Public Participation in Resolving Environmental Disputes and the Problem of Representativeness*

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Introduction

This paper reviews the role of public participation in environmental dispute resolution and highlights the problem of representativeness. There is a growing interest in issues associated with such participation and some history of various attempts to implement it. Experience of the modern world suggests any number of odd occurrences that might fit the category of "environmental dispute" but concern has tended to center on those sorts of issues that fall approximately into the broad category of planning decisions. Where to locate facilities, the so-called "siting problem", is probably the most familiar of these sorts of disputes, though more general planning decisions also exemplify the types of conflict situations which give us pause.

In the examination of cases for empirical study in a current research project, a considerable range of situations emerged about which people might become exercised. What has been repeatedly found by research in this field is that people appear to be concerned with having an adequate voice in making decisions which affects their locality, well beyond what might be seen as the rather limited outlook of the so-called NIMBY[1] view; given the rather more charming acronym of LULU[2] in the U.S.[3] Indeed so significant is this aspect of the situation that it may be the most important element in the formation

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1 NIMBY is a popular acronym for "not in my backyard".

2 LULU is a popular acronym for "locally unwanted land uses".

3 Audrey M. Armour, *The Siting of Locally Unwanted Land Uses: Towards a Co-operative Approach,* 35 **Progress in Planning** 1 (1991).

and/or the escalation of a dispute and, thus, would need to be addressed if we are to have better decisions.

The degree to which people may have an input into such decisions will obviously vary with the nature of their local polity and with the traditions of decision making in their society. Therefore, international variation in the circumstances of public participation is to be expected and, consequently, there is more than passing usefulness in the lessons that might be learned from comparison of the different experiences in different countries. Beyond such particularities there are, of course, the commonalities that might be identified when making comparisons between situations. In fact it seems that sufficient experience in Alternative Dispute Resolution (ADR) procedures demonstrate that taking stock is a real possibility. Certainly initial review indicates a catalogue of pros and cons that make interesting reading.

The main context that reveals the nature of the problem is the history of decisions and decision-making institutions. In general, European experience appears somewhat different from that in the U.S., with less attempts at participation in cases being recorded in the former. In any event, issues of the openness of information and the unresponsiveness of institutions take on significance in most cases. While the problems which dominate effective practice are not necessarily hard to understand because they involve issues of power, they may well be hard to resolve. However, where we cannot resolve problems quickly, we can at least explore methods.

Categories of Methods

One key way in which methods differ is in the extent of public involvement and influence which they permit. For example, in their advice to government agencies, some utilize the concept of a "ladder of participation".[4] This maps the increase in participation from naked government power up to citizen power, where people take actions without reference to government. It could be argued, for example, that the degree of influence varies from very little in traditional systems of consultation and objection, to rather more implied in the setting up of

[4] Billie Jo Hance et al., *Environmental Communication Research Program, Improving Dialogue with Communities: A Risk Communication Manual for Government,* Report to New Jersey Dept. of Environmental Protection (1998).

panels or Community Fora, to a considerable amount expected from the use of formalized quasi-legal mediation.

In general, the following presentation of procedures mirrors the sort of evolution that has occurred in the body of theoretical literature concerned with disputes and their resolution. From initial concerns with solving conflicts, and models for achieving such ends which were based on normative principles, research into mismatches between human actions and theoretical prescriptions has gradually turned towards actual processes and procedures for the management of disputes. A social psychological approach has emerged which explores conflict as a social process and is thus more concerned with "what happens" than with the content of the dispute, or "what it is about". There seem to be three generic phases: exploration of the problem; structuring of the problem and evaluation of options. These divisions are reflected in the various approaches outlined below.

Consultation is perhaps the weakest practice within the general category of participation. As what might be seen as a first step toward including the public in decision-making, consultation has some advantages over the implementation of an otherwise remote decision-making authority. If members of the general public are included in a consultation exercise, such as a round table discussion, they are in turn able to communicate what they have learned from the process to their peers and members of their special interest groups. Communications seem to be improved between authorities and the public.

However, there are drawbacks. The most obvious is that decision prerogatives remain firmly with authorities. The relative transparency of this relation may or may not be a factor in a given situation, but popular mechanisms for consultation may make things more confrontational by amplifying community responses. Public forums may increase anger.[5] McComas argues that "if the organizers of public meetings are perceived as having hidden agendas or as simply giving "lip service" to the citizens attending the meetings, the outcome may be more, rather than less, frustration and concern about the issues."[6]

5 Katherine A. McComas & Clifford W. Scherer, *Risk Perceptions of Participants at Public Meetings: The Potential for Risk Amplification,* Paper Presented to the Society for Risk Analysis, Annual Meeting, Dec. 8, 1996.

6 *Id.*

This appears to be an argument for better structured consultations. Further problems may arise when those included in the consultation process find themselves operating as mediators between the authorities and their own interest groups. Paradoxically, this effect is likely to be even greater if the procedure is relatively well structured, such as in the case of an official "round table." Those who are the leaders of the "opposition" or "special interest" groups may well find themselves being seen as compromised by their special position. Any suggestion that the proposed consultation process will involve more than the mere "hearing of views" may be sufficient to warn group leaders that compromise is possible. In highly charged situations, just talking to the opposition constitutes a political weakening because it legitimizes the dialogue.

Where consultation might be chiefly characterized as a communications approach, the procedures involving mediation go further to include arrangements for the negotiation of outcomes based on the prior negotiation of suitable process.[7] If disputing parties can have access to an agreed neutral mediator, then a competent decision may emerge. Of course, any such decision can only be the product of those groups that are party to the mediation procedure. Given the above remarks about the compromising of positions where there is strong opposition, the mediation procedure will lack validity in the eyes of the excluded groups whether that exclusion is self imposed or not. Most likely the public, by which is meant everyone except those organized into, or represented by, special lobby groups, will be outside the loop of mediation.

Full blown attempts at participation comprise a family of techniques that all attempt to include people the general public in some interactive process. That process may be focused, for instance, on the early planning stages of an environmental development or on the resolution of a particular dispute.

The first sort of attempt in this category comprise mediated workshops, such as Zukunftswerkstatt in Germany. Here the aim is to generate ideas with the assistance of expert opinion that can lead to

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[7] Laurence S. Bacow & Michael Wheeler, **Envtl. Dispute Resolution** (1984); Gail Bingham, **Resolving Envtl. Disputes: A Decade of Experience** (1986); **Environmental. Mediation: The Search for Consensus** (1980); Sally E. Merry, *Varieties of Mediation Performance: Replicating Differences in Access to Justice*, **Access to Justice** 1 (A. Hutchinson ed., 1990).

development proposals or planning criteria. In use, such a procedure seems best suited to community self-development activities. A further step towards participation in dispute resolution is represented by the Planning Cell, which is a more developed approach that brings together lay people in a sort of parallel planning procedure.[8] Such panels are known as Community Advisory Fora in the United Kingdom (U.K.). Community Advisory Fora vary in format but are generally composed of selected representatives of stakeholder groups who are brought together on a number of occasions to learn about and discuss planning issues. They are asked to formulate recommendations, based on their viewpoints and to inform a particular policy. They have been used successfully in the U.K. by the Hampshire County Council to inform local household waste management strategy.[9]

Lay preferences are thus imported into the decision process, again as a sort of advanced consultation, in which planning problems are rehearsed and solutions developed which might subsequently gain wider support in the community. A similar sort of procedure characterises Regional Urban Design Assistance Teams, originating in the U.S. and also recently imported to the U.K. These teams provide professional planning assistance for local community organizations, enabling the latter to move from the position of opposing proposals to the development of their own alternative schemes.[10]

Perhaps more developed are Citizen Juries, in which structured presentations are followed by deliberations on the part of a jury of lay people. The jury then publishes recommendations to the decision-making body.[11] In one proposed and developed implementation, the

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[8] Peter C. Dienel, **Die Planungszelle. Eine Alternative zur Establishmentdemokratie** (1992); Peter C. Dienel & Ortwin Renn, **Planning Cells: A Gate to "Fractal" Mediation, in Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse** 117 (Ortwin Renn et al. eds., 1995).

[9] Judith Petts, *Hampshire County Council Integrated Waste Management Strategy Community Consultation and Involvement: A Case Study, A Report for the Dept. of Trade and Industry,* No. ETSU B/EW/00389/23/REP (1994); Judith Petts, *Waste Management Strategy Development: A Case Study of Community Involvement and Consensus-Building in Hampshire*, 38 **Journal of Envtl. Planning and Mgmt.** 19 (1995).

[10] I. Haywood, *Why Plan for Public Participation?,* 50 **Housing and Planning Rev.** 6 (1995).

[11] Ned Crosby et al., *Citizen Panels: A New Approach to Citizen Participation,* 46 **Pub. Admin. Rev.** 170 (1986); Ned Crosby, *Citizen Juries: One Solution for*

planning jury is part of a three-step procedure of public participation.[12] In the first two steps, the key issues and concerns about a proposed facility or site are identified and transformed into indicators to produce a "performance profile" for the facility. Randomly selected groups of citizens are formed into planning juries and are presented with technical evidence and key arguments for and against the proposed siting. The juries then evaluate the facility on the basis of the evidence and their own value judgements.[13]

The main difference between these juries and Community Advisory Fora or Planning Cells is that the juries are comprised of randomly selected citizens and not of representatives of stakeholder groups. This may be a key benefit of the method and could mean that there will be less chance of participants having vested interests and more chance of resolving conflicts and reaching a consensus.[14] In effect, planning jury participants are given the chance to mediate between polarised groups and the disproportionate influence of pressure groups is avoided. This method was used to assist in the development of national energy policy in Germany where the juries were used to elicit public preferences with respect to four energy policy options.[15]

Probably the most recent systematic treatment of these approaches is the Co-operative Discourse Model.[16] This model is a response to the shortcomings uncovered in implementations of the various methods thus far. Briefly, what is attempted is a matching of the participation processes to the stages that a complex decision may need to go through. There are three such stages identified: value criteria may be brought together through processes involving mediation; confirmation of the facts of the case may be assembled using an expert workshop or

Difficult Environmental Questions, **Fairness and Competence in Citizen Participation-Evaluating Models for Envtl. Discourse** 157 (Ortwin Renn et al. eds., 1995).

12 Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 **Policy Sci.** 189 (1993).

13 *Id.*

14 Ortwin Renn et al., *An Empirical Investigation of Citizens' Preferences Among Four Energy Scenarios*, 26 **Tech. Forecasting and Soc. Change** 11 (1984).

15 Ralph L. Keeney et al., *Structuring West Germany's Energy Objectives*, 15 **Energy Policy** 147 (1987) .

16 Renn et al., *supra* note 12.

so-called Group Delphi; and assessment of options may be achieved by, for example, Planning Cells.[17]

Summarizing Benefits and Problems

The hope of public participation is that any process which involves the public is that it will produce a "better" outcome; a slightly broader term than "decision". The point is that local input may, or may not, appear to be especially useful in a specific case. A technically based decision may seem entirely sufficient. However, often enough, decisions taken without public involvement may be sub-optimal because of factors which cannot be present in an expert evaluation, such as subsequent anger and distrust.[18] Preventing or reducing extreme reactions thus seems to be a benefit of early public involvement. In fact, several suggested benefits that Citizen's Advisory Groups could offer actually seem to apply to any participation method because such methods:

1. provide a cross sampling of public views and concerns;
2. give citizens a chance to become informed about an issue before coming to a conclusion;
3. lead to deeper understanding of the concerns and views of others with the effect of moderating extreme views;
4. serve as a communication link to people in the community;
5. build consensus among conflicting groups.[19]

For all of these reasons increased public participation should increase the efficiency of the planning process, at least to the extent that plans are more likely to be accepted by the public. However, there may also be drawbacks:

Legitimacy of Non-Expert Input

The advisory board which reviewed the project reported by Renn, et al.,[20] argued that the so-called citizen panels were not particularly valuable elements of the planning process.[21] The arguments centered

17 Thomas Webler et al., *The Group Delphi: A Novel Attempt at Reducing Uncertainty,* 39 **Tech. Forecasting and Soc. Change** 253 (1991).

18 Billie Jo Hance, *supra* note 4.

19 James Creighton, Dept. of Energy, *Guidelines for Establishing Citizen's Advisory Groups* (1993).

20 Renn et al., *supra* note 12.

21 Helmut Jungermann et al. eds., *Die Analyse der Sozialvertraglichkeit fur Technologiepolitik: Perspecktiven und Interpretationen,* Munich: HTV Edition

around the purported inability of the public to understand complex data and their lack of experience. In an earlier study in the U.K. of the potential for incorporation of public values into siting decisions for hazardous plant, it was found that local authority planners believed non-expert locals had insufficient technical expertise to provide any useful input.[22]

Accountability

One review of "Community Advisory Committees" observed that the degree of influence of groups was varied and that, often, formal mechanisms to ensure accountability were not in place.[23] Linked to this is the issue that, if participants are not accountable, they will often reach conclusions or make decisions which are not financially or physically feasible. Other studies have drawn similar conclusions.[24]

Legitimacy of Group

There is no necessary assurance that the public will accept an "advisory group" to speak on its behalf. Furthermore, advisory groups may become elitist, or otherwise lose touch with constituencies, thus increasing the likelihood that the general public will not support any recommendations.

Representativeness

This is a key problem identified by many commentators. For example, one study defined the main criterion for success of Community Advisory Committee exercise as the incorporation of the views of a fully representative cross-section of the community into a development plan.[25] To this end, every effort was made to obtain a

Technik und Sozialer Wandel (1986).

22 Peter T. Allen & Louise O'Hara, **Siting Decisions Concerning Hazardous Chemical Sites: A Social-Psychological Approach, in Fourth European Congress of Psychology** 302 (Alexandra Hantzi & Maria Solman eds., 1995); Peter T. Allen et al., *Measuring and Using Public Values in Decisions on the Siting of Hazardous Installations,* EC Report for Contract EV5V-CT92-0071 (1995); L. O'Hara & Peter T. Allen, *The Divergence Between Experts and Lay People: Knowledge, Concerns and Values with Regard to Hazardous Chemical Sites, Risk Analysis and Management in a Global Economy,* SRA Europe; Proceedings of the 1995 Conference at 202 (1997); Renn, *supra* note 12.

23 Frances M. Lynn & G. J. Busenberg, *Citizen Advisory Committees and Environmental Policy: What We Know, What's Left to Discover,* 15 **Risk Anal.** 147 (1995).

24 O'Hara, *supra* note 22.

representative sample. However, despite best efforts, the panel selected was better educated and had a higher average income than that of the general population.[26]

The Problem of Representativeness

Part of this problem is the complexity that arises from the confusion of meanings elicited by the idea. While it appears that a clear conceptual distinction can be made between "representativeness" and "representation", the two meanings overlap in practice. From the point of view of social science, the problem of representativeness might be characterized as one similar to sampling. That is certainly the meaning in the example quoted above, and the explicit reasoning behind an approach that seeks to avoid participants having vested interests.[27] From the perspective of the neutral observer, "representativeness" seems to be about the selection of participants, but the notion of representation does not necessarily imply demographic identity. In liberal democracies the "representatives" need not be a microcosm of the constituencies that they represent, although problems do arise when disparities between the characteristics of representatives and their constituencies become evident. Some degree of parity is usually viewed as appropriate so that, for example, there may be calls for a group of government representatives to include people from ethnic or other minorities.

However, there are other aspects underlying the problem. While one clearly relates to the faithfulness of representatives to their constituency, two other issues are of importance. The first concerns the consequences of having an approximate demographic match for any of the procedures reviewed above and the second concerns the reasons for the appearance of "unrepresentative" groups. When it comes to the selection of participants in any procedure, those with power are likely to employ a discourse about the procedure which legitimizes their own position of opposition to change. Typically, this discourse contains two characteristic responses which relate to the above issues: the "expert

25 L. Kathlene & J. A. Martin, *Enhancing Citizen Participation: Panel Designs, Perspectives, and Policy Formation,* 10 **J. of Pol'y Anal. and Mgmt**. 46 (1991).

26 *Id.*

27 Renn et al., *supra* note 12.

versus non-expert opinion" debate on the one hand, and the "apathetic public" argument on the other. If a group of representatives actually reflects the general population then it is very unlikely that it will include relevant technical expertise. In contrast, if a group appears to consist of people with special interests, rather than a reflection of the local population, it may be taken to indicate a lack of concern on the part of that population.

With respect to the expert opinion element, it has been found that the most popular argument against the use of techniques to incorporate public values in planning decisions is that the public were incapable of making informed judgements about what was said to be a technical subject.[28] It is worth noting that these arguments obviously have some validity in the context of the technical evaluation aspects of certain proposals, and that this has been well recognized in attempts to produce more comprehensive participation procedures.[29] The point is that this sort of assertion seems to primarily be an argument against the whole notion of incorporating public input. However, because it attempts to set the agenda for appropriate decisions within the technical realm, it achieves its end while appearing to be about qualification for suitable input. Indeed, in this view, a representative sample, in the demographic sense, would almost entirely consist of unsuitable people.

The second element in the partisan discourse of the technocrat is more interesting. While this assertion commonly appears to be mobilized in defence of inactivity on the part of those making planning decisions, for example, as part of an argument about the limited usefulness of information provision, it does seem to hinder attempts at adequate participation overall. Clearly, the existence of disputes proves that the public is not completely apathetic but the argument does raise the issue of representativeness in a different form. When a structured process is put in place, the decision makers may attempt to get "demographic" type representation. However, as was noted above, they often fail. Furthermore, in most cases the dispute process gets underway with those people who present themselves. Thus one research question becomes: When people do come forward to pursue a dispute, how representative of the public are they?

28 O'Hara, *supra* note 22.

29 Renn et al., *supra* note 12.

McComas and Scherer, in their work on participation in public meetings, characterized the public in terms of activity levels with respect to given disputes.[30] In the "pyramid model" of public participation, a highly active but small number of policy elite are followed by a somewhat larger number of active people ("attentives"), and then a much larger number of residual non-attentive people. The boundaries between such groups are argued to be fluid, with people becoming more or less active depending on the stake positions in which they find themselves. Such seems to be the approximate empirical distribution in most examples of public involvement. The issue of similarity or difference among those groups is less clear. McComas and Scherer report differences but note that others have found broad similarity among the groups.[31]

One reference might be to examples from the literature on industrial negotiation. Here, the situation has at least one direct parallel: the great mass of people privy to a dispute are not particularly active in the conduct of the negotiations, formal or informal, but tend to rely on the local activists who call meetings, disseminate information and generally speak out against employers. Yet, in such cases, it would seem improbable that most people were indifferent to the possible outcomes of disputes. More likely is the interpretation that group leaders are seen as representatives of the mass of employees. Indeed, analyses of industrial disputes have charted the ways in which ad hoc "leaders" are deposed when the mood of the majority is thwarted by developments. It seems probable that most people rely on visible activists most of the time for the voicing of group concerns. One U.K. case, for example, reports finding considerable sympathy for Eco-warrior activists involved in the dispute.[32] Thus, a simple interpretation of representation in proportional demographic terms does not match the reality revealed in the social processes of disputes.

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30 McComas, *supra* note 5 (taking basic approach from J. D. Miller, *Scientific Literacy: A Conceptual and Empirical Review,* 112 **Daedalus** 29 (1983); J. D. Miller, **Reaching the Attentive and Interested Publics for Science, in Scientists and Journalists: Reporting Science as News** 55 (S. M. Friedman et al. eds.,1986)).

31 Kathleen G. Gundry. & Thomas A. Heberlein, *Do Public Meetings Represent the Public?,* **J. Am. Planning Ass'n.** 175 (Spring 1984).

32 Maria Simosi & Peter Allen, in this issue.

Another study discusses the legitimacy of links between delegates and mandates as a relation of identity.[33] When local authority representatives volunteer only legally-compelled information, they are blamed for violating a moral obligation to respond to constituents' need for information. This blaming, it is argued, demonstrates that people have internalized a normative ideal stressing that representative democracy is about the identity relationship between political representatives and citizens.[34] This implies that political representatives should not contribute to impositing a risk on the least well-off of their constituency. People may be happy to remain silent themselves if spokespersons, empowered to speak in their name, maintain identity with conferred mandates.[35] The public do not necessarily strive initially for participation but may when representatives seem to stray.

The social process, at least as far as it can be traced in the context of large scale and long lasting disputes, is one in which public sympathies are more or less efficiently reflected in the activities of the few and where the issue of representativeness shades into concerns over legitimacy. On the scale of individual disputes, the loss of trust and perceived legitimacy of activists on the part of the wider public mirrors the loss of trust in established institutions for decision-making. It comes about for similar reasons and reminds us that prescriptions for action in the social sphere are often thwarted by developments; what politicians cynically refer to as "events". It is also reminiscent of the useful distinction that is made between global and local concerns. In the general evolution of democracy in Western nations, the issues to be addressed by representatives are assumed to cover the whole likely or eventual range of issues within the defined jurisdiction. However, with increasing frequency, other specific systems are called for by a public concerned that their general political representatives are not sufficient to the task.



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33 Catherine Zwetkoff, *A Proposal for an Analytical Framework for Siting Conflicts, in Development and Evaluation of Procedures for the Resolution of Environmental Disputes*, EC Report for Contract ENV-CT96-0270 (1997).

34 *Id.*

35 *Id.*