

# NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation

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## ABSTRACT

This article explores the relative neglect by environmental NGOs—at least until recently—of the middle, public participation, pillar of the Aarhus Convention. This can be seen in litigation, as well as in political advocacy, both domestically and at the international (Aarhus) level. Interviews with some key actors in this area and analysis of published documents provide insights into NGO decision-making. The limits of law become clear—Aarhus rights are made real only through the commitment of governments and civil society. A nuanced combination of internal and external factors contributes to explaining the lack of NGO attention to Aarhus’ middle pillar. We may also see some indications that NGOs envisage participation as a process properly dominated by expertise. This is far from uniform, however, and other parts of the community clearly appreciate and value the significance of lay participation in the environmental arena.

**KEYWORDS:** Aarhus Convention, public participation, NGOs, legal mobilisation, interviews

## 1. INTRODUCTION

The adoption of different tactics and strategies by NGOs in their pursuit of social change is influenced by a complex and dynamic set of external and internal factors; legal frameworks and NGO understandings of law, can contribute to these factors, as well as being partly shaped by them. In this article, we explore how and why the large, established NGOs working in England use or ‘mobilise’ the middle—public participation—pillar of the Aarhus Convention. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was when it was signed in 1998, an inspirational, progressive development in environmental law.<sup>1</sup> In particular, the privileged status of environmental NGOs in the Convention was both innovative and potentially radical.

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1 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447, signed at Aarhus, Denmark on 25 June 1998 (the ‘Aarhus Convention’).

Our interest in why and how environmental groups ‘mobilise’ the Aarhus Convention arose out of a sense that, whilst environmental groups have devoted a great deal of energy to shaping the scope of Aarhus rights on access to justice in England, they have devoted relatively little attention (at least until recently) to the middle pillar. And yet, NGOs do not passively enjoy or endure legal frameworks. As Lisa Vanhala puts it in her discussion of the access to justice pillar of the Aarhus Convention, ‘civil society agents are not simply passive beneficiaries of rights but instead are strategic actors who can demand, develop, and shape access to justice from the bottom up.’<sup>2</sup> ‘Implementation’ of a Treaty is more than compliance, more than enforcement. The language of the Aarhus Convention is open-ended, and what it stands for, in any particular context, is shaped in its implementation. Environmental groups do, of course, use the provisions of the Convention to enhance their chances of success in any given individual case. But, importantly for our purposes, they also have the opportunity to be the ‘repeat players’, playing the long game, rather than looking for immediate outcomes, and shaping the rules, including the ‘rules of the game.’<sup>3</sup> The line between defining standards and applying them is blurred, and in this article, we explore both the use by environmental groups of the middle pillar to speak to power-holders and also the extent to which environmental groups try to shape its implementation by influencing its meaning and role.

We use a large and well-established literature to help us understand legal mobilisation around Aarhus. Although the scholarship is dominated by rights claims through courts or similar bodies, legal mobilisation is about more than litigation. It extends to ‘any process by which individuals or collective actors invoke legal norms, discourse or symbols to influence policy or behaviour’ including, for instance, the use of law in political advocacy or lobbying.<sup>4</sup> ‘Political opportunity theories’ explore certain external influences on NGOs,<sup>5</sup> the ways in which the structure and carrying on of government and political life affects NGO strategy. ‘Legal opportunity structure’ was developed to add more thoughtful consideration of law to this work,<sup>6</sup> addressing the external factors that influence engagement with law. The middle pillar of the Aarhus Convention, including the Convention’s institutional fora, alters the patterns of political and legal opportunity in the environmental policy field, in principle making the institutions of power more open to the voice of environmental interests and environmental NGOs. Alongside these external opportunities, certain factors internal to an NGO are also crucial to their choice of activities. Resource-based theories focus on the significance of material resources,<sup>7</sup> whilst more cultural perspectives explore the ways in which interest group strategies can both express and contribute to constituting their collective identity.<sup>8</sup>

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

3 Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law and Society Review* 165.

4 Lisa Vanhala and Jacqui Kingham, Literature Review on the Use and Impact of Litigation, PLP Research Paper (Lankelly Chase and Public Law Project 2018) 5.

5 David S Meyer and Debra C Minkoff, ‘Conceptualizing Political Opportunity’ (2004) *Social Forces* 82 1457; Herbert Kitschelt, ‘Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies’ (1986) 16 *British Journal of Political Sciences* 57.

6 Chris Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 *Journal of European Public Policy* 238. We refer in this article to legal and political opportunity (rather than opportunity structures) because whilst some features of parliamentary and judicial systems are indeed structural, others are more contingent.

7 See, eg Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); also Mark Aspinwall, ‘Legal Mobilization Without Resources? How Civil Society Organizations Generate and Share Alternative Resources in Vulnerable Communities’ (2021) 48 *Journal of Law and Society* 202 on mobilising alternative resources in marginalised communities.

8 Lisa Vanhala, ‘Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization’ (2020) 42 *Law and Policy* 105.

We begin below with a discussion of our methodology. Through semi-structured interviews with seven individuals, supplemented by an analysis of NGO publications, we explore NGO engagement with Aarhus domestically and internationally (through the Aarhus institutions), both in courts and court-like fora and beyond the courtroom. This discussion is followed by an introduction to the middle pillar of the Aarhus Convention, especially the protected space for environmental NGOs. We then, through our analysis of published material, turn to the ways in which established environmental NGOs working in England have attempted to shape their political opportunities by engaging with the middle pillar of the Aarhus Convention, seeking insights into ‘how the law is made to matter through processes of mobilization.’<sup>9</sup> Finally, we attempt to make sense of legal mobilisation around the middle pillar of Aarhus, building on the literature that explains NGO choices. We consider the external and resource-based influences on NGO strategies, as well as the role of organisational identity and of insider versus outsider status in legal mobilisation.<sup>10</sup>

We conclude that, until recently, environmental NGOs have indeed paid relatively little attention to the middle pillar of the Aarhus Convention, not using it to assert their rights or shaping it through political advocacy or litigation. Although this is disappointing, a missed opportunity to influence the life of the Aarhus Convention, it is not in itself a criticism. NGOs have neglected the middle pillar for complex, defensible—if not necessarily strategically assessed—reasons. Looking behind this neglect to the reasons for it, moreover, provides a crucial reminder of the limits of the law (alone) on participation: to be meaningful, legal rights must be met with the political commitment by those with power, as well as by broader civil society including NGOs. The NGOs we explored have been responding to their understandings of government receptiveness, as well as to clear internal constraints. Furthermore, they are now increasing their focus on the middle pillar of Aarhus. Nevertheless, the NGO disregard of Aarhus participation rights is not only reflective of but may also partly constitute, a broader under-appreciation of the democratic potential of the right to participate.

## 2. METHODOLOGY

The plurality of the environmental NGO community is important, but we focus in this article on established, relatively large and well-resourced environmental NGOs in England. The focus on England is due to the place- and location-specific nature of environmental law, and the enormous level of change in UK environmental law in the wake of Brexit. Larger more established groups should be (along with others, including government and certain economic actors<sup>11</sup>) Marc Galanter’s ‘repeat players’ on the Aarhus Convention: they know the rules of the game and, importantly for the purposes of this article, are able to ‘play for rules.’<sup>12</sup> These are the groups that are most likely to seek to shape the structure of their political and legal opportunities. By contrast, grassroots or residents’ organisations, or smaller specialised organisations, whilst they can add value to decisions in many ways, are more likely to be most concerned with success in the individual case. Although some emphasised that the lines between repeat players and one-shotters, strategy and outcomes, are not always clear and that there are ‘instances where individual cases become very important and do themselves shape the rules’ (Interviewee 6), our interviewees agree that this is ‘overwhelmingly’ if ‘not exclusively’ the case (Interviewee 1).

9 Lisa Vanhala, ‘Environmental Legal Mobilization’ (2022) 18 Annual Review of Law and Social Science 101.

10 Wyn Grant, *Pressure Groups and British Politics* (Macmillan 2000); Wyn Grant, ‘Pressure Politics: The Changing World of Pressure Groups’ (2004) 57 Parliamentary Affairs 408.

11 On power inequalities between repeat players, see, eg Annabel Ipsen, ‘Repeat Players, the Law, and Social Change: Redefining the Boundaries of Environmental and Labor Governance through Preemptive and Authoritarian Legality’ (2020) 54 Law and Society Review 201.

12 Galanter (n 3).

To enhance our understanding of how and why NGOs engage with Aarhus, we conducted semi-structured interviews with seven individuals, whose views are reported anonymously.<sup>13</sup> All have legal expertise and experience, although not all are legally qualified. Importantly, all seven have considerable expertise in the application of the Aarhus Convention, and most of them have decades of experience in their area. The individuals are either employed by or work with or around environmental NGOs. The individuals were identified from our own knowledge, and on recommendations from those we approached, based on their experience with Aarhus, law and environmental NGOs.

We supplemented these interviews with an analysis of the work that NGOs are publicly doing with Aarhus. Domestic and international ‘cases’, before the English courts or the Aarhus Convention Compliance Committee (ACCC or the Committee), were easily identified. We also examined the use of the Aarhus Convention in public advocacy, particularly in reports and briefings. Here, a combination of our own research and advice from our interviewees and others led us to two key coalitions, the Better Planning Coalition (BPC) and Wildlife and Countryside Link (Link); although we also reviewed other contributions to the debate. The BPC is a coalition of over thirty organisations, including environmental NGOs, ‘with one common goal: a planning system fit for climate, nature and people’.<sup>14</sup> The coalition came together in 2020 as a response to the Planning White Paper, in which the Government made clear the potential scale of the changes it was proposing to the planning system.<sup>15</sup> Planning law is perhaps the most significant set of legal provisions for protecting Articles 6 and 7 Aarhus rights in English law, and provides also the regulatory framework for most environmental impact assessment and strategic environmental assessment. Link is a much longer-standing coalition of over seventy environmental groups, including the larger NGOs that are the focus here, and smaller more specialist organisations.

### 3. THE SPECIAL STATUS OF NGOS IN THE AARHUS CONVENTION

The Convention famously has a three-pillar structure: access to environmental information; public participation in environmental matters; access to justice in environmental matters. Although in this article we focus on the middle pillar of public participation, the three pillars are tightly connected: adequate public participation depends on adequate access to information, and its reliability and consistency may depend on the availability of legal enforcement.

Turning to public participation, Article 3 creates an overarching obligation ‘to establish and maintain a clear, transparent and consistent framework’ for public participation. The middle pillar itself contains three articles on public participation. Article 6 applies to decisions to permit ‘specific activities’: those listed in the Convention<sup>16</sup> and ‘in accordance with ... national law’ activities not listed ‘which may have a significant effect on the environment’. Detailed obligations are included on providing information ‘early’ in the procedure ‘and in an adequate, timely and effective manner’, including information on the application and the decision-making process; procedures ‘shall include reasonable time-frames ... allowing sufficient time for informing the public ... and for the public to prepare and participate effectively’; there must

13 The interviews took place in December 2022 and January 2023 and were professionally transcribed. Interviewees were given the opportunity to check the interview quotations used in this article. Where the interviewee might be identified, we do not attribute the quotation. Where appropriate, we have lightly edited the quotations for the benefit of readers.

14 See <<https://betterplanningcoalition.com/#campaigning>> accessed 20 June 2023. On the complexities of coalition forming in the environment sector, see Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (UCL Press 2021) ch 6.

15 As noted in Better Planning Coalition, *Levelling Up and Regeneration Bill Report Stage Briefing*, 12th December 2022 available at <<https://betterplanningcoalition.com/wp-content/uploads/2022/12/Better-Planning-Coalition-Report-Stage-Day-two-Briefing.pdf>> accessed 20 June 2023.

16 Annex I.

be 'early public participation, when all options are open and effective public participation can take place'; the decision shall take 'due account' of the outcome of public participation; and decision-makers must provide reasons for the final decision. Article 7 deals with 'plans and programmes', requiring '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'. Some of the protections of participation around 'activities' in Article 6 (timings and the obligation to take due account) are incorporated. Article 7 also contains an open 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':<sup>17</sup> 'each party shall strive to promote effective public participation at an appropriate stage, and while options are still open', with some protections as to time-frames and the publication of draft rules; 'the result of the public participation shall be taken into account', but this time explicitly 'as far as possible'.

NGOs were heavily involved in the development of the Aarhus Convention from its earliest stages.<sup>18</sup> They promoted the idea of a UNECE Convention on procedural environmental rights at the first session of a UNECE Task Force on Environmental Rights and Obligations in 1994.<sup>19</sup> In 1995, UNECE ministers agreed to consider the development of a regional Convention on Public Participation with 'appropriate involvement of NGOs',<sup>20</sup> although, according to Jeremy Wates (who became Secretary to the Aarhus Convention after years working in environmental NGOs), there was 'little support from government experts' within the Task Force.<sup>21</sup> The call of NGOs was, however, taken up by other stakeholders which 'undoubtedly helped to persuade some of the more progressive governments ... to push for the issue to be on the agenda for the next phase of the process.'<sup>22</sup> Environmental groups were embedded in the subsequent negotiations: although voting rights were confined to governments, NGOs were treated as 'full and equal partners for all practical purposes.'<sup>23</sup> They participated in inter-governmental working groups, and smaller drafting and advisory groups established on an ad-hoc basis to prepare a draft text.<sup>24</sup> Indeed, 'NGOs participated to an extent hitherto unprecedented in the development of international law.'<sup>25</sup> An independent NGO session was held at the Ministerial Conference adopting the Aarhus Convention, with the ministerial declaration heralding this as 'our recognition of their essential role, and our engagement to strengthen lines of communication between governments and NGOs, including in international fora.'<sup>26</sup>

All in all, the development of the Aarhus Convention demonstrates a quite exceptional contribution by environmental NGOs to environmental law, and from the perspective of this article to shaping their own future political and legal opportunity structures. Whilst establishing lines

17 The former in the heading, the latter in the text.

18 See generally the discussion in Jeremy Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 1 *Journal for European Environmental and Planning Law* 2.

19 This was part of a broader 'Environment for Europe' process, designed to develop co-operation on environmental issues following the collapse of communism, ibid.

20 Declaration by the Ministers of the Environment of the region of the UN Economic Commission for Europe (25 October 1995) [47]. Agreed at the same time as the adoption of the Sofia Guidelines (drafted by the UNECE Taskforce and adopted at the Third Ministerial 'Environment for Europe' Conference in Sofia in October 1995).

21 Wates (n 18) 9.

22 ibid.

23 Vivek Ramkumar and Elena Petkova, 'Transparency and Environmental Governance' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia UP 2007) 299.

24 For example, groups such as the Environmental NGOs Coalition, GLOBE and the International Council of Environmental Law were represented at all ten of the ad hoc working group meetings that were established to discuss contested issues in the Convention text, see <<https://unece.org/environment-policy/public-participation/aarhus-convention/reports-negotiations-convention>> accessed 20 June 2023.

25 Wates (n 18) 10.

26 UNECE Fourth Ministerial Conference, *Environment for Europe* (June 1998) [43].

of causation between NGO activity and outcomes is very difficult that they influenced the ultimate shape of the Convention seems relatively clear.

Given the involvement of NGOs in the development of the Convention text, it is perhaps unsurprising that the special position of NGOs is expressly and strongly referenced in the text itself. The preamble recognises ‘the importance’ of NGOs in environmental protection. The Convention’s access to information, public participation and access to justice provisions are generally exercisable by ‘the public’ and ‘the public concerned’, the definitions of which explicitly include ‘associations, organizations and groups’ (‘the public’) and NGOs ‘promoting environmental protection and meeting any requirements under national law’ (‘the public concerned’).<sup>27</sup> NGOs exercise their legal rights under all three pillars, but the Convention’s provisions on NGOs extend beyond the operationalisation of these rights. Under Article 3(4), for example, each party ‘shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection.’ And the Convention explicitly provides for NGO engagement with the Aarhus institutions, a matter to which we return below.

One of the most innovative and interesting ways in which the Convention privileges NGOs (certainly relative to other international conventions) is through the design of the ACCC (or Compliance Committee), one of the most contentious elements of the Aarhus negotiations.<sup>28</sup> Article 15 is an enabling clause that required the Meeting of the Parties (MOPs) to establish arrangements of a ‘non-confrontational, non-judicial and consultative nature’ to review compliance. The arrangements ‘are required to allow for public involvement’ and ‘may include the option of considering communications from members of the public on matters related to the Convention.’<sup>29</sup> The first MOP in 2002 established the Compliance Committee, its structure and functions and set out the procedural approach to review.<sup>30</sup> The UNECE Guide to the Compliance Committee provides important details on the form, functions and procedures relevant to decision-making.<sup>31</sup>

NGOs have opportunities to engage with the Compliance Committee from the nomination of candidates for ACCC membership through to post-decision follow-up. The ACCC is ‘composed of nationals of the Parties and Signatories to the Convention who shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons with legal experience.’<sup>32</sup> As well as the state parties and signatories, NGOs can nominate candidates for election (by the MOPs) to the Compliance Committee.<sup>33</sup> This is ‘an obvious boon to public participation,’<sup>34</sup> and former NGO activists have been elected onto the Committee.<sup>35</sup> NGO involvement may still be resisted, however. Interviewee 3 told us for example that ‘the selection of people for the Compliance Committee, was a closed and highly

27 Articles 2(4) and (5).

28 Jerzy Jendroska, ‘Aarhus Convention Compliance Committee: Origins, Status and Activities’ (2011) 8 *Journal for European Environmental and Planning Law* 301, 303.

29 *ibid.* See also Veit Koester, ‘Review of Compliance under the Aarhus Convention: A Rather Unique Compliance Mechanism’ (2005) 2 *Journal for European Environmental and Planning* 31.

30 Decision 1/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21–23 October 2002 ECE/MP.PP/2/Add.8 available at <<https://unece.org/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>> accessed 20 June 2023.

31 UNECE, *Guide to the Aarhus Convention Compliance Committee* (2nd edn, May 2019) provides details on the form, functions and procedures relevant to decision-making. The Guide is available at <[https://unece.org/DAM/env/pp/Publications/Guide\\_to\\_the\\_Compliance\\_Committee\\_second\\_edition\\_2019\\_/English/Guide\\_to\\_the\\_Aarhus\\_Convention\\_Compliance\\_Committee\\_2019.pdf](https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee_second_edition_2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee_2019.pdf)> accessed 20 June 2023.

32 *ibid* [56].

33 *ibid* [57](a).

34 Marianne Dellinger, ‘Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law’ (2012) 23 *Columbia Journal of International Environmental Law and Policy* 309, 324.

35 Decision 1/7 (n 30) [4]. See Jendroska (n 28) 306.

political process. My understanding from the outside was that [the UK government was] [...] a powerful voice in that process’.

Most importantly, complaints can be brought against states by members of the public, including NGOs: ‘the Committee welcomes the engagement of the NGO community.’<sup>36</sup> With around 200 complaints to date,<sup>37</sup> this procedure has been well-used to attempt to ensure the implementation of the Aarhus Convention, and some ‘cases’ are discussed below. Complainants (including NGOs) may be invited to attend a formal hearing at which oral submissions can be made.<sup>38</sup> NGOs are also permitted to make submissions as observers to another’s complaint, and their input as experts and advisers may be sought by the Committee.<sup>39</sup> Both complainants and the state are able to comment on drafts of the Committee’s findings and recommendations.<sup>40</sup> The findings and recommendations are then submitted to the next MOP, which may adopt the ACCC’s report, and decide upon ‘appropriate measures to bring about full compliance with the Convention.’<sup>41</sup>

The ultimate objective of the Compliance Committee process is to secure compliance with the Convention’s provisions, and so the significance of ongoing review of the implementation of the Committee’s decisions should not be underestimated: ‘the rigor with which the Committee and the MOP follow up findings of non-compliance is unusual and perhaps unique.’<sup>42</sup> NGOs can be involved in following up on compliance recommendations.<sup>43</sup> For example, at the 7th MOP in October 2021, each of the 19 adopted decisions required the Party concerned to submit a Plan of Action outlining proposals for implementing the recommendations of the decision.<sup>44</sup> These plans were sent to both communicants and observers (including NGOs) for comment with both plans and responses published on the ACCC website.

The Convention is a legally binding treaty, but the legal status of the Committee’s findings and their adoption by the MOP is not entirely clear.<sup>45</sup> The ACCC proceedings are not designed to be legally binding, but to point towards implementation. The MOP may provide an agreed authoritative interpretation of the meaning of the Convention’s provisions,<sup>46</sup> and create expectations as to the future conduct of parties. The non-legally binding Aarhus Implementation Guide draws heavily upon decisions adopted by the MOP and findings of the Compliance Committee in its detailed, article-by-article analysis of the Convention’s provisions.<sup>47</sup> The ACCC’s careful follow-up work on reports and recommendations, discussed further below, provides important information on implementation by the Parties subject to negative findings,<sup>48</sup> and creates additional pressure towards compliance. As discussed below, our interviewees are concerned that the UK government does not take ACCC findings sufficiently seriously and that, for example, in respect of judicial review costs, ‘it was only when it came in through EU law’ that the UK implemented (Interviewee 1). The general impact of the ACCC on state behaviour is also

36 UNECE (n 31) [33].

37 <<https://unece.org/env/pp/cc/communications-from-the-public>> accessed 21 June 2023.

38 *ibid* [182]–[194].

39 *ibid* [33].

40 *ibid* [199].

41 *ibid* [20].

42 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, 29.

43 UNECE (n 31) [33].

44 Aine Ryall, ‘A Brave New World: The Aarhus Convention in Tempestuous Times’ (2023) 35 *JEL* 161.

45 See, for example Fasoli and McGlone (n 42); Gor Samvel, ‘Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice’ (2020) 9 *TEL* 211.

46 Fasoli and McGlone *ibid*, Samvel *ibid* 230.

47 UNECE (n 31).

48 See also Samvel (n 45) noting the limited progress on implementing reports handed down on Article 9 between 2004 and 2012.

underdeveloped, in part because of the difficulty of establishing causal links. At its best, findings might, in addition to sometimes having a direct impact on domestic legislation, assist NGOs in their 'work with legislators and government officials on both procedural and substantive change through existing democratic channels'.<sup>49</sup>

The special role for NGOs in Aarhus is clearly an effort to find space for 'the' environmental interest in decision-making. Knowledge and expertise are fragmented and contested, and will not all be found in the hands of the state. Environmental groups can provide important expertise, including scientific expertise on the environment, as well as broader knowledge, including different values and worldviews from others in the process. They may act as a counterweight to other, often more powerful, stakeholders, including government and industry, scrutinising and providing alternative perspectives on the values and evidence underpinning proposals.<sup>50</sup> In addition to this interest-representation role, NGOs might also have a representative role for public affected by environmental harms, a significance reinforced by the barriers often in the way of the participation of 'ordinary' people.<sup>51</sup> Larger NGOs can lend their voice to the otherwise marginalised,<sup>52</sup> and smaller ones might have emerged from communities, joining together and amplifying the voice and lay knowledge of its community.<sup>53</sup>

The role of NGOs is not, however, straightforward. First, what is good for the environment is likely to be contested: 'environmentalism is full of other sides',<sup>54</sup> and different parts of 'the' environmental NGO community hold distinctive views and values. Second, asking NGOs to represent people is even more challenging, practically and conceptually. But whilst the inclusion of NGOs is complicated, it is a crucial part of the Aarhus Convention. A vibrant civil society is a necessary element of good participation and good decision-making.

#### 4. LEGAL MOBILISATION BY ENGLISH NGOS AROUND AARHUS

In this section, we explore the ways in which NGOs seek to shape the rights provided by Aarhus to participate in environmental decision-making. This involves both asserting Convention rights to public participation and contributing to the understanding and application of those rights more generally.

The legal opportunity literature noted in the introduction focuses almost entirely on efforts to advance social change through litigation.<sup>55</sup> Whilst the shaping of the Aarhus Convention through litigation may be crucial, law is also brought to life, its meaning developed and expectations set, beyond litigation. Political advocacy can take many forms and have many targets, but for our purposes, it is about making the Aarhus rights meaningful in the domestic sphere. Given the focus on litigation in the legal opportunity literature, in earlier work, we considered the idea of 'hybrid political-legal opportunity', a space within which arguments based on law and legal expertise can be *politically* powerful, to the analysis.<sup>56</sup>

49 Dellinger (n 34) 338.

50 Carolyn Abbot and Maria Lee, 'Economic Actors in EU Environmental Law' (2015) 34 Yearbook of European Law 26. Also see Nagmeh Nasiritousi, 'NGOs and the Environment' in Thomas (ed), *Routledge Handbook of NGOs and International Relations* (Routledge 2019); Marjan Peeters, 'About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs' (2018) 24 European Public Law 449.

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

52 See, for example, collaboration between Friends of the Earth and a local community group in Druridge Bay, Northumberland, discussed in Carolyn Abbot, 'Losing the Local? Public Participation and Legal Expertise in Planning Law' (2020) 40 Legal Studies 269.

53 Iris Marion Young, *Inclusion and Democracy* (OUP 2002) 158.

54 Christopher Stone, *Should Trees Have Standing? Law, Morality and the Environment* (OUP 2010) 144.

55 Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (2nd edn, University of Michigan Press 2004).

56 Abbot and Lee (n 14).



In this sense, the Aarhus Convention itself is a powerful tool of advocacy, a ‘legal hook’<sup>57</sup> for speaking to powerful actors.

Efforts by English NGOs both to use Article 9 on access to justice to assert their rights, and to shape the role and meaning of Article 9, are clear. There has been a suite of litigation in the UK and the EU as well as complaints to the ACCC.<sup>58</sup> The third pillar has also been used in broader advocacy on access to justice in environmental matters, for example, in domestic reports and consultation responses<sup>59</sup> and in very active engagement in bodies such as the Aarhus Access to Justice Task Force. One of the prompts for this article is that we see less, and only more recent, intervention by English environmental groups in the middle pillar. In this section, we explore efforts to shape the political-legal opportunity provided by Aarhus. First, we consider, at the domestic level, both litigation and advocacy (or lobbying) outside of the courts: using the Aarhus Convention to enhance legal opportunity for litigation, and political-legal opportunity outside of the courtroom. We then turn to efforts to shape the Convention at the international level: the use of the complaints system is analogous to litigation, and a space is provided for ‘advocacy’ in the institutions of the Convention.

### 4.1 Shaping and Using Opportunities Domestically

It is unsurprising that the middle pillar of the Aarhus Convention receives relatively little attention in litigation, even if it might be disappointing not to see more creativity. The firmly dualist English legal system limits the role of the Aarhus Convention in judicial review: courts will only use the Convention to the extent that it is implemented in domestic legislation or finds expression in the common law.<sup>60</sup> Various pieces of legislation contain obligations to consult. There is no general common law duty to consult, which only 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.’<sup>61</sup> When a decision-maker does consult, however, common law principles of procedural fairness apply, at all levels of decision-making.<sup>62</sup>

So, case law on participation deals with environmental impact assessment or legitimate expectations, rather than Article 6 of the Aarhus Convention. Although Aarhus may be distinctive, particularly in its highly developed interpretive tools, the reluctance of the English courts to interfere with a ‘tenable’ government interpretation of an unincorporated international treaty may further increase caution around its use.<sup>63</sup> But the courts do sometimes acknowledge the relevance of the Convention’s public participation provisions. Lord Carnwath famously observed in *Walton*, for example, that whilst the Convention is not part of our domestic law, ACCC decisions ‘deserve respect on issues relating to standards of public participation.’<sup>64</sup>

57 *ibid*, eg 69.

58 Vanhala (n 2).

59 See, eg Environmental Law Foundation and The Centre for Business Relationships Accountability, Sustainability & Society, *Costs Barriers to Environmental Justice* (2009) available at <[https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/FrELF\\_Report2009.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/FrELF_Report2009.pdf)> accessed 20 June 2023, and Link’s response to the MOJ’s consultation on the reform of judicial review available at <<https://www.wcl.org.uk/docs/Link%20Response%20to%20MoJ%20consultation%20on%20Reform%20of%20JR%20Final.pdf>> accessed 20 June 2023.

60 By contrast, the Civil Procedure Rules on costs explicitly refer to ‘Aarhus Convention claims’, see CPR Part 45.

61 *Moseley v London Borough of Haringey* [2014] UKSC 56; [2014] 1 WLR 3947 [35] (Lord Reed). See Maria Lee, ‘The Aarhus Convention and the Environment Act 2021: Eroding Public Participation’ (2023) 86 MLR 756.

62 *Moseley* *ibid* [25], citing *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.

63 See *R (on the application of Friends of the Earth Limited) v Secretary of State for International Trade/UK Export Finance and others* [2023] EWCA Civ 14.

64 *Walton v The Scottish Ministers* [2012] UKSC 44; [2013] Env LR 16 [100]. Note also *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); [2007] Env LR 29 ‘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’, citing ‘the government’s Aarhus obligations’ [49]–[50] (Sullivan J); this was wholly obiter, and has not been revisited.

This relative neglect of Aarhus extends beyond the courtroom. Our interviewees confirm that the knowing, let alone expressing, use of the middle pillar in advocacy around public participation is very limited, although this might slowly be changing, as discussed below. Environmental groups ‘would less quickly see [public participation] as being part of Aarhus, especially compared to information and access to justice’ (Interviewee 7). To supplement our interviews on this point, we have analysed public documents by two key coalitions in this area, the BPC and Link. We also reflected on advocacy around the evolution of the Environmental Act 2021, led by the Greener UK coalition (in collaboration with Link after the Bill was introduced to Parliament). This campaign did not call on or advocate for the Aarhus rights.<sup>65</sup>

In 2021, the BPC published two short documents: *Our Vision for Planning* and *6 Tests for Planning* both place ‘local democracy and community engagement’ at the forefront of planning.<sup>66</sup> Neither document mentions the Aarhus Convention, perhaps unsurprisingly, given that these are public-facing, high-level documents, which moreover are not solely concerned with the environment. The BPC engaged in important detail with the Levelling Up and Regeneration (LUR) Bill. This is a large framework Bill, with enormous consequences for planning, including granting very extensive powers to ministers to reform or simply revoke environmental assessment law—utterly crucial to the implementation of Articles 6 and 7—through new, under-specified ‘environmental outcomes’ regulations.<sup>67</sup> BPC’s published Parliamentary briefings on the Bill, like the ‘vision’ and the ‘six tests’, emphasise ‘local democracy and community engagement’, albeit with varied attention depending on the context of the briefing.<sup>68</sup> Again, however, they do not attempt to use Aarhus as a tool of persuasion, as a ‘legal hook’.<sup>69</sup> Most of the attention to democratic planning focuses on the new National Development Management Policies, to be given statutory status if the Bill passes,<sup>70</sup> which would engage Article 7. There is little engagement with possible minimum requirements for a ‘democratic’ planning system, and the democratic contributions of the environmental assessment are not strongly drawn.<sup>71</sup>

Link operates primarily through specialist working groups. Their Legal Strategy Group filled the gap left by the demise of the Coalition on Access to Justice on the Environment (CAJE), a collaboration that conducted much of the early post-Aarhus work on costs and judicial review. The Legal Strategy Group’s focus, confirmed in our interviews, has been virtually entirely on access to justice, until recently. They are now preparing an ‘Environmental Rights Bill’, which would create a right to a healthy and sustainable environment and ‘comprehensively and consistently’ incorporate all three Aarhus pillars into UK law.<sup>72</sup> Our interviewees told us that participation as protected by the middle pillar of Aarhus would otherwise be covered by the Land Use Planning Group, not the Legal Strategy Group. This may suggest that participation is seen as more a matter of practice than law, reinforced by those interviewees who emphasised that large

65 Lee (n 61); Abbot and Lee (n 14).

66 All the documents referred to here can be found at <<https://betterplanningcoalition.com/#campaigning>> accessed 20 June 2023. Our analysis applies to publications up to 7 June 2023.

67 The BPC argues that ‘details and supporting evidence on any specific proposals for improving environmental assessment’ should be ‘provided and subject to public consultation’; also that any new approach to environmental assessment should be contained in primary legislation; Better Planning Coalition, *Briefing for the Commons Second Reading of the Levelling Up and Regeneration Bill* (1 June 2022). Subsequent government consultation can be found at <<https://www.gov.uk/government/consultations/environmental-outcomes-reports-a-new-approach-to-environmental-assessment>> accessed 21 June 2023.

68 Up to 7 June 2023, seven parliamentary briefings had been published as advocacy at different stages of the Bill, including some focused on different proposed amendments, such as on permitted development rights. A briefing on a ‘purpose for planning’ is promised in BPC, *Levelling-Up and Regeneration Bill, Lords Committee Stage Briefing* (February 2023). Note that two Wildlife and Countryside Link briefings are on the BPC website.

69 See (n 57).

70 The National Planning Policy Framework has no such status.

71 The same comments apply to BPC, *NPPF Consultation Response*, March 2023 available at <<https://betterplanningcoalition.com/wp-content/uploads/2023/03/Better-Planning-Coalition-NPPF-Response-1.pdf>> accessed 20 June 2023.

72 <<https://www.wcl.org.uk/concerted-action-needed-on-environmental-rights.asp>> dated October 2021. They do seem also to have been part of the Link collaboration with Greener UK over Brexit, see Abbot and Lee (n 14) 127–128.

NGOs who are also close to casework, such as RSPB and Friends of the Earth,<sup>73</sup> are more likely to be interested in this area and to see the strategic potential of Aarhus: ‘two worlds aligned’ (Interviewee 4). We return to this below. It also suggests that the Aarhus Convention is not seen as providing systemic, over-arching expectations of inclusion, rather than case-by-case opportunities—a conclusion belied of course by NGO development of the more recent Environmental Rights Bill.

The comments above about BPC’s publications apply to Link since they share some membership, Link is a member of BPC and both groups publish and seem to take ownership of some of each other’s documents. A review of a selection of the documents produced by the Land Use Planning Group over the past five years and published on their website reinforces the sense that relatively little attention is paid to public participation, and even less to the rights in the middle pillar of the Aarhus Convention. The discussion of environmental assessment in *Planning for Nature* is, for example, largely technical;<sup>74</sup> the Commons Committee Briefing on Environmental Outcomes Reports (under the LUR Bill) does not address the role of environmental assessment in protecting rights to participate in decision-making.<sup>75</sup> Three further briefings on the LUR Bill contain considerable detail on environmental assessment, but without making the connection between environmental assessment and public participation (or, accordingly, the Aarhus Convention). Link’s ‘priorities for planning legislation’ do not mention planning’s contribution to democracy, participation or even consultation.<sup>76</sup>

More positively, the Link group elsewhere classes ‘transparency, participation and openness’ as one of four ‘success criteria’ for environmental assessment, albeit without developing that criterion in what it also describes as properly an ‘expert-led’ process (and again without mentioning Aarhus).<sup>77</sup> More than one document asserts that ‘local voices are the last line of defence for important natural habitats’, again without using the Aarhus Convention as support.<sup>78</sup> Aarhus seems to be a lawyer’s tool, and the lawyers are, or at least have been, focused almost entirely on access to justice.

It is fair to say that the link between Aarhus rights and environmental protection, the connection between rights for everyone and creating space for the environment (and other non-dominant, non-economic concerns) in decisions, either is not recognised or is under-valued by those drafting the material we have reviewed here. Not without exception: as well as the strong support of local communities in the documents cited in the previous paragraph, a 2021 document says that ‘Meaningful democratic public consultation on environmental decisions is not only

73 See (n 52).

74 Wildlife and Countryside Link, *Planning for Nature* (October 2021) available at <[https://www.wcl.org.uk/docs/assets/uploads/Planning\\_for\\_Nature\\_What\\_now\\_28.10.21\\_1.pdf](https://www.wcl.org.uk/docs/assets/uploads/Planning_for_Nature_What_now_28.10.21_1.pdf)> accessed 21 June 2023.

75 BPC/Wildlife and Countryside Link, *Levelling Up and Regeneration Bill: Briefing for Commons Committee Environmental Outcomes Report* (September 2022) available at <<https://www.wcl.org.uk/docs/Briefing%20for%20LURB%20Commons%20Committee%20-%20EORs%20-%2005.09.22.pdf>> accessed 21 June 2023.

76 Engagement is referred to occasionally. See Wildlife and Countryside Link, *Response to Consultation on National Planning Policy* (March 2023) available at <<https://www.wcl.org.uk/docs/Link%20NPPF%20consultation%20response%20March%202023.pdf>> accessed 21 June 2023.

77 Wildlife and Countryside Link, *Success Criteria and Proposals for SEA and EIA* (no date) available at <<https://www.wcl.org.uk/docs/Link%20SEA%20and%20EIA%20briefing%20FINAL.pdf>> accessed 21 June 2023. There is a reference to this criterion in Wildlife and Countryside Link, *Environmental Assessment: Proposition for a Single Robust and Efficient* (October 2021) available at <[https://www.wcl.org.uk/docs/Link\\_SEA\\_and\\_EIA\\_Proposition\\_for\\_an\\_environmental\\_assessment\\_framework.pdf](https://www.wcl.org.uk/docs/Link_SEA_and_EIA_Proposition_for_an_environmental_assessment_framework.pdf)> accessed 21 June 2023, but again without any discussion.

78 Eg Wildlife and Countryside Link, *Briefing: The Planning White Paper and Nature* (November 2020) available at <[https://www.wcl.org.uk/docs/assets/uploads/Link\\_briefing\\_the\\_Planning\\_White\\_Paper\\_and\\_Nature\\_Nov2020.pdf](https://www.wcl.org.uk/docs/assets/uploads/Link_briefing_the_Planning_White_Paper_and_Nature_Nov2020.pdf)> accessed 21 June 2023:

‘Give local communities democratic involvement in all aspects of their local planning system (both at the Local Plan development stage and throughout the planning application process) for the protection and enhancement of the natural environment and landscapes around them. Often, local voices are the last line of defence for important natural habitats, and communities are only really engaged with planning when the threat is very real and imminent. Increasing the quality of engagement and consultation at the Local Plan and through the planning application process level is crucial.’

required by the UK's commitment to the Aarhus Convention, but also helps deliver positive outcomes for nature.<sup>79</sup>

To observe that BPC and Link do not use the middle pillar of Aarhus in advocacy is not a criticism of either them or the Convention. It is, however, an indication of the unloved status of the middle pillar. Perhaps as important as the absence of reliance on Aarhus is the expert-focused understanding of environmental assessment. Whilst seeing environmental assessment as primarily an expert process is a widespread and legitimate understanding of environmental assessment, it does under-emphasise the democratic and environmental significance of engagement with 'ordinary' public. This may contribute to explaining a failure to engage with Aarhus, because whilst Aarhus has ambiguous objectives,<sup>80</sup> it clearly embraces lay participation.

The relative silence on Aarhus, including in the face of recent threats to legislation (such as environmental assessment regulations) specifically protecting existing, taken-for-granted, rights, is significant. Looking beyond the BPC and Link, individual NGOs may occasionally use the Aarhus middle pillar in advocacy.<sup>81</sup> ClientEarth has produced an extremely helpful Guidance Note on public participation in England,<sup>82</sup> using Aarhus 'to inform other NGOs' (unattributed). Most of ClientEarth's non-access to justice work with Aarhus seems to take place at the EU level, but some of their UK activities, for example, around the revision of the Environmental Improvement Plan, speak to public participation and use the Aarhus Convention in support.<sup>83</sup> We were also told that ClientEarth 'will put things into select committees or will in our briefings always reference Aarhus [...]' "Well don't forget you've got an obligation for public participation in this" (unattributed). With law at the heart of the culture of the organisation, we might expect ClientEarth to offer particular insights into the role of law generally and the value of the Aarhus Convention in particular. We have however seen relatively little of this in their public-facing domestic work.

The approach to the middle pillar and its use in advocacy at the domestic level may, however, be changing. Recent complaints to the ACCC on UK compliance with Article 8, discussed below, may have sensitised NGOs to the lack of consultation on the more recent Retained EU Law (Revocation and Reform) Bill (as indeed it did us). Both ClientEarth and Greener UK, for example, refer to Article 8 in this context,<sup>84</sup> and a group of NGOs instructed barristers on issues including Bill's compliance with Article 8.<sup>85</sup> Interviewee 3 'suspect[s]' that the 'enormous threats to EIA, SEA, [Habitats Regulation Assessment]' will mean that the middle pillar of Aarhus 'may suddenly rise up the agenda, as it should'. Perhaps the most obvious indication of change is Link

79 Wildlife and Countryside Link, *Planning for Nature: How the Planning System can Deliver for the Environment* (May 2021) available at <<https://www.wcl.org.uk/docs/Link%20Environmental%20Planning%20Briefing.pdf>> accessed 21 June 2023.

80 Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 MLR 80; Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart 2022). 81 Greener UK has also occasionally referred to Aarhus in its advocacy around the Environment Act 2021 and FTAs.

82 ClientEarth, *Public Participation in Environmental Matters in the UK/England & Wales A Guidance Note* (February 2022) available at <<https://www.clientearth.org/media/ftxaemc/draft-guidance-on-public-participation-9-february-2022-public.pdf>> accessed 21 June 2023.

83 ClientEarth, *Consultation on Environmental Targets – ClientEarth Response* (June 2022) available at <[https://www.clientearth.org/media/lrjqswt/clientearth-response-to-environmental-targets-consultation\\_27-6-22.pdf](https://www.clientearth.org/media/lrjqswt/clientearth-response-to-environmental-targets-consultation_27-6-22.pdf)> accessed 21 June 2023.

84 Eg ClientEarth, *Written Evidence submitted to the House of Commons Public Bill Committee* (November 2022) available at <<https://bills.parliament.uk/publications/48881/documents/2572>> accessed 21 June 2023; ClientEarth, *The Flame to Start a Bonfire of Protections – the Retained EU Law (Revocation and Reform) Bill* (November 2022) available at <<https://www.clientearth.org/media/wzjks5a/retained-eu-law-revocation-and-reform-bill-article-ce-template-final.pdf>> accessed 21 June 2023; Greener UK, *Retained EU Law (Revocation and Reform) Bill Briefing for Lords Committee on clause 1* (February 2023) available at <[https://greeneruk.org/sites/default/files/download/2023-02/REUL\\_Bill\\_Lords\\_Committee\\_briefing\\_clause\\_1\\_Greener\\_UK\\_and\\_Link.pdf](https://greeneruk.org/sites/default/files/download/2023-02/REUL_Bill_Lords_Committee_briefing_clause_1_Greener_UK_and_Link.pdf)> accessed 21 June 2023.

85 Jeffrey Jowell and Jack Williams, *In the Matter of the Retained EU Law (Revocation and Reform) Bill* (February 2023) available at <<https://www.rspb.org.uk/globalassets/downloads/pa-documents/legal-opinion-21.2.23.pdf>> accessed 21 June 2023.

Legal Strategy Group's ongoing project (beginning in 2021) on an 'Environmental Rights Bill' (mentioned above), which builds expressly on all three pillars of the Aarhus Convention.<sup>86</sup>

It is however striking that even in direct responses to Government proposals that threaten the participatory rights protected by the Convention, such as the LUR Bill, public participation and the Aarhus Convention receive little attention. And even the ACCC complaints discussed in the next section, whilst preceded by a certain amount of discussion with the government ('we weren't completely ambushing them' (unattributed)), were not accompanied by 'any major political insider campaigning or anything like that [...] the horse had bolted. [...] we would be banging our heads against a brick wall and for no return' (unattributed).

## 4.2 Shaping the Aarhus Convention through the Aarhus Institutions

We discussed above how NGOs influenced both the existence and content of the Convention. They continue to influence this 'legal stock'<sup>87</sup> (the body of substantive law within which NGOs frame their legal arguments) at the international level through their participation in Aarhus Convention bodies and mechanisms including the MOP, Task Forces and Working Groups. These Aarhus bodies provide an important political space within which NGOs can exert influence, where arguments based on law may be particularly powerful. These hybrid political-legal opportunities are important for continued NGO engagement with the implementation of the Convention's provisions. However, we see very little engagement with these bodies in respect of the middle pillar. One exception seems to be Environment Links UK (bringing together the Wildlife and Countryside Link coalitions across the four nations of the UK<sup>88</sup>), whose written engagements with the Aarhus Convention bodies do occasionally address all three pillars.<sup>89</sup> Furthermore, whilst the value of attending MOPs in the run-up to and aftermath of a complaint seems to be recognised by interviewees who had taken part in complaints, there is no ongoing strategic effort to influence the Convention in this way.

Taking the Convention's Task Forces as an example, these three institutions (mirroring the three pillars of the Convention) established in 2010 have a potentially important 'soft' role to play in working through the Convention's place in the world. The Task Force on Public Participation in Decision Making seeks to improve implementation 'including through sharing expertise and good practices, developing recommendations, strengthening civil society and building capacity for public authorities and other stakeholders', as well as 'working to identify common problems in implementing the Convention's provisions on public participation and make possible solutions available.'<sup>90</sup> In keeping with the Convention's commitment to transparency in decision-making, a list of participants for each meeting of the task force is available online, as well as a detailed record of oral and written submissions.<sup>91</sup> However, whilst there is broad NGO engagement with the work of all three Task Forces, a relatively limited number of English NGOs seek input, with close to no attendance at the Task Force on Public Participation. It might be that NGOs have considered the role of the Aarhus bodies, and decided, strategically, not to attend, especially given the lack of confidence in the UK government's commitment to Aarhus, to which we return below: 'you're attempting to engage with the government ... it

<sup>86</sup> Link (n 72).

<sup>87</sup> Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51 *Comparative Political Studies* 380.

<sup>88</sup> See <<https://wcl.org.uk/environmentlinksuk.asp>> accessed 21 June 2023.

<sup>89</sup> Although most of their engagement is on access to justice, there is more general attention to compliance, see, eg *Meeting of the Parties to the Aarhus Convention (MoP-7) Statement on behalf of Environment Links UK* (September 2021) <[https://www.wcl.org.uk/docs/assets/uploads/ELUK\\_Statement\\_Seventh\\_MoP\\_FINAL.pdf](https://www.wcl.org.uk/docs/assets/uploads/ELUK_Statement_Seventh_MoP_FINAL.pdf)> and their various statements at <<https://www.wcl.org.uk/legal.asp>> accessed 21 June 2023.

<sup>90</sup> See <<https://unece.org/env/pp/aarhus-convention/tfppdm>> accessed 21 June 2023.

<sup>91</sup> *ibid.*

became pointless' (Interviewee 6). Our interviewees did not, however, tell us about any conscious decisions being taken not to attend the public participation Task Force.

Perhaps the most explicit and influential role for environmental NGOs in shaping the domestic implementation of Aarhus provisions (including provisions on public participation) is in making referrals to the ACCC. As we noted above, the ultimate objective of the Compliance Committee is to secure compliance with the Convention's provisions at the national level.<sup>92</sup> It clearly has an important role to play in shaping the legal stock on access to information, public participation and access to justice in environmental matters.

Complaints by members of the public since 2004 are registered on the ACCC website; in March 2023, there had been almost fifty communications to the Committee alleging non-compliance by the United Kingdom.<sup>93</sup> Most of the complaints from the larger, more established environmental groups are about access to justice; they have made very limited use of the Compliance Committee in relation to public participation. The middle pillar complaints are mainly brought by one-shot groups or individuals, often representing a local community. These groups are essentially using Convention provisions to challenge (albeit indirectly) substantive outcomes, a proposition with which our interviewees agreed. Our interviewees also recognised however that these cases can and do have an impact on legal stock around participation: 'you can make all sorts of arguments, can't you, about why these totemic cases are in fact sufficiently impactful. And that you can leverage them and you can build wider campaigns around them' (Interviewee 5).

Two recent complaints, the outcomes of which have yet to be determined, suggest a fresh interest in the middle pillar of Aarhus. They illustrate the ability of the Convention to provide space for NGO legal action on matters that would be quickly dismissed in a purely domestic context. First, in October 2017, Friends of the Earth (FoE) raised a complaint against the UK for failing to comply with Articles 8 (on 'public participation in the preparation of executive regulations and/or generally applicable legally binding normative instruments') and 3 (on having a 'clear, transparent and consistent framework' for implementation).<sup>94</sup> FoE argued that the Bill that became the European Union (Withdrawal) Act 2018—an enormously far-reaching piece of legislation that essentially arranges the UK legal system for exit from the EU—was prepared by the government without adequate public consultation.<sup>95</sup> Regardless of the outcome, this complaint provides an example of an established NGO (and note the WWF as an observer) seeking to influence the implementation of the Aarhus Convention at the national level. Whilst the Act has passed, a finding of non-compliance would have the potential to shape our understanding of the future meaning and reach of the Convention.

The second complaint (brought by WWF, Greenpeace, Green Alliance and several other NGOs) argues that free trade agreements (FTAs) are 'other generally applicable legally binding rules that may have a significant effect on the environment' and thus fall within the scope of Article 8. The complainants allege that the UK has failed to comply with Article 8, not in respect

92 For an assessment of the referrals to the Compliance Committee against the UK in the first ten years of the Convention see Ole Pedersen, 'Price and Participation: The UK Before the Aarhus Convention's Compliance Committee' (2011) 13 ELR 115.

93 n 37.

94 *Communication ACCC/C/2017/150 regarding the United Kingdom* (pending), available at <[https://unece.org/env/pp/cc/acc.c.2017.150\\_united-kingdom](https://unece.org/env/pp/cc/acc.c.2017.150_united-kingdom)> accessed 21 June 2023.

95 A second submission argued that the absence of a legislative commitment to public consultation in the exercise of far-reaching government regulatory powers contained in the Bill is in breach of Article 8 of the Convention. The Aarhus Committee declared this second submission inadmissible on the grounds that it was premature, see *ACCC/C/2017/15 Preliminary determination of admissibility of communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom regarding public participation in the context of the 'Great Repeal Bill'* available at <[https://unece.org/DAM/env/pp/compliance/C2017-150/Preliminary\\_determination\\_of\\_admissibility\\_C150.pdf](https://unece.org/DAM/env/pp/compliance/C2017-150/Preliminary_determination_of_admissibility_C150.pdf)> accessed 21 June 2023.

of one particular FTA, but in respect of the procedure for negotiating all FTAs post-Brexit.<sup>96</sup> In raising this complaint, we see well-established environmental groups collaborating to influence the domestic implementation of the Convention's middle pillar,<sup>97</sup> and in the process seeking to establish the broad reach of the Convention, 'taking consultation at domestic level and saying, "No, no, it applies at the international level as well"' (unattributed).

Even after final decisions by the Compliance Committee, NGOs can be involved in reviews of progress on implementation. States are invited to produce progress reports on implementation, and NGOs have a series of opportunities to comment on those reports, in open sessions at progress meetings and in writing.<sup>98</sup> Increased advocacy (at the UK and international level) may also follow findings: 'the longer game here is that you get a [...] recommendation from the compliance committee, that says the UK needs to do certain things. And then we'll need to try and ensure that those things happen' (Interviewee 6). A perusal of publicly available material illustrates the significant input of environmental NGOs in these post-review processes on access to justice,<sup>99</sup> but not on the middle pillar, again reflecting the limited attention paid by larger NGOs to the middle pillar until recently.

## 5. EXPLAINING THE APPROACH TO THE MIDDLE PILLAR

Working with the well-established literature that seeks to explain NGO action, we have sought to improve our understanding of NGO choices around the middle pillar of the Aarhus Convention. The work on political opportunity, legal opportunity and political-legal opportunity referred to above outlines the influence of external factors on NGO strategies and tactics. Resource theories supplement this work by exploring the ways in which material resources and support structures shape the use of law.<sup>100</sup> A further strand of research brings out the role of 'identity, ideas, and knowledge' in legal mobilisation,<sup>101</sup> including the organisation's understanding of itself and of law, including the Aarhus Convention.<sup>102</sup> In this section, we tease out these ideas to explore our interviewees' discussions of mobilisation around public participation in the Aarhus Convention. We also consider the well-developed distinction between 'insider' and 'outsider' NGOs, with insiders more likely to be invited to speak to and to be heard by the government.<sup>103</sup> And finally, we explored with our interviewees the evolution of approaches to the middle pillar and consider the dynamism of the factors associated with legal mobilisation.

### 5.1 External Factors: Political, Legal and Political-legal Opportunity

The formal institutional structures of the political system and the extent to which they provide (or not) formal access for interest groups are key in political opportunity structure: an 'open' state facilitates attempts to talk to those with power, whereas a 'closed' state incentivises

96 ACCC/C/2022/194 regarding the United Kingdom (pending) available at: <[https://unece.org/env/pp/cc/acc.c.2022.194\\_uk](https://unece.org/env/pp/cc/acc.c.2022.194_uk)>. The action has been deemed admissible, ACCC/C/2022/194 Preliminary determination of admissibility of communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom of Great Britain and Northern Ireland regarding public participation with respect to free trade agreements available at: <[https://unece.org/sites/default/files/2022-12/Preliminary\\_determination\\_admissibility\\_C194\\_United\\_Kingdom.pdf](https://unece.org/sites/default/files/2022-12/Preliminary_determination_admissibility_C194_United_Kingdom.pdf)> accessed 21 June 2023.

97 We also see collaboration on access to justice.

98 UNECE (n 31) [211]–[215]. Progress reports can be found at <<https://unece.org/env/pp/cc/implementation-decisions-meeting-parties-compliance-individual-parties>> accessed 21 June 2023.

99 For example, in respect of Decision V1/8k concerning the United Kingdom (on access to justice), written statements were provided by several environmental NGOs (as both observers and communicants) such as Environment Links UK, Friends of the Earth, ClientEarth and the RSPB. See further <<https://unece.org/env/pp/cc/decision-vi8k-concerning-united-kingdom>> accessed 21 June 2023.

100 Epp (n 7).

101 Vanhala (n 9); Vanhala (n 87); Brian Doherty and Graeme A Hayes, 'Tactics and Strategic Action' in David A Snow and others (eds), *The Wiley Blackwell Companion to Social Movements* (Wiley-Blackwell 2018).

102 Abbot and Lee (n 14).

103 Grant (n 10).

the use of other approaches including, potentially, protest and litigation. These qualities will vary by issue, and over time.<sup>104</sup> The Aarhus Convention contributes to the shape of the formal political opportunity structure for environmental NGOs, domestically. Although these formal institutional structures are crucial,<sup>105</sup> the receptiveness of decision-makers to different interests and ideas matter profoundly, so without an inclusive culture in which environmental issues are politically salient, their impact is limited.

Beginning with government receptiveness to arguments around Aarhus, we wondered whether NGOs may under-emphasise Aarhus because they perceive government to be resistant to such advocacy. Several of our interviewees are obviously frustrated by the ways in which the UK government engages with the Aarhus institutions. ‘We know that the UK government has never, ever accepted the Aarhus Convention’ (Interviewee 4); ‘the UK has been so dismissive [...] the discourtesy in the way the UK has responded to those decisions is quite appalling’ (Interviewee 2); ‘it became pointless [...] they would propitiate and say what they needed to say, and then do nothing’ (Interviewee 6). Several of our interviewees referred to an excoriating ACCC meeting with respect to UK compliance with recommendations on costs.<sup>106</sup> Interviewee 1 told us that ‘the UK basically regard [ACCC findings] as interesting international law’, implying that it is not something they have to take too seriously.

Our interviewees’ concern about the low regard with which the UK Government holds ACCC findings is reinforced elsewhere. In its response to the UK’s first progress report on Decision VI/8k, for example, the Compliance Committee expressed ‘its disappointment ... and surprise considering that the Committee has been working closely with the United Kingdom.’<sup>107</sup> A barrister who frequently represents the UK government before the ACCC and other Aarhus institutions have even questioned the proposition that the decisions of the ACCC deserve ‘respect’.<sup>108</sup> At a public webinar on the Convention, he says that ‘The reality is ... some of the decisions that have been made over the years are pretty extraordinary interpretations of the Convention.’<sup>109</sup> He bases his concern on the fact that the ACCC is not a court and its members are not necessarily all lawyers and that it does not consider itself bound by decisions of domestic and EU courts. And yet, the ACCC is by design, not a court (‘non-judicial’)<sup>110</sup> and given its role to assess compliance of the Parties, it is entirely proper that it does not follow the judicial decisions of the Parties. He also says that ‘It has a very NGO focus’, suggesting perhaps a concern about the fundamental ethos of the Convention rather than the quality of the ACCC, since, as discussed above, the Convention, again by design, makes space for the environmental interests that are often left out of decision-making. Perhaps more worryingly, he argues that the ACCC may fail to understand the law they are assessing. The general tone is however consistent with Interviewee 1’s observation that the UK government ‘is pitching’ and ‘positioning’ an argument that the Convention ‘is inconsistent with the common law’; as Interviewee 1 puts it, ‘No it’s not, but there’s a lot of positioning’.

104 Hilson (n 6) argues that the openness of the political system should be examined in the context of a particular sub-area, avoiding generalisations. He argues that political opportunities depend very much on the political landscape at the time (eg party in power).

105 Meyer and Minkoff (n 5).

106 The report is not available, <<https://unece.org/environmental-policy/events/seventy-seventh-meeting-aarhus-convention-compliance-committee>> accessed 21 June 2023. The issue in question was the plan of action for implementation of decision VII/8s, documents in respect of which (including post-decision documents) can be found at <<https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom>> accessed 21 June 2023.

107 *First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention* (10 October 2018) [25] available at <[https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k\\_UK/Correspondence\\_with\\_the\\_Party\\_concerned/First\\_progress\\_review\\_on\\_VI.8k\\_UK\\_adopted\\_24.02.2019.pdf](https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_the_Party_concerned/First_progress_review_on_VI.8k_UK_adopted_24.02.2019.pdf)> accessed 21 June 2023.

108 Walton (n 64).

109 Available at <<https://www.youtube.com/watch?v=ESXuXuj4Xkg>> at around 1 hour 14 minutes, accessed 21 June 2023.

110 Article 15, although see Fasoli and McGlone (n 42) on its increasing resemblance to a ‘judicial’ procedure.



Interviewee 5, by contrast with the UK's legal representative, was 'very impressed with [the ACCC's] rigour [...] there were some hugely smart people on the committee, asking deeply searching questions [...] It was hugely rigorous.' Perhaps this also explains this interviewee's more positive thinking on the role of Aarhus: 'Once you introduce Aarhus, you're able to say, "We're not simply now saying that it's right or desirable, we're saying that it's lawfully required."'

The general sense that government is not receptive to the Aarhus Convention does go some way to explain a relative lack of attention to the middle pillar of Aarhus: 'why would you invest a lot of time, money, energy in putting together a communication?' (Interviewee 2). Interviewee 4 even fears that 'they'll just withdraw their signature [from the Aarhus Convention] no matter the international embarrassment',<sup>111</sup> and so NGOs 'back off' from advocacy. However, this only partially explains the difference from NGO activity around the third, access to justice pillar, since that deals with the same international convention, which was only really taken seriously by Government when it became hard-edged EU law. Interviewee 2 emphasised that there might be 'benefits besides' enforcement, 'of raising the profile, campaigning [...] crystallising details and the arguments and finding an international body that says, "This has not been done".'

Perhaps as influential as concerns that the UK government may resist advocacy built around international law, is a more general concern about consultation. 'It's not the Aarhus Convention that's not working, it's that the politicians aren't interested [in what we have to say]', and environmental groups might expect to be 'politely not listened to' (Interviewee 1). We also heard that environmental groups might be 'going through the motions' (Interviewee 7) as much as government officials:

I mean, I think it's of limited value, they just say they're in listening mode. And actually, we do it to tick the boxes. [...] I don't put any store on them doing anything, but you've got to do it, haven't you? You've got to engage' (Interviewee 3).

Interviewee 7 was particularly concerned:

NGOs spend a lot of time responding to consultations and a lot of effort responding to consultations [...] I would [...] question the amount of time that goes into it, whether that's a very efficient use of resource. It is often a bit of a shadow boxing game [...] NGOs feel like they have to write their statement to get it out there. [...] And the government will receive those and know fully well exactly what they were gonna say anyway and then make the decision they were going to make anyway.

This perception of a relatively closed political culture might contrast with the potentially more open context in the Aarhus institutions discussed above; this openness is not however much used by English NGOs, at least in part presumably because of the same perceived lack of government respect for these international institutions.

A key issue for both legal opportunity and hybrid political-legal opportunity is legal stock, the body of rules or rights that can be mobilised, be that before (legal opportunity) or beyond (political-legal opportunity) the court. As we noted earlier, the legal stock offered by the Aarhus Convention's middle pillar may be unpromising. Most obviously, the Convention is not justiciable in domestic courts. Equally, although the text of the Convention is not the end of the story (indeed this article rests in part on the point that legal texts are somewhat defined in implementation), the relatively non-stretching 'high-level' (Interviewee 1) language of the Convention

<sup>111</sup> Belarus withdrew from the Convention in 2022; one of our interviewees wondered whether this potential bedfellow would incentivise the UK to stay in the Convention.

may be significant. Whatever its undoubtedly progressive credentials in 1998, the Aarhus Convention's obligations on public participation now seem rather spare, with limited capacity really to open up power. Interviewee 7 described the middle pillar as 'the poorer sibling of the three', with 'less bite' and 'less strong requirements', such that it would be 'clearly hard to build a case'. Whilst the Aarhus Convention could have a more ambitious soul, its legal obligations are relatively thin and not frequently breached. That does not in itself explain the absence of Aarhus in political advocacy, although perhaps the absence of an implicit threat of litigation is relevant. Furthermore, thinking about legal stock more broadly, the Aarhus Implementation Guide referred to above runs to 282 pages and is an important resource that can be shaped by NGO participation in the Aarhus institutions. Although not legally binding, it draws upon the Convention text, other international law instruments, decisions adopted by MOPs, Compliance Committee decisions, academic writing and examples from national legislation and practice. It forms, we argue, a blueprint for improved decision-making.<sup>112</sup>

The assumption of some of our interviewees seems to be that because the (relatively thin) requirements of the middle pillar have been met, there is no need to engage with them: 'EIA regs were okay, fine, so what was there to fight about?' (Interviewee 4). Given that UK environmental groups were busy with access to justice, that makes sense, but it overlooks the possibility of shaping and embedding a strong understanding of the Convention's requirements before they become vulnerable. When the domestic space for inclusion began to close more recently, the access to justice strategy—taking action at the EU level alongside domestic and Aarhus action—was not available.

## 5.2 Internal Factors: Resources and Culture

Exploring the difference in approaches between the middle and the access to justice pillars with our interviewees opened up the reasons for relatively light mobilisation around the middle pillar. Questions of prioritisation, and hence of resource and capacity, came through very strongly. 'None of us have enough time to do everything', and this, in turn, is linked with the possible scepticism about the value of consultation mentioned above: 'we weren't convinced that our consultation responses were making any difference'. (Interviewee 4). Awards of costs in judicial review were a focus because it was 'such a big barrier'; 'this was kind of existential. If something wasn't done about prohibitive costs, then one of the key levers for change [...] was simply going to become inoperable, was going to become unusable' (Interviewee 6).

Resource-based theories supplement the external influences on NGO behaviour that we find in political opportunity theory with internal factors, most commonly 'money and people'.<sup>113</sup> Having the right people—the right expertise, knowledge and experience—in place is partly linked to money, although also to culture (below), how organisations understand themselves and what they think they need.<sup>114</sup>

Generally, 'the level of awareness [among colleagues in NGOs] of pillar two is low' (Interviewee 2).<sup>115</sup> Limited resources (including legal expertise) and capacity were also identified as reasons why the smaller, one-shooter groups do not play for the rules: 'the larger ones have the lawyers who understand the significance of it really' (Interviewee 3) and 'hold the bigger picture, whilst [smaller NGOs] don't have the capacity to do that' (Interviewee 2). The availability of resources depends on funding. Interviewee 2 told us that 'these areas are very

112 See also Barritt (n 80) ch 6.

113 Aspinwall (n 7); some of what Aspinwall calls 'non-material' resources (legal, informational and normative) are quite hard to disentangle from money and people, legal resources including 'capacities, expertise and knowledge'.

114 Abbot and Lee (n 14) ch 2.

115 Although there were other perspectives: 'it may not actually be something that is front and centre, like shop window stuff. So our major campaigns might not ever talk about Aarhus Convention but there'll always be somebody, if not several people [...] who will think about this' (Interviewee 6).

difficult to fund [...] because it's so sort of nebulous', and that whilst the barrier of prohibitive costs on access to justice can be grasped very easily, 'it's hard to tell a story' about participation 'that [funders] want to invest in'. Similarly, in more than one organisation, it has proven to be 'a bit of a challenge [...] getting those above us to recognise what an absolutely crucial Convention this is' (Interviewee 4). Interviewee 7 also speculated on whether membership or larger funders would be impressed by participation.

Organisational culture and identity are additional internal features of an NGO that sit alongside resources.<sup>116</sup> Our earlier work on NGOs and Brexit suggests a very strong association of legal expertise with litigation.<sup>117</sup> This may be at play in the focus on access to justice over the middle pillar of the Aarhus Convention. Interviewee 1 noted, for instance, that 'most environmental lawyers [...] are litigators [...] And so the first thing we reach for is a court procedure, and if the reason we can't do the court procedure is because of prohibitive expense [...] the first battle we fight...'

The slow pace of public participation might be an issue, relative to litigation:

public participation is a long term project to change. You have to have a very clear strategy, and be willing to commit to it for years and years and years. [...] Whilst litigation [...] it's time-limited [...] And so if your priorities are immediate and long term, just as humans we would always go for the immediate (Interviewee 2).

Whilst litigation dominates culturally, the law is also associated with creating legislation.<sup>118</sup> This may contribute to explaining the otherwise surprising emphasis on Article 8 over Articles 6 and 7 in the recent years.

The idea that individuals, people and personality,<sup>119</sup> can be crucial to the approach of environmental NGOs, and the development of the law, is connected with both culture and resource. Almost all of our interviewees mentioned one individual as having been central to the development and persistence of English environmental NGO activity in Aarhus; it is not a criticism (far from it) to observe that this person's utter commitment to access to justice has shaped the whole community's perspective.<sup>120</sup> We also saw how important the decision of more senior individuals within an organisation to support this work could be.

### 5.3 Insiders and Outsiders

One of our hypotheses at the beginning of this project was that the established NGOs who have to capacity to shape the implementation of the Aarhus Convention are already and anyway routinely included in decision-making, as privileged insiders. It may be that the assertion of legal rights, be that through litigation or political advocacy, is for outsiders—insiders are simply invited in.<sup>121</sup> Most of our interviewees agreed in principle:<sup>122</sup> 'you are a hundred percent correct on that'; 'maybe as you say, we were already having the meetings that we wanted' (interviewee 4); 'I think that's certainly partially right. [We] had this relatively insider theory of change, which is essentially a corridors of power type theory of change' (Interviewee 5).

Some of our interviewees did disagree with our hypothesis. The disagreement however seemed precisely to be demonstrating that they and their organisation understand that Aarhus

116 Doherty and Hayes (n 101) 276. Our discussion of ClientEarth above suggests that a lawyerly way of thinking about the world may take a group to the Aarhus Convention.

117 Abbot and Lee (n 14) ch 5.

118 See generally Abbot and Lee (n 14).

119 Natasha Affolder, 'Transnational Environmental Law's Missing People' (2019) 8 TEL 463.

120 The importance of 'people' in making NGO collaboration work was an important finding of Abbot and Lee (n 14).

121 On the distinction see Grant (n 10).

122 Interviewee 7 was 'less convinced by that than some of the other claims you've made'.

is not just about them, but a bigger issue for the community (so agreeing about their own insider status):

It's never good enough to just talk to the people you want to talk to. [...] The whole point of public participation is to go way beyond that, and to improve your decision. Or even just improve confidence in the decision, and a feeling of participation means that people come together and there is a consensus which is hugely missing at the moment. And yeah, so there may be some privileged people that are engaged, but that's just not good enough. (Interviewee 6)

Aarhus work (including access to justice) as a service to the community of environmental NGOs, came through strongly from several of our interviewees: 'We may get into the room, but what about a butterfly conservation trust?' (Interviewee 4). Interviewee 3 also noted with respect to smaller specialist NGOs that 'it's really important they have those [participatory] rights ... they have massive expertise and they need to have these tools'. This is an important contribution to the community. However, it does slightly reinforce our sense that the default understanding of environmental decision-making, raised above, is a matter for *expert* resolution.

#### 5.4 Changing Approaches and Dynamic Opportunities

Some of our conversations indicate the dynamism of political opportunity: 'you have seen very, very recently a degree to which [environmental NGOs] also are on the outside' (Interviewee 5). Access depends on 'the flavour of the government of the day – depending on how they view your NGO, you may be more or much less involved' (Interviewee 6).

Interviewee 1 describes Brexit as 'game changing in a bad way' because EU law was 'the mandatory conduit for [Aarhus] implementation in the UK'. Some of the recent activity may be Brexit-related, specifically given threats to previously taken-for-granted rights. Brexit was a necessary context for the two complaints introduced above, since neither the EU (Withdrawal) Bill nor UK (rather than EU) FTAs would exist had EU membership continued. Our NGOs had either lost their privileged insider position when hugely substantial environmental issues were being determined outside DEFRA, or they had to start worrying about things that, until recently, had been dealt with by their colleagues in Brussels. Further, EU law had implemented Aarhus (if not perfectly) so that there was a hard EU legal instrument between decision-making and the Convention. International law may now be more necessary for the protection of participation than when EU membership prevented participation from being casually removed. In our dualist system, however, international law is a much less effective legal tool than EU law.

The Brexit process itself involved a particular and unique set of political-legal opportunities following the Brexit referendum result;<sup>123</sup> perhaps here, in the context of Aarhus, we again have a particular set of political-legal opportunities within which NGOs must attempt to advance the Aarhus principles through the shaping of domestic law and policy. The early Brexit arrangements were law-heavy questions on which DEFRA and parliament welcomed trusted NGO expertise. We see how quickly that can change, and even in DEFRA, the welcome of NGOs is now more ambiguous, at best. The changing political opportunity has been noted by our interviewees. 'I don't think we were being customarily shut out in 2012', with the implication that such shutting out is more common now (Interviewee 5). Furthermore, the government is not monolithic, and government departments other than DEFRA may be less open to environmental groups: 'Liz

Truss at [the Department for International Development], the door was pretty firmly bolted shut. And it wasn't just bolted shut against Joe Public, it was everyone who wasn't ideologically sound' (Interviewee 5). Neither of the two current ACCC cases is about DEFRA responsibilities. We get a clear sense from our interviewees that there is a closing of political opportunity in England.

It is not only political and political-legal opportunities that shift; the same applies to resources, and more slowly, to culture and understanding. The recent ACCC actions and the Environmental Rights Bill mentioned above, suggest a shift of approach from environmental NGOs.

## 6. CONCLUSIONS

English environmental NGOs prioritised Aarhus's rights on access to justice over public participation for at least the first two decades of the Convention's life, although we may now be seeing more attention being paid to the middle pillar. Well-established efforts to understand NGO choices and behaviour go a long way to explaining the ways in which they engage with the Aarhus Convention. But political-legal opportunity, resources, culture, 'insiderness' operate in nuanced ways. Analysing approaches to Aarhus through the various literature above allows us to draw three further conclusions.

First, the lack of attention by environmental groups to the broad democratic and environmental potential of public participation is disappointing. NGO neglect may feed into government neglect of Aarhus (it renders government backsliding on participation lower risk and lower visibility). The relative absence of English NGOs also reduces the richness of the development of Aarhus at the international level. The Aarhus Convention was a radical achievement by environmental NGOs (among others), but it comes to life in implementation; enriching the understanding of the Convention requires further and ongoing NGO energy.

But second, it is difficult to criticise. NGO resources are limited, and focusing on the issues that pose an immediate threat to their theory of change and sense of identity is perfectly defensible. Further, our interviewees expressed a real scepticism about whether the government is listening to participants. Combined with the (at least erstwhile) insider status of large established environmental groups, we see a negative cycle: if government is listening, institutionalising that listening by working with Aarhus is unnecessary; if government is not listening, insisting on Aarhus seems not only pointless, but possibly positively unhelpful. This also reminds us that legal rights do not make participation happen, but require political commitment from those with power, as well as broader civil society, to be effective. Aine Ryall, Chair of the ACCC, reminds us that 'Successful delivery of the Aarhus rights at local level depends heavily on strong and consistent political leadership to achieve compliance and a willingness to commit the resources necessary to facilitate implementation.'<sup>124</sup>

Our review of the documents suggests a third, less comfortable conclusion. Environmental NGOs sometimes display an expert-oriented understanding of environmental decision-making, reinforcing our sense that the democratic significance of Aarhus may be undervalued. This raises questions about the extent to which our NGOs value the input of 'ordinary' lay members of the public—without expert knowledge of butterflies or any other aspect of the natural environment—or the democratising power of Aarhus. We must be cautious about this conclusion. Our interviewees certainly did not express any such thing, and environmental groups have different priorities at different times and in different areas of the organisation; some devotion to the democratic potential of Aarhus is apparent in the public documents and in our interviews.

124 Ryall (n 44) 165.

NGOs are moreover hard-pressed, and yet still devote valuable resources to empowering local communities in their day-to-day engagement with power, and to nudging inclusive institutional change.<sup>125</sup> The work on the Environmental Rights Bill also points in precisely this hopeful direction.

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<sup>125</sup> See, eg Abbot (n 52); The Citizens' Assembly, *Report of the Citizens' Assembly on Biodiversity Loss* (March 2023) available at <[https://citizensassembly.ie/wp-content/uploads/Report-on-Biodiversity-Loss\\_mid-res.pdf](https://citizensassembly.ie/wp-content/uploads/Report-on-Biodiversity-Loss_mid-res.pdf)> accessed 21 June 2023.