anxiously watched by US industry and academics, many of whom feel that they are losing out on a unique opportunity to participate in this learning experience and shape the future of emissions trading globally.

The carbon constrained economy is a fact—at some point even the US will have to face this. Europe, by taking the initiative on implementing this new instrument is not only demonstrating its determination to take climate change seriously and adopt instruments to tackle it now, it is also giving itself a major advantage by exposing itself to a valuable learning exercise, which will give it a head-start over other countries.

participation

Public Participation, Procedure, and Democratic Deficit in EC Environmental Law

MARIA LEE*

I. Introduction—the Aarhus Convention and Participation

All European Union (EU) Member States, and the European Community (EC) itself, have signed the United Nations Economic Commission for Europe (UN/ECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Convention),[1] which formalizes at an international level a striking recent trend to regulate procedure rather than substance in environmental law. The Convention has three closely related strands: access to information; public participation; and access to justice. The second is the central focus of this paper. Participation is required under the Convention not only in respect of 'decisions on specific activities', but also 'plans, programmes and policies relating to the environment' and 'the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment'.[2] Although it is formally a weak document, both in its conception of 'participation', and in its generally vague and permissive character, the Convention makes a potentially very powerful statement on the importance of public participation in a wide range of decisions. The spirit (if not always the letter) of the Aarhus Convention could provoke a radical rethinking of regulatory procedures. It at least provides a useful legal framework within which to examine participation in EC environmental law and policy, since it applies to all Member States and the Community institutions.[3] Section II of this paper will assess the provisions of the Aarhus Convention in more detail.

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[1] Aarhus (Denmark), 25 June 1998 (entered into force 30 Oct. 2001), (1999) 38 *International Legal Materials*, 3, 517.

[2] Arts. 6, 7, and 8 respectively.

[3] The EC institutions fall within the Convention's definition of public authority, Arts. 2(2)(d) and 17. See also: Proposal for a Council Decision on the Signature by the European Community of the UN/ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention), COM(98)344, 2 June 1998; S. Stec and S. Casey-Lefkowitz, *The Aarhus Convention—An Implementation Guide* (New York/Geneva: United Nations/Economic Commission for Europe, 2000), 34.

Even independently of the signature of the Aarhus Convention, the enthusiasm in EC environmental law for increased public participation in decision-making is apparent in a number of directives, as well as the Sixth Environmental Action Programme.[4] The *meaning* of 'participation' is, however, far more ambiguous. Enhancing participation might simply involve openness of procedures, providing an audit trail of decision-making through which the control of ordinary representative democracy is exercised. Pragmatically, information from a wide range of participants may improve the quality of decisions. Participation might be used to improve the acceptability of decisions taken by non-majoritarian institutions, where tension arises between the need for expert decision-making, and the recognition that expertise alone cannot legitimately make controversial decisions. Section III of this paper will look at these possible rationales for participation in EC environmental law. The trend towards participation may also reflect important shifts in modern democratic thinking, away from the view that representative democracy adequately confers legitimacy and accountability on all decisions through periodic elections. It may extend to ideals of 'deliberation' which rest broadly on the notion that through the rational debate of citizens, arguments are refined, and preferences are transformed, leading both to improved solutions and real democratic engagement with decisions. The deliberative approach is supposed to curb the most selfish instincts of individuals or groups; the requirement to consider, reflect, and argue has a civilizing effect.

The potential for particular forms of participation to enhance democracy, or at least legitimate decisions, has a strong appeal in the environmental sphere, since the relationship between democracy and green political thought has frequently been controversial. The controversy arises both because of the temptation of authoritarianism when faced with a belief in impending ecological catastrophe, and because of the apparent inconsistency between a belief in a single set of acceptable ends, and the value of pluralism normally associated with at least liberal democracy.[5] Much effort has however gone into the relationship between green thought and democracy, and various 'participative' or 'deliberative' approaches have become very influential.[6] Participation here ranges from pragmatic efforts to influence decisions within the confines of existing democratic institutions, to a far more radical approach that challenges contemporary institutions themselves.[7] For current purposes, there is no need to add to the debate on green approaches to participation, or the wider debates within and between different approaches to deliberative democracy. Rather, these political debates are part of the background to the conspicuous development of participatory procedures in law. Perhaps inevitably, an examination of EC environmental law focuses not on any radical tendencies, but on a far more modest approach operating within existing structures—on reform rather than revolution.

Environmental policy is, moreover, not the only area of EC decision-making where hard thinking on these issues is taking place. Concerns about the legitimacy of environmental decision-making have added resonance in EC law, which operates against a constant background of disquiet about the 'democratic deficit' in mechanisms of decision-making, as well as a noisy debate about the legitimacy of the polity itself. Public debates on democracy and legitimacy became prominent in the period preceding and immediately following the negotiation of the Maastricht Treaty, which notwithstanding high hopes, and indeed some progress, notably failed to address these questions.[8] A decade on, the debate is as lively as ever. A turn to procedure, and more specifically participation, is a common response to the weakness of representative democracy in the EU. A major Commission project on reform of 'European governance' has been prompted, in part, by 'the democratic challenge' in the EU.[9] The Commission published its *White Paper on European Governance* (Governance White Paper) in July 2001.[10] The Governance White Paper may turn out to be a fleeting moment in EU, and specifically Commission, reform, but it will be considered quite closely in this paper's assessment of the Aarhus Convention. It provides a

[4] Sixth Environmental Action Programme Environment 2010: 'Our Future, Our Choice'; Proposal for a Decision of the European Parliament and of the Council Laying down the Community Environment Action Programme 2001–2010 (Action Programme Proposal), COM(2001)31, 24 Jan. 2001. One of its themes is 'policy making based on participation and sound knowledge', 5 and 61–5.

[5] A. Dobson, *Green Political Thought* (London: Routledge, 2000) , 114–24, discusses this, but warns against too hasty a link between green thought and authoritarianism; B. Doherty and M. de Geus (eds), *Democracy and Green Political Thought—Sustainability, Rights and Citizenship* (London: Routledge, 1996) generally considers the difficulties with environment and democracy, and a number of contributors find solutions in participatory forms of democracy.

[6] For a review see B. Doherty and M. de Geus, 'Introduction' in Doherty and de Geus (eds), n. 5 above, 1–15; J. Dryzek, *The Politics of the Earth* (Oxford: Oxford University Press, 1997), 200–1, sees 'ecological democracy' as essentially deliberative; M. Sagoff, *The Economy of the Earth—Philosophy, Law and the Environment* (Cambridge: Cambridge University Press, 1988).

[7] Dobson, n. 5 above, highlights the distinction between environmentalism and ecologism. Ecologism, or green politics, unlike environmentalism, requires radical changes to the structure of society.

[8] See particularly G. de Bùrca, 'The Quest for Legitimacy in the EU' (1996) 59 *Modern Law Review*, 349–76; J.H.H. Weiler (ed), *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), generally, and particularly 3–9 and 324–57; D. Curtin, 'The Constitutional Structure of the Union—A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review*, 17–69.

[9] See European Commission Work Programme, White Paper on European Governance: 'Enhancing Democracy in the European Union' SEC(2000)1547/7, 11 Oct. 2000, which also refers to the 'challenge of enlargement' and the 'institutional challenge'. The governance project is probably also related to the crisis of the Santer Commission's resignation, see the parallel project on Commission reform, European Commission, White Paper: 'Reforming the Commission', COM(2000)200, 1 Mar. 2000.

[10] European Governance—A White Paper (Governance White Paper), COM(2001)428, 25 July 2001, 8. The definition of governance in the White Paper is: 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence'. For commentary and critique, see C. Joerges, Y. Meny, and J.H.H. Weiler (eds), *Mountain or Molehill? A Critical appraisal of the Commission White Paper on Governance*, published on the Internet at: http://www.iue.it/RSC/Governance. As a shift to alternative networks of decision-making, it is far from clear that 'governance' is the right tool to 'enhance democracy'.

clear statement of principle from the Commission on the desirability of 'opening up the policy making process to get more people and organizations involved in shaping and delivering EU policy'.[11] Participation is one of the five 'principles of good governance' identified in the Governance White Paper.[12]

Although one might expect some cross-fertilization to occur, it will be suggested here that the debate on broader EU democracy rarely impacts on Aarhus implementation other than at a presentational level. Moreover, the 'democracy' rhetoric attached to public participation by the Commission may be something of a distraction from the real difficulties of using this means to achieve the end. Although the governance project arose out of a rhetoric of democratization, its ambition has been severely tempered.[13] The Governance White Paper does not go far beyond a 'business as usual' approach to consultation, which would aim to elicit the pre-formed views of certain recognized interest groups. For current purposes, the Governance White Paper's main proposals include 'more effective and transparent consultation at the heart of EU policy-shaping'. This 'culture of consultation and dialogue' will require a formal code of conduct setting minimum standards for consultation.[14]

It will be suggested here that neither the Aarhus Convention, nor official EC policy and proposals, have a very clear notion of the purposes behind participation. This confusion is likely to be reflected in the mechanisms provided for participation, which may of course be little more than nominal. Traditional consultation generally involves seeking the views of recognized stakeholders, in writing or by public meeting: results might be ignored; options consulted on may be narrow; there may be no attempt to consult widely enough or early enough to have an impact. Traditional consultation may be genuine and effective, but even at its best will generally take the preferences of those consulted as fixed. More innovative mechanisms such as citizens' juries are becoming fairly common,[15] and here there is the potential to go beyond an

[11] Governance White Paper, n. 10 above.

[12] *Ibid.* The five principles are 'openness, participation, accountability, effectiveness and coherence'.

[13] D. Curtin, 'The Commission as Sorceror's Apprentice? Reflections on EU Public Administration and the Role of Information Technology in Holding Bureaucracy Accountable' in Joerges, Meny, and Weiler (eds), n. 10 above. The White Paper contributes to an ongoing project of reform, although it was initially envisaged that the process would lead to a definitive statement of some sort. In particular, The Treaty of Nice—Declaration 23 on the Future of the Union (Nice (France) 7–11 Dec. 2000), published on the Internet at: http://www.europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf, provides for a conference of the Member States to consider ways of improving the Union's legitimacy and transparency. D. Wincott, 'Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union' (2001) 39 *Journal of Common Market Studies*, 897–911, discusses some of the difficulties raised by the change of approach.

[14] Governance White Paper, n. 10 above.

[15] Royal Commission on Environmental Pollution, 21st Report: 'Setting Environmental Standards' (CM 4053, 1998), 104–11, discusses these different approaches.

assessment of pre-fixed preferences, and to attempt to understand, and indeed form, values by discussion, debate, and challenge.

Section IV of this article will look in some detail at EC environmental law, and examine quite what this ubiquitous notion of participation involves. It is suggested that EC environmental law provides for a very narrow approach to participation, easily controlled by public decision-makers. Legal provision for public participation in decision-making is moreover focused overwhelmingly at Member State, rather than EC, level. The contribution of law to participation is generally thought to be fairly limited—on the whole, participatory structures have developed outside formal legal frameworks. A major caveat throughout this paper must then be that practice may differ from law, particularly if law simply enables participation. At EC level, *ad hoc* participation tends to favour the involvement of environmental interest groups in decision-making. This reflects a long-standing recognition (also apparent in the Aarhus Convention) that non-governmental organizations (NGOs) can effectively represent diffuse interests. However, again, unclear rationales for participation make analysis of this trend difficult—the role of public interest groups from a 'democratizing' perspective on participation must at least be suspect.

One of the legal regimes that will be specifically considered in Section IV is the process for authorizing the marketing of genetically modified organisms (GMOs) in the EU. The recitals to the Aarhus Convention explicitly recognize 'the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field'. Decisions on GMO authorization are extremely controversial, and are ultimately taken by qualified majority voting in respect of the whole of the EU. They then raise some important questions on the role and potential of European public participation. However, and notwithstanding the rhetoric of public involvement surrounding the issue, GMO regulation provides a striking illustration of the ambivalence of legislators to participation.

The starting point for an examination of EC environmental law and policy on public participation in this paper will be the clear support for wide rights of public participation found in the Aarhus Convention. The motives for increasing participation in EC environmental law are however confused, and the mechanisms provided at EC level are distinctly weak, notwithstanding a rhetoric of openness and participation. Somewhat stronger mechanisms are provided for public participation at national or local level. However, given that participation takes place against a background of EC level decision-making where local voices are largely excluded, the 'democratic deficit' with which we are so familiar, is replicated in a participatory context. Although participation may serve other important ends, talk of democratization is at best misplaced in the context of EC environmental law.

II. The Aarhus Convention

The Aarhus Convention has received a cautiously positive response from NGOs and governments.[16] Although criticized for vagueness and poor enforceability, it is likely to require at least marginal changes by all signatories, and, equally important, is a clear statement of political will to open up environmental decision-making.

As noted above, the Convention has three pillars. Access to information is the clearest obligation in the Aarhus Convention, and is of course the necessary starting point for any ability to participate in decisions. In common with most access to information regimes, subject to a number of exceptions, there is a right of access to information without an interest having to be stated.[17] Although the right to information is sometimes subject to the constraints of national law,[18] the Aarhus Convention provides for a relatively broad right, which goes beyond existing EC provisions.[19] In addition to the right of access to existing information, the Aarhus Convention imposes an active obligation on states to collect and disseminate information.[20] In particular, there is a requirement to publish a 'national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment',[21] and a requirement 'where appropriate' to establish 'a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting'.[22] Although there is only limited prescription as to contents of the reports and registers,[23] this positive obligation has the potential to empower the public, especially NGOs, in their formal or informal enforcement role at a local level. This is particularly so when one considers that the Aarhus Convention also provides for something akin to a 'citizen suit'. Under Article 9(3), 'members of the public' are to have access to 'adminis-

[16] S. T. McAllister, 'The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters' (1998) 9 *Colorado Journal of International Environmental Law and Policy*, 187–98.

[17] Art. 4.

[18] For example, an exception is provided for 'the confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law', Art. 4(4)(a); 'the confidentiality of personal data . . . where such confidentiality is provided for in national law', Art. 4(4)(f).

[19] Dir. 90/313/EEC on Freedom of Access to Information on the Environment, [1990] OJ L158/58; Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, COM(2000)400, 29 June 2000, discusses the changes required by the Aarhus Convention. On revision, see Commission Proposal for a Directive of the European Parliament and of the Council on Public Access to Environmental Information (Public Access Proposal), COM(2000)402, 29 June 2000. Also of course, the Aarhus Convention requires access to information from the EU institutions.

[20] Art. 5. [21] Art. 5(4). [22] Art. 5(9).

[23] Note that this is one of the elements of the Convention being developed by a Working Group. The progress of the various Working Groups is published on the Internet at: http://www.unece.org/env/pp/tfwg.htm.

trative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. Although members of the public have to 'meet the criteria, if any, laid down in its national law', the philosophy seems to be that participation is beneficial throughout the environmental regulation process, right up to enforcement. Although that aspect of the Aarhus Convention is not the focus of this paper, given the historical reliance on individuals for the enforcement of EC law, it is particularly significant in a European context.

The Aarhus Convention deals with participation in decision-making, the focus of this article, at three stages: 'decisions on specific activities';[24] 'plans, programmes and policies relating to the environment';[25] and 'the preparation of executive regulations and/or generally applicable legally binding normative instruments'.[26] The acceptance that public participation extends to the latter two types of decision is potentially the most innovative element of the Convention, going far beyond familiar techniques of consulting neighbours over siting decisions. Even if consultation of 'stakeholders' is common in these extended circumstances, the procedural rights that appear to be envisaged (if not imposed) by the Convention, may be significant.

Decisions permitting certain activities listed in the Convention,[27] or other activities likely to have a 'significant effect' on the environment, are covered by Article 6. Under this Article, 'the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner' of a number of matters relating to the permit application, including: the proposed activity and the application on which a decision will be taken; the nature of possible decisions or the draft decision; the public authority responsible for making the decision; the envisaged procedure including opportunities for public participation; and the fact that the activity is subject to a national or transboundary environmental impact assessment procedure. Article 6(6) requires the provision of detailed information on the activity concerned. The need for reasonable timeframes is stressed, and there must be 'early public participation, when all options are open and effective public participation can take place'.[28] Article 6(8) provides that 'due account' must be taken of the outcome of the public participation.

Article 6 provides for the most closely specified form of participation in the Convention. The provisions are clearly underwritten by the aim of increasing participation within otherwise perhaps secretive processes, and they envisage 'real' participation with the potential to exert a genuine influence on decisions. However, even here, a narrow reading of the provisions is possible, such that minimal changes to existing procedures would be required in Western European states. Traditional 'consultation' mechanisms would

[24] Art. 6. [25] Art. 7. [26] Art. 8.

[27] Annex I. [28] Art. 6(4).

presumably suffice, where varied views are collected and given 'due account'. There is only very limited support for more extensive public participation, in the form 'as appropriate', of a 'public hearing or inquiry with the applicant'.[29] More extensive negotiative processes are suggested by a requirement to 'encourage prospective applicants to identify the public concerned, to enter into discussions' before they apply for a permit, again, 'where appropriate'.[30]

Participation in relation to 'plans, programmes and policies' is subject to Article 7. This requires 'appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public'. Provisions on timing and taking due account of results apply. However, it is the public authority that decides who may participate, introducing something of a discretionary element into the Convention. In respect of the 'policies relating to the environment', there is simply an obligation to 'endeavour' to provide opportunities to participate 'to the extent appropriate'. The European Commission considers, probably inevitably on the wording, 'that the exhortatory reference at the end of Article 7 to public participation in the preparation of policies is soft law', and does not require any Community legislation.[31]

Article 8 on 'executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment' provides that 'each party shall strive to promote effective public participation at an appropriate stage, and while options are still open'. There are provisions to allow for timeframes sufficient for effective participation, publication of draft rules, and the opportunity to comment directly or through representative consultative bodies. 'The result of the public participation shall be taken into account as far as possible.' Although this provision is negligible in terms of formal obligation, it could be significant to the 'integration' of environmental concerns into other policy areas. The notion of an 'environmental' decision is not explored in the Convention, but Article 8 extends well beyond classic pollution or conservation law. It can readily be anticipated that agriculture or transport decisions will fall within its scope. Elements of economic decision-making must also be clear candidates for public participation under the Convention. Together with the broad definition of 'public authority',[32] which is not limited to those bodies with specific roles in relation to the environment, this provision has the potential to extend the relevance of the Aarhus Convention quite broadly through public decision-making.

With respect to *who* participates, a crucial element of the meaning of participation, the Aarhus Convention defines the public as 'natural or legal

[29] Art. 6(7). [30] Art. 6(5).

[31] Commission's Proposal for a Dir. providing for Public Participation in respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending Dirs. 85/337/EEC and 96/61/EC COM(2000)839, 18 Jan. 2001 (Public Participation proposal), 7.

[32] Art. 2(2).

persons, and, in accordance with national legislation or practice, their associations, organizations or groups'.[33] The 'public concerned', which features in most of the Article 6 rights, is 'the public affected or likely to be affected by or having an interest in, the environmental decision-making... non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.[34] Notwithstanding the possible deference to national provisions,[35] the perceived importance of NGOs as representatives of the public interest is clear.[36]

The obligations undertaken in the Aarhus Convention are likely to require no more than marginal changes to public participation in EC Member States.[37] Nevertheless, increased opportunities for public participation at all levels is very clearly the overriding objective. Provisions on timing and taking 'due account' of contributions indicate that token measures are not envisaged. The Convention's capacity to put regulatory procedure on the political agenda may be at least as important as its formal requirements. This is particularly the case in the current context of this paper, since EC law could translate the open-ended international commitments into binding legal obligations.

Finally, the Aarhus Convention also imposes obligations in respect of 'access to justice', closely related to the other two limbs of the Convention. Article 9(1) provides for review of a refusal or failure to respond to a request for access to information under Article 4. Article 9(2) provides that those with 'sufficient interest' or who maintain 'impairment of a right where the administrative procedural law of a Party requires this as a precondition' are able to challenge substantive or procedural illegality in any decision subject to Article 6, and also 'where so provided for under national law' any decision subject to 'other relevant provisions' of the Convention. NGOs that comply with the Convention definition of 'the public concerned' are explicitly deemed to have a 'sufficient interest' or 'rights capable of being impaired'. Although 'access to justice' defers to national law in some respects, there is again a clear understanding that it is both desirable and extensive. The courts' involvement is provided as a necessary complement to participation, suggesting that, at least in respect of Article 6, formal legal rights are envisaged.

[33] Art. 2(4). [34] Art. 2(5).

[35] The phrase 'meeting any requirements under national law', and similar phrases, arise in a number of places and are not defined in the Convention. It may indicate a certain deference to state procedure, but Stec and Casey-Lefcowitz, n. 3 above, 30, argue that flexibility is introduced by these provisions, but that they do not change the nature of the obligation.

[36] Note also that a large number of NGOs participated in the conferences leading to the Aarhus Convention: see European Eco-Forum, 'Brussels Declaration', arising out of the International ECO Conference on the Aarhus Convention (Brussels 19–21 Jan. 2002), published on the Internet at: http://www.eeb.org/Brussels%20Declaration.pdf; Stec and Casey-Lefkowitz, n. 3 above, 1–2.

[37] S. Rose-Ackerman and A.A. Halpaap, 'The Aarhus Convention and the Politics of Process' paper prepared for the Symposium on Law and Economics of Environmental Policy, published on the Internet at: http://www.cserge.ucl.ac.uk/news.html. It is thought that the access to information provisions in the Aarhus Convention require most concerted effort in western Europe, see McAllister, n. 16 above.

III. The Trend to Proceduralization

Unlike many international environmental agreements, the Aarhus Convention is not concerned with substantive environmental issues, but with procedural constraints on decision-making. This emphasis on procedure in regulation has been debated in many contexts and can most obviously be compared with the focus of US administrative law, certainly in the 1970s, on the provision of a 'surrogate political process'.[38] The move to procedure, including participation, is reflected in a number of environmental directives,[39] as well as the Sixth Environmental Action Programme.[40] The task of this section is to examine some possible reasons behind the trend towards participation in EC environmental law.

A. PROBLEM SOLVING

One aim of proceduralization is to enable the best substantive decisions to be made in any case. In a search for right answers, NGOs, industry, and others can provide expertise not otherwise available to decision-makers, leading to 'better' environmental decisions. The complexity of environmental problems means that all necessary knowledge cannot possibly be located in any single centralized institution, and so more flexible, inclusive processes are required.[41] As well as technical expertise, third parties can provide the alternative, less technocratic input that is often thought to be necessary in this area.[42] A problem-solving approach to public participation might simply involve the collection of information from a range of sources. It can just as fruitfully be linked with deliberation[43] where, rather than gathering

[38] R. Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review*, 1660–813 and 1712. See also P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990). Peter Lindseth notes the trend in the US away from this pluralist approach, to a more traditional hierarchical view that agency action is legitimated by political control, and argues that the real task now in US administrative law is to link agency decision-making back to democratic bodies: P. Lindseth, ' "Weak Constitutionalism?" Reflections on Comitology and Transnational Governance in the European Union' (2001) 21 *Oxford Journal of Legal Studies*, 145–538; P. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism—The Example of Europe' (1999) 99 *Columbia Law Review*, 628–738. For the purposes of this paper, the added difficulty of linking decision-making to democratic bodies when we look at the EU is a further explanation of the attractiveness of procedure.

[39] See Section IV below.

[40] See n. 4 above.

[41] Dryzek, n. 6 above, 84–102, analyses 'democratic pragmatism' in these terms. This requires participation, albeit not necessarily a radical or extensive approach to participation. Note also that Dryzek's conclusion on 'ecological democracy' focuses on the learning potential of such a regime, 197–201.

[42] See Section III.B further below.

[43] J. Steele, 'Participation and Deliberation in Environmental Law—Exploring a Problem-solving Approach' (2001) 21 *Oxford Journal of Legal Studies*, 415–42; Sagoff, n. 6 above links deliberation with problem solving in conditions of uncertainty; J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law*, 51–97, discusses the link between public participation and sustainability from the perspective of the Aarhus Convention.

information and negotiating over pre-formed interests, there is an attempt to resolve controversial problems through reasoned debate. Consensus is a complementary element of such an approach. Since deliberation assumes the potential to form and change preferences, deliberative processes, based on reasoned argument between uncoerced equals, enhance the possibility of consensus. Even in the absence of a process approximating a deliberative ideal, participation coupled with responsiveness from the public authority may foster support for and confidence in policy decisions. Participation, of course, may not lead to consensus, and may even illuminate dissent,[44] but the perceptions of those involved that the procedure is fair (itself an enormously contested concept) may be a valuable practicable gain.

As a technique of regulation, a move to indirect, procedural law can be an expression of widespread dissatisfaction with the effectiveness of traditional command and control regulation. Law is used to structure decision-making, rather than to command particular results, and the involvement of different actors is central.[45] So (to use examples from the Aarhus Convention) industry takes pollution control decisions in the knowledge that its pollution records are published, and that a citizens' suit is available.[46] Public participation has an added dimension in environmental law, since the public is required to participate in *solutions* as well as decisions. More effective environmental protection through participation in decision-making might not simply be a question of getting more or better information, but of changing individual behaviour. Think for example of the problems raised by the European 'waste mountain'. Solutions cannot simply focus on industry's waste production or on waste management—individuals need to be actively engaged, since they will be asked to reduce waste production, to separate waste for reuse or recycling, to increase composting, to accept waste management facilities

[44] It is generally considered that early and genuine consultation does encourage understanding and agreement. See N. Stanley, 'Contentious Planning Disputes—An Insoluble Problem?' (2000) *Journal of Planning and Environmental Law*, 1226–39, and references therein. To argue that participation enhances levels of environmental protection relies on an acceptance that *real* deliberation focuses not on individual, selfish interests, but on the common good. Even here, however, it is not the case that environmental protection would be an absolute value. This is probably why inclusive problem-solving is often linked with sustainable development, which allows an explicit consideration of other social goods.

[45] Note that a turn to procedure often implies controlling procedure within regulated entities, rather than regulators. See J. Black, 'Proceduralising Regulation' (2000) 20 *Oxford Journal of Legal Studies*, 597–614, and (2001) 21 *Oxford Journal of Legal Studies*, 33–58 which concentrates mainly, although not exclusively, on the proceduralization of the regulated, as does G. Teubner, L. Farmer, and D. Murphy (eds), *Environmental Law and Ecological Responsibility—The Concept and Practice of Ecological Self-Organization* (Chichester: Wiley, 1994); I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford: Oxford University Press, 1992) looks at procedural constraints on regulator and regulated. The role of third parties (i.e. participation in regulation) is particularly important, see 54–100. This paper concentrates on procedural constraints on regulators.

[46] It should also be noted that part of the shift from command and control involves a turn to the market, or directly to industry, to develop environmental standards, which potentially closes out environmental interests in favour of industry participation. So for example, a company's tax affairs are frequently confidential and self-regulation, or environmental agreements negotiated between government and industry, may leave no space for outsiders. See S.E. Gaines and C. Kimber, 'Redirecting Self-regulation' (2001) 13 *Journal of Environmental Law*, 157–84.

near their homes. Add to that the importance of private enforcement, and the centrality of participation to the effectiveness of environmental policy is clear. It is not simply the involvement of individuals or groups litigating against polluters or public authorities that matters—any 'name and shame' approach to enforcement assumes that individuals recognize environmental transgressions as real crimes. There is frequently a didactic, or at least awareness-raising, element to environmental participative democracy, which is linked to changing preferences through debate.[47]

B. RISK, VALUES, AND POLITICS

The problem-solving approaches outlined above can apply in respect of majoritarian or independent decision-making bodies.[48] A complementary starting point for proceduralization is that many vital environmental (and other) decisions in modern states are taken in non-majoritarian institutions, which are not subject to either direct or indirect democratic control,[49] and are not simply applying clear rules that do have democratic approval.[50] There are various reasons for delegating decision-making in this way, the most common justification in the environmental field being the need for detailed technical expertise.[51] There is then a tension, however, between that need for independence and the control of decision-making. The need for control is only partly about concern that regulators will be corrupt, incompetent, or inefficient.[52] The deeper issue is that as the decisions are not simply technical, technocrats should not act in isolation. Environmental regulation is largely about managing risk, both to the non-human environment and to human health. A traditional technical approach to risk assessment focuses on identifying the nature of the hazard and the likelihood of its occurrence. Techniques such as cost-benefit analysis, although they might rest on a desire to increase accountability and effectiveness, emphasize the specialist-technical element of management of that risk.[53] This apparently objective, skilled exercise is, however, far from the end of the story.

[47] J. Barry, 'Sustainability, Political Judgement and Citizenship—Connecting Green Politics and Democracy' in Doherty and de Geus (eds), n. 5 above, 115–32. Note also the importance of this perspective to access to information, C. Kimber, 'Understanding Access to Environmental Information—the European Experience' in T. Jewell and J. Steele (eds), *Law in Environmental Decision Making* (Oxford: Oxford University Press, 1998), 139–60.

[48] So for example, in the United Kingdom (UK), planning decisions are generally taken by local authorities on clear lines of representative democracy, and yet this is also perhaps the area with the longest established and best developed modes of public participation.

[49] They are not elected, and are only tentatively accountable to a directly elected body.

[50] Agencies are often granted explicit discretion, and in addition, the controlling statutes are necessarily vague and imprecise in application.

[51] By which I do not simply mean scientific expertise, but also for example economic, legal, and risk management expertise.

[52] Although this element is also important. So for example, Ayres and Braithwaite, n. 45 above, 54–81, consider the capacity of 'tripartism' to inhibit capture and corruption.

[53] E. Fisher, 'Drowning by Numbers—The Pursuit of Accountable Public Administration' (2000) 20 *Oxford Journal of Legal Studies*, 109–30.

A major problem with solely technocratic risk management is that many decisions have to be made in conditions of scientific uncertainty. Although it is notoriously difficult to agree on the proper role of the 'precautionary principle' in decision-making, the danger of waiting for scientific certainty before taking action constitutes its basic appeal. One approach to the precautionary principle, strongly reflected in the European Commission's Communication on the Precautionary Principle,[54] sees it as essentially a technical tool of risk management, to be applied by experts where they lack clear evidence on the facts. However, as well as legitimizing decisions taken in conditions of uncertainty and telling us what to do with 'sound science', the precautionary principle might imply an acknowledgement of the limits of science. Scientific uncertainties cannot be resolved by more research; we have to accept uncertainty in our approach to environmental regulation. In that case, the precautionary principle operates in a realm *beyond* conventional risk assessment, requiring the consideration of more subjective and contextual experience.[55]

This extended approach to risk management is appropriate in any event, since the acceptable amount of environmental risk is a political question that is likely to be disputed at a number of levels.[56] Differing perspectives on risk among different groups of people is now a well-known phenomenon.[57] Cultural and social background may affect which risks are selected for concern and which dismissed as unimportant.[58] The context in which risk arises may alter risk perceptions, so that, for example, an unfamiliar risk is more worrying than a familiar risk, a freely chosen risk less worrying than one imposed from outside.[59] A simple technical approach to risk does not capture these perspectives. A further strand to this debate is the idea of 'risk society'. According to Ulrich Beck,[60] contemporary society, rather than distributing 'goods' distributes 'bads', including risks. For current purposes, a significant element of this thesis is that the pervasiveness of contemporary risk escapes the control of modern institutions and processes, so that democratizing via some alternative mechanism becomes necessary. Research on risk and

[54] Communication from the Commission on the precautionary principle, COM(2000)1, 2 Feb. 2000. See E. Fisher, 'The European Commission's Communication on the Precautionary Principle' (2000) 12 *Journal of Environmental Law*, 403–5.

[55] See E. Fisher, 'Is the Precautionary Principle Justiciable?' (2001) 13 *Journal of Environmental Law*, 315–34.

[56] The Communication from the Commission on the precautionary principle, n. 54 above, 3, notes that 'judging what is the "acceptable" level of risk for society is an eminently *political* responsibility'. Fisher, n. 54 above, notes the difficulty of assuming that the scientific and political elements of risk management can be separated so easily. Hence the introduction of public participation into the whole of the decision making process on the accounts considered in this section.

[57] For a view of the conflict between 'expert risk' and 'risk perception', see Royal Society Study Group, *Risk: Analysis, Perception and Management* (London: Royal Society, 1992).

[58] M. Douglas and A. Wildavsky, *Risk and Culture* (Berkley: University of California Press, 1983).

[59] C. Starr, 'Social Benefit Versus Technological Risk', (1969) *Science*, 1232; Fischoff *et al.*, *Acceptable Risk* (Cambridge: Cambridge University Press, 1981).

[60] U. Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992).

uncertainty is not always particularly consistent or clear, but illuminates the *political* as well as technical nature of risk management.[61] A very common prescription to balance the technical and political, is to take risk decisions out of the complete control of scientists or technocrats, by varying degrees of public involvement in the decision.[62]

In addition, public values are increasingly recognized as elements of risk regulation, a trend reinforced by the growing alignment of environmental and social justice issues through the lens of 'sustainable development'. Values are not simply private 'preferences' or 'interests', but are more public regarding issues arrived at through reflection and debate.[63] Decisions might be influenced by values such as the fairness of the distribution of risk, the ethics of new technology, or the degree to which government can legitimately interfere in private business. Once values are admitted, technical experts, including those skilled in cost-benefit analysis or risk assessment, have no monopoly on judgement, and it is unacceptable to set up processes as if decisions rely solely on objective technical criteria. Since the technical and the evaluative parts of the decision are only severable with difficulty, if at all, the decision as a whole requires wide participation.

Debates on risk regulation are of course directly relevant to EC environmental lawyers to the extent that EC institutions act as administrative bodies.[64] They feed particularly into environmental decision-making when implementation of legislation is delegated to committees. This delegation attracts similar observations about the normative nature of risk regulation as outlined in this section. The lack of transparency of 'comitology', and its potential to close out democratic oversight by the European Parliament is well known.[65] It has been argued that the involvement of the Member States allows deliberative problem solving in committee,[66] but that does not answer all of the concerns arising from the political nature of risk regulation. The

[61] See also, Special Issue on Risk (1999) 8–2 *Environmental Values.*

[62] K.S. Shrader-Frechette, *Risk and Rationality* (Berkeley: University of California Press, 1991); Beck, n. 60 above, advocates greater deliberative participation in decision-making to meet the challenge of democracy in risk society. Stephen Breyer argues that risk regulation should on the contrary be de-politicized, and kept out of the hands of the irrational public, whose influence prevents the rational prioritizing of risks, S. Breyer, *Breaking the Vicious Circle—Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, 1993). Although this approach is respectable, and can be supported in particular by the costs of 'irrational' risk regulation, it does not address the difficulties raised in this section. Public participation does not imply that public concern should determine the pattern of risk regulation.

[63] See particularly Royal Commission on Environmental Pollution, n. 15 above, 101–11.

[64] This is most obviously the case when the EU institutions are determining individual rights and obligations, as in the regulation of GMOs, see Section IV. C below, or more commonly in areas such as competition law. See n. 132 below.

[65] See generally C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing, 1999); R. Dehousse, 'Towards a Regulation of Transnational Governance? Citizen's Rights and the Reform of Comitology Procedures' in Joerges and Vos (eds), *ibid.*, 109–27.

[66] C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Process: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal*, 273–99 considers the possibility of 'deliberative supranationalism' relying on the 'good arguments of those involved in comitology'. See also E. Vos, 'EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation' in Joerges and Vos (eds) n. 65 above, 32, although this also argues for the involvement of citizens. Given the political nature of risk regulation, it is particularly a matter of concern that the Commission is so suspicious of Member State involvement, Governance White Paper, n. 10 above, 31.

'problem' of committees can be responded to by varying degrees of citizen participation, or more generally by legal proceduralization.[67]

At a more general level, debates on the legitimacy of risk regulation are pertinent in EC law from the perspective of the 'administrative model'[68] of the development of the EU. This argues from the starting point that the EC developed as a 'regulatory order', and analogies are drawn between the constitutional challenges posed by delegation of power to administrative bodies within the state, and delegation of legislative power to a regulatory order beyond the state. The focus is not on democratizing major decisions, but on the legitimacy of a bureaucracy, in this case a European bureaucracy. Problematically, this approach presents technical regulation as quite distinct from politics, specifically redistributive politics. It is this isolation that allows regulation to be sheltered from democracy, since legitimacy is achieved, for example, by the quality of decisions, or by the credibility of the institutions.[69] Procedural standards might also be significant, as with national bureaucracies,[70] and a recognition that technical regulation is deeply implicated in normative issues can only emphasize the need to take decisions out of the sole control of technocratic bodies. This brings us to the unavoidable subject of the 'democratic deficit'.

C. THE DEMOCRATIC DEFICIT

The 'democratic deficit' in the EU is now rarely denied. Although it suffers from poor definition and focus,[71] its basic force is in the fact that the EU legislator cannot be ejected by means of popular vote, whilst it has attracted power away from national democratic institutions. This is a complex debate, involving both concern that the European 'project' itself does not have the support of the European people, and concern that the methods and

[67] Including an increased role for the European Parliament, see Council Dec. 99/468/EC Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, [1999] OJ L184/23. See also Vos, n. 66 above; Dehousse, n. 65 above; C. Joerges, 'Good Governance through Comitology?' in Joerges and Vos (eds), n. 65 above.

[68] The leading exponent is perhaps Majone, see generally G. Majone (ed), *Regulating Europe* (London: Routledge, 1996). According to this approach, the Commission's lack of resources give it an incentive to maximize its regulatory powers, in which it has been supported by Member State governments' willingness to delegate regulatory power to overcome the problems of free riding, and to gain long term credibility for their policies. This approach applies throughout EC law, not specifically to environmental law.

[69] Credibility is crucial for Majone, and he considers it lost if short term electoral politics enter into regulation, G. Majone, 'The Regulatory State and its Legitimacy Problems' (1999) 22–1 *West European Politics*, 1–24.

[70] M. Everson, 'Administering Europe?' (1998) 36 *Journal of Common Market Studies*, 195–216.

[71] C. Lord, 'Assessing Democracy in a Contested Polity' (2001) 39 *Journal of Common Market Studies*, 641–61.

procedures by which the EC/EU institutions reach decisions are not subject to democratic principles. In the earlier stages of its development, European integration was largely an elite project. As the evolution of the EU has been subjected to increased public scrutiny and discussion, there seems to have been a corresponding growth of disaffection. The promise of participation in this debate arises out of the paradoxical effects of traditional mechanisms of representative democracy at EU level. To simplify greatly, although the European Parliament is consistently seen as the *locus* of democratic authority in the EU, further increasing its powers would move power from national democratic institutions to an ill-defined and more remote European polity. At the other extreme from the 'state-building' inherent in an unmediated parliamentary democracy, is a return to inter-governmentalism, relying on Member State democracy by increasing the veto power of individual members of the Council. As well as having a potentially paralysing effect on decision-making, this would involve increasing the strength of the executive over parliament at the national level, and would moreover be only a partial solution, since democratic control by any national electorate can be exercised only over one member of the Council.

The stubbornness of the democratic deficit in the EU has led to an emphasis on (expressions of) openness and participation. The Economic and Social Committee (ESC) essentially formalizes and renders mandatory a form of interest group consultation.[72] The value of 'transparency' is now recognized by treaty, although its implementation is of course extremely controversial.[73] More fundamental approaches to participation also appear. Joseph Weiler, for example, advocates the use of more 'direct democracy' with the creation of the 'European public square' and mechanisms such as legislative ballots.[74] Some form of deliberative democracy is particularly appealing at major decision-making junctures in the European context, given the lack of consensus on either the role of the EU, or what is necessary to give its decisions legitimacy.[75]

D. CONCLUSIONS

There is a wealth of literature on deliberative forms of democracy, on the EU's democratic deficit, and on the legitimacy of agency decision-making. That

[72] The quandary in which the ESC finds itself now its 'expert' advisory role is increasingly usurped by lobbying and advisory committees with greater specialism and flexibility, is clear from S. Smismans and L. Mechi, *The ESC in the Year 2000* (Brussels: Economic and Social Committee, 2000).

[73] Art. 255 EC.

[74] Weiler (ed), n. 8 above. See also P. Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment' (1997) 3 *European Law Journal*, 105–30; J. Scott, 'Law, Legitimacy and EC Governance: Prospects for Partnership' (1998) 36 *Journal of Common Market Studies*, 175–94, who look at deliberation from a perspective of civic republicanism.

[75] It must be noted that discussions of deliberation in the EU context do not necessarily imply wide participation. So 'deliberative' structures are discussed in the context of the decision-making of the EU institutions, particularly the Council or Committee.

literature cannot be fully examined here. Also of course, there are many other possible explanations of the vogue for participation—this section has simply sought to draw out some possible rationales for increasing participation in EC environmental law. Participation has added resonance for the EU, where the normal difficulties of risk regulation are compounded by the weakness of representative democracy.

Quite what participation means is rarely fully drawn out. Julia Black observes the confusion that can surround proceduralization of regulation, and distinguishes between two approaches: 'thin' proceduralization, based on a liberal model of democracy, involving a competition between interests; and 'thick' proceduralization, a model of deliberative democracy.[76] On the whole, the rationales for participation discussed in this paper seek to legitimize, rather than challenge, existing structures, and do not require deliberation. Although they may easily be conceptualized as 'thin' proceduralization, however, an important similarity between these different approaches is that they all require a relatively extensive notion of participation in order to be effective. Early and genuine participation, rather than a public relations exercise after real policy decisions have been taken, is the minimum required to justify any of the approaches outlined here. The limitations of the mechanisms available in EC environmental law will be discussed in later sections.

The Aarhus Convention hedges its bets on justifications for participation. The recitals 'recognize' rights and duties to an 'environment adequate to . . . health and well-being', and the link with substantive rights to environmental quality is reiterated in Article 1. The recitals also posit that the rights in the Convention enhance 'the quality and the implementation of decisions' and 'public awareness of environmental issues'. The Convention also aims 'to strengthen public support for decisions on the environment'. More radically, it 'will contribute to strengthening democracy'. Many of the strands to public participation considered in this section can be identified here: democratization and legitimation; improved decisions; changing individual preferences.[77] The reasoning in the Aarhus Convention essentially provides disparate and *ad hoc* rationalization of participation.

The European Commission is also indecisive on the reasons for participation, although participation seems to be central to its governance project. According to the White Paper, 'the quality, relevance and effectiveness of EU policies depend on ensuring wide participation . . . improved participation is likely to create more confidence in the end result, and in the Institutions which deliver policies'.[78] As regards initial motivation, the Commission's governance project arose out of a Work Programme called *Enhancing Democracy in the European Union*, according to which 'it is clear that the reform of European modes of governance is all about improving democracy in

[76] Black, n. 45 above.

[77] Ebbesson, n. 43 above, identifies three motivations: improving decisions; furthering international human rights; and legitimacy.

[78] Governance White Paper, n. 10 above, 10.

Europe'.[79] We even see a hint of 'deliberation' in the White Paper; the Commission advocates the creation of a 'transnational "space" where citizens from different countries can discuss what they perceive as being the important challenges for the Union'. However, more pragmatic considerations then intervene: 'This should help policy makers to stay in touch with European public opinion, and could guide them in identifying European projects which mobilize public support'.[80]

Participation and even democracy is seen in quite instrumental terms by the Commission. The Work Programme that led to the White Paper has a 'Chinese proverb' as epigram: 'Tell me and I'll forget, show me and I'll remember, involve me and I'll understand'.[81] An assumption that if only the people(s) of Europe understood Europe, they would embrace its ideals is very familiar, and very clearly behind some of the proposals in the White Paper.[82] At the risk of stating the obvious, a vastly more modest European project must be a possibility if democracy really is 'enhanced'. This does not seem to have occurred to the Commission. Moreover, although there is a rhetoric of democratization in the governance project, there is a wide gap between that rhetoric and the mechanisms provided, which are essentially limited to the formalization of consultation. There is no reason to assume that this will go far, if at all, beyond recognized groups and familiar, controllable procedures.

There is no obvious commitment to any particular rationale for public participation either in the Aarhus Convention or by the European Commission. There is a general view that participation is a 'good thing', backed up by a number of possible rationalizations. The reasons for participation, however, do matter. The prevalent rhetoric in both the Aarhus Convention and the White Paper is of democratization, which suggests an intrinsic value for participation. Other indications are, however, overwhelmingly instrumental. If participation is about the quality of a result, it might be less important to protect it, provided that the best result is reached in some other way. If on the other hand the process is important in itself, perhaps for democratic reasons, dispensing with it, or limiting it to those who can provide 'useful' information, is more problematic. Given the confusion as to the motives for legislation, what ultimately becomes of participation in EC environmental law may depend to a large extent on the approach of the courts.[83]

[79] See n. 9 above.
[80] Governance White Paper, n. 10 above, 12.
[81] See n. 9 above.
[82] The Commission's frustration is particularly apparent at 7–9.
[83] See UK House of Lords decision on environmental impact assessment (2001) 13 *Journal of Environmental Law*, 89. The House of Lords refers to the 'inclusive and democratic' procedure required by Council Directive 85/337/EEC on the Assessment of the Effects of certain Public and Private Projects on the Environment (EIA Directive), [1985] OJ L175/40 as a reason for finding that a court is not 'entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same', *ibid.*, 96, *per* Lord Hoffmann. An absence of formal legal rights to participate at the EC level might then be a further cause for concern.

IV. The Content of Participation in EC Environmental Law

The Aarhus Convention could easily be implemented without engaging in challenging approaches to participation, notwithstanding some very limited support for hearings and discussion between stakeholders.[84] The Commission's White Paper concentrates on formalizing its currently *ad hoc* approach to consultation. These are fairly empty vessels for any grand movement to public participation. This section will look at the content of participation in EC environmental law.

A. MEMBER STATE OR EU INSTITUTIONS

EC law quite frequently requires Member States to provide for the involvement of the public in individual licence applications and authorizations. Indeed a 'procedural shift' can be identified in EC environmental law generally, as directives impose procedural rather than substantive requirements on the Member States. Joanne Scott[85] observed this tendency in respect of Integrated Pollution Prevention and Control (IPPC),[86] where an open-ended substantive requirement (best available techniques) is matched by procedural obligations on participation in decision-making. These trends are mutually supportive. It is difficult to ensure wide involvement in setting highly technical standards, and de-centralization of substantive standards means that local participation is more meaningful than would otherwise be the case. Furthermore, public involvement in decision-making provides a degree of supervision of Member State standard setting.

The clearest early example of a shift to procedure in environmental law is in Environmental Impact Assessment (EIA),[87] which requires the provision of information on certain development applications to the public 'within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.... The results of consultations and the information gathered...must be taken into consideration in the development consent procedure'.[88] Although lawyers tend to concentrate on the enforceable procedural rights granted through EIA to the public, the formal framework for obtaining information also provides for an environmental statement to be prepared by the developer, and for the

[84] See ns. 29–30 above.
[85] J. Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU', in J. Scott and G. de Búrca, *Constitutional Change in the European Union* (Oxford: Hart Publishing, 2000), 259–80.
[86] Dir. 96/61/EC concerning Integrated Pollution Prevention and Control, [1996] OJ L257/26.
[87] Dir. 85/337/EEC on the Assessment of the Effects of Certain Private and Public Projects on the Environment, [1985] OJ L175/40, as amended by Dir. 97/11/EC amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, [1997] OJ L73/5.
[88] Dir. 97/11/EC, n. 87 above, Art. 6(2) and Art. 8.

consultation of interested public bodies. This part of the EIA procedure may well concentrate primarily on technical approaches to risk assessment, and has the potential to overwhelm lay participation. The courts have, however, quite jealously guarded at least the procedural requirements for participation, if not the quality of participation.[89]

The IPPC Directive also requires participation, but subject to more limited specification than in the EIA Directive. '...Member States shall take the necessary measures to ensure that applications for permits... are made available for an appropriate period of time to the public, to enable it to comment on them before the competent authority reaches its decision.'[90] Christian Hey argues that rather than getting rid of centralized substantive standards, the IPPC Directive has simply moved the *locus* of the centralized standard setting—to less transparent, less accessible committees, which are in danger of institutionalizing a complex negotiation between industry and regulators.[91] So again, there is a possible tension between participation on individual decisions and technical standards. The risk of crowding out participation where the technical input is centralized, rather than tailored to the individual development proposals (as in EIA) is probably even greater. So notwithstanding a move to procedure in EIA and IPPC, the tension between technical expertise and participation remains.

The extent of participation, including who can participate, was initially left fairly open in these Directives, but amendments to EIA and IPPC have been proposed to allow ratification of the Aarhus Convention. The major development is the clear affirmation of the importance of public interest groups. The Commission proposes introducing the Aarhus Convention definition of 'public' and the 'public concerned' into the EIA and IPPC Directives.[92] New paragraphs to reflect the detailed provisions of Article 6 of the Aarhus Convention are also proposed.[93]

Public participation in EC environmental law is not limited to specific projects. With respect to plans and programmes covered by Article 7 of the Aarhus Convention, Strategic Environmental Assessment (SEA) provides that environmental assessment procedures apply to certain 'plans and programmes' that 'are likely to have significant environmental effects'.[94] The

[89] At the ECJ, see Case C-287/98, *Grand Duchy of Luxemburg* v. *Berthe Linster, Aloyse Linster and Yvonne Linster* [2000] ECR I-6917; Case C-435/97, *World Wildlife Fund (WWF) and others* v. *Autonome Provinz Bozen and others* [1999] ECR I-5613, especially para. 54. The approach of the ECJ to the effect of the Directive in Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a.* v. *Gedeputeeerde Staten van Zuid-Holland* [1996] ECR I-5403, although it does not particularly refer to the provision for public participation, opens the way for this protection of the procedural aspects of the Directive. Note that Advocate General Elmer, who took a more traditional approach to direct effect, saw the participation provisions as a 'right' to be protected, para. 70.

[90] Dir. 96/61/EC, n. 86 above, Art. 15.

[91] C. Hey, *Towards Balancing Participation* (Brussels: European Environmental Bureau, 2000). Non-binding BAT reference notes (BREFs) are produced under the information exchange provisions of the Directive, via the European IPPC Bureau in Seville, see Hey, *ibid.*, 9–10.

[92] Public Participation Proposal, n. 31 above, 9 and 13. [93] *Ibid.*, 9–11, 13–14.

[94] Dir. 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment, [2001] OJ L197/30.

public should be given 'an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure'.[95] The definition of 'public' is 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups'.[96] Although the EC level legislation provides some discretion on involvement of groups (as does the Aarhus Convention), the basic legitimacy of groups is clear. The Commission is of the view that the SEA Directive is consistent with Article 7 of the Aarhus Convention,[97] although 'for other plans and programmes which clearly relate to the environment, it is necessary to make provision for public participation'.[98]

The Directives considered here are concerned with the implementation of EC environmental law by national (or local) administrative bodies. To some extent it is inevitable and instinctive that, rather than attempting to reorganize its own environmental decision-making and the EU institutions generally, the Commission seeks to proceduralize regulation in the Member States. Decentralization of legal powers, by conferring legally enforceable rights on individuals within the Member States, has served the integration project of the EC well and long. Moreover, genuine public engagement with an issue is more likely when faced with a concrete proposal (such as location of a waste incinerator) than with the more abstract policy considerations (such as whether to reduce reliance on landfill) that tend to arise at European level. And yet, those European decisions can involve deeply political questions. To take the Landfill Directive as an example,[99] prioritizing between a form of waste management that creates a gas with global warming potential (landfill creates methane), and a form of waste management that emits known carcinogens (incineration emits dioxins)[100] raises serious questions of risk definition and risk distribution. 'Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.'[101] However, an 'inclusive approach' by the national

[95] Art. 6(2). [96] Art. 2(d).

[97] As is Dir. 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive), [2000] OJ L327/1. The Directive requires the drawing up of 'river basin management plans', in respect of which information must be made available to the public, and at least six months provided for comment, Art. 14. Public Participation Proposal, n. 31 above, 5.

[98] *Ibid.* The Proposal does not address Art. 8 of the Aarhus Convention. See also the rejection of the EP's proposed amendment that would refer to Art. 8 in the recitals, Commission Amended Proposal for a Directive of the European Parliament and the Council providing for Public Participation in respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending Council Directives 85/337/EEC and 96/61/EC, COM(2001)779, 12 Dec. 2001.

[99] Dir. 99/31/EC on the Landfill of Waste, [1999] OJ L182/1. Note that the Aarhus Convention has merely persuasive effect on legislators, including the EC institutions. However, this is probably premissed on the basis that legislative bodies are subject to representative democracy.

[100] Albeit that safe levels are hotly disputed.

[101] Governance White Paper, n. 10 above, 10.

executive will only partially reverberate in the development of EU policies, because of majority voting in Council, and the role of other institutions. As for implementation, participation will take place after the main policy decisions have been taken, at which point the national or local body is subject to binding legal obligations.

The problem can readily be seen in the difficulties the UK faces in the implementation of the Landfill Directive.[102] The Landfill Directive requires Member States to reduce the amount of biodegradable waste being sent to landfill, and also bans the landfill of certain waste streams altogether. In the UK, given a historically high reliance on landfill, meeting these commitments is likely to require increased waste incineration, even if a huge effort goes into recycling. However, waste incineration is enormously controversial and unpopular in the UK, primarily because of safety concerns. A new waste incinerator will in most cases attract public participation through both the EIA and the IPPC processes. The value of participation at the local or national level is, however, undermined by the background of EC law. Participation in decisions on the location of incinerators is really all that is left, once the basic obligation to reduce the amount of waste being landfilled is undertaken at EC level. Just as EC decision-making creates a democratic deficit by shifting power away from national bodies of representative democracy, the strength of national or local participatory arrangements is reduced. This suggests that effective compensatory participation mechanisms should be sought at the EU level.

Although the next section will suggest that even best efforts are likely to be less than satisfactory, mechanisms for participation in environmental decision-making by EC institutions are in fact quite under-developed. To the limited extent that the Commission does address its own procedures, for example in the White Paper, there is simply provision for contribution of outside information, through a familiar and easily controlled consultation process. Moreover, although the Commission clearly envisages some formalization of participation,[103] there is no indication that legally enforceable rights will be granted. It is of course important to be alert to the danger of juridification in this area, and to the risk of ossification of decision-making by overly stringent procedural constraints. The potentially stifling effect of detailed procedural requirements together with strong judicial review is all too well-known from US experience.[104] However, the Commission is notably

[102] See further S. Tromans, 'Alternatives to Landfill—Can the Planning System Deliver?' (2001) *Journal of Planning and Environmental Law*, 257–64.

[103] Governance White Paper, n. 10 above, 17. The White Paper presents 'rationalization' of consultation as a way of increasing inclusion, efficiency, and accountability. Whilst it is true that *ad hoc* approaches are likely to exclude outsiders, there is also a risk that if efficiency takes priority, 'rationalization' of consultation will make consultation less open to outsiders.

[104] See also C. Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review*, 1–18, which in a UK context criticizes the 'partial colonization of the legal by the political process' that may be brought about by increased rights of access to the court for interest groups. The corollary of the participation right in the Aarhus Convention is access to justice. The relevance of these concerns is not denied in the current context, although the weakness of representative democracy in the EU makes them less acute.

unconcerned about the ability to strike the right balance in respect of procedural rights in Member State decision-making, and some formal rights are part of the logic of the Aarhus Convention. The financial and time costs of participation are particularly acute concerns at EC level, when one considers the already slow process of decision-making, and the practicalities of full openness, let alone participation, in all languages.

Notwithstanding such legitimate concerns, at the very least there is a strong case to be made for greater self-examination at the central level, given the breadth of the Aarhus Convention, and the inherent potential for the disempowerment of national participation. The Aarhus debate seems, somewhat strangely, to be taking place in isolation from the broader governance debate to which one would expect it to be relevant. Rather than concentrating on the legitimacy of European decisions, policy and legislation is concerned mainly with the proceduralization of national decision-making. And yet, the background of EC legal obligations may reduce the impact of participation at that level.

It must be acknowledged that although a focus on the Member State is inevitably a limited response to the Aarhus Convention, the Aarhus Convention is not likely to get teeth at all in many Member States other than by the introduction of obligations through EC environmental law.[105] The signature of the Aarhus Convention gives the Commission a strong hand in proposing the proceduralization of national decision-making, and its ratification 'is a political priority for the Commission'.[106]

B. NGOS IN EC LEVEL DECISION-MAKING

To turn to such participation as does exist in decision-making by EC institutions, a crucial question when trying to determine quite what participation involves, is to determine who is entitled to participate in decision-making. Administrative law typically tries to identify those with an 'interest' in decision-making, an individualized approach that is particularly apparent in EC administrative law. So the *Greenpeace*[107] decision makes it clear that when seeking to challenge an act of the Community under Article 230 EC, diffuse interests, such as environmental interests, are represented only if they happen to coincide with an individual interest, narrowly defined. Although

[105] Rose-Ackerman and Halpaap, n. 37 above, consider that legal pressure from the EC will be a very important influence on implementation of both the letter and spirit of the Convention, particularly given limited incentive for western European politicians, career bureaucrats, or groups with privileged access, to increase outside participation in their own decision-making areas.

[106] Public Participation Proposal, n. 31 above, 3; Public Access Proposal, n. 19 above, 4.

[107] Case C-321/95, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission* [1998] ECR I-1651: In this case, Greenpeace, and local individuals and groups, were denied standing in respect of a challenge of a Commission decision to grant funding to Spain for the construction of two power stations on the Canary Islands. Standing was denied on the basis that there was no 'individual concern' with the case.

standing before the European Court of Justice (ECJ) might more readily be discussed within the 'access to justice' pillar of the Aarhus Convention, which is not the focus of this paper, it is fundamentally linked to who has *rights* in the administrative process. The access to justice pillar in the Aarhus Convention strengthens the participation pillar. As is typical of its approach to the Aarhus Convention generally, the Commission seems to be advancing access to justice in respect of Member State arrangements, but shows little concern with its own.[108] Of course, amending Article 230 EC by treaty is not a realistic short-term aim. It is more surprising that the difficulty is not pre-empted where Community institutions are given decision-making powers in particular sectoral legislation, such as GMO authorization.[109] The Directive regulating GMO authorization makes no provision for access to justice to support its (admittedly slight) provisions on access to information and participation at EC level. A Community act under the Directive will then presumably be challengeable on the individualized basis provided for under the case law of the ECJ.[110]

Notwithstanding the formal position in EC administrative law, which tends to exclude groups, with consequent well-known problems for diffuse interests such as the environment, the novel political dynamics of European integration are thought in practice to favour the influence of NGOs in decision-making. The relative weakness of the European Parliament, both in its influence and its own legitimacy, together with disillusionment with traditional party politics even at national level, leaves a gap for NGOs. In addition, some NGOs may gain relatively greater influence from involvement in the European rather than national policy process, since competing interest groups may be tied to national structures, or unable to find common cause with their counterparts in other Member States because they are in economic competition. Administrative practice seems to be receptive to the participation of groups. Although there is no formal requirement on the European institutions to consult generally, there is a relatively widespread use of traditional consultation methods in the Commission and the European Parliament.[111] The Commission often publishes environmental proposals at a

[108] So the Aarhus Convention is mentioned in 'White Paper on Environmental Liability', COM(2000)66, 9 Feb. 2000, 22. Also see Public Participation Proposal, n. 31 above, 12 and 14, which provides for access to justice for NGOs in the EIA Dir.

[109] See Section IV. C below.

[110] The applicant for authorization would probably be able to establish 'direct and individual concern', but other parties would face the usual struggle. Consent to market a GMO throughout the EU is granted by a national competent authority, and will presumably be subject to challenge in that Member State—access to justice will in these circumstances depend heavily on the administrative system available in the Member States. All are signatories to the Aarhus Convention, but there is currently no sign of an EC-level horizontal measure on access to justice. See Section IV. C further below. It is of course possible that the ECJ will reconsider its case law in the light of Aarhus, although the Aarhus Convention is not binding on judicial bodies, Art. 2(2).

[111] See e.g. A. Warleigh, 'The Hustle: Citizenship Practice, NGOs and "policy coalitions" in the European Union—The Cases of Auto Oil, Drinking Water and Unit Pricing' (2000) 7 *Journal of European Public Policy*, 229–43.

relatively early stage, and actively seeks public comment, sometimes using more innovative (and potentially deliberative, or perhaps consensus seeking) mechanisms.[112]

The involvement of NGOs is actively sought by the Commission, partly because of the difficulty of engaging the public in European decision-making. The Commission hopes that involvement of NGOs will 'Europeanize' society. Civil society[113] 'offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest'.[114] It is far from obvious that it will be as simple as that. Alex Warleigh, for example, presents empirical evidence suggesting that NGOs may at different times be either unable or unwilling to perform this socialization role.[115] The limited involvement of members in NGO activity calls into question their ability to engage any other than a very small number of activists in European politics. Moreover, many NGOs will see their role as awareness raising, or agenda setting, and their priorities will not follow the legislative schedule.[116]

Given the difficulty of using NGOs to channel 'the views of the person on the street to decision-makers',[117] or to raise European consciousness generally, we should look more closely at the involvement of NGOs in EC environmental law. The role of interest groups must be, at best, problematic if one takes a traditional liberal view of the democratic process. There are no guarantees that the interest groups (public or private) will effectively (or even in good faith) represent (or even know) the interests of their members. The Commission proposes an exchange: it will 'establish partnership arrangements . . . in selected areas committing the Commission to additional consultation in return for more guarantees of openness and representativity of the organizations consulted'.[118] However, it is not simply the internal structure of NGOs

[112] Proposals for legislation provide useful information on consultations undertaken by the Commission. So for example, in preparation of its proposal for a new directive on access to environmental information (Public Access Proposal, n. 19 above) workshops and meetings took place between: the Commission, Member State representatives and IMPEL representatives; the Commission and certain NGOs; the Commission and 'several industry associations'. A working paper was also released. In preparation of its proposal for a new directive on public participation (Public Participation Proposal, n. 31 above) the Commission made public a working paper, and held consultation meetings with NGOs and industry representatives, as well as with the Member States.

[113] Civil society is not just NGOs, but also includes: 'trade unions and employer's organizations ("social partners"); professional associations; charities; grass-roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities', Governance White Paper, n. 10 above, 14.

[114] *Ibid.*, 15. See also Commission discussion paper 'The Commission and non-governmental organisations: building a stronger partnership', COM(2000)11, 18 Jan. 2000.

[115] A. Warleigh, '"Europeanising" Civil Society: NGOs as Agents of Political Socialisation' (2001) 39 *Journal of Common Market Studies*, 619–39.

[116] P. Newell and W. Grant, 'Environmental NGOs and EU Environmental Law' (2000) 1 *Yearbook of European Environmental Law*, 227–52, suggests that NGOs are most effective at either end of the policy process—that is agenda setting and implementation.

[117] Action Programme Proposal, n. 4 above, 62.

[118] Governance White Paper, n. 10 above, 4.

that is problematic, something that is probably more amenable to resolution than the EU's own democratic deficit. The Commission openly prefers to work with EU-level umbrella groups rather than local groups, and the White Paper would in addition require civil society to follow 'the principles of good governance',[119] and to prove their 'capacity to relay information' or 'lead debates in Member States'.[120] It is possible that formalizing participation at EC level, in particular in such an instrumental way, will have a perverse effect. If domestic civil society organizations lose out to transnational organizations, which are actually more removed from the broader public, there may be an overall dilution of participatory democracy.[121]

Even without this paradoxical effect, the likelihood that EU-level participation will adequately compensate for reduced impact of local participation is not high. Individual participation is not likely to be common at this level. As sectoral organizations, the claim of NGOs to general representativity is clearly limited—at most they represent one element of the public interest. Single-issue NGOs have no obvious reason to engage with the impact of putting resources into environmental protection on other areas of social development, or indeed on the economic viability of industry.[122] The point of deliberation is to create shared interests, and overcome self interest, but the question of whose interests and concerns are represented is an intractable issue in environmental decisions. Moreover, the debate about participation is generally about achieving a balance between representative and participatory models of democracy, with the ultimate, if blunt, weapon of the election firmly in place. Even extensive deliberation (let alone the weaker approaches discussed here), has commonly been associated with the imposition of majoritarian structures in divided societies, rather than with legitimizing non-democratic structures. At the EC/EU level, the safeguards of representative democracy barely exist.

To see participation as a tool of democracy at EC level is problematic, partly because of the danger of exclusion by reliance on pan-European, well-organized groups. *Ad hoc* or controversial groups or individuals are easily excluded from participation. NGOs might even 'help the institutions of the Community to uphold the myth of the involvement and representation of "civil society" in the policy making process'.[123] Participation at EC level is

[119] See n. 12 above. [120] Governance White Paper, n. 10 above, 17.

[121] K. Armstrong, 'Civil Society and the White Paper—Bridging or Jumping the Gap?' in Joerges, Meny, and Weiler (eds), n. 10 above. Note also the possible value of the ESC, in maintaining links with national rather than umbrella organizations, Smismans and Mechi, n. 72 above.

[122] This may be a more acute problem in environmental law than in the very well developed participatory procedures in employment law, from which environmental decision-making seems to be borrowing a stakeholder model. Trade unions and employers generally share at least an interest in economically viable industry. The 'social partners' in employment law are able to negotiate binding legislation to be adopted by Council, and here the Commission and the Council are required to verify that the parties are sufficiently representative, see Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes enterprises (UEAPME) v. Council* [1998] ECR II-2335. The legitimacy of trade unions and employers here may in any event be contestable, if only because of the inevitably excluded interests, not least the environmental interest.

[123] Newell and Grant, n. 116 above, 234; Warleigh, n. 115 above, also notes the possibility that ... development context, civil society might actually be *excluded* by use of NGOs.

not of course limited to NGOs. The White Paper also advocates 'stronger involvement of regional and local authorities in the Union's policies',[124] and they might have a greater claim to representativeness than NGOs. Further, the list of actors in 'civil society' is in fact truly comprehensive.[125] However, nothing is said in the White Paper on the practicalities of participation, either between the groups identified and those they are supposed to represent, or between the Commission and the groups.

These concerns are far less urgent if we abandon the democratization rhetoric, and interest groups and others are seen as providers of expertise, technical and otherwise. Although neutral expertise, particularly in this lobbying context, is elusive, it is intuitively sound for procedures to be open and transparent, and for as much information on as wide a range of relevant material as possible to be available. Indeed, I assume that some 'participation' is inevitable, since banning the involvement of industry in the regulation of industry is neither practical nor desirable. Access for environmental interest groups is an important balance to access for industrial groups. Although this privileges the participation of those with recognized and specialist expertise to bring to the table,[126] it at least mitigates problems of legitimacy, and begins to recognize the political and normative nature of decisions. It may also enhance the scope for consensus and agreement on difficult problems.

The language of participation reflects very deep-rooted concerns about the legitimacy of environmental decision-making. Legitimacy can be enhanced through democratic structures, through improving consensus, through better decisions. The risk of exclusion is inherent in any attempt at participatory democracy—even the call for rationality might marginalize the unpopular, and disguise the exercise of power. This concern is amplified at EU level, where structures are difficult to access, and a technocratic mode of government might exclude alternative discourses. Whilst 100 per cent participation is not possible in any system, and the involvement of organized groups may have some positive impact, it is notable that neither the Commission's White Paper nor the Aarhus Convention look closely at removing barriers to participation, or achieving ideal or even workable conditions for deliberation. Democracy remains a distinctly elite business.

[124] Governance White Paper, n. 10 above, 12.

[125] See n. 113 above. See Armstrong, n. 121 above, on discussion of difficulties and ambiguities in conception of civil society.

[126] Moreover, the industrial lobbies are likely to have greater access, both because they have more resources, and are more likely to have access to other, more influential public authorities for example concerned with industry, as well as the environmental bodies. Public resourcing of NGOs might achieve some parity of resources with industry groups, but concerns must then arise about their independence. S. Mazey and J. Richardson, 'Environmental Groups and the EC: Challenges and Opportunities' (1992) 1 *Environmental Politics*, 109–28. The Commission claims to provide funds to 'several hundred NGOs in Europe and worldwide', Commission discussion paper, n. 114 above.

C. GENETICALLY MODIFIED ORGANISMS

Authorization of the use of GMOs looks like a classic case to which a participatory approach to regulation should be applied.[127] In such a dramatically polarized debate, there is a real danger that without public access to decision-making, one view will be, or will be perceived to be, privileged over others. Not only are views on the appropriateness of genetic modification (GM) technology polarized, there is even a wide diversity of views on the problems raised. GMO regulation can be framed (at least) as a scientific, environmental, health, ethical, or socio-economic problem. The area is also plagued by scientific indeterminacy, meaning that there are no guarantees that regulation will strike the right balance. Although GMO cultivation is not an activity that automatically attracts the public participation provisions of the Aarhus Convention,[128] these provisions also apply to activities 'which may have a significant effect on the environment', and Article 6 explicitly applies 'to the extent feasible and appropriate...to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.'[129] Although this provision has been criticized by environmental groups for its vagueness and permissiveness,[130] it suggests that there is a particular role for public participation in this area. This suggestion is equally strong, at least at a presentational level, in EU policy making.[131] Notwithstanding such an expectation of strong public participation provisions, regulation of the deliberate release of GMOs actually illustrates the deep ambivalence to public participation in EC environmental law, and moreover in the quite unusual context of decisions on specific authorizations being taken at EC rather than Member State level.[132]

The impossibility of the Member States reaching agreement on applications for the authorization of commercial release of GMOs under the initial scheme of regulation[133] prompted the negotiation of an amended authorization procedure for genetically modified crops. Under the new Directive on the deliberate release into the environment of GMOs,[134] anyone who wishes to place a GMO on the market is required to notify the competent authority of the Member State where marketing will initially take place.[135] The notification must contain an environmental risk assessment and its results according to detailed specifications in the Directive.[136] The initial competent authority forwards a summary of the notification dossier to the competent authority of all other Member States and to the Commission. The initial competent authority also prepares an assessment report, indicating whether the GMO(s) in question should or should not be placed on the market. Again, this is passed to the other parties.

If the initial competent authority determines that the GMO should be placed on the market, and no objection is maintained by any other Member State or the Commission, the initial competent authority gives consent to the placing of the product on the market. Once consent has been granted for the placing of a GMO on the market, Member States must then allow the product free circulation,[137] subject to a limited safeguard clause, which is predicated on scientific information.[138] If the initial competent authority determines that the GMO should not be marketed, the notification is rejected, but the notifier is free to apply to another competent authority. Where the assessment report is positive, but an objection is maintained by another competent authority or the Commission, a new decision-making phase commences, involving a 'regulatory committee' under the Comitology decision.[139] The Commission submits a draft of measures to a committee consisting of Member State representatives, and chaired by the Commission. The Committee delivers its decision by qualified majority. If the Committee gives a positive view, the Commission adopts the decision. If negative, the proposal is passed to the Council, where a decision is again taken on qualified majority basis. Although there is initially quite a prolonged search for consensus, then,

[127] J. Black, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 *Modern Law Review*, 621–60 discusses the need for a facilitative, integrative approach by biotechnology regulators. See also Steele, n. 43 above.

[128] Annex I lists activities to which Art. 6 automatically applies.

[129] Art. 6(11).

[130] European Eco-Forum, n. 36 above. Note that this is another element of the Convention being developed by a Working Group, see n. 23 above.

[131] Biotechnology is even explicitly mentioned in the Governance White Paper, n. 10 above, 19.

[132] Whilst this is unusual in environmental law, direct administration by European institutions (generally the Commission acting alone, which is not the case in GMO regulation) is more common in areas such as competition and anti-dumping law. These areas are quite heavily proceduralized, particularly in respect of rights for the defence, and to a far more limited extent to rights for third parties, see L. Azoulay, 'The Court of Justice and the Administrative Governance' (2001) 7 *European Law Journal*, 425–41; also K. Lenaerts and J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review*, 531–69. It is possible to envisage protection of the applicant's rights in the GMO authorization process, but difficult to see how other interests will be involved.

[133] Dir. 90/220/EEC on the Deliberate Release into the Environment of Genetically Modified Organisms, [1990] OJ L117/15.

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

[135] Part C of the Directive covers marketing; Part B covers deliberate release for purposes other than placing on the market (e.g. research).

[136] Annex II. Potential, cumulative, long-term adverse effects on the environment or human health, whether direct or indirect, delayed or immediate, must be taken into consideration in the risk assessment.

[137] Art. 22.

[138] Art. 23 allows a Member State provisionally to restrict or prohibit the use and/or sale of a GMO, where 'as a result of new or additional information...affecting the environmental risk assessment or reassessment of existing information on the basis of new or additional scientific knowledge...has detailed grounds for considering that a GMO...constitutes a risk to human health or the environment'. The referendum relied on by Austria to invoke the safeguard procedure under the previous Directive would presumably not suffice, see further T.K. Hervey, 'Regulation of Genetically Modified Products in a Multi-Level System of Governance: Science or Citizens?' (2001) 10 *Review of European Community and International Environmental Law*, 321–33. A decision on the invocation of Art. 23 is taken by committee procedure under Art. 30.

[139] Art. 5 of Council Dec. 99/468/EC. n. 67 above.

ultimately, the Directive provides for decisions to be taken by qualified majority voting.[140] Again, consent implies free movement.

The very existence of the new Directive suggests that some public concern about GMOs has been heard. Under the old directive, a *de facto* moratorium on authorization of commercial growing followed widespread public disquiet in a number of Member States.[141] The importance of non-technical values in this area has been given increasing support by policy makers, and is to some extent reflected in the Directive. So, as well as the regulatory committee, the Directive provides for consultation of a committee on ethics,[142] acknowledging that the final decision is not a purely scientific or technical question. There are also public participation provisions. Aside from a very limited requirement on the provision of public registers of GMOs,[143] Member States will follow their own procedures for information and participation. Given that consent granted under a qualified majority voting process applies throughout the EU, however, one would expect to see some degree of participation in the centralized, Committee and Council, stage of the procedure.[144] The Commission is required to 'make available to the public' the summary provided with the initial notification, and positive assessment reports. The public then has 30 days in which it 'may make comments to the Commission'. The Commission is required immediately to forward the comments to all competent authorities.[145] In addition to any national procedures, then, information on public views is collected centrally and disseminated to all Member States. The extent of this EU-level participation is unclear from the text of the Directive. There is no definition of the 'public', and no provision as to mechanisms of participation—presumably these will be matters for the Commission. There is no commitment that any heed will be taken of the public comments, although if the Committee procedure is invoked, the Commission's draft measures have to take 'into account' the public comments.[146] There is certainly no hint that deliberative or consensus-seeking approaches will be used, or indeed of any activity other than a simple collection of views. The frailty of participation at EU level means that the representation of views remains

[140] Note that GMOs so far authorized were subject to the comitology procedure set out in Council Dec. 87/373/EEC laying down the Procedures for the Exercise of Implementing Powers conferred on the Commission, [1987] OJ L197/33. The ultimate decision was in the hands of the Commission, since the Commission's proposal at this stage could only be rejected by unanimity in Council. The ability to reject the proposal by qualified majority does give some greater protection to national views (including views of citizens gleaned through national procedures for participation).

[141] There has been no authorization for commercial growing of GMOs in the EU since 1998.

[142] Art. 28 provides for the consultation of scientific committees. See also Recital 9, 'Respect for ethical principles recognised in a Member State is particularly important. Member States may take into consideration ethical aspects when GMOs are deliberately released or placed on the market as or in products'.

[143] Art. 31(3).

[144] For a discussion of the drawing of lines and transnational participation, see C. Hilson, 'Greening Citizenship: Boundaries of Membership and the Environment' (2001) 13 *Journal of Environmental Law*, 335–48.

[145] Art. 24.

[146] Recital 46.

predominantly a national process. Given the background of qualified majority voting, however, that national process can only be of limited effect. It is at least conceivable that cultural approaches to this type of issue might differ across the EU, just as they seem to differ between Europe and north America.[147] It is not however clear that such distinct understandings of the problem will be apparent to decision-makers.

Equally importantly, however, even a modest, or a national, public participation exercise is potentially thwarted by the overwhelmingly scientific-technical approach of the Directive. The revised Directive reflects certain public concerns relating to the environment and public health, particularly by tightening the risk assessment process.[148] This does not respond, however, to the real depth and breadth of public concern, which is not limited either to a technical notion of risk, or to environmental and health concerns. Although the Directive accepts the general relevance of non-technical criteria, and concerns unrelated to environment or public health, there is no clear mechanism for feeding those concerns into the central control mechanism of the risk assessment. If the results of public participation are not framed in terms of risk to environment or public health, it is not clear how they will affect the decision of the competent authorities. Assimilating the concerns of the lay public into a decision-making process that relies on scientific evidence is always difficult,[149] and being forced to frame concerns on, for example, ethical issues, as concerns on the validity of scientific information, can only serve to obfuscate the real normative issues, which remain the same.[150] Poor communication between different disciplines such as science, ethics, economics, is not only unaddressed in the Directive, but is actually exacerbated by the apparent privileging of the technical over the 'other' discourses.[151]

It was noted above that EC environmental law has to some extent reduced its reliance on formal substantive specifications in directives, in favour of a procedural approach.[152] This is reflected in the revised Deliberate Release

[147] See S. Jasanoff, 'The Songlines of Risk' (1999) 8 *Environmental Values*, 135–52: 'Faced with the same "facts" about nature, Americans, for instance, fear cancer more than the British, the French tolerate nuclear power better than their German neighbours, and Americans are more receptive to biotechnology than Danes, Norwegians or Germans.' Note also the possible impact of the 'availability heuristic' between Member States—media reporting between states may well differ.

[148] Note also the application of the precautionary principle, Recital 8.

[149] L. Bray, 'Scientific decision-making: a barrier to citizen participation in environmental agency decision-making' (1991) 17 *William Mitchell Law Review*, 1111. Black, n. 127 above, argues for some sort of mediation role for the regulator.

[150] Wider problems can be disguised as a scientific problem, C. Landfried, 'The European Regulation of Biotechnology by Polycratic Governance' in Joerges and Vos (eds), n. 65 above, 173–94.

[151] Black, n. 127 above discusses the 'language problem' in regulation, and argues that simply allowing participation does not imply communication. She advocates some positive efforts of mediation from regulators. See also A. Bora, 'Discourse Formations and the Constellations of Conflict: Problems of Public Participation in the German Debate on Genetically Altered Plants' in P. O. Mahony (ed), *Nature, Risk and Responsibility—Discourses of Biotechnology* (London: Macmillan Press, 1999), 130–46; D. Byrne, European Commissioner for Health and Consumer Protection, 'Risk Versus Benefit' (Speech given in Brussels, 22 Nov. 2001) talks of 'risk paranoia' in respect of GMOs. He takes the classic approach of comparing GMOs with road and tobacco deaths.

[152] Scott, n. 85 above.

Directive, which specifies no substantive results, but lays out detailed requirements for the environmental risk assessment and for the assessment report. As discussed above, even the EIA and the IPPC Directives, paradigmatic examples of the shift to procedure in EC environmental law, retain the potential for the technical aspects of regulation to swamp participation. The revised Deliberate Release Directive confirms that danger, since the proceduralization itself is predicated on highly technical assessment. The arrangement of fair or rigorous procedures for a technical assessment of information achieves little if the technical nature of the decision is contested. Whilst technical expertise is of course a significant dimension of GMO regulation (and environmental regulation generally), the social aspect of risk regulation is in danger of being misconceived as a purely technical exercise.[153]

Although public debate has undoubtedly had some impact on the framing of the legislation, debate within the regulatory framework on the value of GM technology is more or less excluded. Any public involvement takes as its starting point the acceptability of widespread growing of GMOs in the EU, subject only to environmental risk assessment. Although lip service is paid to public values, the regulation of GMOs is overwhelmingly based on a scientific-technical approach.[154] However, the regulatory process has largely ground to a halt—the political sensitivity of the subject means that authorizations are not granted, notwithstanding an apparent right to authorization under the terms of the Directive. There is a serious and worrying disparity between law (science) and reality (politics).

V. Conclusions

Although much excitement has surrounded the Aarhus Convention, it is weak both in its conception of participation, and in its level of compulsion. It does, however, provide a clear expression of the desirability of extensive participation in a very wide range of decisions, and it is already apparent that the Commission intends to use the Convention to stimulate participatory trends in the Member States. Pushing participation to Member State level is an entirely predictable approach for the Commission to take. EC environmental law already provides some relatively modest, but nevertheless clear and mandatory, mechanisms to encourage public participation at Member State level. Quite aside from raising constitutional issues as to the correct role of the Community legislator in Member State procedures,[155] however, this is not

[153] Landfried, n. 150 above.

[154] The shadow of concern about the WTO reaction to prolonged refusal of authorization may be perceptible in the background of EU policy. G.E.C. York, 'Global Foods, Local Tastes and Biotechnology: The New Legal Architecture Of International Agriculture Trade' (2001) 7 *Columbia Journal of European Law*, 423–72, notes distinction between the scientific based risk assessment of the US and the precautionary approach of the EU.

[155] See especially Scott, n. 85 above.

necessarily going to provide a particularly valuable participatory exercise. Participation at Member State level generally takes place against a background of legal obligation, or even, if conducted in an earlier stage, against a background of qualified majority voting on final decisions. The restrictive nature of participation at EU level does not compensate for this diminution of participation at national or local level. To a large extent, centralized participation founders on paradoxes similar to those that arise in representative democracy. As far as individuals are concerned, the European environmental debate is inaccessible or uninteresting to all but a small, self-selecting group of self-conscious Europeans. There is a tendency to look to pan-European organized groups to fill the gaps, whilst those groups may well be more remote from affected individuals than equivalent local or national groups. Whilst the Commission is full of rhetorical fervour on public participation, and even *ad hoc* innovative practice, in terms of formalized developments, it seems prepared to take only limited action. The effect of the Aarhus Convention on EU decision-making procedures so far promises to be slight.

A turn to more inclusive procedure is almost a knee-jerk response to concerns about the legitimacy of decision-making, concerns that arise with some regularity in environmental law, particularly in EC environmental law. However, this paper has sought to demonstrate that such a reaction is at least problematic. A rhetoric of democratization is particularly worrying, since there is a real danger that it diverts attention from the inability of the chosen method to achieve the aim. 'Participation', certainly as currently conceptualized by the Commission, is far from sufficiently robust an instrument to bear the weight of democratizing the Union. The Commission's White Paper is sanguine on the limitations of participation as a tool of democracy, perhaps because it is also quite surprisingly sanguine on the legitimacy problems of the EU more generally. The democratic deficit shows no signs of resolution. However, even if public participation cannot be used to avoid the increasingly urgent democracy problems at EU level, a commitment to rigorous and transparent involvement of as wide a group of participants as possible may nevertheless be important. Open participation can at least avoid a stranglehold on environmental policy by industry, and provide alternative perspectives that recognize the normative and political, rather than technocratic, character of risk regulation. Quality, legitimacy, acceptability and consensus can all be enhanced by a genuinely participatory process.

GMO regulation clearly demonstrates the ambivalence of legislators to participation at the EC level, and the ambiguity of the very notion of participation. Although public participation is given a high political profile, regulation is subject to an overwhelmingly scientific and technical approach to risk assessment. The inability to air fundamental questions within the regulatory framework has probably contributed to the long moratorium on authorization of GMOs. The backdrop of qualified majority voting, and the consequent downgrading of national participatory structures in such a controversial area makes re-consideration of the EC level of decision-making crucial. As things

stand, there is a distinct danger that a façade of inclusion will mask contestable results, reached moreover by a contested process. The dislocation between the rhetoric on public involvement and the reality is a matter for serious concern.

Beyond *Greenpeace*, Courtesy of the Aarhus Convention

FEMKE DE LANGE*

Without adequate remedies and procedural tools, without access to the courts and to the executive authorities, law is not law; it is only a recommendation. Law is substantive and procedural rules living together, in coexistence.

Per Henrik Lindblom
(Group Actions and the Role of the Courts, Forum Internationale No. 23 May 1996)

I. Introduction

The 1998 United Nations Economic Commission for Europe (UN/ECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Convention)[1] is generally applauded for its innovative approach to international environmental regulation.[2] Unlike more traditional international regulations, the Convention does not focus on environmental quality objectives,[3] but instead lists the specific rights of access to information, public participation, and access to justice in environmental matters. Parties to the Convention have committed themselves to the adoption of these provisions into their national legal systems. The importance of this trinity of procedural rights is emphasized in Article 1 of the Convention:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

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[1] Aarhus (Denmark), 25 June 1998 (entered into force 30 Oct. 2001), (1999) 38 *International Legal Materials*, 3, 517.

[2] See e.g. the compendium of statements from governments, Intergovernmental Organizations, and NGOs made at the occasion of the Convention's entry into force 30 Oct. 2001, published on the Internet at: http://www.unece.org/env/pp/documents/compendium.pdf.

[3] With the possible exception of the UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo (Finland) 25 Feb. 1991), published on the Internet at: http://www.unece.org/env/eia.htm.