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# LEGISLATION

## The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation

Maria Lee*

On the 25th anniversary of the signature of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, this article explores the neglect and suspicion of its values in the new foundations of English environmental law, the otherwise sometimes admirable Environment Act 2021. Examining the journey into the Environment Act, its provisions on consultation, and processes around its implementation, the author concludes that the arrangements for participation are flawed along at least four parameters: general quality and orderliness; information and evidence; inclusion; and impact. An exploration of the Act highlights the importance and the limitations of legally protecting rights to participate in environmental decision-making. The neglect of or hostility towards participation that is apparent from this analysis is, sometimes explicitly, part of a broader suspicion of legally constrained decision-making processes, and presents concerns to scholars and practitioners beyond environmental law.

### INTRODUCTION

It is 25 years since the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in Aarhus, at a time of great optimism for global cooperation and environmental progress. The Convention sat within an orthodoxy that public participation is a good thing: normatively good for democracy (itself a virtually unquestioned – if rarely explored – value); good also for outcomes, for making good decisions – although again, what that might mean was underexplored. The Aarhus Convention represented a moment of democratic optimism, an assumption that democracy is both a good in itself and a good way of solving problems. The paternalistic eye of the West might have been on empowering the citizens of the newly independent Central and Eastern European states, but the Convention's significance was more extensive.[1]

*UCL, Faculty of Laws. I am grateful to Professor Carolyn Abbot for discussions in this area and for her comments on an earlier draft of this paper.

1 For example Lisa Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Protection Rights Back Home' (2018) 40 *Law and Policy* 110.

And it is 20 years since Carolyn Abbot and I wrote on the Aarhus Convention in the *Modern Law Review*.[2] We began from this consensus that public participation in environmental decision-making is a 'good thing'. We shared that view, but were keen to complicate the orthodoxy – not to deny the value of public participation, but to show how deep its roots were and how potentially radical and difficult its achievement would be. The challenges of public participation are certainly clear now, so much so that since 1998 the value of public participation in environmental decision-making has lost its unquestioned place as a good thing.[3] In our 2003 article, we highlighted the two key purposes for public participation. First, a normative role: enhancing inclusion because it is right that people have a say in the decisions that make their world – broadly, a democratic objective, resting on an understanding that environmental decisions are not 'technical' but political, shaping our social and physical world. Second, a more substantive role: including many voices and knowledges in decision-making in order to improve the quality of decisions, in this case with the substantive end of improving environmental protection. This rests in part on an epistemology of knowledge as partially socially constructed – shaping and shaped by values and interests – rather than simply waiting out there in the world.[4] Both the normative and substantive rationales for public participation embrace the complexity of, and accept plural understandings of, our environmental crises, where the identification and implementation of solutions are beyond any single institution. Both objectives can be seen in the recitals to the Convention, which refer explicitly to 'strengthening democracy' and (in a number of formulations) ally the Convention with 'the need to protect, preserve and improve the state of the environment'.

Rather than re-arguing the benefits of participation,[5] in this article I explore the Aarhus Convention through an analysis of public participation in the processes leading into and out of the Environment Act 2021. Suspicion of legal obligations to provide rights of public participation is apparent throughout. This suspicion resonates beyond environmental law, fitting into broader concerns about reducing legal constraints on the UK executive,[6] culminating perhaps in the removal of parliamentary procedures around law reform under

2 Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 MLR 80.

3 Anna Wesselink et al, 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43 *Environment and Planning A* 2688; Chiara Armeni and Maria Lee, 'Participation in a Time of Climate Crisis' (2021) 48 J Law Soc 549.

4 Sheila Jasanoff, 'The Idiom of Co-production' in Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Abingdon: Routledge, 2004).

5 Armeni and Lee, n 3 above.

6 See also Elizabeth Fisher, 'Executive Environmental Law' (2020) 83 MLR 163. For an overview see for example Lisa James, 'Boris Johnson's Constitutional Legacy' (London: The Constitution Unit, 2022). On more specific issues, see for example Paul Craig, 'Judicial Review, Methodology and Reform' [2022] *Public Law* 19; Mark Elliot, 'Legal Exceptionalism and British Political Discourse: International Law, Parliamentary Sovereignty and the Rule of Law' (2021) at https://publiclawforeveryone.com/2021/10/10/legal-exceptionalism-in-british-political-discourse-international-law-parliamentary-sovereignty-and-the-rule-of-law/ [https://perma.cc/889U-V4KZ]; Keith Ewing, 'Covid-19: Government by Decree' (2020) 31 *King's Law Journal* 1; Jeff King, 'The Province of Delegated Legislation' in Elizabeth Fisher, Jeff

the Retained EU Law (Revocation and Reform) Bill (REUL Bill).[7] Although rights to participate are imperfect, as discussed below, their erosion is a disturbing part of the 'shrinking space for civil society'.[8]

The Environment Act 2021 is central to post-Brexit English[9] environmental law, setting the path for a generation. It creates new and imperfect, but very significant, environmental institutions, legal powers, duties and approaches, across a range of issues. It evolved and passed through Parliament during a lengthy and turbulent period marked by division over Brexit, as well as disruption owing to Covid, and finally received Royal Assent in November 2021. It is huge (149 sections, 21 schedules, 264 pages), and expanded as it evolved to cover a wide range of environmental issues. The Environment Act is framework legislation, with potential for progressive levels of environmental protection and improvement, but no guarantees. Implementation of the Act promises to be at least as long and arduous as its route to and through Parliament.[10]

Assessing the Environment Act 2021 against the Aarhus Convention, and vice versa, demonstrates both the importance of the legal institutionalisation of rights to participate, as well as the limits of law.[11] After an introductory discussion of the Convention, I consider public participation in the development of the Act itself. I then assess the arrangements for participation provided *by* the Act, before exploring processes *following* the passage of the Act. Given the scale of the Environment Act, the discussion is restricted to three topics: environmental targets;[12] environmental principles;[13] and amendment of the Habitats Regulations.[14] The progress and ultimate content of the material discussed in this article, in particular the two Bills implicated in discussion of the Habitats Regulations,[15] is uncertain. Even if some of the proposals do not come to pass, the significance of the shift away from legal protection for rights to participate in environmental decision-making should not be underestimated. Finally, I highlight some key themes that emerge from the analysis of the Environment Act. Participation in some respects has gone beyond mere compliance (including with Aarhus). But it is deeply flawed, and in other regards may fail to comply with basic legal and political expectations of participation in terms of quality and orderliness, information and evidence, inclusion, and impact. Although there are occasional glimpses of concern for bare legal compliance

King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford: OUP, 2021).

7 Hansard Society, 'Five Problems with the Retained EU Law (Revocation and Reform) Bill' (2022) at https://www.hansardsociety.org.uk/publications/briefings/five-problems-with-the-retained-eu-law-revocation-and-reform-bill [https://perma.cc/G88K-YG2K].

8 Lisa Vanhala, 'Environmental Legal Mobilization' (2022) 18 Annu Rev Law Soc Sci 101.

9 Much of the Act is limited to England, including the three areas discussed here, although the issues discussed have implications beyond England.

10 Fisher, n 6 above.

11 See also 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* (Oxford: OUP, 2017); Armeni and Lee, n 3 above.

12 Environment Act 2021, ss 1-7.

13 Environment Act 2021, ss 17-18.

14 Environment Act 2021, ss 112-113. Conservation of Habitats and Species Regulations 2017, SI 2017/1012.

15 Levelling Up and Regeneration Bill; Retained EU Law (Revocation and Reform) Bill.

in the progress of the Environment Act, the obligations of Aarhus membership and the underlying values of the Convention have been largely absent or coincidental.

The procedures that the Aarhus Convention seeks to protect may seem banal in the face of the climate and biodiversity crises and the mundane ubiquity of environmental degradation; nor do they capture the energy of 'new' climate activism,[16] or the excitement of litigation. But legal obligations mean that a hearing for outsiders is beyond the simple discretion of the administration, ensuring minimum standards for the inclusion of those with different visions of the world. Further, taking advantage of rights to participate contributes to the meaningfulness of legal norms and obligations: not just enforcing or implementing environmental standards, but working out how they best point the way to the future.

## THE AARHUS CONVENTION

A large literature has explored the Aarhus Convention's rationales over the past 20 years.[17] Emily Barritt's monograph stands out for its sophisticated exploration of three possible purposes: environmental democracy, environmental rights and environmental stewardship.[18] Disagreement over the role of the Convention is unlikely to be resolved, not least because, as Barritt makes clear, the candidates themselves are complex and contested, even essentially contested.[19] Ambiguity in the purpose of the Convention allows flexibility in its interpretation and allows different purposes to take priority at different times. This dynamism is frustrating but does not prevent scrutiny of how seriously public participation is taken by those holding power. Participation may not be taken seriously: participation can be used instrumentally in an effort to legitimise settled decisions;[20] or may be seen simply as a bureaucratic hurdle.[21]

The Aarhus Convention establishes obligations to protect procedural environmental rights across the three closely related 'pillars' (access to informa-

16 Joost de Moor et al, 'New Kids on the Block: Taking Stock of the Recent Cycle of Climate Activism' (2020) 20 *Social Movement Studies* 619.

17 For example Ellen Hey, 'The Interaction Between Human Rights and the Environment in the European "Aarhus Space"' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Cheltenham: Edward Elgar, 2015); Duncan Weaver, 'The Aarhus Convention and Process Cosmopolitanism' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 199.

18 Emily Barritt, *Foundations of the Aarhus Convention: Environmental Rights, Democracy and Stewardship* (Oxford: Hart Publishing, 2019).

19 Barritt, *ibid*; W.B. Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167.

20 Andy Stirling, '"Opening Up" and "Closing Down" Power, Participation and Pluralism in the Social Appraisal of Technology' (2008) 33 *Science, Technology & Human Values* 262, although emphasising the difficulty of avoiding prior commitments; Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 JEL 415.

21 Wesselink, n 3 above.

tion, participation, access to justice) reflected in the Convention's title. The obligations under the Convention are primarily directed towards public authorities,[22] and rights under all three pillars are exercised by 'the public' and/or 'the public concerned'. The former are simply 'natural or legal persons', the latter 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making', and both definitions include NGOs.[23]

The Convention gives the public (not just other states) rights in the international sphere, and is increasingly strongly identified with human rights instruments.[24] Article 15 requires the Meeting of the Parties to establish arrangements of a 'non-confrontational, non-judicial and consultative nature' to review compliance, which 'may include the option of considering communications from members of the public'.[25] The Aarhus Convention Compliance Committee (ACCC) can receive 'communications' from the public about alleged non-compliance. Its findings and recommendations are submitted to the Meeting of the Parties for endorsement and adoption.[26] The legal status of these findings and recommendations is not wholly resolved,[27] but they provide influential interpretations of the Convention.

This article is primarily concerned with the middle, public participation, pillar of the Convention, but this is closely connected to the other two pillars. Under the first, most clearly defined, pillar on access to information, the public have a right, subject to certain exceptions and exemptions, to environmental information held by public authorities 'without an interest having to be stated'.[28] Public authorities also have a pro-active obligation to make certain information available to the public.[29] The third pillar on access to justice supports the other pillars of the Convention, requiring a review process to address breaches of rights to information,[30] and a process to challenge decisions subject to Article 6 (public participation in decisions on specific activities).[31] There is also a more general right to 'administrative or judicial procedures to challenge acts and omissions by private persons and public authorities' alleged to have breached national environmental law.[32] All of these procedures 'shall

22 Defined broadly in Aarhus Convention, Art 2.
23 *ibid*.
24 Hey, n 17 above; Barritt, n 18 above; Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30 JEL 1.
25 Jerzy Jendroska, 'Aarhus Convention Compliance Committee: Origins, Status and Activities' (2011) 8 JEEPL 301.
26 Decision I/7 establishes the Compliance Committee and sets out the procedures.
27 For example Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 *Netherlands International Law Review* 27; Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 *Transnational Environmental Law* 211.
28 Aarhus Convention, Art 4.
29 Aarhus Convention, Art 5; see also Kyiv Protocol on Pollutant Release and Transfer Registers 2003.
30 Aarhus Convention, Art 9(1).
31 Aarhus Convention, Art 9(2); also, 'where so provided for under national law' any decision subject to 'other relevant provisions' of the Convention.
32 Aarhus Convention, Art 9(3).

provide adequate and effective remedies … and be fair, equitable, timely and not prohibitively expensive.'[33]

The middle pillar contains three provisions on public participation. Article 6 applies to decisions to permit 'specific activities': those listed in the Convention[34] and 'in accordance with … national law' activities not listed 'which may have a significant effect on the environment'. The 'public concerned' must be provided 'early' in the procedure 'and in an adequate, timely and effective manner' with information on the application and the decision-making process; 'as soon as it becomes available', more detailed information on the activity and its environmental impacts must be provided.[35] Decision-makers must provide reasons for the final decision.[36] Article 7 deals with 'plans and programmes' and, distinctly, with 'policies'. On plans and programmes 'relating to the environment', Article 7 requires 'appropriate practical and/or other provisions for the public to participate … within a transparent and fair framework, having provided the necessary information to the public'. Common provisions to protect participation around 'activities' (Article 6), 'plans' and 'programmes' (Article 7) are set out in the Convention: procedures 'shall include reasonable time-frames … allowing sufficient time for informing the public … and for the public to prepare and participate effectively'; there must be 'early public participation, when all options are open and effective public participation can take place'; and the decision shall take 'due account' of the outcome of public participation.[37]

Article 7 contains a sparse obligation to 'endeavour' to provide opportunities to participate, 'to the extent appropriate', in the preparation of 'policies relating to the environment'. Article 8 deals with the preparation of 'executive regulations' and 'generally applicable legally binding normative instruments' or 'legally binding rules':[38] 'each party shall strive to promote effective public participation at an appropriate stage, and while options are still open'. Article 8 requires time-frames sufficient for effective participation and the publication of draft rules. The public should be given the opportunity to comment 'directly or through representative consultative bodies'. Again, the Aarhus Convention specifies that 'the result of the public participation shall be taken into account', but this time explicitly 'as far as possible.'

The analysis of the Environment Act 2021 in this article goes beyond the relatively familiar (although still important and fragile) Article 6 of the Convention, to the less commonly explored Articles 7 and 8. To the extent that the language is permissive, these articles have generally been interpreted as creating 'softer'[39] legal obligations, leaving Parties 'with some discretion as to the

33 Aarhus Convention, Art 9(4).
34 Annex I.
35 Aarhus Convention, Arts 6(2) and 6(6).
36 Aarhus Convention, Art 6(9).
37 Aarhus Convention, Arts 6(3), 6(4) and 6(8), expressly incorporated into the first part of Art 7.
38 The former in the heading, the latter in the text.
39 *Findings and recommendations with regard to communication ACCC/C/2014/120 concerning compliance by Slovakia* (*ACCC/C/2014/120*) at [103], on Art 8.

specificities of how public participation should be organized."[40] The open language also however creates space for approaches that are more ambitious than consultation, and more suitable for these strategic activities.[41]

Distinguishing between 'specific activities', 'plans and programmes', 'policies' and 'executive regulations and generally applicable legally binding normative instruments' can be difficult. The Aarhus Implementation Guide provides examples of 'plans and programmes relating to the environment', which it says 'may include land-use and regional development strategies and sectoral planning' in a range of areas such as transport or water resources, and 'may also include government initiatives to achieve particular policy goals', such as incentive programmes or voluntary recycling programmes, or environmental action plans.[42] Policies are 'typically less concrete than plans and programmes."[43]

Article 8 extends the Convention to law-making, including primary legislation.[44] Many of the Aarhus obligations apply to 'public authorities', the definition of which explicitly 'does not include bodies or institutions acting in a judicial or legislative capacity',[45] although the preamble 'invites legislative bodies to implement the principles of this Convention in their proceedings'. The parliamentary process is a core aspect of our democratic fabric, but whilst there can be tension between representative democracy and participation, it does not go without saying that any need for participation is automatically overtaken by the legislative role of Parliament. Most importantly, even if the Convention does not apply to Parliament when legislating, Article 8 applies to the earlier preparatory phases: 'public authorities, including Governments, do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation'.[46] As Lady Hale puts it 'A complex Bill … does not suddenly spring onto the Parliamentary stage', adding (perhaps optimistically given the discussion below) 'without any prior consultation with the public'.[47]

In any event, the ACCC has noted that the lines between Articles 6, 7 and 8 must be 'determined on a contextual basis, taking into account the legal effects of the act, while its label under the domestic law of the Party concerned is not decisive."[48] Even primary legislation could fall within Article 6 and not

40 *Findings and recommendations with regard to communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland* (*ACCC/C/2010/53*) at [84].

41 Barritt, n 18 above, 151 onwards.

42 UNECE, *The Aarhus Convention: An Implementation Guide* (Geneva: UNECE, 2014) 176.

43 *ibid*, 180, defining a policy as 'a course or principle of action adopted or proposed by an organization or individual'.

44 *ACCC/C/2014/120* n 39 above. See also *Communication ACCC/C/2017/150 regarding the United Kingdom* (pending), challenging the process leading up to the passage of the EU (Withdrawal) Act 2018.

45 Aarhus Convention, Art 2(2). Art 8 imposes obligations on the Parties rather than public authorities.

46 *ACCC/C/2014/120* n 39 above at [101].

47 *R (HS2 Alliance)* v *Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 (*HS2*) at [143].

48 *Findings and recommendations with regard to communication ACCC/C/2011/61 concerning compliance by the United Kingdom of Great Britain and Northern Ireland* (*ACCC/C/2011/61*) at [52]. See also for example *Findings and recommendations with regard to communication ACCC/C/2015/135 concerning compliance by France*; *ACCC/C/2010/53* n 40 above.

Article 8: 'while the system of the Party concerned … opts for a procedure that passes through Parliament, the act ultimately permits a specific activity.'[49] Allocating processes to different Aarhus categories is further complicated by their dynamism. For example, policy evolves into secondary or primary legislation, in turn perhaps instituting programmes or addressing specific activities. Even the legislative step can be complex and iterative: the Environment Act 2021, as discussed below, was presented and re-presented to Parliament and amended by Government.

## THE JOURNEY TO THE ENVIRONMENT ACT 2021

Following the Brexit referendum in June 2016, there was a major civil society campaign for primary environmental legislation to fill some of the gaps that would be left by Brexit.[50] The first formal *Consultation on Environmental Principles and Governance After EU Exit*[51] was held in May 2018. This was framed in a predominantly technical way, and we might have expected most respondents to be environmental groups and businesses. However, in an indication of the sensitivity of the impact of Brexit on environmental protection, there were over 176,000 responses to the *Principles and Governance* consultation.[52] A draft Environment (Principles and Governance) Bill followed in December 2018, with some significant improvements in response to the consultation.[53] The Environmental Audit Committee and the Environment, Food and Rural Affairs Select Committee both undertook detailed pre-legislative scrutiny of the draft Bill, with an open call for written evidence and a number of oral evidence sessions. Both produced detailed reports, including, for current purposes, strong and consistent recommendations on the environmental principles.[54] This consultation and the draft Bill covered only a very small part of what became the Environment Act 2021, and of the three issues examined here, only environmental principles.

The short draft Bill was followed by a full Environment Bill in October 2019. The more challenging feedback on principles in the draft Bill, in particular with respect to their legal status,[55] was rejected. This Bill fell away when the 2019

49 *ACCC/C/2011/61 ibid* at [53]. The disputed legislation was Crossrail Act 2008, authorising the construction of a rail line.

50 See Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (London: UCL Press, 2021).

51 DEFRA, *Consultation on Environmental Principles and Governance After EU Exit* (2018), https://consult.defra.gov.uk/eu/environmental-principles-and-governance/ [https://perma.cc/6J66-5MQ2].

52 See https://www.gov.uk/government/consultations/environment-developing-environmental-principles-and-accountability (last visited 11 November 2022).

53 Fisher, n 6 above. The draft Bill was required by EU (Withdrawal) Act 2018 s 16, a unique provision, see the discussion in Abbot and Lee, n 50 above, especially 67-68.

54 Environmental Audit Committee, *Scrutiny of the draft Environment (Principles and Governance) Bill*, 18th Report of 2017-19 HC 1951; Environment, Food and Rural Affairs Committee, *Pre-legislative Scrutiny of the draft Environment (Principles and Governance) Bill* 14th Report of 2017-19 HC 1893.

55 See text at notes 91-94 below.

general election was called, and an almost identical Environment Bill was introduced to Parliament in January 2020. There had been no formal consultation or pre-legislative scrutiny of most of the Bill's provisions. Some of them however built on the *25 Year Plan* 2018,[56] the announcement of which predated the referendum. The *25 Year Plan* became the first Environmental Improvement Plan under section 8 of the Environment Act 2021, rendering it subject to statutory monitoring and reporting (but not consultation) obligations.[57]

There had been no open or formal consultation on the *25 Year Plan*, and there is no suggestion in the document of significant engagement with environmental or other groups. The domestic label ('plan') is not decisive for its treatment under the Convention. The *25 Year Plan* combines different sorts of measures: it sets 'policy' goals, but also includes many 'actions'; whether they are detailed or prescriptive enough to constitute 'government initiatives to achieve particular policy goals'[58] is open to question. Even using the least demanding Article 7 language applying to policies, however, there was no apparent 'endeavour' to consult, or consideration of whether consultation would be 'appropriate'.

Although not consulted on itself, the *25 Year Plan* became a framework for engagement with the evolution of the Bill. Most significantly for current purposes, the non-binding nature of its objectives and targets stimulated advocacy around mandatory legislative environmental targets.[59] This advocacy came from NGO and parliamentary initiatives, rather than a public and coherent government consultation. Government has referred however to an impressive-sounding range of deliberative activities around implementation of the *25 Year Plan*: 'a programme of citizen engagement across England … [aiming] to generate options for taking public attitudes, values, and priorities into account'.[60] The outputs of these activities, and whether or how they relate to and are integrated into the decision-making processes for the Act and its implementation, is not clear. Even if they were meaningful for individuals or contributed to policy development, to constitute participation in the shaping of outcomes they would need at least to be clearly considered in the exercise of power.

Participatory arrangements in the preparation of the Environment Act's provisions on the three issues discussed here (targets, principles, habitats) were very different. Principles were subject to conventional, organised, open consultation by both Government and Parliament, as well as less formal discussions. By contrast, no information on the proposed approach to targets was published until the full Bill was introduced to Parliament, although debate had swirled around the *25 Year Plan*. Most starkly, the provisions on the Habitats Regulations, discussed in the next section, had been subject to no formal consultation before

56 HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* (London: Defra, January 2018).
57 Environment Act 2021, ss10-15.
58 Text at n 42 above.
59 See for example Environmental Audit Committee, n 54 above calling for a legislative targets framework, building on civil society advocacy.
60 UK Implementation Report 2021 (Under Article 10 of the Aarhus Convention) at [12] at https://aarhusclearinghouse.unece.org/national-reports/reports [https://perma.cc/H9MG-9RNS]. The activities include 'weekend long public dialogues', 'a two-day online workshop' and 'distributed dialogues' and a Youth Steering Group.

they were introduced as a government amendment to the Bill, 16 months after the second version of the full Bill was given its first reading.[61]

During the Bill's progress through Parliament, civil society, especially NGO, engagement with both Government and Parliament was predominantly informal and private, an exchange of expertise for access. Greener UK, for example, a coalition of 13 major environmental groups set up to address the environmental implications of Brexit, met ministers on multiple occasions.[62] There were also very frequent meetings between invited environmental NGO stakeholders and officials in the Department for Environment, Food and Rural Affairs (DEFRA) and other departments.[63] Similarly, environmental groups (and others) engaged with parliamentarians and their staff, and some briefings around the passage of the Bill are publicly available.[64]

Drawing this together, participation in the development of the Bill was intense. Rather than being considered and systematic however, it was patchy in its coverage and selective in its participants, raising obvious concerns about inclusiveness from both a democratic perspective and an epistemic perspective. I return to this below. Positively, the intense but narrow participation with trusted environmental partners may have gone beyond the information input envisaged by the Aarhus Convention, with space for a more deliberative exchange.[65] A concern to incorporate alternative voices, or to allow publics to contribute to the shaping of our world, may conceivably have motivated this inclusion of environmental groups. A more pressing rationale, however, is likely to have been a need for expertise on the part of those creating law and policy, in a classic 'insider' exchange of access for expertise.[66] In particular, following a loss of experience in the 'austerity' years running up to Brexit, speedy recruitment was not enough to deal with the extensive, complex and technically demanding DEFRA Brexit agenda.[67] DEFRA engaged with 'insider' groups who they perceived to be (and who had worked hard to be considered) legitimate and credible.[68]

61 Rebecca Pow HC Deb vol 696 col 376 26 May 2021; they were announced on 18 May 2021 by Secretary of State for Environment, Food and Rural Affairs, George Eustice, https://www.gov.uk/government/speeches/environment-secretary-speech-at-delamere-forest-on-restoring-nature-and-building-back-greener (last visited 11 November 2022).

62 Data available at gov.uk/government/collections/ministers-hospitality-gifts-meetings-overseas-travel (last visited 11 November 2022).

63 Abbot and Lee, n 50 above.

64 *ibid*. For example Greener UK's Environment Bill briefings at https://greeneruk.org/briefings/environment-bill [https://perma.cc/26FW-G4RR].

65 For example Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 OJLS 415.

66 For example Wyn Grant, *Pressure Groups, Politics and Democracy in Britain* (Hemel Hempstead: Philip Allen, 1989); William A. Maloney, Grant Jordan and Andrew M. McLaughlin, 'Interest Groups and Public Policy: The Insider/Outsider Model Revisited' (1994) 14 *Journal of Public Policy* 17.

67 Abbot and Lee, n 50 above, ch 3. Parliamentarians and their staff were also under a great deal of pressure.

68 Abbot and Lee, *ibid*.

## THE LANGUAGE OF THE ACT

English courts will only apply the Aarhus Convention to the extent that it is implemented in domestic law.[69] The rights contained in the middle Aarhus pillar are scattered inconsistently and partially through English legislation, mainly in secondary legislation on planning, permitting of industrial facilities and environmental assessment law, without referencing Aarhus.[70] The origin of much of the legislation is EU law, which before Brexit could have been amended only by EU-level legislation. In addition, although there is no general common law duty to consult, a duty exceptionally arises 'where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation'.[71] When Greenpeace successfully challenged the consultation around nuclear energy in the 2000s, the assurance in an earlier government White Paper of the 'fullest public consultation' created such an expectation.[72] When a decision-maker chooses to consult in the absence of an obligation to do so, the common law *Gunning* / Sedley principles,[73] endorsed by the Supreme Court in *Moseley* v *London Borough of Haringey*, apply:

> First … consultation must be at a time when proposals are still at a formative stage. Second … the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … adequate time must be given for consideration and response and, finally, fourth … the product of consultation must be conscientiously taken into account in finalising any statutory proposals.[74]

These criteria are generally framed as a question of procedural fairness, even if the consultation pursues broader objectives of public participation rather than the protection of individual rights and interests.[75] They apply from routine local decisions to high level, strategic policy, and precisely what fairness requires 'must be linked to the purposes of consultation'.[76] Consultation on matters of 'high policy' is reviewable, but establishing 'procedural impropriety' is 'very difficult' in the absence of statutory requirements.[77]

Legislators missed the opportunity provided by the Environment Act 2021 to establish a general legal right to participate in environmental decisions. The 2018 draft Bill had included the 'principles' of access to information, public

69 In *R (Greenpeace Ltd)* v *Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); [2007] Env LR 29 (*Greenpeace*) at [49]-[50] Sullivan J said that 'in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive' because of the Aarhus Convention; this did not however form part of the common law reasoning for the decision.

70 Civil Procedure Rules, Ch 47 deals with costs in what are called 'Aarhus Convention Claims'.

71 *Moseley* v *London Borough of Haringey* [2014] UKSC 56; [2014] 1 WLR 3947 (*Moseley*) at [35] per Lord Reed.

72 *Greenpeace* n 69 above at [9] and [48].

73 Adopted from the argument of Steven Sedley QC in *R* v *Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.

74 *Moseley* n 71 above at [25].

75 Discussed in *Moseley ibid*.

76 *Moseley ibid* at [24].

77 *Greenpeace* n 69 above at [54], also at [62].

participation, and access to justice in environmental matters in its list of environmental principles.[78] This would have reduced the legal rights contained in the Aarhus Convention (and in some domestic legislation) to policy principles. These paragraphs were deleted from the full Bill. Their re-insertion as a general duty or right was (understandably)[79] overlooked in civil society – NGOs, academics, parliamentarians – endeavours to improve the Bill, although some no doubt tried. The Environment Act could have mirrored the Aarhus Convention, providing a bare right to be consulted in specific circumstances, including Aarhus and common law minimum protections on timing, information-provision and 'taking into account'. It could have exceeded Aarhus, creating legal obligations or incentives for more ambitious approaches in certain cases, such as citizens assemblies[80] or the deliberative events apparently embraced by Government for implementation of the *25 Year Plan*,[81] linking these activities more clearly with decisions than is currently the case. It could usefully have provided more protection of the basics, with clearer minimum standards (including on timing, information, participatory fora, inclusion, responses) and obligations to support participation more actively (for example by resourcing public authorities and participants). Instead, obligations to consult (such as they are) are shaped by the discretion of the Secretary of State. Liz Fisher's analysis of the 2018 draft Bill, observing the extent to which 'the executive dominates how the norms, ambitions, and accountabilities of environmental law are defined',[82] applies equally to the Act. Parliament has granted enormous discretion around environmental ambition and accomplishment to current and future governments.

As outlined above, I focus here on the Act's approach to targets, principles and habitats. The Act empowers or requires the Secretary of State to set 'long term' ('no less than 15 years')[83] environmental targets. Targets *may* be set in any area, and at least one *must* be set for each broad priority area (air quality; water; biodiversity; resource efficiency and waste reduction); specific targets must be set on particulate matter in air and species abundance.[84] 'It is the duty of the Secretary of State to ensure that' targets are met.[85] If the Secretary of State is to 'revoke or lower' an existing target, a statement must be laid before Parliament explaining why the Secretary of State is 'satisfied' that there would be 'no significant benefit' to meeting the more demanding target, or that 'because of

78 Draft Environment (Principles and Governance) Bill 2018, Clause 2(g)-(i). Note that this was in accordance with the EU (Withdrawal) Act 2018, s 16, n 53 above.

79 Given that they were already contained in retained law and ordinary English law and the Aarhus Convention, as well as the extraordinary workload around the Environment Bill.

80 See for example Leslie-Anne Duvic-Paoli, 'Re-Imagining the Making of Climate Law and Policy in Citizens' Assemblies' (2022) 11 *Transnational Environmental Law* 235.

81 n 60 above.

82 Fisher n 6 above, 164. See also King, n 6 above on the use of secondary legislation in the EU (Withdrawal) Act 2018.

83 Interim targets are set in the Environmental Improvement Plans, Environment Act 2021, ss11 and 14.

84 Environment Act 2021, ss 1, 2 and 3.

85 Environment Act 2021, s 5. See Colin Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' [2012] *Public Law* 749; Chris Hilson, 'Hitting the Target? Analysing the Use of Targets in Climate Law' (2020) 32 JEL 195.

changes in circumstances … the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits.[86] The targets are to be reviewed by the Secretary of State every five years to assess whether they would, if successfully implemented, 'significantly improve the natural environment in England'.[87] This 'significant improvement test' is cumulative (so a mixture of improvement and regression could be ambiguous), and weakened by the absence of either substantive statutory criteria for the assessments, or procedural requirements around the gathering and testing of evidence.

These environmental targets are potentially generation-defining standards of environmental quality. They will be set in secondary legislation, so in principle by Parliament. The statutory language and the well-known limitations on parliamentary scrutiny of secondary legislation[88] leave the specific issues addressed and the stringency of the targets largely in the hands of the Secretary of State. Parliament's inability to amend secondary legislation is particularly problematic, since even if it was feasible to reject the regulations,[89] that could mean no target rather than a better one. Notwithstanding the importance of targets and the extent of government discretion, they are not subject to a general consultation requirement. The Secretary of State must 'seek advice from persons the Secretary of State considers to be independent and to have relevant expertise'.[90] This envisages consultation as a way to promote more informed, better decisions, but problematically assumes that government can easily identify the holders of valuable knowledge. The obligation may be met moreover without consulting *environmental* interests at all; or even if environmental stakeholders are included, this may be limited to particular insiders, marginalising more challenging voices.

Section 17 requires the Secretary of State to prepare a 'policy statement on environmental principles' (precaution, prevention, rectification at source, polluter pays and environmental integration), which is 'a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.' Ministers are obliged to 'have due regard' to the policy statement when making policy, subject to certain exceptions. When the UK was an EU member state, these five environmental principles were legal principles, contained in the Treaty on the Function of the European Union (TFEU),[91] and applied throughout the administration of environmental law, wherever relevant EU law was at stake. Civil society mobilised very effectively to find a home for the principles in the Environment Act 2021.[92] They were not successful however in achieving 'equivalence' between the role of principles before and after Brexit.[93] The environmental principles are no longer legal principles, but purely matters of policy, with a narrow

86 Environment Act 2021, s 4.
87 Environment Act 2021, s 7. Certain other targets are included in the test, *ibid*.
88 See for example King, n 6 above; Hansard Society's Delegated Legislation Review at https://www.hansardsociety.org.uk/projects/delegated-legislation-review [https://perma.cc/8599-8XQ3].
89 This is exceptionally rare, King, *ibid*, 161.
90 Environment Act 2021, s 4(1).
91 The first four are found in TFEU, Art 174, the fifth in Art 11.
92 EU (Withdrawal) Act 2018, s 16.
93 Equivalence was a constant theme of the Government in the Brexit-Environment debate between 2017 and 2019, see Abbot and Lee, n 50 above, especially ch 3.

scope of application (the Policy Statement applies to ministers only, in respect of policy-making only, and subject to exceptions).[94]

Again, the process for drafting the Policy Statement involves Parliament, but in a limited way. A draft statement must be laid before parliament for (only) 21 days.[95] The Secretary of State must respond to, but need not adopt, parliamentary recommendations. The content and role of the environmental principles is at the discretion of the Secretary of State. But again, there is no obligation of broad consultation: the legislation simply requires the Secretary of State to 'consult such persons as the Secretary of State considers appropriate'.[96]

Finally, the Environment Act 2021 grants the Secretary of State powers to amend the Habitats Regulations,[97] crucial EU and hence domestic nature protection law, by statutory instrument.[98] The idea, according to the Secretary of State, is 'to re-focus the Habitats Regulations to ensure our legislation adequately supports our ambitions for nature'.[99] These provisions have major procedural and substantive implications for environmental law, and before Brexit, changes would have required EU legislation, with its expert and democratic inputs.[100] When introducing the amendment to the Bill, the Minister promised to 'closely consult conservation groups, the [Office for Environmental Protection] and others' in exercising the powers.[101] But there is no statutory obligation to do so, and again the Environment Act merely provides that 'the Secretary of State must consult such persons as the Secretary of State considers appropriate'.[102]

Secondary legislation, on both targets and habitats, puts us in the realm of Article 8 of the Aarhus Convention. It is unfortunate that the Environment Act 2021 did not clarify and implement Article 8 in domestic law,[103] noting the obligation in Article 3 of Aarhus 'to establish and maintain a clear, transparent and consistent framework' for public participation. Legislators could also have overlooked the ambiguity in Article 7 and made consultation (or more) a condition of principles policy-making. The limits of the Act's language on consultation are clear; the next section turns to the processes actually arising out of our three areas of the Act.

94 Maria Lee and Eloise Scotford, *Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill* (2019) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3322341 [https://perma.cc/S6WZ-NG5Y].

95 Under the negative procedure, statutory instruments must be laid before Parliament for 40 days.

96 Environment Act 2021, s 18.

97 n 14 above.

98 Environment Act 2021, s 112 (on regulation 9, *ibid*, requiring functions to be exercised 'so as to secure compliance with the requirements' of the EU Directives on nature conservation) and s 113 (on part 6, requiring habitats regulation assessment and imposing challenging substantive conditions on certain damaging developments).

99 Eustice, n 61 above.

100 In the absence of Environment Act 2021, ss 112-113, any amending regulations would have been subject to enhanced scrutiny, EU (Withdrawal) Act 2018, Schedule 8.

101 Rebecca Pow HC Deb vol 696 col 383 26 May 2021.

102 Environment Act 2021, s 113(5).

103 Note the vagueness of the response to the question about Aarhus Convention, Art 8 in the UK's Aarhus Implementation Report, n 60 above. It refers to plans and SEA (both Art 7 issues) and to the Principles and Governance consultation and draft Bill discussed in this section, rather than to any broader commitments. Note again *Communication ACCC/C/2017/150* n 44 above; the challenge of the failure to require consultation by statute was considered premature.

Finally on the content of the Environment Act 2021, the Act established the Office for Environmental Protection (OEP). The OEP has a watchdog function in respect of government and public authority compliance with environmental law. Its published advice to the Government on consultations and proposed legal and policy changes has so far been measured, but robustly critical.[104] In itself, this does not compensate for any failures in public participation; but it does ensure *some* external input to government decision-making, as well as providing expert analysis for the benefit of parliamentarians and broader civil society. Equally importantly, and in addition to some narrowly-drawn enforcement powers,[105] the OEP must monitor and may report on the *implementation* of environmental law.[106] Disappointingly, the definition of environmental law does not include international law, and so there will be no direct monitoring of Aarhus. But the OEP can monitor the implementation of English law on consultation, including the provisions of the Environment Act. Even if undemanding of legal *compliance*, the *quality* of implementation may be subjected to public exploration and discussion between the OEP and the Government.

## THE JOURNEY OUT OF THE ENVIRONMENT ACT 2021

For all of its potential ambition in other areas, the Environment Act 2021 fails, as discussed above, to create a strong and coherent legal framework for participation in environmental decision-making. Actual consultation on its implementation has, however, gone beyond the legislative obligations.

### The targets

The Act requires the Secretary of State to 'seek advice from persons the Secretary of State considers to be independent and to have relevant expertise' when setting environmental targets. A more extensive, although problematic, open consultation process has taken place.

In August 2020 (before the Environment Act was passed), the Government published what was subsequently[107] described as a 'policy paper' on environmental targets, setting out the DEFRA's 'initial thinking on possible objectives for targets' and providing a 'roadmap for our programme of work with experts, umbrella organisation groups, the public and Parliament'.[108] The 'roadmap' consists of four 'steps'. First, 'setting the scope of the targets'. This is essentially

104 https://www.theoep.org.uk/reports-publications [https://perma.cc/82UZ-W74D].
105 Environment Act 2021, ss 31-41.
106 Environment Act 2021, s 29.
107 DEFRA, *Consultation on Environmental Targets* (May 2022) 5. All of the consultation documents can be found at https://consult.defra.gov.uk/natural-environment-policy/consultation-on-environmental-targets/ [https://perma.cc/5TX4-P6UX].
108 DEFRA, *Environment Bill: Environment Targets* (2020), 4 and 7. The version online was updated in 2022. DEFRA made the original available on request, email 11 August 2022 from Defra Targets Team.

the Government's view on the areas in which targets will be set. This crucial step is contained in the 2020 policy document itself. There was no formal consultation, although the issues have been subject to long-standing debate, including engagement during the evolution of the Environment Act. The scope of the targets evolved further between 2020 and the publication of the 2022 consultation documents discussed below.

Step two, 'developing fully evidenced targets', is the actual setting of targets. This is framed as a technical exercise, to be performed by government and government agencies, as well as 'other evidence partners'.[109] The Target Advisory Groups (TAGs) who contributed to this exercise are not mentioned. Understanding the TAGs (their membership, how they gathered their evidence and formed their views, as well as their precise recommendations) is not straightforward. The best information can be found in the detailed evidence for each individual target, but the multiple documents published during consultation take consultees to several different websites, with varied information across the groups.[110]

DEFRA commits to 'public consultation' as step three, which is 'expected to be carried out over a three-month period'.[111] The Targets Consultation was published on 16 March 2022, with only eight weeks for responses.[112] It is not yet clear how or whether the 2020 commitment that '[w]hen seeking public views, we will make sure that our proposals reach civil society networks, including youth networks'[113] has been achieved.[114] Finally, the 2020 policy document says that, before the formal consultation, there will have already been 'iterative engagement with key umbrella organisations throughout the target setting process',[115] and there are multiple references to debate, consensus and engagement in the *Summary of Evidence* published alongside the 2022 consultation. A clear and detailed sense of this engagement, in particular who was involved and the substance of the arguments, is not consistently or easily available.[116]

As well as this general difficulty pinning down approaches, the consultation documents released in March 2022 referred to information and evidence that

109 *ibid*, 8.

110 For example the standing DEFRA advisory groups working as TAGs provide a register of members' interests, whilst the specially-created TAGs simply list names and key affiliation, without an easily accessible outline of political, economic or academic interests. DEFRA, n 106 above, footnote 2, lists the TAGs, although the role of the Scientific Advisory Council in the biodiversity target is inconsistently described across the documents.

111 DEFRA, n 108 above, 8.

112 The original document is no longer available online and was provided by email 11 August 2022 from Defra Targets Team. DEFRA, *Consultation on Environmental Targets* (16 March 2022).

113 DEFRA, n 108 above, 26.

114 There were no additional engagement or questionnaires on 'Citizen Space', email 11 August 2022 from the Defra Targets Team.

115 DEFRA, n 108 above. Greener UK and the National Farmers' Union are given as examples of 'umbrella groups' in the Glossary. There is also a reference to the possibility of 'wider engagement (such as through digital tools)' on an iterative basis.

116 Additional information is provided in the evidence on the individual targets, for example an open questionnaire was followed by a selective workshop for the biodiversity target, an open call for evidence was made for the air quality target.

was not available to consultees.[117] Following vociferous complaints,[118] on 6 May 2022, further evidence was published and the consultation was extended to 27 June 2022. The information for the targets consultation is now very extensive. The vast scale of the exercise is challenging for DEFRA, but the information remains open to criticism in terms of consistency and ease of access as well as a lack of information on the substance of prior debate.[119] Further, the highly technical vision of environmental protection, and the sidelining of broader values is problematic. There seems to have been no more general *public* consultation on the fundamental issue of environmental prioritisation and ambition through the targets; if such exercises did take place,[120] it is unclear how their results fed into the process. Further, the limited time to absorb and respond to the volume and complexity of the material is not a trivial issue, even for technically expert consultees.

DEFRA's hasty preparation of this enormous consultation may explain some of its flaws. This could be a shortcoming of the statutory deadline for step four, laying the draft Statutory Instruments before Parliament.[121] Equally however, we might be concerned at the failure to resource such statutory deadlines.

### The Environmental Principles

Before the Environment Bill had passed into law, DEFRA undertook a non-statutory 12-week consultation on a draft Environmental Principles Policy Statement. The Government only responded to the outcomes of this consultation when it laid the draft Policy Statement before Parliament nearly a year later, in May 2022.[122] The responses were 'coded' by 'analysts', with a preference for quantitative analysis (how many agreed, how many disagreed). This approach risks overlooking the complexity of the issues,[123] although 'themes' were outlined that summarised some of the consultees' arguments. The bland response might be justified by the lengthy debate leading up to this point. However, this raises questions about how much was still open for decision. The Secretary of

117 DEFRA, n 112 above, for example footnote 3 providing a website address on which impact assessments 'will be published'; footnote 33, providing a website address on which air quality evidence is 'to be published'; 'outstanding meeting minutes will be published shortly', 5.

118 For example ClientEarth at www.clientearth.org/latest/latest-updates/news/why-the-uk-environment-bill-matters/ [https://perma.cc/B4KC-CCCB]; Pippa Neill, 'Key Evidence Missing from DEFRA's Environmental Targets Consultation' *ENDS Report* 22 March 2022.

119 On the failure to identify links between the targets and with obligations in other measures, see Letter from the OEP to the Secretary of State dated 27 June 2022 at https://www.theoep.org.uk/report/oep-response-consultation-environmental-targets [https://perma.cc/J753-8M9F].

120 Which is possible.

121 Environment Act 2021, s 4(9)(c), 31 October 2022. The deadline was missed, see Written Parliamentary Statement of the Secretary of State (Therese Coffey), 28 October 2022, HCW347.

122 The Cabinet Office, *Consultation Principles* (2018) require that a delay beyond 12 weeks should be explained, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf [https://perma.cc/XX7T-W5V4].

123 For example Maria Lee, 'DEFRA's Draft Environmental Principles Policy Statement' (2021) at https://ssrn.com/abstract=3827270 [https://perma.cc/96K8-7Q6Z].

State should have had a more substantive view of the external arguments when he put the statement before Parliament.[124]

Parliament was rigorous in its attention to the draft Policy Statement, following up on its long-standing interest (stimulated at least in part by NGO advocacy after the Brexit referendum) in the environmental principles. Both the Environmental Audit Committee and the House of Lords Select Committee on Environment and Climate Change scrutinised the draft Statement,[125] expressing concerns about its content, as well as its slow progress. The House of Lords also held a debate on the draft Policy Statement[126] after the Secondary Legislation Scrutiny Committee drew it to the special attention of the House.[127] The demands that 'executive law' places on Parliament, as the core institutional mechanism for holding the executive to account, are significant.[128] The Secretary of State is required to respond to parliamentary recommendations.[129]

Whilst I am not exploring the substance of the Environment Act 2021 here, the environmental principles are substantively significant for the Aarhus Convention, since they are generally supportive of open decision-making. For example, taking uncertainty seriously under the precautionary principle means celebrating 'the epistemic other',[130] being alert to unthought of ways of seeing the world – and more prosaically, acknowledges that government may not know best. Further, the Secretary of State must be 'satisfied' that the statement will 'contribute' to sustainable development:[131] the principle that 'environmental issues are best handled with the participation of all concerned citizens'[132] is generally considered to be a fundamental aspect of sustainable development. The draft Policy Statement is silent on the potential value of outsiders.

The Environmental Principles Policy Statement probably falls under Article 7 of the Aarhus Convention. The national 'policy' label is not, as discussed above, decisive, but does seem appropriate. The Statement is an approach to decision-making, a 'policy' on how the principles will be used, without a plan

124 See *R (Stephenson)* v *Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin); [2019] PTSR 2209 (*Stephenson*) at [68] on the need for decision-makers to understand the substance of consultation responses.

125 Environmental Audit Committee, *Recommendations on the Government's Draft Environmental Principles Policy Statement* 3rd Report of Session 2022-23 HC 380; letter from Baroness Parminter, Chair, Environment and Climate Change Committee to Minister Pow, 23 June 2022. Query whether this letter containing 'the Committee's comments' constitutes 'recommendations' from a 'committee of either House of Parliament', Environment Act 2021, s 18.

126 HL Deb vol 823 col 157 30 June 2022.

127 House of Lords Secondary Legislation Scrutiny Committee, 3rd Report of Session 2022–23 HL Paper 11.

128 Fisher, n 6 above. Parliament did not engage (publicly) with the targets consultation.

129 Environment Act 2021, s 18. 'Consideration of the feedback received from Parliament is ongoing', Written Parliamentary Statement of the Minister (Lord Benyon), 24 October 2022 HL 2442

130 Ian Scoones and Andy Stirling, 'Uncertainty and the Politics of Transformation' in Ian Scoones and Andy Stirling (eds), *The Politics of Uncertainty: Challenges of Transformation* (London: Earthscan, 2020) 13-14, citing personal communications with Brian Wynne.

131 Environment Act 2021, s 17(4)(b).

132 United Nations 1992 *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26, Principle 10, cited in the preamble to the Aarhus Convention. See also the UN Sustainable Development Goal 16.7, United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGA Res 70/1 (2015).

or programme for action. There have been at least 'endeavours' to consult. The 2021 consultation probably meets the more demanding 'plans and programmes' provisions, especially if we accept that some elements of decision-making had been determined (and so some issues had been given due regard) following earlier consultation. The repetition of the same arguments on principles between 2018 (even 2016) and 2022 indicates the necessary disappointments of participation when it is not possible to persuade decision-makers.

## The Habitats Regulations

The convoluted approach to amending Habitats Regulations under the Environment Act 2021 began with the Secretary of State's announcement of a Working Group to 'consider the technical detail and … gather evidence from experts and stakeholders'.[133] The Group's recommendations are more reflective of its political composition than of this narrow technical description. The Working Group was not independent (nor did it claim to be), comprised of two DEFRA ministers, the chair of Natural England and a barrister.[134] Its recommendations have the potential fundamentally to reshape the future of nature conservation and recovery in England, and to replace entirely the existing framework of protection with a new form of assessment.[135]

The Working Group did not hold an open consultation or publish its working methods. The only information on its activities is an eight-page summary of its 'findings', published by DEFRA alongside the Green Paper discussed below.[136] The *Summary of Findings* says that the Working Group based its recommendations 'on evaluations of the evidence from [Habitats Regulations Assessment] experts and the expertise of Working Group members'[137] and that it consulted a 'balanced range' of experts. The six categories of expert consulted includes developers and environmental NGOs, but in the absence of detail on who participated, and how their views were dealt with, assessing the 'balance' of interests is not possible.[138] The Working Group 'evaluated' the contributions of external experts 'as a coherent whole' and in the context of 'proposals for reform' from the Department. Given that the experts were selected invitees, some coherence of views is plausible, but presumably (unless critical voices were entirely excluded) varied views were expressed about the future of this most crucial area of environmental law. There is no indication in the documents of

133 Eustice, n 61 above; Rebecca Pow HC Deb vol 696 col 376 26 May 2021.
134 Christopher Katkowski QC (a planning barrister), Lord Benyon (DEFRA minister), Rebecca Pow (DEFRA minister) and Tony Juniper (Chair of Natural England).
135 Three 'solutions' are proposed, which 'are not mutually exclusive'.
136 DEFRA, *Habitats Regulations Assessment Review Working Group Summary of Findings*; DEFRA, *Nature Recovery Green Paper: Protected Sites and Species* (March 2022) both at https://consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/ [https://perma.cc/RF93-QSNU].
137 *ibid*, 1.
138 On the importance of this, see for example Carolyn Abbot and Maria Lee, 'Economic Actors in EU Environmental Law' [2015] YEL 1.

areas of disagreement or resistance, or of the actual arguments.[139] Nor is the thinking of the Working Group, the specific evidence on which it based its conclusions, or the involvement of the members personally in assessing points made by external experts, fully explained.

By the time of the conventional open consultation via the *Nature Recovery Green Paper* (NRGP or Green Paper),[140] the Government's position was advanced. Political frustration with the procedural and substantive constraints of the Habitats Regulation had been clear for some time,[141] and the direction of travel within DEFRA was apparent.[142] The Working Group's *Summary of Findings* describes its recommendations as '[complementing] a more coherent and simplified approach to protected sites … as set out in the NRGP'.[143] We might have expected the Working Group to inform the Green Paper rather than the other way around; further, the *Summary of Findings* and the NRGP were published side-by-side, with the NRGP ostensibly the *beginning* of a public consultation process.

The *Green Paper* was published on 16 March 2022, with only eight weeks to respond. It set out options for fundamental reform of habitats designation and assessment. It also announced a 'new legislative framework' for environmental impact assessment (EIA) and strategic environmental assessment (SEA), requesting views ahead of firm proposals.[144] These are enormously consequential and complex issues, and their significance should imply a commensurately careful and inclusive consultation exercise.

The substance of the consultation also raises participatory issues. A failure to require public participation has always been a significant gap in the Habitats Regulations.[145] Planning permission and/or EIA or SEA will often be necessary for activities that require assessment under the Habitats Regulations, bringing consultation obligations with them. Nowhere in the Green Paper is public participation or formal consultation raised.[146] Its overwhelming theme is a frustration with legal processes, an assertion that 'process has become king and crowded out individual judgment on individual cases'.[147] The Green Paper describes an 'obsession with uniformity of procedure' as the 'scourge of modern government', where 'the consistency of the process to avoid litigation risk

139 Letter from the OEP to the Secretary of State 11 May 2022, 1 at https://www.theoep.org.uk/report/oep-response-government-nature-recovery-green-paper-and-advice-proposals-reform-habitats [https://perma.cc/WPW7-WF5L].

140 DEFRA, n 136 above.

141 See for example the then-Prime Minister's 'project speed' speech deriding 'newt counting delays' to development, 30 June 2020 at https://www.gov.uk/government/speeches/pm-economy-speech-30-june-2020 (last visited 11 November 2022).

142 From at least Eustice, n 61 above.

143 DEFRA, n 136 above, 1.

144 *ibid*, 20. It also raised the possibility of major changes to the environmental regulatory structure, in particular (implicitly) around merging Natural England and the Environment Agency, ch 6.

145 n 14 above, and the EU Habitats and Birds Directives on which they are based: Directive 1992/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7; Directive 2009/147 on the conservation of wild birds (codified version) [2010] OJ L20/7.

146 The only hint is a suggestion that the complexity of the current system reduces public understanding of the system or its importance, DEFRA, n 136 above, 4.

147 *ibid*, 15. The OEP advises 'that Defra seeks to establish more clearly' where difficulties are caused by the regulations, n 139 above, 3.

has become elevated above the quality of decision making'.[148] The evidence for these startlingly expressed assertions, and for the Green Paper's conclusions and proposals, is not provided; nor is it made clear to consultees that the Habitats Regulations include substantive as well as procedural obligations.[149]

The explicit objective of the *Green Paper* is to 'place science above process in determining conservation outcomes', and to 'make space for calibrated judgements to be exercised on a case-by-case basis'.[150] The Green Paper aims to allow 'individual case officers to exercise their expert scientific judgement and have sufficient clarity to be confident their decision will not be constantly subject to legal challenge in relation to process.'[151] Whether, and if so what, procedural or substantive criteria will be put in place to guide the exercise of individual judgement is not discussed.[152] The Green Paper does '[recognise] the importance of due process',[153] but without expanding. It calls for 'a legal framework of long-term statutory targets and then a government that has the powers needed to deliver those targets, freed from the distractions that have held back progress in recent decades'.[154] In fact, integrating environmental ambition, including long-term targets, into routine decision-making is one of the most difficult challenges in environmental law and policy.[155] It might be argued that ad hoc good judgement is a return to a pre-1970s 'British way' that was smothered by EU red tape, but this is not a plausible solution to our complex environmental challenges.[156] More specifically for current purposes, the NRGP seems to offer little scope for public inclusion in decisions, and indeed guaranteed rights to participate would be anathema to its fundamental rejection of process.

The deadline for responses to the Green Paper was 11 May 2022. On the same day, the Levelling Up and Regeneration Bill (LUR Bill) was introduced in the House of Commons.[157] This is another enormous Bill, and if passed will (amongst other things) introduce 'a new approach to environmental assessment' and to habitats regulation assessment. Part 5 of the LUR Bill

148 DEFRA, *ibid*, 16; this is similar to the language of the Secretary of State's earlier speech, n 61 above.
149 See also OEP, n 139 above.
150 DEFRA, n 136 above, 6.
151 *ibid*, 16. Officers rarely take the decision themselves.
152 The OEP, n 139 above, observes that an approach based on individual judgement 'risks undermining transparency and accountability as well as being likely to result in increased uncertainty. It risks arbitrary, capricious decision-making, contrary to good regulatory practice', *ibid*, 13.
153 DEFRA, n 136 above, 16.
154 *ibid*, 29. This is in the part of the Green Paper on public bodies and delivery, rather than assessments.
155 Also for example Joanna Bell and Liz Fisher, 'The 'Heathrow' Case: Polycentricity, Legislation, and the Standard of Review' (2020) 83 MLR 1072.
156 See Ben Pontin, *The Environmental Case for Brexit: A Socio-Legal Perspective* (Oxford: Hart Publishing, 2019) 12 and generally, arguing that the post-Brexit UK can return to an earlier time of pragmatic, consensual and flexible environmental regulation, and voluntarism around implementation. The highly technical vision apparent in Environment Act implementation is probably not consistent with Pontin's understanding. It is a fascinating book, but my doubts about the 'British way', conceptually and practically, can be found in Maria Lee, 'Environmental Pasts and Futures: The European Union and the "British Way"' (2019) 31 JEL 559.
157 Discussion here is of the Bill as amended in Committee.

empowers the Secretary of State to make Regulations (EOR Regulations)[158] setting 'specified environmental outcomes.'[159] The EOR Regulations *may* require the assessment of plans and projects against these outcomes in an 'Environmental Outcomes Report'. The Environmental Outcomes Report would then be 'taken into account or given effect, in accordance with EOR Regulations'.[160]

Clause 129 grants broad powers to govern interaction between the EOR Regulations and existing environmental assessment legislation (EIA and SEA) or the Habitats Regulations. The powers include both the possibility of 'disapplying or otherwise modifying … existing environmental assessment legislation or the Habitats Regulations' when an Environmental Outcomes Report is required,[161] and the power to 'amend, repeal or revoke existing environmental assessment legislation', *without* the proviso that an Environmental Outcomes Report be required instead.[162]

The political situation is uncertain. These provisions may not become law, and if they do, will not necessarily be exercised. And, as with the Environment Act 2021, this is framework legislation which could lead to positive as well as negative environmental outcomes.[163] For the purposes of our exploration of the Aarhus Convention, however, the Bill is progressing through Parliament before any opportunity for the Government to consider responses to the NRGP, let alone to publish its response, and before the publication of further evidence or detailed proposals on environmental assessment. As primary legislation, the LUR Bill does provide additional and welcome democratic input. And by contrast with the Environment Act, the LUR Bill provides that the Secretary of State 'must consult the public' before specifying 'environmental outcomes' and before amending, repealing or revoking existing environmental assessment legislation in the absence of specified environmental outcomes.[164] Only 'such persons as the Secretary of State considers appropriate' must be consulted on 'interaction' between the EOR Regulations and environmental assessment and habitats law.[165]

The substance of the powers in the LUR Bill is worrying from an Aarhus perspective. Many of the obligations contained in Articles 6 and 7 of the Convention are met in English law by EIA and SEA. One of the so-called 'safeguards' in the Bill provides that '… the Secretary of State must seek to ensure that … arrangements will exist under which the public will be informed of any

158 The Bill does not spell out what EOR stands for, but the Explanatory Memorandum refers twice to 'Environmental Outcomes Report Regulations'.

159 LUR Bill, Clause 118; The Secretary of State must have regard to the current Environmental Improvement Plan under the Environment Act 2021.

160 LUR Bill, Clause 119.

161 LUR Bill, Clause 129(2)(d).

162 LUR Bill, Clause 120(3).

163 The legislation simply requires the Secretary of State to be 'satisfied' that the regulations will not result in environmental law providing lower levels of environmental protection, LUR Bill, Clause 122(1).

164 LUR Bill, Clause 127(1).

165 LUR Bill, Clause 127(2)(a)(iv). The Explanatory Memorandum describes, inadequately, the reduced consultation as being for 'more technical or procedural matters'.

proposed relevant consent or proposed relevant plan in sufficient detail, and at a sufficiently early stage, to enable adequate public engagement to take place.'

But in a familiar qualification, '"adequate public engagement" means such engagement with the public … as the Secretary of State considers appropriate'.[166] This Bill thus moves away from a legally protected right to be consulted, let alone to participate in a more profound way, towards participation at the government of the time's discretion. The Bill's international law 'safeguard' is also unlikely to place significant limits on the scope of the new regulations; international law in this area addresses transboundary environmental assessment, rather than day-to-day EIA and SEA.[167]

It is easy to picture the introduction of secondary legislation that breaches the Aarhus Convention. The simple introduction of statutory powers to reduce public participation (ie passing the Bill) would in itself represent a backwards step, relative to the current situation. There is no explicit provision in Aarhus barring backsliding in the absence of an independent breach. The ACCC, however, has recommended that parties refrain from taking measures that would reduce existing rights, and that where rights have been reduced, they be kept under review.[168]

This discussion also raises more questions about the elusive dividing lines between Articles 6, 7 and 8. The LUR Bill is part of a legislative process, and so Parliament arguably escapes Aarhus obligations. There was, however, no 'striving' for public participation on the legislative preparation, or at least no opportunity for the Government to take due account of what participation there was.[169] At every step, from government amendments of the Environment Bill 16 months after it was introduced to Parliament (for the second time), to the overtaking of consultation by the LUR Bill, there has been a disregard for public participation on these most fundamental environmental matters.

Adding to the pressure, habitats and environmental assessment law is now subject to automatic repeal, if the REUL Bill passes. As well as the potential harm to these and other provisions of environmental law, the sunset clause in the Bill would allow for the repeal of vast swathes of law with no parliamentary process, public consultation or impact assessment.[170]

166 LUR Bill, Clause 122(3), (4).

167 LUR Bill, Clause 122(2), for example Espoo Convention on Environmental Impact Assessment in a Transboundary Context 1991, ECE/MP.EIA/21/Amend.1. In the EU-UK Trade and Cooperation Agreement, Art 393(2), 'The Parties reaffirm their respective commitments' to environmental assessment. The courts are likely to defer to a 'tenable' government interpretation of international law, *Friends of the Earth* v *Secretary of State for International Trade / Export Credit Guarantee Department* [2022] EWHC 568 (Admin) at [106]-[120].

168 *ACCC/C/2005/13, addendum to Communication ACCC/C/2004/04 Hungary* at [17], [21].

169 Aarhus Convention, Art 8. The relevant White Paper (Ministry of Housing, Levelling Up and Communities, *Levelling Up the United Kingdom* (2022) CP604) did not discuss environmental assessment, although reform of planning had been subject to consultation.

170 Saving, or restating, revoking or replacing the legislation is possible through secondary legislation, but subject to a very short deadline and much pressure on resources. Hansard Society, n 7 above.

Government is not avoiding consultation. Arguably, it cannot. Not only is consultation demanded politically, but government needs the expertise of the broader environmental community. Although aspects of the processes discussed here surpass the bare requirements of the Aarhus Convention, the consultation processes are flawed. At least four key issues stand out: an overarching question of quality and orderliness; poor information and evidence; limited inclusion; and limited impact.

These issues can be added to more familiar limitations of participation in practice.[171] Participation requires resources of time, mobility, literacy and communication skills, as well as often technical or specialist expertise. The uneven distribution of these resources means that participatory rights can reinforce rather than reducing existing patterns of exclusion. NGOs as much as individuals need a range of resources to participate effectively.[172] These practical issues lead us to more conceptual questions around the democratic and problem-solving capacities of a process, about who participates and how well the powerful listen.[173] 'Traps', including overly prioritising the 'local'[174] or making assumptions about 'ethnicity and difference',[175] abound. Resolving these difficulties may not even be possible and legal rights to participate do not guarantee actual participation.[176] The Environment Act 2021 processes do not even get this far, however, not attempting to embrace broad publics, and rejecting legal constraints on the executive. The UK Government claims in its Aarhus Implementation Report that it is 'improving the way it consults by adopting a more proportionate and targeted approach', emphasising 'focusing on real engagement with key groups rather than following a set process'.[177] In the context of the material above, this otherwise innocuous language suggests a discretionary and selective approach to inclusion, inconsistent with the spirit and often the letter of the Convention. It is also inconsistent with the Environment Act's ostensibly ambitious environmental agenda. The paradox can be resolved only if decision-makers believe they already know what environmental enhancement demands, or at least who to ask, and that providing solutions is also within their grasp. The complexity, contentiousness and distributive

171 See for example Lucy Natarajan et al, 'Participatory Planning and Major Infrastructure: Experiences in REI NSIP Regulation' (2019) 2 *Town Planning Review* 117 on practical barriers; Alan Irwin, Torben Jensen and Kevin E. Jones, 'The Good, the Bad and the Perfect: Criticising Engagement in Practice' (2013) 43 *Social Studies of Science* 118. Nor does public participation necessarily lead to better environmental outcomes, see Armeni and Lee, n 3 above.

172 On legal support structures for *litigation*, see Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998); on planning, see Carolyn Abbot, 'Losing the Local? Public Participation and Legal Expertise in Planning Law' (2020) 40 *Legal Studies* 269.

173 Sherry Arnstein, 'A Ladder of Participation' (1969) 35 *Journal of the American Planning Association* 216; Stirling, n 20 above.

174 Mark Purcell, 'Urban Democracy and the Local Trap' (2006) 43 *Urban Studies* 1921.

175 Yasminah Beebeejaun, 'Gender, Urban Space, and the Right to Everyday Life' (2017) 2 *Journal of Urban Affairs* 323.

176 Natarajan et al, n 171 above; Lee, n 11 above.

177 UK Implementation Report, n 60 above at [26].

consequences – features demanding broad inclusion – of acting or failing to act to enhance the environment, are neglected.[178]

The first of the concerns listed above is about the quality and orderliness of consultation, embracing the other three points. A 'haphazard' approach to consultation is apparent throughout the material reviewed here.[179] The selection of areas for consultation does not seem to have been driven by a sincere and careful assessment of their significance. For example, powers to change the Habitats Regulations and environmental assessment were introduced to Parliament (in the Environment and LUR Bills) without prior public consultation, whilst the environmental principles have been through multiple rounds of consultation. The principles are crucial and difficult, but they bite only on environmental law (generally legislation); the Habitats Regulations and environmental assessment are absolutely fundamental to environmental law. Nor is there any apparent method to determining the length of consultations, which should be commensurate with the complexity and consequence of the issues. Although progress on the Environment Act has been tortuously slow from the outset, consultation (formal and informal) seems to have always been urgent.[180] It may seem paradoxical that, alongside limited consultation, we see a hint of consultation fatigue, with the environmental NGO community working at a frenzied pace. But it is not a paradox, it is part of the poverty of the consultation processes. The ability of even privileged insider NGOs to find time for effective internal reflection and deliberation, let alone to fulfil their role of mediating between government and broader publics,[181] is compromised by haste. Far from implying too much consultation, this emphasises quality: a process that enables consultees to give the most 'intelligent consideration and response'.[182]

Poor quality consultation may, in part, be attributed to the sustained pressure on civil servants. They have a huge, technically and politically difficult, and not always consistent, DEFRA agenda, stretching far beyond the three (enormous) issues discussed here.[183] Good, democratic environmental decision-making requires public resourcing and political prioritisation; giving consultees sufficient time, but also devoting adequate time and resources to preparing the consultation and integrating its results into decisions. The Aarhus Convention imposes some order and minimum standards of quality on participation; as does the common law, but unlike Aarhus, only if government *chooses* to consult. Brief

178 Resonance with populism is striking, with its simple answers to complex questions, leaders who already know what 'the people' think – those who disagree are not the 'real' people – and a resistance to legal constraints on action. See for example Jan-Werner Muller, *What is Populism?* (Philadelphia, PA: University of Pennsylvania Press, 2017); Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 Annu Rev Law Soc Sci 79. We might also consider the patrician aspects of the 'British way', Pontin, n 156 above.

179 See ClientEarth on the targets consultation in particular, n 118 above.

180 Abbot and Lee, n 50 above

181 For example Itay Greenspan, Galit Cohen-Blankshtain and Yinnon Geva, 'NGO Roles and Anticipated Outcomes in Environmental Participatory Processes: A Typology' (2022) 51 *Nonprofit and Voluntary Sector Quarterly* 633; Sheila Jasanoff, 'NGOs and the Environment: From Knowledge to Action' (1997) 18 *Third World Quarterly* 579.

182 *Moseley* n 71 above, under the *Gunning* / Sedley criteria, text at n 73 above.

183 There are major changes in agriculture, fisheries and trade, and virtually every part of the Environment Act requires implementation activity.

Cabinet Office guidance on consultation, with which all three processes discussed above purport to comply, is without ambition or detail. Its 11 principles are unobjectionable,[184] but there is no sense that good participation is a political priority.

Secondly, information or evidence has in some cases been absent or hard to track down. In particular, the evidence on which proposals are based is missing from both the initial targets consultation and the Green Paper. As well as technical evidence, this includes detail on who has contributed to the process, and how, and the substance of the key arguments. Further, whilst it is good practice to consult early, before developing firm proposals, this needs to be part of an iterative process, so that there is also consultation on actual options.[185] Clarity on links between different areas (other consultations or existing law and policy[186]) is also necessary for meaningful consultation.[187] Far from integrating environmental protection into other areas of policy, the massive DEFRA agenda seems to be internally siloed; and the introduction of the LUR and REUL Bills by different government departments suggests impatience or incoherence.

The underpinning of participation by rights to information is clear from Aarhus.[188] The English common law, whilst emphasising the importance of context, contains a 'general obligation' to inform consultees 'what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response'.[189]

Thirdly, inclusion has often been *selective*, invitations to participate granted at the discretion of government. Selective participation was a feature of the development of the Environment Bill, actively reinforced by the terms of the Act, and apparent in implementation. There are obvious concerns. Selective participation is likely to exclude inconvenient environmental voices, as well as 'ordinary' people. There is a risk that elite participants will develop shared interests that reduce the diversity and challenge.[190] Emphasising again the link between information and participation, the substance of government thinking and the evidence on which it is based is likely to be released confidentially as a 'favour' rather than as a right.[191]

184 For example consultation should be 'informative' and 'last for a proportionate amount of time', and government responses should be published 'in a timely fashion', Cabinet Office, n 122 above.

185 As, for example, on environmental assessment in the NRGP, n 136 above.

186 For example, the three issues discussed above are tightly linked, but consultees have no assistance in bringing the material together, complicating ability to respond to the consultation, n 119 above.

187 Note also the failure to mention the substantive element of the Habitats Regulations, OEP n 139 above. If consultees are under the impression that the Habitats Regulations are entirely procedural, they are not able to respond adequately to the NRGP.

188 For example Aarhus Convention, Arts 6(2), 6(6), and 7.

189 *Moseley* n 71 above at [39] citing *R* v *North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. See also *R (Friends of the Earth)* v *Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) at [245] on enabling recipients 'to understand and assess the adequacy of the Government's policy proposals and their effects'.

190 Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 ELJ 542.

191 See also *Greenpeace* n 69 above at [115]: 'the public, and not simply those who happened to be "in the know", were entitled to be given sufficient information …'.

These problems are compounded by a lack of transparency.[192] Outsiders do not know who has been involved, the substance of their arguments, or how that was reported to ministers or other decision-makers. Even if 'the' environmental community is consulted, how that compares with the consultation of private economic actors is important. And of course, there is no such thing as 'the' environmental community. Environmental groups are diverse in their objectives, their understandings of the environmental interest, and their approaches. Greener UK's privileged access was mentioned above; notwithstanding my admiration for them, this does not satisfy the need for inclusion of the broader community.[193] Matters become more complex with privileged access for 'environmental' collaborations between environmental groups and business, where the interests driving the agenda may be even less clear.[194]

Articles 7 and 8 of the Aarhus Convention apply to the 'public', not the 'public concerned'. Whilst Article 7 requires the public authority to identify 'the public which may participate', that is not a limit on participation, but an expansion, recognising that public authorities must work at inclusion.[195] Selectivity most obviously impacts the democratic potential of participation. The demand for broad input comes in part from a recognition that environmental decisions are never purely technical, but distribute costs and benefits, and reflect values as well as interests. It also resonates with the fragmentation of information and knowledge. Only a few experts might choose to participate, but decision-makers cannot presume to know in advance who they will be.

Fourth, in a number of cases, the outcome of the consultation process seems to be a foregone conclusion, or at least the scope for change of heart is limited. A 'closed mind' is in principle unlawful in the common law,[196] as well as under the Aarhus Convention. It would nevertheless in most cases be difficult to establish that 'all options' are not in principle 'open', given that government's hands are not tied,[197] and in some cases because of a 'tiered' process where different options are closed at different stages.[198] A fully open mind might often be too much to ask. Commitments and appraisal (decisions and process) are inevitably co-constitutive, interweaving: 'social appraisal is conditioned by the

192 Abbot and Lee, n 138 above.

193 I should disclose my former membership of Greener UK's Brexit Scenarios Group for some months.

194 Such groups abound, for example https://www.aldersgategroup.org.uk/membership/organisations/; https://www.broadwayinitiative.org.uk/ [https://perma.cc/PRG8-4A7X] and closer to home, https://www.ukela.org [https://perma.cc/S2AY-4DG5]. See generally for example Jan Beyers and Iskander De Bruycker, 'Lobbying Makes (Strange) Bedfellows: Explaining the Formation and Composition of Lobbying Coalitions in EU Legislative Politics' (2018) 66 *Political Studies* 959.

195 See also Barritt, n 18 above, 152, and note the qualifier 'taking into account the objectives of this Convention'.

196 In *Stephenson* n 124 above at [58], the Government had effectively conceded that the Secretary of State had a closed mind, arguing that the contested issues had not been part of the challenged consultation.

197 See for example *HS2* n 47 above at [98]-[99] on the decision-making role (in that case of Parliament) being 'not merely formal', notwithstanding an established government decision in principle, and the exercise of party discipline by the Government; also discussing other cases.

198 Implementation Guide, n 42 above, 146.

commitments it supposedly informs', decisions shape the consultation.[199] Some pre-commitment, a sense of the direction of policy, *need* not be inconsistent with openness to argument and to a change of approach. A clear explanation of what has already been decided (and by whom, on what basis) could go some way to reassuring officials who experience public participation as a bureaucratic hurdle, to helping consultees, and to somewhat easing the toxicity of doubts about authenticity of consultation.[200] The idea that we can easily separate proposals and decisions, decision-making and participation, may be part of the frustration with participation. A clearer and more demanding legal obligation in this respect would be helpful.

At the other end of the process, the Environment Act 2021 is silent on the related need for an attentive government consideration of responses. 'Due account' in Aarhus, and 'conscientious' consideration in the common law, are modest efforts to render consultation meaningful. The ACCC has said that 'in practice' due account requires 'an explanation of the public participation process and how the results of the public participation were taken into account'.[201] Responses from Government in our cases have been tardy, and patchy in their approach. Most egregiously, the already flawed NRGP consultation was overtaken by a Bill before any response to the consultation. Good public participation requires timely responses from decision-makers, which are embedded in decision-making, rather than an entirely separate exercise.

The limitations of these consultations go beyond the routine failings of well-intentioned consultation exercises, suggesting a more fundamental resistance to the value of participation. In the absence of statutory requirements, we turn to the common law, which whilst not requiring consultation, does apply the *Gunning*/Sedley standards if there is consultation. It is clearly difficult to establish either common law procedural impropriety or *Wednesbury* unreasonableness for the sorts of high-level decisions considered here.[202] But it is not impossible, given how very far it fell short of good practice. For example, it is possible that without a re-think, the initial targets consultation would have been vulnerable to judicial review. Without suggesting that this would be necessary or sufficient for compliance with the Aarhus Convention,[203] a broad statutory duty to provide opportunities for public participation on environmental matters, alongside minimum quality standards, could have provided a more coherent approach: the Environment Act gives nobody in particular a legal *right* to participate or be consulted, and makes no effort to address even the most basic

199 Stirling, n 20 above.

200 Maria Lee et al, 'Public Participation and Climate Change Infrastructure' (2013) 25 JEL 62.

201 *Findings and recommendations with regard to communication ACCC/C/2010/52 concerning compliance by the United Kingdom* at [86], of Article 8 (with the 'as far as possible' qualification). This does not require the acceptance of all comments, but they must all be 'seriously [considered]' *ACCC/C/2014/120* n 39 above at [106].

202 *Greenpeace* n 69 above at [54].

203 Note especially Aarhus Convention, Art 3(1), requiring Parties to 'take the necessary legislative, regulatory or other measures … to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.' A clear and enforceable regulatory framework appears to be necessary for the EU, although this might be related to its particular structure, *Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union* at [87].

limitations of participation. Statutory rights to participate are not without cost, and frequently expose the real-life barriers and conceptual limitations outlined above. But whatever their imperfections, without them, the existence and methods of participation are at the discretion of the decision-maker, and we can be sure that economic interests will be included.

## CONCLUSIONS

The Aarhus Convention was absent from the development of the Environment Act 2021, and the Environment Act denies the Aarhus obligations and values in English law. The analysis above reinforces the importance of legally protected *rights* to participate: obligations in law ensure participation, even when the process is inconvenient and alternative perspectives are unwelcome, and can incorporate minimum standards of quality. However, the discussion above also highlights the limitations of law. In part, this is because of the limited obligations in the model provided by the Aarhus Convention, which 25 years on looks like a bare minimum. Mere consultation – subject to sparse protections as to timing, information and regard – might belie a more adventurous spirit, but Aarhus' *legal* demands are relatively easily met, notwithstanding jeopardy in elements of the processes reviewed above. In any event, compliance, even with ACCC findings, depends significantly on domestic political priorities.[204]

When it signed the Aarhus Convention, the UK Government may have been complacent about the challenge of compliance;[205] 25 years on, it seems to doubt the wisdom of any legal institutionalisation of public participation in environmental decision-making. This feeds directly into the quality of participation, which requires public resources and political commitment. Erstwhile supporters of participation may have lost confidence in the potential of participation to redistribute power or to incite ecological transformation, or even to provide more modest environmental and democratic enhancement. Improving public participation is a never-ending task, and 'critical disappointment' is not necessarily rejection.[206] Continued scrutiny of processes of decision-making is crucial, and the institutions of good and democratic decision-making need defending. Better participation will not solve our environmental problems, and better law will not on its own create a participatory and inclusive culture. But in the absence of legal rights to participate, inclusion is at the discretion of the powerful.

204 Samvel, n 27 above.
205 Vanhala, n 1 above.
206 Irwin et al, n 171 above, 122.