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Public Participation in Environmental Decision-making

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A. Introduction: The Importance of Participation

Public participation in environmental decision-making has become an indelible feature of many environmental regulatory systems world-wide over the past few decades. Individuals and organisations affected by development approvals, pollution licences, land use plans and other types of regulatory processes have increasingly demanded greater consultation, and more transparent and accountable decisions. Parliamentary democracy ratified through periodic electoral contests is widely viewed as insufficient to provide meaningful public input into day-to-day environmental decision-making. Governing elites' hostility to independent protest and community self-expression has encouraged the creation of 'surrogate political processes',[1] wherein citizens' views are channelled into and considered in alternate administrative and judicial structures.[2]

In these structures, public participation assumes a variety of forms. It can occur through education, information dissemination, advisory or review boards, public advocacy, public hearings and submissions, and even litigation.[3] By these means, public participation may assist decision-makers to understand and identify public interest concerns while formulating environmental policies.[4] Greater citizen

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[1] RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard L Rev* 1660, 1712.

[2] See generally C Offe, 'New Social Movements: Challenging the Boundaries of Institutional Politics' (1985) 52 *Social Research* 817.

[3] S Stec and S Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (UNECE, 2000) 85. On definition of the 'public', see DN Zillman, 'Introduction to Public Participation in the 21st Century' in D. Zillman *et al, Human Rights in Natural Resource Development*: *Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford UP, 2002).

[4] E Petkova, C Maurer, N Henninger and F Irwin, *Closing the Gap: Information, Participation, and Justice in Decision-making for the Environment* (World Resources Institute, 2002) 66–67.

input may promote environmental justice and help integrate ecological and social considerations in governmental decisions.[5] Further, participation may enhance the accountability, and thus acceptability, of environmental decisions.[6] This may lead to less litigation, fewer delays and generally better implementation of decisions.[7] Thus, as Lawrence Tribe once warned, the *way* policy decisions are made has important implications for the outcomes of those decisions.[8]

Public participation is particularly significant in the context of sustainable development. Sustainability depends largely on the way economic, social and environmental considerations have been integrated in decision-making. The principles of inter- and intra-generational equity in sustainable development discourse reflect the centrality of public involvement and social justice.[9] Implementation of the precautionary principle, another part of sustainability discourse, also depends on public input into the assessment of acceptable risks. Environmental threats, such as climate change or genetically modified organisms, are often characterised by scientific and technical uncertainties and risks for which people often hold very different and competing preferences.[10] Public participation can help assess these uncertainties and risks, and weigh them against perceived benefits.[11]

Several interrelated factors have fuelled the growth of participatory processes in decision-making. The first is increased public awareness and concern about the relationships between ecological health and human well-being.[12] Secondly, the growth of human rights in legal and political systems has heightened people's expectations of participation in policy-making.[13] Thirdly, the prevailing concerns of the international community for 'good governance' and the strengthening of civil societies have contributed to increasing interest in the use of participatory mechanisms.[14] Also, weaknesses in the legitimacy of the state and lack of trust in

[5] M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *MLR* 80, 82–85.

[6] NP Spyke, 'Public Participation in Environmental Decision-making at the New Millennium: Structuring New Spheres of Public Influence' (1999) 26 *Boston College Envtl Affairs L Rev* 263, 269–70; see also J Habermas, *Communication and the Evolution of Society* (Beacon Press, 1991).

[7] DA Wirth, 'Public Participation in International Processes: Environmental Case Studies at the National and International Levels' (1996) 7 *Colorado Journal of International Law & Policy* 1.

[8] L Tribe, 'Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality' (1972) 46 *Southern California L Rev* 617.

[9] I Voinovic, 'Intergenerational and Intragenerational Equity Requirements for Sustainability' (1995) 22(3) *Envtl Conservation* 223.

[10] J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 59.

[11] J Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem Solving Approach' (2001) 21 *Oxford Journal of Legal Studies* 426. B Doherty and M de Geus, *Democracy and Green Political Though: Sustainability, Rights and Citizenship* (Routledge, 1996).

[12] B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in Zillman, above n 3, at 81–3.

[13] *Ibid.*

[14] M Pimbert and T Wakeford, 'Overview-Deliberative Democracy and Citizen Empowerment' (2001) PLA Notes, available at www.iied.org/docs/pla/pla_fs_5.pdf.

governments have fuelled popular demands for more grass-roots, direct involvement in decisions.[15]

Different models have been proffered to analyse the range of forms of public participation. One model, known as Arnstein's 'ladder', shows the spectrum of participation opportunities, beginning with mere notification, and extending to consultation and even joint decision-making power.[16] The lowest levels of participation may effectively amount to non-participation.[17] The highest level of participation, says Arnstein, is where the public has the power to negotiate with decision-makers and to veto proposed decisions. Another model of participation distinguishes between 'top-down' and 'bottom-up' approaches. The former is where the government initiates participation, the latter where communities do so.[18] Thirdly, some commentators distinguish between *substantive* and *procedural* dimensions of participation.[19] Participatory rights may derive from substantive human rights, such as a right to live in a healthy, unpolluted environment, and may be enshrined in a constitution or statutory bill of rights.[20] By contrast, procedural rights concern the methods of decision-making, and typically encompass public consultation, information provision and access to the courts.[21] Substantive and procedural rights are often intertwined: for instance, a substantive right to a healthy environment usually requires procedural rights to be heard in decisions that might affect those substantive rights.[22]

Law plays a crucial role in all these approaches. Open-ended discursive experiences based on custom or current controversy may be too fragile and insufficient to sustain the desired policy and political transformation. Law can provide two remedial functions in this respect. First, through decision rules and procedures it can enable democratic will to emerge. Secondly, through its ability to codify norms and structure institutions, it can effectively channel this political power throughout society, as a force for social coordination. In other words, law creates a structure for participation that helps crystallise and protect society's environmental goals.

This chapter is divided into five parts. Section B traces briefly the historical evolution of public participation reforms. Section C considers their theoretical context. Sections D and E survey legal reforms for participation, including the seminal Aarhus Convention. The final part canvasses some problems commonly associated with the democratisation of environmental decision-making.

[15] *Ibid,* 24–5; see also A Dobson, *Justice and the Environment* (Oxford UP, 1998).
[16] SR Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Institute of Planning* 216.
[17] *Ibid,* 217.
[18] S Langton (ed), *Citizen Participation in America* (Lexington Books, 1978).
[19] Steele, above n 11, 415–6.
[20] *Ibid.*
[21] Ebbesson, above n 10, 70–5; P Birnie and A Boyle, *International Law and the Environment* (Clarendon Press, 1992) 261.
[22] Ebbesson, above n 10, 63–9.

B. Historical Perspectives on Participation

Public participation provisions began to appear in the planning and environmental regulations of some states during the late 1960s and 1970s,[23] coinciding with the political upheavals of these times when publics agitated for more democratic governance and stronger environmental protection.[24] During the 1970s and early 1980s, commentators increasingly emphasised the value of a 'bottom-up', people-centred approach to economic development.[25] Economists such as Schumacher stressed the value of grass-roots, small-scale decision-making to promote social welfare.[26] By the 1990s, consultation and participation became the buzzwords of successful environmental decision-making, feeding into broader discourses on 'good governance', 'environmental justice' and 'environmental citizenship'.

In developing countries, the participation agenda often manifested in calls for greater local community involvement in development planning and poverty alleviation projects, especially in the context of development aid schemes.[27] Post-colonial commentators argued that the post-War decolonisation process was 'prematurely celebratory', given the persistence of widespread oppression and poverty in many developing countries.[28] They advocated further reforms to recently-independent states to widen community participation in government to ensure social and economic policies addressed people's primary needs.[29] Recent development policies have sought to decentralise decision-making and enhance local institutional capacities (eg, through strengthening local government and NGOs) to create a more participatory milieu.[30] These trends have been accentuated by recent global policy initiatives, such as the 'Local Agenda 21' movement for sustainable development.[31]

In developed nations, the public participation agenda achieved similar prominence, though it has tended to take a more legal form than in many developing

[23] Eg, in the UK, in its planning legislation of the 1960s. The creation of the Royal Commission on Environmental Pollution (1969) and the Department of the Environment (1970) is the governmental response to these public pressures: see generally J McCormick, *The Global Environment Movement* (Wiley, 1995). In the USA, the National Environmental Policy Act of 1969 provided for participation by the general public: see S Kuhn, 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision Making Process' (1999) 25(4) *Ecology Law Quarterly* 647.

[24] Barton, above n 12, 81.

[25] Spyke, above n 6, 269;

[26] EF Schumacher, *Small is Beautiful: Economics as if People Mattered* (Harper and Row, 1973).

[27] M Aycrigg, *Participation and the World Bank: Successes, Constraints and Responses* (World Bank, 1998).

[28] A McClintock, *Imperial Leather* (Routledge, 1995) 12–13.

[29] A Memmi, *The Colonizer and the Colonized* (Beacon Press, 1991); G Rajan and R Mohanram (eds), *Postcolonial Discourse and Changing Cultural Contexts* (Greenwood Press, 1995).

[30] BJ Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local—Global Institutional Spectrum' (2000) 11(1) *Colorado Journal of Environmental Law & Policy* 1, 45–7.

[31] J Agyeman and B Evans, 'Sustainability and Democracy: Community Participation in Local Agenda 21' (1995) 22(2) *Local Goverment Policy* Making 35.

countries where it has typically been confined to policy mechanisms.[32] Some eco-activists saw the best prospects for change in parliamentary electoral contests through the formation of green political parties. Although green parties have survived in several Western polities, notably Germany and Australia, they have yet seriously to challenge the electoral dominance of the mainstream parties.[33] Most public participation has thus occurred not through legislative fora but in the proliferation of administrative-based consultation, information and review mechanisms established pursuant to environmental and planning laws.[34]

Numerous societal conflicts over development choices in the 1970s and 1980s fuelled popular demands for more participation in decision-making. For example, in Australia, a series of protracted and often violent conflicts over logging in World Heritage forests caused governments to look for more peaceful means by which citizens could be involved in resource management policy.[35] In the urban areas of many countries, community groups mobilised for more say in decisions about brownfield redevelopment and urban amenity planning.[36] Public participation reforms in Canada, New Zealand, the US and other countries with indigenous minorities were also influenced by the Aboriginal self-determination movement.[37] The emergence of Aboriginal land claims and demands for self-governance provided another lever for legal reforms to enhance community involvement in environment and development decision-making.

Internationally, the rhetoric of good governance has received considerable attention. Empowerment of civil societies has been identified as one of the best means to promote good environmental governance.[38] Major international environmental policy statements in the 1980s and 1990s routinely called for increased community involvement in environmental decision-making.[39] International financial institutions,

[32] O Renn, T Webler and P Wiedemann (eds), *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Kluwer, 1995).

[33] SP Hays, 'The Structure of Environmental Politics Since World War II' (1981) 14 *Journal of Social History* 719; E Bomberg, *Green Parties and Politics in the European Union* (Routledge, 1998).

[34] Stewart, above n 1.

[35] BJ Richardson, 'A Study of Australian Practice Pursuant to the World Heritage Convention' (1990) 20(4) *Environmental Policy & Law* 143.

[36] See eg A Jakuhowicz, 'The Green Ban Movement: Urban Struggle and Class Politics' in J Halligan and C Pairs (eds), *Australian Urban Politics* (Longman, 1984) 143.

[37] PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford UP, 2005) 315–65.

[38] J Steffek and P Nanz, 'Deliberation and Democracy in Global Governance: The Role of Civil Society' in S Thoyer and B Martimort-Asso (eds), *Participation for Sustainability in Trade* (Ashgate, 2005).

[39] See eg World Commission on Environment and Development, *Our Common Future* (Oxford UP, 1987); World Conservation Union, *Caring for the Earth* (IUCN, 1990). This realisation is also evident in a growing body of international legal instruments: eg Stockholm Declaration (1972) 11 ILM 1416, Rio Declaration on Environment and Development (1992) 31 ILM 874, Declaration of the World Summit for Sustainable Development (2002), and UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) (1999) 38 ILM 517, discussed below.

like the World Bank and its 'sister' regional banks, also reformulated their lending procedures to require more information disclosure and consultation with affected parties.[40] These initiatives acknowledge that civil society can also play an important role in making the decision-making processes of international organisations more transparent.[41]

C. Theoretical Approaches to Public Participation

There has been a plethora of academic writings on the virtues of public participation in policy-making, especially in relation to environmental policy.[42] Not all environmentalists however have always championed democracy: for example, during the 1970s, several commentators such as Ophuls and Hardin believed that the intensification of societal conflict over an ever-decreasing pool of natural resources could be dampened only through the enlightened despotism of an authoritarian state.[43] Today, the complex and multi-faceted nature of sustainability, involving various social objectives flanking and supporting environmental protection, suggests that no single institution can be expected to hold all of the expertise and knowledge needed for good decision-making.[44] Popular involvement in environmental decision-making has been rationalised from two main perspectives, a *process* perspective and a *substantive* perspective. The latter is based on arguments that public participation improves the substantive outcomes of decision-making processes; the former that it bolsters the democratic legitimacy of those decisions. Across these two perspectives, several schools of thought on the rationale and role of public participation have arisen.

First, there is the 'rational elitism' school, which treats environmental policy as complex and technical, requiring primarily technical and administrative expertise. This doctrine emphasises decision-making by experts, and concedes limited participation to the general public when they hold information that may assist experts.[45] Technical environmental risk assessments and economic cost-benefit analyses of development proposals are situations in which governments often

[40] Barton, above n 12, 84.

[41] S Oberthür *et al, Participation of NGOs in International Environmental Governance: Legal Basis and Practical Experience* (FIELD and Ecologic, 2001); see also J Razzaque, 'Transparency and Participation of Civil Society in International Institutions Related to Biotechnology: A Brief Study of the Bio-safety Protocol, WTO and Codex Alimentarius' in Thoyer and Martimort-Asso (eds), above n 38.

[42] See discussion in Barton, above n 12, 84–98.

[43] W Ophuls, 'Leviathan or Oblivion?' in HE Daly (ed), *Toward a Steady-State Economy* (WH Freeman, 1973); G Hardin, *Exploring New Ethics for Survival* (Viking Press, 1972).

[44] See generally K Ginther *et al* (eds), *Sustainable Development and Good Governance* (Nijhoff, 1995).

[45] Barton, above n 12, 86–7.

favour 'expert' participation.[46] But this approach, which pretends that science is 'objective' and 'apolitical', obfuscates the fundamental way in which social values influence decision-making. For example, even if the scientific information about a hazard and its likelihood is relatively clear, the acceptable level of environmental risk is arguably a political question.[47] Another strand of the rational elitism model is known as 'corporatism'. Corporatist modes of interest group intermediation, for instance, have been widely used in round-table negotiations of economic policy-making in Scandinavia and Germany.[48] Corporatist styles of participation have also been used in the environmental policy round-tables adopted in Australia and Canada.[49] However, corporatism offers only a 'functional representation' to representatives of large strategic groups such as trade unions, industry and business councils, and sometimes renowned environmental NGOs.[50]

A second approach to participation is the 'liberal democratic' one, which stresses procedural rights for individuals and NGOs to be consulted and heard in decision-making. When electoral legitimacy is weak, procedural legitimacy assumes greater salience. The traditional polyarchal mechanisms (eg, elections and political parties) of liberal-democratic systems have been criticised as unable to manage the demands of competing interest groups in modern societies. To Offe, the 'conflict-generating potential of the institutions of the democratic polity by far outweighs their conflict-resolving capacity'.[51] Consequently, most liberal-democratic states have sought to create supplementary public consultation and information processes in administrative and legislative decision-making.[52] Thus, the propensity of modern environmental legislation is to identify the factors relevant to agency decision-making, one of which is the input made by the public consulted. Through procedural reforms, concerned persons have rights of access to relevant information, to make submissions on environmental decisions, and to use courts to enforce environmental laws.

Apart from bolstering the legitimacy and public acceptability of policy decisions, the procedural reforms of liberal-democratic systems may also shape substantive policy outcomes. For example, simple obligations of openness may illuminate the uncertainties and value judgements inherent in experts' advice, allowing *political* decision-makers to reach conclusions on the basis of a wider array of evidence. Public involvement can also facilitate community co-operation

[46] See S Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* (Harvard UP, 1990); S Breyer and V Heyvaert, 'Institutions for Regulating Risk' in RL Revesz, R Sands and RB Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge UP, 2000).

[47] P Slovic, *The Perception of Risk* (Earthscan, 2000); M Douglas and A Wildavsky, *Risk and Culture* (U California P, 1983).

[48] PC Schmitter and G Lehmbruch (eds), *Trends Toward Corporatist Intermediation* (Sage, 1979).

[49] M Howlett, 'The Round Table Experience: Representation and Legitimacy in Canadian Environmental Policy-making' (1990) 97 *Queen's Quarterly* 580.

[50] C Offe, *Contradictions of the Welfare State* (MIT Press, 1987) 167.

[51] *Ibid,* 164.

[52] See J Habermas, *Legitimation Crisis* (Beacon Press, 1973), Offe, above n 50.

in implementing environmental decisions, such as anti-littering and recycling campaigns. The sense of ownership and responsibility for decisions that comes from being part of decision-making can encourage more thoughtful environmental behaviour. Regulation theorists often see third party involvement and transparency as a way to keep regulators accountable, again a means of improving outcomes.[53] Opening decision-making processes can reduce the risk of agency 'capture' by their industry clientele.[54] However, not all commentators share such a sanguine view of participatory proceduralism. Liberal-democratic procedural reforms may hardly challenge the structure of governing elites' power: citizens may be heard, but their views are given weight in discretionary decision-making only insofar as they are seen as consistent with the 'seamless web of bureaucratic control and coordination'.[55] Further, liberal-democratic methods hardly provide an institutional framework for active citizen interaction, learning and ethical transformation.

These limitations have engendered a third model of participation, known as deliberative democracy, which seeks to empower citizens in the actual making of decisions and to reorient decision processes to fundamental ethical and social values.[56] While sustainable development cannot be guaranteed, wide participation in political debate is seen as essential to allow for the pedagogic cultivation and exchange of environmental values.[57] Deliberative models of decision-making dovetail closely with the deep and radical ecological schools of thought. For the self-styled 'eco-anarchist' Murray Bookchin, the human domination and exploitation of nature are largely a consequence of hierarchical social relations, being a reflection of the domination of human by human.[58] Deep ecologists thus often stress the value of egalitarian, community-based means of decision-making.[59]

Whether citizen participation is 'deliberative' depends on many factors, including whether the participants represent all sectors of the community.[60] Touraine has identified popular social movements as the most creative source of new norms to regenerate dialogue in public institutions.[61] But, because the complexity of

[53] I Ayres and J Braithwaite, *Responsive Regulation* (Oxford UP, 1992); N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford UP, 1998).

[54] M Levine and J Forrence, 'Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics and Organisation* 167.

[55] A Fraser, 'Legal Theory and Legal Practice' (1976) 44–45 *Arena* 123, 147.

[56] J Bohman and W Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997).

[57] See B Doherty and M de Geus (eds), *Democracy and Green Political Thought—Sustainability, Rights and Citizenship (*Routledge, 1996*)*; G Smith, *Deliberative Democracy and the Environment (*Routledge, 2003*)*.

[58] M Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Cheshire Books, 1982).

[59] B Boer, 'Social Ecology and Environmental Law' (1984) 1(3) *Envtl & Planning LJ* 233.

[60] J Elster (ed), *Deliberative Democracy* (Cambridge UP, 1998); B Barber, *Strong Democracy: Participatory Politics for a New Age* (U California P, 1984); J Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford UP, 2000).

[61] A Touraine, *The Voice and the Eye: An Analysis of Social Movements* (Cambridge UP, 1982).

modern life probably makes it impossible to assume or develop shared social values on many environmental and economic issues, some commentators argue that at best we can hope to agree on the institutional processes by which we can deliberate policy. Habermas has posited an 'ideal speech situation', or a set of rules for communication and discourse, by which rational decision-making is most likely to flourish.[62] Dryzek has argued that mediation and negotiation are institutional means to achieve such a rational discourse in an environmental policy setting.[63] Other methods are some forms of social impact assessment and public environmental inquiries.[64]

The foregoing approaches to public participation are not necessarily mutually exclusive, and elements of each have featured in the related 'environmental citizenship' and 'environmental justice' movements. The former sees public participation as a means of nurturing a new ethos of environmental responsibility,[65] while the latter champions democratic decision-making as a way to ensure social equity in the distribution of the environmental costs and benefits of policy decisions.[66] The complex, normative and political nature of environmental decisions means that public involvement is necessary at many levels. Active citizen involvement in environmental decisions would be hampered, for instance, without the presence of basic rights to access information and to receive notice of pending development proposals. Most examples of public participation canvassed in this chapter are of the liberal-democratic variety. They emphasise public access to environmental information, participation in administrative decision-making (eg, environmental assessments and development applications) and access to justice (eg, standing in courts to enforce regulations). While these participatory reforms have improved the quality of many environmental decisions, they have hardly engendered a major paradigm shift to ecologically sustainable development. Most participatory techniques so far hardly seem to threaten existing political institutions, since they operate within those institutions, and leave power and authority mostly unfettered.

Apart from the theoretical debates about participation in public government, it should be noted that numerous commentators also advocate more openness and public involvement in corporate governance. The ethical investment movement

[62] J Habermas, *The Theory of Communicative Action 1: Reason and the Rationalization of Society* (Beacon Press, 1984); see also K Popper, *The Open Society and Its Enemies (*Routledge, 1986*)*.

[63] JS Dryzek, *Rational Ecology, Environment and Political Economy* (Basil Blackwell, 1987).

[64] See LM Lake (ed), *Environmental Mediation: The Search for Consensus* (Westview Press, 1980); D Craig, 'Social Impact Assessment: Politically Oriented Approaches and Applications' (1999) 10 *Envtl Impact Assessment Rev*iew 37; see also Bosselmann, this vol, on the philosophical dimensions of this debate.

[65] R Engel 'The Faith of Democratic Ecological Citizenship,' (Nov 1998) *Nature, Polis, Ethics* S31.

[66] KS Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford UP, 2002); E Gauna, 'The Environmental Justice Misfit: Public Participation and the Paradigm Paradox' (1998) 17 *Stanford Envtl L J* 3.

has long championed greater shareholder activism in business decision-making to give more attention to the social and environmental effects of corporate policies.[67] This can be applied through corporate–shareholder dialogue and submission of shareholder proposals. Further, many company law theorists advocate a 'stakeholder' approach to corporate management, whereby a wider range of social interests including workers, consumers and local communities are given a voice in company policy, alongside shareholders.[68] The German system of corporate governance, guaranteeing representation of employees on company governing boards, comes closest to this model.[69] Apart from these major structural reforms, public participation in corporate governance may also be advanced by modest initiatives such as corporate social and environmental reporting obligations.[70]

D. The Aarhus Convention and its Implementation

1. Public Participation Provisions of the Aarhus Convention

One of the unique developments in the public participation arena is the 1998 Aarhus Convention.[71] While there are other international environmental treaties that contain public participation clauses,[72] only the Aarhus Convention is dedicated exclusively to participation. Although the Convention is a product of the United Nations (UN) Economic Commission for Europe, it is open to accession by any UN member state (with the approval of the parties). The Convention is a globally significant example of the legal consolidation of measures to enhance public participation in relation to administrative decision-making, freedom of information and access to justice.

The Aarhus Convention imposes participation standards for decision-making by public authorities. They relate to activities that may significantly affect the environment (eg, construction of a power plant), or policies, programmes and

[67] R Sparkes, *The Ethical Investor* (HarperCollins, 1995); R Sparkes, *Socially Responsible Investment. A Global Revolution* (John Wiley and Sons, 2002)

[68] JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1995); D Campbell, "Towards a Less Irrelevant Socialism: Stakeholding as a 'Reform' of the Capitalist Economy" (1997) 24 *Journal of Law & Society* 65.

[69] D Charny, 'The German Corporate Governance System' [1998] *Columbia Business L Rev* 145.

[70] Mandatory environmental reporting has been introduced in Australia, Britain, France and the US, among many countries: see KMPG Environmental Consulting, *International Survey of Environmental Reporting* (KPMG, 1999).

[71] (1999) 38 ILM 515.

[72] Eg Convention on Environmental Impact Assessment in a Transboundary Context (1991) 30 ILM 800, Art 16; North American Agreement on Environmental Cooperation (1993) 32 ILM 1480, Arts 13–14.

plans relating to the environment.[73] The procedural rights are to be applied without discrimination as to citizenship, nationality or domicile.[74]

The first pillar of the Convention is participation in administrative decision-making. Article 6 requires public notice of environmental decision-making to be given when 'all options are open', to allow public comment and input into the process.[75] Public authorities[76] must also take public feedback into account in their final decisions.

Secondly, governments must make relevant information available to the public when requested, and the Convention stipulates time-frames for responding to these requests.[77] Article 4 creates a presumption in favour of information disclosure and public authorities may deny a request for information only on the basis of the list of specific grounds for refusal.[78] Further, public authorities may refuse to disclose information that would impair the ability of a person to receive a fair trial, or would adversely affect national defence or public security.[79]

The third pillar of the Convention is 'access to justice'. These provisions are closely tied to the other two pillars of the treaty. Article 9(1) provides for review of a refusal or failure to respond to a request for access to information. Article 9(2) provides for the challenge of substantive or procedural legality of decisions subject to Article 6 (above) and also 'where so provided for under national law'. Finally, Article 9(3) mandates access to administrative or judicial procedures to challenge acts and omissions by private and public bodies that contravene national law relating to the environment. The Convention also requires proceedings to be 'fair', 'equitable' and 'not prohibitively expensive', and that there be 'adequate and effective remedies'.[80]

Overall, the Aarhus Convention provides a useful framework for public participation along the lines of the liberal-democratic model. Its participatory rights are linked to various legislative, administrative and judicial decision-making points. Implementation of these provisions however depends on strong political support by state parties.

2. Implementation of the Convention

The Aarhus Convention signalled the culmination, rather than the beginning, of public participation reforms made since the 1970s. States' enthusiasm to ratify the

[73] Arts 6–7. Annex I lists those activities that must be subject to the requirements under Art 6.
[74] Art 3(9).
[75] Art 6.
[76] Public authority is defined in Art 2(2) and covers any body or any natural or legal persons performing public administrative functions, and may include privatised companies providing public services: Stec and Casey-Lefkowitz, above n 3, 44.
[77] Arts 4 and 5.
[78] Art 4(3).
[79] Art 4(4).
[80] Art 9(4).

treaty reflects the fact that many governments already provide for similar kinds of public involvement in environmental decision-making. Within the European Union (EU), virtually all Member States have either signed or ratified the Aarhus Convention. However, scope for public participation at the EU level itself is less developed, making the EU's ratification of Aarhus especially significant.[81]

The European Commission has undertaken necessary measures to implement the Convention by adopting regulations to align EU legislation to the Convention.[82] The EC's enthusiasm for the Aarhus Convention partly reflects a desire to shore up its own democratic legitimacy. The Convention is of particular importance to the EU institutions (eg, the Commission, the Parliament and the Council) as they are covered by its definition of 'public authorities'.[83] The EU has adopted a directive concerning public access to environmental information, reflecting the first pillar of Aarhus.[84] In addition, two important pieces of EU environmental legislation[85] have been amended to take account of the public participation in certain environmental decision-making procedures. Directive 2003/35/EC[86] updates provisions on public participation in national procedures on environmental impact assessment and integrated pollution prevention and control, and introduces rules on access to justice. In addition, provisions related to access to justice are introduced in the Directive on environmental liability.[87] However, the latter provisions fail to specify that access be fair, timely and not prohibitively expensive. The European Commission has also adopted a proposal for a directive to address the requirements of access to justice in environmental matters.[88]

[81] See list of parties to the Convention, at www.unece.org/env/pp/ctreaty.htm.

[82] Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice regarding environmental matters, COM(2003)625 final.

[83] See the proposed Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final.

[84] Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L/41/26.

[85] Directive 85/337/EEC concerning the environmental impact assessment for certain public and private projects (EIA Directive [1985] OJ L/175/40); and Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive) [1996] OJ L/257/26.

[86] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L/156/17.

[87] See Arts 12 (Request for Action) and 13 (Review Procedures) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L/143/56.

[88] Commission proposal for a Directive on access to justice (COM(2003)624); see further J Razzaque, 'Access to Justice in Environmental Matters at EU Member State Level' (2005) 5 *Yearbook of European Environmental Law*, 63.

At the EU Member State level, all 25 parties have national laws to enable some participation in their decision-making processes. However, the contexts in which these procedural rights operate are diverse, and reflect differences of legal and democratic traditions. Mindful of this, the European Commission's proposed directive on access to justice on environmental matters addresses only the acts and omissions of public authorities, and does not extend to private entities. On the ground of the 'subsidiarity' principle (ie, that decisions should be made at the lowest level of government where feasible), the Commission believes that administrative or judicial review of the environmental behaviour of private entities is best left to individual Member States to determine. Even in relation to the public sector, 'standing' rules vary considerably among EU Member States.[89] Similar variations in national practice have been documented in relation to the other limbs of Aarhus concerning participation in administrative decisions and access to information.[90]

E. Legal Mechanisms for Public Participation

1. Constitutional Provisions and Environmental Rights

National constitutions often lay down fundamental human rights, sometimes known as a bill of rights. Increasingly, constitutions also incorporate fundamental environmental rights.[91] These rights can support public interest litigation or judicial review for environmental protection.[92] Constitutional norms that oblige governments to protect the environment or give citizens enforceable rights to a clean and healthy environment may be more secure than statutory rights, which are more vulnerable to change or repeal by the government of the day. On the other hand, constitutions do not provide a suitable framework for prescribing in detail environmental standards and rules including participation provisions, which are better elaborated through legislation. Thus, because of their generality, the effectiveness of constitutional norms in shaping environmental law hinges considerably on the willingness of the courts to interpret and elaborate on their application.[93]

[89] J Ebbesson, 'Comparative Introduction' in J Ebbesson (ed), *Access to Justice in the Environmental Matters in the EU* (Kluwer, 2002) 20, 23.

[90] United Nations Economic Commission for Europe, *Synthesis Report on the Status of Implementation of the Convention* ECE/MP.PP/2005/18 (ECOSOC, Apr 2005).

[91] Numerous examples are contained in C Bruch, W Coker and C Van Arsdale, 'Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa' (2001) 26 *Columbia J Envtl L* 131; EF Brown, 'In Defense of Environmental Rights in East European Constitutions' (1993) *University of Chicago Law School Roundtable* 191.

[92] J Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer, 2004) ch 2.

[93] Eg the role of Canadian courts in developing Aboriginal rights, which are merely 'recognised and affirmed' by s 35(1) of the Constitution Act 1982.

In many Asian and African countries, constitutions incorporate a panoply of human rights, including rights to life, free expression and assembly, along with specific environmental protection clauses.[94] But often these rights tend to be merely rhetorical and consequently are ignored by policy-makers. For example, the Constitution of South Korea was amended in 1980 to provide its citizens with the right to live in a healthy and clean environment,[95] but the Supreme Court of Korea has construed this provision as not self-executing and enforceable in its own right.[96] By contrast, constitutional norms play a much greater role in the legal systems of Western countries such as the US, Canada and Australia.[97] Even nations without a written constitution, such as Britain, have acquired an extensive body of human rights through the common law and from international treaties such as the European Convention on Human Rights,[98] which the UK incorporated domestically via the Human Rights Act 1998.

Apart from constitutional entrenchment, participatory rights can be articulated through a statutory environmental bill of rights (EBR), as seen in Ontario and Michigan, for instance.[99] To illustrate, the Ontario EBR of 1994 established an Environmental Registry as part of a framework for notifying and consulting the public with regard to proposed legislation, policies, regulations and other legal instruments that may significantly affect the environment.[100] Although the EBR does not provide a substantive right to a healthy environment, it does expand procedural rights.[101] While it is a significant precedent, it remains difficult to assess whether the improved participation has per se changed the quality of authorities' environmental decisions.[102]

[94] B Ajibola, 'Individual Human Rights in African Context' in A Anghie and G Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry (*Kluwer, 1998*)*; L Beer (ed), *Constitutionalism in Asia* (U California P, 1979).

[95] Constitution of the Republic of Korea, Art 35, available at: www.oefre.unibe.ch/law/icl/ks00000_.html.

[96] Eg *Dae-bup-won* [DBW] [Supreme Court] 94 ma 2218 (23 May 1995) (S Korea).

[97] DP Kommers, JE Finn and GJ Jacobson, *American Constitutional Law* (2nd edn, Rowman, 2004) 425, 432–5.

[98] (1950) ETS 5/213, UNTS 222.

[99] DK Slone, 'The Michigan Environmental Protection Act: Bringing Citizen-initiated Environmental Suits into the 1980's' [1985] *Ecology Law Quarterly* 271; P Muldoon 'Ontario Environmental Bill of Rights' (1992) 3(1) *Earthkeeper* 44; C Miller, *Environmental Rights: Critical Perspectives* (Routledge, 1998).

[100] MA Schofield and DS Thompson, 'Access to Justice and the Right to a Healthful Environment in Canada: Public Participation in Environmental Decision Making' (1994) 3/4 *RECIEL* 232.

[101] DP Emond, 'An Environmental Bill of Rights—Ontario Style' (1994) 1 *Government Information in Canada/Information Gouvernementale au Canada* 1(2–3) (1994), available at www.usask.ca/library/gic/v1n2/emond/emond.html.

[102] RD Lindgren, 'The Environmental Bill of Rights Turns 10 Years-old: Congratulations or Condolences?', Environmental Commissioner's EBR Law Reform Workshop (16 June 2004).

2. Participation in Administrative Decision-making

One of the pillars of the Aarhus Convention is public participation in administrative decision-making. Such participation can arise in a variety of contexts, including in decisions concerning specific development proposals, plans and policies, and in regulation-making processes.[103] Most public participation reforms adopted in this field entail rights to make written submissions and to be involved in public inquiries, with concomitant obligations on decision-makers to take into account public opinion. The oldest and most basic of these reforms are simple 'notice and comment' provisions, in place since the 1960s in most US environmental regulatory regimes and subsequently adopted in many other jurisdictions. Modern environmental legislation, delegating powers to administrative agencies, often makes participation a central agency function.[104] These participation mechanisms can be illustrated by environmental impact assessment (EIA) regulation.

Public participation in the EIA process can assist the integration of economic, social and ecological objectives in decision-making.[105] Although historically expert specialists dominated EIA procedures, in many jurisdictions these procedures have evolved to allow for extensive public input in the assessment process.[106] At the 'screening stage', which is an initial consideration of whether a proposal may have significant impacts on the environment, people may help identify potential impacts of the proposal. If the proposal is deemed to require an EIA, the 'scoping stage' serves to identify the range of significant impacts that need to be evaluated. This stage provides an opportunity to identify public interest and priorities for assessment.[107] Although most jurisdictions have legislated public rights to access information and to make submissions during these stages, in some cases such as Canada the scoping phase remains entirely up to the responsible authority.[108] The weight given to public comments in the environmental assessment is also usually a matter of agency discretion in many jurisdictions. A major analysis of the Canadian, US and European EIA processes concluded that the degree of public participation affects the quality of the assessment process, which in turn affects the quality of the decision.[109] Although it is argued that public participation slows down the EIA process, one underlying rationale of EIA is to ensure socially acceptable environmental results.[110]

[103] See A Boyle and MR Anderson (eds), *Human Right Approaches to Environmental Protection* (Clarendon Press, 1996).

[104] Eg Australia's Environmental Planning and Assessment Act 1979 (NSW) s 5.

[105] See also the discussion of EIA regulation in Abbot's ch, this vol.

[106] See J Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford UP, 2004).

[107] See CM Wood, *Environmental Impact Assessment: A Comparative Review* (Prentice Hall, 2002); J Glasson, R Therivel and A Chadwick, *Introduction to Environmental Impact Assessment* (UCL Press, 1999).

[108] Canadian Environmental Assessment Act, SC 1992, c 37, *as amended* SC 2003, c 9.

[109] Wood, above n 107, chs 2, 3 and 5.

[110] WA Tilleman, 'Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community' (1995) 33 *Columbia Journal of Transnational Law* 337.

The public environmental inquiry is another means for concerned citizens to be heard.[111] It provides an opportunity for direct community dialogue in the spirit of deliberative democracy. The public inquiry technique was pioneered in the UK and is used in much of its planning legislation. For instance, once a planning application is submitted to a Local Planning Authority (LPA), community groups can submit comments on the environmental statement. In addition, if there is a public inquiry against the decision taken by the LPA, the local community can send written comments or present its views in person.[112] Moreover, the Secretary of State has the discretion to 'call in' for a public inquiry any application for his or her own determination if the proposal involves planning issues of more than local importance.[113] However, these processes can be time consuming and expensive: the public inquiry on Heathrow Terminal 5 lasted almost four years and cost over £80 million.[114] Public environmental inquiries have been used extensively in several other jurisdictions as an adjunct to EIA processes. Australia's Industry Commission and Resource Assessment Commission each conducted numerous public inquiries into contentious resource management proposals during the 1990s.[115] Some major environmental assessment inquiries have also been established under New Zealand's Resource Management Act 1991.[116]

An EIA may come too late to result in major changes in proposed activities that can protect the environment. In those cases, a strategic environmental assessment (SEA) process may be more beneficial as it allows people to participate at the policy- (or plans or programmes) making level, which in turn shape future, specific development projects. SEA is a procedure integrated in the political decision-making process that is intended to ensure that the long-term environmental sequelae of various plans and programmes are identified and assessed before being adopted.[117] In the EU, the SEA Directive[118] stipulates that prior to the adoption of a plan or programme, or its submission to the legislative process, the competent national authority must carry out an environmental report. The public are to be given an opportunity to comment on the draft plan or programme and the

[111] G Hart, 'The Value of Inquiries System' (1997) 25 *Journal of Planning and Environmental Law* 8.
[112] Town and Country Planning Act 1990 s 78.
[113] *Ibid,* s 77.
[114] K Thorpe, 'The Heathrow Terminal 5 Inquiry: An Inquiry Secretary's Perspective' (1999) 15 *Planning Inspectorate Journal* 8.
[115] TL Hundloe, 'The Role of the Industry Commission in Relation to the Environment and Sustainable Development' (1992) 51 *Australian Journal of Public Administration* 476; BJ Richardson and BW Boer, 'Federal Public Inquiries and Environmental Assessment' (1995) 2(2) *Australian Journal of Envtl Management* 90, 92.
[116] BJ Richardson, 'Public Environmental Inquiries: Lessons for New Zealand' (1996) 1 *Butterworths Resource Management Bulletin* 252.
[117] R Therivel and MR Partidario (eds), *The Practice of Strategic Environmental Assessment* (Earthscan, 1996).
[118] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L/197/30.

accompanying environmental report. The relevant public authority has a duty to inform the parties concerned and all consultees of the result of the consultation, and the reasons for choosing the final plan or programme.

2. Access to Information

Liberal access to environmental information has many advantages. It makes it easier for the public to participate in administrative and judicial processes; it helps promote more rational, informed decision-making; and it fosters transparent and accountable decision-making.[119] Apart from ensuring access to a broad range of information, effective access to information laws should include obligations on agencies to collect and maintain relevant information, to meet information requests in a timely manner, and to keep information application fees low and within the means of all people.[120]

So far, most environmental information reforms have targeted the public sector, and few address disclosure of information by the private sector. The relevant Aarhus Convention provisions deal only with government information. Nonetheless, the right of citizens to access information is becoming widespread and even recognised in constitutional law. For example, the constitutions of Uganda, South Africa and Thailand guarantee the right of the public to information.[121] In addition, as of 2004 over 50 countries worldwide passed access to information legislation, of which most included provisions related to environmental information.[122] In some countries (eg, South Africa, Thailand) environmental protection laws provide specific provisions for environmental information[123] complementing access to information laws. There are also examples of countries having specific legislation on access to environmental information.[124] In addition, some countries have constitutional provisions, specific freedom of information legislation and environmental protection laws with specific provisions on information.[125]

Omnibus access to information legislation is often complemented by sector-specific information regulations and business self-regulation initiatives. The corporate social responsibility movement has fuelled increased public disclosure of

[119] JR Robinson, *et al,* 'Public Access to Environmental Information: A Means to What End?' (1996) 8(1) *Journal of Environmental Law* 19, 20.

[120] Petkova *et al,* above n 4, 37–40.

[121] D Banisar, 'Global Survey: Freedom of Information and Access to Government Record Laws Around the World' (May 2004), available at: www.freedominfo.org/survey/global_survey2004.pdf.

[122] *Ibid.*

[123] World Resources Institute (WRI), *World Resources 2002–2004—Decisions for the Earth: Balance, Voice and Power* (WRI, 2004) ch 3.

[124] In Britain, the Environmental Information Regulations 2004 implement the EU Directive on Access to Environmental Information, Sl 2004 No 3391.

[125] Eg, Mexico, South Africa and Thailand: Petkova *et al,* above n 4, ch 3.

corporate environmental policy and performance information.[126] Some of this disclosure is voluntary, while some is associated with regulation. There are several ways in which environmental disclosure is occurring, principally:[127] (i) public inventories of uses and releases of toxic chemicals;[128] (ii) environmental auditing of business operations;[129] and (iii) eco-labelling programmes that identify products with preferable environmental characteristics.[130] For instance, in order to enhance public accountability by industry, the US enacted the Emergency Planning and Community Right to Know Act 1986[131] to require certain industries publicly to disclose their annual emissions, recycling of chemicals, accidental releases and source reduction measures. Mandating disclosure of environmental information can help regulators, consumers, financial sponsors, as well as the companies themselves, better to understand the environmental impacts. Through education and awareness, pressure can be exerted on companies to improve their environmental behaviour.

2. Access to Justice

(a) Judicial review

A traditional means by which environmentally concerned persons can participate is through court action to challenge the legality of administrative decisions made pursuant to legislation. Judicial review is a procedure by which decisions of public bodies exercising environmental responsibilities can be challenged in court and a means by which the courts can supervise public bodies' exercise of their statutory authority. Judicial review is usually concerned with the decision-making process rather than the decision itself.[132] The basic principle is that it is not for the judges to interfere in the decision as this is within the remit of the decision-maker, unless the decision is 'manifestly unreasonable' or the way in which the decision

[126] See further ch 7, this vol.

[127] F Irwin and MF Repko, 'From Public Disclosure to Public Accountability: What Impact will it have on Compliance?' (1999), available at www.inece.org/2ndvol1/irwin.htm.

[128] SM Wolf, 'Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right to Know Act' (1996) 11 *Journal of Land Use & Envtl Law* 217.

[129] Environmental auditing describes a technique for allowing a company or a regulator to assess the impact of its activities on the environment, which includes procedures beyond the scope of a traditional financial audit: see N Gunningham and J Prest, 'Environmental Audit as a Regulatory Strategy: Prospects and Reform' (1993) 15 *Sydney L Rev* 492.

[130] In the EU, companies are using product labelling to make environmental claims. Eco-labels are used to communicate that the environmental impacts are reduced over the entire life-cycle of a product without specifying the production practices. See FIELD, 'Legal and Policy Issues in the Market Access Implications of Labelling for Environmental Purposes', Briefing paper (FIELD, 2003).

[131] Pub L 99–499, Title III, 17 Oct 1986, 100 Stat. 1729, codified at 42 USC §§ 11001–11050.

[132] Lord Woolf, J Jowell and AP Le Sueur, *De Smith, Woolf and Jowell's Principles of Judicial Review* (Sweet and Maxwell, 1999) part I.

was arrived at is flawed.[133] But the success of a judicial review application may not secure the desired outcome. A court may find the agency's decision to be unlawful and, while reconsidering the matter, the public body may come to the same conclusion in a lawful way.[134] In judicial review proceedings in common law systems, such as in the UK, courts do not directly consider the merits of any public decision, act or omission.[135] However, in some cases they will indirectly consider the merits through the doctrine of 'manifest unreasonableness'.[136] Judicial review proceedings do not therefore usually examine whether the decision taken was good or bad from a broad policy or ethical perspective, but merely check to see whether the public body has acted within its statutory powers.

Apart from the narrow focus of judicial review on procedural and jurisdictional issues, the judicial forum is not conducive to the deliberative model of democratic decision-making. The rigidly structured format for the presentation of evidence and cross-examination of participants is far removed from the communicative discourse championed by theorists.[137] Argument transpires through the language of 'rights', 'duties' and 'procedures', which tends to squeeze out less precise, ethical and policy considerations to the dispute.[138] The wider policy significance of a case can be lost, as judges tend to decide cases on as narrow grounds as possible.

(b) Public Interest Litigation

Public interest litigation (PIL) is a legal mechanism allowing individuals and NGOs to vindicate a 'public interest', and it has been widely used to uphold environmental law.[139] It is a form of legal proceeding in which redress is sought in respect of injury to the public in general. In a PIL, the collective rights of the public are affected and there may be no direct injury to any individual member of the public.[140] Although PIL for environmental causes originated in the US,[141] the concept of PIL has arisen in numerous jurisdictions and today is most widely practised in India.[142] The growth of PIL in India was facilitated by the inclusion

[133] M Supperstone and J Goudie, *Judicial Review* (Butterworths, 1997) ch 3.
[134] *Ibid.*
[135] H Southey and A Fulford, *Judicial Review* (Jordan, 2004) ch 1.
[136] Supperstone and Goudie, above n 133, ch 3.
[137] AR Lucas, 'Legal Foundations for Public Participation in Environmental Decision-making' (1976) 16(1) *Natural Resources Journal* 73, 100.
[138] Dryzek, above n 63, 146–7.
[139] Cassels identified four characteristics of PIL: liberalisation of *locus standi;* procedural and remedial flexibility; ongoing judicial participation and supervision; and creative and active interpretation of legal and fundamental rights: J Cassels, 'Judicial Activism and Public Interest Litigation: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 498.
[140] S.J Sorabjee, 'Introduction to Judicial Review in India' [1999] *Judicial Review* 128.
[141] J Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1970).
[142] CD Cunningham, 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience' (1987) 29 *Journal of the Indian Law Institute* 495.

of fundamental duties in the Constitution, the promotion of legal aid at the national level and the adoption of various social-justice related laws.[143] The historical development of PIL in India shows that the judiciary has been very active in relaxing the standing rules giving access to marginalised communities to the court and interpreting the constitutional rights in a liberal manner in order to enhance the rule of law.[144] The judiciary has also taken an inquisitorial role and appointed commissions of enquiry, monitored its own directions, initiated *suo motu* proceedings,[145] accepted *amicus curiae* briefs, supervised implementation of its orders and awarded compensation to the aggrieved.[146] Over the years, the subject matter of PIL in environmental matters has become more complex. The Indian case studies of the 1980s on PIL related to the environment show that they were mainly covering various sectoral issues, eg, air, water, mining or forest conservation.[147] In the 1990s, the categories have become more sophisticated and dealt with complex areas of waste management, protection of bio-diversity, access to environmental information, and groundwater management.[148]

Among the various types of civil suits or actions that can be brought through PIL, the class action can be one of the most empowering. A class action may be allowed in some tort claims that have an impact on a large number of people (eg, tobacco litigation in the US).[149] Separate adjudication of common questions of law or fact could give rise to inconsistent decisions. Moreover, an action brought by an individual member of the class may achieve a result affecting the interests of other members and may substantially impede their ability to protect their interests. Therefore, class actions can be cost-effective, easier to finance, may reduce courts' time and delay, and may spread the cost of litigation among the litigants. The courts, however, are also required to consider whether the class action overrides any question affecting an individual member and whether it would bring a fair and efficient result to the controversy. In recent years in the US there has been an increase in the number of class actions and the size of damages

[143] S Ahuja, *Public Interest Litigation in India: A Socio-legal Study* (PhD thesis, University of London, 1996) 115.

[144] R Dhavan, 'Whose Law? Whose Interest?' in J Cooper and R Dhavan (eds), *Public Interest Law* (Blackwell, 1986) 21.

[145] In order to provide complete justice, the Constitution of India allows the Supreme Court (Art 142) and the High Court (Art 226) to take account of letter and petition from individuals or groups and move the matter as PIL.

[146] Razzaque, above n 92, ch 5.

[147] A Rosencranz and S Divan, *Environmental Law and Policy in India* (Oxford UP, 2001).

[148] Razzaque, above n 92, ch 1.

[149] Eg, Federal Rules of Civil Procedure, Rule 23 (US); Federal Court of Australia Act 1976, Part IVA, enacted by Federal Court of Australia Amendment Act of 1991; Class Proceedings Act 1992 (Ontario). For a useful discussion of class actions, see C Loveday, 'Multi-Party Rules: US, Canada, Australia and the UK', *International Business Lawyer,* (Feb 1998) 77.

awards.[150] The US recently enacted legislation to alleviate the impact of class actions against the corporate sector.[151]

(c) Standing

Public interest litigation, along with other types of litigation, is possible only if the court gives the applicant standing to argue its case. The traditional rule of standing suggests that judicial redress is available only to persons who have suffered a direct injury by reason of a violation or threatened violation of his or her right or interest.[152] For instance, in the Australian case of *Australian Conservation Foundation v Commonwealth*, the NGO applicant was expected to demonstrate a 'special interest' in the proceedings, rather than a mere 'intellectual' or 'emotional' concern.[153] Often rights to seek judicial review or other appeal mechanisms are limited to parties directly involved in the initial administrative decision and do not extend to so-called 'third parties'. Thus, in the UK, for instance, there are no third party rights of appeal against some decisions made under planning legislation.[154] It is frustrating for affected communities as they, unlike the developers, cannot appeal against the planning decision. Though the Royal Commission on Environmental Pollution has recommended expanding third party rights of appeal,[155] the UK government has rejected its proposals.[156]

In recent years, courts in many jurisdictions have become willing to hear arguments from environmental groups and concerned individuals who have no direct economic or other concrete interests at stake.[157] Often, the increased flexibility is

[150] AH Barnett and TD Terrell, 'Economic Observations on Citizen Suits Provisions of Environmental Legislation' (2001) 12 *Duke Environmental Law& Policy* Forum 1.

[151] The Class Action Fairness Act of 2005, Pub L 109–2 (17 Feb 2005), 118 Stat 4, seeks to keep large class actions out of state courts (where awards tend to be higher and defendants are often faced with multiple court actions) and to limit what its proponents see as exorbitant settlements and attorneys' fees.

[152] P Cane, 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303; C Hilson and I Cram, 'Judicial Review and Environmental Law: Is there a Coherent View of Standing?' (1996) 16 *Legal Studies* 1.

[153] (1980) 54 ALJR 176.

[154] In a planning decision, local communities are the third party; the first party is the developer and the second party is the Local Authority. *Report by the Environmental Justice Project* (WWF, Leigh Day and Co and the Environmental Law Foundation, 2004) 33; Green Balance *et al, Third Party Rights of Appeal in Planning* (Friends of the Earth, 2002).

[155] Royal Commission on Environmental Protection (RCEP), *23rd Report on Environmental Planning* (RCEP, 2002) ch 5, paras 30–47.

[156] *The Government's Response to the Royal Commission on Environmental Pollution's Twenty-Third Report Environmental Planning (England)* (Cm 5888, TSO, July 2003). The UK government argued that the public has the opportunity to participate in the land-use plan-making process. Secondly, the majority of the decisions are made by elected local authority members who are directly accountable to the local electorate: Department for Transport, Local Government and the Regions (DTLR), *Planning: Delivering a Fundamental Change* (DTLR, 2001) paras 6:21 and 6:22. At present, Scotland is considering whether to widen third party right of appeal in planning applications.

[157] Eg, *R v Inspectorate of Pollution and Another, ex parte Greenpeace (No 2)* [1994] 4 All ER 329; *R v Secretary of State for Foreign Affairs* [1995] 1All ER 611; *Algonquin Wildlands League v Ontario (Min. of Natural Resources* [1996] 21 *Canadian Environmental Law Reports* (New Series) 102 (Ontario Divisional Ct); *Sierra Club of Canada v Canada (Min. of Finance)* [1999] 2 FC 211 (Fed Ct Trial Div).

a direct result of statutory reforms. For example, the Environmental Planning and Assessment Act 1979 (NSW) in Australia gave open standing to 'any person' to challenge a decision made under the legislation.[158] New Zealand's Resource Management Act 1991 provides that 'any person' may participate in any of the planning and development decision-making processes and the enforcement provisions of the Act.[159] In Britain, however, reforms to the rules of standing made in 1977 still left the judiciary with considerable discretion.[160] Civil Procedure Rules made under the Supreme Court Act 1981 provide that any applicant for judicial review should have a 'sufficient interest' in the matter to which the application relates.[161] No test or formula is provided as to how the court should determine the sufficiency of interest.[162]

In the US, citizens bringing suit over environmental laws in federal court must satisfy a three part test to survive a standing challenge: 'injury in fact' (concrete, particularised injury that is actual or imminent, not conjectural), causation (causal connection between the injury and the conduct complained of) and redressability (likelihood that the injury will be redressed by a favourable ruling).[163] Injury suffered by individuals may be redressed by litigation brought on their behalf by organisations representing them.[164] An organisation must allege and prove that its individual members have suffered injury and would themselves satisfy the requirements of standing, and that the general purpose of the organisation is consistent with the interest the group is pursuing in the suit.[165] 'Injury in fact' requires harm to the recreational, aesthetic or economic interests of the plaintiffs themselves, rather than harm to the environment per se,[166] and a series of Supreme Court decisions in the 1990s took a particularly narrow view of this requirement.[167] However,

[158] S 123.

[159] S 86, 311, 316.

[160] For a discussion on the reform: R Gordon, *Judicial Review and Crown Office Practice* (Sweet and Maxwell, 1999) Part 3. For changes in 2000, see the *Crown Office Digest* (2000) 382.

[161] For a discussion on cases where the standing issue has been examined: S Grosz, 'Access to Environmental Justice in Environmental Law' in D Robinson and J Dunkley (eds), *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995) 194; C Harlow, 'Public Interest Litigation in England: The State of the Art' in J Cooper and R Dhavan (eds), *Public Interest Law* (Basil Blackwell, 1986) 107.

[162] Sufficiency of interest is described as 'a mixed question of fact and law; a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case': Supreme Court Practice 1993, vol 1, para 53/1–14/11.

[163] *Lujan v Defenders of Wildlife,* 504 US 555, 112 S Ct 2130 (1992).

[164] *Sierra Club v Morton,* 405 US 727, 2 ELR 20192 (1972).

[165] For a discussion on standing in the USA, see DH Robbins, 'Public Interest Environmental Litigation in US' in Robinson and Dunkley (eds), above n 161.

[166] Eg *Sierra Club v Morton*, 405 US 727, 92 S Ct 1361 (1972).

[167] *Lujan v National Wildlife Federation,* 497 US 871, 110 SCt 3177 (1990); *Lujan v Defenders of Wildlife,* 504 US 555, 112 S Ct 2130 (1992).

evidence of a recent more liberal approach to standing may assist public interest groups to bring environmental cases in the US courts. [168]

The reasons for such restrictions on a standing test relate in one way or another to the 'flood-gates' argument.[169] A relaxed standing rule may mean a flood of applications to the courts, requiring public bodies to spend more time preparing their defences. Moreover, an increase in cases could result in further delays in determining cases. In addition, an increase in the number of applications would put pressure on the already constrained time of existing judges or require extra judges experienced to deal with environmental matters. This may detract from the quality of judgments. Lastly, there is another fear that the judiciary will engage in settling the disputes better resolved through political process.[170]

(d) Environmental courts and ADR processes

Environmental courts and alternative dispute resolution (ADR) mechanisms provide a means for facilitating public access to justice. They are institutions that have significant public participation implications. The rationale for special environment courts is that, because many environmental issues are assumed to be highly complex and technical problems, they require specialised institutions for evaluation of the claims and evidence.[171] It would also enhance the role of specialist judges in developing a consistent environmental jurisprudence.[172] However, the appropriate jurisdiction and structure of a separate environmental forum has been the subject of much debate.[173] Arguments for environmental courts based on the need for specialist judicial and technical expertise sit uncomfortably with some theories of public participation that are critical of expert, elite decision-making bodies that work to exclude lay people. Therefore, environmental courts may be more congruent with the rational elitist models of participation rather than those championing active, community involvement in decision-making. At

[168] See: *Friends of the Earth Incorporated v Laidlaw Environmental Services,* 528 US 167, 120 S Ct 693 (2000). Here, the aesthetic and recreational interests of members of the plaintiff organisation were injured by the defendant's discharge of mercury into the North Tyger River in North Carolina in violation of a permit issued under the Clean Water Act. The Supreme Court held that the plaintiff had standing under the Clean Water Act's citizen suit provisions to seek the assessment of civil penalties for the violations.

[169] GR Nicol, 'Rethinking Standing' (1984) 72 *California L Rev* 68.

[170] B Hough, "'Standing' for Pressure Groups and the Representative Plaintiff" [1991] *Denning LJ* 77.

[171] R Carnwarth, 'Environmental Enforcement: The Need for a Specialist Court' [1992] *Journal of Environment & Planning Law* 798.

[172] Lord Woolf spoke of a specialist tribunal with a general responsibility for overseeing and enforcing safeguards provided for the protection of the environment. According to him, 'It would be a "one stop shop" which should lead to faster, cheaper and more effective resolution of dispute in the environmental area': 'Are the Judiciary Environmentally Myopic?' (1991) 4(1) *Journal of Environmental Law* 1.

[173] Eg, in the UK, the debate has continued on for more than 15 years: Lord Justice Carnwarth, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16 *Journal of Environmental Law* 315.

present, only a few countries have successfully established environmental courts with a liberal approach to standing.[174]

An alternative to the formality of environmental courts are informal ADR[175] measures, including negotiation, arbitration and mediation. All of these measures potentially offer less costly and less adversarial means of dispute resolution, and in theory create a decision-making milieu more accommodating of policy, ethical and other non-legal arguments. Negotiation is a process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Arbitration is an adjudicative process in which one or more arbitrators issue a judgment on the merits (which may be binding or non-binding) after an expedited, adversarial hearing in which each party has the opportunity to present evidence and arguments.

Mediation, in particular, has been praised for its potential to offer a participatory, informal and amicable setting whereby a wide variety of parties can be involved.[176] Essentially, mediation is a process under which an impartial person, the. mediator, facilitates communication between the parties to promote reconciliation or settlement.[177] Mediation has been successfully used to deal with a wide variety of environmental disputes related to local planning and development, participatory forest management, and community fisheries.[178] Drzyek sees mediation as a potential 'discursive forum' that can institutionalise the promise of deliberate democracy.[179] In contrast to the hearing of cases in courts, mediation procedures emphasise win-win solutions for all. This helps to create a stronger commitment among participants to respect decisions.

There are however some drawbacks to the effectiveness of ADR as a participatory tool. For example, regulatory agencies overseeing the ADR processes could

[174] Eg, the Land and Environmental Court of New South Wales, the Planning and Environment Court in Queensland, and the Environment Court in New Zealand. Malcolm Grant, in his report, commented that 'the performance of Australasian model is impressive in terms of assembling and deploying appropriate expertise, operating advanced case management techniques with rapid turnaround of business, incorporating systems of alternative dispute resolution (ADR) and in providing and effective mechanism for enforcement': M Grant, *Environment Court Project: Final Report* (DETR, 2000) 4–11.

[175] HT Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard L Rev* 668.

[176] See further J Harrison, 'Environmental Mediation: The Ethical and Constitutional Dimension' (1997) 9(1) *Journal of Environmental Law* 79.

[177] R Lyster, 'Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking' (1998) 20 *Sydney L Rev* 579.

[178] D Shapiro, 'ADR and the Environment' (2001) 1(3) *Journal of ADR, Mediation and Negotiation* 16, discussing examples of environmental mediation, including two from the USA (cleaning up of Hanford Nuclear Military base and Cape Cod endangered species conservation) and the UK (Brent spar floating oil storage buoy and dead fish River Eden), and Canada (Winnipeg Bridges Dispute). In all these examples, many public interest groups, tribal groups, or low-income communities were involved in the mediation.

[179] Dryzek, above n 63, 212–4.

become less accountable if judicial oversight were removed from the dispute settlement process. Some parties might be omitted from the process, or the mediator might be unable to balance the unequal power of the disputants.[180] Even though mediation and other ADR processes are usually less expensive options to litigation, the equal participation of all groups may still be hampered by financial constraints. A corporate developer is more likely than a community group to have the resources to hire a lawyer, scientific consultant or mediator in the ADR process.[181] Secondly, because the decisions of ADR are often unenforceable in court, developers might use ADR processes for tactical reasons to waste time while pushing ahead with their project.[182] The lack of monitoring afterwards to ensure that an ADR-derived settlement is complied with can also undermine the value of these mechanisms.

(e) Legal Aid and Intervenor Funding

Public participation in environmental decision-making often hinges upon financial resources. Financial constraints are particularly acute for those seeking remedies through the courts, where the costs of hiring counsel and researching evidence can be exorbitant, in addition to the risk of an adverse costs award should the case be lost. Therefore, government provision of legal aid and intervenor funding are vital complements to participation reforms.

Most developed countries have legal aid schemes, where assistance depends on various criteria including: (i) the applicant's disposable income and capital; (ii) the subject matter and merits of the case, including the presence of public interest considerations; and (iii) the lack of other funding. Some developing countries such as India have also established successful legal aid schemes.[183] Through the Legal Services Authorities Act 1987, the Indian government has sought to provide free and competent legal services to the weaker sections of the society.[184] Only a few jurisdictions offer legal aid specifically for environmental litigation. In Australia, for instance, the New South Wales government offers legal aid for public interest environmental litigation.[185] In Britain, the Legal Services Commission

[180] J Harrison, 'Environmental Mediation: The Ethical and Constitutional Dimension' (1997) 9(1) *Journal of Environmental Law* 85.

[181] M Doyle, *Advising on ADR: The Essential Guide to Appropriate Dispute Resolution* (Advice Service Alliance, 2000).

[182] *Ibid.*

[183] For the history of legal aid in India, see S Singh, *Legal Aid: Human Rights to Equality* (Deep and Deep, 1996); SL Whitson, "Neither Fish, Nor Flesh, Nor Good Red Herring" *Lok Adalats:* An Experiment in Informal Dispute Resolution in India' (1992) 15 *Hastings International and Comparative Law Rev* 391.

[184] The Act establishes a National Legal Aid Fund (ss 15–17), and specifically targets legal aid to scheduled castes and tribes and persons of particular social placement (s 12).

[185] Legal Aid Commission Act 1979 (NSW) s 47l; see B Boer, 'Legal Aid in Environmental Disputes' (1986) 3(1) *Environmental & Planning LJ* 22.

provides legal aid that can also extend to environmental cases.[186] In both jurisdictions, if the case is lost, legal aid offers some measures of protection against adverse costs awards.

As a system, legal aid can be criticised for its bias towards expensive, court-based solutions. Under most legal aid schemes, where claims vastly exceed available funds, it is difficult to target resources to the priority areas.[187] Often, legal aid does not cover the whole cost of the litigation and fails to attract experienced lawyers to take on environmental cases.[188] Moreover, almost all legal aid schemes have some form of means testing, which may arbitrarily exclude certain deserving sections of the community. Most fundamentally, legal aid is not particularly effective as an instrument for systemic social change: it does challenge the basic cost and accessibility of the judicial system.

Intervenor or participant funding also aims to increase public participation in judicial and administrative processes, such as EIA procedures. It provides funds to people who otherwise could not afford the necessary legal or expert consultant fees and who have no alternative funding sources. Canada has pioneered the intervenor funding model,[189] at both a provincial level with Ontario's Intervenor Funding Project Act 1988 and federally through the Canadian Environmental Assessment Act 1992. These schemes channel public funds to individuals, NGOs or Aboriginal organisations seeking to contribute to environmental assessments.[190] However, their budget is limited and those eligible for participant funding are parties with a direct local interest, community knowledge or Aboriginal traditional knowledge, or expert information relevant to the likely environmental effects of the project.[191] The Canadian Environmental Assessment Act (CEEA) has designated eight distinct areas to which participant funding may apply, including professional fees and the purchase of information materials.[192] The CEEA gives higher priority to measures increasing local participation and the dissemination of third-party expertise.[193] In some jurisdictions including Canada, intervenor funding and concomitant environmental legal aid

[186] J Dunkley, 'Legal Aid Rules for Environmental Cases', *ELFline,* 10 Jan 2004, available at www.elflaw.org/news/showarticle.php?action=display&id=36&type=elfline.

[187] For criticisms RK Gordon and JM Lindsay, 'Law and the Poor in Rural India: The Prospects for Legal Aid' (1990) 5 *American University Journal of International Law and Policy* 658.

[188] MI Jeffrey, 'Intervenor Funding as Key to Effective Citizen Participation in Environmental Decision-Making' (2002) 19 *Arizona Journal of International and Comparative Law* 643.

[189] This innovative legislation was repealed in 1996.

[190] AR Lucas, 'Canadian Participatory Rights in Energy Resource Development: The Bridges to Empowerment?' (2004) 24 *Journal of Land Resources & Envtl L* 195, 200.

[191] Canadian Environmental Assessment Agency (CEAA), *Canadian Environmental Assessment Act, Participant Funding Program* (CEAA, Apr 2004); Jeffrey, above n 188, 674–5.

[192] *Guide on Participant Funding Program* (Apr 2004) 11, available at www.ceaa-acee.gc.ca/012/013/Participant-Funding_e.pdf.

[193] *Ibid.*

programmes have been drastically slashed or withdrawn altogether owing to government fiscal constraints.[194] Both initiatives are very sensitive to fluctuations in fiscal policy.

F. Conclusion: Constraints to Public Participation and Future Reforms

The actual practice of public participation in environmental decision-making often differs markedly from theoretical models. The legal provision of opportunities for participation in environmental decision-making does not itself ensure that participation will occur or be meaningful. There are numerous barriers to effective public participation.

For a start, the classical vision of an Aristoleian-style deliberative democracy has been criticised as unrealistic in contemporary mass societies.[195] Collective decisions may reflect conformity rather than genuine unanimity. Janis argues that groups of people who deliberate together 'tend to maintain esprit de corps by unconsciously developing a number of shared illusions and related norms that interfere with critical thinking and reality testing'.[196] Another concern is that individuals or groups do not have an equal chance to use participation reforms. If the best arguments are to prevail, participants must have an equal ability to participate. This is rarely, if ever, true. Marxist theory posits that the ability to participate in policy-making is closely tied to one's economic and political power.[197] Feminist theory also shows that participation is tied to gender; for instance, Agarwal shows that the exclusion of women from public institutions is a widespread problem in many countries.[198] The environmental movement itself has been criticised for its social elitism, supposedly dominated by the better educated and wealthier segments of society with little representation from blue-collar workers or the poorest.[199] It is no coincidence that many of the most polluted and unattractive places to live are occupied by the most disadvantaged groups of society, victims of the NIMBY ('not in my backyard') attitude and power of privileged classes.[200] Thus, many of the benefits from increased opportunities in environmental policy-making may, without additional corrective action, accrue to those who already

[194] Eg R Lindgren, 'Harris Government Kills Intervenor Funding Law', *Intervenor* Mar/Apr 1996 (describing cuts to Ontario's intervenor funding regime).

[195] J Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge UP, 1983) 35–42.

[196] I Janis, *Groupthin*k (Houghton Miffin, 1982) 35.

[197] See N Poulantzas, *State, Power, Socialism* (New Left Books, 1978).

[198] Eg B Agarwal, *A Field of One's Own: Gender and Land Rights in South As*ia (Cambridge UP, 1994).

[199] DE Morrison and RE Dunlop, 'Environmentalism and Elitism: A Conceptual and Empirical Analysis' (1986) 10 *Envtl Management* 581.

[200] RD Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press, 1999).

enjoy considerable advantage in society. Consequently, strategies to promote public participation should be linked to a broader strategy of social change.[201]

The notion that *what* is to be represented in decision-making has priority over *who* is to do the representing has been criticised by post-colonial theorists who ascribe pre-eminence to questions of identity such as race, gender and ethnicity.[202] Rationalist conceptions of discussion may distort and constrict both what is counted as legitimate speech and who is regarded as qualified to be a speaker. When Spivak asks, 'Can the subaltern speak?', she raises the question whether oppressed minorities are able truly to represent and speak for themselves when they are constituted as subjects only through the positions that have been permitted by their colonisers.[203] Their voice, argues Spivak, is invariably modulated through some colonising discourse or narrative. There is also the enduring problem of how to give a voice to nature per se, a problem first raised by Stone in his polemic on 'Should Trees Have Standing?'.[204] Since Western deliberative norms, argues Young, are dominant and agnostic, different 'voices' and styles of communication need to be recognised and accorded equal legitimacy in policy-making processes.[205] The problems of cross-cultural dialogue and representation of minority interests most obviously occurs in relation to Aboriginal peoples. The Berger Inquiry of the 1970s into a proposed natural gas pipeline in Canada is a rare example of a participation process sensitive to these concerns.[206] The case for a politics of identity thus provides a crucial supplement to the communicative politics of ideas.

Many deficiencies with public participation can be traced to flaws in the enabling legal and institutional frameworks. For example, the terms of reference of an EIA or an environmental inquiry may be drafted narrowly by authorities to exclude certain contentious issues. More seriously, participation exercises can be a charade, to legitimate government policies already approved. For example, during the famous environmental inquiry into the Ranger uranium mine in Australia, the federal government was surreptitiously searching for potential buyers of uranium from the would-be mine.[207] If inputs from people are not integrated into final decisions, ultimately people will become disillusioned with the process as a whole, harming the quality of environmental decisions and of the environment itself.

[201] K Graham, *The Battle for Democracy* (Wheatsheaf Books, 1986) 150.
[202] S Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton UP, 1996).
[203] GC Spivak, 'Can the Subaltern Speak?' in P Williams and L Chrisman (eds), *Colonial Discourse and Post-colonial Theory* (Harvester Wheatsheaf, 1994) 66, 103.
[204] C Stone, 'Should Trees Have Standing?' (1972) 45 *Southern California L Rev* 450.
[205] I Young, *Justice and the Politics of Difference* (Princeton UP, 1990).
[206] TR Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Minister of Supply and Services, 1978).
[207] *Ibid.*

The costs and procedural technicalities of participation procedures are a related concern. Excessively technical and bureaucratic procedures for public involvement can be a major hurdle for fruitful consultation. Complex, encyclopaedic-size EIA reports, for instance, tend to hinder rather than facilitate public scrutiny of proposed developments. Lack of technical support and difficulties in gaining access to clear information can diminish the public's ability to provide a meaningful voice in decisions. There are also financial costs of widening public participation in decision-making. These are costs to the participants themselves (eg, gaining access to information, preparing submissions, attending hearings and litigating), costs to governments faced with slower and more complex decision-making, and costs to developers concerned about stalled investments. The most expensive participation institution is the public environmental inquiry.[208] Access to the courts is also prohibitively expensive for most individuals, and therefore public interest litigation is unlikely in the absence of generous state legal aid and intervenor funding schemes.

One way to overcome some of these barriers would be to shift the onus from people to governments to initiate and ensure participation. Agencies should be obliged to initiate consultation with persons or organisations identified by some fair means as having a stake in a proposed decision. This already occurs to a limited extent in some environmental legislation.[209] Further, governments should establish public participation watchdogs, to monitor and verify that environmental decision-making processes are in fact transparent, participatory and accountable. The creation in Canada and New Zealand of environmental ombudsman-type positions, answerable to parliament, illustrates this approach.[210] Negotiation and real power-sharing processes should also be more widely used, as already demonstrated by Canada's comprehensive land claims agreements negotiated with Aboriginal peoples.[211] These are only a few of many possible reforms.[212]

For the long term, the theory and practice of public participation in environmental law need to pay more attention to the hollowing out of the state, as more and more public assets are privatised, policy functions delegated to the market and other deregulation reforms sweep the world. To focus on participation 'in the state' may become less relevant when market institutions increasingly call the tune. We need to consider how corporate governance, financial institutions and

[208] Richardson and Boer, above n 115, 101.

[209] Eg New Zealand's Fisheries Act 1996, s 12, requires the Minister to initiate consultations with certain groups including Maori when making resource management plans.

[210] Canada has a Commissioner of the Environment and Sustainable Development, www.oag-bvg.gc.ca; and New Zealand a Parliamentary Commissioner for the Environment, www.*pce.govt.nz*.

[211] BJ Richardson, D Craig and BW Boer, *Regional Agreements for Indigenous Lands and Cultures in Canada* (Australian National University, 1995).

[212] For further examples, see WM Lafferty and J Meadowcroft (eds), *Democracy and the Environment: Problems and Prospects* (Edward Elgar, 1996).

other features of modern markets can be made more transparent and open to participation and control by civil society. The values we hold as consumers participating in markets are arguably quite different from the values we would express as citizens participating in political processes.[213]

The encroachment of capitalist market systems into nearly all spheres of life poses a related, very serious challenge. Global capitalism has eroded the normative-generating capacities of civil society. Apathy over social values and public policy is an endemic feature of politics today. We live in a world of more information but less meaning. This is an abstract world Baudrillard characterises as 'hyperreality', where a decentralised consumer society floods us with images and information but little normative guidance.[214] The moral indeterminacy and nihilism of our so-called 'post-modern' consumer society may emasculate attempts to motivate citizens to participate in their public governance.

[213] M Sagoff, 'Economic Theory and Environmental Law' (1991) 79 *Michigan L Rev* 1393.
[214] J Baudrillard, 'The Hyper-realism of Simulation' in C Harrison and P Wood (eds), *Art in Theory 1900–1990: An Anthology of Changing Ideas* (Blackwell, 1993) 1043.