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Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations

John Morison *

Consultation procedures are used increasingly in the United Kingdom and elsewhere. This account looks critically at consultation as presently practiced, and suggests that consulters and consultees need to do much more to ensure both the participatory validity and democratic value of such exercises. The possibility of a “right to be consulted” is examined. Some ideas from a governmentality perspective are developed, using the growth of localism as an example, to suggest that consultation is often a very structured interaction: the actual operation of participation mechanisms may not always create a space for an equal exchange between official and participant views. Examples of best practice in consultation are examined before consideration is given to recent case law from the UK seeking to establish basic ground rules for how consultations should be organized. Finally the promise of consultation to reinvigorate democracy is evaluated and weighed against the correlative risk of “participatory disempowerment”

The Growth and Role of Consultation

Consultations are becoming ubiquitous in modern governance, particularly in the United Kingdom which is the main focus of this account.¹ In part this is about trying to bring a closer democratic engagement in circumstances where formal electoral politics often seems sterile. Consultation, particularly where it can adopt the reach and immediacy of the internet through online engagement, seems to offer a direct way of bringing government nearer to the governed and a chance to reinvigorate democracy. Referendums may now seem to be a somewhat dangerous democratic instrument but consultations appear as a safer option for governments seeking a degree of democratic legitimacy. It often seems that there cannot be a legislative or policy proposal that is not preceded by some form of consultation. The traditional regime of

* School of Law, Queen’s University Belfast. The author would like to thank the participants at various conferences where these ideas were developed, various colleagues, including The author would like to thank the participants at various conferences where these ideas were developed, various colleagues, including Professors Gordon Anthony and Amnon Reichman, and the editor and anonymous reviewers for helpful suggestions.

¹There is of course a worldwide and international context for consultation. The United Nations Agenda 21 on sustainable development calls for “the broadest public participation” and urges “the active involvement of the non-governmental organizations and other groups” (see <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>). The European Commission is attempting to redress the disconnect with its institutions felt by many of its citizens through a variety of initiatives including a “Your voice in Europe” consultation webpage and its Citizens’ Dialogue initiative (see http://ec.europa.eu/yourvoice/index_en.htm, and <http://ec.europa.eu/citizens-dialogues/> (visited 14th February 2017). See also D Friedrich, *Democratic Participation and Civil Society in the European Union* (Manchester: Manchester University Press 2011).

Green paper followed by White Paper, with perhaps a little discussion with interested groups or lobbyists, has given way to a more elaborate processes seeking the views of a wider range of interests.² Despite the fact that, as Davidson and Elstub point out, the culture of democracy and nature of government structures in the UK have never been particularly suited to deliberation,³ there have been a variety of experiments over the last quarter century. These have involved citizen juries, deliberative polls and participatory budgeting, sometimes with an information and communication technology (ICT) element.⁴ However most consultations are more prosaic, with the online element restricted to a webpage containing a link to a .pdf document.

The UK Government's website page for "Consultations" lists 698 consultations published in 2016 alone, out of a total of 3,642 since the decade began.⁵ Devolution has intensified the emphasis on consultation. The Northern Ireland Act 1998 initially led the way through its s. 75 requirement that public authorities promote equality of opportunity, and consult widely about the effect of their policies on persons of different sex, religious belief, political opinion, racial group, age, marital status or sexual orientation, and those with a disability or with dependents. The Scottish Ministerial Code commits the Scottish Government "to develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation", and it has established a "Consultation Hub".⁶ Participatory budgeting too has received a boost in Scotland with a commitment in 2016 to spend an extra half million pounds in this way.⁷ In Wales there is not only a list of consultations online but the Council for Voluntary Action maintains a webpage detailing consultations from various

² See further J. Morison, "Models of Democracy: From Representation to Participation?" in J. Jowell and D. Oliver eds. *The Changing Constitution* 6th Edition. Oxford University Press (2007). Pp.134-156.

³ S. Davidson and S. Elstub, "Deliberative and Participatory Democracy in the UK" 16 *British Journal of Politics and International Relations* (2014) 367–385.

⁴ For example, in the case of participatory budgeting (PB) the Labour government published a draft PB strategy in 2008, stating it was its ambition that PB be used to fund housing and other projects in every local authority area by 2012 (see <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/communities/pdf/727993.pdf>). However, as the Department of Communities and Local Government, *Communities in the driving seat: a study of Participatory Budgeting in England: A Final Report* (DCLG 2011) indicates, this has fallen away as a national strategy, although experiments continue in local authorities and with the Scottish Government.

⁵ See https://www.gov.uk/government/publications?publication_filter_option=consultations (visited 14th February 2017).

⁶ See *The Scottish Ministerial Code* (2015) para. 3.2(c) and <https://consult.scotland.gov.uk> .

⁷ See the announcement at <http://news.gov.scot/news/councils-giving-more-power-to-people> (accessed 25th January 2016) and the website at <http://pbscotland.scot>.

sources where it offers to advise and to coordinate responses.⁸ The other consultation requirements in the original architecture for Welsh devolution are now updated in the Government of Wales Act 2006 which has a chapter from ss.72-82 entitled “Inclusive’ Approach to Exercise of functions” detailing how consultation should take place in relation to a whole range of schemes from local government to business, and regulatory impact to sustainable development. There are also particular areas where enhanced consultation is required. For example, the Planning (Wales) Act 2015 requires Ministers to make a statement on their proposals for public participation and a full report on its success.

Indeed this sort of approach, where specified areas of development are the focus for greater levels of consultation, is part of a more general trend. For example in England the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 give effect to the EU’s Environmental Impact Assessment Directive 2001/1/92 EU requiring public bodies to conduct a formal consultation process with both the public and a range of statutory consultees.⁹ At more general level the public sector equality duty created under the Equality Act 2010 requires a regime of impact assessments and consultations.¹⁰ As shall be discussed further below there are a number of initiatives developing ideas of “localism” which attempt to facilitate local engagement and the translation of proposals developed there into policy.¹¹ The Sustainable Communities Acts 2007 and 2011 provide a bottom-up mechanism to require central government to give effect to local authority proposals that arise from grassroots initiatives directed towards local sustainability and social well-being (defined in the Act as “the economic, social and environmental well-being of the authority’s area” and covering “participation in civic and political activity”). The Local Democracy, Economic Development and Construction Act 2009 imposes a duty on local councils to promote understanding of the democratic arrangements of the authority and how citizens can involve themselves.

All of these initiatives in particular areas suggest a continuing interest in some parts of some of the governments across the devolved United Kingdom in broadening and deepening the way in which they interact with citizens. However does this mean there is anything like a “right to be consulted”?

⁸ The Welsh Government’s consultation site can be found at <http://gov.wales/consultations/?lang=en&status=open>. The WCVA site is at <http://www.wcva.org.uk/what-we-do/policy-and-influence/consultations> (visited 30th September 2016).

⁹ See further the National Planning Policy Framework for England who provide guidance on consultation at <http://planningguidance.communities.gov.uk/blog/guidance/consultation-and-pre-decision-matters/>.

¹⁰ See further D. Pyper, *The Public Sector Equality Duty and Equality Impact Assessments*, House of Commons Briefing Paper Number 06591, (22 January 2015).

¹¹ See further the policies outlined at <https://www.gov.uk/government/policies/localism> (visited 18th January 2016) and G. Bentley and L. Pugalís, (2013) “New directions in economic development: localist policy discourses and the Localism Act”, *Local Economy*. (2013).

Is there a general “right to consultation”?

At the most general level, the Universal Declaration of Human Rights (UDHR) states that “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives,” and further that “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”.¹² This is of course less about consultation and more directed towards establishing a first generation basic political right along similar lines to the International Covenant on Civil and Political Rights (ICCPR) which enshrines a right of self-determination to all peoples, so that “they freely determine their political status.”¹³ The International Labour Organisation Convention 169 (ILO C169) on the Rights of Indigenous and Tribal Peoples in Independent States asserts a similar, very general level right to prior consultation for such peoples regarding development plans that may affect their “lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use”.¹⁴

At a national level there are sometimes more binding requirements to consult. These may arise out of particular statutory requirements and can give rise to challenge in the courts if not properly carried out. For example National Health Service providers and commissioners in England have a statutory duty to consult patients and the public on the range of health services and the manner of their delivery.¹⁵ Similarly, for example, the decision by a public body to outsource service provision can be challenged on judicial review grounds for breach of the consultation requirements under s3(1) of the Local Government Act 1999.¹⁶ Sometimes this duty to consult can go beyond a public body and rest on other entities too.¹⁷ However more interesting is the issue of whether there might be a general duty to consult outside of any statutory requirement. The general position was expressed in *R (Harrow Community Support Ltd) v Secretary of State for Defence*¹⁸ where the court

¹² Universal Declaration of Human Rights article 21(1), 21(3)

¹³ International Covenant on Civil and Political Rights, article 1(1). This article works in tandem with Article 25 (b) , which guarantees all citizens the ability ‘to vote and to be elected at genuine periodic elections’

¹⁴ The International Labour Organisation Convention 169 on the Rights of Indigenous and Tribal Peoples in Independent States, 1989, Article 7(1). Only some 20 countries have ratified this to date.

¹⁵ See Section 242(1B) of the National Health Service Act 2006, as amended by the Local Government and Public Involvement in Health Act 2007

¹⁶ See *R(Nash) v Barnett LB* [2013] EWCA Civ 1004. The Local Government Finance Act 2012 also introduces a requirement that local authorities publish and consult interested persons on any draft Council Tax Reduction Scheme and this too has given rise to litigation. See below.

¹⁷ For example, in certain circumstance an employer is required by the Collective Redundancies Directive to consult employees about redundancies and both the European Court of Justice and national courts have intervened on occasion to ensure the efficacy of such a process. (see *Junk v Wolfgang Kühnel* (Case C-188/03) and the Employment Appeals Tribunal decision in *Leicestershire County Council v UNISON*, UKEAT/0066/05/DM. A similar duty falls upon an employer who wishes to make certain major changes in a pension scheme.

¹⁸ [2012] EWHC 1921 (Admin). The claimants, residents of a tower block in Leytonstone in

summarized the law in the following terms:

“A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult.”¹⁹

The Supreme Court considered this recently in *R (ota Mosley) v London Borough of Haringey*.²⁰ Lord Reed took the view that there is “no general common law duty to consult persons who may be affected by a decision” but where there is a legitimate expectation of such a consultation, a common law duty arises. As Lord Reed put it

“A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation.”²¹

Lord Wilson in the same case pointed out that a duty to consult may arise “in a variety of ways” but in particular by the common law duty on a public body “to act fairly”.²² This is rather different perhaps from a democratic right to participation, and relates more to ideas about good administration and procedural fairness there. As Lord Wilson puts it, where the common law infers a duty to consult “the search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation”. On one reading this would seem to take this sort of consultation right out of a democratic, participatory classification – relating to hearing voice and maximising engagement - and into something more akin to a rule of law inspired right protecting individuals from arbitrariness. There is however some uncertainty about this in the different judgments within this case. Lord Reed (with the support of Lady Hale and Lord Clarke) took a slightly different view from that of Lords Wilson and Kerr and maintained that consultation in these

London, sought judicial review of the decision by the Secretary of State for Defence to deploy military personnel and a ground based air defense missile system on the roof of their building during the Olympics. Among the grounds for review argued was the failure to carry out an adequate consultation process. (Other grounds included challenges based on the public sector equality duty, Article 8 and Article 1, Protocol 1 of the ECHR.) The court accepted the government’s evidence that there was no alternative location for the missiles and that disruption and risk to the claimants would be minimal.

¹⁹ Ibid para 2.

²⁰ [2014] UKSC 56 para 35. See also discussion below of this case in relation to the nature and process required in a given consultation.

²¹ As Lord Reed continued, “the general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213”, Para 36.

²² Para 23.

circumstance was less about fairness and more 'to ensure public participation in the local authority's decision-making process'²³

This is an interesting and important distinction. If the courts are really suggesting that there is a common law right of *democratic* participation, and that it is the job of the judges to guarantee it, this is potentially an important development. It is one which may give further impetus to the existing consultation imperatives in government (as well as perhaps taking the courts into new constitutional territory). However overall it is not clear if this is something the courts are prepared to underwrite.²⁴ We know the courts are prepared to require that a consultation take place when statute prescribes one, or where trigger mechanisms such as a right, an interest or a legitimate expectation engage an idea of fairness. Also, as shall be discussed below, it is clear that the courts are willing to supervise the nature and style of participation and set minimum standards for conducting an existing consultation. However it is perhaps a step too far for the courts to take these ideas and expand them beyond the case where someone was directly and personally effected over an issue such as loss of liberty or livelihood, into an all-encompassing requirement for decision makers to engage in general consultation on any decision they may wish to make.²⁵

Consultation online – Citizen-led or Government directed

Away from the formality of government consultation requirements there remains an undoubted growth in citizen engagement, especially on line. This takes various forms but interest here is in participation and technology, and the definition adopted is that offered by Sæbø et al who refer to 'the extension and transformation of participation in societal democratic and consultative processes mediated by information and communication

²³ Para 38. See also below.

²⁴ This point was considered in some detail in another Supreme Court decision, *R (Osborn) v Parole Board* ([2013] UKSC 61, (known also as *R (Booth) v Same, In re Reilly*). This concerned a slightly different, but related, point about the purpose of procedural fairness and the basis on which it may require that a person is given an oral hearing in a decision about a matter concerning them. Here Lord Reed reviewed the case law which takes several directions. For some judges fairness in this context is about improving the decision-making and the utility of any oral procedure in doing so. For others (most notably Lord Hoffman in *SS Home Department v AF (No.3)* [2010] 2 AC 269, para 72) it is not only about improving the chances of reaching a right decision but also about avoiding the sense of injustice that a person who is denied a voice in a matter that concerns them closely may otherwise feel. Lord Reed endorsed this approach adding (with an unusual reference to academic dignitarian literature) the idea of the law paying respect to those who are the subject of its decisions. He also went on to relate this closely to the rule of law, and here perhaps the nature of this approach as having an individual rather than a general application can be seen.

²⁵ Indeed this would seem to engage debates about the proper constitutional role of parliament and the other legislative bodies, (as well as those to whom they give decision making powers in an administrative role). Are legislators, in Edmund Burke's famous terms, always subordinate to those who elected them or deputed only to represent them, and so subordinate to any more accurate expression of what they may want? (see further "Speech at the Conclusion of the Poll", in *Works* (1854) Vol. 1, p. 180).

technologies (ICT), primarily the Internet'.²⁶ This ICT consultation can be citizen led or government driven.

Where engagement is citizen-led it may be about general consciousness raising and the development of social movements.²⁷ Much of this enthusiasm from the citizen side may be a result of a belief in the efficacy of the online culture bringing the power of crowdsourcing, the participatory dynamic of open source working, and a sense that free, democratic speech can now be expressed through a mouse click.²⁸ The abundance of information that is made available, and the volume of communication occurring, can be suggestive of both openness in government and the democratic potential of citizens online.²⁹ There is a range of citizen inspired initiatives which can be quite focused. Often they offer the facility to start a petition.³⁰ These are interesting and potentially significant. At one level it seems to suggest that not only do networked communications afford everyone the opportunity to

²⁶ Ø. Sæbø, J. Rose, L. Skiftenes Flak (2008). The shape of eParticipation: characterizing an emerging research area. *Government Information Quarterly*, 25(3) (2008) pp. 400–428 at pp. 401-2.

²⁷ See further K Garrett, "Protest in an information society: A review of literature on social movements and the new ICTs", 9 *Information, Communication and Society* (2006) pp. 202-24. Research by SimilarWeb suggests the importance of traffic on Facebook in helping the leave campaign win the Brexit vote. See <https://www.similarweb.com/blog/brexit-traffic> (visited 29th June 2016).

²⁸ See further Y. Benkler (2006) *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven, CT: Yale University Press. (2006); C. Sunstein, *Infotopia: How Many Minds Produce Knowledge*. Oxford: Oxford University Press.(2006) and C. Shirkey, *Here comes everyone: the Power of Organizing without Organizations* Harmondsworth: Penguin 2009; M Lodge and K Wegrich, *The Californication of Government? Crowdsourcing and the Red Tape Challenge*, London: London School of Economics Discussion Paper No. 72 (2012).

²⁹ There are of course a range of critical views of this simplistic idea of a Twitter or Facebook revolution and many of these will be reviewed later. For now however it should be noted that criticisms focus in two directions. Firstly in relation to the idea that open government data is inevitably a driver for new accountability, transparency and new forms of citizen participation and action (see further the overview provided by T. Davies and Z. Bawa, (2012) 'The Promises and Perils of Open Government Data (OGD)', *Journal of Community Informatics*, Vol 8, No. 2 (2012) <http://ci-journal.net/index.php/ciej/article/vitw/929/955>). Secondly there is the view that many celebrated events around the Arab Spring and other important social movements are not really the result of online activism at all (see further E. Morozov *The Net Delusion: How Not to Liberate the World* London: Penguin 2012).

³⁰ See for example Change.org, 38 degrees, GetUp.org, Avaaz.org, or ipetition.com and Petitionbuzz.com which promise a facility to set up a petition in less than a minute. Sites such as <http://twibbon.com/freecampaigns> and <https://twitter.com/twition> provide a link into Facebook and Twitter and seem to approach petitioning as an add-on to social marketing or social networking. At a more organised, political level there is <http://www.campaigncentral.org.uk> which is a resource site containing "know-how" on how to use the internet to mobilise opinion. Petition (<https://www.gopetition.com>) describes itself as having no political affiliations but maintains a register of petitions in countries across the world and on topics from animal rights to youth issues as well as a repository of online petitioning tools.

contribute, participate and be heard but that people can be connected with one another and send strong and specific messages to governments. However at another level the TripAdvisor-style ratings that these outlets inspire remain a very mean / thin version of democratic power. Is civic duty really met by simply providing an email contact on a petition or clicking “like” on a website? What happens next? How do or should governments respond?

Governments generally are also often happy to be associated with online participation and the language of crowd-sourcing, openness and enhanced communication. This perhaps indicates their credentials as appropriate to a modern, web-based society.³¹ In various fields, particularly planning and the environment,³² there is particular interest in obtaining the benefits of citizen engagement, stakeholder knowledge, and enhanced legitimacy along with the sort of extended reach and interaction that consultation mediated by information and communication technology (ICT) can provide.³³ A range of ICT tools has been used at the experimental end.³⁴ However, as shall be developed later, this has provoked the criticism that the practice of online consultation often has been largely divorced from deliberative democracy theory,³⁵ and that the various mechanisms developed have not been sensitive to the different and particular political contexts in which they may

³¹ See J. Morison, “Gov 2.0: Towards a User Generated State?”, 73 *Modern Law Review* (2010) 551-77; V. Mosco, *The Digital Sublime: Myth, Power, and Cyberspace* Cambridge MA: MIT Press 2005); and the overview of the state of play provided by The United Nations, *United Nations e-Government Survey: E-Government for the People*, (UN: New York 2012). It should also be said the government e-democracy initiatives are concerned not only with consultation and deliberation but also encompass developments in e-voting, and opening up government by making public data available online, although these are beyond the scope of this article.

³² See further, for example, M. Sudlich, “Can the internet reinvent democracy?” *Irish Political Studies*, Vol. 26, No. 4, (2011) 563–577 and, in the planning context, E. Stern, O. Gudes and T. Svoray “Web-based and traditional public participation in comprehensive planning: a comparative study” 36 *Environmental Planning B: Planning and Design* (2009) 1067-85; E. Gordon and E. Manosevitch, “Augmented deliberation: merging physical and virtual interaction to engage communities in urban planning”, 13 *New Media and Society* (2011) 75-95; and the useful overview in D. Schulz and J. Newig, “Assessing Online Consultation in Participatory Governance: Conceptual framework and a case study of a national sustainability-related consultation platform in Germany”, 25 *Environmental Policy and Governance* (2015) 55-69.

³³ See further, S. Coleman and P. Shane (eds.) *Connecting Democracy* Cambridge: MIT Press 2011; B. Noveck, *Wiki-government: how technology can make government better, democracy stronger, and citizens more powerful*. Washington, DC: Brookings Institution Press (2009); S. Wright, “Politics as usual? Revolution, normalization and a new agenda for online deliberation”, *New Media and Society* (2012) 14(2) 244-261.

³⁴ See M. Kamal, “An Analysis of e-participation research: moving from theoretical to pragmatic viewpoint”, 3 *Transforming Government: People, Process and Policy* (2009) 340-354; and I. Susha and A. Grönlund, “eParticipation Research: systematizing the field” 29 *Government Information Quarterly* (2012).

³⁵ See further D. Schultz and J. Newig, “op cit n. 32 at p. 57.

operate.³⁶

The UK Government certainly is willing to associate itself with the directness and immediacy of new technology in this area.³⁷ This has been the case for some time and with different governments.³⁸ In practice, however, the story of engagement has shown an approach that is rather cautious and often carried out in a rather top down way.³⁹ This may be more of a consequence of the style and approach to political engagement that characterizes the British system rather than anything related to the perceived need to improve democratic engagement. Indeed as Davidson and Elstub report,⁴⁰ the political system in the UK is simultaneously weak in terms of democratic criteria relating to representation, accountability, participation and openness, and considered to be particularly in need of new participatory initiatives to overcome political apathy, repair trust and better connect people to government.⁴¹ However to date the main government initiatives have been rather simple, and on a mainly experimental level. There have been citizen juries,⁴² deliberative polls,⁴³ and assorted instances of participatory

³⁶ See M. Saward, "Enacting Democracy", *Political Studies*, 51, (2003) 161–179 and, more generally, C. Snow Bailard, *Democracy's Double-Edged Sword: How Internet Use Changes Citizens' Views of Their Government*, (Baltimore, MD: Johns Hopkins Press, 2014).

³⁷ One of the more egregious examples of the UK government wishing to be seen as in touch and responsive can be found with David Cameron's 'No 10 dashboard app', which was designed to provide real time feeds of financial and polling information to the UK Prime Minister. See further <https://www.gov.uk/government/publications/case-study-on-action-4-digital-capability-across-departments/action-4-case-study-digital-capability-across-departments--2#the-number-10-dashboard> (Accessed 25th February 2016).

³⁸ The New Labour Government elected in 1997 was enthusiastic about the potential to remake democratic politics online and this has continued with varying degrees of emphasis during the New Labour era and beyond. For example, a paper published by the Office of the e-Envoy, *In the Service of Democracy: A Consultation on A Policy for E-Democracy* (London: HM Stationery Office 2002) enthusiastically endorsed e-democracy as "using new technology to energize the democratic and political life of the nation" (p. 5). See also P. Dunleavy and H. Margetts, *Digital Era Governance: IT Corporations, the State, and E-Government* (Oxford: Oxford University Press, 2006); H. Margetts, 'e-Government in Britain—A decade on', *Parliamentary Affairs*, 59:2, (2006) 250–265; and G. Moss, and B. O'Loughlin, B. 'New Labour's information age policy programme: An ideology analysis', *Journal of Political Ideologies*, 10:2, (2005) 165–183.

³⁹ See G. Moss and S. Coleman, "Deliberative Manoeuvres in the Digital Darkness: e-Democracy Policy in the UK", *British Journal of Politics and International Relations*, Vol 16 (2014) pp. 410-427.

⁴⁰ S. Davidson and S. Elstub, op cit n. 3.

⁴¹ On the size and nature of the democratic gap to be addressed see further The Power Inquiry, *Power to the People: an independent inquiry into Britain's democracy* (2006) (available at <http://www.jrrt.org.uk/publications/power-people-independent-inquiry-britains-democracy-full-report>); G. Stoker, *Why Politics Matters: Making Democracy Work* Basingstoke: Palgrave Macmillan 2006; Hansard Society, *Audit of Political Engagement* 11 2014 (available at <http://www.hansardsociety.org.uk/research/public-attitudes/audit-of-political-engagement/>).

⁴² See further C. Delap, 'Citizens' juries: Reflections on the UK experience', *Participatory Learning and Action*, 40, (2001) 39–42; C. Lafont, "Deliberation, Participation, and

budgeting⁴⁴ - with various degrees of online involvement. In addition there have been special initiatives such as the Scottish National Conversation carried out over three years of the Scottish National Party's first term in office about the possibility of devolution,⁴⁵ and of course, the somewhat singular experience of Scottish Independence referendum.⁴⁶

The main thrust of e-participation strategies, however, has remained the e-petition.⁴⁷ In competition with the various citizen inspired initiatives, governments at various levels have sought to catch (and perhaps domesticate) the movement towards petitioning online. There are now Citizen Petition websites across all levels of government in the United Kingdom. At the European level there is the European Citizens' Initiative. Here a proposal from seven EU citizens based in seven member states, backed with at least one million signatories from across the EU member states, will receive "careful examination" by the Commission – although it "is not obliged to propose legislation as a result of an initiative".⁴⁸ The current UK Government and Parliament site lists 27,200 petitions submitted by five

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⁴³ R. Luskin, J. Fishkin, J. S. and R. Jowell, 'Considered opinions: Deliberative polling in Britain', *British Journal of Political Science*, 32, (2002) 455–487.

⁴⁴ See further Department for Communities and Local Government, *Communities in the driving seat: a study of Participatory Budgeting in England Final report* 2011 (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6152/19932231.pdf); A. Röcke *Framing Citizen Participation: Participatory Budgeting in France, Germany and the United Kingdom*, Houndmills: Palgrave MacMillan 2014, chapter 6.

⁴⁵ See Scottish Government (2009) *Your Scotland, Your Voice: A National Conversation* (Edinburgh: Scottish Government 2009) which describes an inclusive process drawing upon access to Ministerial blogs, and audio and video recording of events but cf. M. Harvey and P. Lynch, (2012) "Inside the national conversation: The SNP government and the politics of independence 2007–2010", *Scottish Affairs*, 80 (2012) 91–116 who offer a more cynical view of the process.

⁴⁶ See further S. Tierney, "Direct democracy in the United Kingdom: reflections from the Scottish independence referendum" *Public Law* (2015) 633-651; "Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum" *Political Quarterly* 86 (2015) 226-233; and N. McGarvey, "The 2014 Scottish Independence Referendum and Its Aftermath" *Social Alternatives* 34.3 (2015): 34-40; S. Quinlan, M. Shephard, L. Paterson "Online discussion and the 2014 Scottish independence referendum: Flaming keyboards or forums for deliberation?" *Electoral Studies*, 38 (2015) 92–205.

⁴⁷ See the overview of the development of the e-petition in S. Wright, "E-Petitions" in S. Coleman and D. Freelon, *Handbook of Digital Politics* (Cheltenham, Edward Elgar 2015) and P. Panagiotopoulos and T. Elliman, "Online Engagement from the Grassroots: Reflecting on over a Decade of ePetitioning Experience in Europe and the UK" in Y Charalabidis and S. Koussouris (Eds.) *Empowering Open and Collaborative Governance: Technologies and Methods for Online Citizen Engagement in Public Policy Making* (Berlin Springer 2012). Pp. 74-94.

⁴⁸ See further <http://ec.europa.eu/citizens-initiative/public/basic-facts>.

or more UK citizens and details the 2,607 that are open for signature.⁴⁹ If any of these reaches 10,000 signatures a “response from the government” is offered, and if 100,000 signatures are achieved a petition “will be considered for debate in Parliament”. This seems redolent of mediaeval rituals where the common people petitioned their masters - and perhaps about as effective. Indeed it may close down dissent and divert activism as people remain disconnected from others with the same views in contrast to real political movements which bring people together to create energy for change.

Nevertheless the turn towards participation through petitioning continues. The devolved administrations in Edinburgh and Cardiff also have petition sites, although Northern Ireland currently does not.⁵⁰ Indeed the Scottish Government led the way here, although one study found that even here, in its most advanced form, the simple presence of a new opportunity for political involvement does not guarantee enhanced participation.⁵¹ Many local authorities in Great Britain too have petition sites and, as was seen above with consultation duties more generally, there is also a trend towards requiring petitions in particular areas of activity in an attempt to develop a sense of connectedness and interactivity between the governors and the governed. A central example of this was to be found in Chapter Two of the Local Democracy, Economic Development and Construction Act 2009, which required local authorities in England to make available a Citizens’ Petition and e-Petition mechanism, and to act upon it. Much of the detail of this procedure has been replaced by the Localism Act 2011. However this in itself is interesting and significant as this “new localism” as it is termed provides an important example of very significant mechanism of government – and one which has consultation as firmly central to its operation.

⁴⁹ See <https://petition.parliament.uk/petitions?state=all> (visited 14th February 2017). This figure includes the petition requesting a second EU referendum which attracted more than four million signatures and was debated in the House of Commons HC Debs Vol 614, 3 September 2016, and the petitions calling for President Trump to be invited and not be invited to make a state visit to the UK which attracted nearly 310,000 and 1.85 million signatures respectively.

⁵⁰The Scottish Parliament’s petition site is at <https://www.parliament.scot/gettinginvolved/petitions/> (visited 3rd October 2016) and the Welsh Assembly site can be found at <http://www.assembly.wales/en/gethome/e-petitions/Pages/e-petitions.aspx>. Also see further C. Bochel, “Petitions: Different Dimensions of Voice and Influence in the Scottish Parliament and the National Assembly for Wales”. 46 *Social Policy & Administration*, (2012) pp. 142–160; “Petitions Systems: Contributing to Representative Democracy?” 66 *Parliamentary Affairs* (2013) pp. 798-815. Northern Ireland does not yet have a direct petitioning mechanism although the Assembly there has commissioned a report considering the options. See further the Procedure Committee debate on the 1st March 2016 reported at <https://www.theyworkforyou.com/ni/?id=2016-03-01.3.1&s=procedure+committee+northern+ireland+petitions#g3.12>

⁵¹ Carman draws upon survey evidence to conclude that “Just because new, innovative methods of participation are made available to the public it does not mean that the playing field suddenly becomes level and that ‘critical citizens’ will spontaneously shed their cynicism.” C. Carman, “Barriers are Barriers: Asymmetric Participation in the Scottish Public Petitions System”, *Parliamentary Affairs* (2014) 67 (1): 151-171 at p. 168.

New Localism: A governmental strategy enlisting the governed through participation

Despite the (arguable) demise of formal local government, ideas of localism have been around for some time as “a focus for policy making and a primary building block for democracy”.⁵² Under the Coalition Government, and the majority Conservative Government of more recent years, there has however emerged what one critic has described as “a new grammar of localism” – albeit one which “masks a contextual history of centralism”.⁵³ In England much of this localism agenda is centred around the development of plans, made in association with “the community”.⁵⁴ (There is a different and contrasting narrative over localism in Scotland.⁵⁵)

Along with wider, more eye-catching reforms such as a general power of competence for local authorities, the election of mayors, and the extension of the Free Schools scheme, this new localism in England contains an agenda of “community empowerment”. Much of this is expressed in terms of “community rights”.⁵⁶ Among those introduced are a Community Right to Challenge, enabling communities to challenge and take over public services;

⁵² N. Bailey and M. Pill, “The Continuing Popularity of the Neighbourhood and Neighbourhood Governance in the Transition from the ‘Big State’ to the ‘Big Society’ Paradigm” *Environment and Planning C: Government and Policy*, (2011) vol. 29, 5: pp. 927-942 at p. 927.

⁵³ G. Bentley, “New directions in economic development: Localist policy discourses and the Localism Act”, *Local Economy* (2013) 28(3) 257–274 at p. 270.

⁵⁴ See further J. Rees and N. Rose, “New ‘new localism’ or the emperor’s new clothes: diverging local social policies and state–voluntary sector relations in an era of localism” *Voluntary Sector Review* 61 (2015) 81-91; N. Bailey and M. Pill “Can the State Empower Communities through Localism? An Evaluation of Recent Approaches to Neighbourhood Governance in England”, *Environment and Planning C: Government and Policy*, (2015) 33 pp. 289-304; S. Davoudi and A. Madanipou (eds.) *Reconsidering Localism* London: Routledge 2015; M. E. vans, D. Marsh, and G. Stoker. 2013. “Understanding Localism.” *Policy Studies* 34 (4): 401–407.

⁵⁵ The Scottish outworkings of the localism agenda are following a slightly different course via the Community Empowerment (Scotland) Act 2015 which puts community planning on a statutory basis where it is to operate within a National Performance Framework and involve a range of designated “community planning partners”. See SPICe Briefing,, Community Empowerment (Scotland) Bill 22 September 2014 14/58 available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-58_.pdf. According to Rolfe this is a substantially collaborative approach where there is some attempt from the Scottish Government to limit the danger of agency power turning participation into manipulation by providing communities with legal powers around voice and asset transfer. “Divergence in Community Participation Policy: Analysing Localism and Community Empowerment Using a Theory of Change Approach”, *Local Government Studies*. Vol. 42:1, (2016) 97-118. In Wales and Northern Ireland this localism agenda has been has not been applied directly see further N. Clarke and A. Cochrane, “Geographies and politics of localism: The localism of the United Kingdom’s coalition government” *Political Geography* 34 (2013) 10-23

⁵⁶ See further Department for Communities and Local Government, *You’ve got the Power: A Quick and Simple Guide to Community Rights* (2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244635/130924_You_ve_got_the_power_accessible.pdf.

a Community Right to Bid, enabling communities to bid for local assets and challenge and take over public services; a Neighbourhood Planning Right, allowing communities to control planning for their own area; and a Community Right to Build, permitting communities to instigate local house building. Whether these are correctly termed “rights” in the sense of being a general, justiciable entitlement attached to identifiable individuals or groups is perhaps debatable. However what is clear is that within this “new localism” generally there is a strong consultative element.

For example, within the planning and development process local plans are an increasingly important part of the process. While there is considerable flexibility for local planning authorities in how they carry out the initial stages of plan production, they must comply with certain specific consultation requirements in law. These can be found in regulation 18 of the Town and Country Planning (Local Planning) (England) Regulations 2012 but their effect can be best appreciated by visiting the extensive website of the National Planning Policy Framework for England with its online planning practice guidance.⁵⁷ Here there is detail on gathering evidence, preparation of the Local Plan and effective discussion and consultation with local communities, businesses and other interested parties. This consultation exercise must correctly identify emerging options as “issues and options”, “preferred options” or “pre publication”, and make clear how any consultation fits within the wider Local Plan process and with the commitments in the “Statement of Community Involvement”.⁵⁸

While the details of this process may seem somewhat esoteric, this wider localism, enlisting the community through consultation, is clearly a new form of governance.⁵⁹ It is one that is perhaps understood best in terms of governmentality. This is an approach to understanding power and its operation by focusing less on the state, sovereignty and law and more upon how the micro power relations that can be found throughout society operate to create possibilities, shape ways of thinking and inform “technologies of government”.⁶⁰ The neologism “governmentality” was developed by Michel

⁵⁷ See <http://planningguidance.communities.gov.uk/blog/policy/>.

⁵⁸ Para 155 of the Guidance on plan-making sets the tone here as it declares “Early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is essential. A wide section of the community should be proactively engaged, so that Local Plans, as far as possible, reflect a collective vision and a set of agreed priorities for the sustainable development of the area, including those contained in any neighbourhood plans that have been made.” See http://planningguidance.communities.gov.uk/blog/policy/achieving-sustainable-development/plan-making/#paragraph_150

⁵⁹ See further, N Rose, “The Death of the Social? Re-Figuring the Territory of Government.” *Economy and Society* 25, 3 (1996): 327–356; *Powers of Freedom: Reframing Political Thought* Cambridge: Cambridge University Press 1999, Chapter 5.

⁶⁰ Technologies in this context refers to all the means, mechanisms, techniques and methods used in governance - from ideas of information, statistics, databases and economy to techniques such as accounting, auditing and managing – which render reality thinkable, and therefore governable. See further, M. Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, Sage 2010) and 269–70. B. Baez, *Technologies of Government: Politics and Power in the “Information Age”* (Charlotte, NC: IAP 2014)

Foucault to capture the irreducible connection between practices of government and the styles or modes of thought underpinning those practices.⁶¹ In contrast to elements of Foucault's earlier work, which emphasized the technologies of power and domination, the later governmentality approach looks beyond the actions of the state.⁶² It does so to give attention to emphasize the way in which subjects turn themselves into subjects, and to give attention to the activities of other forces in wider society and their role in directing conduct. A governmentality approach looks at all the strategies, techniques, and procedures through which different forces and groups attempt to render their programmes operable in a wider exercise of governance. It suggests that in addition to action through law, sanctions, budgets, and administrative action, there is the important quality of the freedom of the subject (government of the self). And the approach focuses on how this freedom is managed. In contrast to simple domination, which involves crushing the capacity for action of the dominated, government—properly understood here—entails recognizing that capacity for action, and mobilizing it. Government here involves understanding how those who are to be governed think and act, and using and shaping this in order to guide them in the desired direction. As Foucault expresses it, 'the exercise of power is a "conduct of conducts" and a management of possibilities'.⁶³

The governmentality approach thus seeks to locate and uncover what makes a given exercise of power both possible and intelligible. It finds its answers in exploring the multiplicity of interactions, confrontations, struggles and transformations whereby all those who are both the subject and author of power come together to form a chain or system that comes to be embodied, albeit in unstable ways, into ways of thinking, state systems, laws and various social hegemonies. Arguably, in the case of local planning, central government is instituting a regime of "government through community" whereby it is shifting responsibilities onto communities in a development that began with the Big Society agenda, and has been pushed forward in new ways by the economics of austerity within a wider agenda of neoliberalism.⁶⁴ Within an understanding of power that looks at all the practical mechanisms, the details of the technologies of government, and all those ways of thinking and engaging with others within a wider exercise of governance, this is clearly a new governing strategy.⁶⁵

⁶¹ See further, M. Foucault, *Security, Territory, Population: Lectures at the College De France 1977-1978* (ed. M. Senellart New York: Picador 2009 at p.p 108-9.

⁶² See further S. Elden, *Foucault's Last Decade* (London: Polity 2016) and *Foucault: The Birth of Power* (London: Polity 2017)

⁶³ M Foucault, "The Subject and Power" in JD Faubion (ed) *Michel Foucault, Power: The Essential Works* Vol. 3 (Allen Lane Penguin Press 2000) 341.

⁶⁴ See further J. Clarke and J. Newman, "The Alchemy of Austerity." *Critical Social Policy* 32 (2012) 299–319.

⁶⁵ See further N Rose and P Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173.

Local communities here are being constructed as units of governance. They are however being made up in particular ways and for certain purposes. Communities in this sense have little connection necessarily with existing, lived understandings of how place and identity can confer meaning to those who inhabit a geographical area.⁶⁶ The legal construction of these local communities seems rather to involve an attempt, as Layard describes it, “to create rather fixed, static, territorial units rather than reflecting an inter-linking network of scales of decision making.”⁶⁷ It is a process that creates a local unit legally, and establishes it as site for governance, within a wider context where self-government is preferred to central government, and the individual consumer operating within the democracy of the marketplace is seen as the main model.⁶⁸ As Lowndes and Pratchett see it, “on the one hand, communities are being asked to take responsibility for creating new markets in areas of public service, whilst on the other hand their influence routes are increasingly individualized and marketized.”⁶⁹ This aggregative approach is one where communities are made up, sometimes quite arbitrarily – either spatially or through the exercise of one or another of the “Community Rights” on offer - or simply by self-selected groups of residents and activists. As Layard explains, once this “local” is legally constructed and validated through these mechanisms, it takes on a new administrative and political identity (even though it may be disguising various subgroups or features which are not reflected in this construct). It becomes something that can make decisions itself within a process where what is now seen as neutral, “local knowledge” can be given priority.⁷⁰ The effect of this can be, as Layard points out - in the context of the vulnerability of residents in multiple occupancy housing to vested local interests, although the point has wider application too - exclusionary, non-egalitarian, regressive and even contrary to human rights standards.⁷¹ It is also perhaps “anti-democratic” in so far as the consultation process has privileged one set of voices through the construction of a engagement mechanism that hears only some of the voices that might be relevant, while marginalizing or excluding others. Indeed, it is perhaps also “anti-political” too insofar as such individualized, aggregative approaches preclude the educative element of a more deliberative approach of the classical style⁷² let alone real pluralist debate or disagreement.

⁶⁶ See further, for example, D. Massey, *For Space* (Sage: London, 2005).

⁶⁷ A. Layard, “The Localism Act 2011: What is ‘Local’ and how do we (legally) construct it?” *Environmental Law Review*, Volume 14 (2012) pp. 134- 144 at p. 135.

⁶⁸ See S. Rolfe op cit n.55. .

⁶⁹ V. Lowndes and L. Pratchett, “Local Governance under the Coalition Government: Austerity, Localism and the ‘Big Society’.” *Local Government Studies* 38 (2012) 21–40 at p. 37.

⁷⁰ A Layard, “Law and localism: the case of multiple occupancy housing:”, *Legal Studies*, Vol. 32 No. 4, December 2012, pp. 551–576.

⁷¹ Supra pp. 571-575.

⁷² See further Lowndes and Pratchett op cit n. 69 pp.28-9 and the classic deliberative approach as set out in the overviews offered by J. Dryzek, *Foundations and Frontiers of Deliberative Governance*. Oxford: Oxford University Press. (2010) and D. Thompson,

This is one important example of the wider context in which government consultation takes place. It perhaps illustrates that there is very much more than a simple interaction or solicitation of views when governments consult. It makes a link to the type, nature and role of citizenship that is presupposed by, and in, the wider consultation mechanism. It should not be thought the process of consultation is ever without a wider determining agenda or that consultation is a straightforward process limited only by its technical effectiveness in gathering opinions.

The “democratic adequacy” of Government Consultations

Consultation may take one of the many forms noted earlier but whatever means is used it is clear that there is more going on than a straightforward exercise in gathering opinion. The consultation method presupposes a type of citizenship. An online consultation where there is a document for comment, for example, does not go out into a void where interested, engaged and public spirited citizens (somehow reflective of the composition of wider society) perform their civic duty and respond in the evenings after work.⁷³ Instead, as was seen with the localism example, the type and nature of the consultation presupposes a particular sort of participant and helps to create, validate and instantiate that participant within a wider governance regime. But beyond this there is also a relationship between consultation and some wider ideas of democracy and this must be explored.

At a general level, where the nature and quality of democracy is reviewed, there is a very considerable literature.⁷⁴ Fiskin suggests however that there are four basic forms of democracy: Competitive Democracy, (2) Elite Deliberation, (3) Participatory Democracy, and (4) Deliberative Democracy.⁷⁵ Fiskin is of course part of the general revival of deliberative democracy as urged by a variety of theorists who follow an agenda set by Habermas.⁷⁶ He advocates an idea of democracy as collective will formation in preference to those versions of democracy which are either, in Schumpeter’s famous

“Deliberative Democratic Theory and Empirical Political Science”, *Annual Review of Political Science*, Volume 11, (2008) 497–520.

⁷³ P. Leith and J. Morison, “Communication and dialogue: what government websites might tell us about citizenship and governance”, *International Review of Law, Computers & Technology*, Volume 18, (2004) pp. 25-35.

⁷⁴ See further E. Brodie, N. Cowling, A. Nissen, E. Paine, V. Jochum, and D. Warburton *Understanding Participation: A Literature Review*. London: Involve. (2009).

⁷⁵ J. Fiskin in “Making Deliberative Democracy Practical: Public Consultation and Dispute Resolution”, *Ohio State Journal on Dispute Resolution*, Vol 26, (2011) 611- 626 at 618.

⁷⁶ This more general movement is represented by, for example, B. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: Uni of California Press 1984) C. Pateman, *Participation and Democratic Theory* Cambridge: CUP 1970, J. Fishkin *Democracy and Deliberation; New Directions for Democratic reform* (New Haven Yale Press 1991). Much of this develops the agenda set by J. Habermas, *The Structural Transformation of the Public Sphere* Cambridge MIT Press 1989 with an idea of strong democracy requiring “enlarged thinking” within a public sphere of “thick citizenship”.

phrase,⁷⁷ “a competitive struggle for the people’s vote”, or an elite deliberation by a chosen body, or a version of democracy that emphasizes mass participation and equal counting. This emphasis on the type and purpose of any democratic engagement is important and should condition any approach to consultation.

An alternative way of looking at the same issue involves considering the type of deliberative public space created and its democratic nature. Fung sees there being a wide variety of mini publics involved in any consultation and these stand in for the wider public in some sort of representative role.⁷⁸ These mini publics maybe be constructed for different purposes; they may have an educative, advisory or problem-solving function, or even a more ambitious participatory governance role. The nature and role of the public space created ushers in a whole series of choices about how to recruit participants, the subject, style and length of the deliberation, and much else besides. Each of the choices made has an impact on the nature and quality of any exercise in democracy. Another important distinction lies with the difference between deliberative as distinct from participatory democracy. Deliberative democracy can be seen as a form of participatory democracy but it is distinct from it in so far as with the former the emphasis remains on public reasoning as a central element of public decision-making while participatory democracy is concerned more with the engagement of citizens, and the variety, breadth and depth of democratic involvement.⁷⁹

While there may be elements relating to deliberation and problem-solving, and even inter-connected systems of public reasoning, consultation is mainly about hearing and being heard.⁸⁰ In terms of Arnstein’s famous “ladder of participation”, consultation is on rung 4 or 5 (of 8) where participation is allowed but limited, and there is no assurance that change will follow because the right to decide is maintained by those who hold power.⁸¹ Nevertheless the

⁷⁷ See J. Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge; New edition 1994, originally published 1942).

⁷⁸ See further A. Fung, “Survey Article: Recipes for Public Spaces: Eight Institutional Design Choices and their Consequences” *Journal of Political Philosophy* Vol. 11, (2003) pp. 338-367.

⁷⁹ See further C. Pateman, “Participatory Democracy Revisited” *Perspectives on Politics* Volume 10 (1) (2012) 7-19 and M. Böker & S. Elstub “The Possibility of Critical Mini-Publics: Realpolitik and Normative Cycles in Democratic Theory”, *Representation* Volume 51 (1) (2015) 125-144. Current trends in what is described now as the “fourth generation” of deliberative democracy are developing a “systemic turn” where the focus is on how to secure deliberation on a mass scale and on the structures needed for this deliberation in multiple, diverse but interconnecting spaces. See further S. Elstub S. Ercan and R. Fabrino Mendonça, “Editorial introduction: The fourth generation of deliberative democracy”, *Critical Policy Studies*, Volume 10 (2) (2016) 139-151.

⁸⁰ See J. Morison, “The Democratic Dynamics of Government Consultations: Speaking Freely and Listening Properly” in E-M Svensson, M. Edstrom and A. Kenyon, (eds.) *Blurring the Lines. Market-driven and Democracy-driven Freedom of Expression* (Gothenberg: Nordicom 2016). Pp.79-89.

⁸¹ See further S. Arnstein, “A Ladder of Citizen Participation,” 35 *Journal of the American Institute of Planners*, (1969) pp. 216-224 and some of the revisions to this offered at <http://www.nonformality.org/wp-content/uploads/2011/07/Participation-Models-20110703.pdf>. According to Arnstein, it is only further up the ladder that citizen power

modern turn towards consultation combines with the internet age, to seem to open up possibilities of speed, reach, economy and interaction that were unimaginable when Arnstein was writing. However, the online quality of any consultation does not automatically make an interaction more (or indeed less) democratic. Clearly there are many things going on when governments and citizens are interacting online, and there is no ideal version of interaction towards which all mechanisms should aspire.⁸² However, at a general level, Coleman sees the type of technology used as reflecting the conception of citizenship and the nature of civic practices within any given polity.⁸³ Schulz and Newig review several attempts to classify online interactions in terms of their democratic qualities.⁸⁴ Others attempt to analyse the communication flows involved for their level of engagement.⁸⁵ However perhaps the most revealing insight comes from looking at so-called best practice.

Best practice in consultation

At a practical level there are a series of guides available.⁸⁶ An examination of these can be quite revealing. There seems to be a basic divide between

increases with increased degrees of decision-making. Only on rung (6) "Partnership" are citizens able to negotiate and engage in trade-offs with traditional power holders, and at the topmost rungs, (7) "Delegated Power" and (8) "Citizen Control", citizens obtain the majority of decision-making seats, or full managerial power.

⁸² See further C. Skelcher and J. Torfing, "Improving democratic governance through institutional design: civic participation and democratic ownership in Europe". 4 *Regulation and Governance*, (2010) pp. 71–91.

⁸³ S. Coleman "Making the E-Citizen: A Sociotechnical Approach to Democracy" in S. Coleman and P. Shane (eds.) *Connecting Democracy: Online Consultation and the Flow of Political Communication* (Cambridge Mass: MIT Press 2012). As he points out, "an authoritarian regime might value surveillance technologies such as cctv more than a content-sharing media such as YouTube while a populist democracy might value plebiscitary technologies such as instant opinion polls while more deliberative democracies would value technologies that bring people together irrespective of distance to facilitate mass deliberation while at the same time distrusting technologies owned or controlled by interested minorities or groups with a motive to skew or frame public discussion" (p. 390).

⁸⁴ See Schulz and Newig op cit n. 32. A United Nations model distinguishes between e-information, e-consultation and e-decision-making., where e-consultation refers to the inclusion of citizens in discussions of policy topics, with e-decision-making involving a more direct influence of citizen input (United Nations, *UN Global E-Government Survey 2003*. N. York: 2003). United Nations. Jiang and Xu (2009: 179) add the level of e-discussion to this to differentiate simply collecting opinion collection from more interactive communication. (M. Jiang and H. Xu, "Exploring online structures on Chinese government portals: citizen political participation and government legitimation". *Social Science Computer Review* Vol., 27 (2009) pp. 174–195. Other models find yet more levels reaching up towards e-empowerment but as Schulz and Newig remark, most of these models share a normative orientation towards direct democracy and this can lead to disappointment as most government websites display rather few opportunities for deliberation and discussion (p. 57). See also L. Dahlberg, "Re-constructing digital democracy: an outline of four 'positions'", *New Media and Society* (2011) 13(6): 855–872.

⁸⁵ G. Rowe and L. Frewer, "A typology of public engagement mechanisms". *Science, Technology and Human Values*, Vol. 30 (2005) pp. 251–290.

⁸⁶ See the review of various guides at <http://www.involve.org.uk/blog/2012/10/01/how-to-consult-great-guides/> (visited 26th May 2016).

those designed to ensure that the consulters are protected from challenge, and others, more expansively designed to attempt a fuller engagement. However even within the later category often there is very little about the relationship to wider theories of democracy, understandings of participatory decision-making or even the purpose of any consultation, either in general or in particular instances.

Perhaps surprisingly it is at the international level that context and detail is spelled out best. The Organization for Economic Cooperation and Development (OECD) has produced a *Background Document on Public Consultation*.⁸⁷ This makes an important basic distinction between: “Notification” which is one way, passive for the consultees, and should be prior to consultation; “Consultation” which is two way, either in one stage or by continuing dialogue, or more simply information gathering; and “Participation” which should involve active engagement in policy formation where a sense of ownership of policy is developed. The European Commission too has a 28 page document from 2002 titled *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission* and this has been reinforced by a *Better Regulation* initiative.⁸⁸ This details how to set objectives, map the range of stakeholders to engage with, and select from the range of online and traditional methods and tools available. In contrast the UK Cabinet Office has produced its *Consultation Principles 2016* which presents remarkably modest proposals.⁸⁹ The 11 principles offered there range from advice to use plain English, a suggestion that consultees should be given enough information to make an informed response, to a recommendation that agreement be sought before publication. The *National Principles for Public Engagement* produced in Wales in 2011 are similarly brief but they do seem rather less defensive and more oriented towards encouraging people to take part and public bodies to listen.⁹⁰ It is however in the voluntary sector that

⁸⁷ See <https://www.oecd.org/mena/governance/36785341.pdf> (visited 26th May 2016). See also M Gramberger, *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy Making*, Paris: OECD 2001.

⁸⁸ COM(2002) 704 final and The Better Regulation Guidelines and Toolbox (http://ec.europa.eu/smart-regulation/guidelines/index_en.htm accessed 19th May 2016).)

⁸⁹ See <https://www.gov.uk/government/publications/consultation-principles-guidance> and note a context where much interaction is to be “digital by default” see <https://www.gov.uk/government/publications/social-media-guidance-for-civil-servants/social-media-guidance-for-civil-servants> (accessed 19th May 2016). Cf. the Court of Appeal’s approach to the code in *R (Bhatt Murphy) and others v Secretary of State for the Home Department* [2008] EWCA Civ 755.

⁹⁰ <http://www.participationcymru.org.uk/national-principles>. See also the Scottish Government, *Consultation Good Practice Guideline* (2008) at <http://www.gov.scot/Resource/Doc/160377/0079069.pdf>. In Northern Ireland the NI Direct website offers seven “Tips for Consultation”, including “Be Brief” “Reply to the questions” and “Say who you are” which perhaps indicate the consulters expect their audience to be particularly helpful and docile see <https://www.nidirect.gov.uk/articles/public-consultations>. Local councils too have a range of guides and toolkits and, although of variable quality, some of these do at least try to move beyond simple tickbox exercises. See for example Dover

perhaps the most innovation is occurring. The non-party think-tank *Involve* has a *Participation Compass* website which details more than thirty case studies and offers links to a wide variety of participatory resources.⁹¹ It also provides a guide to 57 different methods of consulting with a brief account of their origins, uses, strengths and weakness, and costs. These range from Feedback Kiosks, 21st Century Town Meetings, Citizen Juries and Citizen Summits, through to Mystery Shopper exercises, Forum Theatre, Conversation Cafes and various survey methods, right up to a range of online tools from ePanels and traditional Online Consultations to Participatory GIS systems with digital maps, satellite imagery and models to assist engagement.⁹² There is also the *Digital Engagement Guide* which provides a somewhat eclectic collection of ideas and practical help for those in the public sector who may wish to consult with links to both strategies for engagement and practical examples.⁹³

All of this suggests a wide range of choice when planning a consultation. It also implies that consulters and consultees should have fairly well worked-out ideas about what they hope to achieve in any consultation, how this fits within any wider structures of decision-making, and what the relationship is to wider concepts of democracy. Unfortunately this all too rarely the case. The consultations to be found on the UK Governments website (n 5 above) are not thought-through in these terms – and the qualities of reach and accessibility gained from internet technology merely exacerbate the idea that a simple response (of any kind) is all that is needed to claim democratic endorsement. Given this situation it is perhaps not surprising that the courts have been drawn into assessing the adequacy of consultation processes.

Judicial oversight of consultation processes

The courts in the UK have devoted considerable energy to determining what makes an adequate (if not necessarily a good) consultation. Essentially the position is that unless there are statutorily prescribed procedures, and subject to the overall requirements of fairness, the decision-maker will usually have a broad discretion as to *how* a consultation exercise should be carried out. However this does not mean that there is unbounded discretion for the consulter or that there are not certain fundamental ground rules to followed. The most commonly known formulation of these rules are known as the *Gunning Principles* or *Sedley Principles* from the arguments offered by Stephen Sedley QC, accepted by the court in *R v. Brent London Borough Council, ex parte Gunning*,⁹⁴ and subsequently approved by the Court of

District Council Consultation Toolkit <http://www.dover.gov.uk/Consultation/Consultation-Toolkit.pdf> or Derbyshire Council at http://www.derbyshire.gov.uk/images/2013%2012%2010%20CONSULTATION%20TOOL%20KIT%202013%20v1%2E0_tcm44-112741.pdf (all accessed 23rd May 2016).

⁹¹ See <http://participationcompass.org/pages/index/about> (accessed 25th May 2016).

⁹² See also the Go2Web2.0 website which provides a searchable directory with thumbnail logos linking to more than 2,500 apps, many of which have some consultation or deliberation applications (www.go2web20.net).

⁹³ See <http://www.digitalengagement.info/section/techniques/> (accessed 31st May 2016).

⁹⁴ (1985) 84 LGR 168 at 169.

Appeal.⁹⁵ The *Gunning Principles* require that: (i) consultation must take place when the proposal is still at a formative stage; (ii) sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response; (iii) adequate time must be given for consideration and response; and (iv) the product of consultation must be conscientiously taken into account.⁹⁶

This blueprint for adequate consultation has been revisited several times and indeed is the subject of much professional briefing.⁹⁷ The general approach was summarized by the Court of Appeal in a commercial judicial review case, *R (United Company Rusal PLC) v London Metal Exchange*.⁹⁸ The Court held that where a public body is under a duty to consult, the content of that duty to consult is governed by a common law duty to act fairly, and the Court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair. This was said to be an intensely case-sensitive decision. As Lady Justice Arden insisted, it not an area of law where it is possible to provide statements of general principle (para 28). Indeed the court here endorsed the view that there is no general principle that a public body must consult on all possible alternative ways in which a specific objective might arguably be capable of being achieved. To require this would make the process of consultation inordinately complex and time consuming. Accordingly there is no common law obligation on a public body to consult on options it has discarded and a consultation process would be unfair for failing to set out alternative options only in exceptional cases.

However the context of government cuts within the austerity agenda has provided several opportunities for the courts to revisit the details of what makes an adequate consultation. The most significant decision is again that of the Supreme Court in *R (Moseley) v LB Haringey* - already considered briefly above in relation to the “right to be consulted”.⁹⁹ Here there was a challenge

⁹⁵ See Simon Brown LJ in *R v. Devon County Council, ex parte Baker* [1995] 1 All.E.R. 73 and *R v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [108].

⁹⁶ A recent illustration of the outworkings of these principles can be found with *R (Derbyshire CC v Barnsley, Rotherham, Doncaster and Sheffield Combined Authority* [2016] EWHC 3355 (Admin). Here Ouseley J, in considering a consultation about creating a new Sheffield City Region, detailed how the right questions must be asked of the right people, and further how a consultation may not be properly “public” if it has a limited geographical range.

⁹⁷ See for example, K. Olley *Consultation* Landmark Chambers available at http://www.landmarkchambers.co.uk/userfiles/documents/resources/KO_Consultation_24_Oct_PPT.pdf; V. Butler Colen and J Auburn, *Consultation: Recent Cases and Issues* Thirty Nine Essex Street at http://www.39essex.com/docs/seminars/ja_vbc.pdf; The Welsh Local Government Association, *The Law of Consultation* (Cardiff: WLGA 2014); D. Burrows, *Fairness and a Public Body’s Duty to consult* Jordan Publishing at http://www.jordanpublishing.co.uk/practice-areas/family/news_and_comment/fairness-and-a-public-body-s-duty-to-consult#.V0cwX2MprFw (accessed 27th May 2016).

⁹⁸ [2014] EWCA Civ 1271.

⁹⁹ n 20 above [2014] UKSC 116. This decision came almost at the same time as that of the Court of Appeal in *Rusal* above.

to Haringey Council's consultation over the adoption of a Council Tax support scheme which required the poorest residents to pay 20% of their Council tax where previously their liability would have been met by the national Council Tax Benefit scheme. The Court found that the consultation failed to recognize that the council had a choice to make in how they would meet the shortfall in funding. As Lord Wilson pointed out, the materials circulated to consultees strongly suggested that the council was required to pass on the cut to the poorest residents, and did not indicate that there were a range of alternatives (which other councils had in fact adopted). These alternatives had been considered by the Council and been rejected but neither their existence nor the reasons for their rejection were made known to the consultees. While Lord Wilson again acknowledged that "fairness is a protean concept, not susceptible of much generalised enlargement" (para 24) it was felt that the context here did in fact require that the consultees were informed of other options that had been considered and rejected. Without such information they would be unable properly to consider the proposal. Lord Wilson went further. He expressed the view that the view that fairness may require variable information to be given, depending on the identity of the consultees, with members of the public or those with a disability needing more specific and detailed information than technical experts. Also, Lord Wilson expressed the view that where an authority contemplates depriving someone of an existing benefit, rather than where an applicant is merely applying for some future benefit, a more stringent requirement of fairness may apply to the consultation. In the circumstances of the *Haringey* case the consultees were economically disadvantaged and the proposal envisaged reducing yet further their income causing real hardship while sparing the more prosperous residents from making any contribution to the shortfall in government funding. This approach, which was generally supported by Lord Kerr, differed somewhat from that taken by Lord Reid (supported by Baroness Hale and Lord Clarke). Lord Reid agreed with the conclusion of Lord Wilson but sought to emphasize the statutory context of the particular consultation rather than any more general common law duty to act fairly.

It would seem that the courts are not only rather reluctant to specify detailed requirements for any adequate consultation but they are divided on the purpose and nature of consultation.¹⁰⁰ One view – that of Lord Wilson - would have all the details of the decision, including the rejected options, exposed for consideration (and this of course is appealing to those, especially in an anti-austerity context, who wish to challenge the very substance of the decision rather than simply its method). On the other hand the view expressed by Lord Reid (supported 3:2) although providing the same result, is different. It is based not so much on a general idea of fairness effecting the interests of individuals (such as might arise where there is a legitimate expectation usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation) but rather on the detailed nature of the consultation process expressed in statute, where a local authority is discharging an important function in relation to local government finance affecting its residents generally. This may seem a subtle

¹⁰⁰ See also above at n. 20

distinction but it is one which the courts are developing in a series of decisions, some of which are heading towards the Supreme Court.¹⁰¹ As with the courts' approach to the existence of a right to consultation discussed above, it signals that generally the judges are less concerned with opening up a public space for political participation than with protecting individuals where a right, an interest or a legitimate expectation engages a more conventional idea of fairness.

While the courts may police what constitutes a fair consultation in terms of how it effects individual rights relating to individual fairness it seems that they are not placed to develop or enforce more general standards of adequacy in a wider, political process of consultation. This means that we are alone in the world of best practice – and more worryingly - less than best practice.

Conclusion: Participatory Disempowerment and the Foreclosure of Politics

There is a whole set of issues and problems associated with consultation and any attempt to realize a vision of democracy thereby. If the courts cannot be expected to underwrite any general theory of democratic engagement we are left in a dangerous world where appeals to democracy through consultation are available to be equally used and misused in support of a range of wider projects and processes of governance.

While this account has focused on the UK there is of course a wider theatre for consultation, and there may be lessons to be learned from it. The World Bank has produced a report detailing the range of approaches to participation internationally.¹⁰² Context and wider democratic culture remain of course hugely important.¹⁰³ Nevertheless, a recent study looking at non-electoral participation in 39 developed countries found that everywhere effective engagement seems to be associated less with processes within institutional settings aimed at creating consensus, and more with “inclusive contestation” carried out away from state structures.¹⁰⁴ Technology, with its qualities of

¹⁰¹ See *R(T) v Trafford MBC* [2015] EWHC 369 (Admin); *R (Robson) v Salford CC* [2016] EWCA Civ 6; *R (C) v Warwickshire CC* [2015] EWHC 203 (Admin) and R. Clayton, ‘Fairness, Consultation, and the Supreme Court: There Is (Sometimes) an Alternative’ U.K. Const. L. Blog (16th Mar 2015) (available at <https://ukconstitutionallaw.org>).

¹⁰² World Bank *World Bank Participation Sourcebook*. Environment Department Papers No. 19. Participation Series. Washington, DC: World Bank. (1995) <http://documents.worldbank.org/curated/en/650481468781551648/World-Bank-participation-sourcebook> (accessed 23rd February 2017)

¹⁰³ See further Å. Bengtsson, and H. Christensen, “Ideals and Actions: Do Citizens’ Patterns of Political Participation Correspond to their Conceptions of Democracy?”, *Government and Opposition*, 51(2), (2016) pp. 234–260; J. Sloam, “Diversity and voice: The political participation of young people in the European Union”, *The British Journal of Politics and International Relations*, Vol. 18(3) (2016) 521–537.

¹⁰⁴ K. Vráblíková, *What Kind of Democracy? Participation, Inclusiveness and Contestation* (London: Routledge 2016)

scale, immediacy, and reach is encouraging further efforts at engagement in many places, but particularly in Brazil and the Nordic countries.¹⁰⁵ However, technology does not guarantee democracy even there. An account of the declining popularity of e-participatory budgeting in a Brazilian context suggests the need to maintain the quality of democracy in terms of the maintenance of community awareness, appropriate opportunities for involvement, and a meaningful relationship between an input to politics and policy outputs.¹⁰⁶ The experience of what remains perhaps the most ambitious instance of using technology in consultation, Iceland's crowd sourced constitution-making experiment, is also somewhat mixed.¹⁰⁷ However, it has been suggested that a broadening of the debate there to include participants from outside of the normal political structures may have introduced an impromptu element and a lack of constraint, putting the onus on the political establishment to defend the status quo.¹⁰⁸

Overall, consultation on policy development can reinvigorate democratic engagement but often it can silence views through a sort of participatory disempowerment whereby the existence of an official consultation exercise closes off further, alternative or subaltern voices who are silenced by the existence of an official depiction of "the public". Consultation around service delivery can improve services or it can be used to detach public services from an integrated public sector and loosen the democratic anchorage of the public service within the state through the adoption of consumerist perspectives. Deploying a governmentality perspective¹⁰⁹ it can be seen that what we have here is often not a properly democratic exchange. Voice is not being privileged despite appearances. Often there is instead an idea of consultation

¹⁰⁵ See further E. Anduiza, M. Jensen and L. Jorba (eds.), *Digital media and political engagement worldwide: A comparative study*. Cambridge: Cambridge University Press. (2012); P. Rossini and V. Oliveira "E-Democracy and Collaborative Lawmaking: The Discussion of the Political Reform in Brazil", *International Journal of Communication*. Vol. 10 (2016). Pp. 4620–4640 and S. Joseph and A. Avdic, "Where do the Nordic Nations' Strategies Take e-Government?" *The Electronic Journal of e-Government* Volume 14 Issue 1 (2016) pp. 3-17.

¹⁰⁶ See S. Coleman and R. Cardoso Sampaio "Sustaining a democratic innovation: a study of three e-participatory budgets in Belo Horizonte", *Information, Communication and Society*, Vol 20:5, (2017) pp. 754-769.

¹⁰⁷ See further generally V. Ingimundarson, P. Urfalino and I. Erlingsdottir (eds.), *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction* London: Routledge 2016.

¹⁰⁸ See T. Gylfason and A. Meuwese, *Digital Tools and the Derailment of Iceland's New Constitution* (July 21, 2016). CESifo Working Paper Series No. 5997. Available at SSRN: <https://ssrn.com/abstract=2821479>

¹⁰⁹ For further details on what this might amount to in this context see, for example, J. Morison, "Gov 2.0: Towards a User State?" op cit n. 31; "The Government – Voluntary Sector Compacts: Governance, Governmentality and Civil Society" in *Journal of Law and Society*, Vol. 27, Number 1 (2000) pp. 98-132; and "A Sort of Farewell: Sovereignty, Transition, and Devolution in the UK" in P. Leyland, R. Rawlings and A. Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* Oxford: Oxford University Press (2013) pp. 120-44.

as part of a wider technology of government, involving a set of programmes, strategies and assemblages designed to mobilize local communities and other targets of consultation to become agents of policy as well as simply objects of policy. Ideas of democratic engagement are constructed, managed and controlled. Consultees “make themselves up” in reply to the strategies of consultation: the fact of their engagement renders them “representative”, while their response to the structured engagement simultaneously reinforces and advances the wider governing project. As was seen earlier in the context of consultation around the localism agenda, such techniques of governmentality relating to participation can be used to re-configure public services into a market - consumer model and undermine the idea of public services within the state being an expression of the public. In the wider context of legitimating governance, consultation can be conscripted into a process of remaking the public sphere in ways that have a justificatory veneer of democratic engagement.

For some this is simply because the whole idea of deliberative democracy is irretrievably culturally biased.¹¹⁰ For others it is the details of the process that are distorting. Official constructions of “the public”, and of “community” and citizenship” not only help shape the conceptions that officials draw on as they establish new forums for participation but also condition the conceptions members of such forums themselves bring to the process of dialogue. This conditioning can operate to deplete the civic imagination rather than facilitate it. Very often too government directly controls the form of the debate, its agenda, and the sources of information. The literature on, for example citizen juries and deliberative polls, reports on criticisms around the exclusion of partisan citizens with vested interests or technical expertise; how organizers set the agenda and questions for discussion; keep the records and select which recommendations from the jury to ignore and which to accept.¹¹¹ Putting the interaction online or in an ICT enabled format of engagement

¹¹⁰ IM Young, “Communication and the other: Beyond deliberative democracy” in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* Princeton NJ: Princeton University Press (1996), 120–135; D. Gambetta, (1998) “‘Claro!’: An essay on discursive machismo”, in J. Elster (ed.), *Deliberative Democracy*, Cambridge: Cambridge University Press (1998), 19–43; and SJ Min, “Deliberation, East meets West: Exploring the cultural dimension of citizen deliberation”, *Acta Politica*, 44, (2009) pp. 439–458.

¹¹¹ See, for example, E. Olsen and H-J Trenz, “From Citizens’ Deliberation to Popular Will Formation? Generating Democratic Legitimacy in Transnational Deliberative Polling”, *Political Studies* 62, (2014) 117–133; D. Price, “Choices without reasons: Citizens’ Juries and Policy Evaluation”, *Journal of Medical Ethics* 26 (2000) 272-6; C. Delap, “Citizens’ Juries: Reflections on the UK Experience”, *Participatory Learning and Action* (2001) 39-42; P. McLavery, “Is Deliberative Democracy the answer to Representative Democracy’s Problems? A consideration of the UK Government’s Programme of Citizen Juries”, *Representation*, 4 (2009) 379-89; and G. Smith *Democratic Innovations* Cambridge: Cambridge University Press (2009).

does not necessarily improve the interaction.¹¹² Indeed there is a view that it makes it worse. There is no internet agora or ideal speech situation - online or offline. The internet is no more value free, unstructured or universal than any other space. Consultation remains a highly political activity, perhaps best seen through the lens of governmentality, as a continuing struggle for voice to be heard effectively.

¹¹² See S. Wright (2012) op cit n. 33: S. Albrecht, "Whose voice is heard in online deliberation? A study of participation and representation in political debates on the internet", *Information, Communication & Society*, 9, (2006) pp. 62-82; and T. Davies and S. Gangadherm (eds.) *Online Deliberation: Design, Research, and Practice* CSLI Publications (2009) available at <http://odbook.stanford.edu/static/filedocument/2009/11/10/ODBook.Full.11.3.09.pdf>