objective facts.⁷ A constructivist approach recognises the importance of socially constructed values and knowledge claims beyond objective facts. It supports an inquiry on the 'factors – the who, what and how as well as the histories – of the things that gave rise to those claims'.⁸ Where multiple knowledge claims are made in a regulatory process, a constructivist stand offers a significant epistemological framework to understand how these claims are elaborated and their role in decision-making.⁹

Second, a constructivist perspective helps appreciating law - and regulatory processes - as social constructions. As Hirokawa notes,

'[L]aw governs a facilitative process that acknowledges (or rejects) the values and meaning that we attribute to things and our experiences of the world. In some cases, law draws clues from socially constructed meaning, and in other instances meaning may originate in law, and law consequently governs social application'.¹⁰

While some have criticised its sharp opposition between science and society,¹¹ many scholars associated with constructivism have presented a more nuanced picture.¹²

Science and Technology Studies (STS) is a field where constructivism has been especially provocative and contested.¹³ Reflecting on this debate, my work on public participation in environmental decision-making has been influenced by

⁶ Jonathan Joseph, 'Constructivism' in Garret W Brown, Ian McLean and Alistair McMillan (eds), *The Concise Oxford Dictionary of Politics and International Relations* (OUP 2018).

⁷ Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' in Colm O'Conneide (ed), *Current Legal Problems 2009* (OUP 2010).

⁸ Keith K Hirokawa, *Environmental Law and Contrasting Ideas on Nature: A Constructivist Approach* (CUP 2014) 15.

⁹ Maria Lee, 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 *Legal Studies* 3.

¹⁰ Hirokawa (n 8) 21-22.

¹¹ E.g. Alan Sokal and Jean Bricmont, *Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science* (St. Martin's Press 1998); Paul Boghossian, *Fear of Knowledge: Against Relativism and Constructivism* (OUP 2006).

¹² In particular: Bruno Latour and Steve Woolgar, *Laboratory of Life: The Social Construction of Scientific Facts* (2nd edn. Princeton University Press 1986); Ian Hacking, *The Social Construction of What?* (Harvard University Press 2000).

¹³ Michael Lynch, 'Social Constructivism in Science and Technology Studies' (2016) 29 *Human Studies* 101.

Jasanoff's "idiom of co-production" in STS.¹⁴ As explained in the introduction to this thesis, Jasanoff clarifies that

'co-production is the shorthand for the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it. [...] Scientific knowledge [...] both embeds and is embedded in social practices, identities, norms, conventions, discourses, instruments and institutions'.¹⁵

In this sense, the co-production paradigm somehow expands social constructivism (leading some to frame it as post-constructivism) to clarify that 'not only are "science" and "facts" socially constructed, but "the social" is also partially constructed by what and how we know about the world'.¹⁶ As Lee and colleagues further explain:

'[l]aw and governance may be understood here as an aspect of the social. Law is not "a datum, a fact, unproblematic and one-dimensional", and it too contributes to the shaping of knowledge, which in turn shapes law, until in some cases facts and law are barely distinguishable'.¹⁷

Finally, a constructivist epistemological framework supports a deeper understanding of some key concepts that surround the debate on public participation in regulatory decision-making and planning. As explained in chapter 4, some important notions - such as "landscape", "public", "place" - are often given for granted in environmental law and planning, as objective realities, but these are complex social and symbolic constructions. When they are translated in a decision-making context, these social constructions acquire regulatory meaning. A constructivist stance helps understand these notions in their socio-legal context, that is to say as having a socially constructed meaning and implications for law and regulation.

In sum, a constructivist perspective is really useful for addressing legal ideas. I use it in the thesis to explain the nuances and complexities of legal and non-legal concepts that shape our understanding of public participation in environmental decision-making and planning. However, I do not deconstruct participants' representations in the thesis.

¹⁴ See Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004).

¹⁵ *Id* 2-3.

¹⁶ Maria Lee and others, 'Techniques of Knowing in Administration: Co-Production, Models, and Conservation Law' (2018) 45 *Journal of Law and Society* 427, 432.

¹⁷ *id* (reference omitted).

3. Methodological Choice

While epistemology is concerned with the nature of knowledge, methodology refers to the approaches and techniques used to acquire such knowledge. However, while they ask different questions, they are linked. In this respect, Kratochwil explains that ‘while constructivism is certainly neither a theory nor a methodology, taking this perspective does enable and constrain our research designs and our choice of the tools in making our case’.¹⁸

From this point of view, my methodological choice is qualitative empirical research. As opposed to quantitative approaches, ‘qualitative research does not depend on statistical quantification, but attempts to capture and categorize social phenomena and their meanings’.¹⁹ A qualitative approach is generally (but not exclusively) favoured by social scientists and increasingly lawyers, including those coming from a constructivist epistemological stance. The reasons for this choice are explained well by Della Porta and Keating:

‘Qualitative research aims at understanding events by discovering the meaning human beings attribute to their behaviour and external world. The focus is not on discovering laws about causal relationships between variables, but on understanding human nature [...]. [T]his type of social science aims at understanding [...] the motivations that lie behind human behaviour, a matter that cannot be reduced to any predefined element but must be placed within a cultural perspective, where culture denotes a web of shared meanings and values’.²⁰

My research approach is socio-legal in nature. This is a common – and perhaps almost inevitable - methodological choice in environmental law research. The critical debate on the quality and maturity of environmental law scholarship and its methodological approaches is relatively recent, but theoretically rich.²¹ Within it, socio-legal approaches have gradually expanded the breadth and ambition of this scholarly enterprise, both in

¹⁸ Friedrich Kratochwil, ‘Constructivism: What It Is (Not) and How It Matters’ in Della Porta and Keating (n 3) 88.

¹⁹ Webley (n 4) 928.

²⁰ Della Porta and Keating (n 3) 26.

²¹ Elizabeth Fisher and others, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213; Richard Macrory ‘Maturity and Methodology: A Personal Reflection’ (2009) 21 *Journal of Environmental Law* 251; Chris Hilson, ‘Editor’s Foreword’ (2008) 2 *Journal of Environmental Law* 1; Ole Pederson, ‘Modest Pragmatic Lessons for a Diverse and Incoherent Environmental law’ (2013) 33 *Oxford Journal of Legal Studies* 103.

methodological and theoretical terms.²² In recent years, socio-legal approaches to environmental law have become more prominent. As Vaughan notes, there is a 'potentially transformative value of empirical socio-legal environmental law scholarship: in putting to test assumptions about the law and the world in which it operates; and in exploring how the law works (or does not work) in environments away from appeal courts and legislatures'.²³ It is within this methodological strand that my thesis is located.

4. Research Questions

As described in Chapter 1, this thesis addresses two primary research questions. First, it explores the nature and space for public participation in decision-making on planning for climate change infrastructure in England. Second, it investigates the role of planning law and other processes, such as community benefit provision, in facilitating or restricting spaces for public participation.

To answer these questions, I looked at the space for, and influence of, public participation within decisions on the development of offshore wind energy infrastructure under the Nationally Significant Infrastructure Projects (NSIPs) regime of the Planning Act 2008. As I explained earlier, this is a particularly interesting area, because of the evidential weight given to national policy objectives, at the expenses of participation.²⁴ Within this regulatory space, I was interested in the following sub-questions:

1. How are the key concerns (such as landscape and visual, place attachment and fairness) expressed by the lay public handled by the Examining Authority (ExA) in the decision-making process for NSIPs? Why?
2. How does this affect the model of public engagement pursued in the decision-making process for consenting NSIPs?
3. How can the local community participate in developer-led community benefits decisions for NSIPs, after consent is granted?

²² Bridget M Hutter, 'Introduction: Socio-Legal Perspectives in Environmental Law: An Overview' in B Hutter, *A Reader in Environmental Law* (OUP 1984).

²³ Steven Vaughan "The Law is My Data": The Socio-Legal in Environmental Law', OUP Blog, 4 September 2017 <<https://blog.oup.com/2017/09/socio-legal-in-environmental-law/>> accessed 8 January 2020.

²⁴ Chapter 1 above.

By grounding the analysis within a specific decision-making process and linking it to the practical operation of the models illustrated in chapter 3, these sub-questions help answering the key questions of the thesis. In order to address them, my research followed a case study approach, as I explain next.

5. Case Study Research Design

In this section, I illustrate why a case study approach offers the best research design to answer my questions and how I selected the two case studies of the thesis.

5.1. Justification

There are multiple conceptions on what a case study is or should be, as well as a discrepancy between case study theory and practice.²⁵ Yin defined a case study as ‘an empirical study that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident’.²⁶ In general terms, a case study is designed to focus in depth on a given situation and is useful to answer “how” and “why” questions. In planning and legal research, case studies have a comparable advantage over other approaches. Campbell notes they are ‘interdisciplinary tools that are more flexible, grounded and narrative than more traditional tools’.²⁷

However, the purpose of case study research is disputed in the academic literature. On the one hand, authors have drawn a distinction between efforts towards generalisation and the idea of drawing general conclusions from case studies.²⁸ While, for most, generalisation is impossible, the nature of case studies allows and supports some general conclusions to be made. On the other hand, case studies are a useful tool to develop and test theories.²⁹ This does not mean that they become generalised through the back door. Instead, they present the capacity of experience in the social context to show whether and how a theory might operate in practice. As Holder and

²⁵ Pascal Vennesson, ‘Case Studies and Process Tracing: Theories and Practices’ in Della Porta and Keating (n 3) 223, 226.

²⁶ Robert Yin, *Case Study Research Design and Methods* (2nd edn. Sage Publications, 1994) 13, cited in Webley (n 4) 939.

²⁷ Scott Campbell, ‘Case Studies in Planning: Comparative Advantages and the Problem of Generalization’ (2003) Urban and Regional Research Collaborative (UU 02-07 University of Michigan Working Paper Series).

²⁸ Robert Stake, ‘The Case Study Method in Social Inquiry’ in Roger Gomm, Martyn Hammersley and Peter Foster (eds), *Case Study Methods* (SAGE 2011); Bent Flyvbjerg, ‘Five Misunderstandings About Case-Study Research’ (2006) 12 *Qualitative Inquiry* 219.

²⁹ Martyn Hammersley and Roger Gomm, ‘Introduction’ in Gomm, Hammersley and Foster, id.1.

McGillivray note, ‘the crucial issue is not whether the findings can be generalised to a wider universe’ but about using the case studies to explore theoretical insights, including in this case the idea that taking key factors of acceptance into account in the consent decision-making is important to ensure genuine acceptance and proper public participation³⁰

A case study research design is appropriate to answer my sub-questions for three reasons. First, the nuances and complexities of the claims made by the public – and how they reflect key factors of acceptance - can only be grasped and understood through a very deep and close reading of the documents of each examination process (see sub-question 1). This is only possible through a case study approach. Second, a case study approach is the best tool to gain a snap shot of the issues that can then be used to explore the assumptions I made in the theory of acceptance (see sub-question 2). Finally, through its flexibility and narrative character, a case study approach is particularly suitable to “tell a story” that spans beyond planning to look into how participation is understood in community benefits provision (see sub-question 3).

5.2. Case Selection

To select the case studies for this thesis, I first mapped the data of the Department for Business, Energy and Industrial Strategy (DBEIS)’s Renewable Energy Planning Database (REPD) (version of January 2018).³¹ The database contained information on all Renewable Electricity and Combined Heat and Power projects submitted for development consent to the competent planning authority as of December 2017. Based on my technology and geographic focus, I applied the following research filters to the initial sample of 5048 projects included in the REPD:

- a) Technology Type: “Wind Offshore”;
- b) Installed Capacity: equal or above 100 MWElect, which is consistent with the legal threshold to qualify as an offshore wind energy NSIPs under the Planning Act; and
- c) Country: “England”.

This initial selection produced a sample of 33 projects at different development stages (i.e. abandoned; operational; application withdrawn; planning permission refused;

³⁰ Jane Holder and Donald McGillivray, ‘Bringing Environmental Justice to the Centre of Environmental Law Research: Developing a Collective Case Study Methodology’ in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (EE 2017).

³¹ Department for Business, Energy and Industrial Strategy (DBEIS), *Renewable Energy Planning Database* (version January 2018) <<https://www.gov.uk/government/publications/renewable-energy-planning-database-monthly-extract>> [accessed 16 January 2020](#). The database is updated monthly.

planning permission granted; under construction). Within these projects, I disregarded those for which planning application was withdrawn and those that were abandoned before the ExA report was published. This selection reduced my sample to 29 projects. Within this sample, I only focused on projects for which planning application was submitted after the entry into force of the Planning Act in November 2008, as the NSIP regime would not have applied to applications submitted before that date.

Within the resulting 19 projects, I focused on those for which the planning application was submitted to the Planning Inspectorate (PINS) for examination as an NSIP application. This is because some of the projects included in my final sample were extensions of previously consented projects under the ordinary planning regime. This involved a search on the PINS website's database for each of the 19 projects selected through the REPD. This reduced my sample to 12 offshore wind energy projects in England for which planning application was submitted to the PINS between December 2008 and November 2015.³²

From this sample, I selected two projects as my case studies: the Rampion Offshore Wind Farm, located off the Sussex coast and consented in March 2014, and the Navitus Bay Wind Park expected to be located off the Dorset coast, for which consent was refused in September 2015. I selected these two cases for two reasons. First, because the number of Interested Parties (IPs) relevant representations submitted to the ExA for these two cases (212 and 2673, respectively) was considerably higher than the number of representations for other projects within my sample. The hypothesis made for the case study selection was that the participatory process for these cases offered a wider range of material and perspective to extrapolate insights in the weight of several factors within the decision-making process.

Second, as I described above, I was interested in the reasoning of the ExA in making its recommendation for both approval and rejection of wind energy projects, to ascertain whether cases of rejection exposed a more careful engagement with the participants' arguments. This reinforced my choice to analyse the IPs relevant representations and ExA Report for the Navitus project, as it was the only project rejected by the ExA within my sample. This rejection was important in the light of the fact that, as of June 2018, only two wind energy projects - the offshore Navitus project in England and the onshore Mynydd y Gwynt Wind Farm in Wales - had been rejected by the Secretary of State (SoS).³³

³² I.e.: Dogger Bank Teesside A; Rampion; East Anglia 1 (EA 1); Hornsea Project One; Galloper Wind Farm; Triton Knoll ; Walney 3; Navitus Bay; Dudgeon East ; Burbo Bank Extension (Burbo Bank 2); Dogger Bank Creyke Beck A & B and Sofia (Dogger Bank Teesside B).

³³ In contrast with Navitus that received the ExA recommendation for refusal, the Mynydd y Gwynt Wind Farm was rejected by the SoS after the ExA recommendation for approval. See SoS decision letter: Department of Energy and Climate Change, *Planning Act 2008 - Application for the Mynydd Y Gwynt Windfarm Order*, 20 November 2015 [28]. The refusal was

It is also important to clarify that with respect to community benefits schemes, I inevitably only focused on the case of benefits associated with Rampion, as it was the only one of the selected cases to have been approved, leading to a community benefit offer from the part of the developer (see Chapter 8 below).

A question arises as to whether the analysis of only two cases is sufficient and methodologically sound to provide ground for the overall argument. From a methodological perspective, what the optimal number of cases is remains unclear. In some circumstances, a small number of case studies (i.e. 'small-N' studies) is particularly useful, as they provide some level of generalisation, but also 'more insight into the intracase dynamics than summary quantitative data'.³⁴ Along these lines, the case studies in this thesis should be interpreted as an opportunity to draw some general conclusions about the meaning and scope of public participation in these particular decisions on wind energy infrastructure, rather than to generate robust data. Limiting the focus to two case studies allows me to go very deeply in the rich empirical details. In sum, although a limited sample, the case studies presented in chapters 6 and 7 were conceived and should be understood as 'snapshots' of the issues.³⁵ They are intended to support general conclusions about the practice of the ExA in relation to decisions on consenting offshore wind energy NSIPs in England as well as testing my theory of acceptance in practice.

6 Data Set and Boundary of Data Relevance

In this section, I discuss the nature, source and characteristics of my data set as well as the boundary of data relevance. I also explain how I dealt with a lack of data. As shown by my first two research questions, this research investigates how the weight of lay public voices are recognised and constructed by and within the regulatory and policy process. For this reason, on the one hand I focused on the voice of the lay public as constructed as IPs with the right to make representations to the ExA. On the other hand, I looked to the Exa reasoning as reflected in its Report of Finding and

challenged by the Applicant, but the Court of Appeal upheld the decision. See *R (on the application of Mynydd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231.

³⁴ See Yvonne Rydin and others, 'Black-Boxing the Evidence: Planning Regulation and Major Renewable Energy Infrastructure Projects in England and Wales' (2018) 19 *Planning Theory and Practice* 218, 223 justifying their 12 wind projects case studies as small-N research by referring to Joachim Blatter and Markus Haverland, *Designing Case Studies – Explanatory Approaches to Small-N Research* (Palgrave Macmillan 2012).

³⁵ Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007).

Conclusions and Recommendation to the SoS. My third question was addressed in chapter 8, where I only use Rampion as an illustrative example rather than a fully developed case study, as I clarify below.

6.1. Data Set

My data was collected from the written documents from the planning process in relation to the two projects. These were all publicly available on the PINS website until 31 July 2019, together with all documents related to the application.³⁶ I focused on two types of documents: the ExA Report of Findings and Conclusions and Recommendation to the SoS, and all IPs relevant representations made to the ExA during the examination pursuant to section 102A of the Planning Act 2008. With respect to Rampion, my research also expanded to some additional data (such as written representations; responses to ExA's written questions; statements of common ground; post-hearing documents; comments on responses to ExAs written questions and written comments to the ExA's draft Development Consent Order), as appropriate. These additional data was included in order to better understand some claims made in the relevant representations. Comparable additional data was not included within the data set for Navitus, as the number of IPs relevant representations in that case already offered a vast source of data for analysis.

6.1.1. ExA Reports

As explained in the previous chapter, under the Planning Act 2008, an application for a Development Consent Order (DCO) with regard a wind energy NSIP is made to the ExA.³⁷ The ExA must examine the application and make a report to SoS 'setting out the Panel's findings and conclusions in respect of the application, and the Panel's recommendation as to the decision to be made on the application'.³⁸ There is no statutory provision addressing the form and content of the report. However, it generally covers: the main features of the proposal, the legal and policy context, findings and conclusions on the main policy and factual issues, overall conclusions and recommendation on the case for development consent, compulsory acquisition, the draft DCO and a summary of conclusions and recommendation. It occasionally refers to submissions by IPs during public consultation and includes them all in the

³⁶ Most of these documents have now been archived but can be inspected free of charge at the offices of Brighton and Hove Council and at the Mid Sussex District Council Planning Offices.

³⁷ Planning Act, Part 4.

³⁸ *ibid* s 74(2). Also Infrastructure Planning (Examination Procedure) Rules 2010, SI 2010/103, r 19.

Appendices. The ExA report is a key document for tracking the Authority's reasoning and the weight of participation in the final recommendation to the SoS. Although the recommendation is not binding,³⁹ the report has 'a high level of authority within the system', effectively illustrating, in most cases, the reasons and explanations for the final decision on consent.⁴⁰ I concentrated on these documents, as I was interested in the reasoning of the ExA in making its recommendation for the approval and rejection of the projects, respectively. Both the Rampion and the Navitus report exceeded 500 pages.

6.1.2. IPs Relevant Representations

A "representation" is a statement of what a person agrees or disagrees with in a planning application. It 'includes evidence, and references to the making of a representation include the giving of evidence'.⁴¹ This means that the ExA will read all valid representations and each will form part of the evidence considered during the examination. Under the Planning Act, there are three types of representations: "relevant", "written" and "oral" representations.

A "relevant" representation is 'a summary of the aspects of the application a person agrees and/or disagrees with and their reasons why'.⁴² Under the Planning Act,

[a] representation is a relevant representation [...] to the extent that
(a) it is a representation about the application, (b) it is made to the Secretary of State in the prescribed form and manner, (c) it is received by the Secretary of State no later than the deadline [...], (d) it contains material of a prescribed description, and (e) it does not contain

- (i) material about compensation for compulsory acquisition of land or of an interest in or right over land,
- (ii) material about the merits of policy set out in a national policy statement, or
- (iii) material that is vexatious or frivolous'.⁴³

³⁹ Disagreement on the decision between the ExA and the Secretary of State is rare. However, the SoS is entitled to depart from the ExA recommendation, subject to giving reasons.

⁴⁰ Lee (n 9) 5.

⁴¹ Section 102 (2) Planning Act 2008

⁴² National Planning Inspectorate, 'Glossary of Terms' <<https://infrastructure.planninginspectorate.gov.uk/help/glossary-of-terms/>> accessed 8 January 2020.

⁴³ Section 102 (4) Planning Act 2008.

A “written” representation is ‘a more detailed written account of what an IP agrees and/or disagrees with in the application, together with any evidence or documents to support this. It is an opportunity to expand on the issues set out in a relevant representation’.⁴⁴ An “oral” representation refers to the opportunity for an IP to speak in person at a hearing. This representation should be based on either a relevant or a written representation made by the person making the oral representation. When all points have been made in the relevant representation (including one made by another IP), a written or an oral representation should not be submitted.

I decided to focus on IPs relevant representations, occasionally referring to written representations only to better understand some points made in the relevant ones. This choice was determined by the fact that a formal submission of a relevant representation is essential to ensure that a participant’s view enters the examination as evidence. Conversely, participants might decide not to submit additional evidence in the form of written examinations or oral representations. In other words, relevant representations are legally necessary for participating, while written or oral representations are optional and their content depends on the content of the relevant representation which they clarify or expand.

As my focus was on relevant representations made by the lay public and businesses IPs, my data set resulted in 212 relevant representations in relation to the Rampion examination; and 2561 relevant representations made in relation to the Navitus examination. These representations ranged from one line to several pages of written text.

6.2. Boundary of Data Relevance

In my research, I was interested in how IPs representations were treated within the examination, rather than on people’s experience of the process. My focus was what happens in the planning consent examination and community benefit decision-making process, rather than people’s perceptions and understandings of those processes. This focus influenced the boundary of my data relevance in two ways.

First, I excluded representations made in the pre-application phase. Those types of representations are the primary data in the pre-consultation phase and feed into the preparation of the project application by the developer. These are important data if the aim of the research is to understand the impact of public participation on mitigation measures and the choices made by the developer (including whether a project is withdrawn before submission of the application). Although likely to provide a

⁴⁴ National Planning Inspectorate (n 42).

wider picture of peoples' perception and influence in the wider governance process, they have less impact on the final decision.⁴⁵

Second, I excluded other secondary data sources (e.g. newspapers reports) and primary data (e.g. interviews with the public and decision-makers). This choice has a deeper explanation in the way socio-legal scholars conduct research and collect data. In general, collection and boundary of data relevance between socio-legal and social science research does not follow the same methodological rules. In social science research, the collection and analysis of a multiplicity of data (so-called "data triangulation") should be used to reduce the risk of misleading results. In other words, the more data the researcher has, the strongest the results are likely to be. This is always true, including for legal scholars. However, socio-legal research gives priority to the 'use of empirical methods to study what is *legal* about legal processes, legal institutions and legal behaviour'.⁴⁶ Applying this approach to my study, I considered collecting other secondary and primary data. But, while this would of course have been interesting, it would have raised a whole set of new questions as these data are generated, and their insight remain, outside the regulatory decision-making process itself. It would have made the project about what the public and decision-makers think about the process. Such empirical work would have therefore diverted from the purpose of my research that was to explore the weight of participation within and outside the process (i.e. community benefits). They remain of course useful data as shown in the wider social science research in this field.⁴⁷

While I acknowledge that the narrow boundary of my data set could appear as a limitation of my methodology, I am comfortable with my research design in the light of my research questions and the socio-legal nature of my study. A wider data set would have provided additional data and perspectives and may be possible in the future.

6.3. Dealing with Lack of Data

While details on the consenting process for wind energy NSIPs were extensive and easy to access through the PINS website, my research showed a lack of public information about participation in the decision-making about community benefits with

⁴⁵ However, the link between the examination stage and pre-application stage should not be underestimated. See UCL, *Evidence, Publics and Decision-Making for Major Renewable Energy Infrastructure* (December 2017) <https://www.ucl.ac.uk/nsips/pdfs/Final_Findings_Recommendations> accessed 8 January 2020).

⁴⁶ Reza Banakar and Max Travers, *Theory and Methods in Socio-Legal Research* (OUP 2005) x.

⁴⁷ Nina Hall, Peta Ashworth and Patrick Devine-Wright, 'Societal Acceptance of Wind Farms: Analysis of Four Common Themes Across Australian Case Studies (2013) 58 *Energy Policy* 200 conducting a thematic analysis of primary and secondary data.

respect to this infrastructure (see sub-question 3). I then wondered whether this lack of data was due the fact that:

- a) a public participation process had not been carried out;
- b) a public participation process had been carried out, but the data was not publicly available; or
- c) the data was publicly available, but I could not find it.

Considering the lack of legal requirement for public consultation with respect to decisions on community benefits in planning, my supposition was that a developer-led public participation had not happened in this context.

To confirm this, I exchanged emails with the 'Development and Stakeholder Manager' for the Rampion project, whom I had met at a seminar I had organised for my LLM students at University of Sussex Law School in October 2017. He agreed in writing that I could use his email in this thesis. Although this was not a planned element of my methodology, and must obviously be treated with caution, it has helped me to develop my thoughts in this area. The function of this data element was therefore confirmatory, rather than explanatory.

I decided not to collect other secondary or primary data to fill this gap. Similarly to the point made above, this is because in the exploration of the space for participation in community benefits provision, my research was concerned with the *legally constructed* space available to the local community to express their views and expectations in the design and management of these schemes, and not on their specific content. I did not consider additional data necessary to answer my research question in this area. Although interesting and certainly important, primary empirical work would have made this a different project all together, as explained above

7 Qualitative Data Analysis Method

The data collected were analysed using thematic analysis. Thematic analysis is 'a data reduction and analysis strategy by which qualitative data are segmented, categorised, summarised and reconstructed in a way that captures the important concepts in the data set'.⁴⁸ The aim of thematic analysis is to identify and describe patterns ("themes") within the data and use them to address the research question(s). In thematic analysis, the data are segmented and categorised through coding. Coding, as Gibbs notes,

⁴⁸ Lioness Ayres, 'Thematic Coding and Analysis' in Lisa M Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (2012) 868.

'involves identifying and recording one or more passages of text or other data items such as the parts of pictures that, in some sense, exemplify the same theoretical or descriptive idea. Usually several passages are identified and they are then linked with a name for that idea—the code'.⁴⁹

As a qualitative data analysis technique, thematic analysis has the advantage of being flexible and adaptable to a variety of epistemological positions. It has been successfully used in studies on social acceptance of wind farms to identify factors shaping people responses to these developments.⁵⁰ For these main reasons, I found it to be a suitable method to identify significant themes in the lay public representations and examine how they were reflected in the ExA reports for the Rampion and the Navitus projects.

My data analysis strategy followed five steps.⁵¹ First, I became familiar with the data, by reading both the ExA reports and all relevant representations. I annotated the documents and took separate notes of the key information and provisional themes. My initial themes were:

1. landscape (including seascape) and visual impact of the development;
2. place attachment(s) and place de-essentialisation;
3. fairness of the process and of the outcome;
4. environmental and biodiversity impact; and
5. technical information and public awareness

Second, I started to organize the data in a meaningful and systematic way, by generating initial codes. The difference between themes and codes is related to the fact that themes come up in a multiplicity of ways, which I identified through a series of codes. I coded segments of the data (i.e. both the ExA Reports and the representations) that was relevant or captured something interesting about the research questions. I conducted an open coding, which means that I developed and modified the codes as I worked through the coding process, rather than relying on pre-set codes. The codes were informed by my reading of the literature on factors influencing public acceptance of renewable and wind energy technologies and infrastructure.⁵² My coding technique was annotation with pen and paper, rather than coding through a data management software, which I do not find user (nor lawyer)

⁴⁹ Graham Gibbs, *Analyzing Quantitative Data* (Sage Publications, 2007) 38.

⁵⁰ Hall, Ashworth and Devine-Wright (n 47).

⁵¹ Based on Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

⁵² Particularly: Patrick Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 *Wind Energy* 125; Patrick Devine-Wright, 'Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action' (2009) 19 *Journal of Community and Applied Social Psychology* 426.

friendly. This is because a software disregards the context in which representations are made. Context is crucial in legal research and the only way I could include it was by coding with pen and paper. The following is the list of my codes:

1. Landscape, seascape, visual, view, sight, modern, industrial, beauty;
2. (out of, wrong, sense of) place, experience, memory, rural, natural;
3. Fair, fairness, justice, benefit, cost;
4. Participation, consultation;
5. Environmental impact, biodiversity, fishery, fish, fishing;
6. Information; experts.

Third, this coding exercise facilitated the development of final themes, as my pattern within the data. I did not develop all possible themes from the data set. I was interested specifically in three themes within my initial themes, selected from the literature on social and public acceptance of renewables and wind energy infrastructure. I reviewed and modified the initial themes. I gathered together the data relevant to each theme, by cutting and pasting the text.

From this review, I decided to only focus on: landscape (including seascape) and visual impact of the development; place attachment(s); and fairness of the process and of the outcome. These themes emerged clearly from the social science (not legal) scholarship and were significant in the data set. Although important, environmental and biodiversity impact, and technical information and public awareness were not as strong as I initially thought from the data. Other themes, such as trust, are also important from the literature, but were not reflected so clearly within my data set.⁵³ The review also shows some overlap between themes, and between themes and codes (e.g. between landscape and place attachment, and experience) which was an interesting finding that I reflected in the writing-up of the case studies.

Fourth, I analysed how the themes were addressed in the relevant representations and the ExA reports. This was a key stage where I combined the empirical data with the results from my literature review and the assumptions of my theory of acceptance.

Finally, I summarized my findings and worked on the writing-up for the two case study chapters. In this final phase, I was engaged in the selection of some illustrative quotes to include in the text. This was an important part as my data included 2819 documents and it was impossible to include all relevant quotes. This means that my selection is inevitably subjective. Nevertheless, these illustrative quotes are evidence of the emotional nature of some the representations and of how the language used in both the ExA report and the representations are indicative of the themes. The quotes

⁵³ Hall, Ashworth and Devine-Wright (n 47).

also allow the reader to ‘see some raw data, allowing the reader to travel’ to the ExA’s examination room and see the tone of the documental evidence submitted.⁵⁴

8 Conclusions

The epistemological and methodological choices outlined in this chapter are the foundations of the research conducted in this thesis. Indeed the empirical element of the research inevitably requires clarification on my position as a researcher and the specific steps I undertook to collect and analyse my data. However, this chapter should be read within the wider context of the developing methodological debate in environmental law scholarship, rather than from the traditional rules of social science or sociology research methodology.⁵⁵

⁵⁴ Webley (n 4) 947.

⁵⁵ n 21.

THE RAMPION OFFSHORE WIND PROJECT AND THE WEIGHT OF PUBLIC PARTICIPATION

1. Introduction

Chapter 4 explored the narrative of speed and urgency embedded in the legal and policy framework for decision-making on wind energy Nationally Significant Infrastructure Projects (NSIPs) in England. This narrative explicitly justifies a presumption in favour of development, arguably at the expense of a deliberative approach to public engagement. I argued that, while participation opportunities are built in to the regulatory process, the weight of substantive arguments made through participation is *de facto* limited by technical assessments and national policy objectives.

To explore this point further, I am interested here in the reasoning of the Examining Authority (ExA) in deciding on applications for development consent for offshore wind energy NSIPs. This and the following chapter analyse the examination process for the Rampion Offshore Wind Farm (section 2 below) and the Navitus Bay Wind Park (chapter 7), respectively. As explained in chapter 5, these case studies focus on the ExA Report of Findings and Conclusions and Recommendation to the Secretary of State, as well as on the representations made by interested parties (IPs) to the ExA during the examination.¹

The Rampion project is an offshore wind energy NSIP located off the Sussex coast. Multiple and diverse issues are addressed in the ExA report on this project, but space prevents an in-depth analysis of all of them.² In this chapter, I focus on the way in which the factors of acceptance described in chapter 3 – i.e. sea/landscape and visual impact, place attachment and perceived fairness of the development outcome and of the decision-making process – are reflected and considered in the examination.³ My analysis here engages with both the ExA's approach to these aspects, as well as

¹ Planning Inspectorate, 'The Planning Act 2008 – Rampion Offshore Wind Farm and Connection Works – Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change' (16 July 2014). See Chapter 1, section 7 on Methodology.

² I.e. Biodiversity, Biological Environment and Ecology [4.106], Effects during Construction and Operation [4.244]; Landscape, Seascape and Visual Impacts [4.309]; Marine and Coastal Physical Processes [4.413]; Navigation and Risks [4.442]; Socio-economic impacts [4.470]; Traffic and Transport [4.511]; Other Traffic and Transport Matters [4.541]; Commercial Fishing [4.573]; Civil and Military Aviation and Defence [4.586]; Decommissioning [4.594]; Good Design [4.612]; Grid Connection [4.619] and Heritage [4.625].

³ See discussion in Chapter 3 above.

how they are conceptualised in the IPs' representations made to the ExA during the examination. It shows how the ExA took into account and extensively scrutinised sea-/landscape and visual impact of the project (sections 3). In doing so, it also expressly acknowledged relevant representations from the public and statutory consultees.⁴ But a close reading of the report suggests that the ExA was primarily preoccupied with giving weight to the technical evidence on landscape impact and the extent to which the project was aligned with set policy objectives. Of course, this should not be overly surprising given that the ExA's role and remit are statutorily defined by the Planning Act and the National Policy Statements (NPSs). Nevertheless, in practice the evaluation of balance between costs and benefits of a large scale infrastructure is hardly an objective judgement.⁵ The place-based values and emotions of the lay public and those having situated knowledge of the area (e.g. fishers, park users) provide a crucial contribution. Participation is the mechanism by which they become apparent to the decision-makers, acquiring weight and influence for the decision. In the case of Rampion, I argue that this disconnection between process and substance of participation is potentially intensified by the ExA's silence on other important factors of acceptance, such as place-attachment and perceived fairness (sections 5 and 6). This approach is likely to trigger instrumental views of participation, characteristic of an acceptance model of public engagement.

2. The Rampion Offshore Wind Project and the Examination Process

The Rampion Offshore Wind Farm project is an offshore wind energy NSIP located off the Sussex Coast, in England. The project required the construction and operation of three infrastructure components: 175 offshore wind turbines with a maximum tip height of 210 metres; two offshore substations with a gross electrical output capacity of up to 700MW; and an export cable corridor to connect the offshore development to a landfall east of Worthing. The export connection from the offshore station consists of an underground cable passing through mainly agricultural land and part of a nationally designated conservation area, the South Downs National Park, to an onshore substation near Bolney.

⁴ All relevant representations were coded and listed at the end of the ExA Report. See Planning Inspectorate (n 1) Appendix I REP-012 to REP-213.

⁵ On this point, Theodor M Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton University Press 1999); Frank Ackerman and Lisa Heinzerling, 'Pricing the Priceless: Cost-Benefits Analysis of Environmental Protection' (2002) 150 *University of Pennsylvania Law Review* 1553.

E.ON Climate and Renewables (UK Rampion Offshore Wind Limited) applied for a development consent order (DCO) for Rampion in March 2013. The Secretary of State appointed a 3-member Panel of Inspectors as ExA to assess the proposal and make recommendations on granting development consent, according to the Planning Act 2008.⁶ As explained in chapter 4, opportunities for public participation are available at multiple stages in the process, subject to the participant having registered as an IPs.⁷ Following acceptance and advertising of the application by EON, 213 relevant IPs representations were received by the ExA during the examination. After a preliminary meeting between the applicant, all IPs and statutory consultees to discuss how the examination should be conducted, the ExA issued a timetable for the examination, together with two rounds of written questions to IPs and requests for further information.

As part of the examination, the ExA convened a number of public hearings, including issue specific hearings,⁸ open floor hearings and one compulsory acquisition hearing.⁹ It conducted a number of onshore site visits (including night time visits) to the area of the onshore application site, to the coastal view points from which the offshore development would be seen, and to the proposed onshore cable corridor and substation site. Having collected all relevant evidence and information, the ExA drafted its report of findings and conclusions, including its recommendation to the Secretary of State for Energy and Climate Change for granting development consent for the Rampion project.¹⁰ A decision for granting development consent was adopted in March 2014 and the first power from Rampion was generated and delivered to the National Grid on 26 November 2017.¹¹

While the lay public participated throughout the entire examination, the largest set of representations were made in the context of registration as IPs, to which some participants followed up by submitting answers to the ExA's questions and/or written representations to the hearings. Individuals and business enterprises, statutory consultees, non-statutory consultees and other organisations, made relevant

⁶ Planning Act 2008, s 65.

⁷ During the pre-application phase, members of the public – including residents and interest groups - were also consulted by the developer, potentially involving a lot of input. See E.ON, Rampion Offshore Wind Farm, Appendix 39 - Document 5.1.1 Consultation Report (December 2012). However, I am not examining the pre-application consultation in this thesis.

⁸ These hearings covered: the draft development consent and deemed marine licence; biodiversity, biological environment, ecology; landscape/seascape and visual impact; and socio-economic impact (including commercial fishing).

⁹ For details, see Planning Inspectorate (n 1) [1.13].

¹⁰ In July 2016, the Department for Energy and Climate Change became part of the newly established Department for Business, Energy and Industrial Strategy (DBEIS), which is currently competent for the decision on development consent order.

¹¹ Since April 2018, all 116 turbines are able to generate electricity and are delivering power to the grid. See History of the Project <<https://www.rampionoffshore.com/about/history/>> accessed 30 April 2019).

representations. Here I am specifically concerned with the arguments made by residents and representatives of the fishing industry, both individuals and enterprises.¹² This is because the influence of representations by these two sub-groups on the ExA's final reasoning appears relatively diluted, compared to the more powerful voices from statutory consultees, local authorities and other organisations.¹³ The representations offer a valuable picture of the local experiences of the area, the socio-cultural context and the factors shaping participants' attitudes towards the project. In some measure, one could recognise diverse "communities" participating in the examination process. These include the local residents connected through geographical location (i.e. 'community of place') as well as the fishing groups and the park users who are connected by common interests and lifestyles (i.e. 'community of interest').¹⁴

Interestingly, relevant representations also include the voice of those in favour of the project. However, supporters were much less vocal than opponents were. They made fewer representations later in the hearing phases and received hardly any acknowledgement in the report. As explained earlier, this is not the focus of this thesis, but it is worth noting how this difference in actual engagement and institutional recognition of the project supporters confirms the argument about the imbalance in level of participation between opponents and supporters in planning decisions.¹⁵ The silence on supportive arguments in the report could also suggest that, even when the lay public is in favour of development, the ExA cannot give them weight for the decisions, as its discretion remains constructed around technical assessment and national policy objectives. But it is also an indication of the underlying persistence of the assumption that the opponents are wrong.¹⁶ The report seems to be directed at convincing opponents of the correctness of the decision. It could also mean that we reiterate a deficit model of how "the public" and "public knowledge" are constructed for the purpose of regulatory decision-making for wind energy developments.¹⁷ And this is another insight in how an acceptance model might work in practice.

¹² Of the 213 relevant representations received by the Examining Authority, 148 were made by individuals and 17 by business enterprises.

¹³ See Maria Lee and others, 'Techniques of Knowing in Administration: Co-Production, Models, and Conservation Law' (2018) 45 *Journal of Law and Society* 427. See also Mhairi Aitken, Seonaidh McDonald and Peter Strachan, 'Locating "Power" In Wind Planning Processes: The (Not So) Influential Role of Local Objectors' (2008) 51 *Journal of Environmental Planning and Management* 777.

¹⁴ For early definitions, David W McMillan and David M Chavis, 'Sense of Community: A Definition and Theory' (1986) 14 *Journal of Community Psychology* 6; Jack L Nasar and David A Julian, 'The Psychological Sense of Community in the Neighbourhood' (1995) 61 *Journal of American Planning Association* 178. On the concept of community, see chapter 1 section 5.

¹⁵ Anna Davies, 'What Silence Knows – Planning, Public Participation and Environmental Values' (2001) 10 *Environmental Values* 77.

¹⁶ See discussion on supporters in Chapter 3 section 2.2 above.

¹⁷ Kate Burningham, Julie Barnett and Gordon Walker, 'An Array of Deficits: Unpacking NIMBY Discourse in Wind Energy Developers' Conceptualization of Their Local Opponents' (2015) 28 *Society and Natural Resources* 246.

3. Seascape, Landscape and Visual Impact

In the examination of the Rampion proposal, the seascape, landscape and visual impact of the turbines were major, if not the most significant, concerns. This is not a new issue for energy infrastructure, as explained in chapter 3.¹⁸ The Overarching National Policy Statement for Energy (NPS EN-1) confirms that ‘virtually all nationally significant energy infrastructure projects will have effects on the landscape’.¹⁹ Yet, what constitutes ‘landscape’ and how to assess impact on it remains an extremely complex and – at least partially - socially constructed question.²⁰ Moreover, landscape impact concerns do not evaporate by moving the project offshore, to build it “out of sight”.²¹ Rampion involves seascape and landscape impact, as it is close to shore, thus clearly visible from land, and also includes land-based developments. Contrasting early literature, many authors have explained how people cherish the seascape and the view at sea from the coast in different, but not less significant, ways than they do for onshore landscape and visual amenities.²² This means that issues associated with acceptability of landscape impact do not vanish by simply moving wind energy infrastructure offshore, as the Rampion project clearly shows.

In its assessment of seascape, landscape and visual impact (SLVI), the ExA used visualisation tools, maps, plans and photos, in conjunctions with carrying out several accompanied and non-accompanied sites visits. The developer broke down the SLVI into three grounds for assessment. First, it looked at the impact related to the exposure and visibility of the turbines from the settlements along the coast.²³ This was particularly important due to the tourism value of the area. Second, it examined the impact on the local landscape character and residential amenity of households residing in close proximity to the proposed onshore substation (both discussed in subsection 4.1).²⁴ Finally, it assessed the impact of the offshore development as well as of the

¹⁸ See discussion of factors of acceptance in Chapter 3.

¹⁹ DECC, *Overarching National Policy Statement for Energy (EN-1)* (July 2011) (hereinafter “EN-1”) [5.9.8].

²⁰ Lee (n **Error! Bookmark not defined.**). See discussion in Chapter 3.

²¹ In an NSIP context, even some of the far out to sea projects – e.g. Triton Knoll Offshore Wind Farm, Galloper Wind Farm and Hornsea Wind Farm - have visual amenity issues for onshore infrastructure development. See e.g. ‘The Planning Act 2008 Hornsea Project Two - Examining Authority’s Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change’ (16 March 2016).

²² E.g. Claire Haggett, ‘Public Perceptions of Offshore Wind Energy’ (2010) 39 *Energy Policy* 503; Claire Haggett ‘Over the Sea and Far Away? A Consideration of the Planning, Politics, and Public Perceptions of Offshore Wind Farms’ (2008) 10 *Journal of Environmental Policy and Planning* 289; Olivia Woolley, ‘Trouble on the Horizon?: Addressing Place-based Values in Planning for Offshore Wind Energy’ (2010) 22 *Journal of Environmental Law*, 223; Maarten Wolsink ‘Near-shore Wind Power—Protected Seascapes, Environmentalists’ Attitudes, and the Technocratic Planning Perspective’ (2010) 27 *Land Use Policy* 195.

²³ Planning Inspectorate (n 1) [4.335-4.341].

²⁴ *ibid* [4.386-4.412].

onshore underground cabling on the Nationally Designated Areas of the South Downs National Park and the Sussex Heritage Coast (sub-section 4.2).²⁵ Here, I analyse the ExA reasoning and IPs contributions concerning these aspects.

3.1. Seascape, Landscape and Visual Impact on Residential Areas

Interested parties expressed concerns about the impact of the turbines on sea view from seafront residential properties.²⁶ Residents were concerned about the risk of ‘an uninterrupted view of 145 wind mills’²⁷ and expressed fears for ‘a future turbine graveyard’.²⁸ The Rampion project was also described as constituting ‘visual pollution to the Sussex coast’²⁹ and ‘[...] a permanent eyesore for which there will be negligible environmental return’.³⁰ Many representations emphasised concerns for the effects of the visual impact of the turbines on tourism in seafront settlements (i.e. Brighton, Hove, Worthing and other holiday resorts along the edge of the bay between Selsey Bill and Beachy Head).³¹ One participant argued that ‘[s]uch installations of [sic] the coast in a famous sea side resort do offend the eye’.³² Another resident framed this point as:

‘Brighton and Hove is a magnet for tourism to the UK. To destroy the nature of that site by placement of this windfarm would be tantamount to vandalism of the local economy based on tourism’.³³

This was echoed by concerns about the adverse financial repercussions of the project, with one participant claiming that:

‘The ruination of such views is a potential disaster for the inhabitants of Brighton and Hove and I believe will affect the tourist interest in the area and cause significant financial blight’.³⁴

In the Environmental Statement (ES) accompanying the application, the developer stated that it would expect “major” and “major to moderate” SLVI upon coastal

²⁵ *ibid* [4.342- 4.385] and [4.386-4.412].

²⁶ E.g. REP-069: Dr G Lickfold.

²⁷ REP-177: E Felton.

²⁸ REP-159: N Enever.

²⁹ REP-018: A Carter and REP-040: C Carter.

³⁰ REP-211: T Williams.

³¹ (n 26); REP-061: Mr D Samuel; REP-044: C Gross.

³² REP-036: B Gibson.

³³ REP-114: J Lewis.

³⁴ REP-022: A Saunders.

settlements and the coast of Sussex during operation.³⁵ Having considered IPs representations and conducted site visits, the ExA found that ‘the proposed wind farm would be clearly visible from coastal settlements’ and agreed with ‘the applicant’s findings that there would be major and major moderate adverse effects during operation should the wind farm be consented’. However, ‘on balance’, the ExA did not ‘consider the effect of the proposed wind farm on seaward views from coastal settlement to outweigh the need for energy infrastructure as set out in NPS EN-1’.³⁶ As illustrated earlier, this balancing exercise is a matter of judgement for the decision-maker, but the reasoning of the ExA here is ultimately guided by a presumption in favour of development. Although considered, the representations of the public and their concerns are insufficient to rebut this presumption.

With respect to the landscape and visual impact of the onshore substation upon the residential area near Bolney, the residents expressed major concerns.³⁷ One resident explained that:

‘the substation will be visible from all rooms on the south side of our property, all garden areas, including the garden room. The site [...] is completely across the rear of our property. All the main rooms of our property have a southerly aspect, meaning it will be impossible to take in any views without there being some impact from the substation’.³⁸

This was echoed by another resident’s stating:

‘As my house is in the general vicinity of the proposed Bolney sub-station development, I wish to be kept aware of decisions made or possibly made on this, in case they could have an adverse impact on the environment close to me. In particular, I would wish to see the proposals for natural screening of the development implemented if the scheme is to be given the go-ahead, in order to lessen any visual impact on the local area’.³⁹

³⁵ Planning Inspectorate (n 1) [4.333-4.334] stating that ‘these would arise given the visual relationship and associations between the seascape character areas and the landscape character areas coincident with the [Zone of Theoretical Visibility] and the study area’.

³⁶ Ibid [4.341].

³⁷ E.g. REP-042: C Worsley; REP-169: Mr. R J Gloyn; REP-115: J Miller; REP-158: N Hanley.

³⁸ REP-287: J Living.

³⁹ REP-165: P Letts.

In the ES on landscape and visual impact, the applicant stated the impact of the substation upon the landscape to be medium to small.⁴⁰ However, in relation to visual impact during construction, the applicant noted that ‘temporary moderate to substantial adverse effects on visual amenity will arise for more sensitive receptors and for those afforded a high degree of visual exposure to construction operations within the site’.⁴¹ During operation, the degree of impact will vary from negligible to major, depending on the viewpoint.

Particularly interesting in the examination of the landscape and visual impact at the substation is the ExA’s reasoning on the possibility to develop alternative sites for the onshore substation, as requested by several participants.⁴² The ExA considered the alternative site proposed by some local residents, but found that it lay ‘outside the Order limits for the application’.⁴³ The ExA clarified that

‘[i]n legal and procedural terms it is not open for the Panel to recommend refusal [sic] an acceptable proposal merely because it may not be the best of a range of options considered at the pre-application stage. The scope of the judgement available for the Panel is whether the proposals submitted for examination (including the relevant mitigation measures provided for in the Order) could be developed without giving rise to effects that would be so adverse as to justify refusal of the DCO application. For these reasons the Panel does not consider that this alternative can or should be given weight’.⁴⁴

In other words, the ExA stated that because the alternative site did not fall under the area covered by the application (i.e. the order limits of the application), it was outside its discretion to recommend a better alternative to what would otherwise be an acceptable proposal. This approach is not entirely surprising given the NPS’s indication that the weight given to alternatives to the proposed development should be considered in the light of ‘the level and urgency of need for new energy infrastructure’.⁴⁵ This shows that the ExA’s discretion is narrowly defined not only by

⁴⁰ E.ON, Rampion Offshore Wind Farm – ES Section 26 – Landscape and Visual Impact Assessment Document 6.1.26 (December 2012) [26.6.58-65]. One participant described the measures proposed in ES Section 26 to mitigate landscape impact as ‘inadequate’ (See REP-158 n 37).

⁴¹ *ibid* [26.7.44].

⁴² E.g. REP-105 J Livings; REP-276 A Livings. See also REP-215 Twineham Parish Council. See also Responses to ExA’s Second Written Questions: REP-400 J Livings; REP-363 A Living, REP-298 R Hirst.

⁴³ Planning Inspectorate (n 1) [4.84].

⁴⁴ *ibid* [7.169].

⁴⁵ EN-1 (n 19) [4.4.3] subject to any relevant legal requirements (e.g. under the Habitats Directive). As a general guidance, though, EN-1 ‘does not contain any general requirement to

the scope of the application, and therefore by the applicant, but also by the NPS's overarching narrative which implies that we need all available sites. Even when a better solution could emerge through a dialogue with the local community, the choice of the applicant to confine the application to a specific area defines the ability of the ExA to give weight to people's contribution on alternative options. This discussion is also interesting as the ExA noted that, while the applicant identified the proposed alternative site as viable in the pre-application phase, this was then excluded from the order's limits at the time of application. Some residents argued that this was due to economic factors and pre-agreement with landowners of the proposed site to acquire land at a cheaper price compared to the alternative site.⁴⁶

The ExA report ultimately concluded that the effects on landscape and visual amenities on the area near the Bolney substation would have been temporary and the mitigation measures proposed by the applicant 'would assist in the management and mitigation of the potential landscape and visual effects'.⁴⁷

3.2. Seascape, Landscape and Visual Impact on Nationally Designated Areas: The South Downs National Park and the Sussex Heritage Coast

The South Downs National Park (SDNP) was designated in 2002 and is the newest National Park in Britain.⁴⁸ The SDNP covers an area of '1,653km², which includes heritage coast,⁴⁹ farmland and woodland, National Nature Reserves, historic monuments, visitor attractions, listed buildings and Conservation Areas'.⁵⁰ The SDNP 'is the most populated National Park in the UK, with around 110,000 people living within its boundary'.⁵¹ This perhaps explains the high level of participation of the local community in the examination process of the Rampion proposal. This community not only includes local residents, but also park visitors who are engaged in a variety of

consider alternatives or to establish whether the proposed project represents the best option'. [4.4.1].

⁴⁶ REP-296, N and R Hanley.

⁴⁷ Planning Inspectorate (n 1) [4.412].

⁴⁸ The South Downs National Park was designated on 18th December 2002, under Part 2 of the National Parks and Access to the Countryside Act 1949, by the South Downs (National Park) Designation Order 2002. The Order was varied on the 5th January 2004 by the South Downs National Park (Designation) Variation Order 2004. The designation was confirmed with modifications on 12th November 2009 and took effect on 31st March 2010.

⁴⁹ The Sussex Coast was designated 'Heritage Coast' in 2011 under the National Parks and Access to Countryside Act 1949.

⁵⁰ South Downs National Park Authority, *State of the South Downs National Park 2012* (2012) 8 <<https://www.southdowns.gov.uk/wp-content/uploads/2015/03/State-of-the-National-Park-Report.pdf>> accessed 26 August 2019.

⁵¹ Ibid 110.

recreational activities. This made the impact of Rampion on the beauty and integrity of the Park a matter of concern to many.

The statutory purpose of designated National Parks is to 'conserve and enhance their natural beauty, wildlife and cultural heritage and to promote opportunities for the understanding and enjoyment of their special qualities by the public'.⁵² To ensure the fulfilment of these objectives, the South Downs National Park Authority (SDNPA) was established in 2010.⁵³ The SDNPA was an active and vocal consultee in the examination of the Rampion project. Although it was intended to be sited outside the boundary of the designated park area, the project had a series of effects on its landscape and biodiversity. In dealing with the impact of energy NSIPs on designated conservation areas, the Overarching National Policy Statement for Energy (EN-1) is relevant in explaining that:

'National Parks [...] and AONBs have been confirmed by the Government as having the highest status of protection in relation to landscape and scenic beauty. Each of these designated areas has specific statutory purposes which help ensure their continued protection and which the [Secretary of State] should have regard to in its decisions. The conservation of the natural beauty of the landscape and the countryside should be given substantial weight by the [Secretary of State] in deciding on applications for development consent in these areas'.⁵⁴

Two issues were particularly contentious in relation to the impact of Rampion on the SDNP: the impact of the offshore development on views out to sea *from* the Park and Heritage Coast (sub-section 3.2.1) and the impact of the onshore development on landscape and views *within* the Park (sub-section 3.2.2). I will address them in turn here.

3.2.1. Impact of Offshore Development on Views out to Sea from the Park and Heritage Coast

The impact of the Rampion wind farm development on views out to sea from the South Downs National Park (SDNP) and the Sussex Heritage Coast was an important area of

⁵² The National Parks and Access to the Countryside Act 1949, s 11 A (2).

⁵³ The South Downs National Park Authority (Establishment) Order 2010, SI 2010/497.

⁵⁴ EN-1 (n 19) [5.9.9 – 5.9.13] mentioned in Planning Inspectorate (n 1) [4.310]. This policy guidance also affects the export cable corridor element associated with the Rampion project. This National Policy Statement refers to Infrastructure Planning Commission that was abolished by the Localism Act 2011. The decision is now made by the Secretary of State under the advice of the Planning Inspectorate.

discussion in the examination.⁵⁵ Along with opposition from statutory consultees at different stages of the examination,⁵⁶ many lay public representations touched upon the negative landscape and visual impact of Rampion on the view from the SDNP. This representation describes the concerns of participants:

‘A significant aesthetic value of those parts of the National Park affording seaward views is the clear view across the sea to the horizon. This will be spoilt by the windfarm [sic] which will be visible over a lengthy stretch of the park.

I most strongly object to the cluttering of the view from the iconic Seven Sister [sic]. For this reason alone the farm should not be allowed to proceed unless it can be entirely moved to a site westr [sic] of its current most westerly point’.⁵⁷

Another participant noted:

‘I wish to object to the application because what is proposed is likely to damage the beauty of an area of great aesthetic quality as recognised in its status of national park’.⁵⁸

These concerns were not only limited to the designated conservation status of the Park, but extended to the protected status of the Sussex Heritage Coast.⁵⁹ This individual representation is a useful outline of the issues:

‘I object to the placement of the turbines offshore where they remain in sight of the Heritage Coastline. Thousands of people have moved to the

⁵⁵ Planning Inspectorate (n 1) [4.342-].

⁵⁶ See in particular, REP-583: Natural England (arguing that, despite the measures proposed by the applicant to mitigate impact, the Rampion project ‘would still compromise or conflict with the landscape/seascape objectives of designation of the National Park and Heritage Coast’ (Planning Inspectorate (n 1) [4.355]). See also REP-589, South Downs National Park Authority (arguing that the ‘proposed wind turbines will have a detrimental and unacceptable impact upon the Heritage Coast... [and] a detrimental and unacceptable impact upon the landscape character of the National Park’ (Planning Inspectorate (n 1) [4.345]).

⁵⁷ REP-210 Mr T Holter.

⁵⁸ REP-024: A Hepher.

⁵⁹ According to the National Planning Policy Framework, ‘Heritage Coast’ refers to ‘[a]reas of undeveloped coastline which are managed to conserve their natural beauty and, where appropriate, to improve accessibility for visitors’ (Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (February 2019) 67). The Sussex Heritage Coast was the first to be designated in the England in 1973. The land section of the Sussex Heritage Coast sits entirely within the South Downs National Park. See South Downs National Park, *Sussex Heritage Coast: A Strategy and Action Plan 2016-2020* (undated) <<https://www.southdowns.gov.uk/wp-content/uploads/2018/04/TLL-24-Sussex-Heritage-Coast-Strategy-and-Action-Plan-2016-2020.pdf>> accessed 5 May 2019>).

coast to enjoy the coastal view and have recreational pursuits all along the coastline. The blight of 175 turbines even with a 20 degree view will seriously impact the much needed tourism trade and property investment along the shoreline [...].⁶⁰

This was echoed by another individual, linking the landscape and visual impact of the project once again to the tourism value of the Park:

'Our coastline in Sussex is somewhere not only local people love and appreciate but is visited by thousands of people every year searching for open space and beautiful views from the shores out to sea and from the South Downs behind us'.⁶¹

This perspective makes a clear reference to the wider community involved in the enjoyment and appreciation of the SDNP, including both local residents and visitors.

In relation to the SLVI on views from the park, national policy provides primary guidance to the Panel. With respect to a Nationally Significant Infrastructure development outside a designated area that might affect it, EN-1 expands on the idea of giving substantial weight to the conservation objectives, by stating that:

'The duty to have regard to the purposes of nationally designated areas also applies when considering applications for projects outside the boundaries of these areas which may have impacts within them. The aim should be to avoid compromising the purposes of designation and such projects should be designed sensitively given the various siting, operational, and other relevant constraints'.⁶²

However, in addressing the inevitable clash between such presumption in favour of conservation and the presumption in favour of development arising from the need and urgency narrative, the NPS notes that:

'the fact that a proposed project will be visible from within a designated area should not in itself be a reason for refusing consent'.⁶³

⁶⁰ REP-055: C Downie.

⁶¹ REP-062: D Sexton.

⁶² EN-1 (n 19) [5.9.12]. This is consistent with the 'highest status of protection' in relation to 'landscape and scenic beauty' attributed to National Parks, and with 'the special character' of the Heritage Coast, under the National Planning Policy Framework (See Ministry of Housing, Communities and Local Government (n 59) [172-173]).

⁶³ EN-1, *ibid* [5.9.13].

Considering the site visits and the evidence gathered from participants, the ExA acknowledged that ‘no measures are available that would completely mitigate the significant adverse visual effects of the proposed array on the National Park or Heritage Coast’.⁶⁴ As a result, the ExA recognised that ‘there would be some changes to the special qualities of the national park [...], in particular the “diverse, inspirational landscape and breathtaking views” would be changed in parts of the National Park’.⁶⁵ However, it argued that:

[o]n balance, and taking into account the range of mitigation measures set out above, although the visual effects of offshore development upon the National Park and Heritage Coast cannot be eliminated, the level of benefits to be afforded from the proposed wind farm in terms of the need of energy infrastructure as set out in EN1 outweigh the level of damage likely to be occasioned to the environmental setting of the National Park and the harm to the objectives of designation of the South Downs National Park, including consideration of its outstanding long distance views’.⁶⁶

As with SLVI on the coastal settlements, this conclusion shows that, while the ExA took into account representations and views, their weight was not considered persuasive enough to outweigh the benefits of the project in terms of contribution to the national policy objectives.

3.2.2. Impact of Onshore Development on Landscape and Views Within the Park

In relation to the landscape and visual impact within the park, the option of laying the export cable through a portion of the National Park was generally considered more acceptable than siting overhead transmission cabling. However, the ExA acknowledged the high number of representations concerned with laying the cable through the National Park.⁶⁷ Some IPs claimed that ‘the likely adverse effects upon the landscape and/or on recreational enjoyment of the South Downs had not been given sufficient consideration’.⁶⁸ Some representations stated that a more suitable route through the National Park could have been chosen ‘not to cause damage to the downland, hedgerows and woodlands’.⁶⁹ Others stressed concerns about impact on

⁶⁴ Planning Inspectorate (n 1) [4.382].

⁶⁵ Id [4.382] reference omitted in the original.

⁶⁶ *ibid* [4.385].

⁶⁷ REP-019: A Weinhold; REP-124: L McCormick; REP-162: P Morris, REP-172: R Donovan.

⁶⁸ REP- 115: J Miller. See also REP-172: R Donovan.

⁶⁹ Planning Inspectorate (n 1) [4.389].

the aesthetic qualities of the Park.⁷⁰ The laying of the cable route was described by one individual as ‘the scarring of downland within the South Downs national Park which is likely to take many lifetimes to heal, if ever’.⁷¹

However, in relation to the complex and much debated issue of the seascape, landscape and visual impact within the Park, the ExA found that ‘although there will be effects on the landscape character and visual receptors as a consequence of onshore cable laying, these effects would be temporary’.⁷² It also linked its reasoning to the policy narrative, pointing out that:

[...] the risk of direct landscape losses within the National Park [...] would be outweighed by:

- the contribution that would be made to the public interest by the project in helping to meet the identified need for renewable and low carbon forms of energy and
- the high cost of and limited scope for developing a route outside of the designated National Park area, taking account of the information considered regarding alternatives [...].⁷³

This led the ExA to conclude that ‘none of the matters in relation to the potential or likely landscape, seascape and visual impacts [...] would be so adverse (following mitigation where mitigation is possible) as to justify refusal of the Rampion DCO application’.⁷⁴

4. What Is Missing?

The decision-making process for the Rampion Offshore Wind Farm has involved a complex assessment exercise, touching upon questions of how evidence is constructed and given weight.⁷⁵ The task of the ExA was not trivial. As discussed thus far, they worked through technical assessments, modelling and predictions, as well as their own sensitivity and judgement. In particular, the ExA devoted primary attention to the compliance with policy and to the adequacy of the measures proposed to mitigate

⁷⁰ REP-024: B Hepher.

⁷¹ REP-210: Mr Tim Holter.

⁷² Planning Inspectorate (n 1) [4.410].

⁷³ *ibid* [6.31].

⁷⁴ *ibid* [6.34].

⁷⁵ Lee and others (n 13).

the impact. And when issues were not resolved through mitigation or negotiation, the ExA accepted that they were discussed and addressed outside of the planning process (e.g. through fisheries liaison groups, discussed below). But participants often aim for more, or something different, than mitigation, especially when mitigating impact is not possible.⁷⁶ The ExA's reasoning and approach show its discomfort with engaging with individuals' place-based values and expectations, as well as with the lay public's perception of fairness of the development outcome and of the process.

In the next two sub-sections, I focus on the concept of place attachment and perceived fairness, as important factors of acceptance which I argue were overlooked in the ExA examination. My point here is that, while giving extensive – although technical and procedural - scrutiny to seascape, landscape and visual impact, the ExA left these other claims broadly unanswered. It would perhaps be simplistic to merely attribute this gap to the limited discretion granted to the ExA by the regulatory decision-making framework and the boundary set in the policy, or to the strictly planning-related scope of the ExA's examination remit. Certainly, these are significant limitations to a wide consideration of value-based arguments, as discussed above. But this specific gap could also be the result of the profound challenges that regulators face in dealing with emotions⁷⁷ and questions of fairness.⁷⁸ However, within the scholarship on public acceptance of wind energy infrastructure, both place attachment and perceived fairness of the outcome and of the process have emerged as factors shaping people's attitude to energy systems.⁷⁹ As such, they are deeply connected to discourses on the substantive quality of participation and certainly deserve careful consideration.

4.1. Place Attachment(s)

As illustrated in detail in chapter 3, the notion of place attachment relates to the multifaceted emotional bonds between people and places.⁸⁰ An increasingly rich body of research is emerging on the role of place-related approaches to understand

⁷⁶ Cf Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139.

⁷⁷ Bettina Lange, 'The Emotional Dimension in Legal Regulation' (2002) 29 *Journal of Law and Society* 197.

⁷⁸ Susana Batel and Patrick Devine Wright, 'Energy Colonialism and the Role of the Global in Local Responses to New Energy Infrastructure in the UK: A Critical and Exploratory Empirical Analysis' (2017) 49 *Antipode* 3; Phil Johnstone, 'Planning Reform, Rescaling and the Construction of the Postpolitical: the Case of The Planning Act 2008 and Nuclear Power Consultation in the UK' (2014) 32 *Environment and Planning C* 697.

⁷⁹ See Patrick Devine-Wright, 'Reconsidering Public Acceptance of Renewable Energy Technologies: A Critical Review' in Michael Grubb, Tooraj Jamasb and Michael G Pollitt (eds), *Delivering A Low-Carbon Electricity System – Technologies, Economics and Policy* (CUP 2008).

⁸⁰ Chapter 3 section 3.3. above. See in particular, Lynne Manzo and Patrick Devine-Wright (eds), *Place Attachment: Advances in Theory, Methods and Applications* (Routledge 2014).

acceptance of wind energy infrastructure and participatory processes.⁸¹ But the consideration of place attachments in the decision-making process remains embryonic. As explained in chapter 4, in the English regulatory context, the national policy takes a residual view to the sense of place and people's bonds with it by limiting its scope in the decision-making to issues framed as matters of historic heritage.⁸² In the Rampion examination however, the idea of sense of place and place attachment escaped predefined categories to emerge in different and messier ways within IPs representations. This is especially evident where representations expressed emotions and sensations associated with the landscape from the coastal settlements and the character of the National Park as a 'place'.⁸³ A sensation of space and emptiness was what many referred to as key features that made the coastline valuable and gave it its defining character. The following representation is particularly illustrative of this argument, engaging with the emotional and human element of the landscape.⁸⁴

'The open, empty, seascape is a feature of Brighton and the surrounding towns, for residents and visitors alike, that I believe is of vital importance to the character of the area. Brighton is a congested city, made more bearable by the fact there is nothing visible over the sea to the south of the city. I genuinely fear that the proposed wind farm will generate a sense of enclosure that will affect a large number of people for many years'.⁸⁵

When a landscape and a geographic open space is valued for its ability to relieve people from the congestion of city life, a sense of necessity and connection is recognised in them. This relationship helps define a landscape as a 'place'.⁸⁶ Another participant explained this as:

'I have lived in this area for 4 years and know that the rural scenes, quietness and wildlife in this area is very respected by residents and visitors'.⁸⁷

⁸¹ Patrick Devine-Wright, 'Rethinking NIMBYism: the Role of Place Attachment and Identify in Explaining Place Protective Action' (2009) 19 *Journal of Community and Applied Social Psychology* 426.

⁸² See discussion in Chapter 4, section 5 above.

⁸³ REP-069: Dr G Lickfold.

⁸⁴ See Chapter 3, section 3.

⁸⁵ REP-113: J Ashley.

⁸⁶ Brian Wattchow, 'Landscape and a Sense of Place' in Peter Howard, Ian Thompson and Emma Waterton (eds), *The Routledge Companion to Landscape Studies* (Routledge 2012). See extended discussion in Chapter 3 above.

⁸⁷ REP-102: J May.

Based on this, some members of the public expressed what Pasqualetti calls 'expectations of landscape permanence'.⁸⁸ One participant in the Rampion examination stated:

[...] I believe that the *natural status quo* of the visual environment in which we live has greater value than it is suggested by the planners. I believe that the unfettered horizon is of a great benefit to the health of this and future populations of this country'.⁸⁹

The maintenance of the 'natural status quo' of the place is presented here as a value and a benchmark for assessment. What many representations sought to convey was the special link they felt with the park and its land and the emotions associated with any disruption to that link. This is particularly evident in the following comment:

'As a walker who loves the scenery of the area in question, I am dismayed that a very long cable duct should be laid which will intersect the newly created National Park, and much of the beautiful landscape to the North of it. I am concerned that the surroundings will NOT [sic] be restored to their full beauty, that the work will go on and on and disrupt walkers by closing rights-of-way, and also that the work will badly affect the flora and fauna of the region'.⁹⁰

Objections to infrastructure development based on place attachment arguments tend to frame energy projects in a particular location as being 'out of place'.⁹¹ Participants raising place-attachment-based justifications often oppose proposals that are seen to 'industrialise' a rural place typically regarded as 'natural'.⁹² This is what Batel and Devine-Wright have described as a feeling of '(de-)essentialisation' of the place, which means that renewable energy infrastructure are 'represented as industrial and urban, and thus, as having a different essence from rural landscapes, where they are usually deployed and which are represented as natural and unspoilt'.⁹³ Van Veelen and Haggett argue that, where place attachment embraces a sense of fitness with a place,

⁸⁸ Martin Pasqualetti, 'Opposing Wind Energy Landscapes: A Search for Common Cause' (2011) 101 *Annals of the Association of American Geographers* 907.

⁸⁹ REP-174: R Bairstow (emphasis added).

⁹⁰ REP-172: R Donovan.

⁹¹ Patrick Devine-Wright and Yuko Howes, 'Disruption to Place Attachment and the Protection of Restorative Environments: A Wind Energy Case Study' (2010) 30 *Journal of Environmental Psychology* 271.

⁹² E.g. REP-049: C Morris; REP-192: P Morris.

⁹³ Susana Batel and others, 'The Role of (De-)essentialisation Within Siting Conflicts: An Interdisciplinary Approach' (2015) 44 *Journal of Environmental Psychology* 149 (noting that 'essentialisation' could also be used 'strategically').

'perceptions of this fit [are] often more important than "actual" environmental impact'.⁹⁴ An example of the (de)essentialisation framing is seen in the Rampion examination where the project was considered by some participants as causing the 'industrialisation of yet another wild environment',⁹⁵ and affecting an area that 'is not nor ever has been an industrial coast',⁹⁶ resulting in this infrastructure constituting a bad fit with the place.

These examples show that a sense of place attachment could be identified in the residents and visitors representations in different forms – such as a need to maintain the status quo of natural beauty and permanence of the landscape; an objection to the industrialisation of rural environment, as well as the recognition of the character of the place in terms of being distinctive from other places - , reflecting the plurality of place attachments.⁹⁷ As place attachments are increasingly considered factors that shape people reaction to, and acceptance of, renewable energy infrastructure, their consideration in the reasoning for a decision has a strong influence on how people feel about the substance of participatory opportunities. However, as discussed in chapter 3, the ability (or willingness) of the regulatory decision-making to appreciate place-attachment(s) is limited, resulting in these factors being isolated from other technical issues and squeezed out form the decision-making process. This is not only due to the routes of the concept within emotions and sensory relationship between people and a place, but also to the NIMBY bias that still permeates the policy and decision-making process for infrastructure development.⁹⁸ This means that opposition based on place attachments risk being judged as selfish and irrational, compared to evidence offered by technical impact assessment models.

The examination of the Rampion project offers a good example of institutional silence on place attachment(s). Representations, such as those reported above, touch upon several of these aspects, but were reduced to concerns about e.g. tourism or residential landscape impact, and dealt with accordingly through the technical assessment discussed above. This approach falls short of engaging in the value framework underpinning them. It shows an approach to planning decisions based on technocratic reasoning rather than collaborative and participatory planning, when all

11. ⁹⁴ Bregje van Veelen and Claire Haggett, 'Uncommon Ground: The Role of Different Place Attachments in Explaining Community Renewable Energy Projects' (2017) 57 (S1) *Sociologia Ruralis* 533, 542.

⁹⁵ (n 92).

⁹⁶ REO-061: Mr D Samuel.

⁹⁷ Patrick Devine-Wright and Susana Batel, 'My Neighbourhood, My Country or My planet? The Influence of Multiple Place Attachments and Climate Change Concern on Social Acceptance of Energy Infrastructure' (2017) 47 *Global Environmental Change* 110, 110. See van Veelen and Haggett (n 94).

⁹⁸ See discussion in Chapter 3. See in particular, Patrick Devine-Wright, 'Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action' (2009) 19 *Journal of Community and Applied Social Psychology* 426.

arguments and multiple knowledge(s) are valued and have weight in the final decisions.

5. Perceived Fairness

In chapter 3, I also introduced the idea that issues of fairness can be seen as factors of acceptance shaping the attitude of people towards a particular energy infrastructure project.

As clarified above, by “fairness” I mean both fairness of ‘development outcomes’ (e.g. environmental and socio-economic effects of the wind NSIPs and their distribution) and fairness of the decision-making process (e.g. fairness in ‘procedural openness and inclusivity of the participatory process’).⁹⁹ During the consultation on Rampion, a great number of representations focused their opposition and concerns on the local community and fishing industry bearing the environmental and socio-economic cost of the development, while the benefits of the development were enjoyed by the developer and foreign energy companies. Moreover, some representations highlighted a lack of fairness in the participation process. I will focus on these two issues in turn here, in particular on the arguments made by the representatives of the fishing community and how they were reflected in the ExA reasoning.

5.1. Fairness of the Development Outcome: Fishing Impact and Compensation

Together with impact on seaside and rural settlements and the South Downs National Park, one of the main issues in the examination of Rampion was the impact of its construction, operation and future decommissioning upon the marine environment. There were concerns that the project would disturb and destroy seabed habitat, which in turn would affect fish stock.¹⁰⁰ Negative impact was found to derive from both construction and operation of the project affecting in particular black bream (a fish species of both conservation and commercial value), herring (one of the largest fish products in the Sussex coastal area) and cuttlefish. During construction, the main issues for these species were related to their sensitivity to underwater noise generating from the piling of the turbines into the seabed, leading them to avoid that area and

⁹⁹Lucy Natarajan and others, ‘Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation’ (2019) 90 *Town Planning Review* 117, 121.

¹⁰⁰ Natural England was the key consultee in the dialogue about nature conservation and habitat protection in the marine environment, together with the Marine Maritime Organisation (MMO).

eventually move elsewhere. However, a greater issue emerged in relation to the effect of the operation of the wind farm. The developer noted that ‘new habitat such as turbine foundations could alter the distribution of some species, representing both a minor loss of natural habitat for small seabed species and a gain of artificial habitat, especially for species that aggregate around structures such as reefs’.¹⁰¹

The ExA cautiously examined the impact of the project on marine conservation areas, marine habitat and marine ecology. It relied on data provided by the applicant on the different degrees of sensitivity of diverse species.¹⁰² The applicant offered some mitigation measures for this impact, such as reduction of piling, which the ExA judged sufficient.

However, while these were presented as primarily ecological considerations within the ExA report, the impact on commercial fishing as a result of the change in habitat and the occupation of fishing ground by the project emerged strongly in the individual and business representations.¹⁰³ This stressed the importance of the socio-economic context against which issues of ecological protection emerged. It showed that participants’ concerns in relation to the marine environment went somewhere beyond the pure conservation and ecological element to touch upon the socio-economic implications of biodiversity disruption and loss for the fishing industry and local livelihood, flagging the role of multiple knowledge(s) within each participant.¹⁰⁴ Participants claimed that the number of vessels involved during construction of the proposed array would have the adverse effect of displacing the local fishing fleet. This would result in a number of fishing vessels fishing in a reduced area, with greater competition for the accessible fish stock and higher navigation risks. There were also concerns for the restrictions that would effectively be placed upon types of fishing activity that would be safe or practicable during operation of the project, should Rampion be authorised. On this aspect, the ExA received a high number of representations from individual local fishers, the Commercial Fisheries Working Group and the Sussex Independent Fishermen Group.¹⁰⁵ Some of them focused on the socio-economic characteristics of the Sussex coast being traditionally a fishing area with some long lasting activities which spanned generations. This highlighted the importance of this business for the livelihood and subsistence of a large group of

¹⁰¹ E.ON, Rampion Offshore Wind Farm, Appendix 175 - Document 6.4. Non-Technical Summary (December 2012) Revision A [9.27] <<http://www2.westsussex.gov.uk/ds/cttee/ecs/ecs120713i4b.pdf>> accessed 26 August 2019.

¹⁰² Planning Inspectorate (n 1) [4.574]. See also *ibid*

¹⁰³ These were coupled with navigational risk concerns.

¹⁰⁴ On this point in another context, Margherita Pieraccini, ‘Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England’ (2015) 27 *Journal of Environmental Law* 45, 50.

¹⁰⁵ Planning Inspectorate (n 1) [4.575] referring to REP-538 E.ON - Appendix 6 – Statement of Common Ground with Commercial Fisheries Working Group and REP-422: E.ON - Statement of Common Ground with Sussex Independent Fishermen Group.

interested parties.¹⁰⁶ Some of the comments received by the ExA stressed the historical and economic importance of that fishing ground to the local fishing industry.¹⁰⁷ The Brighton and Newhaven Fish Sales Ltd put this into a wider perspective by pointing out that:

‘the fishing industry is facing increasing pressure from Government departments and agencies, to curb activities that “may” disturb the seabed. We believe that any marine development should be made to adhere to these same principles and if it cannot do so, should not be given permission’.¹⁰⁸

Another representation framed the project as ‘another nail in the coffin for genuine fishermen, who have fished that area all their life [...]’.¹⁰⁹ Inevitably, the connection of local fishers with that particular sea area and the protection of its habitat determined concerns in relation to the maintenance of current fishing practices that would have been disrupted or changed by the installation of the turbines. On this aspect, a participant noted:

‘[a]s a fisherman who has fished this area for more than 35 years I hope the industry will be treated with the respect it deserves and will [be given] full consideration for our fishing practice’.¹¹⁰

Another participant argued:

‘my main concern is that I own two fishing vessels and I worry that my income will be diminished as my two boats up to now make a good living in of [sic] the proposed area. The income obtained by working in different areas will severely impede my livelihood’.¹¹¹

These comments emphasized the importance of examining the proposed development in a wider socio-economic perspective for its impact upon the local community livelihood and its historical connection with the marine environment. However, this

¹⁰⁶ Seafish, *Quayissues – 2016 Economics of the UK Fishing Fleet* (July 2017, Seafish Report No SR 707) <https://www.seafish.org/media/publications/Quay_Issues_-_Economics_of_UK_Fishing_Fleet_-_2016_interactive_version.pdf> accessed 26 August 2019.

¹⁰⁷ E.g. REP-032 Brighton & Newhaven Fish Sales Ltd.

¹⁰⁸ *ibid.*

¹⁰⁹ REP-043: C Leach.

¹¹⁰ REP-223: W D Bickerstaff.

¹¹¹ REP-057: D Rathbone. See also REP-076: Enterprise Fisheries Limited.

angle appears downplayed in the national policy and, as a consequence, the ExA report. Rydin and others have found this a common feature in the examination of other renewable energy projects, where evidence of socio-economic impact of these projects (provided by both the developer and local economic actors) on the local economy and community is hard to quantify.¹¹²

In the case of Rampion, the ExA's approach to socio-economic impact and the local fishing industry's representations was instead to examine the impact and adequacy of mitigation measures. These contained a commitment that the parties would 'jointly work towards an agreement' on mitigation to minimise and/or offset any adverse effect on the viability of commercial fisheries and legitimately affected commercial fishing vessels, in line with the policy guidance.¹¹³ Interestingly here, the policy requirement to make sure that the costs do not outweigh the benefits means that the ExA primarily relies on the ability of the applicant to provide convincing mitigation measures, including financial payments. Little regard is given to whether the local fishing community is able to effectively have its concerns heard, has a grasp of what is proposed (as little or no detail are provided at the time of the examination) or is put in a position to negotiate on an equal footing once the project is granted consent. The ExA did not question the acceptability of mitigation measures to deal with socio-economic impact. Nor is this approach based on the argument that these are wider policy questions about the need for the infrastructure, which should not be considered by the ExA in this context. Primarily, fishers were worried about being able to continue to make a sufficient income from fishing in the affected area.¹¹⁴ Here, income agreements were deliberately left out from the conditions for granting development consent and the ExA considered it simply 'a matter of trust' between the applicant and the liaison officers representing the interests of the fishers.¹¹⁵

The applicant proposed the inclusion of an 'Outline Fisheries Liaison Strategy',¹¹⁶ setting out the responsibilities of the Company Fishing Liaison Officer, the Fishing Industry representative and Offshore Fisheries Liaison Officer, together with an outline of how and to whom information would be distributed in respect of the project.¹¹⁷ The aim of the liaison strategy was to 'ensure ongoing communication with the fishing community during the construction and operation of the wind farm should the DCO be

¹¹² Yvonne Rydin and others, 'Do Local Economic Interests Matter When Regulating Nationally Significant Infrastructure? The Case of Renewable Energy Infrastructure Projects' (2018) 33 *Local Economy* 269 (noting that on balance fishers were treated better than other local businesses).

¹¹³ Planning Inspectorate (n 1) [4.584].

¹¹⁴ *ibid* [4.577].

¹¹⁵ *ibid* [4.584].

¹¹⁶ REP-618: E.ON - Appendix 11 - Outline Fisheries Liaison Strategy.

¹¹⁷ Planning Inspectorate (n 1) [4.580]. Cf Angus Garrett, Phil MacMullen and David Symes, 'Fisheries as Learning Systems: Interactive Learning as the Basis for Improved Decision-Making' (2012) 127-128 *Fisheries Research* 182.

consented'.¹¹⁸ These governance arrangements (often relying on local fishers as mediators) were informed by the practice of the Fisheries Liaison with Offshore Wind and Wet Renewables group (FLOWW) set up in 2002 'to foster good relations between the fishing and offshore renewable energy sectors and to encourage co-existence between both industries'.¹¹⁹ The developer concluded Statements of Common Ground (SoCGs)¹²⁰ with the Commercial Fisheries Working Group and with the Sussex Independent Fishermen Group, including on mitigation and financial compensation. While in both cases the parties agreed to work together towards an agreement on mitigation, only in the case of the SoCG with Sussex Independent Fishermen Group, EON agreed on specific principles in relation to financial mitigation.¹²¹

In this context, with respect to socio-economic impact from offshore wind farms, mitigation measures might include financial compensation for losses associated with the loss of access to fishing grounds, disruption or displacement of fishing activities resulting from offshore renewable energy installations.¹²² While in the UK there is no legal basis for automatic financial compensation, the FLOWW recommendations state that '[s]ettlements agreed on a mutual basis [...] aim to counterbalance or offset any residual fisheries related impacts associated' with an offshore renewable energy installation.¹²³ EON agreed to - or agreed to explore the possibility of - providing some financial compensation in the form of disruption payments and funds in the SoCGs.¹²⁴ However, not all fishers were interested in compensation. A participant argued that:

¹¹⁸ *ibid.*

¹¹⁹ FLOWW, 'Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Liaison' (January 2014) <<https://www.sff.co.uk/floww/>> accessed 1 May 2019) 1.

¹²⁰ *ibid.*

¹²¹ E. ON, 'Statement of Common Ground, EON Climate and Renewables (UK Rampion Offshore Wind Limited) – Sussex Independent Fishermen Group' (October 2013). These principles included the principle that 'a community fund should be explored. It was also agreed that the Sussex Inshore Fisheries and Conservation Authority should be consulted as to how such a fund should be assessed and administered'; the principle that 'disruption payments will be offered to local fishing vessels during the construction phases where there are legitimate, evidenced based for doing so', and the principle that 'a compensation steering committee [...] should be explored, the primary purpose of which would be to devise a compensation evaluation and disbursement methodology' [31 (a) (d) and (e)].

¹²² But see distinction between mitigation and compensation in e.g. the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7). For analysis, Donald McGillivray, 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive' (2012) 24 *Journal of Environmental Law* 417.

¹²³ FLOWW, 'Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Disruption Settlements and Community Funds' (August 2015) [2]. 'Settlements' can include 'disruption settlements' or 'a Fishery Community Fund' [s. 2]. <<https://www.thecrownestate.co.uk/media/1776/floww-best-practice-guidance-disruption-settlements-and-community-funds.pdf>> accessed 5 September 2019.

¹²⁴ E.ON (n 121) [s. 24 and 31].

'[t]he proposed site will affect my fishing opportunities and I have been given no details on how any losses of fishing area will be compensated for as I use the area many months of the year. I started a new drift net fishery 2 years ago and feel this will not be possible when the turbines are in place. I would rather be able to fish than be compensated for loss of income'.¹²⁵

This is not surprising as compensation for loss of income is generally seen as a 'second-best outcome'.¹²⁶ Rydin and others have noted how agreements on compensation are not able to deal with the long term issues posed to local businesses by wind energy NSIPs. Despite possible agreements for compensation, regulatory decisions are taken on a project-by-project basis overlooking the cumulative impact of multiple projects on the available fishing areas (i.e. 'creep effect'); and this impact is linked to a 'restructuring of the local economy that these projects precipitate'.¹²⁷ In practice, this means that, while potentially compensated, local fishers are worried about the future viability of their business and might be unwillingly led to abandon it.¹²⁸ And this is what fishers participating in the Rampion examination perhaps cared mostly about. This is apparent from the following contribution:

'I am concerned that the development will limit or impact access to fishing grounds that form the basis of my sole income, with potentially a serious impact on the ongoing viability of my business'.¹²⁹

From a participation perspective, compensation does also come with a worrying effect of silencing the concerns of those compensated, as 'financial agreement effectively removes the local business voice from the regulatory deliberation'.¹³⁰

In consideration of the arrangements made for the Outline Fisheries Liaison Strategy, and the proposed mitigation measures (i.e. primarily in terms of reduction of piling), the ExA held that '[...] taken together these measures would help mitigate the effects on general commercial fishing in line with policy set out in the NPSs'.¹³¹ In other words, the issues raised in relation to the impact on the marine environment and – in particular – to the socio-economic impact on commercial fisheries were not judged significant enough to preclude the project to be granted consent.

¹²⁵ REP-197: S Parker.

¹²⁶ Rydin and others (n 112) 281.

¹²⁷ *ibid* 282.

¹²⁸ *ibid*.

¹²⁹ REP-033 Brighton Charter Fishing Limited.

¹³⁰ Yvonne Rydin and others, 'Local Voices on Renewable Energy Projects: The Performative Role of the Regulatory Process for Major Offshore Infrastructure in England and Wales (2018) 23 *Local Environment* 565, 573.

¹³¹ Planning Inspectorate (n 1) [4.585].

5.2. Broader Distribution of Costs and Benefits

Perceived fairness of the development outcome is not only determined by who bears the costs of the project (i.e. the local and fishing community), but it also inevitably engages with the perception of who enjoys its benefits (i.e. developer, local community, taxpayers or consumers) and at what scale (e.g. local, national or global level). Within the representations submitted for the Rampion examination, the question of who bears the benefits is primarily framed by opponents through the lenses of power dynamics between the developer, operator or manufacturer on the one side, and the local community, taxpayers and consumers on the other side. One participant made this point as:

‘Foreign firms building these wind farms reap £500 million a year in subsidies from the U.K. These subsidies could be given to schools, hospitals, care homes and others, to fit solar panels and thereby reduce the energy required from the grid and greatly reduce costs to the individuals’.¹³²

Another representation noted that:

‘The only people who benefit are the German operators’.¹³³

This is echoed by another comment focusing on socio-economic benefits, such as job creation, not being fairly distributed, stating that:

‘[...] all major items of equipment, turbine blades, generators etc.: will have to be imported (a fact given in answer to a question at a recent meeting and never mentioned in the literature provided). Much was made of the creation of a mere 85 jobs in Newhaven. How many more could have been created if all these major items had been manufactured in the UK?’.¹³⁴

This comment aligns with a vision of imbalance of power between actors, revealing the multifaceted dimensions of fairness claims in this context. But what emerges from the representations is the number of participants framing the benefits of Rampion in terms of climate change mitigation and energy security. As part of a relatively large group of supporters, one participant was in favour of the project as:

¹³² REP-100: J Sutton.

¹³³ REP-133: M Armstrong.

¹³⁴ REP-275: A R Coppard.

'Off-shore wind power must be a vital component in developing renewable energy output that will reduce our dependence upon fossil fuels and help us to meet climate change targets. This area has the potential to make a significant contribution and will also help to drive the creation of new sustainable jobs in an area greatly in need of them. It may well be visible from the heritage coast and indeed from the new South Downs National Park but i [sic] do not view this as a disadvantage, especially as steps have been taken to ensure that the power lines connecting to the national grid are not intrusive in the landscape'.¹³⁵

Another interesting contribution took a radical approach to support:

'I do support the scheme and a diversified energy pool of which wind is essential. Therefore I feel it necessary to get the maximum number of wind turbines possible. It seems utterly pointless to minimise the number of turbines: as it is no conciliation to opposers [sic]. One may as well build the maximum here possible without drastic ecological impacts to avoid elsewhere in the country having turbines (land or sea) and therefore having opposition there. If you are going to pass it, pass as many as possible'.¹³⁶

All these contributions (either for support or rejection) do not expressly frame the outcome of the development in fair or unfair terms. However, a feeling of unfairness permeates from those expressing a sense that the benefits will disproportionately sit with some, often more powerful, actors. As I clarified in chapter 2 section 2, support is more nuanced and generally less vocal. It is not clear from the representations the extent to which support comes from the perception that the cost and benefits are fairly distributed between actors.

5.3. Fairness of the Process

Compared to the fairness of the development outcome, people's perception of fairness in the process is easier to assess. In several representations, participants referred to their experience of the consultation process in the pre-application consultation.

One participant stated:

¹³⁵ REP-20: S Murray.

¹³⁶ REP-115: J Miller.

'E.ON have failed to consult with several neighbours and have omitted our previous comments and concerns from all published material thus far, despite having attended a meeting at our house. Consequently we do not believe the consultation process has been full and fair'.¹³⁷

Another resident said:

'1. We object to the site chosen for the construction of the new substation. E.ON has failed to take into account the representations we and others made that the Wineham Lane site (Option B in Section 3 of the Environmental Statement ('ES')) is preferable to the Bob Lane site (Option A).
2. We argue that the process to select the site set out in Section 3 of the ES adopted by E.ON is flawed'.¹³⁸

Another argued that:

'[the] consultation process has been limited, as a resident of Hove I have had no information through my door from Eon, Brighton council or any other parties. Eon claim that 4,700 people offered opinions but this only represents about 2% of the residents of Brighton & Hove. Brighton Council have been very unhelpful in providing information or making their views on the project known'.¹³⁹

From the latter, it also emerges that access to, and provision of, technical information was problematic. Information about the proposal and the way the developers and the Local Authorities answered lay public questions shaped people's feeling of inclusivity within the process. This is evident in the representation made by this association of residents, which noted:

'During the public displays held last year we attempted to ask questions about the location of the windfarm, but the staff on duty did not know anything about that. The Residents' Association Committee had a personal meeting with the managers from Eon where we raised the same questions about location and were told it was not for consultation or negotiation. We

¹³⁷ REP-105: J Livings; REP-276 A Livings.

¹³⁸ REP-158: N Hanley.

¹³⁹ REP-103: J Smith.

tried to raise the problem with West Sussex County Council but the woman there would not speak to us. We also note that there is no response from Adur District Council'.¹⁴⁰

It is hard to find conclusive evidence from the representations of the extent to which fairness of the outcome (i.e. distributive justice claims) and fairness of the process (i.e. procedural justice claims) have influenced people's attitude towards Rampion, or indeed the decision. It would be for another project to ask this question.¹⁴¹ What the reading of the representations shows is that there were a variety of concerns related to, on the one hand, how costs and benefits from the projects are distributed between actors (i.e. local community, fishers, the developer) and, on the other hand, how the participation process and information within it are handled by the developer and the local authorities. Here, I am mainly concerned with the mismatch between what counted as important in the examination process, and what people mentioned in the representations, as the ExA did not engage with these concerns. Fairness will always be a slippery subject for decision-makers and there is no obvious way to handle it. Of course, decision-makers are not legally required to reach "fair" – or any other particular – substantive outcomes, but to ensure the procedural fairness of the decision as a matter of legal compliance with the provisions of the Planning Act. But there is even less space for perceived fairness claims in a streamlined and expert-based decision-making process, such as the one entrenched in the NSIP regime. As Lee and others noted, this is not so much about providing more opportunities for participation, but rather about being clear on what is open for discussion and what remains outside the decision-making process.¹⁴²

6. Conclusions

It was not possible in this chapter to give a full account of the sheer number of issues raised in the ExA's report on the examination of the Rampion Wind Energy Project. Inevitably, some details were left out. However, the chapter illustrated how the ExA dealt with arguments made by different actors and how arguments from the lay public were given little or no substantive weight for the final recommendation. This does not mean that the ExA cynically disregarded them, following a specific, self-imposed agenda. I am not ignoring that participation can have a more nuanced impact, shaping

¹⁴⁰ REP-189: Shoreham Beach Residents Association.

¹⁴¹ E.g. see focus groups in Natarajan and others (n 99).

¹⁴² Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 *Journal of Environmental Law* 33.

mitigation measures.¹⁴³ However, the narrative of need and urgency for offshore wind energy infrastructure is a strong one, and I argued that the Rampion Offshore Wind Farm proposal was ultimately considered to satisfy that rationale.

My argument is also not that the ExA blindly followed that narrative to automatically conclude that the cost of the project outweighs its benefits. The ExA showed an ability to critically interpret that narrative by a careful scrutiny and exercise of discretion, although within strict regulatory and policy barriers. My point is slightly more nuanced and relates to the substantive arguments that inform the exercise of that discretion. I argue that, within defined boundaries for exercise of its discretion, the focus of the ExA on technical assessment and policy-defined arguments ended up squeezing out substantive, value-based claims made by the lay public (such as those connected to place-attachment and fairness), potentially frustrating the scope and meaning of participation. To further clarify this argument, the next chapter explores the case of the Navitus Bay Wind Park project and the way in which the ExA reached its conclusions and recommendations for rejection.

¹⁴³ Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139.

NAVITUS BAY WIND PARK, PUBLIC PARTICIPATION AND THE ROLE OF EXPERIENCE

1. Introduction

In exploring the space for public participation in the decision-making and the acceptance model, it is useful not only to look at the Examining Authority (ExA)'s reasons for consenting projects, but also to analyse its reasons for rejecting them. At first glance, it could be tempting to argue that when a project is rejected, more weight is implicitly attributed to the views of opponents compared to when projects are approved.¹ But under the Planning Act, 'the Secretary of State must decide the application in accordance with any relevant national policy statement, except [...] if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits'.³ This is a legal test and the reasoning on the balancing exercise between impact and benefit becomes the key reference to understand what counts in the regulatory decision-making process. Yet, the more the reasons for rejection draw on evidence and situated knowledge claims from the public, the more we can conclude that participation gains weight in the decision-making process.

With this in mind, this chapter explores the space for public participation in decision-making related to the Navitus Bay Wind Farm proposal. It engages specifically with the reasons for rejection presented in the ExA report, against the backdrop of the many individual representations made by interested parties (IPs).⁴

The aim of this chapter is to ascertain the extent of the correlation between weight of participation and the refusal of the project. It argues that while the outcome of the examination process aligns with many of the concerns expressed by the lay public representations (e.g. seascape, landscape and visual impact, and effect on designated conservation areas), it is hard to derive a higher level of substantive public influence on the final decision than in cases where consent was granted. The justifications for the

¹Sandy Kerr, Kate Johnson and Stephanie Weir, 'Understanding Community Benefit Payments from Renewable Energy Development' (2017) 105 Energy Policy 202 (arguing that '[l]ocal opposition to past offshore developments, sometimes in the form of quite visceral protestation, has at times ensured potential developments are refused consent by authorities' citing the example of the Navitus Bay Wind Park at 206).

² Planning Act, s 104 (3).

³ *ibid* s 104 (7).

⁴ Planning Inspectorate, 'The Planning Act 2008 – Navitus Bay Wind Park - Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change' (11 June 2015).

rejection of Navitus fall squarely within the “bounded discretion” left to the ExA by the national policy on designated conservation areas. This policy states that a presumption in favour of conservation needs to be balanced with the presumption in favour of development, as discussed in chapter 4. The ExA reasoning in this case operationalises that discretion by giving weight to the reasons of conservation, and concluding that the impact of the project outweighed its benefits.

From the perspective of how the planning system receives different inputs and knowledge claims and validates them in the decision, I agree with Lee’s conclusions that, ‘[i]n Navitus, although the project was ultimately successfully resisted, there was no reliance on lay public knowledge claims in the ExA reasoning for the decision’.⁵ As she explains, the ExA reached its decision on recommending the rejection of the application through a complex and lengthy assessment of technical expert input from the developer, statutory and non-statutory bodies, local authorities and individuals. This technical evidence was combined with ‘prior institutional knowledge claims’ – understood as ‘knowledge that has formerly been absorbed within the system, in this case by means of statutory landscape designations’- and its own ‘professional planning knowledge claims’ (e.g. through– but not limited to - site visits and the ExA’s ‘experience of the area and inspections at identified viewpoint locations’⁶).⁷ However, I read the evidence slightly differently. Lee notes that, despite its ‘potential to bring into the planning process some of the multiple complexities of landscape and place, [...] the focus on prior institutional knowledge claims limits the space for any further or deeper elaboration of, for example, place attachment, or the effects of the proposal itself on the ways people respond to landscape’.⁸ In this chapter, however, I claim that in interpreting landscape designations, the ExA’s reasoning in Navitus seems – perhaps unintentionally - more sympathetic of the reasons of participants and of the link between ‘landscape’ and ‘place attachment’ than Lee suggests. By emphasising the importance of the ‘experience’ of receptors of the Areas of Outstanding Natural Beauty (AONB) or of the heritage sites, in terms of the necessary link between the physical landscape and people’s emotional connection with a place, the ExA expanded its assessment to reflect wider positions. Although within the constraints of national policy and the regulatory decision-making process, this might point to the ExA’s sensitivity to the connection between experience and the special character of a landscape, as an important aspect of place attachment.

⁵ Maria Lee, ‘Knowledge and Landscape in Wind Energy Planning’ (2017) 37 *Legal Studies* 3 (on the ways in which planning approaches knowledge claims about landscape and seascape impact of wind energy NSIP. While she focuses on a knowledge perspective, this is also important from a participation perspective).

⁶ Planning Inspectorate (n 4) [7.2.67].

⁷ Lee (n 5) 4.

⁸ *ibid* 16.

The chapter starts by looking at the technical aspects of the Navitus proposal and the key procedural steps of its examination and reasoning (section 2). I then explore the extent to which my factors of acceptance – i.e. landscape and visual impact; place-attachment; and perceived fairness of the development outcome and of the process – were validated in the ExA reasoning. Sections 3 and 4 provide a detailed account of the project’s seascape, landscape and visual impact on national and international designations. There were 3 types of designations potentially affected by the project: two Areas of Outstanding Natural Beauty (AONB) (i.e. the Dorset and the Isle of Wight AONBs); one National Park (NP) (i.e. the New Forest National Park) and one World Heritage Site (WHS) (i.e. the Jurassic Coast World Heritage Site). While the AONB and the NP were designated for their landscape and natural beauty, the WHS was designated because of its ‘outstanding combination of globally significant geology and geomorphological features’, for which the AONB constituted an inseparable heritage setting. This distinction between landscape and non-landscape designations is important. The analysis of the potentially adverse impact on AONB and NP, as inseparable heritage settings was, although not decisive, at least supportive of the rejection of the project by the SoS.⁹ In section 5, I discuss the extent to which place attachment concerns might be reflected in the ExA report through the consideration of the role of experience of landscape. In so doing, the chapter looks at the way in which the ExA report engaged with people’s experience, suggesting that the ExA shows a cautious openness to consider place-based values in its reasoning. Finally (section 6), I explore the extent to which fairness claims were framed in the IPs representations and the extent to which they were reflected in the ExA report, as factors of acceptance.

2. The Navitus Bay Wind Park Project and the Examination Process

The Navitus Bay Wind Park project was a proposal for an offshore wind energy Nationally Significant Infrastructure Project (NSIP) to be located in the English Channel off the Dorset coast (closest point 14.7 km) to the west of the Isle of Wight (closest point approximately 17 km). The proposal involved the construction of 194 wind turbines (around 9 nautical miles from the coast); up to three offshore substation platforms; and an onshore cable corridor (approximately 35 km) connecting the project to a new onshore substation at Three Legged Cross, North of Ferndown. The applicant, Navitus Bay Development Limits (NBDL), was a British company registered

⁹ See SoS decision letter: Department of Energy and Climate Change, *Planning Act 2008 – Planning Consent Application - Proposed Navitus Bay Wind Park*, 11 September 2015.

in the UK, born from a joint venture between Dutch-owned¹⁰ ENECO Wind UK Ltd and the French company EDF Energy.

Following acceptance of the application by the Planning Inspectorate in 2014, the Secretary of State for Communities and Local Government appointed a 4-member Examining Authority (ExA), which started the examination in September 2014 and concluded it in March 2015. The examination was conducted through written evidence submitted to the ExA, eight issue-specific hearings, two open-floor hearings, a compulsory acquisition hearing and a number of site inspections. More than 2000 representations, of which the majority came from individuals and business representatives, were submitted to the ExA, making it the most participated-in wind energy NSIP application thus far.¹¹

The ExA concluded that the project presented significant impact on the seascape, landscape and visual amenities of the Areas of Outstanding Natural Beauty (AONB) of Dorset and Isle of Wight. It also expressed concerns with regard to the adverse effect of the project on the World Heritage Site of the so-called “Jurassic Coast” for which the AONB constituted an inseparable heritage setting. The harm caused to the setting of the Site carried ‘significant weight against the decision whether or not to make the Order’.¹² Finally, the ExA noted that an impact on heritage assets (i.e. Lower Needles Point Battery Scheduled Monument; Hurst Castle Scheduled Monument; St Adhelm’s Chapel; Durlston Castle and the Park of Durlston) along the Dorset coast deserved the SoS attention. These three aspects were expressly found by the ExA to weigh against granting development consent to the Navitus Bay Wind Park application.¹³ The ExA concluded:

‘The key issue of greatest concern to the Panel is the adverse impacts arising from the visual effects of the offshore elements of the proposed development on a range of national and international designations. The level of harm resulting from the Project’s offshore elements is considered by the Panel to be of such seriousness as to outweigh its benefits’.¹⁴

In her decision letter of September 2015, the SoS for Energy and Climate Change evaluated the conclusions and recommendation of the ExA. With respect to seascape, landscape and visual impact, she noted that ‘the ExA’s assessment that there will be a

¹⁰ This is owned by 55 Dutch municipalities.

¹¹ All relevant representations were coded and listed at the end of the ExA Report. See Planning Inspectorate (n 4) Appendix C - REP-0125 to REP-2673.

¹² *ibid* (n 4) [21.2.33]. See also *Id* [21.2.33] on the impact on the experiential aspects of the setting (discussed below).

¹³ For the ExA’s conclusions, Planning Inspectorate (n 4) [21].

¹⁴ *ibid* (n 4) [21.2.77].

significant adverse impact on the perception of viewers standing on the coastlines is a reasonable one'.¹⁵ The SoS found that the adverse impact on the World Heritage Site, even if temporary, was not acceptable.¹⁶ She ultimately decided to refuse development consent.¹⁷ Following this decision, the developer did not appeal.¹⁸

3. Seascape, Landscape and Visual Impact on Areas of Outstanding Natural Beauty

The examination of the Navitus Bay Wind Park project nicely incorporates the tensions between landscape expectations, nature conservation and climate change mitigation objectives. These tensions clearly emerged in relation to the predominantly technical assessment of seascape and landscape and visual impact (SLVI) of the project on the two Areas of Outstanding Natural Beauty (AONB): the Dorset AONB and the Isle of Wight AONB. The Dorset AONB was designated in 1959 and covers 42 percent of Dorset, extending from Lyme Regis along the coast to Poole Harbour.¹⁹ The Isle of Wight AONB was designated in 1963 for its landscape value and covers approximately half of the island.²⁰ As I explain in this section, while a technical tenor permeates the discussion on landscape in the report, it acknowledges the role of experience in defining what landscape is.

3.1. Areas of Outstanding Natural Beauty (AONB) and the National Policy Statement

An AONB is land designated by Natural England under (now) the Countryside and Rights of Way Act 2000 'for the purpose of conserving and enhancing the natural

¹⁵ See Department of Energy and Climate Change (n 9) [19].

¹⁶ *ibid* [29].

¹⁷ *ibid* [52].

¹⁸ See developer's statement at <<http://www.navitusbaywindpark.co.uk/>> accessed 29 August 2019.

¹⁹ With respect to the Dorset AONB, there is an overlap between the world heritage site and other national and local designation within the area, including the Dorset AONB, Site of Special Scientific Interest and the Purbeck Heritage Coast, which are protected under national legislation and policy guidance.

²⁰ Unusually, the Isle of Wight AONB area is not continuous and is made of five distinct land parcels across the Island. (See <https://www.peppercreative.net/wightaonb.org.uk/uploads/iw_aonb_management%20plan_%20public%20version_2014_2019.pdf> accessed 29 August 2019. In 1992, the decision was taken to incorporate issues relating to Heritage Coasts and the AONB into one overall Isle of Wight AONB Management Plan'. (See <<https://www.wightaonb.org.uk/about-us/what-we-do/heritage-coasts/>> accessed 29 August 2019).

beauty of the area'.²¹ The meaning of 'natural beauty' is not defined in the Act, and its vagueness has been considered at times conceptually and practically problematic.²² The character of the landscape features is a key reason for the designation. In deciding on AONB designation, Natural England relies on certain natural beauty criteria, such as:

'landscape quality, where natural or man-made landscape is [of] good quality; scenic quality, such as striking coastal landforms; relative wildness, such as distance from housing or having few roads; relative tranquility, where natural sounds, such as streams or birdsong are predominant; natural heritage features, such as distinctive geology or species and habitat; cultural heritage, which can include the built environment that makes the area unique, such as archaeological remains or historic parkland'.²³

Most of these elements were addressed in the Report as well as in the IPs representations made to the ExA during the Navitus examination. Each AONB must have a Management Plan, which is drafted and reviewed every five years by the local authority.²⁴ The Management Plan must include at least 'an assessment of the special quality of the AONB, such as a landscape character assessment; cross reference to existing plans; a strategy; other special sites that exist in the AONB; an action plan; and a monitoring plan'.²⁵

The impact of a wind farm development within or outside an AONB is an important factor in the assessment on SLVI, as it might affect the purpose of the AONB in terms of the conservation and enhancement of its natural beauty. The Overarching National Policy Statement for Energy (EN-1) provides that landscape effects 'depend on the existing character of the local landscape, its current quality, how highly it is valued and its capacity to accommodate change'.²⁶ But, as previously illustrated, the EN-1 states that 'the duty to have regard to the purposes of such areas applies to projects that have impacts within them. However the fact that a proposed project will be visible from within

²¹ Countryside and Rights of Way Act 2000, s 82(1).

²² Paul Selman and Carey Swanwick, 'On the Meaning of Natural Beauty in Landscape Legislation' (2010) 35 *Landscape Research* 3.

²³ UK Government, 'Guidance, Areas of Outstanding Natural Beauty (AONBs): Designation and Management' (5 October 2017) (<<https://www.gov.uk/guidance/areas-of-outstanding-natural-beauty-aonbs-designation-and-management>> accessed 29 August 2019).

²⁴ (n 21) s 89.

²⁵ UK Government (n 23).

²⁶ DECC, *Overarching National Policy Statement for Energy (EN-1)* (July 2011) (hereinafter "EN-1") [5.9.8].

a designated area should not in itself be a reason for refusing consent'.²⁷ The ExA noted that the only reasons for justifying a refusal of consent, according to national policies, are instances where 'an alternative layout can be reasonably proposed (while expecting it to be unlikely that mitigation in the form of reduction in scale will be feasible)'; and where 'the harmful effects are considered to outweigh the benefits of the proposed scheme'.²⁸

3.2. Seascape, Landscape and Visual Impact on the Dorset AONB

Unsurprisingly, the impact on the seascape, landscape and visual amenities of the AONB played a key role in the ExA's conclusion for rejection of the Navitus project. The consideration of impact on the unique landscape and views of these AONBs ultimately led to the rejection of the project. But the ExA's concerns with respect to SLVI were echoed by lay public representations. Among others, one individual argued:

'This proposal for a Wind Park is totally unnecessary for this area of natural beauty. [...] Who wants to look out to sea and see these on the horizon. [...] I trust those in the decision making will see sense'.²⁹

The project was widely opposed as 'simply unacceptable';³⁰ 'a disaster visually, economically and for the environment'³¹; 'ecologically damaging and aesthetically unacceptable';³² 'wanton vandalism of the natural landscape in the name of Environmentalism, purely for commercial gain'³³ and 'an unnatural and unattractive intrusion into an environmentally sensitive area'.³⁴ It was viewed as 'an illogical proposition'.³⁵ The applicant claimed that no significant impact on the Dorset AONB would originate from the project. The impact would only be limited and localised, as the project would significantly affect only a small portion of the Dorset AONB.³⁶ But the ExA disagreed, criticising a merely quantitative assessment of SLVI in favour of focusing on the AONB characteristics and its linkages with the unique experience of the coast and

²⁷ Planning Inspectorate (n 4) [7.0.2] citing *ibid* [5.9.12 and 13].

²⁸ DECC, *National Policy Statement for Renewable Energy Infrastructure (EN-3)* (July 2011) [2.6.208- 2.6.210].

²⁹ REP-0025: Mrs J Burton.

³⁰ REP-0187 G Tulley.

³¹ REP- 0110 L Bruce

³² REP-0111: Mrs B Jell.

³³ REP-0083: S Casey.

³⁴ REP-0250: A McEwen.

³⁵ REP-0219: M Spooner.

³⁶ Planning Inspectorate (n 4) [7.1.132].

its 'sense of place'.³⁷ The following passage in the ExA's report is indicative of this approach:

'Firstly, judgements of whether a project would compromise the special qualities of the designation cannot be bound by the sort of quantitative exercise deployed. Second, the Dorset AONB Management Plan confirmed that the AONB is a collection of fine landscapes "*each with its own characteristics and sense of place*"; in other words recognising that individual parts can as much reflect the qualities meriting the designation, as the Dorset AONB as a whole. Finally, the approach fails to recognise that the special and outstanding landscape qualities of this AONB are particularly well expressed on its coastal edge and in some instances can only be experienced on the coast'.³⁸

While the final assessment was a technical one, drawing from expert input, prior institutional knowledge of designated areas and planning judgement, the ExA's assessment also looked at the role of experience of landscape. The ExA's report indulges in a lengthy - and almost romantic - description of the uniqueness of the coastal landscape, which defines people's experience of the AONB landscape. It recalls its 'uninterrupted panoramic views' and 'views across to the open sea and Isle of Wight' as 'an integral part of the experience of the coastal landscape, adding to the sense of remoteness and tranquillity'.³⁹ This landscape offers 'opportunities for experiencing the dark skies and exceptional undeveloped coastline aspects of the AONB'.⁴⁰ Interestingly, the ExA did not focus on the physical changes to the landscape (which it agreed would not result from the project), but on 'the extent to which [Navitus] would undermine the experience or appreciation of the qualities of the AONB'.⁴¹ In its conclusions, the ExA noted that 'the application project would have significant consequences for the "sensory perceptions" of the natural beauty of the Dorset AONB'.⁴²

³⁷ *ibid* [7.3.134].

³⁸ *ibid* (emphasis in the original).

³⁹ *ibid* [7.3.136].

⁴⁰ *ibid*

⁴¹ *ibid* [7.3.138].

⁴² *ibid*

3.3. Seascape, Landscape and Visual Impact on the Isle of Wight AONB

The ExA's appreciation of the coastal view and SLVI of the project was also evident in its reasoning regarding the SLVI on the Isle of Wight AONB, supported by some individual representations. One participant noted:

'I object to the Navitus Bay wind farm project on the grounds on environmental and visual degradation caused by the installation and running of the turbines. The planned site is positioned that it will [sic] be visible from the coastline from the Isle of Wight to the Isle of Purbeck: areas of Outstanding Natural Beauty, which in my view must not be impacted whatsoever by this wind farm proposal'.⁴³

Others stated:

'We are [...] shocked and appalled that all that has always been recognised as making this part of the island so special is going to be seriously compromised by this proposal for a huge wind farm which will be clearly visible along the coast road. It will effectively industrialise the coastline and will destroy the open views across the mainland'.⁴⁴

Some representations were especially detailed, linking SLVI and impact on heritage sites (discussed in the next section), as in this comment:

'We object to the proposal for a number of reasons of which the most important is the closeness to the beautiful Jurassic Coast in North Swanage area where the Estate consisting of 50 low rise bungalows of significant character is located and the damage to the view by this monstrosity being closer the Isle of Wight, especially the Needles which with the sea alongside form the current view. The wind farm is proposed to be less than the distance laid down and will be so obstructive as to damage the UNESCO site of outstanding beauty in which we live and impact our bungalows views [...]'.⁴⁵

⁴³ REP-0044: Dr T Bevan.

⁴⁴ REP-0107: B Clarke 14 May 2014. See REP-0175: I Taylor.

⁴⁵ REP-0032: The Ballard Estate Company Limited (The Ballard Estate Company Limited).

While the applicant argued that the project would ‘create some potentially minor alterations’⁴⁶ to the qualities of the Isle of Wight AONB, the ExA found that the project ‘would have significant implications on the experience and appreciation of coastal views extending from the Needles to Freshwater, and continuing along the coast southwards’.⁴⁷ Ultimately, the ExA concluded:

‘During the long-term (at least 25 years) operation and maintenance phase, our findings show that the Application Project would have widespread significant adverse effects on the defining characteristics and special qualities of the Dorset AONB and the Isle of Wight AONB. [...] [T]he adverse impact of the Project on the qualities that merited the AONB and NP (National Park) designations would be significant. The scale and location of the Project would affect important special qualities of the AONBs over a widespread coastal area of exceptional quality and sensitivity. The matter is accorded significant weight against the project’.⁴⁸

This is a clear reiteration of an expert framing. As Lee notes, here the ExA sees landscape ‘as predominantly a visual or aesthetic question, focusing on surface appearance, on the physical rather than the symbolic or socially constructed’.⁴⁹ While I agree that the ExA fundamentally based the decision on an expert framing, through a mix of ‘technical/expert’, ‘prior institutional’ and ‘professional planning’ knowledge,⁵⁰ I argue below that the ExA’s reasoning on this point is in some respects more complicated. This is primarily because the emphasis on the importance of experience of the coastal landscape as part of the SLVI assessment in Navitus helps make the gap between the physical and the symbolic less pronounced, as I suggest in section 6 below.

3.4. The World Heritage Site and Its Settings

The presence of heritage sites or assets is a criterion to evaluate the outstanding value of an AONB, as mentioned above. The assessment of impact on the World Heritage Site (WHS) and Heritage Assets in the project area was a defining aspect of the examination of the Navitus Bay Wind Park project. The impact on heritage sites was also discussed in relation to the Rampion project, but in Navitus it acquired more

⁴⁶ Planning Inspectorate (n 4) [7.3.207].

⁴⁷ *ibid* [7.3.208].

⁴⁸ Planning Inspectorate (n 4) [21.2.27].

⁴⁹ Lee (n 5) 11.

⁵⁰ *ibid*.

explicit weight in the decision. This is due to the international designation of the area of Dorset and East Devon coast as WHS under the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.⁵¹ The Convention establishes a duty on Parties to ‘ensure identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage on its territory’.⁵² The designation of a WHS brings ‘no additional statutory controls, but protection is afforded’ through the decision-making under the Planning Act 2008 and the other designations (i.e. listed buildings⁵³) that relate to the site.⁵⁴ In England and Wales, protection of these sites is also reflected in the National Policy Statements (NPSs),⁵⁵ the National Planning Policy Framework (NPPF) and the Planning Policy Guidance (PPG).⁵⁶

The NPS EN-1 recognises that adverse impact might originate from the development of energy infrastructure and particular consideration should be paid to the value of heritage asset in order to ‘avoid and minimise conflict between conservation of that significance and proposals for development’.⁵⁷ In this respect, ‘substantial harm to a designated asset of the highest significance should be wholly exceptional’ and ‘consent should be refused where an application leads to substantial harm or loss of significance unless demonstrated to be necessary “in order to deliver substantial public benefits that outweigh that loss or harm”’.⁵⁸ Not only is the heritage asset protected, but also its ‘important views and other areas or attributes that are functionally important as a support to the site’ (i.e. ‘immediate settings’) are to be given special attention.⁵⁹ The concept of ‘setting’ is important in Navitus as the Dorset AONB was judged to constitute the immediate setting of the World Heritage Site, making any impact on the former to also affect the latter.

⁵¹ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972) UNTS 1037, 151.

⁵² *ibid* art 4.

⁵³ Planning (Listed Buildings and Conservation Areas) Act 1990. See discussion in chapter 4 section 5 above.

⁵⁴ See UNESCO, ‘Heritage Protection Guide’ (<<https://historicengland.org.uk/advice/hpg/>> accessed 24 July 2019).

⁵⁵ EN-1 and EN-3.

⁵⁶ DCLG, *National Planning Policy Framework* (2012) (hereinafter “NPPF”), DCLG, *Planning Practice Guidance* (2016) (hereinafter “PPG”) (<<https://www.gov.uk/government/collections/planning-practice-guidance>> accessed 24 July 2019).

⁵⁷ EN 1 [5.8.12].

⁵⁸ Planning Inspectorate (n 4) [9.0.5] citing EN-1 [5.8.15] (emphasis in the original). The Panel’s Report also cites the NPPF [133 and 134] outlining the approach to weighing public benefits against harm relative to the degree of harm or loss of significance; in other words whether harm is ‘substantial’ or ‘less than substantial’ (Planning Inspectorate (n 4) [9.0.8]).

⁵⁹ *ibid* [9.0.9].

The Dorset and East Devon coast WHS - also known as the Jurassic Coast WHS - was granted WHS status in 2001.⁶⁰ The basis of this designation was the Outstanding Universal Value (OUV) of its 'outstanding combination of globally significant geology and geomorphological features', rather than its landscape or natural beauty value.⁶¹ The Environmental Statement submitted by the applicant found that the impact of Navitus on the site's attributes would not be significant.⁶² A large number of representations challenged these conclusions, as shown in this comment:⁶³

'The proposed site is totally unacceptable given the surrounding areas of natural beauty, the World Heritage site of the Jurassic Coast and the nearby resorts which rely heavily on tourism'.⁶⁴

Many focused on the idea of the infrastructure being developed in 'the wrong place' and 'not fitting' with its natural and heritage context. Due to the special heritage designation, participants saw this area as 'the wrong site for a windfarm'⁶⁵ and judged the project as being 'totally out of place'.⁶⁶ This is an argument in common with the Rampion examination and was framed in the following terms by some participants in the Navitus examination:

'The proposed windfarm is far too large, too close to the beach, can be seen from land, is in a world heritage location, is in the wrong place, is not needed due to enough windfarm locations elsewhere in the UK'.⁶⁷

In other representations, this idea of siting a project in the 'wrong place' originated calls for alternative locations and further distance from the coast to be considered, as the following two contributions made clear:

'Any windfarm situated in this beautiful area should be situated [much] further out to sea so it is not visible from the beaches and surrounding cliffs'.⁶⁸

⁶⁰ See UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee 25th session Report (WHC-01/CONF.208/24 Paris, 8 February 2002) 50.

⁶¹ See Dorset Council, 'Dorset and East Devon World Heritage Site Management Plan 2014-2019'

<<http://shadowcouncil.dorset.gov.uk/documents/s4052/DorsetandEastDevonCoastWorldHeritageSiteManagementPlan.pdf>> accessed 26 August 2019.

⁶² Planning Inspectorate (n 4) [9.2.3] also explaining the findings leading to this conclusion.

⁶³ For a summary, *ibid* [9.2.15].

⁶⁴ REP-2017: M Smith.

⁶⁵ REP-0089: J Piesse.

⁶⁶ REP-0153: Mrs S Nunn.

⁶⁷ REP-0066: D Coleman.

'I really find it unacceptable that it would even be a consideration to put this wind farm where is proposed! We have hundreds of miles of empty coastline in the country. Move it!'.⁶⁹

Some representations expressed a deep sense of anger and frustration in striking language:

'It is the Wrong Development in the wrong place and proposed by the wrong people. Placing such a development so close to the heritage coastline is akin to putting a pornographic cinema next to St Paul's Cathedral'.⁷⁰

Another comment links its objections to expectations for landscape permanence and continuity.⁷¹

'I strongly object to the plans for the Navitus Bay wind Park. It is not a case of me being anti-renewable energy or 'not in my back yard'. The efficiency of wind turbines is dubious and to put hundreds of them right next to the only UNESCO World Heritage Site in England seems absurd [sic] [...] This is such an important area, geologically [sic], environmentally and also for tourism – so please leave our beautiful coast as it is'.⁷²

This comment is particularly interesting in its call for maintaining the character of the place. As permanence is an important element of the concept of place,⁷³ it has also been noted how a search for stability and continuity is at the core of processes of place attachment.⁷⁴

Having considered the technical evidence and IPs representations, the ExA used the concept of 'immediate setting' to draw a link between the impact on AONB

⁶⁸ REP-0191: J Gunton. On the argument of this infrastructure being a 'wrong fit'. See also REP-181: J Whiteley; REP-0487: R Field; REP-0131: R Lowe; REP-0265: D Mallam; REP-0222: D Cater and REP-0206: G Curtis.

⁶⁹ REP-0100: J Maidment.

⁷⁰ REP-0193: A Flower.

⁷¹ On 'expectations of landscape permanence', see Chapter 6 above.

⁷² REP-0138: E Blanchard.

⁷³ Yi-Fu Tuan, *Space and Place – The Perspective of Experience* (University of Minnesota Press, 1977 – reprinted 2014).

⁷⁴ See Patrick Devine-Wright, 'Dynamics of Place Attachment in a Climate Change World' in Lynne Manzo and Patrick Devine-Wright (eds), *Place Attachment: Advances in Theory, Methods and Applications* (Routledge 2014) 167.

and the impact on WHS.⁷⁵ Here again the attention is on technical assessment of impact, but with consideration of the experience of landscape. The setting of a heritage feature, like the Jurassic Coast, is ‘the surrounding on which a place is *experienced*, its local context, embracing present and past relationships to the adjacent landscape’.⁷⁶ The Management Plan for the Jurassic Coast WHS states that the ‘setting should be regarded as the surrounding landscape and seascape and “concerns the quality of the cultural and sensory experience surrounding the exposed coasts and beaches” (experiential definition)’.⁷⁷

Due to the overlap between the Dorset AONB and the WHS, the setting of the Site corresponded to the AONB, for which the ExA had already assessed a significant adverse impact of the project.⁷⁸ The applicant considered the qualities of the AONB irrelevant to the assessment of how the Outstanding Universal Value (OUV) of the site is experienced. But the ExA strongly disagreed. Based on this linkage between the two types of designations (i.e. AONB and WHS) and their spatial overlap, the report points out that:

‘The Panel [...] fails to understand how the special qualities marking the coastal stretches of the AONB can be dissociated from the experiential aspects of the WHS. The overlapping of boundaries, for one, binds the AONB/Heritage Coasts with the Site’.⁷⁹

Here the ExA comes back to the importance of the sensory experience of the AONB and of the WHS, noting that:

⁷⁵ The ExA looked at 3 things: 1) the extent to which the application project would affect the three components of OUV: values, integrity, and protection and management and therefore its OUV as a whole; 2) the impact on the setting of the WHS and the extent to which threat of impact would affect the property’s significance; and 3) whether allowing the project would be a breach of the State’s duty under the Convention’ (Planning Inspectorate (n 4) [9.3.3]). My focus here is on the impact on the setting of the WHS, as it is on this ground that the ExA justified its refusal.

⁷⁶ Historic England, ‘Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment’ (April 2008) [76] (emphasis added).
<<https://historicengland.org.uk/images-books/publications/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesandguidanceapril08web/>> accessed 26 August 2019.

⁷⁷ Planning Inspectorate (n 4) [9.3.18] as opposed to a functional definition which concerns the physical processes which the ExA did not explore.

⁷⁸ In consideration of the ‘high hurdle’ set in the National Policy, and ‘given that the ExA report did not rely on the listing of a World Heritage site as being under threat to draw its conclusion of harm’, the SoS decision letter clarifies that ‘the project though not damaging to the protected feature of the World Heritage Site, would adversely affect the use and enjoyment of that Site’, and that these effects are unacceptable. DECC (n 9) [24, 28 and 29].

⁷⁹ Planning Inspectorate (n 4) [9.3.20].

‘the high expectations of a tranquil setting comprising an exceptional undeveloped coastline and an open seascape is as much part of enjoying the WHS as it is a perceptual experience of the AONB or Heritage Coast. Similarly, appreciating the natural beauty of the AONB cannot be separated from appreciating it as a part of the WHS, especially for visitors wishing to experience the Site without detailed knowledge of its physical attributes. The same applies in reverse. [...] [T]he WHS adds an extra dimension to the quality of the coastline’.⁸⁰

The ExA concludes that:

‘The setting therefore makes a positive contribution to the WHS and the Panel considers contributes to its significance as whole’.⁸¹

In reality, the applicant’s Environmental Statement did not entirely dismiss the experiential value of the AONB setting, noting that the ‘dynamic nature’ of the relationship between the surrounds of the asset and its experience is ‘central to the OUV of the Jurassic Coast WHS’.⁸² However, this acknowledgement of the interconnection between AONB/WHS and their respective experiences did not amount to such a strong claim as in the ExA’s report. The ExA was instead very clear on the significant implications of the functional linkage between the site and its settings, concluding that the harm caused to the view of the AONB would also affect the WHS.⁸³ It emphasised this in line with its detailed consideration of the experience of the place and its connection with the purpose of the national or international designation. And this is mixed with the dominant expert framing of the report. Even with mitigation measures in place, it was noted that ‘the harm that would be caused to the setting of the Jurassic Coast WHS, and the harm to its OUV, carries significant weight against the decision to make the Order’.⁸⁴

Overall, the analysis of the seascape, landscape and visual impact of the Navitus project suggests that despite the rejection of the application, lay public contributions did not have substantive influence on the decision. The ExA’s decision in

⁸⁰ *ibid* [9.3.20].

⁸¹ *ibid* [9.3.22] citing the Historic England ‘s Guide (n 54).

⁸² *ibid* [9.3.21].

⁸³ *ibid* [9.3.23]. The ExA found this impact on the heritage assets ‘less than substantive’ (i.e. ‘the impact would not be such as that “very much, if not all, of the significance was drained away” [9.3.24] (citing *Bedford Borough Council v Secretary of State for Communities and Local Government, Nuon UK Ltd* [2013] EWHC 2847 (Admin) [24]). However, it recognised that this is ‘still an objection to some magnitude and requires the negative impact to be weighed against the public benefit of the development’ *ibid* [9.3.24]. See *ibid* chapter 10 for details on offshore and onshore archaeology and heritage environment.

⁸⁴ *ibid* [9.3.26].

Navitus was justified on the ground of significant SLVI and impact on the World Heritage Site status of the Jurassic Coast grounds, in accordance with the national policy guidance and a technical assessment of those features. Little weight was attributed to the richer variety of arguments that emerged from the participation, including those expressed by the lay public. Going back to the challenges of evaluating the influence of participants, here the reason lies within the type of evidence used by the ExA in reaching the conclusions and the claims at the roots of such evidence. The ExA was primarily concerned with SLVI and impact on the integrity and experience of the WHS, but the source of that evidence was not to be found in the opinions of the public in relation to these issues.

Although the ExA acknowledged the contribution of public representations, I agree with Lee that technical expertise and ‘prior institutional’ understanding of landscape, along with expert planning judgement, contribute to creating the decision.⁸⁵ Indeed, despite the rich body of lay public arguments and personal claims offered through the participation in the examination, the ExA focused its reasoning on the ‘prior institutional knowledge’ claims about the designated area and its characteristics and a technical interpretation of the impact on that. These claims pertain to the statutory, national landscape designations and other designations that provide primary resources to assess the significance of an area, a site or a landscape.

Interested Parties contributions are not referred to, let alone relied on, in the Report. This suggests that despite a final decision for rejection, the substantive influence of public participation in the decision remains limited. The fact that the conclusion of the ExA in Navitus is consistent with some of the main concerns of the public is perhaps simply a coincidence. This conclusion is supported by the fact that other important arguments made in the representations did not find a specific place in the reasons for rejection. Some of these issues correspond to the broader factors of acceptance, but do not seem to have been given a special role in the decision.

There is however something novel and special about the narrative of the Navitus examination. Despite its reliance on prior institutional knowledge claims about designation, expert knowledge and ExA’s professional knowledge, the ExA’s reasoning here suggests a gentle shift away from technocratic views of decision-making to embrace a more experiential approach, to which I turn in the next section.

⁸⁵ Lee (n 5).

4. Experience of Landscape and the Link with Place Attachment

As explained thus far, the ExA's reasoning in Navitus primarily engages with fundamentally technical framings of landscape, rather than lay public evidence.⁸⁶ This makes the influence of participation in the decision-making limited.⁸⁷ However, the Exa's engagement with the experience of landscape is interesting. From the perspective of the analysis of the factors of acceptance in the ExA decision, there is something intriguing about the way place-based concerns are lightly considered in the ExA's narrative about Navitus. This can be seen in the ExA's preoccupation for preserving the experience of the place. "Space" becomes "place" when it feels 'familiar' and 'acquires definition and meaning'.⁸⁸ Centred on the multi-faceted bond between people and places, place attachment literature has focused on notions such as place identify, place dependence and sense of place, articulating them according to different dimensional models (see chapter 3).⁸⁹ The ExA acknowledged the debate on sense of place as a separate issue in the examination, but quickly and unequivocally rejected its independent role in the examination. This is clarified by the ExA in noting that:

'The prospect of including sense of place and policy issues as principal considerations was raised [...] by interested parties and persons (IPs). The Panel noted the points raised but did not identify them as principal issues to be considered separately in the examination, as the matters fell within one or other of the topics headings identified'.⁹⁰

This is in line with the predominantly technical framing in the examination. But the ExA does not dismiss key aspects of the symbolism and personal connection with a place. Instead, it brings them into the assessment through the significant role attributed to the experiential value of landscape and designated sites. From a place attachment perspective, this emphasis on experience is interesting and reveals a particular sensitivity of the ExA to issues of social construction of place around the positive feelings associated with living it.⁹¹ In seminal work on space and place, Tuan defined experience as 'a cover-all term for the various modes through which a person knows

⁸⁶ *ibid.*

⁸⁷ Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 *Journal of Environmental Law* 33.

⁸⁸ Tuan (n 73) 73 and 132.

⁸⁹ For a review, Bernardo Hernández, M Carmen Hidalgo and Cristina Ruiz, 'Theoretical and Methodological Aspects of Research on Place Attachment' in Manzo and Devine-Wright (n 74).

⁹⁰ Planning Inspectorate (n 4) [4.0.4.].

⁹¹ Tuan (n 73) 8.

and constructs a reality' and explained that '[t]hese modes range from the more direct and passive senses of smell, taste, and touch to active visual perception and the indirect modes of symbolization'.⁹²

As illustrated in chapter 3, the connection between landscape and place attachment is intriguing, and it constitutes the focus of an important – although not legal – scholarship.⁹³ In this context, Budruk and Stains note that this body of scholarship is 'useful and important in natural resources management by increasing our understanding regarding the intangible values of natural places and motivations for visiting these settings'.⁹⁴ Interestingly, experiences of landscape have been proven to influence place attachment and its various elements (i.e. place identity, sense of place and place dependence).⁹⁵ As Seamon notes, place itself is 'the invisible, normally unnoticed phenomenon of person-or-people-experiencing-place'.⁹⁶ However, whether and to what extent place attachment influences experience is less explored. What is clear from this literature though is a two-way relationship between the two concepts.⁹⁷

It is then interesting to interpret the emphasis of the ExA in ensuring the quality of the experience of the coastal landscape and heritage site through the lenses of place attachment. By giving value to the experience, and preserving it, the reasoning of the ExA implicitly recognises that the bond of people with a place is worthy of consideration and weight. This should not go as far as suggesting that the ExA is willing - or institutionally empowered - to trespass the boundaries of the national policy and technical assessment to account for the multiplicity of place attachment(s). Although this is a small part of a long and highly technical decision, it might nonetheless suggest an inclination towards interpreting those boundaries more expansively. The ExA has perhaps managed to convey public concerns into its interpretation of designated areas and the experiences associated to them. These concerns are nicely expressed in the way people talk about their experience of the area

⁹² Id, citing Paul Tillich, *My Search for Absolutes* (Simon And Schuster, 1967) 29.

⁹³ E.g. Brian Wattchow, 'Landscape and a Sense of Place' in Peter Howard, Ian Thompson and Emma Waterton (eds), *The Routledge Companion to Landscape Studies* (Routledge 2012). See extended discussion in chapter 3 above.

⁹⁴ Megha Budruk, Sonja A Wilhelm Stanis, 'Place Attachment and Recreation Experience Preference: A Further Exploration of the Relationship' (2013) 1-2 *Journal of Outdoor Recreation and Tourism* 51, 53 (providing an overview of the literature). See e.g. Piera Buonincontri, Alessandra Marasco and Haywantee Ramkissoon, 'Visitors' Experience, Place Attachment and Sustainable Behaviour at Cultural Heritage Sites: A Conceptual Framework' (2017) 9 *Sustainability* 1112.

⁹⁵ See discussion in chapter 3 above.

⁹⁶ David Seamon, 'Place Attachment and Phenomenology – The Synergistic Dynamism of Place' in Manzo and Devine Wright (n 74) 11.

⁹⁷ For a review: Lynne Manzo 'Exploring Multiple Dimensions of Place Meaning' (2005) 25 *Journal of Environmental Psychology* 68; Maria Lewicka, 'Place Attachment' (2011) 31 *Journal of Environmental Psychology* 207; Michel E Patterson and Daniel R Williams, 'Maintaining Research Traditions on Place' (2005) 25 *Journal of Environmental Psychology* 361; Carla Koons Trentelman, 'Place Attachment and Community Attachment' (2009) 22 *Society and Natural Resources* 191.

to be affected by the project. One participant focused on the impact of a change in experience upon people's well-being:

'I have a young child and a dog and we spend a lot of time at the beach (as well live on the cliff top) and feel that the proposed wind farm will have a detrimental effect on the well-being of both our child and dog as well a [sic] act as a massive disturbance of peace'.⁹⁸

Another participant illustrated his memory and repeated experience of a place as indication of his connection with the area in the following way:

'I have spent many holidays in the Swanage area and intend to purchase a small holiday apartment in Westbourne for myself and family to use. We walk around the coastline to enjoy the beautiful scenery and fresh air. I am appalled and object to the close proximity of the proposed wind farm to Old Harry Rocks, Swanage and Durlston Head [...]'.⁹⁹

The following is also interesting, while apparently contrasting with previous comments:

'As is the case on many Bank holiday weekends, we visited Swanage/Bournemouth several weeks ago with our young family in early May. During the weekend, we walked at Durlston and then, on the Sunday 4th May 2014, we walked from Swanage to Corfe Castle in the sunshine. Whilst stopping to enjoy the natural views or rest, we spoke to other walkers and visitors to this part of Dorset. On discussing the proposed windfarm, all were totally against it and [worryingly], said they would reluctantly go elsewhere to holiday or visit – if it happens. Why on earth would they [continue] to visit unnatural landscape when other beautiful places (turbine free) exist? I object'.¹⁰⁰

Here the participant shows the fragility of place attachment by expressing how experience, and change to it, can influence people's behaviour and attitude towards a place.¹⁰¹ This confirms claims about the important role of stability and continuity in defining the process of place attachment mentioned above.

⁹⁸ REP-0136: G Williams.

⁹⁹ REP-0146: H Pratley.

¹⁰⁰ REP-0209: Mrs A Griffiths.

¹⁰¹ Patrick Devine-Wright and Yuko Howes, 'Disruption to Place Attachment and the Protection of Restorative Environments: A Wind Energy Case Study' (2010) 30 *Journal of Environmental Psychology* 271.

Of course, the value of experience is also entrenched with the purpose of designating particular areas for conservation. Nor is the ExA fully engaging with the profound complexities of landscape and the multiple dimensions of place–attachment that characterise those experiences. Nevertheless, the way in which the report stresses the need to safeguard the experience of a specific place is interesting. Although still within the uncontested boundaries of the policy objectives, the ExA in Navitus might have taken the opportunity to reduce the distance between prior institutional knowledge claims and lay public knowledge claims. There are clear legal incentives not to use place attachment (i.e. the risk of making the decision subject to appeal) and this is problematic. As explained in chapter 3, I argue that, under an expansive reading of the Planning Act 2008, place attachment concerns are at least capable of being ‘important and relevant’ matters for a decision. As a result, the ExA would be legally allowed to have regard to these factors in examining an application and giving its recommendation, depending on the circumstances and his/her balancing exercise.¹⁰²

5. Perceived Fairness

The examination of Navitus was extremely complex and not limited to issues associated with impact on – and experience of - national and international designated areas. As explained earlier in this thesis, here I am concerned with the extent to which the ExA validated concerns about perceived fairness of the development outcome and of the participatory process associated with the Navitus examination. I am interested in whether fairness concerns expressed by the lay public in the IPs representations were given weight as reasons for the decision. As for place attachment, I argue that these are capable of being important matters for the examination.¹⁰³ As argued in chapter 3, the distributive as well as procedural dimension of fairness constitute key factors shaping people’s response to infrastructure development. As a result, I claim that an exploration of the extent to which the ExA engaged with IPs concerns on fairness provides useful insights into the model of public engagement pursued in this regulatory context. In this section, I explore the two dimensions of fairness in turn, referring to key arguments made by IPs to the ExA.

¹⁰² See chapter 3, section 4 above.

¹⁰³ Ibid.

5.1. Fairness of the Development Outcome

Many participants criticised the judgement on the appropriate location for the Navitus project compared to other areas, with a focus on the tensions between natural and industrial areas. To some extent, these claims reflected concerns about fairness understood as fair distribution of costs and benefits between the project area and less 'beautiful' or less 'naturally significant' areas, as well as about the risk of (de)essentialisation of rural and coastal areas.¹⁰⁴ Many participants felt that the project would result in the industrialisation of an area of natural beauty and a change of the character of its landscape, as expressed in this representation:

'In its history, the area has never had a[n] industrial landscape. The proposals are essentially for a massive power station taking up a huge area, surrounded and clearly visible from human habitats in the West, North and East of the proposed wind farm. Not even a small wind farm would be acceptable, let alone this monstrosity'.¹⁰⁵

Others contested the disproportional impact of the development on the local community, drawing on the perceived unfair distribution of costs and benefits, as shown by these comments:

'It is accepted that wind farms are necessary but their location needs to be chosen to provide the right balance between the wind-farm benefits of a particular location and the negative impact of the locality. [...] The negative impact on this site and thus the UK is too great'.¹⁰⁶

'Of course in the end money always talks, and cynically I expect it will do so here as well. But we have to balance out legacy aims. Yes our children will have expected us to have [developed] renewable energy and reduce carbon but they will also have expected us to safeguard such important (and rare) natural landscape. Once gone they are gone forever'.¹⁰⁷

¹⁰⁴ See discussion of (de-)essentialisation in chapter 6 above. In particular, Susana Batel, and others, 'The Role of (De-)Essentialisation Within Siting Conflicts: An Interdisciplinary Approach' (2015) 44 *Journal of Environmental Psychology* 149.

¹⁰⁵ REP-0083: S Casey.

¹⁰⁶ REP-0212: C Ross.

¹⁰⁷ REP-0139: N Bagge.

These concerns were echoed by those questioning the distribution of costs and benefits between the community and the foreign investors, as in Rampion.¹⁰⁸ In many cases, participants showed support for the technology, but opposition to the specific location, with one representative claiming that:

'We understand the need for green energy and it's [sic] very serious importance, but cannot for the life of us understand the allowing of such a thing to happen in a very fragile, delicate area such as this with the title 'World Heritage Site' given for good reason, surely there are other areas less significant, equally productive and where it would be less damaging?!'.¹⁰⁹

This is not surprising in the light of the vast academic research on factors of acceptance and the ambivalence in people's attitudes towards energy infrastructure siting, discussed earlier in the thesis.¹¹⁰ In other cases, participants opposed the technology as well as the siting of Navitus in a beautiful area:

'Whilst I am reluctant to state that wind farms should go elsewhere – because of my scepticism about the principle, I am sure that there are other less sensitive sites around Britain's coastline that can accommodate such proposals. Why place this "industry" in one of the busiest, most beautiful, most visible areas of the coast that exists within Britain?'.¹¹¹

Key representations also concerned socio-economic impact (especially impact on tourism, fishing activities and navigation¹¹² and recreational activities). Some concerns were especially focused on the negative impact of the project on tourism due to the potential changes over the WHS designation, as emphasised by these participants:

'I do not support this planning application on the basis that it will have a detrimental [effect] on Bournemouth's tourist industry which in turn will adversely lead to unemployment of local people. Despite the developers assurance I believe these monstrous wind generators will create a skyline

¹⁰⁸ REP-0038: Mrs J Burman. See also REP-0153: Mrs S Nunn.

¹⁰⁹ REP-0090: A Tillsley. See also REP-0161: M Joynes; REP-0139: N Bagge; REP-0213: B Newman.

¹¹⁰ See Chapter 3.

¹¹¹ REP-0187: G Tulley.

¹¹² The Panel concluded that, despite mitigation measures, 'some adverse impacts remain and by its very presence the wind farm would represent a greater risk to marine navigation than existed previously. This matter weighs against the proposal but not to a significant extent'. Planning Inspectorate (n 4) [21.2.51].

comparable to an industrial factory. Just the sort of environment many holiday makers are escaping from. [...] The Jurassic Coast, a World Heritage site, will probably end up losing [its] status'.¹¹³

'Job creation in area will only be indirect as main jobs will go to outside construction workers and will be offset by local job losses in tourist industry'.¹¹⁴

'[T]here has been no proper research of the balance between costs and benefits economically but given the areas reliance on tourism a few bad years would wipe out the community'.¹¹⁵

Some representations were more nuanced, having both technical and experiential language, and mentioned a series of interlinked issues, touching upon environmental, recreational and historic value of the place, which was also understood as part of one's individual memory.¹¹⁶ The following is a useful example of such approach:

'I am a frequent visitor to this part of the world and have been since the age of four, so some 63 years. [...] It is much loved area by the boating / yatching community, with high volume of traffic particularly in the Spring and Summer months. In addition to which there are still local fishermen who fish the inshore waters. The large scale trauma to the seabed as a result of heavy drilling will cause untold damage to the substrata and may well contribute to an acceleration of the degradation of the shore line. In short this venture will cause large scale damage for an unreliable and small scale power return'.¹¹⁷

Some of the issues raised by these participants (e.g.socio-economic impact) were discussed in the report, but did not received substantive weight for the decision. Others, such as the (de)essentialisation argument and the issues associated with the important of memory of a place where not engaged with by the ExA. This is not surprising in the light of the predominantly technical tone of the ExA's report.

¹¹³ REP-0061: P R Henderson. On the "industrialisation" argument, see also REP-0120: S Heath.

¹¹⁴ REP-0055: P Blenkarn.

¹¹⁵ REP- 0181: J Whiteley.

¹¹⁶ On the relation between memory and place-attachment, Maria Lewicka, 'In Search of Roots: Memory as Enabler of Place Attachment' in Manzo and Devine-Wright (n 74).

¹¹⁷ REP-0202: D A Strong.

5.2. Fairness of the Process

As I have argued earlier in this thesis, the right to participate in environmental decision-making is institutionalised in law.¹¹⁸ In the NSIP regime, consultation and participation opportunities are available to the public in the pre-application as well as in the examination phase.¹¹⁹ However, the extent to which the public considers the participatory process fair is problematic.¹²⁰ In Navitus, several IPs questioned the quality of the information received about the project. Indeed, the ExA viewed 'misleading and inaccurate information presented against the Project and the opposition to it generated by such information' as the primary reason for people rejecting the project.¹²¹ But the reading of the individual representations shows a much more complex set of issues associated with technical information and expertise.¹²² This is important as the level of information and awareness of the public generally shapes the quality of the participation and consultation process. Some complained that information was 'deliberately misleading',¹²³ and that 'public opinion [was] being overridden and ignored or worse confused'.¹²⁴ A participant argued that:

'The consultation process [has not been] managed in a balanced way. Many of the people impacted are not local and have been largely ignored'.¹²⁵

Within this context, the compatibility of the project with policy objectives was also questioned by many, with one participant claiming that:

'[...] the proposed development is not the result of an acceptable consultation exercise within the spirit and intention of the Localism Act , is not in accordance with a credible energy policy (the business case is likely to be unconvincing) [...]'.¹²⁶

¹¹⁸ Maria Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP 2017).

¹¹⁹ See details in chapter 4.

¹²⁰ See discussion on procedural fairness in chapter 1.

¹²¹ Planning Inspectorate (n 4) [21.2.10]. While arguments in support of the project are carefully listed and articulated in the report, those against it are simply framed under the banner of complaints about the quality of information provided by the applicant.

¹²² See point on methodology in chapter 1 fn 65 above.

¹²³ REP-0083: S Casey. On the point about poor quality of the information provided to the public, see also REP-0232: D Pattenson.

¹²⁴ REP-0178: R Tipple.

¹²⁵ REP-0204: S Clutton.

¹²⁶ REP-0048: Society of Poole Men.

Another participant argued that:

'The previous consultation documents published regarding this application were of exceptionally poor quality, omitting many material considerations, drawing illogical conclusions from the evidence presented, and failing to give due consideration to the economic, social and environmental impacts of the scheme. The issues were further compounded by an approach that sought to trivialise the process and dress it up as something it's not, for example by referring to the major industrial development as a "park".

As a local resident I have a direct interest in the outcome of the application, since I am extremely concerned that the local economy may suffer irreparable [sic] damage as a result. However beyond my own concerns there is a much greater issue relating to appropriate stewardship of our natural resources, and long-term planning of our management of the environment and our impact upon it. Such issues have to date been woefully neglected by the applicants whose sole driver appears to be personal gain'.¹²⁷

As explained with respect to the Rampion case study in the previous chapter, it is hard to draw conclusions about the extent to which the ExA engaged with questions of fairness. This is only partially due to the technical nature of the examination and the "bounded discretion" granted to the ExA. But it is also related to the intrinsic difficulty in translating these issues within the regulatory process in planning. Issues of justice and fairness are extraordinarily slippery. However, I argue that as fairness remains a fundamental factor shaping people's attitude towards the development, a lack of substantive engagement with the issues associated with fairness of the development outcome and of the process implies the participation is only pursuing a model of passive acceptance.

6. Conclusions

This chapter's starting argument was that to assess the influence of public participation on decisions related to offshore wind energy NSIPs, we must look at the reasons why an application has been approved or rejected and the evidence supporting these reasons, rather than simply focusing on the outcome of the decision-making process.

¹²⁷ REP-0232: D Pattenson.

In the case of Navitus, the reasons for rejection are directly written in the law and policy on designation and the ExA applied its pre-established approach by making sure that the decision complied with the policy objectives in favour of conservation of designated areas and heritage sites. This shows that while the ExA's conclusion on Navitus aligns with the views expressed in many representations, the role of participation in the decision-making remains limited. This is also shown by the fact that the wider array of claims and arguments reflecting factors of acceptance (such as place attachment or the perceived fairness of the development outcome and of the process) made in the representations are not considered to add weight, or perhaps even to be material to, the decision. Factors of acceptance other than those compatible with the reasons for conservation (i.e. SLVI and World Heritage Status considerations) were not substantially considered. I do not suggest that all factors must be evaluated and given the same weight at all time and in every circumstance. But their role in allowing for a substantive space for participation should be acknowledged and, at least, taken into account in the examination.

This chapter however explained that the role of participation is perhaps reinvigorated by the ExA's own interpretation of its bounded discretion left by the NPSs. A more flexible approach to the ability of the ExA to interpret aspects of that 'prior institutional knowledge'¹²⁸ might be seen through the value recognised to people's experience of landscape of Areas of Outstanding Natural Beauty and World Heritage Sites. Certainly, this is something that the designation does take into account. However, the emphasis given to it by the ExA is significant here. Arguably, this does not leave a huge space for giving more weight to the lay public concerns and situated knowledge in the regulatory decision-making process, being simply an attempt to expand discretion in a defined area (i.e. national designation and presumption in favour of conservation) where it is possible to do it under the comfort of the statutory and national policy framework. The ExA here looked at ways to consider its weight without contradicting the policy objectives. This is perhaps not enough to claim a renewed space for participation and its weight in the decision-making. But it might have a potential in slightly shifting the discourse from a dominant model of passive public acceptance to a model of deliberative participation that starts accounting for wider perspectives.

¹²⁸ Lee (n 5).

PUBLIC PARTICIPATION BEYOND PLANNING CONSENT: THE PARTICIPATORY POTENTIAL OF COMMUNITY BENEFITS

1. Introduction

Thus far in the thesis, I have explored and criticised the conceptual,¹ legal² and practical³ approach to public participation in the regulatory decision-making for offshore wind energy Nationally Significant Infrastructure Projects (NSIPs) in England. In line with the broader literature on the limits of participation in this area, this study suggests that, while the right to participate is embedded in law, the scope for lay public influence in consenting decisions is *de facto* restricted by the weight given to policy objectives and technical knowledge.⁴ I argue that this approach is indicative of a model of public engagement that tends to pursue passive acceptance of decisions by the public, instead of deliberative participation.

In this chapter, I expand the analysis of the scope for participation – and the models of public engagement - from the consenting process, (i.e. whether and why a wind energy NSIP is accepted or rejected by the Examining Authority and subject to which mitigating conditions⁵) to the implementation of the consent decision (i.e. how the project is going to be carried out). This inquiry is useful to appreciate the full breath of the meaning of participation in decisions concerning this infrastructure. Implementation might address a range of issues, such as conditions on construction and traffic movement. I am interested in the rationale and practice of community benefits with respect to wind energy infrastructure (in particular to offshore wind energy NSIPs) and the opportunities for participation in decisions on their design and management.

¹ Chapter 3 above.

² Chapter 4 above.

³ Chapters 5 and 6 above.

⁴ Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 *Journal of Environmental Law* 33; Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 *Journal of Environmental Law* 415; Lucy Natarajan and others, 'Navigating the Participatory Process of Renewable Energy Infrastructure Regulation: A "Local Participant Perspective" on the NSIPs Regime in England and Wales' (2018) 114 *Energy Policy* 201; Yvonne Rydin and others, 'Local Voices on Renewable Energy Projects: The Performative Role of the Regulatory Process for Major Offshore Infrastructure in England and Wales' (2018) 23 *Local Environment* 565.

⁵ On mitigation, Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139.

There are multiple definitions and types of community benefits.⁶ Community benefits associated with infrastructure projects (e.g. energy, transport, and housing) are understood as ‘non-standardised, non-institutionalised, locally varying, and voluntary gestures’ offered by the developer to the local community outside the consenting process.⁷ Although their meaning is characterised by ‘constructive ambiguity’,⁸ they generally fulfil the purpose of providing a positive contribution for an area and people affected by an infrastructure project.⁹ They take the form of economic contributions, delivered by a variety of modes, including: community funds; shared ownership; distribution of revenues; direct investment and project funding from the part of the operator; or electricity discount.¹⁰ These are often complemented by benefits of a non-economic nature, such as educational, tourism support or environmental conservation schemes.¹¹ My focus is on Community Benefits Packages, in particular community funds, which tend to be the most common approach to offshore wind farms in England.¹² Community benefits are different from ‘planning obligations’, which are planning agreements between the local planning authority and a developer ‘for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as it may be prescribed by the agreement’.¹³ In contrast with community benefits, these agreements are necessary ‘to make the development acceptable in planning terms’¹⁴ and can be enforced by the local planning authority.¹⁵

⁶ E.g. David Rudolph, Claire Haggett and Mhairi Aitken, ‘Community Benefits from Offshore Renewables: The Relationship Between Different Understandings of Impact, Community, and Benefit’ (2017) 36 *Environment and Planning C* 92.

⁷ *ibid* 95.

⁸ Richard Cowell, Gill Bristow and Max Munday, ‘Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development’ (2011) 54 *Journal of Environmental Planning and Management* 539,549.

⁹ Although the economic development outcomes to rural areas have been questioned. See Gill Munday, Max Bristow and Richard Cowell, ‘Wind Farms in Rural Areas: How Far Do Community Benefits from Wind Farms Represent a Local Economic Development Opportunity?’ (2011) 27 *Journal of Rural Studies* 1.

¹⁰ Rudolph, Haggett and Aitken (n 6).

¹¹ David Rudolph, Claire Haggett and Mhairi Aitken, ‘Community Benefits from Offshore Renewables: Good Practice Review’, *Climate XChange*, 2015. They clarify that non-economic benefits are not “community benefits” in the stricter sense, but they are perceived as such.

¹² See Peter Strachan and David Jones, ‘Navigating a Minefield? Wind Power and Local Community Benefit Funds’ in Joseph Szarka, Richard Cowell and Geraint Ellis (eds), *Learning from Wind Power – Governance, Societal and Policy Perspectives on Sustainable Energy* (Palgrave Macmillan 2012).

¹³ Michael Purdue and Victor Moore, *A Practical Approach to Planning Law* (13th edn, OUP 2015) 301. These are also referred to as “Section 106 Agreements” under the Town and Country Planning Act 1990, s 106.

¹⁴ Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (hereinafter “NPPF”) (February 2019) [56].

¹⁵ Town and Country Planning Act 1990, s 106 (3).

Over the last 15 years, a body of scholarship has explored community benefits from renewable energy projects and their relationship with local acceptance.¹⁶ Although not legally required, public participation in decisions associated with community benefits is important in determining the extent to which these packages are able to foster public support of the infrastructure.¹⁷ However, the environmental law scholarship, including the literature engaged with issues of public participation in regulatory decision-making, has shown little interest in the justifications for, and practice of, community benefits with respect to wind energy infrastructure and their implications for participation.

Community benefits are generally routine with respect to wind energy projects, but their practice is controversial. This is in part because of the difficulties of defining who the recipient “community” should be.¹⁸ While multiple definitions can be used (e.g. community of place, community of interest, affected community), they fall short of reflecting the complex notion of “community” as recipients of benefits.¹⁹ Moreover, a narrative centred on ‘recipients’ - rather than ‘active citizens’ - has also been contested.²⁰ But community benefits are also controversial because the reasons for offering them are problematic. The possible rationales range from re-localising benefits and sharing rewards to being “good neighbours with the community”; from increasing local acceptance of projects to recognising a symbolic (not legal) ownership of the resources by the community (Section 2).

Taking stock of this debate, I argue that community benefits should be understood as having the potential to contribute to environmental justice (section 3). I contend first, and in common with Cowell and others, that community benefits can offer a platform to reopen the debate on the distribution of benefits and impacts from the

¹⁶ Within the vast literature: Richard Cowell and Patrick Devine-Wright, ‘A “Delivery-Democracy Dilemma”? Mapping and Explaining Policy Change for Public Engagement with Energy Infrastructure’ (2018) 20 *Journal of Environmental Policy and Planning* 499; Benjamin Walker, Bouke Wiersma, Etienne Bailey, ‘Community Benefits, Framing and the Social Acceptance of Offshore Wind Farms: An Experimental Study in England’ (2014) 3 *Energy Research and Social Science* 46; Cowell, Bristow and Munday (n 8); Noel Cass, Gordon Walker and Patrick Devine-Wright, ‘Good Neighbours, Public Relations and Bribes: The Politics and Perceptions of Community Benefit Provision in Renewable Energy Development in the UK’ (2010) 12 *Journal of Environmental Policy and Planning* 255; Richard Cowell and others, ‘Wind Farm Development in Wales: Assessing the Community Benefits’ Project Report, Cardiff Welsh Assembly Government (2007).

¹⁷ Patrick Devine-Wright, ‘Fostering Public Engagement in Wind Energy Development: The Role of Intermediaries and Community Benefits’ in Joseph Szarka and others (eds) *Learning from Wind Power – Governance, Societal and Policy Perspectives on Sustainable Energy* (Palgrave Macmillan 2012).

¹⁸ E.g. Gill Bristow, Richard Cowell and Max Munday, ‘Windfalls for Whom? The Evolving Notion of ‘Community’ in Community Benefit Provisions from Wind Farms’ (2012) 43 *Geoforum* 1108; Gordon Walker and Patrick Devine-Wright, ‘Viewpoint. Community Renewable Energy: What Should It Mean?’ (2008) 36 *Energy Policy* 497.

¹⁹ On this point, see Chapter 1, section 5 above.

²⁰ Cowell and Devine-Wright (n 16) 513.

project.²¹ Second, I build on this literature by arguing that the process by which community benefits are defined in any particular case can contribute to addressing some of the limits of participation in the regulatory process by which development consent has been granted. Community benefits show what I shall call “participatory potential” that can be understood by locating their function within a conception of procedural justice, which is a rationale less discussed in the literature on community benefits.²² But, despite the value of this conceptual framework, the English experience of policy guidance and practice of community benefits with respect to wind energy infrastructure has been – so far - unable to effectively and consistently develop such potential (section 4 and 5). This is primarily because public participation is not factored into the process of deciding about the design and management of community benefits. While this is justified by the voluntary nature of the benefit offer, this approach could be framed as another manifestation of the acceptance model of public engagement.

Building on this argument, in section 7, I offer some ideas for reform to operationalise the participatory potential of community benefits as a matter of procedural justice. I propose framing the provision of community benefits as a legally mandatory requirement for wind energy developers, with the details of the offer agreed through a participatory process. While inevitably imperfect, mandating a participatory decision-making process for community benefits would be an important concrete step towards meaningful public engagement.

2. Rationales for Community Benefits

Community benefits are increasingly routine with respect to wind energy developments.²³ They are primarily offered with respect to onshore developments, but they are rare and *ad hoc* for offshore developments, leaving gaps in the understanding of their rationales and practice.²⁴ But irrespective of the project’s geographic scope, community benefits remain hugely contested as to their rationales. The reasons for providing community benefits affect the way the benefits are perceived and the extent to which they are able to achieve re-distributive objectives. Rudolph and colleagues found that the rationales and forms of delivery of these benefits are important in

²¹ Richard Cowell, Gill Bristow and Max Munday, ‘Viewpoint – Wind Energy and Justice for Disadvantaged Communities’ (May 2012).

²² E.g. Rudolph, Haggett and Aitken (n 6); Mhairi Aitken, ‘Wind Power and Community Benefits: Challenges and Opportunities’ (2010) 38 Energy Policy 6066.

²³ See RenewableUK, *Onshore Wind: Our Community Commitment* (October 2013) <<https://www.renewableuk.com/page/CBP>> accessed 22 June 2019.

²⁴ Devine-Wright (n 17); Rudolph, Haggett and Aitken (n 6).

determining their effectiveness.²⁵ However, here I argue that the justification for providing the benefits are not only key to effectiveness, however measured. A reflection on the rationales for the benefit provision is also essential to understand the extent to which community benefits can foster public participation beyond consent decisions.

There are multiple rationales for community benefits with respect to wind energy projects. Here I shall focus on four intersecting motives for their provision: re-localisation of benefits; corporate social responsibility; host-recognition; and the local acceptance of the project. Based on a critique of the issues associated with each of these rationales, in the next section I propose an alternative rationale for community benefits provision based on a justice framework.

2.1. Re-localisation of Benefits

First, community benefits respond to a demand for re-localising benefits and sharing rewards with the community, in the light of the localisation of impacts. This rationale recognises that the imbalance between the national benefits or corporate gains and the local burden associated with the project must be re-adjusted at the expenses of the developer.²⁶ To some extent, the idea of re-localising benefits due to a distributive imbalance goes in the direction of assimilating community benefits to compensation for harm and loss.²⁷ But, while some have seen compensation as ‘the most credible rationale for community benefits’, compensating communities for bearing the disproportionate cost of a project – allegedly - in the public interest is deeply problematic.²⁸ As Owens and Cowell explain ‘addressing distributive injustices through compensatory means cannot obviate the need to address matters of procedural justice in the way in which different communities participate in the broader decisions about production and consumption. The question’ - they conclude - ‘is how far planning

²⁵ Rudolph, Haggett and Aitken (n 6) 95.

²⁶ Derek Bell and others, ‘Re-visiting the “Social Gap”: Public Opinion and Relations of Power in the Local Politics of Wind Energy’ (2013) 22 *Environmental Politics* 115. See also Louise Gallagher, Susana Ferreira and Frank Convery, ‘Host Community Attitudes Towards Solid Waste Landfill Infrastructure: Comprehension Before Compensation’ (2008) 51 *Journal of Environmental Planning and Management* 233.

²⁷ Sandy Kerr, Kate Johnson and Stephanie Weir, ‘Understanding Community Benefit Payments from Renewable Energy Development’ (2017) *Energy Policy* 105; Cass, Walker and Devine-Wright (n 16). See also Centre for Sustainable Energy (CSE), *Community Benefits From Wind Power: A Study of UK Practice and Comparison with Leading European Countries*, Report to The Renewables Advisory Board and the DTI (2005) 05/1322. On compensation for impact of wind energy NSIPs: Rydin, Lee and Lock (n 4) and Planning Inspectorate, ‘Dogger Bank Creyke Beck Offshore Wind Farm - Examining Authority’s Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change’ (17 November 2014) specifically addressing compensation claims.

²⁸ Cowell, Bristow and Munday (n 21) 12.

allows such participation to take place'.²⁹ As I explained in chapter 6, regarding fishers' compensation for the impact of Rampion, a compensation narrative might misunderstand people's motives and interests.³⁰ Moreover, the causal relation between the benefits and localised impact is generally not made explicit by developers who do not want to be perceived as providing a sort of reparation for the adverse effects of their project.³¹ On this point, Rudolph and colleagues found that, although there is an obvious connection between impact and benefit, 'developers often actively eschew impact rhetoric by stressing altruistic and good neighbour behaviour, social corporate responsibility, and the formation of community ties'.³²

2.2. Corporate Social Responsibility

The second reason for developers to grant community benefits is to be seen as good neighbours to the community.³³ This rationale follows a corporate social responsibility (CSR) approach to the provision of community benefits, which is framed as 'part of developing and applying good practice principles'.³⁴ An analysis of the notion of CSR is beyond the scope of this thesis.³⁵ However, from a CSR viewpoint, community benefits align with the idea 'that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimize any adverse effects of its operations and activities on the environment, society and human health'.³⁶ Under this rationale, community benefits are framed as a "gift", a voluntary payment to the community beyond legal requirements for mitigation measures or compensation. This normally comes with a high level of publicity and press coverage of the benefits offered to maximise reputational returns.³⁷ But even this justification does not come without problems as it can be seen as a

²⁹ Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (2nd edn, Routledge 2011) 154.

³⁰ Chapter 6, section 5.1. See also on this, Rydin and others (n 4) 573.

³¹ Cowell, Bristow and Munday (n 8) 548.

³² Rudolph, Haggett and Aitken (n 6) 95. On this point, Cass, Walker and Devine-Wright (n 16) and Devine-Wright (n 17).

³³ Mhairi Aitken, Claire Haggett and David Rudolph, 'Practices and Rationales of Community Engagement with Wind Farms: Awareness Raising, Consultation and Empowerment' (2016) 17 *Planning Theory and Practice* 557; Cass, Walker and Devine-Wright (n 16); Cowell, Bristow and Munday (n 21).

³⁴ Rudolph, Haggett and Aitken (n 6) 98.

³⁵ Within the vast literature: Abigail McWilliams, Donald S Siegel, and Patrick M Wright, 'Corporate Social Responsibility: Strategic Implications' (2006) 43 *Journal of Management Studies* 1; Archie B Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38 *Business & Society* 268; Doménech Melé, 'Corporate Social Responsibility Theories' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008).

³⁶ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 32.

³⁷ Kerr, Johnson and Weir (n 27).

strategic action to enhance the developer's competitiveness and reputation in order to ultimately improve its financial and economic performance (i.e. 'strategic CSR'), rather than as a sign of genuine interest in the local community.³⁸ Some suggested that the CSR rationale - i.e. community benefits are a "gift" from a "good neighbour" - tends to be predominant for community benefits with respect to offshore developments, as 'a way of simultaneously promoting a positive public image and reducing corporate risks'.³⁹ As I shall explain below, E.ON's narrative of "being a good neighbour" by providing the Rampion Community Benefit Funds seems to confirm this tendency.⁴⁰

2.3. Host Recognition

Third, some have acknowledged that the community has symbolic (not legal) ownership of the resources (e.g. land, sea, wind, landscape and natural environment) that the developer will benefit from.⁴¹ As a result, a community benefit is understood as a way to give something back to the host community and value them as interlocutors. By recognising the role of the local community as symbolic owners of the resources, this rationale goes somewhere towards acknowledging the contribution of the community's experience and knowledge about those resources and their attachment to them. It is intended to avoid the perception that large developers with no local ties "exploit" a rural community and its resources.⁴² Nevertheless, even in this case, there are risks of such approach being seen, sometimes rightly, by the community as a mere public relations exercise and an expression of strategic CSR. The boundaries between CSR and host recognition rationales are therefore blurred.

2.4. Local Acceptance

Finally, community benefits are often presented as a mechanism to increase local acceptance of the project and soften opposition to the siting of the infrastructure. Since 2005, the public discourse around community benefits has framed them primarily as

³⁸ Marc Orlitzky, Donald Siegel and David Waldman, 'Strategic Corporate Social Responsibility and Environmental Sustainability' (2011) 50 *Business & Society* 6. See also Rosa Chun and others, 'Corporate Reputation: Being Good and Looking Good' (2019) 58 *Business and Society* 1.

³⁹ Kerr, Johnson and Weir (n 27) 206.

⁴⁰ See section 5 below.

⁴¹ Rudolph, Haggett and Aitken (n 6)

^{12.} ⁴² Maarten Wolsink, 'Planning of Renewables Schemes: Deliberative and Fair Decision-Making on Landscape Issues Instead of Reproachful Accusations and Non-Cooperation' (2007) 35 *Energy Policy* 2692.

mechanisms to secure social acceptability and speed up infrastructure deployment.⁴³ This rationale is a powerful driver for the developer's voluntary commitment. The local acceptance rationale also justifies community benefits as a device to gain trust and establish ties between the developer and the local community.⁴⁴

Although in some cases community benefits can support genuine public acceptance and local support, this framing is problematic.⁴⁵ This rationale is based on a simplistic understanding of 'acceptance' and 'acceptability', and of the multidimensional nature of people's attitudes towards community benefits, raising doubts about the ability of these schemes to actually achieve support.⁴⁶ From an acceptance perspective, Cowell and others suggest that 'there are risks in seeing community benefits as a device for securing social acceptance, especially if it implies that acquiescent communities deserve less consideration'.⁴⁷ As I will further explain in the next section, they argue that this rationale 'obscures' other justifications, in particular 'the role of community benefits in promoting environmental justice'.⁴⁸

A local acceptance narrative for community benefits may be more likely to generate perceptions of "bribery" than other reasons for providing them.⁴⁹ Perceptions that the developer is attempting to "bribe" the local communities are particularly pervasive when using this rationale. Some research shows that community benefits do not enhance public acceptance when concerns about "bribery" are present.⁵⁰ However, Walker and others have rejected this conclusion saying that 'it is possible to implement strategies to ensure that the provision of community benefits can increase local support of offshore wind farms, even when these funds are portrayed by some within the local context as "bribes"'.⁵¹ These strategies – they argue - require the institutionalisation of the benefits within a legal and policy framework to help prevent, rather than rebut, "bribery" perceptions all together. I come back to this point in section 6 below.

⁴³ Cowell, Bristow and Munday (n 21); CSE (n 27). Cf Cowell and Devine-Wright (n 16) arguing that the narrative has now shifted more towards a distributive justice rationale [507].

⁴⁴ In another community benefit context, Fleur Goedkeep and Patrick Devine-Wright, 'Partnership or Placation? The Role of Trust and Justice in the Shared Ownership of Renewable Energy Projects' (2016) 17 *Energy Research & Social Science* 135; Gordon Walker and others 'Trust and Community: Exploring the Meanings, Contexts and Dynamics of Community Renewable Energy' (2010) 38 *Energy Policy* 2655.

⁴⁵ Cowell, Bristow and Munday (n 8).

⁴⁶ *ibid* referring to Cass, Walker and Devine-Wright (n 16) (on how people rationalise community benefits) and Joseph Szarka, *Wind power in Europe. Politics, Business and Society* (Palgrave Macmillan 2007) (on conflating acceptance and acceptability).

⁴⁷ Cowell, Bristow and Munday (n 21) 11.

⁴⁸ Cowell, Bristow and Munday (n 8) 539.

⁴⁹ On this point: Benjamin Walker, Duncan Russel and Tim Kurz, 'Community Benefits or Community Bribes? An Experimental Analysis of Strategies for Managing Community Perceptions of Bribery Surrounding the Siting of Renewable Energy Projects' (2017) 49 *Environment and Behaviour* 59; Walker, Wierma, and Bailey (n 16); Aitken and others (n 33) and Cowell, Bristow and Munday (n 8).

⁵⁰ Aitken, Haggett and Rudolph (n 33) Cass, Walker and Devine-Wright (n 16) and Walker, Russel and Kurz (n 49).

⁵¹ Walker, Russel and Kurz (n 49) 74.

These four justifications – re-localisation of benefits, corporate social responsibility, host recognition and local acceptance – overlap and are nuanced in the UK government and developers’ rhetoric about the provision of community benefits with respect to wind farms. However, because of the issues and critiques illustrated in this section, I argue that none of them is able to deal with the complexity of wind energy siting conflicts and the participatory challenge that they embed. In the next section, I offer a different angle.

3. Changing the Narrative: The Justice Rationale and the Participatory Potential of Community Benefits

Considering the limits of the rationales discussed above, I share the view of those who argue that providing community benefits with respect to environmentally disruptive energy infrastructure projects is simply ‘a matter of justice’.⁵²

Some authors framed the justice rationale for community benefits based on a distributive dimension.⁵³ This stresses ‘how community benefits might serve environmental justice, in terms of addressing the unequal distribution of environmental and economic costs and benefits, and the balance of responsibility between public and private sectors for addressing the costs of development’.⁵⁴

From this distributive perspective, Cowell and colleagues conceptualised a justice rationale for community benefit provision, as opposed in particular to a local acceptance rationale.⁵⁵ They convincingly argued:

‘Seeing community benefits as a corollary of justice makes them a social obligation, rather than something which developers can choose to provide or not. It is also a more truthful reflection of the limited power of potential host communities, as planning and policy frameworks increasingly assert the necessity of major renewable energy developments and diminish the legitimate scope for local objections’.⁵⁶

⁵² Cowell, Bristow and Munday (n 8) referring to David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007).

⁵³ Rudolph, Haggett and Aitken (n 6); Walker, Russel and Kurz (n 49). and Aitken, Haggett and Rudolph (n 33).

⁵⁴ Cowell, Bristow and Munday (n 8) 554.

⁵⁵ Cowell, Bristow and Munday (n 21).

⁵⁶ *ibid* 32.

Cowell and Devine-Wright noted that this distributive justice rationale is now reflected within ‘an increasingly developed narrative that communities should share the benefits of energy infrastructure development’ in the government discourse, away from a predominantly local acceptance rationale.⁵⁷

While I agree that a distributional justice framework makes a more compelling case for community benefits than a local acceptance one, I build on this argument to add a procedural dimension to it. I contend that, by framing the provision of community benefits from wind energy projects as a matter of justice, these mechanisms reveal not only a potential for equitable and fair distribution of costs and benefits between the developer and the local community (i.e. distributive justice), but also an opportunity to engage the public in decisions about how such distribution might occur (i.e. procedural justice), locating this process within a deliberative-participatory model of public engagement.

The procedural justice rationale for participation in decision-making on wind farms development have been widely discussed in the literature, as explained earlier in the thesis.⁵⁸ However, the procedural justice implications of community benefits provision are less explored.⁵⁹ My main point here is that as a ‘social justice obligation’, the provision of community benefits requires a more careful consideration of the procedural opportunities for the lay public to participate in the decision-making related the benefit package.⁶⁰ This procedural justice dimension imposes a recognition of the potential for participation within decisions associated with their design and management, which I call the “participatory potential of community benefits”.

A focus on community participation is not new in the context of benefit sharing.⁶¹ The importance of a public engagement process has also been stressed in the specific context of decisions on community benefits from wind energy projects. As Aitken and colleagues point out, ‘community benefits have the potential to have empowering effects if they are facilitated through community-led processes and/or if their impacts lead to broader positive impacts for communities (such as building social

⁵⁷ Cowell and Devine-Wright (n 16) 507. Although this might be less obvious in the developers’ discourse where CSR and local acceptance rationales might still be dominant, as I explain in section 5 below.

⁵⁸ See in particular chapter 3, section 5. See further Aitken, Haggett and Rudolph (n 33).

⁵⁹ Rudolph, Haggett and Aitken (n 6) arguing that ‘[c]ommunity benefits represent an opportunity to realise distributive justice addressing unequal impacts of energy developments, procedural justice through participation of communities in planning operation and governance of community benefits and recognitional justice in both processes and outcomes’ (at 106) and Aitken (n 22).

⁶⁰ Cowell, Bristow and Munday (n 21) 32.

⁶¹ For a review, Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016); Elisa Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law* 353.

capital or capacities)'.⁶² This is an important way of seeing the value of public participation not only within the regulatory decision-making for siting decisions, but also on decisions related to its implementation. As part of the ongoing engagement with the local community, Rudolph and colleagues claim that 'developers should be urged to consider, reveal, discuss, and justify openly what is achievable and expectable in terms of community benefits when engaging with the local communities'.⁶³ In this respect, benefits that are superficially oriented to achieving local acceptance fall short of ensuring a wider public engagement, and fails to recognise this "participatory potential" and the scope for deliberation in this context.⁶⁴

The "participatory potential" of community benefits puts the local community back at the centre of the decision on community benefits by emphasising its role in the decision-making process. This is important as the re-localisation, CSR, host-recognition and local acceptance rationales all tend to be unilaterally framed from the perspective of the developer that voluntarily grants the benefits to the community. Within these justifications, the developer is the "master of the discourse" on community benefits and, because of the benefit offer being voluntary, can unilaterally shape their objectives. In contrast, a focus on the participatory potential of community benefits within a conception of procedural justice offers the possibility to rebalance the power relationship between the developer and the community. It not only frames the provision of the benefits as a 'social obligation', but it also makes the decision-making around them accessible to the community.⁶⁵ By acknowledging such "participatory potential", local communities have an opportunity to have their voices heard beyond the consent process to express their concerns and expectations in terms of types and distribution of the benefits. This potential can open up an additional space for participation beyond the limits of the formal scope for public consultation in the consenting process, discussed earlier in the thesis.

Discussing the design and eligibility criteria for the package in a participatory process also offers an opportunity to address the boundaries of the definition of "recipient community" and construct it together with the people affected by the project. It might help change the focus of the narrative on community benefits from one focused on passive 'recipients' to one focused on 'active citizens'.⁶⁶

⁶² See Aitken, Haggett and Rudolph (n 33) 570. However, the extent to which community benefits have such empowering effects remains debatable. See Marianna Markantoni and Mhairi Aitken, 'Getting Low-carbon Governance Right: Learning from Actors Involved in Community Benefits' (2016) 21 *Local Environment* 969.

⁶³ Rudolph, Haggett and Aitken (n 11) 15-16.

⁶⁴ *ibid* at 15.

⁶⁵ Cowell, Bristow and Munday (n 21) 32.

⁶⁶ Cowell and Devine-Wright (n 16) 513.

Participation in this context allows community benefits schemes to “fit” with the local context and expectations, and re-open some of the issues that might not have found space within the consent process.⁶⁷ This space could be seen as a second chance – not a second best – for the lay public to influence decisions. Acknowledging the participatory potential of community benefits is a step to reframe the practice of achieving public acceptance into the one of public participation through a justice discourse.

While the participatory potential of community mechanisms might be conceptually solid, its operationalisation remains tricky in practice. Primarily this is because, unlike public participation in consenting decisions, there is no legal right to participate in decisions associated with the developer-led voluntary benefits.⁶⁸ This is linked to the voluntary nature of the benefit offer. While the community might reasonably expect to be consulted on the benefit provision, the developer is not compelled to run a public consultation, other than perhaps for reasons of good corporate practice and strategic CSR. As I will explain in the case for the Rampion Community Benefit Fund (below), developers might prefer engaging with other actors (e.g. local community “experts” or other intermediaries) to discuss what might “fit” best with a particular community, rather than start another – potentially conflictual – engagement process, in addition to the public consultation in the consenting process. It is to address these challenges that in section 7 below, I suggest that legal reform is necessary to institutionalise the provision of community benefits with respect to major energy infrastructure, alongside a mandatory consultation process. Of course, an institutionalised process is not a perfect answer. As this thesis has shown with respect to the regulatory decision-making for consent of wind energy NSIPs, the provision of a legally guaranteed procedural space for participation does not guarantee substantive influence. And as with views on the project itself, deliberative consensus within the community on how to allocate and manage community benefits funds ‘may never be fully possible’.⁶⁹

For the time being, the UK government’s response to the participatory challenges associated with community benefit provision with respect to wind farms has been by way of developing best practice policy guidance for community benefits only with respect to onshore infrastructure, which I discuss next.

⁶⁷ Armeni (n 4).

⁶⁸ See discussion in chapter 4 above.

⁶⁹ Aitken (n 22) 6073.

4. Policy Guidance for Community Benefits from Wind Farms

In England, two main factors shape the policy approach to community benefits provision with respect to wind energy infrastructure, affecting the types of benefits used by developers and how they might be perceived by the public.

The first factor relates to the characteristics of the UK wind energy market. This market features predominantly large energy companies with few – or no - connection with local communities.⁷⁰ This is mostly due to the system of financial support to investments in large-scale renewables, which has generally kept small operators outside the UK market, because of high entry costs and risks associated with compliance.⁷¹ This has resulted in a preference for providing benefits in the form of large community funds, rather than other, more inclusive, community-based types of benefits.⁷²

The second factor is the focus of discussion of community benefits on onshore developments only.⁷³ This might be linked to the enduring assumption that onshore developments entail a more significant impact on the hosting community, than offshore projects.⁷⁴ This argument builds once again on the – contested - connection between proximity and people's attitude towards an infrastructure as the main aspect of social acceptance or opposition. As reiterated several times thus far and shown in the case studies above, this approach overlooks the complex dynamics of public acceptance.⁷⁵ This emphasis on community benefits with respect to onshore developments is reflected in the scope of the industry-voluntary protocol on community benefits for

⁷⁰ Strachan and Jones (n 12).

⁷¹ This was primarily based on the Renewables Obligation (RO), which placed an obligation on licensed electricity suppliers in the UK to source a set proportion of their electricity from renewable energy. The RO closed in 2017 as part of the Electricity Market Reform (ERM), although it remains applicable to existing participants until 2037. For new participants, the RO is replaced by a Contract-for-Difference scheme. See, House of Commons, 'Energy: The Renewables Obligation' (Briefing Paper No 05870, 22 July 2016).

⁷² Scotland is an exception here. See among others, Charles Warren and Malcom McFadyen, 'Does Community Ownership Affect Public Attitudes To Wind Energy? A Case Study From South-West Scotland' (201) 27 Land Use Policy 204.

⁷³ Devine-Wright (n 17) and Strachan and Jones (n 12). This focus is reflected in the literature: e.g. Aitken (n 22); Cowell, Bristow and Munday (n 8) Munday, Bristow and Cowell (9); Walker, Russel and Kurz (n 49).

⁷⁴ Devine-Wright (n 17).

⁷⁵ See discussion in chapter 3 above, in particular: Patrick Devine-Wright, 'Reconsidering Public Acceptance of Renewable Energy Technologies; A Critical Review' in Michael Grubb, Tooraj Jamasb and Michael G Pollitt (eds), *Delivering A Low-Carbon Electricity System – Technologies, Economics and Policy* (CUP 2008); Rolf Wüstenhagen, Maarten Wolsink and Mary Jean Burer, 'Social Acceptance of Renewable Energy Innovation: An Introduction to the Concept' (2007) 35 Energy Policy 2683; Patrick Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 Wind Energy 125.

onshore wind energy infrastructure, as well as on the UK Government guidance on community benefits from onshore wind farms. In this section, I focus on the latter.⁷⁶

In 2014, the UK Department of Energy and Climate Change (DECC) published a Best Practice Guidance on Community Benefits from Onshore Wind Developments, setting principles and community engagement best practices for designing and managing these schemes in England.⁷⁷ This Guidance uncritically defines the community as ‘community of locality’ and gives examples of modes of delivery of community benefits from onshore wind energy developments (in particular community benefit funds and benefit-in-kind).⁷⁸ It conceptualises the key principles intended to drive the provision of the benefits and the role of participatory practices. The document recommends that the offer of benefits from onshore wind energy projects is ‘timely, transparent, constructive, inclusive, fair and unconditional’.⁷⁹ These are essential principles in theory, but their implementation in practice is challenging, especially because of the interaction of community benefits with the planning process. I return to some of these principles in my proposal for a new institutionalised approach to participation around community benefits (section 6 below).

With respect to the principle of *timely* provision, the guidance states that ‘[a]ll parties should consider and communicate how they can contribute to the process of providing community benefits in a timely fashion. Developers should state their approach to community benefits at the point that details of the proposed development are made public, to allow the community time to consider how and when they wish to engage in negotiations’.⁸⁰ From the developer’s perspective, the timely communication of the details of the package is tricky. Devine-Wright points out that the details of the benefit offer ‘could not be easily communicated to the local residents, since these would not be known with any certainty until the project became operational, and because of the status of the community package outside the UK planning

⁷⁶ RenewableUK (n 23). According to this Protocol, developers of onshore wind farms in England commit to provide ‘no less than £5,000 per MW per year or benefits-in-kind to an equivalent value. The annual contribution (or equivalent) will be indexed for the operational lifetime of the project’ [2]. No comparable protocol is available for offshore wind energy infrastructure.

⁷⁷ DECC, *Community Benefits from Onshore Wind Developments: Best Practice Guidance for England* (October 2014) (hereinafter “DECC Guidance”). The Guidance makes no distinction between large or small scale projects for the purpose of community benefits. As of September 2019, the UK government has given no indication that a comparable guidance for community benefits with respect to large offshore wind energy projects in England is being developed or planned. Cf Scottish Government, ‘Good Practice Principles for Community Benefits from Offshore Renewable Energy Developments’ Consultation (November 2018). See also Rudolph, Haggett and Aikten (n 11).

⁷⁸ *ibid* 8 (these are distinct from socio-economic benefits (e.g. job creation and training) and material benefits (e.g. improved infrastructure), which ‘will be considered as part of any planning application for the development and will be determined by local planning authorities’ and are not covered by the Guidance [8]).

⁷⁹ *ibid* 13.

⁸⁰ *ibid*.

procedures'.⁸¹ The timing for announcing the content of the benefit has also an unclear impact on how the community might perceive the reasons for providing the benefits and what this mechanism can actually achieve.⁸² This is because discussing community benefits within the consenting process might give the (false) impression to the community that this mechanism is actually a material consideration for the decision, serving a local acceptance rationale. At the same time, presenting a benefit package after the planning decision has been made could be perceived as compensation for disproportionate impact, with little ability for the public to influence the decision on community benefits.⁸³ However, the timing of the benefit offer seems to be irrelevant vis-à-vis the presence and intensity of “bribery” perceptions. There is always a risk of “bribery” allegations being brought up, regardless of whether the benefit offer is made public before and after the planning decision.⁸⁴

Concerns about timing are linked to the call for **transparency** in the establishment of community benefits packages. It is generally rather difficult for the community to have a transparent picture of what is being offered, especially if the developer does not fully engage the community in decisions about the package on offer.⁸⁵ Transparency is framed in the Guidance as ‘a priority in both establishing and administering community benefit schemes for all parties involved’.⁸⁶ The Guidance then clarifies that ‘[d]etails of community benefit packages agreed should be included on the English Community Benefit Register, once available, by both developers and fund administrators’.⁸⁷ The Wind Energy Community Benefit Register for England was established in 2013. It was conceived as a post-announcement repository of community benefits offered, rather than a transparency tool to engage the community in the decision on benefits. Irrespective of this limit, by 2018 the Register was no longer active and there is no indication of whether it will be replaced by an equivalent, or perhaps more transparency-oriented, tool.⁸⁸ Both the absence of detail on how transparency can be achieved, and the failure of the Register, emphasise the point made by Cass and colleagues in 2010 that ‘despite some attempts at formalization

⁸¹ Devine-Wright (n 17) 207.

⁸² Cass, Walker and Devine-Wright (n 16).

⁸³ Cowell, Bristow and Munday (n 8).

⁸⁴ Strachan and Jones (n 12) 188.

⁸⁵ Kerr, Johnson and Weir (n 27). On transparency see also Aitken (n 22); Rudolph, Haggett and Aitken (n 6).

⁸⁶ DECC Guidance (n 77) 14.

⁸⁷ *Ibid.*

⁸⁸ The English Register of Community Benefits and Engagement was archived on 11 March 2018

(<https://webarchive.nationalarchives.gov.uk/20180311170351/http://www.communitybenefitsregister.org/> accessed 26 June 2019). A Community Benefit Register is available in Scotland (<https://www.localenergy.scot/projects-and-case-studies/searchable-register-of-community-benefits/> accessed 28 June 2019). A Register was launched in Wales in April 2014, but the page cannot be found.

through the production of guidance documents from government, little is currently known about the practices of provision and, in particular, about the consequences which then follow for local communities'.⁸⁹

The indication that the establishment of the community benefits should be '**constructive**' is also obscure.⁹⁰ By constructive engagement, the Guidance means that '[a]ll parties involved should engage in a positive manner and aim to create and strengthen relationships based on mutual trust. All participants should focus on creating a positive legacy which generates tangible benefits in the area local to the development'.⁹¹ From a generic perspective, this reference to 'constructive engagement' might simply mean that all actors should act in good faith with the view of reaching an agreed and beneficial outcome. And this is arguably the aim of any developer-community relationship. The intrinsically uneven position of power between large energy companies and the community impacted by the project, and its multiple voices, is one hurdle to achieving such objective that has been discussed in the literature.⁹² But what seems to be more of a problem is the lack of any state body mediating between the different actors. Being an entirely voluntary action outside the planning law system, community benefits are left to the negotiating capacity of the actors involved. As explained in the case of the Rampion project, the role of intermediaries – such as FLOWW, the liaison officers or local charities with regard to community benefits (discussed below) – is interesting, although relatively little explored in the literature.⁹³ The reference to 'mutual trust' is also challenging, as trust between those involved in a renewable energy project is an important factor in community attitude towards renewable energy infrastructure. It is, however, context and project specific, and making assumptions about its existence is impossible.⁹⁴

Of all the principles outlined in the guidance, **fairness and inclusiveness** are key for those concerned with the space for participation in decision on the benefits schemes and their procedural justice rationale. To enable inclusiveness, the Guidance clarifies that:

⁸⁹ Cass, Walker and Devine-Wright (n 16) 257-258.

⁹⁰ DECC Guidance (n 77) 14.

⁹¹ *ibid.*

⁹² on power dynamics in this field, Kerr, Johnson and Weir (n 27) and Cowell, Bristow and Munday (n 8) noting that '[t]he justice rationale for community benefits] also raises questions about whether just outcomes can be achieved through bilateral negotiation between what are often large corporations and small rural communities, given the inequalities of power and resources between them' at 554.

⁹³ Devine-Wright (n 17) 194.

13. ⁹⁴ See Cass, Walker and Devine-Wright (n 16) and Cowell, Bristow and Munday (n 8). In a different context, Gordon Walker and others, 'Trust and Community: Exploring the Meaning Contexts and Dynamics of Community Renewable Energy' (2010) 38 Energy Policy 2655.

'[a]ll parties should look to involve a wide range of local stakeholders and help to identify and engage people in the community. Developers should follow best practice engagement techniques set out in Community Engagement for Onshore Wind Developments: Best Practice Guidance (2014) in an attempt to include the full range of potential stakeholders. They should apply consistency in their approach to engagement and should cooperate with other developers in an area, where appropriate, to enable better strategic outcomes'.⁹⁵

This approach to inclusiveness is a clear message to developers that the local community is expected to be involved in identifying the relevant people to engage, despite the lack of legal obligation to consult. However, it assumes that the community will be defined in terms of locality. The reference to the best practice for engagement is useful, but not community benefit-specific or focused on offshore wind energy developments. The Guidance states that '[f]air and inclusive engagement principles are supported by academic research pointing out the importance of justice (both procedural and distributive) as a factor that influences social acceptance of wind energy'.⁹⁶ While this reference locates community benefits provision within a justice framework, it gives a simplistic account of the relationship between dimensions of justice, participation and social acceptance.⁹⁷ This approach also emerged in the consultation documents for the Guidance, where public engagement was viewed as a tool 'to ultimately help increase social acceptance of the project'.⁹⁸

Finally, the point about making community benefits provision '**unconditional**' signifies that regardless of the role of an individual in the negotiation of community benefits, he or she will retain the right to engage and oppose the development through planning channels.⁹⁹

The Guidance gives generic suggestions on how the public should be engaged in decisions on the design and management of the benefits. During the preparatory phase, the community should consider 'how a wind energy development could integrate with the aspirations of the community' and 'set out those aspirations in a plan which could inform how community funds in the area might be used'.¹⁰⁰ The local community here potentially has a leading role, as it should start mobilising and informing people about the projects and about how to achieve the community's

⁹⁵ DECC Guidance (n 77) 14.

⁹⁶ *ibid* 13 (references omitted).

⁹⁷ Armeni (n 4) 430. See discussion in chapter 1, section 5 and in chapter 3, section 3.4 above.

⁹⁸ DECC, *Onshore Wind – Call for Evidence, Part A- Community Engagement and Benefits* (September 2012) [38].

⁹⁹ DECC Guidance (n 77) 18.

¹⁰⁰ *ibid* 20 and 24.

aspirations. The developer at this stage must clarify its policy on community benefits, who is engaged and at what level, and provide information about the proposed benefit package. But the scope for community participation remains entirely shaped by the developer, as the Guidance is not particularly forceful in developing these packages' "participatory potential". However, it recognises that in this phase, the broader parameters of the benefits should be discussed, covering forms, geographical area, who should be involved in the negotiation and how the package might work. This is where a deeper engagement exercise should be undertaken, based on public and open communication. Should the project be approved, the engagement with the community on the benefit offer continues in the post-consent phase, but no indication on how this should be run is given in the Guidance.¹⁰¹

As long as no equivalent guidance is available for offshore wind energy development, the 2014 Guidance sets a valuable, although simplistic, benchmark to assess the scope for participation in decisions on community benefits. In section 6, I argue that it could constitute the basis for a potential offshore-specific best practice guidance.

5. The Rampion Community Benefit Package

Having illustrated the (limited) policy framework embedded in the 2014 Guidance, this section engages with the developers' practice with community benefits, describing the community benefits package offered with respect to the Rampion Offshore Wind Farm. I first describe the benefit package (sub-section 5.1) and then focus on the role of a local intermediary engaged in its disbursement (subsection 5.2).

5.1. The Benefit Package

Throughout the local engagement process and public communications events, the Rampion project was always presented to the public as an opportunity. The developer, E.ON, emphasised that the project will lead to the generation of 1,366 GWh of power output from 'home grown' sustainable energy sources to supply the equivalent of almost 350,000 homes per year (i.e. around half the residential homes in Sussex).¹⁰² From a global perspective, the project's climate change mitigation potential was said to

¹⁰¹ Armeni (n 4) 430-431.

¹⁰² Rampion Offshore Wind, Benefits of Rampion <<https://www.rampionoffshore.com/environment/benefits/>> accessed 23 June 2019.

amount to around 600,000 tonnes of CO₂ per year.¹⁰³ Rampion is also expected to generate 750 jobs in construction at its peak, providing opportunities for local suppliers and approximately 60 full time jobs across the project lifetime of 20-25 years.¹⁰⁴ These are socio-economic benefits that were discussed during the consenting process and were considered in the planning examination.

In addition to the benefits directly generated by the project, the developer also offered a Community Benefit Package (CBP). The rationale for providing it was 'to be a good neighbour by playing an active and supporting role, and being of benefit, to the local communities in which it works and impacts' (i.e. following the CSR rationale).¹⁰⁵ The Rampion CBP was announced in November 2017, two years after the application was accepted by the Examining Authority and when construction work had already started and all turbines had already been installed.¹⁰⁶ The Package is composed of a financial contribution and the establishment of a visitors centre on the Sussex Coast. The financial contribution amounts to £4 million, structured by three elements: a £100,000 donation to the local Royal National Lifeboat Institution (RNLI), a charity engaged in lifesaving at sea; £800,000 investment in a Rampion Visitor Centre and £3.1 million Rampion Fund for local projects. The recipient community with respect to the Rampion Fund is defined as 'organisations working for the benefit of people of Sussex' in an area spanning 'from Littlehampton Harbour in the west, to Beachy Head in the east and up to the A272 near Twineham in the north close to the wind farm's onshore substation'.¹⁰⁷ The Rampion Fund includes an endowment fund for the long-term benefit of Sussex communities and ring-fenced amounts for East Worthing and Lancing Communities, the communities around the electrical substation near Twineham and sea-user organisations.¹⁰⁸ The Fund is administered by Sussex Community Foundation, a local charity working with local grants givers for Sussex (which I further discuss below).

Eligible projects are projects run by - primarily non-profit - organisations around three main themes: environmental protection and ecology; climate change and energy; and improved community facilities, with priority being given to 'projects that also help to tackle disadvantage and improve people's lives and well-being'.¹⁰⁹ However, the

¹⁰³ Ibid.

¹⁰⁴ Rampion Offshore Wind, Rampion Community Benefit Launch – November 2017 <<https://www.rampionoffshore.com/app/uploads/2017/11/Rampion-Community-Benefit-Launch-presentation.pdf>> accessed 21 July 2018.

¹⁰⁵ Rampion Offshore Wind, Rampion Community Benefit Fund <<https://www.rampionoffshore.com/community/benefit-fund/>> accessed 10 May 2019.

¹⁰⁶ The last turbine was installed in September 2017.

¹⁰⁷ Rampion Offshore Wind (n 104).

¹⁰⁸ Sussex Community Foundation, Rampion Fund at Sussex Community Foundation <<https://sussexgiving.org.uk/wp-content/uploads/2013/09/ROW-Guidance-Sheet.pdf>> accessed 21 July 2018

¹⁰⁹ *ibid* 1.

developer remains flexible and this list is not exhaustive. In the first round, funded projects included: the design, installation and maintenance of the solar panels system for a Veterans' nursing care and rehabilitation home; the replacement and equipment of a rescue boat for disabled sailors; the launch of a city-central community kitchen; the purchase of an electric van for an organisation working on reducing fuel poverty; the creation of community woodland and gardens; support for a project on seaweed harvesting and farming; funding for an Education Officer to run the new World Cetacean Alliance (WCA) visitor centre; funding for an elderly day club and repair of the scout hut.¹¹⁰

The Rampion Visitor Centre aims to 'tell the story of Rampion from a technical, environmental and community perspective; raise awareness about climate change, renewable energy, offshore wind and The Living Coast Biosphere designation', a UNESCO World Biosphere Region based upon the chalk block of the South Downs.¹¹¹ It will be established in the refurbished seafront arches in Brighton and is expected to open in Autumn 2019.¹¹² The centre is intended to engage with local schools and colleges and be freely accessible to residents, businesses and visitors.

5.2. Intermediary or "Expert"? The Role of Sussex Community Foundation

The Rampion Community Benefit Fund is disbursed to local community projects by the Sussex Community Foundation (SCF). This charity organization was founded in 2006 by the Duke of Richmond and Gordon and a number of donors.¹¹³ The aim of the charity is to build a substantial, permanent fund to support charities and communities across Sussex. The Foundation's vision is 'to make it easier for local people and companies to give to local communities'.¹¹⁴ Since its foundation, SCF has distributed £14 million in grants to over 2000 community groups. SCF operates as an intermediary between E.ON and the local recipients for the Rampion Community Benefit Fund. Its role is to select eligible projects and to disburse the funding.

Subject to meeting the eligibility criteria decided by EON and SCF (see below), applications to the Fund are assessed and presented to the Rampion Fund Panel for

¹¹⁰ See the full list of funded projects at <<https://sussexgiving.org.uk/400000-to-sussex-communities/>> accessed 21 July 2018.

¹¹¹ Ibid

¹¹² See information on Rampion Visitor Centre at <<https://www.rampionoffshore.com/community/visitor-centre/>> accessed 29 August 2019 (When I accessed the website on 21 July 2018, the centre was expected to open at the end of 2018. When I accessed it again on 10 May 2019, it was expected to open in Summer 2019).

¹¹³ i.e. The American Express Foundation, BAA Communities Trust, Barclays, The Batty Charitable Trust, The Ernest Kleinwort Charitable Trust, The Henry Smith Charity, West Sussex County Council, and 11 individual donors (unnamed).

¹¹⁴ Sussex Community Foundation, Our History <<https://sussexgiving.org.uk/about-sussex-community-foundation/our-history/>> accessed on 28 June 2019).

consideration. The Panel is composed by the Sussex Community Foundation trustees and representatives of Rampion Offshore Wind Ltd. The 13 SCF trustees are individuals from very different backgrounds, most – but not all – of them connected to the Sussex area and engaged in charitable work, representing ‘the breadth of Sussex and a wide range of skills and experience’.¹¹⁵ The decision on funding award is taken by the Foundation’s Trustees.

As I explained in chapter 1, there is a lack of public information about the scope for public participation of the community in the decision-making about the Rampion Fund, either in respect of the decision on the constitution of the Fund, or in the individual decisions on the disbursement of the Fund. To try to understand the situation a little better, I exchanged emails with the ‘Development and Stakeholder Manager’ for the Rampion Offshore Wind project. I asked a) whether E.ON had conducted a specific public consultation about the details of the Fund before taking financial decision on it and b) whether SCF was involved in the decision-making process’ on how the fund is set up. The developer explained:

‘The CBF [Community Benefit Fund] is a completely voluntary undertaking and is not connected in any way to the formal consultation regarding the wind farm proposals, nor the consent award or requirements of the consent. As a result, Rampion liaised with the *local experts on community funds, community needs and criteria for qualifying community organisations* (SCF). Together with our *own knowledge* of the Rampion project geography, construction and community interests, coupled with our own interests to see some synergy with the wind farm, e.g. an emphasis on energy conservation and renewable energy in community projects, we were able to discuss and agree the area(s) of benefit and eligibility criteria’.¹¹⁶

This was an informal exchange and of course we can only draw very limited conclusions from it. However, the explanation does shed some light on the developer’s approach to public participation in the decision-making regarding community benefits.

First, although public engagement is generally good practice in this context (e.g. based the 2014 best practice guidance), the developer seems to understand public participation within the limits of the legal requirements of the planning consent process. In line with a CSR rationale, the Rampion Community Benefit Fund is a “gift” to the public that does not (formally or informally) involve wider participation in the decision

¹¹⁵ Sussex Community Foundation, Meet the Trustees <<https://sussexgiving.org.uk/about-sussex-community-foundation/our-people/scf-trustees/>> accessed 28 June 2019.

¹¹⁶ Email communication from Chris Tomlison, (Development & Stakeholder Manager, Rampion Offshore Wind), 20 July 2018 (consent to use this communication in this thesis was obtained on 3 May 2019) (emphasis added).

associated with its design or management. The idea of the community as passive recipient of the benefit in a CSR logic is evident here.

Second, the developer's response gives useful insights on the role of SCF. SCF does seem to have been involved in the design of the Fund, as well as, as explained above, acting as an intermediary between the developer and applicants by assessing the eligibility of proposed projects, and disbursing the funding, once the Fund was set up. The recourse to intermediaries, such as local groups or local charities, to manage community benefits funds is not uncommon. Intermediaries can help developers build local ties. But the outcome of this synergy between operators and intermediaries in terms of public support and trust is 'by no means guaranteed'.¹¹⁷ Devine-Wright notes that:

'[...] there is at least prima facie evidence that employing a locally-situated intermediary to play an active role in community affairs, and distributing benefits to specific stakeholders rather than to "the community" at large, would seem to represent a strategy more likely to foster public acceptance of energy project proposals. However, [...] it is also possible that such actions could be counter-productive and further entrench hostility towards particular technologies and development organisations'.¹¹⁸

Finally, while the recourse to SCF as local intermediary in the disbursement of the Fund might be straightforward, the qualification of SCF as 'local experts on community funds, community needs and criteria for qualifying community organisations' by the developer is potentially problematic. This is because, while the technical assessment of the compliance with eligibility criteria could relatively easily be delegated to an intermediary, questions about 'community needs and criteria for qualifying community organisations', i.e. setting those criteria, are precisely the type of decisions requiring public engagement of the local community as 'active citizens'.¹¹⁹ These are not technical questions for 'community experts', but rather questions about the values, interests and expectations of a particular 'set of people who are brought together by choice or force of circumstance, and who have learned to live, work and play together'.¹²⁰

¹¹⁷ *ibid* 195.

¹¹⁸ Devine-Wright (n 17) 211 (who here uses the language of 'public acceptance' to mean genuine acceptance, rather than passive acquiescence).

¹¹⁹ Cowell and Devine-Wright (n 16).

¹²⁰ Valerie Brown and Jennifer Pitcher, 'Linking Community and Governments: Islands and Beaches' in Meg Keen, Valerie Brown and Rob Dyball (eds), *Social Learning in Environmental Management: Towards a Sustainable Future* (Earthscan, 2005) 124.

In the case of the Rampion Community Benefit Fund, the final decision on these important questions was supported by EON's "professional knowledge" (i.e. 'knowledge of the Rampion project geography, construction and community interests'¹²¹) and SCF's "local community knowledge" (i.e. knowledge 'of community funds, community needs and criteria for qualifying community organisations'¹²²). There appears to have been no reliance on the lay public situated knowledge in this context, providing a clear indication of the lack of recognition and implementation of the "participatory potential of community benefits" in this case.

The recourse to SCF's expertise of the local community – whatever this might mean - to effectively define who the recipients are in geographic (i.e. areas of disbursement) and substantive (i.e. eligibility criteria) terms is potentially disempowering of the community. This is because these are crucial decisions determining the effectiveness of the benefit and its ability to generate public support. Yet, the public had not been involved in this decision. Information is limited in order to draw further conclusions on the type of expertise of the SCF trustees and their representativeness of the local community, however defined. How the final decision on eligibility criteria and area of disbursement has been reached between E.ON and the SCF is also unclear. As others have mentioned, the role of intermediaries in public engagement with offshore wind energy is an area where further research is needed, including on their blurred nature as "experts".¹²³

Two main observations can be made here. First, the absence of public engagement in relation to the design and management of the Fund is a significant, although hardly surprising, finding. Importantly, a rejection of community's participation in the decision-making about the design and criteria for disbursement of the Rampion Community Benefit Fund dismisses the "participatory potential" of the community benefit package under a conception of procedural justice.

Secondly, although it does not constitute an example of public engagement, E.ON's reliance on SCF's expert knowledge and its professional knowledge might denote an attitude of the developer towards using this decision-making space to pursue (passive) local acceptance of decisions on community benefits. This attitude is validated by a limitation of the opportunities for public participation.

The relationship between a failure to pursue the "participatory potential" of community benefits, and an attitude of passive local acceptance is nuanced, but relevant to the question of whether community benefits could provide an additional space for public engagement. The failure may reinforce a passive acceptance model,

¹²¹ n 116.

¹²² *ibid.*

¹²³ Devine-Wright (n 17) 211 also noting that this should be expanded to other renewable energy technologies.

in the sense that the more developers dismiss the participatory potential of community benefits, the more we might find a passive acceptance model. In the next section, I focus on the extent to which a legal process could help operationalise the participatory potential of community benefits and reverse this trend.

6. Operationalising the Participatory Potential of Community Benefits: A Proposal for Legal Reform

So far, I have argued that, from a conception of procedural justice, community benefits with respect to wind energy infrastructure show a participatory potential. However, the absence of a policy for large-scale offshore infrastructure, the content of the policy for onshore infrastructure, and my case study all suggest that the English experience is unable to effectively and consistently operationalise such potential. Primarily this is because local community's participation is not factored into the process of deciding about the design and management of community benefits. Being an entirely voluntary undertaking, the decision on whether to offer community benefits - and to what extent to involve the local community on the details of the benefit package - is left to the developer. Aitken argues that 'lack of an institutionalised approach, and the voluntary nature of the community benefits in the UK has led to [community benefits] becoming a problematic aspect of wind power development'.¹²⁴

Cowell and colleagues explained that developers tend to perceive the voluntary nature of the provision of benefits and the freedom to negotiate their level, form and distribution as a prerogative of the developer.¹²⁵ Perhaps this explains why any attempt to improve current practice through some form of institutionalisation has been rejected by developers, requiring strong action within the planning system.

Based on these findings, in this section I offer some suggestions on how the "participatory potential" of community benefits could be enhanced in practice. There is an emerging scholarly debate on the possibility of institutionalising community benefits to ensure that they contribute positively to public acceptance of the wind energy infrastructure, primarily with a focus on onshore.¹²⁶ However, little research and policy work has been so far conducted on the details of a potential legal reform to that effect.

Here I argue that, in order to operationalise the "participatory potential" of community benefits for offshore wind energy NSIPs, a mandatory requirement for the developer to actively consider whether to provide some kind of community benefit (and

¹²⁴ Aitken (n 22).

¹²⁵ Cowell, Bristow and Munday (n 8) 553.

¹²⁶ E.g. Cowell, Bristow and Munday (n 8); Aitken (n 22); Cass, Walker and Devine-Wright (n 16); Walker, Russel and Kurz (n 49).

if so, to disburse it) should be introduced, coupled with a legal obligation to consult the local community on its design, distribution, and who should be involved in this process. As I argued throughout the thesis, I recognise that procedural rights to participate offer a limited guarantee of substantive influence. In this case, however, the establishment of an institutionalised process would be a positive, although imperfect, step (section 6.1). A participatory process for decision-making on community benefits could be enacted under the NSIP regime of the Planning Act 2008. This proposal requires us to rethink the relationship between community benefits and the development consent process. This is because while community benefits are “formally irrelevant” to planning decisions (i.e. they are not a material consideration), they are nonetheless “informally relevant” in the sense that if they are effective, certain objections will fade away. As a result, I suggest that while the content of the package should remain outside the considerations of the Examining Authority (ExA) for approving or rejecting development consent, the process leading to its agreement should be incorporated within the planning process (section 6.2). While I focus on offshore wind energy NSIPs here, this proposal can also possibly extend to community benefits with respect to other types of NSIPs developments.¹²⁷

6.1. The Process

I maintain that in order to operationalise the participatory potential of community benefits, a mandatory participatory process in law is needed. This will only be possible if at least the active consideration of whether to provide community benefits with respect to major offshore wind energy infrastructure is mandatory. Public consultation can in turn then be required under the Planning Act 2008.

I propose for the participatory decision-making process on the community benefit offer to be incorporated within the pre-application phase under the NSIP regime.¹²⁸ As explained in chapter 4, before the application for a major wind farm is formally submitted to the ExA, the developer must inform PINS and carry out a public consultation on the project proposal. A number of statutory consultees, (e.g. Natural England, the Environment Agency and local planning authorities), any relevant person with a right or interest in the land relevant to the proposed project, and the local community must be consulted during this pre-application phase, for which there is no legally prescribed timeframe. The applicant must take into account the responses to

¹²⁷ Cowell and Devine-Wright (n 16) on a wider technology focus.

¹²⁸ Planning Act, s 42. For also, Department for Communities and Local Government (DCLG), *Planning Act 2008: Guidance on the Pre-Application Process* (March 2015).

the consultation and publish the proposal, as well as the Statement of Community Consultation, with the application documents.¹²⁹

Under my proposal, in the pre-application phase, the applicant would be required to consult not only on the project proposal, but also on the consideration of whether to make a community benefit offer, broadening the scope of this mandatory consultation. Under the wording of the Planning Act, a right to participate in this process should be granted to ‘any relevant person with a right or interest in the land relevant to the proposed project, and the local community’.¹³⁰

As for the project proposal, the applicant would be required to consider the responses and publish the community benefit offer with the application documents to PINS. The developer would be required to submit information about the community benefit package, and associated public consultation opportunities, as part of the application.

The advantage of embedding the process within the pre-application phase could be twofold: first, it would allow early public engagement in the definition of the benefit offer. The details of the offer will be known before the examination, so the local community will also know the terms of the “deal”. Second, it will mean that the benefit offer can be defined before the examination formally begins, keeping decisions on the benefits separate from development consent decisions (i.e. not material consideration), although within the same legal framework, as I further explain in the next section.

Within the examination, the ExA will be responsible for verifying that there has been public consultation around a community benefits package, although the content and details of any package would remain outside the scope of the examination for development consent. The consultation on community benefits would be acknowledged as a procedural requirement complied with by the developer and could appear as an appendix to the ExA Report, while it would only become effective should the application be successful.

In combination with the legally mandatory process, an offshore-specific best practice guidance should be produced to support the public consultation on the community benefit offer for offshore wind energy NSIPs. This could be modelled on the 2014 Best Practice Guidance for community benefits from onshore wind farm, although it should be based on a more sensitive consideration of the complex rationales for, and implications of, community benefits.

Of course, this proposal is not a perfect solution to the participatory challenge in decisions on major offshore wind energy infrastructure, especially in light of the limits of a procedural approach to participation, discussed earlier in the thesis. The potential for

¹²⁹ Planning Act, s 49.

¹³⁰ *ibid* ss 42 and 43.

developers to continue to pursue an acceptance model of public engagement does not fade away. However, my point is that the process needs to be right, and that procedural legal rights to participate in decisions associated to community benefits do offer a better chance of public engagement than the current absence of such rights. As part of a legally framed process, rather than a simple policy recommendation – no matter how strong - community benefits ‘might be associated with securing a better deal for community members’.¹³¹

To ensure transparency in the provision and implementation of the community benefit offer, my proposal would imply the publication of the details of the package in a Public Registry for England, as required by the 2014 Best Practice Guidance for Community Benefits from Onshore Wind Farms. This Registry should be reinstated and kept up to date to ensure monitoring and comparability of best practices.

Finally, there have been suggestions that we should move towards standardisation of the type and amount of community benefits with respect to wind energy infrastructure. Standardisation relies on the idea that the benefit contribution should be uniform across projects with the same electricity generating capacity. This is the approach taken by developers of onshore wind farms in England.¹³² Some argue that institutionalisation of community benefits and standardisation of their type and amount should go hand in hand, to avoid the perception that the offer has been more generous in some case than in others.¹³³ But I agree with those who consider standardisation counterproductive as it eliminates flexibility and the possibility to adapt to local specificities.¹³⁴ Standardisation in this context would inevitably limit the scope for participation and the ability to reflect the needs and expectations of the community within the types of benefit offered.¹³⁵ Under my proposal, the type and calculation of the benefit should not be prescriptive. Instead, it should be one of the elements to be defined through the participatory process.

As a participatory process enacted within the planning law framework of the NSIPs, my proposal would necessarily require a rethink of the status of developer-led community benefits within the planning system, as I illustrate next.

¹³¹ Walker, Russel and Kurz (n 49) 64.

¹³² n 76 above.

¹³³ Walker, Russel and Kurz (n 49).

¹³⁴ Rudolph, Haggett and Aitken (n 6).

¹³⁵ Some standardisation is imposed outside England. See John Glasson, ‘Large Energy Projects and Community Benefits Agreements – Some Experience from the UK’ (2017) 65 Environmental Impact Assessment Review 12.

6.2. The Relationship between Community Benefits and Development Consent Process

This proposal for reform poses the immediate question of how to solve the ‘awkward status’ of the community benefits within the planning system, including within the NSIP regime.¹³⁶ This is because, as explained earlier, community benefits are “formally irrelevant” to the planning system, as they are located outside the regulatory decision-making in planning. In law, this is because they do not constitute material consideration for the consent decision. If they were considered material considerations, and necessary ‘to make the development acceptable in planning terms’, they would be introduced as conditions or s 106 agreements.¹³⁷

For planning scholars, one of the main concerns seems to be the perception that developer-led financial benefits constitute “bribery”, such that ‘[t]he practice [of community benefits] threatens to bring the planning system into disrepute’.¹³⁸ Arguably though a perception that the developer “bribes” the local community with a benefit offer is likely to be stronger in connection with a voluntary, developer-centred decision-making process, where participation is limited. As Walker and colleagues have noted, by institutionalising the practice of community benefits, the perception of “bribery” could potentially be prevented.¹³⁹ While a legal process might not be able to fully resolve these conflicts, I argue that by reducing the developer’s discretion in the decisions associated with community benefit provision and catalysing inclusiveness and participation, this perception can be at least diluted.

As a result, by reducing the chances for the benefit to be perceived as a “bribe”, the need to isolate the decision-making process on the benefits from the planning process decreases. This would make the argument for keeping the decision-making of community benefits formally outside the planning system less compelling. I do not go as far as Cass and colleagues, who suggest that community benefits could be formalised as legitimate material considerations in decisions on consent. However, I see a sharp formal/procedural separation between decisions on developer-led benefits and the planning system excessive, and potentially unhelpful from a participatory perspective.

¹³⁶ Strachan and Jones (n 12).

¹³⁷ NPPF [56].

¹³⁸ Paul Miner, ‘Wind Farms: More Respectful and Open Debate Needed, Not Less’ (2009) 10 *Planning Theory and Practice* 535, 537.

¹³⁹ Walker, Russel and Kurz (n 49).

7. Conclusions

In this chapter, I moved away from the consenting process in planning to assess the extent to which community benefits can provide an additional space for participation to address the limitations of participation in planning for wind energy NSIPs in England. Community benefits generate mixed feelings, between those confident in their ability to deal with siting conflicts, and those who see them ill suited to satisfy a loose coalition of interests and expectations. There is no doubt though that community benefits have an increasingly significant role in supporting the transition to more sustainable energy generation.¹⁴⁰ I have argued here that their justification can be framed as a matter of justice, at the crossroad between concerns about distributive and procedural justice claims. Community benefits can respond not only to a need to rebalance distribution of impacts and benefits, but also to improve participation in decisions related to wind energy development outside the regulatory decision-making.

This “participatory potential” of community benefit provision is important as it offers a platform to re-open the dialogue between the developer and the community, which has been substantively limited by technical and policy objectives in the examination process. Institutionalising a participatory decision-making process for community benefits within planning could be seen as a desirable, although imperfect, answer. Of course, as argued by Cass and colleagues, ‘[i]n the end, it may [...] never be possible to change the nature of planning decisions that are linked to localized benefits as intrinsically sensitive and political’.¹⁴¹ But bringing decisions on community benefits within an institutionalised participatory framework might at least help recognise their “participatory potential”. Ultimately, this shows that community benefits are not simply controversial, but can offer an additional space for public engagement in the decisions associated with wind energy development beyond the development consent process in planning. This changed narrative contributes to the idea that ‘in debating how community benefit streams might be best invested, society can contribute to and be involved in setting sustainability goals more generally’.¹⁴²

¹⁴⁰ Susan Owens and Louise Driffill, ‘How to Change Attitudes and Behaviours in the Context of Energy’ (2008) 36 *Energy Policy* 4412.

¹⁴¹ Cass, Walker and Devine-Wright (n 16) 272.

¹⁴² Strachan and Jones (n 12)190.

CONCLUSIONS

1. Introduction

This doctoral thesis engages with the space and influence of public participation in environmental decision-making and planning. My focus has been on the decision-making for major offshore wind energy in England, as an emerging and fascinating field of legal enquiry.¹ First, I am interested in the scope for public participation in the consenting process (chapter 4) and the extent to which participants' concerns are taken into account in the reasoning of the Examining Authority (ExA) (chapters 6 and 7). Second, this thesis looks at the opportunities for participation in decisions concerning developer-led community benefits provision and the possibility to frame it as a participatory process, beyond development consent (chapter 8).

I have discussed two main ideas. The first concerns the distinction between the 'acceptance model' and the 'deliberative-participatory model' of public engagement in decision-making.² These two models depict two very different ways of engaging with people's rationality in this context. I claim that the weight attributed to key factors shaping people's attitude to wind energy infrastructure – i.e. landscape and visual impact; place attachment and fairness of the outcome and of the process – in the decision-making process (so-called "factors of acceptance" in this thesis) determines which model dominates in a particular context.³ The second idea elaborated in this thesis is the "participatory potential" of developer-led, voluntary community benefits with respect to wind energy infrastructure.⁴ This potential is grounded on a conception of procedural justice as the primary rationale for the provision of these benefits.⁵ By

¹ In particular: Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 *Journal of Environmental Law* 33; Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139; Maria Lee, 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 *Legal Studies* 3; Elizabeth Fisher, 'Law and Energy Transition: Wind Turbines and Planning Law in the UK' (2018) 38 *Oxford Journal of Legal Studies* 528.

² Chapter 3 above.

³ Within the vast literature, Patrick Devine-Wright, 'Beyond NIMBYism: Towards An Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 *Wind Energy* 125; Patrick Devine-Wright, 'Reconsidering Public Acceptance of Renewable Energy Technologies: A Critical Review' in Michael Grubb, Tooraj Jamasb and Michael G Pollitt (eds), *Delivering A Low-Carbon Electricity System – Technologies, Economics and Policy* (CUP 2008).

⁴ Chapter 8 above.

⁵ E.g. Mhairi Aitken, 'Wind Power and Community Benefits: Challenges and Opportunities' (2010) 38 *Energy Policy* 6066; David Rudolph, Claire Hagggett and Mhairi Aitken, 'Community

acknowledging their participatory potential, community benefits with respect to wind farms can represent an additional – although imperfect – procedural space for citizens’ participation in decisions associated with the design and management of the benefit package.

This concluding chapter explains my key conclusions. First in section 2, I illustrate how the legal approach to participation in consenting decisions for offshore wind energy Nationally Significant Infrastructure Projects (NSIPs) can be framed as a failure of the deliberative-participatory model in wind energy infrastructure decisions. Building on the literature on participation in this context and the two case studies discussed in the thesis, my finding is that the decision-making process in planning for offshore wind energy NSIPs represents an example of how the acceptance model of public engagement operates in practice. I argue that this model is problematic not only because it limits people’s influence in the decisions, but also because it validates a vision of planning law as a mechanism of persuasion, rather than a catalyst for genuine participation.

The second conclusion of the thesis is that, although conceptually promising from a procedural justice perspective, the “participatory potential” of community benefits is not operationalised in the English legal and policy context for wind energy infrastructure development (section 3). In the case of community benefits with respect to offshore wind energy NSIPs, the lack of policy guidance and absence of legal obligation for the developer to provide community benefits, reinforce the merely voluntary nature of these packages. As such, they do not imply a duty of the developer to consult the community on the design and management of the benefit package. The absence of public engagement opportunities in decisions on community benefits means that there is no formal participatory process within which my acceptance and participatory models can be clearly recognised. However, I suggest that discounting the contribution of local community participation in decisions on community benefits reproduces a passive acceptance logic. It also frames the local community affected by the project simply as passive recipient of a benefit, rather than as a group of ‘active citizens’ able to engage in the decisions.⁶

Having elaborated on these conclusions, this chapter reflects on the limits and opportunities of the legal institutionalisation of a procedural right to participate in

Benefits from Offshore Renewables: The Relationship Between Different Understandings of Impact, Community, and Benefit’ (2017) 36 *Environment and Planning C* 92.

⁶ Richard Cowell and Patrick Devine-Wright, ‘A “Delivery-Democracy Dilemma”? Mapping and Explaining Policy Change for Public Engagement with Energy Infrastructure’ (2018) 20 *Journal of Environmental Policy and Planning* 499, 513.

decisions on major wind energy infrastructure, both within and outside planning.⁷ Undoubtedly, procedural approaches offer an imperfect answer to the density of the lay public's participation and the multiple factors shaping acceptance. Nevertheless, they do constitute an unescapable condition for the lay public to express itself and have their voices taken into account in the decision-making – within or outside the regulatory planning process (section 4). Finally, this chapter concludes this thesis by outlining my thoughts for a future legal research agenda in this field (section 5).

2. Failure of the Participatory Model and Pursuit of Public Acceptance in Planning

The first conclusion from this research is that the legal approach to participation in the consenting process for offshore wind energy NSIPs can be understood as an example of the failure of the deliberative-participatory model of public engagement.

The literature shows how the policy pre-definition of what counts as a “good reason” for the decision effectively limits the ability of the public to influence decisions in this context.⁸ This argument resonated in my case studies of the Rampion Offshore Wind Energy project (chapter 6) and Navitus Bay Wind Park project (chapter 7). In the examination of the Rampion project and of the weight of the Interested Parties' representations within it, the reasoning of the ExA was primarily based on expert knowledge and technical assessment.⁹ The ExA was a diligent agent of policy guidance on what counts as an argument to justify a decision on an application, showing little engagement with lay public situated knowledge and ‘other’ arguments. The ExA here was ultimately guided by the narrative of need and urgency for this infrastructure, as required by the Planning Act 2008.¹⁰ Although carefully considered, the participants' representations expressing concerns or opposition were insufficient to rebut this approach.

In my examination of the Navitus project, I argued that the ExA showed a slightly more sympathetic approach to the experience of landscape presented in the representations, although within very limited policy boundaries.¹¹ This does not necessarily mean that when issues - such as the experiential value of a landscape -

⁷ Maria Lee, ‘The Legal Institutionalisation of Public Participation in the EU Governance of Technology’ in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP 2017).

⁸ In particular, Lee and others 2013 (n 1); Rydin, Lee and Lock (n 1).

⁹ On this point, Maria Lee and others, ‘Techniques of Knowing in Administration: Co-Production, Models, and Conservation Law’ (2018) 45 *Journal of Law and Society* 427.

¹⁰ See Chapter 4 above.

¹¹ See Chapter 7 above.

come into play, a project will automatically be rejected. The way in which the ExA understands “landscape” is still predominantly based on technical, professional and ‘prior institutional knowledge claims’, rather than on lay public knowledge.¹² But I suggested that the case of Navitus demonstrates that, even within the tight boundary of the national policy guidance and expert knowledge, there is some scope for the ExA to (re)interpret its discretion and construct its reasoning for a decision. This is argued by recognising that other arguments (e.g. people’s lived experience and its link with place attachment) are, although not sufficient, at least relevant.

Framing this discussion of the legal and regulatory context of participation through the lenses of my models of acceptance and of deliberative participation allows us to draw some conclusions on the predominant model of engagement in this context. Public engagement here tends to constitute a space for the lay public to passively ‘accept’ decisions based on technical knowledge and expert arguments. Despite its façade of policy concern for bringing people on board (e.g. through the policy shift towards ordinary planning for major onshore wind energy infrastructure), there is little regulatory engagement with the profundity of how people construct and develop their attitudes towards wind energy projects and the factors that shape them.¹³ When participation is used instrumentally as a means to achieve passive acceptance and fast implementation of these projects, we are more likely to end up with an acceptance model where the lay public influence is limited, than with a deliberative-participatory model. This is problematic primarily because, as illustrated in chapter 3, the reasons for people to support or reject infrastructure development are hugely contested and are shaped by multiple factors, which I have called ‘factors of acceptance’ in this thesis.¹⁴ Factors such as landscape and visual impact; place attachment and the perceived fairness of the development outcome and of the decision-making process are crucial examples of ‘factors of acceptance’ that shape how local communities and individual respond to wind energy infrastructure, although arguably not the only ones.

The failure of the participatory model and parallel pursuit of an acceptance model therefore tells us something interesting about the regulatory process in planning for major wind infrastructure in England. Arguably the tension between the participatory requirements under the Planning Act 2008 and the national policy objectives for renewable energy infrastructure, as well as the practice of the ExA, tends to reflect a vision of planning law as persuasion, or indeed acceptance.¹⁵ This vision aligns with a

¹² Maria Lee, ‘Knowledge and Landscape in Wind Energy Planning’ (2017) 37 *Legal Studies* 3.

¹³ See Chapter 3 above.

¹⁴ See n 3.

¹⁵ John Barry and Geraint Ellis, ‘Beyond Consensus? Agonism, Contestation, Republicanism and a Low Carbon Future’ in Patrick Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011).

paradigm of 'decide-announce-defend' in planning.¹⁶ The idea of planning law as persuasion is strictly connected to a framing of public engagement as the pursuit of passive public acceptance of decisions already made. This is in part because a public acceptance model openly challenges the conceptual nature of participation as deliberative, consensus-based public dialogue aimed at reaching better-quality decisions through the value of individual rationalities. In so doing, it tends to re-shape, or potentially even sideline, the role of law away from providing opportunities for such dialogue.¹⁷ A regulatory approach that sees planning law as persuasion and public engagement as pursuing passive public acceptance is problematic not only on procedural and on substantive grounds, but also as it disregards the participatory traction of the planning system.

It is within the conceptualisation of the regulatory process that the role of "factors of acceptance", including but not limited to those discussed in this thesis, becomes important. A deeper understanding and reflection of these factors within the decision-making should be a necessary step to enable genuine participation in planning decisions. This would allow for a more inclusive understanding of people's knowledge and attitudes toward energy infrastructure development to be reflected in the decision to provide the tool for meaningful influence. This move towards a richer definition of relevant arguments certainly requires an effort from the part of all actors involved in the decision-making process.¹⁸ My deliberative-participatory model is primarily a model able to reflect on the multiple "factors of acceptance" and give them weight within the decision-making process. However, this is not necessarily a simple solution. While calls for deliberative participation have been recurrent in the literature,¹⁹ I agree with Devine-Wright that 'it cannot be assumed that deliberative public engagement in renewable energy developments will secure public acceptance. In fact, it may cause the opposite, providing a means for local people to collectively organise and communicate their concerns within an interactive process'.²⁰ However, if we are committed to participation – rather than passive public acceptance - 'where all options are open', we should be ready to, or even perhaps welcome, such scenario as a signal

¹⁶ Maarten Wolsink, 'Planning of Renewable Schemes: Deliberative and Fair Decision-Making on Landscape Issues Instead of Reproachful Accusation of Non-Cooperation' (2007) 35 *Energy Policy* 2692.

¹⁷ Cf Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007) chapter 1 (discussing how the debate on risk decision-making might sideline the role of law).

¹⁸ Lucy Natarajan and others, 'Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation' (2019) 90 *Town Planning Review* 117.

¹⁹ E.g. Susan Owens and Louise Driffill, 'How to Change Attitudes and Behaviours in the Context of Energy' (2008) 36 *Energy Policy* 4412; David Toke, 'Explaining Wind Power Planning Outcomes: Some Findings from a Study in England and Wales' (2005) 33 *Energy Policy* 1527; Derek Bell, Tim Gray and Claire Haggett, 'The "Social Gap" in Wind Farm Siting Decisions: Explanations and Policy Responses' (2005) 14 *Environmental Politics* 460.

²⁰ Devine-Wright 2008 (n 3) 453.

of functioning participatory model of public engagement.²¹ This would align to Brownwill and Inch's view of public participation in planning as 'a contested terrain within which a range of tensions and contradictions create openings and closures which vary over time and space'.²²

3. Community Benefits from Wind Energy Projects as Undeveloped Participatory Space

The second conclusion from this thesis concerns the conceptual nature of developer-led, voluntary community benefits from wind energy projects and the opportunities for public participation in the decision-making on their design and management.²³ In chapter 8, my focus shifted from the consenting process for wind energy NSIPs to their implementation, focusing specifically on community benefits with respect to this infrastructure. This was based on the acknowledgment that calling for enhanced opportunities for participation justifies the exploration of other loci for engagement outside the legal framework.²⁴ I was interested in whether, given the limitations of the regulatory planning process in terms of substantive impact of public participation, community benefits could constitute additional – although inevitably partial - spaces for participation in decisions affecting the local community and their area.

The debate on community benefits is not univocal. Community benefits have been largely questioned for their motives, including their – contested - rationale (to achieve public acceptance of the associated infrastructure).²⁵ While acknowledging these claims, my argument was that these mechanisms do embed a "participatory potential" under a conception of procedural justice.²⁶ When agreed through a participatory process, community benefits can generate an empowering effect for the

²¹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) UNTS 2161, 446, art 6 (4). See also art 6 (2).

²² Susan Brownwill and Andy Inch, 'Framing People and Planning: 50 Years of Debate' (2019) 45 *Built Environment* 7, 23. See also Adrian Smith and Andy Stirling 'Moving Outside or Inside? Objectification and Reflexivity in the Governance of Socio-Technical Systems' (2007) 9 *Journal of Environmental Policy and Planning* 351.

²³ Chapter 8.

²⁴ Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33, 37 (arguing that advocating for greater participation is a point of departure rather than a conclusion).

²⁵ Richard Cowell, Gill Bristow, and Max Munday, 'Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development' (2011) 54 *Journal of Environmental Planning and Management* 539; Richard Cowell, Gill Bristow and Max Munday, 'Viewpoint – Wind Energy and Justice for Disadvantaged Communities' (May 2012).

²⁶ See chapter 8 above.

local community.²⁷ However, my analysis of the guiding policy principles for community benefits from onshore wind farms and of the experience from the Rampion Community Benefit Fund showed that, despite a theoretical participatory potential, opportunities for participation in the design and management of community benefit schemes from wind energy NSIPs are restricted in practice. The reasons for this limited scope of participation are not entirely clear, but some speculation is possible. First, as the thesis made clear, participation is messy and complicated for developers. Developers are required to engage with individuals and groups affected by a project in the planning process. However, this obligation disappears when dealing with voluntary mechanisms outside planning, such as voluntary community benefits. This does not mean that the developer is legally prevented from running a public consultation, but it is entirely possible that commercial operators would find this practice unworthy of time and money.

Secondly, participation is unpredictable. As seen through the sample of representations reported in the case studies, individuals and groups express a variety of arguments and opinions when it comes to environmental and planning decisions. It is conceivable that a similarly diverse set of views, needs and expectations would emerge from consulting the relevant community on voluntary community benefits. This is even more so, considering the ambiguity of the notion of “community”, which is far from the idealised group of people and homogenous set of interests that it is often depicted.²⁸ That is to say, that agreement on needs and expectations is likely to be tricky and developers might prefer avoid finding themselves stuck with more disagreement and opposition within the host community.

Finally, participation is a risk. Even assuming that the community is able to agree on a package of measures to consider as community benefit package, there is a risk for the developer in terms of their financial feasibility and desirability. Again here, there is potential for further disagreement and frustration from the part of the community in what can actually be offered and delivered.

Beyond the specific reasons for non-engagement, the lack of commitment to public participation in decisions on the design and disbursement of the benefits shows features of a passive acceptance logic, rather than a (procedural) justice rationale. The case of the Rampion Community Benefits Fund is particularly clear in this respect, as the developer’s approach showed a preference for relying on expert intermediaries to identify the needs and expectations of the community, rather than engaging with the local community directly. This conclusion is based on a limited sample, and other

²⁷ Aitken (n 5).

²⁸ David Rudolph, Claire Hagggett and Mhairi Aitken, ‘Community Benefits from Offshore Renewables: The Relationship Between Different Understandings of Impact, Community, and Benefit’ (2017) 36 *Environment and Planning C* 92.

developers might address it in different ways. Yet it is interesting to see here a correspondence in approach to participation within and outside the planning process.

It is hard to foresee where the increasingly routinized practice of community benefits might lead. This research has not embarked on a detailed exploration of the effects of participatory practices within decisions on community benefits on public attitudes toward the development.²⁹ This might be for a different – multidisciplinary-research project. In the thesis, I suggested a rethink of these mechanisms within a legally institutionalised participatory process for participation in decisions on mandatory community benefits provision. Such institutionalisation might take the form of a positive legal requirement in the Planning Act 2008 to provide a form of benefit and formally consult the community on its design and management. Some limited experience with the institutionalisation of community benefits exists, but provisions on participation within this context are non-existent. The aim of such institutionalization is to channel the voluntarist nature of the benefit within some legally enforceable boundaries and reduce the developer's discretion and negotiating power within the process. Although the quality and influence of the participation remains a challenge, this would - at least at this experimental stage – offer procedural guarantees to catalyse local community engagement, through a requirement for public consultation with the local community. Dedicated guidance for community benefits with respect to wind energy infrastructure should also complement the process. In this thesis, I have argued that such an institutionalisation will also need to be aligned with the planning process, although without formally making community benefits material considerations for the decision. This suggestion for institutionalisation is intended to provide a mechanism for the participatory potential of the community benefits to be operationalised in practice. This would ultimately help shifting from a logic of acceptance to a participatory model in this context.

Of course, legal obligations are not a perfect answer to the complexities and contradictions of participation. As I made clear throughout the thesis, a merely procedural approach to participation runs the risk of dismissing the importance of the substantive quality of the outcome. Ultimately, it might still be conducive to an acceptance model. However, as the weight of substantive arguments inevitably vary, a process is unavoidably necessary, as I further explain in the next section.

²⁹E.g. Jennifer C Rogers and others, 'Public Perceptions of Opportunities for Community-based Renewable Energy Projects' (2008) 36 Energy Policy 36 4217.

4. Procedural Rights as Imperfect Space for Participation

There is no doubt that public participation in environmental decision-making and planning is infinitely complex and politically charged. Despite the richness of academic work on different aspects of the participatory challenge, participation remains a highly divisive matter. It is very hard to draw specific conclusions on the ability of legal rights to deal with these challenges. Participation is institutionalised in law through the construction of procedural spaces within the decision-making process.³⁰ The visibility of procedural rights to participate is partially the result of what Hilson calls the ‘Aarhusisation’ of environmental law.³¹ However, the limitations of this merely procedural approach have been largely explored in the literature and are reflected in this thesis.³²

Reflecting on the conclusions from this thesis, my approach to procedural rights and the procedural rationale for participation remains somehow ambivalent. On the one hand, I have argued that merely procedural approaches to participation are problematic. Simply providing a right to participate in a process does not offer guarantees of being able to influence it. I claim that ‘proceduralisation of participatory rights within models of acceptance is mostly framed as validation of national policy objectives and expert advice, rather than enabling public contributions to be heard by decision-makers’.³³ A procedure merely guarantees a “seat at the table”, but is not a promise to shape the decision. This should not be entirely surprising. As noted earlier in the thesis, participation does not amount to a veto or a final right of the public – however defined – to give prior consent to a decision or infrastructure development. But, from a substantive perspective, this might feel inadequate to deliver improved outcomes. As Hilson argues, procedural rights ‘lack the salience and force’ of substantive environmental rights.³⁴ By their own nature, procedural rights will always be limited tools to achieve specific levels of protection. In this respect, it could be claimed that the institutionalisation of procedural rights to participate – generally through public consultation - could amount to a mere illusion of engagement, in the absence of clarity

³⁰ Lee (n 7).

³¹ Chris Hilson, ‘Substantive Environmental Rights in the EU: Doomed to Disappoint?’ in Sanja Bogojevic and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 87.

³² E.g. Jonas Ebbesson, ‘The Notion of Public Participation in International Environmental Law’ (1997) 8 *Yearbook of International Environmental Law* 51; Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21 *Oxford Journal of Legal Studies* 415.

³³ Chiara Armeni, ‘Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 *Journal of Environmental Law* 415, 437.

³⁴ Chris Hilson, ‘The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?’ (2018) 25 *Journal of European Public Policy* 1589, 1606.

about the scope for influence. This is in line with Arnstein's point that consultation is nothing more than tokenism.³⁵

On the other hand, though, while procedural rights are problematic, they remain a legal and democratic necessity. In this respect, I suggested that a way to operationalise the participatory potential of community benefits is precisely institutionalising a procedural right to participate within a consultation process on the details of the benefit package. This is consistent with Lee's point that 'an expansion to the legal framework, so that a broader range of public comments can be heard by decision makers, is both desirable and, importantly, plausible—albeit extraordinarily difficult'.³⁶

Procedural rights do not resolve the conceptual and practical complexity of the participatory debate. But this thesis maintained that while a process is not the perfect solution, as a minimum participation needs an institutional space for people to express their reasons. Indeed a process is necessary for decision-makers, as well as energy infrastructure developers, to 'be able to rely on the substantive concerns voiced in public comments, but the weight of those concerns in any particular case will vary'.³⁷ The extent to which this procedural space – and the legal rights entrenched in it – are able to fully reflect individual arguments will always be a political question around which factors bear weight in the decision-making process. Ultimately, the limitations of procedural rights are embedded in the ambiguity of what we mean by 'participation' and 'public acceptance'. This makes a critique of the models illustrated in the thesis significant for a deeper legal understanding of these concepts and their practice.

5. A Research Agenda for the Future

My conclusions on models of public engagement and the "participatory potential" of community benefits in energy infrastructure in England, are intended to contribute to reflection on the contours of the right to participate in environmental decision and the institutional space for such participation. This exploration has highlighted a number of issues that are worthy of further research. In this section, I discuss two areas that I think are especially interesting and could be part of a future research agenda. These are a "localist shift" in major wind energy decisions and its implications for the space for participation (section 5.1) and the role of intermediaries as experts (section 5.2). I have

³⁵ Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of American Institute of Planners* 216.

³⁶ Lee (n 7) 621.

³⁷ *Ibid.*

not fully explored these aspects in the thesis. They are complex issues that deserve a completely new intellectual space and research approach.

Here I also point to the potential expansion of the theory of acceptance and the models of public engagement beyond wind energy technology and beyond a disciplinary focus on law, to further explore the features and prospects of this theoretical framework and the opportunities for cross-disciplinary research in this field (section 5.3).

5.1. Participation in Wind Energy Decisions and the “Localist Shift”

Localism has been a key concern in British planning over the last decade, and I have not addressed its context and implications in the thesis.³⁸ It has more recently become a focus with respect to wind energy infrastructure, especially since the removal of onshore projects from the NSIP regime in 2016 (as I have briefly discussed in chapter 4).³⁹ The underlying argument for that policy shift was the advantages of localism as a response to calls for more public participation and against centralisation of decision-making.⁴⁰ My intuition here is that there is more to be said about the reasons and effect of localism and the nature of participation within it.⁴¹ While it is easy to sell localism as a way to “give power back to the people”, what matters is the detail of what power is being transferred and how. Localism does not necessarily come with more or better opportunities for public participation. Unless the model of public engagement is genuinely participatory, ‘a shift in the level of decision-making may result in a simple reverse of the outcome, through a shift from a ‘presumption in favour’ to a ‘presumption against’ wind farms.’⁴² There is a risk that changes in the name of ‘localism’ might simply conceal ‘a fundamental discharge of responsibility for decision-making from central government to local authorities on a too complex policy dilemma’.⁴³

³⁸ E.g. Antonia Layard, ‘The Localism Act 2011: What is Local? And How Do We (Legally) Construct It?’ (2012) 14 *Environmental Law Review* 134; Antonia Layard, ‘Law and Localism: The Case of Multi Occupancy Housing’ (2012) 32 *Legal Studies* 551; John Sturzaker and David Shaw, ‘Localism in Practice: Lessons From A Pioneer Neighbourhood Plan in England’ (2015) 86 *Town Planning Review* 587; Nancy Holman and Yvonne Rydin, ‘What Can Social Capital Tell Us About Planning Under Localism?’ (2013) 39 *Local Government Studies* 71.

³⁹ E.g. Gordon Walker and others, ‘Harnessing Community Energies: Explaining and Evaluating Community-based Localism in Renewable Energy Policy in the UK’ (2007) 7 *Global Environmental Politics* 64.

⁴⁰ Quintin Bradley, ‘Bringing Democracy Back Home: Community Localism and the Domestication of Political Space’ (2014) 32 *Environment and Planning D* 642; Selen A Ercan and Carolyn Hendriks, ‘The Democratic Challenges and Potential of Localism: Insights from Deliberative Democracy’ (2013) 34 *Policy Studies* 422; Mark Evans, David Marsh and Gerry Stoker, ‘Understanding Localism’ (2013) 34 *Policy Studies* 401.

⁴¹ Richard Cowell and others, ‘Rescaling the Governance of Renewable Energy: Lessons from the UK Devolution Experience’ (2017) 19 *Journal of Environmental Policy and Planning* 480.

⁴² Armeni (n 33).

⁴³ *ibid.*

The localism shift makes issues of participation and acceptance ever so important. It would be interesting to use the same analytical framework used in this thesis to assess whether the decentralisation of decision-making for onshore wind farms has had any effect on the space and ability of local community to influence decisions. In other words, the extent to which localism can determine a shift from an acceptance model to a participatory model should be further explored. Inevitably, any research on localism would have to engage with the conceptual and theoretical literature on scale, which I do also not address in the thesis. This poses the question of scale back on at the centre of the discussion about participation and planning, as an interesting angle to look at localism, participation and the acceptance model.⁴⁴

5.2. Intermediaries as “Experts”

Secondly, my research suggested that the role of intermediaries in decision-making on wind energy infrastructure is an interesting area for further research.⁴⁵ The use of intermediaries in the practices associated with wind energy infrastructure development (e.g. community benefit provision) is intriguing, while yet underexplored, especially by legal scholars.⁴⁶ The notion of ‘intermediaries’ is discussed from different angles and identified in different types of actors in the literature.⁴⁷ Their role is particularly important where the developer has weak local ties.⁴⁸ They can do ‘relational work’ between both the developer and the community,⁴⁹ as well as among different communities.⁵⁰ Intermediaries can be private (e.g. NGOs, charities, and liaison officers) or public (e.g. local planning authorities) individuals and organisations. Interesting research has also highlighted the significance of intermediary *spaces* in energy

⁴⁴ See Chapter 1, section 6.1 above.

⁴⁵ Chapter 8 above.

⁴⁶ Patrick Devine-Wright, ‘Fostering Public Engagement in Wind Energy Development: The Role of Intermediaries and Community Benefits’ in Joseph Szarka, Richard Cowell and Geraint Ellis (eds), *Learning from Wind Power - Governance, Societal and Policy Perspectives on Sustainable Energy* (Palgrave MacMillan 2012) 199.

⁴⁷ Bart Nooteboom, ‘Social Capital, Institutions and Trust’ (2007) 65 *Review of Social Economy* 29; Harro van Lente and others, ‘Roles of Systemic Intermediaries in Transition Processes’ (2003) (2003) 7 *International Journal of Innovation Management* 247; Jan Fischer and Simon Guy, ‘Reinterpreting Regulations: Architects as Intermediaries for Low-Carbon Buildings’ (2009) 46 *Urban Studies* 2577; Mike Hodson and Simon Marvin ‘Governing the Reconfiguration of Energy in Greater London: Practical Public Engagement as “Delivery”’ in Devine-Wright (n 15).

⁴⁸ Devine-Wright (n 46).

⁴⁹ Timothy Moss, ‘Intermediaries and the Governance of Sociotechnical Networks in Transition’ (2009) 41 *Environment and Planning A* 1480.

⁵⁰ Tom Hargreaves and others, ‘Grassroots Innovations in Community Energy: The Role of Intermediaries in Niche Development’ (2013) 25 *Global Environmental Change* 868.

governance, as relational spaces of networks and relations, focusing on how these spaces are shaped and expanded.⁵¹

In a wind energy context, the role of intermediaries in public engagement has been little explored.⁵² In the discussion of the Rampion Community Benefit Fund, I highlighted a complementary framing to understand the role of intermediaries as ‘experts’ and linked it to the (limited) scope for participation in that context.⁵³ As I explained in the introduction, my research acknowledged the importance of the debate on the nature of expertise and who is an expert, but has not engaged in it. However, my analysis of the scope of participation in decisions on community benefit has accentuated the importance of these questions. Looking at expertise and knowledge from the perspective of intermediaries as “experts” in wind energy conflicts and engagement could be a valuable contribution to the literature. Further research in law could be developed in thinking about their functions in the decision-making process, the nature of their expertise and their potential role in public engagement in the decision-making. This research could provide useful insights on their influence in terms of expanding or restricting the scope for the local community to engage in decisions affecting the siting of wind energy projects as well as the design and management of the community benefits schemes.

5.3. Opportunities for Wider Technological and Disciplinary Scope

Finally, the acceptance model could be tested with respect to decision-making on other energy infrastructure, such as fracking, nuclear, and tidal. A wider technological scope could investigate whether there is anything special about the narrative constructed around wind energy projects in England or whether the passive acceptance – participation divide is also present in other technological contexts. This would allow me to develop and nuance my theory of acceptance within regulatory decision-making on energy infrastructure more generally. It would allow me to understand any contingent factors that might change some of the results (e.g. institutional practices, technology-specific factors of acceptance; legal guarantees or requirements; role of intermediaries and experts; policy and political objectives). By looking at the contours of the acceptance model within a wider technological perspective, this research would broaden the investigation of the weight of factors of acceptance in decision-making.

From a methodological perspective, further research in this area would support and develop calls for cross-disciplinary research in environmental law scholarship and

⁵¹ Bregje van Veelen, ‘Caught in the Middle? Creating and Contesting Intermediary Spaces in Low-Carbon Transitions’ (2019) *Environment and Planning C: Politics and Space* (online first).

⁵² But see e.g. Devine-Wright (n 46).

⁵³ See Chapter 8 above.

planning.⁵⁴ While sociological research methods have provided considerable data and evidence, there has been less appetite for “borrowing” sociological notions to understand law’s concepts and gaps.⁵⁵ This would further our understanding of law in its social context.⁵⁶ While a cross-technological focus is not new,⁵⁷ it could also support extending the scope of the research beyond a purely legal focus. This is because the engagement with notions that have primarily been researched and contested within other disciplines (e.g. social and public “acceptance”,⁵⁸ “place attachment”, “experience” and “community”) inevitably poses questions – and challenges – with respect to how lawyers understand concepts that have traditionally been elaborated outside the legal domain.⁵⁹ In this respect, a wider technological scope could be accompanied with a cross-disciplinary research focus, stimulating collaboration between law and other disciplines (e.g. sociology, psychology, human geography). The result of this cross-disciplinary dialogue would deeply enrich the legal and regulatory understanding of what matters to local communities and individuals and which arguments are used as evidence in the regulatory decision-making. It would improve the way lawyers and legal scholars think about these concepts.

6. Conclusions

The exploration of the meaning and scope for public participation in decision-making and community benefits with respect to major wind farms has taken me through an exciting intellectual journey. The conclusions discussed in this chapter reveal how planning choices entail a mix of knowledges as well as policy, law and social construction. Despite attempts to separate and rationalise the weight of individual contributions to the decision, participation remains a messy business. My argument has never been about fundamentally changing the law, but rather about recognising its limits and complexities as well as reflecting upon wider issues within the regulatory process. The models of acceptance and participation allow me to do exactly this.

It has also been about finding and recognising participatory space within the law (community benefits). My primary purpose was to show that the justification for the

⁵⁴ Maria Lee and others, ‘Crossing Disciplines in Planning: A Renewable Energy Case Study’ in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship* (CUP 2018).

⁵⁵ Ole W Pedersen ‘The Limits of Interdisciplinarity and the Practice of Environmental Law Scholarship’ (2014) 26 *Journal of Environmental Law* 423.

⁵⁶ Seminally, Roger Cotterrell, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171.

⁵⁷ Cowell and Devine Wright (n 6).

⁵⁸ See Chapter 3 above.

⁵⁹ E.g. Bettina Lange, ‘The Emotional Dimension of Legal Regulation’ (2002) 29 (Special Issue) *Journal of Law and Society* 197.

weight of different arguments in decision-making is to be traced back to a different role and nature of participation under these models. The two models of public engagement are simply two – competing but often overlapping and nuanced - models of participation in decision-making. This thesis is not, and has never pretended to be, a perfect answer to the multiple issues that arise when people participate in environmental and planning decisions. It is, I hope, my first, not my last, word in this field. What it aims to do is to help rethink the way legal scholars understand the regulatory process in such a complex landscape, acknowledging that there is more to be said about the role of the public and decision-makers in dealing with fundamental questions about the future of renewable energy generation.

The tensions and contradictions are entrenched in the decision-making on wind energy infrastructure, where the policy narrative of need and urgency with respect to more wind energy is seen as irreconcilable with the democratic participation on choices about these technologies. This requires more profound efforts to understand the limits of current assumptions about participation and carve out additional (although imperfect) spaces to engage with people's expectations, values and needs with respect to this transition. This thesis could be seen as a contribution to such an effort.

Cases, Legislation and Treaties

Cases

Barbone v Secretary of State for Transport [2009] EWHC 463 (Admin)

Baroness Cumberlege of Newick and another v Secretary of State for Communities and Local Government and another [2017] EWHC 2057 (Admin)

Bedford Borough Council v Secretary of State for Communities and Local Government, Nuon UK Ltd [2013] EWHC 2847 (Admin)

Bolton Metropolitan District Council and Others v Secretary of State for the Environment and Others House of Lords [1995] 1 WLR 1176

Bushell v Secretary of State for the Environment [1981] A C 75 (HL)

Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255

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Morgan v Hinton Organics (Wessex) Limited [2009] EWCA Civ 107

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Finance Act 2000

Localism Act 2011

National Parks and Access to Countryside Act 1949

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Town and Country Planning Act 1990

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Developments of National Significance (Specified Criteria and Prescribed Secondary Consents (Wales) (Amendment) Regulations 2016, SI 358/2016

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The South Downs National Park (Designation) Variation Order 2004

The South Downs National Park Authority (Establishment) Order 2010, SI 2010/497

The South Downs National Park Designation Order 2002

Town and Country Planning (Development Management Procedure) (England) Order 2015, SI 2015/595

Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2013, SI 2932

Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571

EU Legislation

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