

Participation in a time of climate crisis

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The climate crisis puts real pressure on legal guarantees of public participation in decision-making. This pressure comes from a number of directions, but we are particularly concerned with the technocratic erosion of routines of participation, in a turn to expertise rather than democracy for legitimate decision-making. At the same time, populists resist the constraints imposed on their power by legal rights of participation. We argue however that the climate crisis, whilst putting pressure on participation, also reinforces the need for participation, and the limitations of technocratic decision making. Politics is unavoidable, even and especially in a crisis. Law, or its silence, contributes to the context, the place and the meaning of participation, and we explore its strangely underexplored role in shaping participation on the ground.

1 INTRODUCTION

The long-standing progressive orthodoxy that ‘public participation’ contributes positively to good, democratic environmental decision-making, is under pressure. In this article, we seek to defend the inclusion of (for want of a better word) ‘ordinary’ people and broad civil society in environmental decisions, and the important, frequently neglected, role of law in that. We make this explicit defence of legal protection for public participation because we are concerned that the urgency of the climate crisis is giving fresh appeal to technocratic approaches to decision-making. We have been working on participation for many years,¹ and are increasingly challenged (by students, by colleagues, in the wider world) to justify its continued legitimacy. This paper aims to be part of the process of working through the doubts (some of which we share).

At the heart of technocracy is the idea that all problems are technical problems, with a technical solution that can be revealed by adequately knowledgeable individuals;² lay participation is not helpful, or welcome. A technocratic response to climate change is not the only threat to

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¹ M. Lee and C. Abbot, ‘The Usual Suspects? Public Participation under the Aarhus Convention’ (2003) 66 *Modern Law Rev.* 80; C. Armeni, ‘Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 *J. of Environmental Law* 415.

² F. Fischer, *Climate Crisis and the Democratic Prospect* (2017).

public participation. Threats may also come from populist resistance to procedural constraints on power, including legal guarantees of participation. In the UK context, the loss of EU law, and its institutionalisation of participation, amplifies this threat. The deep flaws of public participation, which in practice often fails to meet, and in some cases actually thwarts, hopes for inclusive decision-making, intensify disenchantment among those who may have been its traditional supporters. The turn to experts for a legitimacy that publics no longer seem able to provide, is the particular focus of this paper.

The balance between participatory and technocratic approaches to governing in the climate crisis raises issues that are global and local, and everything in between, across all types of decision-making. We take stock here of the challenges across different types of decision. But the specific challenges of inclusion will vary between sites. When we come to spelling out concrete implications, and as lawyers, we take a modest and pragmatic stance, focusing on the situation, and especially the law, in England, in its particular international context. The space for participation has long been a central feature of English environmental law, reinforced in recent decades by the Aarhus Convention,³ and perhaps even more by EU law's insistence on consultation in the implementation of EU environmental law. When lawyers talk about public participation, we tend to mean formal participatory or consultative opportunities in regulatory processes, such as the drawing up of plans or policies, or the granting of licenses or permits. With the proviso that this is an inadequate representation of a much richer tapestry of participation and democracy,⁴ and that our ideas sit in a broader governance framework, we focus on these legal guarantees in this article. This focus might need to be defended as much from those seeking a radical green democracy as from the technocrats. We have some sympathy, and hope to reflect on broader questions through this prism. But importantly, we wish to emphasise the role of law in supporting pluralism and providing a space for citizens, environmental groups and activists to speak to power. Law, or its silence, contributes to the context, the place and the meaning of participation. Its role in shaping participation on the ground is strangely underexplored and merits closer attention.

The role of public participation in the climate crisis, in a technocracy, in a populist context, is of course the subject of vast, rich and diverse literatures. Our purpose in this article is not to

³ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters UNECE 1998.

⁴ J. Chilvers and M. Kearnes, 'Remaking Participation in Science and Democracy' (2020) 45 *Science, Technocracy, and Human Values* 347. The relationship between protest or civil disobedience and institutionalised spaces for participation in particular requires more attention, see the discussion in O. Corrie and D. Reiner, 'Protests and Policies: How Radical Social Movement Activists Engage With Climate Policy Dilemmas' (2021) 55 *Sociology* 197.

review these literatures. It is to focus on legally protected rights of participation at a time of crisis. But the wider context in which these rights operate is essential to understand the pressures on participation, and we explore these pressures in the section following this introduction. Our primary concern is with the mistrust of democracy or participation in parts of the climate debate, including a ‘technocratic’ effort to draw legitimacy from competence and expertise rather than broader inclusion or even consent. When confronted with the climate crisis, technocracy shares some tendencies with populism. Like technocracy, populism turns away from publics. Left- and right-wing populism have of course different approaches to the crisis, and different visions of the role of the publics and of experts.⁵ But at their core they share both an anti-elitist sentiment and a claim to represent ‘the people’ as a morally pure and uniform political actor.⁶ Such unity is antithetical to the messiness of participation. The populist claim to *represent* the people might appear at first in tune with the democratic mechanisms for hearing them. However, it is the notion of *the people* as singular, uniform entity which distinguishes populism from democracy, representative or participatory: at least in theory, democracy acknowledges a multiplicity of voices and diversity of *peoples*.⁷ Perhaps paradoxically, technocratic and populist approaches share a resistance to the procedural legitimacy that is at the heart of this article,⁸ as well as to many ordinary democratic and rule of law expectations, as we explain in section 2.

Also in section 2, we rehearse the common critiques of public participation, with which we have considerable sympathy, and touch on some specific pressures on rights to participate in English law. We are not trying to establish a clear link between these pressures and strands of populism in the current government,⁹ but they do indicate the unwillingness to be constrained by process that we see also in populism. In the following section 3, we argue that the values underpinning more, rather than less, inclusive decision-making survive the climate crisis, and that a turn to technocracy is to be avoided. Politics is unavoidable, especially in a crisis. Finally, in section 4, we offer some thoughts on how law might shape participation in the climate crisis. However, our intention is not to discuss detailed legal doctrine on public participation, such as the ambitious vision in the Aarhus Convention.¹⁰ Rather, we are reflecting more broadly on legal rights to participate during the climate crisis. Our discussion

⁵ C. Mouffe, *For a Left Wing Populism* (2018) 79.

⁶ J. Muller, *What is Populism?* (2017). There are different perspectives, see e.g. A.L. Young, ‘Populism and the UK Constitution’ (2018) 71 *Current Legal Problems* 17.

⁷ Muller, id., 19-20.

⁸ E.g. C. Bickerton and C. Invernizzi Accetti, ‘Populism and Technocracy’ in *The Oxford Handbook of Populism*, eds. C. Rovira Kaltwasser et al (2017).

⁹ Making causal connections is challenging, see N. Lacey, ‘Populism and the Rule of Law’ (2019) *LSE Working Paper* 28.

¹⁰ On which see E. Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (2020).

of process does not in itself provide any answers to the proper relationship between expert and public, in any particular case. It leaves space for multiple voices and multiple possible resolutions of that question.

We use the language of ‘climate crisis’ in this article to acknowledge unprecedented environmental and climate upheaval, and to reflect the challenges that climate change in particular poses for public participation. Crises have always been important catalysts of legal and policy action, but they are conceptually difficult to grasp. There is a difference, however nuanced, between a ‘crisis’ and an ‘emergency’. As Fischer suggests, a crisis is ‘a situation in which a complex, highly uncertain, and often unexpected system starts to function or operate poorly and the causes of the malfunctioning are not well known’.¹¹ When this malfunctioning becomes a threat to our institutional arrangements and assumptions, a crisis triggers emergency responses to avoid a disaster or catastrophe.¹² The uses and meanings of ‘emergency’ have proliferated in recent years,¹³ and it can be used hopefully to claim attention and attempt to dislodge normal hierarchies of priorities.¹⁴ But we resist the ‘extra-legal climate narrative’ of the ‘climate emergency’.¹⁵ We are concerned by its framing of climate change as a situation requiring responses ‘outside and beyond the rule of law itself’,¹⁶ at a ‘threshold of indeterminacy between democracy and absolutism’.¹⁷ The underlying assumption of the climate emergency seems to be that existing normative and institutional arrangements, including legal requirements for public participation, have failed, and can or must be rejected, creating a ‘state of exception’.¹⁸ Although equally, and on the contrary, we note that the declaration of a climate emergency often meets with no action at all.¹⁹ Like an emergency, a time of crisis produces resistance to the inconveniences of participatory processes. We argue however that it simultaneously reinforces the need for inclusion. Even when the crisis is dire,

¹¹ Frank Fischer, op cit., n.2, 22.

¹² Id., 23.

¹³ P. Adey, B. Anderson and S. Graham, ‘Introduction: Governing Emergencies: Beyond Exceptionality’ (2015) *Theory, Culture & Society* 3.

¹⁴ B. Anderson, ‘Emergency Futures: Exception, Urgency, Interval, Hope’ (2017) 65 *The Sociological Rev.* 463.

¹⁵ N. Rogers, *Law, Fiction and Activism in a Time of Climate Change* (2020).

¹⁶ Id., 168.

¹⁷ G. Agamben, *The State of Exception* (2005) 3.

¹⁸ Id. Note that some argue that even within a state of exception, emergency measures sit in a continuum with normal values and legal rights and are mechanisms that originate and still operate within a system of constitutional rights and liberties, eg N.C. Lazar, *States of Emergency in Liberal Democracies* (2009).

¹⁹ So that the ‘climate emergency’ framing is largely rhetorical, rather than legal. In many jurisdictions, including the UK, the declaration of a ‘climate emergency’ has no legal impact: ‘[i]f a “climate emergency” — or policies intended to pursue comparably rapid social and economic change — is to be posed seriously, the term needs to be subject to critical analysis’, B. Lindsay, ‘Climate of Exception: What Might a “Climate Emergency” Mean in Law’ (2010) *Federal Law Rev.* 256, at 256.

there are choices around how to respond, and even in extremis, we are concerned with process.

2 PARTICIPATION UNDER PRESSURE

Technocracy, democracy, populism are not on or off – all are more or less. Countries that we unproblematically call democracies vary dramatically in their processes and norms, and none would meet any ‘ideal’ definition of democracy. Implicit and explicit compromises are made, and normative choices about democratic processes actively constitute different communities and different ideas of democracy.²⁰ Further, democracies, and indeed non-democratic systems, have very different approaches to public participation and its legal institutionalisation. Similarly, decision-making can be more or less technocratic, and populism may be present or influential in parts.

In this section, we begin by setting out current locations and manifestations of the turn to technocracy. We then turn to some of the well-rehearsed limitations of participation in practice, and the possible moves to reduce participation in English law. This provides a space from which to reflect on the challenges of guaranteeing participatory rights through law, when faced with a technocratic response to the climate crisis.

(a) Technocracy, Populism and the Climate Crisis

Democracies have undeniably failed so far adequately to face up to climate change. Although the same applies to all other forms of government, the urgency of climate change is nevertheless tempting some away from democratic norms. A critique of democracy is nothing new: the successes of democracy have been accompanied by ‘a constant drumbeat of intellectual anxiety’.²¹ The limitations and inadequacies of democracies are well known. Democracies can move slowly, they find it difficult to engage with the long term, and can be overly-affected by special interests. Looking at these weaknesses from an ecological perspective, the territorial and temporal horizons of democracies bear little relationship to

²⁰ R. Eckersley, ‘Geopolitical Democracy in the Anthropocene’ (2017) 65 *Political Studies* 983.

²¹ D. Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (2013) xi.

ecological needs,²² and the association of liberal democracy with capitalism is seen by many as hostile to environmental improvement.²³

The long-standing 'survivalist' strand of autocracy or dictatorship in ecological thought,²⁴ has been reinvigorated in recent years. Shearman and Smith argue that 'humanity will have to trade its liberty to live as it wishes in favour of a system where survival is paramount.'²⁵ Lovelock turns to the well-worn war analogy:

Even the best democracies agree that when a major war approaches, democracy must be put on hold for the time being. I have a feeling that climate change may be an issue as severe as a war. It may be necessary to put democracy on hold for a while.²⁶

In less radical, but equally severe terms, Dale Jamieson concludes that 'it is not entirely clear that democracy is up to the challenge of climate change.'²⁷ A closely connected strand of thought sees the chaos that follows ecological catastrophe as creating conditions inimical to democratic values and processes.²⁸

It is not clear to us where we find the ecological strong leaders or 'planetary sovereign'²⁹ to manage survival for us. Regimes towards the autocratic end of the spectrum in the real world are far from ecologically superior,³⁰ and the opposite is more likely.³¹ Our interest here is less with proposals for revolutionary change and an autocratic ecological regime, than with the detailed day to day erosion of participatory opportunities or values. Some see a deeper failure of democracy in, for example, objections to wind farms or protests against fuel taxes. A more

²² R. Eckersley, 'Ecological Democracy and the Rise and Decline of Liberal Democracy: Looking Back, Looking Forward' (2020) 29 *Environmental Politics* 214.

²³ Fischer, op. cit., n. 2; hence the argument that democracy needs to change. Others would argue that the economic system needs to change, e.g. N. Klein, *This Changes Everything* (2014).

²⁴ See J.S. Dryzek, *The Politics of the Earth* (2013, 3rd edn), chapter 2. Fischer op. cit., n. 2 chapter 3 and N. Stehr, *Information, Power and Democracy: Liberty is a Daughter of Knowledge* (2015), 'Excursus' to Chapter 4.

²⁵ D. Shearman and J.W. Smith, *The Climate Change Challenge and the Failure of Democracy* (2007) 1.

²⁶ L. Hickman, 'James Lovelock: Humans Are Too Stupid to Prevent Climate Change' *Guardian*, 29 March 2010. Climate change is of course not an event, which we can respond to and move on, pausing and then reinstating democratic values.

²⁷ D. Jamieson, *Reason in a Dark time: Why the Struggle Against Climate Change Failed – And What it Means for Our Future* (2014) 100.

²⁸ See Fischer, op. cit., n. 2.

²⁹ J. Wainwright and G. Mann, *The Climate Leviathan – A Political Theory of Our Planetary Future* (2018); although they advocate an ideal, just and democratic approach, rather than the Leviathan.

³⁰ J.S. Dryzek and S. Niemeyer, 'Deliberative Democracy and Climate Governance' (2019) 3 *Nature Human Nature* 411.

³¹ D. Fiorino, *Can Democracy Handle Climate Change?* (2018).

technocratic and less inclusive approach is seen by some as a way to side-step these sorts of difficulties, made necessary by the urgent and catastrophic nature of the challenge. Again, this is hardly new. Concerns that even participatory processes can be dominated by technical or expert-framings of what is at stake are a consistent theme of environmental policy,³² and of discourse in academic and activist debates.³³

As suggested in the introduction, the 'climate emergency' narrative can form part of this autocratic trend, in its turn to a 'state of exception'. The emergency narrative, and indeed a crisis narrative, might be problematic for another reason. Crucially, these narratives tend to reduce political discourse to a simplistic quantitative climate discourse, a narrowly constructed framework that Hulme calls 'hitting the carbon numbers'.³⁴ The emergency response to the climate crisis becomes a mix of more or less radical policy and technical measures to reduce emissions, without acknowledging the broader socio-political implications of the climate change crisis or other political priorities. Governing the climate emergency becomes the exclusive territory of experts and technocracy, rather than lay people and democracy. The need for anticipatory action or regimes raises all sorts of questions,³⁵ although the concern to preserve 'valued ways of life' is not to be denigrated.³⁶ But the *urgency* creates fresh challenges, as 'the expected future has the form of a catastrophe approaching with maximum velocity'.³⁷ Even beyond a full state of exception, the emergency seems to leave little time for the procedures (including the participatory procedures) of law, as the 'catastrophic vision' points towards 'extreme acceleration'.³⁸ It leaves little or no time for nuance, reflection on broader consequences, or even disagreement or dissensus.

Any argument that rests on an assumption that what the planet needs and how to provide it can be unproblematically identified without politics, points towards a technocratic shaping of the future. As Nico Stehr puts it, '[b]y focusing on the effects or goals of political action (what

³² Seen across many areas, e.g. M. Aitken, 'Wind Power Planning Controversies and the Construction of 'Expert' and 'Lay' Knowledge' (2009) 18 *Science as Culture* 47; B. Wynne, 'Creating Public Alienation: Expert Cultures of risk and Ethics on GMOs' (2001) *Science as Culture* 446; J. Petts and C. Brooks, 'Expert Conceptualisations of the Role of Lay Knowledge in Environmental Decision Making: Challenges for Deliberative Democracy' (2006) 38 *Environment and Planning A* 1045.

³³ See eg the discussion in Fischer, op. cit., n. 2 chapter 2.

³⁴ M. Hulme, 'Climate Emergency Politics is Dangerous' (2019) *Issues in Science and Technology* 23. See also S. Asayama et al., 'Why Setting a Climate Deadline is Dangerous' (2019) 9 *Nature Climate Change* 570.

³⁵ E. Stokes, 'Beyond Evidence: Anticipatory Regimes in Law' (2020) *Law & Policy* 1; B. Anderson, 'Preemption, Precaution, Preparedness: Anticipatory Action and Future Geographies' (2010) 34 *Progress in Human Geography* 777.

³⁶ Anderson, id.

³⁷ S. Opitz and U. Tellmann, 'Future Emergencies: Temporal Politics in Law and Economy' (2015) 32 *Theory, Culture & Society* 107, at 122, of the 'ticking bomb' scenario.

³⁸ Id.

government should do) rather than its conditions (what government can do), the contentious issue of climate change is reduced from a socio-political to a technical issue'.³⁹ Much of the debate around the Anthropocene for example focuses on technical questions, leaving little space for lay publics to contribute to shaping the world, and raising the status of expert elites.⁴⁰ Planetary boundaries, highly technical and top-down

'were actively propagated as the normative target corridor for human activities in the Anthropocene - if the Anthropocene discourse saw humans as the driving force on planet Earth, the planetary boundaries were framed as the direction, or rather, as the guard rails of the speed train of human development'.⁴¹

Even if underpinned by more or less unrealistic expectations of science or experts, these are interesting responses to the failure of existing approaches. The turn to climate scientists is also an understandable response to right-wing populism, especially its association with climate denialism.⁴² Matthew Lockwood suggests that while the structural roots of right-wing populism in economic and political marginalisation are important, its opposition between 'the people' and the elite is 'more compelling' in explaining climate change denialism or populist hostility to climate change policy.⁴³ As he further explains, climate scepticism 'can be seen as an expression of hostility to liberal, cosmopolitan elites, rather than an engagement with the issue of climate change itself. [...] climate change is the cosmopolitan issue par excellence'.⁴⁴

³⁹ N. Stehr, 'Exceptional Circumstances – Does Climate Change Trump Democracy?' (2016) *Issues in Science and Technology* 37

⁴⁰ A. Stirling, 'Emancipating Transformations: From Controlling "The Transition" to Culturing Plural Radical Progress' STEPS Working Paper 64 (2014). Eckersley, op. cit., n. 20; J.S. Dryzek, 'Institutions for the Anthropocene: Governance in a Changing Earth System' (2016) 46 *Brit. J. of Political Science* 937. Many legal scholars contributing to Louis J Kotzé (ed.), *Environmental Law and Governance for the Anthropocene* (2017) conspicuously strive to resist manageriality and hard divisions between the human and the non-human, although we see assumptions that planetary boundaries tipping points and integrity can be understood and managed.

⁴¹ F. Biermann and R.E. Kim, 'The Boundaries of the Planetary Boundary Framework: A Critical Appraisal of Approaches to Define a "Safe Operating Space" for Humanity' (2020) 45 *Annual Rev. of Environment and Resources* 497, at 513. Although the two debates around planetary boundaries and the Anthropocene do not always overlap.

⁴² On the language of 'denialism' see P.J. Jacques, 'A General Theory of Climate Denial' (2012) 12 *Global Environmental Politics* 9, at 10. Populism is not the only source of climate denialism, e.g. R.E. Dunlap and A.M. McCright, 'Organised Climate Change Denial' in *The Oxford Handbook of Climate Change and Society*, eds. J.S. Dryzek, R.B. Norgaard and D. Scholsberg (2011).

⁴³ M. Lockwood, 'Right-wing populism and the climate change agenda: exploring the linkages' (2018) 27 *Environmental Politics* 712, at 726. As a 'thin ideology', populism tends to be combined with other political ideologies, on the left or the right, e.g. M. Canovan, 'Trust the people! Populism and the two faces of democracy' (1999) 47 *Political Studies* 2; B. Stanley 'The Thin Ideology of Populism' (2008) 13 *J. of Political Ideologies* 95.

⁴⁴ Lockwood, id. 723. See also P.A. Taggart, *Populism* (2000) who argues that climate change is 'anathema' to right-wing populism, 105. R.A. Huber, 'The Role of Populist Attitudes in Explaining Climate Change Skepticism and Support for Environmental Protection' (2020) 6 *Environmental Politics* 959 makes the empirical link between populism and climate denialism in the UK.

The links and oppositions between populism, climate change and technocracy, in practice and theory, are complex. Chantal Mouffe and other political theorists, see the ‘populist moment’⁴⁵ as to some degree a response to the ‘there is no alternative’ consensus of neoliberalism, and the associated technocratic management of society. And vice versa, David Runciman refers to a ‘technocratic backlash’, for example the imposition of a technocratic government on Italy after the 2008 financial crisis, as to some degree a response to Berlusconi’s populism.⁴⁶ Populist approaches to the climate crisis may call for a side-stepping of ‘a proper political framing’,⁴⁷ instead relying upon through a particular sort of expert technocratic thinking to protect a universal ‘people’. Erik Swyngedouw sees climate apocalyptic imaginaries as themselves ‘decidedly populist’,⁴⁸ highlighting the deep links between populism and technocracy.

Most importantly for our purposes, even if participatory moments might be temporarily useful in pursuit of particular ends,⁴⁹ technocratic and populist approaches share a resistance to the procedural legitimacy that is at the heart of this article.⁵⁰ This resistance is justified by the urgency of showing action and perhaps an obsession in some cases with delivering fast, quantifiable outcomes. ‘Hitting the carbon numbers’ is far from the only example of this shift away from process towards outcome; the “whatever it takes” approach’ to fighting the Covid-19 pandemic⁵¹ is another highly visible case. While we do not suggest that action is not urgent, or that outcomes do not matter, we are concerned here with the effect that this shift has on normal democratic and rule of law process. A rejection of process accentuates the familiar failures and flaws of participation, which we discuss next, and contributes to the context for the erosion of legal rights to participate, including in the ways we discuss at the end of this section.

⁴⁵ Mouffe defines the ‘populist moment’ as ‘the expression of resistances against the post-democratic condition brought about by thirty years of neoliberal hegemony’, op. cit., n. 5, 79.

⁴⁶ See David Runciman interviewing Jan-Werner Muller, <https://prod.lrb.co.uk/podcasts-and-videos/podcasts/talking-politics>.

⁴⁷ E. Swyngedouw, ‘Apocalypse Forever? Post-political Populism and the Spectre of Climate Change’ (2010) 27 *Theory, Culture & Society* 213-232; also C. Hilson, ‘Law, Courts and Populism: Climate Change Litigation and the Narrative Turn’ in *Research Handbook on Law and Courts*, eds. S.M. Sterett and L.D. Walker (2019). W. Davies, ‘Green Populism? Action and Mortality in the Anthropocene’ (2020) 29 *Environmental Values* 647, argues that left-wing calls for the declaration of a climate emergency is ‘a manifestation of green populism’, albeit with a more hopeful, democratic construction of the people (see also Mouffe, op.cit., n. 5).

⁴⁸ Swyngedouw, id.

⁴⁹ Premised on a known and uniform set of participant views, by contrast with the democratic and inclusive nature of the process we are concerned with here.

⁵⁰ Bickerton and Invernizzi Accetti, above n 8.

⁵¹ D.M. Herszenhorn, ‘G20 Leaders Vow “Whatever It Takes” to Fight Virus and Rescue Economy’, 26 March 2020, *POLITICO*.

(b) Failures and Flaws

A number of practical barriers prevent equal and effective participation, even if the opportunity to participate exists in principle. Taking part can be gruelling, emotionally and physically,⁵² and some query whether more participation is really what people want. Joanne Hawkins' work with communities affected by fracking, for example, suggests a yearning on the part of participating publics for experts to come in and settle disagreement.⁵³ And the deliberative UK Climate Assembly emphasised the need for 'strong and clear leadership from government', far ahead of 'everyone [having] a voice', with the rest of us simply '[playing] our part' in implementation.⁵⁴ These voices resonate with the idea that participation can be a burden that people do not want, and cannot bear in the midst of crisis,⁵⁵ when they may be more concerned by government output than their own input.⁵⁶

As well as being gruelling, participation may require skills and expertise, either in presentation, or (given the deep roots of technocratic decision-making) in the technical issues around which authorities have very often framed the process.⁵⁷ Participation is likely to be easier for those rich in time and other resources. The fact that barriers to participation are unevenly distributed, with economic inequalities lying beneath many of them,⁵⁸ means that rights to participate can, if care is not taken, actually *amplify* existing inequalities.

These practical barriers to participation are related to a challenge to its democratic or deliberative credentials. The question of who and what interests are present or missing from a participatory exercise looms large. There is moreover considerable scepticism about

⁵² Y. Rydin et al., *Evidence, Publics and Decision-Making for Major Renewable Energy Infrastructure* (2017).

⁵³ J. Hawkins, "'We Want Experts': Fracking and the Case of Expert Excess' (2019) 32 *J. of Environmental Law* 1.

⁵⁴ Climate Assembly UK, *The Path to Net Zero* (2020), 13 and 7. The leadership should be 'accountable'.

⁵⁵ I. Scoones and A. Stirling, 'Uncertainty and the Politics of Transformation' in *The Politics of Uncertainty: Challenges of Transformation*, eds. I. Scoones and A. Stirling (2020). They argue for a co-produced responsibility, 'that does not impose a technocratic, standardised plan' but 'does not load responsibilities wholly onto local people to work out on their own', 17.

⁵⁶ W. Merkel, 'Who Governs in Deep Crises – The Case of Germany' (2020) 7 *Democratic Theory* 1, for concerns about the risks to democracy of a technocratic / executive response to the covid-19 pandemic in Germany.

⁵⁷ M. Lee et al, 'Public Participation and Climate Change Infrastructure' (2013) 25 *J. of Environmental Law* 62; Y. Rydin, M. Lee and S. Lock, 'Public Engagement in Decision-making on Major Wind Energy Projects' (2015) 27 *J. of Environmental Law* 139.

⁵⁸ C. Houle, 'Does Economic Inequality Breed Political Inequality?' (2018) 25 *Democratization* 1500. This is one of the factors identified by K. Harrison, 'Can't, Won't and What's the Point? A Theory of the UK Public's Muted Response to Austerity' (2020) *Representation* 1 to explain the lack of participation around financial austerity in the UK, notwithstanding an increase in economic inequality.

whether a merely instrumental approach to participation meaningfully affects decisions. Sometimes, public participation is just a diversion, where an impression of participation is simply a source of legitimation, and participants are expected to accept policy decisions that have already been made.⁵⁹ Those who aim for more ambitious deliberative approaches also struggle to achieve ideals of equality. For Melissa Leach and Ian Scoones, 'deliberative forums remain couched within a particular framework, silencing other perspectives and agendas' and deliberation 'betrays naivety about the politics and power relations of such encounters'.⁶⁰ And again, there are questions about the ability of deliberation to make a substantive difference in practice.⁶¹

Populist politics is frequently explained in part by a sense of exclusion, and an associated loss of faith in the 'establishment' or the 'elites' of representative democracy. The discussion in this section is a reminder that a feeling (or reality) that one's voice is not heard in participatory processes may be part of that exclusion. Failures of formal routes of participation must be examined alongside failures of representative democracy in the assessment of a move to populism.⁶²

And finally, precisely the issues discussed in this article are key challenges. First, the almost overwhelming sense that time is short.⁶³ There is a perception that democracy is too slow, and that public participation too inefficient. Concerns about inefficiency are however heard as often from those pursuing dirty economic development as those pursuing climate justice.⁶⁴ Second is the argument that 'ordinary' people are either too ignorant or too selfish to be allowed to participate in decisions on climate change.⁶⁵ Sheila Jasanoff describes this as a 'backlash against participatory democracy ...coming from the policy analytic world'.⁶⁶ It might be seen

⁵⁹ In a wind energy context, Armeni op. cit., n. 1.

⁶⁰ M. Leach, I. Scoones and B. Wynne, 'Introduction' in *Science and Citizens - Globalization and the Challenge of Engagement* eds. M. Leach, I. Scoones and B. Wynne (2005), 35.

⁶¹ See also J. Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 18; J. Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) 6 *J. of Political Philosophy* 400.

⁶² Protest or civil disobedience might be one response, and C. Saunders, B. Doherty and G. Hayes, 'A New Climate Movement? Extinction Rebellion's Activists in Profile', *CUSP Working Paper No 25* (2020) suggest that a particular strength of Extinction Rebellion has been to create a new public agency among those frustrated with the potential of mainstream politics to bring about change.

⁶³ Anderson, op cit., n. 14.

⁶⁴ On the complexity of a 'speeding up' agenda, see T. Marshall and R. Cowell, 'Infrastructure, Planning and the Command of Time' (2016) *Environment and Planning C: Government and Policy* 1.

⁶⁵ And beyond, see G. Jones, *10% Less Democracy – Why You Should Trust Elites A Little More and the Masses A Little Less* (2020); J. Brennan, *Against Democracy* (2016) for problematic arguments on restricting the franchise. See also op cit., n. 26.

⁶⁶ S. Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (2013) 40 *Boston College Environmental Affairs Law Rev.* 439, at 449 attributing it largely to behavioural economics.

as a re-framing of the discredited, but resilient, 'deficit' model of public understanding of science.⁶⁷ This is to be resisted, because of the limitations of *expertise* and the unavoidability of politics, discussed below.

The failings of public participation are often assumed to be inadvertent. But exclusion can also be knowing or careless, and participatory mechanisms can be deliberately undermined.⁶⁸ The legal framework sets the prior conditions within which publics can be heard, so law is not innocent in the barriers and limitations of participatory mechanisms. The most obvious, but strangely neglected, issue for law is to attend to the limitations of participation discussed above. We return to this in Section 4 below, but first we note how even those rights that we have are subject to erosion.

(c) The Erosion of Legal Participation

Rights of the public to contribute to decision making processes have a considerable history in English law relating to environmental protection, for example forming a key feature of post-war development planning.⁶⁹ Planning plays a central role in responding to climate change, shaping the nature and location of infrastructure, from wind energy to waste facilities, the need for and manner of transport, the energy efficiency and flood exposure and resilience of homes. In principle anybody can make comments during the planning process, both on the creation of 'local' or 'development' plans in which authorities set out their vision for their area,⁷⁰ and on individual applications for planning permission.⁷¹ The precise legal arrangements in different cases are however extraordinarily, and perhaps revealingly, complex. The detail depends on a range of factors, including the activity (planning or consenting), the regime (for example, whether the development constitutes a Nationally Significant Infrastructure Project under the Planning Act 2008), the size of the project (potentially bringing in environmental assessment obligations) and whether other interests are legally protected through the planning system (for example habitats).

⁶⁷ J. Stilgoe, S. Lock and J. Wilsdon, 'Why Should We Promote Public Engagement with Science' (2014) 23 *Public Understanding of Science* 4.

⁶⁸ S. Bogojevic, 'The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31 *J. of Environmental Law* 389 discusses what she calls the erosion of rule of law in Serbia through attempts to withhold information, to limit public participation, and restrict access to the judiciary.

⁶⁹ P. McAuslan, *The Ideologies of Planning Law* (1980) identifies participation as one of the competing ideologies of planning law.

⁷⁰ The Town and Country Planning (Local Planning) (England) Regulations 2021, Regulation 20, provides that any person may make representations; the Local Planning Authority must also prepare and comply with a Statement of Community Involvement, Planning and Compulsory Purchase Act 2004, sections 18 and 19.

⁷¹ Under The Town and Country Planning (Development Management Procedure) Order 2015.

Many rights to participate (or more realistically, to provide information to a decision making process) pre-date the UK's membership of the EU. EU membership has however significantly extended those rights and underpinned them with stronger legal guarantees. EU law has also given the international standards in the Aarhus Convention a hard, justiciable edge.⁷² The EU arguably relies on public participation in its Member States to compensate (inadequately) for the EU's democratic limits, and enhance the implementation of EU law.⁷³ Providing rights of public participation through ordinary legal instruments is routine, creating specific occasions for participation, especially through environmental assessment at strategic⁷⁴ and project level.⁷⁵

The UK has left the EU, and EU participatory rights, mainly found scattered through secondary legislation,⁷⁶ are vulnerable to erosion. For example, the UK Government consulted in 2020 on potentially revolutionary reform to the planning system, from what it calls a 'discretion-based', to 'a rules-based' system.⁷⁷ The proposed changes would pull public participation away from decisions on whether and how to authorise development at the project stage, which should be speedy and apparently somewhat as-of-right, in line with local plans. It is difficult to keep particular issues out of the bounds of local participation⁷⁸ and 'unauthorised' participation can spring up. But the consultation proposes pushing opportunities for participation on housing, wind or waste policy or general spatial planning to the strategic level, rather than around concrete developments. We should not give up on the importance of engaging the public at this higher level, as discussed below, but this amplifies the difficulties of inclusion: strategy can seem abstract to non-specialists, and distributive impacts are often unclear. Further, the ambition to speed up plan making 'sits uncomfortably' with the simultaneous

⁷² The compliance mechanism under the Aarhus Convention is stronger than most international treaties, but not as strong as in EU law.

⁷³ M. Lee, *EU Environmental Law, Governance and Decision-Making* (2014).

⁷⁴ 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 OJ 2001 L197, 30.

⁷⁵ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) OJ 2012 L 26, 1.

⁷⁶ For example, the implementation of environmental impact assessment in England imposes publicity requirements on an application for planning permission, and requires developers to make their environmental statement available to the public, with a minimum of thirty days to make representations to the decision maker, under a combination of The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and The Town and Country Planning (Development Management Procedure) Order 2015.

⁷⁷ Ministry of Housing, Communities and Local Government, *Planning for the Future – White Paper* (2020). On the blurred lines between different approaches to planning, see A. Schulze Bäing and B. Webb, *Planning Through Zoning* (2020).

⁷⁸ S. Owens and R. Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (2011, 2nd edn).

ambition for ‘up front community engagement’.⁷⁹ And constraints on the scope of even the strategic consultations will be set by central government requirements on, for example local obligations to provide a certain quantity of new housing.

The publication of a Planning Bill was announced in the 2021 Queen’s Speech, although its content is currently uncertain. The playing out of the Government proposals is likely to take time, and the control that Government seems to seek is likely to be illusory. The pressure on participation in planning is however indicative of an impatience with process. It should also be read alongside other developments, such as the apparent intention to reduce the reach of judicial review.⁸⁰ The ability to insist, if necessary in the courts, on participation, is one of the strengths of legal rights to participate, although we should not overstate the current position, since rights to participate are particularly vulnerable to even existing restrictions on judicial review.⁸¹

As suggested in the introduction, this is not the place to attempt to establish links between populist instincts and particular institutional changes. But these moves do indicate an unwillingness to be constrained by process.

3 PARTICIPATION IN A TIME OF CRISIS: A DEFENCE

Scholarly and practical scepticism towards the participatory agenda is hardly surprising. But the long-standing justifications for public inclusion in decisions that affect the environment continue to hold. Public participation is necessary both because we have a right to be involved in decisions about our world, and because the dispersal and fragmentation of knowledge and information means that good decisions demand as wide a space as possible for diverse inputs. There are other related arguments for inclusion: participation may foster critical attitudes and democratic capacity,⁸² or generate a sense of ‘environmental citizenship’ that might in turn

⁷⁹ Bartlett School of Planning, *Planning for the Future White Paper: Consultation response from academics based at the Bartlett School of Planning*, UCL (2020), 4.

⁸⁰ See Ministry of Justice, *The Government Response to the Independent Review of Administrative Law*, March 2021, https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/judicialreviewreformconsultationdocument.pdf-1. See for discussion M. Elliott, ‘Judicial Review Reform I-IV’ (2021) available at <https://publiclawforeveryone.com/>.

⁸¹ This is not the first restriction of judicial review, see C. Crummey, ‘Why Fair Procedures Always Make a Difference’ (2020) *Modern Law Rev.* 1221. See also *R (Champion) v. North Norfolk District Council* [2015] UKSC 5 (on the difficulties of quashing EIA decisions on procedural fairness grounds) and in *Greenpeace v. Secretary of State for Trade and Industry* [2007] EWHC 311 (on the difficulties of judicial review of high-level policy).

⁸² E.g. W.F. Baber and R. Bartlett, *Deliberative Environmental Politics: Democracy and Ecological Rationality* (2005) 171; J.S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and*

catalyse behavioural change and improve our collective understanding of the social, environmental and governance challenges of the climate crisis.⁸³

These roles or justifications for public participation tend to be left silent or used interchangeably; they may of course point to different understandings of and approaches to participation. As is probably clear from the above, we are most concerned with the normative explanation of participation and with the role of law in shaping participation in any given context, with potentially different results. Democracy and participation are not coterminous, but even if participation fails to match ideals of democratic equality as above, we understand participatory modes of decision-making to be part of democratic modes of decision-making. And we do see the more substantive value of including otherwise marginalised concerns, including by rights of participation for environmental groups, even if some of them will pursue advocacy by relying on their own technical expertise.⁸⁴ As Andy Stirling argues, progressive change historically comes from the bottom up.⁸⁵

In this section, we examine the reasons for resisting technocratic decision-making from the perspective of the climate crisis. The fragility of expertise points towards the need for legitimate political authority, including processes that go beyond periodic elections. Notwithstanding multiple crises, technocracy, in the sense of excluding diverse publics and lay debate from climate decisions, is to be resisted. That is not to resist science, expertise or knowledge – on the contrary, they are crucial. But we resist the argument, hope or expectation that experts or technical advisors alone can lead us through the climate crisis. All that we have learned about expertise and the values associated with wide public participation over recent decades continues to apply. *Expert* judgment is crucial in the crisis response. But *even* in a crisis, decisions are deeply political and therefore require political legitimacy.⁸⁶

We start from science and technology studies (STS) and the examination of knowledge and expertise by scholars within this discipline over many years. Knowledge is partly socially constructed, not something existing out there in the world, waiting to be identified and then

Contestation (2000) 21; A.G. Gundersen, *The Environmental Promise of Deliberative Democracy* (1995).

⁸³ A. Dobson, 'Environmental Citizenship: Towards Sustainable Development' (2007) 15 *Sustainable Development* 276.

⁸⁴ They are often pushed into such an approach by the preference of public authorities for framing their decisions in such terms, *op. cit.*, n. 32 and 57.

⁸⁵ Stirling, *op. cit.*, n. 40 although we are not suggesting that he would necessarily see that as consistent with our focus on legal institutions. See also N. Gunningham, 'Averting Climate Catastrophe: Environmental Activism, Extinction Rebellion and Coalitions of Influence' (2019) 3 *King's Law Journal* 194.

⁸⁶ See also Merkel, *op. cit.*, n. 56.

neutrally slotted into a decision-making process. STS maintains the undesirability, if not impossibility, of giving 'experts' a uniquely privileged voice in decisions. It stresses the social context and commitments of experts and expertise, especially pertinent with respect to knowledge for policy, and rejects the autonomy of 'facts' from society, and vice versa. Social as well as scientific labour is required, 'infrastructure, effort, ingenuity and validation structures',⁸⁷ for claims to become accepted as knowledge or expertise that can enter decision-making processes. Scientists, or experts, be they Shearness and Smith's 'new priesthood' setting the direction of society, or the more mundane arbiters of physical or polluting development, do not exist free of politics or social life. Sheila Jasanoff's 'idiom' of co-production sits alongside social constructionism and reminds us that, just as 'the facts' cannot be taken for granted, our social world is also partially constructed by 'facts', by what and how we know about the world.⁸⁸

The revitalisation of technocracy has perhaps inevitably led to accusations that this strand of scholarship enables that part of right-wing populism that has been labelled 'post-truth',⁸⁹ including climate denialism. For example, Harry Collins and colleagues argue that 'STS erodes the cultural importance of scientific expertise and unwittingly supports the rise of populism';⁹⁰ Chris Hilson says that STS and populism share 'a similar scepticism towards positivist scientific knowledge';⁹¹ Bruno Latour worries that climate deniers and conspiracy theorists use arguments resembling those made in a more emancipatory critical studies.⁹² Those who 'deny' climate science may present it as 'socially constructed' by those whose interests are served by strong climate regulation. This leads to proposals to shelter 'expertise', to deny lay access to and challenge of 'facts'.⁹³ We do not think this is either desirable or realistic. Whilst we may be frustrated or alarmed by the politics we see, politics (in the sense of values and commitments) are always present.

⁸⁷ S. Sismondo, 'Post-truth?' (2017) 47 *Social Studies of Science* 3, at 3.

⁸⁸ S. Jasanoff (ed.) *States of Knowledge: The Co-Production of Science and Social Order* (2004); M. Weimer and A. de Ruijter (eds.), *Regulating Risks in the EU: The Co-Production of Expert and Executive Power* (2017).

⁸⁹ Post-truth may imply some golden age in which 'truth' directed public affairs; but panics about the status of knowledge have always been with us: S. Jasanoff and H.R. Simmet, 'No Funeral Bells: Public Reason in a Post-Truth Age' (2017) 47 *Social Studies of Science* 751. See also J. McCarthy 'We Have Never been "Post-political"' (2013) 24 *Capitalism Nature Socialism* 19.

⁹⁰ H. Collins et al., *Experts and the Will of the People* (2020), abstract to chapter 1.

⁹¹ C. Hilson, 'Climate Populism, Courts, and Science' (2019) 31 *J. of Environmental Law* 395.

⁹² B. Latour, 'Has Critique Run out of Steam?' (2004) *Critical Inquiry* 225; D. Demeritt, 'Science Studies, Climate Change and the Prospects for Constructivist Critique' (2006) 35 *Economy and Society* 453.

⁹³ See H. Collins and R. Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (2002) 32 *Social Studies of Science* 235 whose 'normative approach' to expertise for example is a way to identify or to explain the exclusion of those unqualified to question science.

Social constructionism can be used in very different ways (and we are focusing on science for policy).⁹⁴ Our knowledge on climate change is indeed constructed through an extraordinary amount of labour, including social and political labour: the facts don't 'stand up all by themselves, without a shared world, without institutions, without a public life'.⁹⁵ Saying that something is socially constructed does not mean that it is 'bad', or that it should be rejected,⁹⁶ and it does not mean that perception is the same as reality. On the contrary, Latour suggests that 'if something is constructed then it means it is fragile and thus in great need of care and caution'.⁹⁷ Social construction is a way of viewing the world that gives us additional tools for analysis, allowing us to see how things could have been otherwise.⁹⁸ The climate crisis is real, but the scholarship reminds us that that reality is complex and does not provide a solution to the social (and political and economic, as well as physical) matter of concern.⁹⁹

Abandoning our understanding that what we know is closely connected with how and why we know it, or that the relevance of what we know is a social question, seems to us to be impossible. We cannot understand the world without acknowledging that the scientific and the social are irremediably intertwined.

And more technocratic approaches also face obvious practical questions, on which broader input would be helpful as well as proper. Somebody needs to set the direction of travel, with more or less detail. We might note for example that Hawkins' participants, introduced above, wanted experts to settle the rights and wrongs of fracking. But not just any experts. They rejected both government (Environment Agency) and industry expertise. As Hawkins explains, local people wanted experts to pursue their (the local people's) objectives of environmental protection.¹⁰⁰ But environmental protection is a complex and contested notion, and presumably the Environment Agency would say that that is exactly their role. This suggests that the aims of the experts in that case need to be publicly defined, and in an iterative way so that the meaning of (in this case) 'environmental protection' can be challenged and refined. The longest standing, most intuitive reason for resisting technocracy is that whilst experts have insights into the nature of climate change, they have no special access to the right way of responding. Experts are also knowledgeable about the technological changes that will form

⁹⁴ See Demeritt, *op. cit.*, n. 92.

⁹⁵ B. Latour, *Down to Earth: Politics in the New Climatic Regime* (2018), 25. Wynne's argument that our knowledge on climate change is a socially constructed *understatement* is pertinent, B. Wynne 'Strange Weather, Again: Climate Science as Political Art' (2010) 27 *Theory, Culture & Society* 289.

⁹⁶ M. Lynch, 'Social Constructionism in Science and Technology Studies' (2016) 39 *Human Studies* 101.

⁹⁷ Latour, *op. cit.*, n. 92, 246.

⁹⁸ Sismondo, *op. cit.*, n. 87.

⁹⁹ Latour, *op. cit.*, n. 92.

¹⁰⁰ Hawkins, *op. cit.*, n. 53.

part of our future, but which technologies, how and when and their relationship with ways of life, are open.¹⁰¹ Uncertainties, winners and losers and alternative visions of and paths to the future are all suppressed by a wholly technical approach.

The populist rejection of expertise is exemplified in the UK by the notorious statement of Michael Gove, one of the leading pro-Leave politicians during the Brexit referendum campaign, that ‘people in this country have had enough of experts ...’.¹⁰² As with US Secretary of Defence Donald Rumsfeld’s ruminations on ‘unknown unknowns’ at the time of the Iraq war,¹⁰³ there are plenty of reasons to be suspicious, but this is not entirely wide of the mark. Gove was discussing the economic consensus that leaving the EU would be bad for the economy, and indeed that EU migration is economically beneficial. This economic expertise contradicted the lived experience of many of those voting for Brexit, because it entirely failed to account for the distribution of those benefits. Expert neglect of, or untested assumptions about, distribution or justice is a well-understood challenge. Further, this advice about the economy is unhelpful if the politically *salient* questions are about sovereignty and identity. Questions of salience - whether expert propositions matter - is a social rather than a technical question.¹⁰⁴ Here is an example of social constructionism playing out.

The complexity and significance of uncertainty also emphasises open politics over closed expert decision-making: ‘that even the best global scientific knowledge and attendant policy cultures are always beset with contingency and ignorance has been a long and unfinished learning struggle’.¹⁰⁵ Uncertainty tells us that other ways of seeing the world are possible. For now, this means that an open, inclusive approach to climate change is vital: ‘To embrace ignorance is to celebrate the pervasive presence of the “epistemic other” – affirming that there is always space for different ways of knowing any object’.¹⁰⁶ Uncertainties in our knowledge about climate change,¹⁰⁷ and in the impacts of our responses to it, are simply inevitable and

¹⁰¹ Stehr, *op. cit.*, n. 24.

¹⁰² H. Mance, ‘Britain has had enough of experts, says Gove’ *Financial Times*, 3 June 2016.

¹⁰³ Referred to in S. Jasanoff, *The Ethics of Invention: Technology and the Human Future* (2016). This also reminds us that this has always been with us – think also of President Bill Clinton’s ‘it depends what your definition of “is” is’. See ‘Bill Clinton and the Meaning of “Is”’ *Slate*, 13 September 1998.

¹⁰⁴ C. Hay, ‘Brexistential Angst and the Paradoxes of Populism: On the Contingency, Predictability and Intelligibility of Seismic Shifts’ (2020) 68 *Political Studies* 187 discusses the rejection of ‘expert paternalism’ in the Brexit debate. There is a large literature on salience, eg N. Oreskes, ‘Science and Public Policy: What’s Proof Got to do With it?’ (2004) 7 *Environmental Science and Policy* 369; B. Wynne, ‘Risk and Environment as Legitimatory Discourses of Technology: Reflexivity Inside Out?’ (2002) 50 *Current Sociology* 459; Jasanoff and Simmet, *op. cit.*, n.89.

¹⁰⁵ Wynne’s endorsement for Scoones and Stirling (eds), *op. cit.*, n. 55.

¹⁰⁶ Scoones and Stirling, *op. cit.*, n. 55, 13-14 citing personal communications with Brian Wynne.

¹⁰⁷ See L. Mehta and S. Srivastava, ‘Uncertainty in Modelling Climate change’ in Scoones and Stirling *id.*

that uncertainty cannot be resolved by more and better data. This is not to doubt the climate crisis. But someone, somehow chooses, consciously or not, what to do with uncertainty, and that demands legitimate political decision-making (of course leaving open what makes political decision-making legitimate).

The emergency response to the 2020 pandemic crisis illustrates the unfolding of expertise, politics and democratic expectations and practice in a time of crisis.¹⁰⁸ Especially in the early days of the pandemic, politicians across the UK repeatedly called on expertise for legitimacy. And we do indeed want our leaders to have the best science, knowledge and advice. But three observations reinforce the limitations of expertise even in a crisis. First, expertise cannot avoid uncertainty.¹⁰⁹ The experts know surprisingly much, but still worryingly little, about this brand new virus. And the uncertainty about what happens next, politically, socially, economically will not ever be *resolved* by more data. Secondly, criticism of the scientific advice itself, and of the government's failure to challenge that advice, emerged very quickly. For our purposes, this indicates the inevitability of political assumptions in scientific assessments and the importance of a range of voices (including a range of expertise), a self-conscious openness about assumptions built into modelling (for example as to levels of compliance with behavioural restrictions), and debate of those assumptions. Scientific models, rather than just being true or false (and if they are about anything interesting, they will always be at least somewhat false), can provide an artefact, around which we deliberate about what to do, and why.¹¹⁰

Third, and most obvious, many, including scientists, have pointed out that these are not purely scientific or technical questions. What to do about the virus has many dimensions, including fundamental questions about what matters: about the balance and the relationship between different health questions, between health and other values, about equality and who wins and who loses, in everything from death rates to A level results. Taking this common-sense recognition of the insufficiency of expertise seriously, means asking who is in the mind of decision-makers, what sorts of 'experts', which publics, are involved in shaping the future, how they are involved and for what purpose.

¹⁰⁸ A. Afsahi et al., 'Democracy in the Time of COVID-19' (2020) 7 *Democratic Theory* v. In particular: Afshani et al., 'Democracy in a Global Emergency – Five Lessons from the Covid-19 Pandemic' at v discussing the importance of pluralist perspectives and W. Merkel, 'Who Governs in Deep Crises – The Case of Germany' at 1 who queries whether the executive dominance has been either necessary or effective.

¹⁰⁹ A. Stirling, 'Modernity without its Clothes: The Pandemic Crisis Shines a Light on the Futilities of Control' (2020), available at <http://step-centre.org/blog/>.

¹¹⁰ M. Lee et al., 'Techniques of Knowing in Administration: Co-production, Models, and Conservation Law' (2018) 45 *J. of Law and Society* 427.

Many now argue that the problem in the climate crisis is not too much democracy, but too little; it has become almost a cliché to say that contrary to abandoning or reducing democracy, we should deepen and extend it.¹¹¹ The climate democracy literature tends to focus on one or both of two issues: deliberation and the local.

Deliberative democratic participation underpins an extensive literature in environmental and ecological democracy. Robyn Eckersley argues that deliberation is widely called on because it 'is not contained by fixed borders, enables communication across the expert/lay divide, welcomes different kinds of knowledge, facilitates social learning and promotes generalisable interests by weeding out purely self-serving arguments through the requirement of answering to others and providing reasons that can be accepted by differently situated interlocutors'.¹¹² Deliberation is an effort to escape self-interest, whether conceptually by contrast with democracy as a thin form of compromise or aggregation of interests, or practically by encouraging reflection on self-interest and reasoning and articulation of public or collective interests. The free exchange and development of values and views through deliberation is advocated or identified in different spaces, including global institutions and networks,¹¹³ particular 'events' at all levels of governance,¹¹⁴ as well as more mundane day-to-day engagement with power,¹¹⁵ such as the moments discussed in the next section.

Focusing on local meanings and agency may be a way to render issues concrete and situated, avoiding the abstract feel of climate change on a bigger scale. The literature features a replication of cases, perhaps because many locals allow for experimentation. Fischer sees the local as the foundation of 'authentic democratic self-government' and an essential space to engage citizens in political and democratic politics.¹¹⁶ It is a counter to pessimism: 'Whereas deliberative environmental democracy will have little chance of marching through the dominant institutional structures of the capitalist state', Fischer is able to offer multiple examples of local deliberative democratic fora.¹¹⁷ The local may also be a corrective, or at least complement, to the global emphasis in the climate crisis, although that is not to say that the global becomes less significant. The local can be especially significant for marginalised communities, in our English context and even more so globally.¹¹⁸

¹¹¹ Eg R. Willis, *Too Hot to Handle: The Democratic Challenge of Climate Change* (2020); Fischer, op. cit., n. 2; H. Stevenson and J.S. Dryzek, *Democratizing Global Climate Governance* (2014); Stehr, op. cit., n. 39.

¹¹² Review in Stevenson and Dryzek id, chapter 2. Eckersley, op. cit., n. 22.

¹¹³ Stevenson and Dryzek id.

¹¹⁴ For example the UK Climate Assembly.

¹¹⁵ Willis, op. cit., n. 111 calls it 'more painstaking to and fro'.

¹¹⁶ Fischer, op. cit., n. 2, 14.

¹¹⁷ Id, 90, focusing on local movements.

¹¹⁸ Mehta and Srivastava, op. cit., n. 107.

We do not disagree with this focus on deliberation and the local. The significance of participation is not however limited to the local or the deliberative, and nor does a prescription of local or deliberative participation tell us much about institutionalising participation. We take a slightly different direction. Our interest is in law and its capacity to support plurality and provide space for lay people and broader civil society. That frequently manifests at a more or less local level as things stand, but as should be clear from the examples below, this is not always the case, and nor should it be.

4. LAW AND PARTICIPATION IN THE CLIMATE CRISIS

In this section, we turn to think more specifically about the role of law in participation, in the context of the climate crisis. Rather than abandoning legal guarantees of participation, or simply calling for more participation, we should seek to improve the legal framing of public participation. And finally, we reflect on where this leaves us: with process, not solutions.

(a) The Role of Law

Law cannot guarantee ‘good’ participation, but rights to participate or be consulted are part of that story. We are leaving culture, networks, protest to one side. All are partially shaped by law, and protest especially is legally protected or restricted. We leave them to one side not because they, or their relationship with law, are unimportant or illegitimate, but simply for reasons of focus.¹¹⁹

Choices are made in and by law, even once considerable space has in theory been created for participation. The legal framework might provide for simple consultation, or more ambitious shared problem-solving, and can allow or not the time required for deliberation. So for example, the tight time scale, dominance of written procedures and the form of hearings in the consent process for Nationally Significant Infrastructure Projects under the Planning Act 2008 reduces the opportunity for dialogue and prioritises information exchange.¹²⁰ Similarly, we might ask whether the 30 day consultation period, and developer-led process, under environmental impact assessment allows local community groups and other parts of civil

¹¹⁹ Although see *op cit.*, n. 4

¹²⁰ L. Natarajan et al, ‘Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation’ (2019) 90 *Town Planning Rev.* 117. See especially sections 90 and 98 of the Planning Act 2008.

society to come together, educate themselves, and reach, review and communicate their views.¹²¹

Legal requirements on participation are generally open-ended, leaving discretion on form to the decision-maker or developer. It is hardly surprising that they keep things simple (for themselves), or present the most favourable possible view of their proposals.¹²² Law could *require* more ambitious deliberative engagement methods, especially for more challenging policy and other higher level processes. Law can choose to provide space for a relatively narrow group of participants, or a more open process, directly or indirectly; it would be possible expressly to include environmental interest groups in participatory exercises for example, as the Aarhus Convention does,¹²³ or to explicitly prioritise the inclusion of the 'local community', as under the Planning Act¹²⁴ (although that does not seem to prevent national interest groups contributing to the processes).

Beyond a minimum time period for consultation, law generally does not provide minimum standards for reaching so-called 'hard to reach' communities, on accessibility of venues, on notice periods for reorganised meetings.¹²⁵ It could do so. Support for participation can be institutionalised, so that participants have access to expertise, training or translation,¹²⁶ although we should be alert to the danger of returning to a 'deficit' model of participation, where only those with appropriate training are able to contribute. The needs of public decision-makers are rarely discussed.¹²⁷ They also need to be resourced in time, expertise and finances for participation, both for their own participatory processes and for their scrutiny of developers' processes. And the challenges they face in articulating reasons for a decision beyond the technical should be engaged with directly.

Law should also at least engage with the question of consequence, whether participatory mechanisms make any difference. This does not mean granting participants a veto or a vote, although planning policy has come close to that with respect to onshore windfarms. Onshore windfarms are not 'acceptable' development unless '... It can be demonstrated that the

¹²¹ Op cit., n. 76.

¹²² See eg J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (2010); R. Willis, 'Dig Coal to Save the Climate: the Folly of Cumbria's Plans for a New Coal Mine', *The Guardian*, 27 May 2021.

¹²³ See Article 2(4) and especially (5) of the Aarhus Convention above n. 3..

¹²⁴ See section 47 of the Planning Act 2008 on pre-application consultation. Note that any 'interested party' can contribute to the formal process under chapter 4 and section 102 of the Planning Act 2008.

¹²⁵ Natarajan et al, op. cit., n. 120 on the very common challenges in this respect.

¹²⁶ Rydin et al., op. cit., n. 52, 14 ; on law, C. Abbot, 'Losing the Local? Public Participation and Legal Expertise in Planning Law' (2020) 40 *Legal Studies* 269.

¹²⁷ But see Bartlett, op. cit., n. 79.

planning impacts identified by the affected local community have been fully addressed and the proposal has their backing'.¹²⁸ This seems a little vague, but is a clear statement of direction, and arguably reverses the presumption in favour of development that had previously been in place.¹²⁹ Whether it requires decision-makers to listen to participants (rather than making assumptions about their rejection of wind development) is more open to question.¹³⁰

More conventionally, law may require decision-makers to have regard to input from participants. A 'have due regard to' obligation would require substantive and rigorous attention to participants' inputs, although not dictating any result.¹³¹ Such an obligation could further be used to structure processes and prioritise some issues over others. For example, specific obligations to have regard to costs and benefits creates a different approach from a specific obligation to have regard to the need to mitigate climate change. 'Have regard' duties can also be strengthened by reason-giving obligations, requiring the response to participation to be explicitly articulated.¹³² Again, issues (costs and benefits, climate change) can be prioritised. Explaining decisions in terms of public interests and in terms that on reflection make sense to interlocutors is a key aspect of deliberation, and could be supported by legal obligations.

This concern with consequence implies also attention to the space open in law to respond to participants' input. The decision-maker might have significant discretion in law to make their decision responsive to participants' input, or might be limited to a 'how not whether' engagement.¹³³ The Planning Act 2008, for example, explicitly rules some questions out of bounds,¹³⁴ but more pertinently indirectly limits the scope of the inquiry by the strong *legal* presumption in favour of development that accords with policy, combined with the level of detail and commitment to development in that policy.¹³⁵ More generally, law can provide that a generous breadth of issues is relevant, or limit relevant input to narrowly defined technical questions.¹³⁶ An obligation to explain more carefully at the outset of participation what is open

¹²⁸ National Planning Policy Framework (2019), footnote 48. Policy plays a strong role in planning.

¹²⁹ Armeni, *op. cit.*, n. 1. Large onshore windfarms had previously been categorised as Nationally Significant Infrastructure Projects, governed by the Planning Act 2008, *ibid.*

¹³⁰ *Ibid.*

¹³¹ See eg *R (on the application of Brown) v Secretary of State for Work and Pensions* [2009] P.T.S.R. 1506 on the public sector equalities duty under the Equalities Act 2010.

¹³² There is a patchwork of legislative obligations to give reasons in English planning law, and whilst there is in principle no general common law duty to provide reasons, 'it is well-established that fairness may in some circumstances require it'. *Dover v CPRE* [2018] 1 WLR 108, [51].

¹³³ Lee et al., *op. cit.*, n. 57.

¹³⁴ So eg under section 106, the Secretary of State 'may disregard representations' (explicitly including 'evidence') relating 'to the merits of policy set out in a national policy statement'; the national policy statement can be very detailed.

¹³⁵ Lee et al, *op. cit.* n. 57; Rydin et al., *op. cit.*, n. 52.

¹³⁶ E.g. Regulation 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) OJ 2006

for debate, and what (and why, how and by whom) has been closed by a prior decision, is not only a small response to issues of consequence above, but also implies the articulation of the ways that decisions fit together. Simultaneous support for, for example, locally unpopular wind farms and airport extensions becomes subject to articulation, so that sacrificial communities do not bear mitigation burdens whilst others carry on unimpeded.¹³⁷

We do not suggest that meaningful change to public participation through law is simple. Publics are constituted within participatory processes, rather than defined in advance,¹³⁸ the definition of issues by law is only ever partially effective, and the mode of participation emerges within the process rather than following pre-set paths. Law is however part of the story, and the generally narrow legal framing of participation limits the exercise before it gets started.

In addition to the construction of participation during practice, we need to bear in mind that tweaks to individual provisions on participation sit in broader legal architectures that impose their own constraints on participation.¹³⁹ The seemingly inexhaustible GMO saga provides a good example. National participation on GMOs ran into difficulties communicating the outcomes of participation into the EU level process for authorising GMOs; public participation at that EU level ran into the limited reasons set out in the legislation for lawfully refusing authorisation; and extending the reasons for refusing authorisation ran into the profound significance of trade rules (free movement of goods) to the EU polity. In the end GMO disruption to the EU legal order led to the attempt to fundamentally break with free movement thinking; whether even that 'works' to allow for response to publics is unclear.¹⁴⁰

Further, as a practical project, meaningful change to institutions of participation is a political aspiration that will be subject to resistance. Securing agreement to change is likely to be difficult, and may not be a strategically attractive target for activists calling for urgent solutions.¹⁴¹ That is not our focus here, and these questions of agency are just as pertinent for

L396, 1; M. Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in *Oxford Handbook on the Law and Regulation of Technology* eds. R. Brownsword, E. Scotford and K. Yeung (2017).

¹³⁷ Lee et al, op. cit., n. 57.

¹³⁸ Y. Rydin et al, '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; on the complexity of local authority construction of participatory communities by race or ethnicity, see Y. Beebeejaun, 'The Participation Trap: The Limitations of Participation for Ethnic and Racial Groups' (2006) 11 *International Planning Studies* 3.

¹³⁹ Lee, op cit., n. 136.

¹⁴⁰ M. Lee, 'GMOS in the Internal Market: New Legislation on National Flexibility' (2016) 79 *Modern Law Rev.* 317.

¹⁴¹ Although note that there were over 176000 consultation responses to Department for Environment, Food and Rural Affairs. *Consultation on Environmental Principles and Governance After EU Exit*.

the technocrats.¹⁴² These underpinning architectures of participation are at the heart of our democracy and at the heart of responsibilities to climate change.

As should be clear, participation never takes place in a blank space. What has gone before sets the context, and rendering legitimate that earlier closing down is a key challenge. Issues are closed on the basis of as Jasanoff would put it *good enough* knowledge and (we would add) *good enough* process.¹⁴³ That is not to say that all closures will be permanent, but some sort of closing down and moving on will be necessary. A legitimate closing down will include science and technical expertise, and democratic processes. These are in part questions about how and by whom different communities are willing to be bound, in what circumstances, and must be constantly negotiated. Law shapes this negotiation.

Concretely, participation on infrastructure in our planning system takes place within a policy that includes climate change;¹⁴⁴ the Climate Assembly UK deliberated with the 2050 net zero legislative target as its starting point;¹⁴⁵ the proposed EU Climate Law sets a legally binding target of carbon neutrality by 2050 that will set the context for other decisions.¹⁴⁶ In each of these examples, the carbon 'number' is set through the jurisdiction's primary democratic processes: by the UK Parliament, which approves National Policy Statements under the Planning Act and approved the net zero Statutory Instrument under the Climate Change Act 2008, and by European Parliament and Council as co-legislators.¹⁴⁷ And in turn, these commitments are underpinned by international assurances through the Paris Agreement.¹⁴⁸

A parliamentary process, a decision by the pinnacle representative democratic institution, is an important part of the answer to the legitimacy question around closing down, and we do not wish to diminish it. Parliament steps in, reducing the anxiety about participation, even if the relationship between participatory and representative democracy is another enormous topic. But the mere presence of parliament does not simply resolve the dilemma of a legitimate

London: HM Government, 2018, <https://www.gov.uk/government/consultations/environment-developing-environmental-principles-and-accountability>.

¹⁴² See the discussion of 'governance' in Biermann and Kim, op. cit., n. 41, at 507.

¹⁴³ S. Jasanoff 'Serviceable Truths: Science for Action in Law and Policy' (2015) 93 *Texas Law Rev.* 1723.

¹⁴⁴ *R (Plan B Earth, Friends of the Earth, London Borough of Hillingdon & others) v. Secretary of State for Transport* [2020] EWCA Civ 214.

¹⁴⁵ Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No. 1056).

¹⁴⁶ Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final.

¹⁴⁷ Note the proposal in COM/2020/80/final that the *Commission* set interim targets.

¹⁴⁸ Paris Agreement 2015 (signed 22 April 2016, entered into force 4 November 2016), FCCC/CP/2015/10/Add.1.

closing down. We might want to explore the representativeness of these bodies (which will vary from jurisdiction to jurisdiction), their internal deliberative processes, their power,¹⁴⁹ before we dismiss the necessity for measures approved by parliament to be open to external perspectives.¹⁵⁰ Further, whilst we approve of a net zero target, as we would imagine do many of our readers, our concern is process. A legally binding emission target sets the framework for future participatory and democratic processes, however strong or weak that target, and yet parliaments allow space only for particular voices at a particular time. And of course, the arguments in favour of an *earlier* (before 2050) net zero target were not aired in the formal process.¹⁵¹

(b) Begging the Question? Expertise and Publics in Participatory Governance

Our turn to law has limits. Law cannot fix underlying questions of trust, power and communication, and it cannot impose or guarantee a participatory, inclusive or deliberative culture. If legal requirements are treated as a mere procedural hurdle, they do not reach their potential, and so they cannot do their work alone. Attitudes, conventions and culture are important, and cannot be written into or enforced by rules. Worse, there is a risk of focusing on the form rather than substance of participation, and legal obligations may create a 'legalistic' rationale for participation, problematically downgrading the significance of the political.¹⁵² The attention required to ensure law on participation is meaningfully applied could paradoxically enhance a certain form of (legal) technocracy. However, in the absence of legal obligations, whether, when and how publics are given a hearing is left to the administration and developers. This is not likely to enhance routine engagement of either organised civil society or ordinary citizens with power. Procedural rights provide space for participation and are a crucial way of enhancing the likelihood of multiple (including climate as well as economic) perspectives into a decision. They are imperfect, but have the potential to be meaningful and to be improved.

¹⁴⁹ The UK Parliament's role in passing delegated legislation is limited, even under the affirmative procedure under the Climate Change Act 2008; in particular, it cannot make amendments to a government draft of regulations.

¹⁵⁰ The amendment of the Climate Change Act that increased the UK emission reduction targets from 80% to 100% against the 1990 baseline was not subject to public consultation or impact assessment.

¹⁵¹ There had of course been large public demonstrations to press for net zero, see Gunningham, *op cit.*, n. 85. but that does not absolve government or parliament from the different task of ensuring mechanisms of formal and open involvement. One of Extinction Rebellion's demands is net zero by 2025, <https://extinctionrebellion.uk/the-truth/demands/>.

¹⁵² A. Wesselink et al., 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43 *Environment and Planning A* 2688. See also Lee et al., *op cit.*, n. 57.

Just as law cannot guarantee 'good' participation, nor can providing a right to participate guarantee better environmental outcomes.¹⁵³ That is what provokes the technocratic impulse. We are offering process and institutions, not a solution to climate change. Procedural environmental rights might be thought to 'lack the salience and force' of substantive environmental rights,¹⁵⁴ especially when time is short and the threat is catastrophic. We are not arguing against substantive environmental or ecological rights, for example to a healthy environment, although we doubt they provide any guarantees either.¹⁵⁵

Not only is the formal outcome open on our approach, but so is the relationship between science and politics, experts and publics. Importantly, law is there to open up the space for the discussion of these questions. Nor does it say anything about the balance between elected and appointed decision makers.¹⁵⁶ Populism is unlikely to tolerate deliberation, and it cannot tolerate the process constraints of even modest participatory consultative rights, even if occasionally the result of participation coincides with the populist objective. More technocratic methods of decision-making can in theory embrace deliberation, but the scope and content of the deliberation is constrained; the stronger, more open rights we advocate would limit technocratic elements.

Setting minimum standards for inclusion is not about giving anyone a veto, or about saying that one view is as good as any other. Nor does it necessarily come with the aim of consensus, which some consider merely utopian;¹⁵⁷ on the contrary, conflicts not only between technocratic approaches and values and opinions, but also between different expertise and different values and opinions, become visible within a participatory process.¹⁵⁸ Of course, as Margherita Pieraccini points out, participants' perspectives are also ambivalent, as people have 'multiple knowledges to draw upon and offer to the decision-making process'.¹⁵⁹ But this is a strength, rather than a limitation, further enriching input to the process.¹⁶⁰

¹⁵³ Armeni, op cit., n 1. And local people are overwhelmingly in favour of a new coalmine in west Cumbria, Willis, op cit., n. 111.

¹⁵⁴ C. Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25 *J. of European Public Policy* 1589, at 1606.

¹⁵⁵ S. Bogojevic and R. Rayfuse (eds), *Environmental Rights in Europe and Beyond* (2018).

¹⁵⁶ See Jones, op cit. n. 65, arguing (inter alia) for independent expert institutions, in particular central banks.

¹⁵⁷ W.F. Baber and R.V. Bartlett, *Consensus and Global Environmental Governance: Deliberative Democracy in Nature's Regime* (2015).

¹⁵⁸ Mouffe, op cit., n. 5, favouring *agonism*, implying disagreement between respected opponents, and avoiding *antagonism*, which can look like destroying an enemy. S. Owens and R. Cowell, op cit., n. 78.

¹⁵⁹ M. Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 *J. of Environmental Law* 45, at 50.

¹⁶⁰ Id., at 66.

A process ensures a 'seat at the table' and an opportunity to be heard. Participation is about attending to and staying open to different ways of understanding the world, and different insights into our situation. Broad participation, including non-expert knowledge and values, allows a better appreciation of the problems, social contexts, alternatives and underlying societal values.¹⁶¹

5 CONCLUSIONS

Concern about participation is understandable. Participation has not provided the hoped-for emancipatory programme, populism might be giving 'the people' a bad name and manipulation of the 'facts' has placed a high price on the democratic scrutiny of expertise. Participation remains however a central element of good decision-making, maintaining openness to multiple perspectives, multiple paths to the future, and multiple relevant reasons. And without even turning our mind to the many errors and failings of closed groups of experts, a closed elite seems more likely to favour existing power structures, with their carbon dependency, than a messy open democracy.¹⁶²

Law has its limits. But it shapes the meaning and space for participation, and so would its absence. In the face of a surprising relative neglect of the role of law in scholarship and activism, we advocate a legal regime that attends to the need to improve the scope of participation and the potential for plural participants and plural reasons. Law should be used to provide a space for ordinary people, civil society and environmental activists.

As well as a hint of the sort of catastrophes that climate change could bring, the current health crisis shows us how *not* to address the climate crisis. Mitigating climate change must not bring with it the hardship, sadness and civil liberties implications of lockdown. What we see in the pandemic shows that even in an emergency, and even when expertise is vital and urgent, politics happens: goods and bads *are* distributed, paths *are* set, particular visions of the world *are* preferred (or just taken for granted). It is too early to say what impact the emergency framing of the pandemic will have on the climate crisis. But if anything, the health crisis does suggest that the climate crisis cannot be depoliticised because we wish it were so. The crude question is who 'does' the politics. There are many routes to the carbon transition or transformation. We are not alone in making the perhaps self-evident, and certainly simple, point that democracy matters no less than it always has, and that what environmental lawyers

¹⁶¹ E.A. Kirk and K.L. Blackstock, 'Enhanced Decision Making: Balancing Public Participation Against "Better Regulation" in British Environmental Permitting Regimes' (2011) 23 *J. of Environmental Law* 97.

¹⁶² Stehr, *op cit.*, n. 39.

call the Aarhus rights are a crucial part of democratic decision-making. Environmental law, and its relationship with participation, both shapes and is shaped by the way we understand good decision-making.