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Challenges to the Aarhus Convention: Public Participation in the Energy Planning Process in the United Kingdom

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Abstract

This article examines the tension between the democratic right of public participation on specific environmental issues, guaranteed by European Law, and the degree to which it is being challenged in the UK as a consequence of recent approaches to energy infrastructure planning. Recent trends in UK government policy frameworks seem both to threaten effective public participation and challenge EU planning strategy, in particular those outlined in the Aarhus convention. The research outlined in this study involves an assessment of the changing context of planning and energy policy, in addition to recent changes in legislation formulation in the UK. The research findings, derived from an extensive interview process of elite stakeholders engaged in policy and legislation formulation in the UK and the EU provide a new categorisation system of stakeholders in energy policy that can be utilised in future research. The article concludes with a second order analysis of the interviewee data and provides solutions to increase public participation in the planning of energy infrastructure that emerge from the different perspectives.

Keywords

Public participation; Aarhus Convention; planning policy

‘The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you.’ (Arnstein 1969: 216)

This article examines new challenges related to public participation in the planning process and in particular, large projects centred on energy and transport infrastructure, focussing on policy and legislation formation in the UK. The study presents research findings, expressed in a new framework, demonstrating that there is a growing tension between the rapid need to plan, develop and construct an effective and integrated energy infrastructure in order to meet carbon emission reduction commitments, while, at the same time, ensuring that the planning process is deliberative and inclusive, with considerable public participation with which to build consensus. While all member states of the EU face similar challenges, the UK seems to be most transparent in pursuing policy that ignores EU wide agreements on public participation in the planning process.

Under the changes to planning regulations – as of yet untested - large energy projects, including nuclear, maybe fast-tracked through the planning process with limited public participation; however, without perceived legitimacy in process, and public participation observed in practice, such proposals are likely to lead to negative outcomes including protests and legal action by those who oppose specific elements of a proposal, apathy and limited understanding by potential beneficiaries and the disempowerment of the local communities affected by the plans. The consequences are that without the necessary structures to inform the public and build consensus, coupled with the legal right to challenge planning decisions that have not been sufficiently evaluated and deliberated in its public consultation, the planning processes is likely to be considerably slower, antagonistic and, at the same time, give disproportionate power to small but well organised interest groups.

PUBLIC PARTICIPATION IN THE PLANNING PROCESS

Public participation within the UK planning process is no longer limited series of local meetings, but involves a series of legally required procedures, as part of the planning process. These include the dissemination of key information concerning the details of the plan, public consultation and some attempted engagement related in specific details of the decision making process, particularly the inclusion of the views of those affected by a decision. These procedures are not detailed in specific legislation, but are generally considered to be effective if they are able to build consensus through deliberative action, usually focussing on the local community, but not to the exclusion of other interested parties (see Smith 1983). There are many options for public participation, but these can be divided into two types, depending upon the level of engagement and the flow of information: (1) lower level engagement, which involves top down communication and a one-way flow of information; (2) higher level engagement, characterised by dialogue and a two-way information exchange (Rowe and Frewer 2000).

While the most suitable method of public participation will depend on the specifics of a particular planning arrangement, more knowledge-based decisions (e.g. technical decisions) will require lower levels of participation than value-based decisions. Learning how to effectively communicate complex ideas to non experts is important, and by developing the public understanding of the issue, the public's capacity to enter debate will be enhanced (Frewer and Shepard 1998). Studies have been conducted on the best ways to present information (Golding *et al.* 1992), the best medium for transmitting information to a target audience (Chipman *et al.* 1996), and the best people to impart information (Frewer *et al.* 1996). Less research has been carried out on mechanisms for involving the public simultaneously at both higher and lower levels of input into decision-making. There is also a lack of research into the implications of the democratic right of participation in environmental issues under the Aarhus Convention. This article will examine the key implications of the tension between the right to participate in the planning process and the need to get the planning process completed effectively under challenging time constraints, and will develop a framework with which to address the tensions implied by these implications, as exemplified through energy infrastructure planning policy.

Public participation in planning is of importance from a legal perspective as it both adds value in terms of legitimacy and sets limits from a procedural perspective in particular in limiting the arbitrary power of the government or the institution that is the law-maker (Boyle and Chinkin 2007). Susana Aguilar Fernandez (2001) states that the basic EU principles of subsidiarity, shared responsibility and partnership –all linked to sustainable development – emphasise the value, need and requirement for enabling citizens, and in particular the local communities, to engage in environmental related decisions. In the context of US government agencies, Michael Kraft (1996) illustrates that public approval for specific types of planning, such as waste facilities, are unlikely to pass swiftly through the planning process if they do not provide sufficient opportunities for citizens to participate in critical judgements about acceptable levels of risk. It thus follows that it serves the interest of such agencies to support public engagement and, indeed, such agencies are beginning to advocate greater public involvement in their planning process to improve transparency and avoid policy failure (Kraft 1996: 205). Aguilar Fernandez (2001), however, notes that there is still only a limited success in public participatory programmes, arguing that much of the action taken by government agencies is reactionary and typically occurs at an advanced stage of the planning process, rather than being proactive from the beginning.

The UK's jurisdictions differ from the USA and most European countries from a public participatory level as their legal character, and in particular judicial review, are procedural in nature (see Harlow 2002). Decisions made are examined at first in terms of whether the correct procedure was followed and the protection of individual interests. In contrast, in other European countries the national

interest or considerations of reasonableness and proportionality are the key objectives. The introduction of National Policy Statements, able to over-ride local concerns, in the Planning Act 2008, indicates, then, that the environmental planning system and planning in general within the UK jurisdictions is moving towards a more continental European focus of national interest. This is important because, as Neil Hawke (2002) notes, policies make or definitively contribute to law both in the UK and the EU.

In the case of the EU, policies eventually become enshrined within law, and as such to ensure meaningful public participation, it is at the policy formulation stage that the effort should be made to engage with the public. In this way, as the law emerges from policy, any processes that follow from the law will already have taken significant opportunities to enrol public support. However, as policies tend to be created from a top-down process with little or no involvement from the public any such opportunities, and the benefits afforded by effective engagement measures, will remain unexplored.

While considerations of public participation and engagement apply to regeneration, infrastructure development and built environment planning in general, both in terms of the practical benefits of greater participation and the institutional requirements, public engagement in energy planning policy is particularly important for the UK at present, as a series of major energy infrastructure projects are required to meet the changing energy requirements. Many of the projects, from renewable energy to nuclear power, are controversial, in terms of their impact on the local environment, impact on local residents and the perceived risks they pose. As a consequence, there has been a return to prominence of energy planning research, not least because nuclear energy is back on the agenda, but such research tends to focus on public perceptions rather than considerations of public participation (see, for example, Reiner 2006; Tweena 2006; Pidgeon *et al.* 2008). It is not difficult to see why: identifying attitudes is, at least methodologically, relatively straightforward, while identifying the most relevant considerations from the many conflicting definitions and conceptualisations of participation is much more of a challenge.

The issue is not new and, indeed, there is literature on public participation in the decision-making process dating from the 1980s for example Brian Wynne (1982) and Richard Davies (1984), but the literature is somewhat limited. For example, Davies's research details public participation in Sizewell B nuclear power plant in Suffolk, although his study is almost wholly descriptive. Davies notes that the process was a success; the first time (along with Windscale) that the public had been centrally involved in decision-making for a nuclear energy plant, with previous decisions having been made by public servants and government ministers in private and with very little consultation. However, although Davies provides interesting comments on the role of public participation in the Sizewell B inquiry, he offers little more than review the inquiry itself, as indeed does Wynne (1982). Where research in public participation does go beyond description, for example in Frank Laird's (1993) analysis of participation and democracy in decision making, such reviews tend to be limited to the evaluation of secondary sources.

For this reason, this article is an attempt to adopt a different approach to assessing public participation. This approach will be outlined later in the analysis, however, in order to examine the issues of public participation in UK energy infrastructure planning, the case with which the approach will be exemplified, it will be necessary to give a critical overview of the energy policy context to the infrastructure planning it implies.

THE EMERGENCE OF A NEW UK ENERGY POLICY

The UK's current policy on energy infrastructure planning is undergoing a transition, as discussed in early sections of this article. This transition was greatly influenced by the 2002 Energy Review and, in turn, the 2003 White Paper *Our Energy Future: Creating a Low Carbon Economy* (DTI 2003). The 2002 and 2003 documents represent a shift in attitudes towards the UK's energy strategy, framed in terms of a response to commitments made by the UK government to reduce carbon emissions, and to assess energy security, with particular reference to the need to build a new energy infrastructure, including constructing a large number of renewable energy projects around the country and upgrading the UK's nuclear generation capacity, in response to the need to reduce dependency on fossil fuels for energy generation in the future.

In 2006 the UK government's Department of Trade and Industry produced another Energy Review, assessing the UK's progress towards the medium and long-term goals of the 2003 Energy White Paper. The 2006 review reinforced the need to build more large scale renewable projects and represented a shift in government attitudes towards nuclear energy, advocating an expansion of nuclear power, through Generation III nuclear power plants. In the 2007 White Paper, *Meeting the Energy Challenge*, the UK government set out its energy strategy, based on 'tackling climate change' and 'ensuring secure, clean and affordable energy' (2007: 6), a strategy which formed the basis of the 2008 Energy Act. Also in 2008, three other government outputs were to modify the UK's approach to energy and energy infrastructure planning: the White Paper on Nuclear Power; the Planning Act; and, the Climate Change Act and the key implication of each output will be noted.

The key provision of the 2008 Planning Act was the introduction of a new system for approving major infrastructure projects of national importance. The objective was to streamline these decisions and avoid long public inquiries (with an estimated saving of £300 million a year). This new regime means decisions are taken by a new independent Infrastructure Planning Commission, whose members are unelected, and who base decisions on new national policy statements (NPS). The hearing and decision-making process are rigidly bound to a timetable. The Act also specifically states that the system will be used for energy developments such as large scale renewable projects, and for nuclear power.

The White Paper on Nuclear Power, produced by the Department for Business Enterprise and Regulatory Reform (2008) states very clearly the modification to the UK government's energy strategy in relation to nuclear power:

The Government believes it is in the public interest that new nuclear power stations should have a role to play in this country's future energy mix alongside other low-carbon sources; that it would be in the public interest to allow energy companies the option of investing in new nuclear power stations; and that the Government should take active steps to open up the way to the construction of new nuclear power stations (BERR 2008: 10).

This was the first formal indication that new nuclear power generation would be developed as part of the UK's energy mix beyond 2020 and an indication that new nuclear power stations would be planned and constructed with an emphasis on being government driven.

Coupled with these two policy statements came the UK's 2008 Climate Change Act, which reconfirmed the UK's commitment to carbon emission reduction, which under the Kyoto protocol set a 12.5 per cent reduction of 1990s emission levels, and indeed extended and formalised the UK commitment to an 80 per cent reduction of carbon emission on 1990 levels by 2050. In 2010 the UK government policy on energy provision reached a state of tension. One tension point was that the parties comprising the new UK coalition government had expressed different manifesto commitments on energy, a second was that in Scotland and Wales, the devolved governments have

each expressed the importance of developing large scale renewable projects in their jurisdiction, along with each having also expressed opposition to new nuclear power stations. In 2011 a new White Paper: Planning our Electric Future, was presented by the Department of Energy and Climate Change, and the key elements of this white paper intended to become law in 2013 (DECC 2011: 13). Alongside the 2011 White Paper, the Renewables Roadmap details proposals for a major expansion of large scale projects by 2020. A careful analysis of these documents indicates that no extra provision for public engagement or participation is discussed at all. Indeed the documents are consistent with the limits to public participation affirmed by the 2008 Planning Act: to reduce the time and opportunities for public participation, and fast track energy infrastructure projects, although there is no explanation of the implications for the right to public participation in the planning process. Understanding the implications for the construction of energy infrastructure from this context is complex and requires an analysis from a wide range of expert perspectives. The following section will present a method with which to provide synthesised perspectives with which to undertake a second order analysis of energy infrastructure planning, emerging from our research programme.

TOWARDS A NEW FRAMEWORK

This section explains the case study structure developed as part of a new methodology applied in this study. This structure is derived from a new type of framework based on a classification of expert perspectives which emerged from a large number of elite interviews with many of the leading experts on energy policy and planning in the UK. The sample for the interviews was taken from 264 contacts made with different stakeholders involved in energy policy and legislation formulation, with a request-to-interview rate of 12.5 per cent and a final total of 33 interviews conducted. The average length of interview was around 40 minutes with 70 per cent being conducted by telephone and the remainder face-to-face. A “semi-structured” ethnographic approach was taken, using an interview guide with a prioritised list of topics to steer the discussion.

Interviews were conducted in order to deliver on three main objectives:

- (1) provide insight into the perspectives on current practice of public participation;
- (2) provide an evaluation of the range of views on legal and policy requirements for effective public participation;
- (3) determine the range of perspectives that exist on effective methods of public participation within the context of energy infrastructure planning

The case study was developed, derived from these insights, using a two step process: (1) the examination of policy formulation in the context of the energy planning debate within the UK and EU; (2) the critical analysis of elite interviews conducted with different categories of stakeholders in policy and legislation formulation.

The different types of expertise were analysed so as to provide a second order analysis of public participation by combining the complementary policy observations afforded by their different position within the network of planning experts. In this way, a small number of distinct perspectives emerged from the interview process. These perspectives have been synthesised and classified into six distinct categories as outlined in Table 1. Also shown in Table 1 are the amount of interviews secured in each category for this study and the type of interviewees.

Table 1: Identified categories, and Interviewee Sample

Category	No. of interviews conducted	Interviewees
1: Governance perspective (national and intra-national)	4	with EU Energy Commission, Members of the House of Commons, and Government institutions in the environment and energy sector
2: Legal perspective	4	with legal experts from leading UK Barrister chambers and Solicitor firms
3: Academic researcher perspective	6	with academic experts who research in energy and nuclear energy
4: Non-public sector practitioner perspective	4	with nuclear experts in private industry
5: Public sector practitioner perspective	5	with Energy Managers or Environment Officers in County Councils
6: Local governance perspective	10	with Councillors from districts where nuclear power plants are located, for example, Suffolk, Cumbria etc.

Each perspective is named after the stakeholder type most associated with the perspective, although it should be noted that this convention is an abstraction, used for the convenience of applying the framework rather than implying any unanimity among those who share an occupation.

POSITIONING THE PERSPECTIVES

There is a wide range of themes encompassed by issues of participation in energy policy decision making, and these can be indicated through the identification of themes, and the importance attributed to such themes that emerge in different planning perspective contexts. It is not the case that through such perspectives it is possible to contrast a range of distinct characterisations of public participation problems with six separate solution types. The different perspectives are more nuanced and subtle than separate “ideal types” would be and specifically emerge from agreement of those informed by experience on energy policy issues, which implies working within a dialogue with other perspectives. There is, of course, much consensus from the six categories that have been identified and synthesised in the course of this research. For example there is common consensus that EU and UK energy policies are beleaguered by a lack of direction, but in the detail there is a difference of emphasis from the different perspectives, which will inform this section. To return to the EU/UK example above, while there might be consensus among perspectives, there are differences of emphasis, for example, emerging from the governance, legal and academic perspectives there is a strong sense that there are no clear long-term strategies around which to build public participation into the planning process either from the EU or the UK. Other perspectives contrast UK and EU practices – with EU energy policy considered to involve much more long term planning, with open and inclusive decision making built in, contrasted with UK energy policy, which

is considered to be evolving and institutionally less participatory, in particular as suggested from the non public sector practitioner perspective.

There is consensus that confusion surrounding energy policy and the complex nature of the area mean there is limited scope for the public to get involved. Perspectives differ on the assessment of opportunities for participation: the legal perspective is sceptical that opportunities exist, although there is also the sense that the public were very reactive instead of being proactive, as emerged from the academic perspective. The non public sector practitioner perspective is in agreement but emphasises that most people are unaware of how to get involved in the formulation stage, in contrast with the local governance perspective, which suggests that people are not interested in getting involved at that stage of planning. The public sector practitioner perspective supports the view that people will only get involved if it emerges they are directly affected.

There is a consensus that the planning system in the UK is lengthy. The public sector practitioner, and the local governance, perspectives emphasise that the planning system itself is a major barrier and should be streamlined to make it faster. Other categories advocate that the current planning system with lengthy inquiries is working well, as the complex nature of the large energy infrastructure projects (particularly nuclear) means there should be time spent in delivering a decision. Nuclear energy is considered a long-term commitment, and one with potential implication for the UK taxpayer (academic and legal perspectives), and hence debate and lengthy processes to ensure all parties are heard should happen.

Public participation in the formation of legislation and consultation events is considered by all perspectives as too low, with the legal and local governance perspectives emphasising the low figures in general and local elections. The legal, academic, governance and non public sector practitioner perspectives, converge on the view that recent UK government consultation documents, likely to informing new legislation, and a strict interpretation of the participation requirements implied by the 2008 Planning Act, will lead to more Judicial Review cases before the Courts on the grounds of the right to fair hearings, privacy, or under the freedom of Information Act. Coupled with formal criteria for legal challenges, legitimacy also has to be seen in the areas of policy and legislation formulation stages and also the planning process – according to legal, academic, governance and non public sector practitioner perspectives.

Perspectives do, though, diverge in their emphasis on what causes the delays in the planning stages for large infrastructure. The governance, public sector practitioner, and local governance perspectives blame the time documents spend with centralised government for these delays, while the governance perspective additionally places emphasis on the general public and local communities. The legal and public sector practitioner perspectives also cite the failure of developers to engage with the public and also their failure to deliver a better up front product. The analysis will now turn to some of the recommendations and potential solutions to promoting public participation emerging from the synthesis of perspectives.

CONCLUSIONS AND RECOMMENDATIONS

As has been shown, there is consensus from among the key perspectives that the lack of forward planning in energy by the UK government, and this has contributed to the need for urgent action because of a looming shortage of low carbon energy provision within the UK energy mix. A number of key issues have been highlighted and a number of potential solutions have emerged from combining assumptions which have been drawn out of the different perspective categories.

While the public can be blamed for their lack of participation, there is consensus emerging from the perspectives that the under-funded consultation processes coupled with the inertia of the government to engage the public contributes to this apathy; the government at all levels is not being proactive, indeed there is a strong consensus that the consultation process is perceived as little more than a legitimisation process, designed to promote an outcome already decided before the consultation process began. A lack of creativity and proactive engagement with the public by planners and decision makers, coupled with cynicism regarding the power relations and touch points for impacting on the planning process within a consultation, conspires against public participation and leaves the public believing that the process lacks legitimacy, independence and, as a consequence, lacks the means to build consensus.

The failure to engage local communities at an early stage of a proposal means that government is not forcing the developers of large energy infrastructure projects to have better project proposals from the outset, while all the information that emanates from government on the issue is far beyond the grasp of those members of the public that would be most beneficial in enrolling as active participants within the planning process. Each perspective agrees that tangible improvements can be made to increase public participation but will require increased resources to do so, a concerted effort to involve the public from the outset, an overhaul of the planning system to encourage participation in addition to more education, greater access to a relevant level of information that is appropriately pitched for non specialists, as well as a range of incentives to increase public participation.

The details of such incentives diverge, with some perspectives emphasising the benefits of a relaxation of the planning laws, while other perspectives suggest clarifying the financial incentives and other benefits from the development of, and changes to, the nation energy infrastructure. Understanding the personal, community and national benefits of different energy provision strategies would be a necessary condition of repositioning energy as the type of trade-off policy issue that attracts interest from within affected communities. Instead, there is a growing consensus a that new approach to energy infrastructure planning and policy implied by a stricter implementation of the Planning Act 2008 threatens public participation in the UK further, and, if enacted to the letter of the law, would lead to a continuous flow of legal action by members of the public because of the failure of the UK government to adhere to legitimate democratic processes of public participation.

Although the long-term nature of the impact of energy infrastructure planning policy and legislation means that it is vital to the UK national interest to have active public participation, consensus emerged that an effective way of re-engaging with the public is to reconnect with EU-wide energy strategies. It is clear that energy policy within the UK is bound to various EU frameworks, such as the EU energy commission, binding climate change and renewable energy commitments, the EU emission trading scheme, and EU driven agreements, such as the Aarhus Convention. All of the latter illustrate that the EU remains a major driving force in key areas of energy policy within the UK. The level and effectiveness of public participation in energy policy operates quite well in terms of the current EU energy commission, and could, as a first step, be applied as a model to UK energy infrastructure planning, in particular as expressed by the governance, academic and legal perspectives.

Finally, all categories agree that improvements can be made to increase public participation and in this context many support a call for increased resources to do so. The legal and public sector practitioner perspectives emphasise the need for a more concerted effort to involve the public from the outset, and an overhaul of the planning system to encourage participation, supported by the non public sector practitioner perspective, although less so by the public sector practitioner perspective. The academic and local governance perspective place a strong emphasis on the need for education,

accessible information and incentives to increase public participation, while other perspectives converge on the view that emerging energy solutions, such as micro generation could provide innovative methods to increase public participation, and, indeed, this is where incentives have been proposed. Further, additional strategies have been suggested that have emerged through observing the successes and failures of other attempts to enrol public participation, for example, that the public should be consulted on a more 'what if' basis, and the language being directed at them as to how they are directly affected (local governance perspective) or the use of event based participation, such as citizen's juries (academic and legal perspectives).

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