

Being Reasonable:
**How do rationalist assumptions affect the
treatment of the environment in decision-making
processes?**

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Table of Abbreviations

ABP	Association of British Ports
ALA	Acquisition of Land Act 1981
AM	Assembly Member
BCR	Benefit Cost Ratio
CALM	Campaign Against the Levels Motorway
CEM	Corridor Enhancement Measures
CPRW	Campaign for the Protection of Rural Wales
DoT	Department of Transport
EIA	Environmental Impact Assessment
FM	First Minister
GWT	Gwent Wildlife Trust
HA	Highways Act 1980
HMT	Her Majesty's Treasury
JOYS	The Judge over your Shoulder
M4CAN	M4 Corridor around Newport
NAW	National Assembly for Wales
NGO	Non-governmental organisation
NIMBY	Not In My Backyard
NRW	Natural Resources Wales
NSIP	Nationally Significant Infrastructure Project
PINS	Planning Inspectorate
RSPB	Royal Society for the Protection of Birds
SSSI	Site of Special Scientific Interest
SSW	Secretary of State for Wales
SONAR	State of Nature Report
TAN	Technical Advice Note
UKELA	UK Environmental Law Association
WFGA	Well-being of Future Generations Act 2015
WG	Welsh Government

Summary

Public local inquiries are a common mechanism for public participation in the UK planning system. They frequently address environmental concerns, and as such are a route through which the public participate in environmental decision-making. Public participation in environmental decision-making is a key principle in environmental law; one might then assume that forums for participatory decision-making such as public local inquiries are well-equipped to hear environmental arguments. What if this is not the case? What if embedded assumptions that shape the way we argue are reproduced in these decision-making processes?

This thesis explores how rationalist assumptions might affect participatory decision-making processes and in particular limit people's ability to advocate for the environment in these processes. It employs socio-legal empirical research methods to investigate these issues. Data was collected through ethnographic fieldnotes and interviewing. The research fieldwork site is a public local inquiry in Wales, the inquiry into the M4 Corridor around Newport, or M4CAN inquiry. The scheme under consideration at the inquiry was a major infrastructure project with a high economic cost and significant environmental implications.

Drawing on socio-legal ethnographic data, this thesis proposes that human-nature dualism in rationalist philosophy, its favouring of compartmentalised argument and its prioritising of abstracted argument adversely impacted the treatment of the environment at the M4CAN inquiry. The thesis further proposes that rationalist assumptions and their impact in legal decision-making processes make it harder to account for the intrinsic value of the environment, and that recognising the intrinsic value of the environment is essential to ensuring that legal decision-making processes have due regard to the environment. It proposes that meaningful public participation in environmental decision-making can serve as a mechanism through which intrinsic environmental value is better recognised.

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This research explores the interconnected nature of the environment, that no one part of an ecosystem exists separated from its community of fellow species. Trite though it may be, this thesis stands as testament to this. While my name sits alone on the front page, the submission of this thesis has depended on the kindness and support of my community.

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Agus buíochas agus grá ó bhun mo chroí le haghaidh Mum agus Dad.

1 Introduction

What levels of climate change and sea-level rise are acceptable? Which Pacific islands are condemned to disappear? How many other species besides our own will we allow to survive? At what point will the acidification of the oceans and the spilling of toxic substances be declared intolerable? If scientists can cast light on these questions, the answers are political decisions. In the time of the Anthropocene, the entire functioning of the Earth becomes a matter of human political choices.¹

We are living through a time of upheaval and profound environmental change. We are told repeatedly that the basic health of the Earth is compromised, and that substantial social change is needed in order to avert the worst of the impacts. Underscored in the above quote, while modern science has provided evidence of this profound change, it is the role of legal and political systems to come up with a response. Yet, despite these sobering reports, legal systems do not seem to treat environmental issues with the urgency they deserve. Why is this the case? What underlying assumptions prevalent in modern society and evident in our legal decision-making processes might account for this oftentimes inadequate response? I was drawn to this problem, to investigate what assumptions these might be, and in what ways might they limit the case for the environment.² Building on theoretical inquiry and primarily from empirical research, the position this research seeks to examine is that assumptions of rationalist philosophy negatively impact the treatment of the environment in legal decision-making. This research will investigate embedded assumptions that shape how legal decision-making processes treat environmental issues. It will further examine the everyday practices of these processes, illustrating how these processes are contested grounds where assumptions and values are challenged and where alternative approaches are tested, and the complex picture of which these assumptions form a part. This research contributes to discourses on public participation in environmental decision-making; it provides unique insights for ongoing developments within the planning process regarding public participation procedures. Furthermore, it explores these issues through a detailed ethnographic account of a landmark public local inquiry in Wales with significant environmental implications, and thus makes a valuable contribution to the emerging field of environmental empirical legal research.

As noted above, in order to explore what assumptions might negatively impact the treatment of the environment in decision-making processes, I conducted ethnographic research at a public local inquiry in Wales. This inquiry considered the Welsh Government proposed scheme for addressing traffic congestion

¹ Christophe Bonneuil and Jean-Baptiste Fressoz, *The shock of the Anthropocene: the Earth, history, and us* (Verso 2016) 25

² Valuable scholarship has set out how 'nature' and 'the environment' as designations for the natural world carry different perceptions of value. (See Subhabrata Bobby Banerjee, 'Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature' (2003) 24 *Organization Studies* 143, 152). As terms, they are also more prominent in different contexts. Keeping with convention in environmental law scholarship, I will predominantly use the term 'environment'. I will use 'nature' when referring to the human-nature relationship, particularly in reference to enlightenment rationality and human-nature dualism. My use of the term 'environment' should not be taken to mean that I am ignoring the legitimate concerns raised in this scholarship; indeed, this research contends deeply with these perceptions of environmental value.

by Newport, termed the M4 Corridor around Newport scheme. This was a significant inquiry in Wales that frequently appeared in news media;³ it concerned a significant infrastructure project, 23 kilometres of new motorway south of Newport, and was estimated to cost somewhere over £1.5 billion.⁴ It attracted considerable opposition, and environmental objectors were prominent among them. This inquiry was an ideal site at which to explore these questions, in part because the mechanism of the inquiry and the broader context in which it was situated highlighted conflicting approaches within the Welsh Government.⁵ While the inspectors ultimately recommended in favour of the scheme, the First Minister for Wales Mark Drakeford, in a move that surprised many participants, disagreed with the inspectors and did not approve of the scheme. Contested notions of the environment were evident at the inquiry, in the Inspector's Report and in the First Minister's decision. These tensions emerge throughout the thesis.

This research question touches on several broad and complex fields of theoretical scholarship. Chapter 2 considers these fields as they inform the research question. Firstly, this chapter considers what fundamental ideas in rationalist philosophy these assumptions might stem from. What aspects of rationalist philosophy are particularly relevant to the environment, to legal decision-making and to public participation? Chapter 2 turns to the core tenets of Enlightenment rationalist philosophy, in particular the notion of innate reason and how it establishes the relationships between mind and body and human and nature. From there, the contributions of Habermas and Weber are considered. Habermas serves as a valuable link between Enlightenment and contemporary rationalist philosophy, holding on to the idea of transcendent reason but theorising it in terms of public deliberation. Habermas's theory of communicative rationality is particularly helpful in theorising public participation. From Habermas the chapter turns to Weber. Abstract notions of transcendent reason might feel far removed from the everyday bureaucracy of legal decision-making. However, Weber in his work on rationalisation and legal rationality sets out how aspects of rationality, embedded in processes of rationalisation, shape legal decision-making.

From this introduction to the aspects of rationalist philosophy that relate to this thesis, Chapter 2 considers public participation, an area of environmental law scholarship to which this research contributes. The

³ Anon, 'Benefits of M4 relief road 'outweighs £1.1bn costs two to one' (*BBC News Wales*, <<https://www.bbc.co.uk/news/uk-wales-south-east-wales-39127347>> accessed 16 December 2019; Anon, 'M4 relief road would 'damage historic landscape' (*BBC News Wales*, 2017) <<https://www.bbc.co.uk/news/uk-wales-south-east-wales-39692493>> accessed 16 December 2019; Anon, 'M4 relief road objections still 'significant' - NRW' (*BBC News Wales*, 2018) <<https://www.bbc.co.uk/news/uk-wales-43507894>> accessed 16 December 2019; Craig I, 'M4 relief road decision is delayed again, as protest is held against controversial plan outside Senedd' (*South Wales Argus*, 2018) <<https://www.southwalesargus.co.uk/news/17275168.m4-relief-road-decision-is-delayed-again-as-protest-is-held-against-controversial-plan-outside-senedd/>> accessed 17 December 2019

⁴ £1.321 billion excluding VAT. William Wadrup and Aidan McCooney, *M4 Corridor around Newport (M4CAN): Inspector's Report on the Public Local Inquiries which were held at the Llysaght Institute, Newport between 28 February 2017 and 28 March 2018* (2018) 74

⁵ As highlighted above, the inquiry was of significant scale and of a particular kind, a highway inquiry. This is useful in some ways as it throws the issues the thesis looks at into sharp relief. However, its scale and unique nature also raise questions as to the generalisability of the findings. These concerns will be addressed, chiefly in Chapter 4 section 4 of the thesis.

prominence of public participation in environmental law is discussed. This chapter highlights that public participation is supposed to enhance the fairness and democratic legitimacy of decision-making and can be transformative. Public participation in legal theory and in administrative justice case law will be revisited in Chapter 3. Public participation is a key concept that features prominently in the analysis and findings of this thesis; it is therefore important to be clear on its meaning in this context, and its limits and possibilities. Chapter 2 discusses theoretical developments within environmental justice, outlining how environmental justice scholarship contends with rationalist philosophy, focusing on the work of ecofeminists and other environmental justice scholars who contend that capitalist notions of progress promote an instrumentalist view of the environment. It focuses on environmental justice instead of environmental law in part because the detail of relevant environmental legislation will be discussed in Chapter 3. Moreover, this thesis is predicated on a normative assertion. It contends that there is structural unfairness in legal decision-making processes and that this negatively affects the environment. This is an issue of environmental justice. Lastly, the chapter considers whether rationalist dualisms might have a negative impact on the environment and might affect decision-making processes; these concepts play a significant role as the thesis develops.

Having outlined the theoretical context of this research, this thesis then discusses relevant legal theory and law in Chapter 3. The law relevant to the research field site is also discussed in this chapter. Chapter 3 provides an overview of UK planning law and of Welsh planning law. The chapter focuses on the Wellbeing of Future Generations Act 2015, a landmark piece of sustainable development legislation in Wales. This Act is of particular relevance to this research for several reasons. Firstly, the Wellbeing of Future Generations Act 2015 seeks to rebalance the treatment of the environment and other priorities, such as economic, social and cultural priorities. It seeks to change the processes through which public bodies make decisions. Secondly, it played a key role at the inquiry which served as the research field site. Scheme proposers and objectors at the inquiry closely contested whether the scheme under consideration complied with the Act; indeed, some contended that the inquiry was a test case for the Act. From there, the chapter revisits public participation in a planning-specific context. Chapter 3 reflects on early iterations of a right to public participation in administrative justice case law. From there the public local inquiry as a public participation procedure is assessed.⁶ This section describes the public local inquiry into the M4 Corridor around Newport (hereafter referred to as the M4CAN inquiry). Chapter 3 concludes with a closer look at the M4CAN scheme and inquiry.

This research makes a unique contribution to a small but growing field of empirical environmental legal research; consequently, Chapter 4 focuses on the empirical research methodology this project applies, identifying and justifying the methodological choices made. The chapter firstly introduces the reader to the field site, the M4CAN inquiry. We metaphorically walk through its doors and are introduced to its key

⁶ During data collection, I was struck by the adversarial nature of the inquiry and the concern regarding equality of arms that emerged and affected the inquiries' participatory role. The impact of adversarialism is noted frequently throughout the analysis chapters, and its impact on equality of arms is further discussed in Chapter 8 section 5.

participants. From there, the chapter describes the characteristics of socio-legal and ethnographic research and what this means for data collection and analysis. It considers why ethnography is uniquely well suited to this research project, highlighting its affinity with critical research and its commitment to particular, complex and material data. Data was collected using ethnographic participant observation and interviewing; this chapter considers possible obstacles and challenges employing these methods. Ethnographic research must often be attentive to issues of access and sampling; this research project was no different. These issues and responses to these issues are explored in this section, as well as ethical considerations. These are identified following Van Maanen's three perspectives from which the researcher must be attentive; from the perspectives of the observed (the participant being researched), the observer (the person conducting research) and the tale (the act of writing down the data).

The first part of the thesis sets out the legal and theoretical context of this research question and the methodological tools required for answering it. Foundations thus established, the next part of the thesis turns to the field site and seeks to investigate whether rationalist assumptions negatively impacted the treatment of the environment in this case. This thesis draws primarily on the empirical research conducted at the field site. Consequently, my thinking evolved throughout the course of thesis, firstly developing from an initial idea that there were ideologies present in legal decision-making processes to an idea that there were rationalist assumptions present in these processes, that might have a negative impact on the environment. Throughout data collection and analysis, the thesis then honed in on three specific assumptions and their impacts. I was struck by how these prevailing assumptions were so evident at the inquiry and how their effect was felt throughout the process, interacting with other effects at the inquiry to create a complex and shifting picture. Chapters 5, 6 and 7 identify a rationalist assumption and consider whether it had a negative impact on the case for the environment at the M4CAN inquiry. Chapter 5 investigates compartmentalisation, firstly investigating the theoretical foundations for the claim that processes of compartmentalisation are embedded and encouraged in rationalist decision-making. Data from the M4CAN inquiry is presented that demonstrates evidence of compartmentalisation in the inquiry process. It suggests that the treatment of expertise, the adversarial and rigid nature of the inquiry process and the narrowing focus on legal protections served to embed compartmentalisation at the inquiry. The chapter then outlines the theoretical basis for the claim that processes of compartmentalisation negatively impact the environment. Returning to the M4CAN inquiry, the chapter proposes that processes of compartmentalisation had a negative impact on the environment at the inquiry, highlighting that an isolated approach to environmental damage and a focus on mitigation limited the environmental case; this was further exacerbated by the reactive role of objectors. In its concluding section, the chapter notes that these processes of compartmentalisation were noticed and responded to by the objectors; the role of the Wellbeing of Future Generations Act 2015 as a tool for objectors is further highlighted.

Chapter 6 considers processes of abstraction at the inquiry and their negative impact on the treatment of the environment. This chapter firstly considers the theoretical basis of the claim that processes of abstraction are a product of rationalist decision-making. Processes of abstraction at the M4CAN inquiry are then explored; the chapter proposes that the formal processes of the inquiry, the prioritising of expert knowledge over local knowledge and the discounting of material impact were evidence of abstraction.⁷ The chapter evidences the claim that processes of abstraction have a negative impact on the environment. The chapter then returns to the M4CAN inquiry and contends that processes of abstraction had a negative impact on the treatment of the environment at the inquiry, highlighting the inquiries' treatment of practical and local knowledge and of emotion and public participation.⁸ The final section of the chapter considers the response of objectors to these processes of abstraction, and the response of the process itself through the mechanism of the site visit.⁹

Chapter 7 examines human-nature dualism; this is a defining concept in rationalist philosophy, underpinning the previous assumptions. The chapter establishes this dualism as a cornerstone of rationalist philosophy, before describing how human-nature dualism was evident at the inquiry in the separate treatment of humans and the environment. The negative impact of human-nature dualism on the environment is illustrated. Chapter 7 then contends that human-nature dualism had a negative impact on the treatment of the environment at the inquiry, evident in the instrumentalist treatment of the environment and in how humans and the environment were framed as in conflict with one another. Moments at the inquiry that seemed to disrupt this dualism, where interconnections between humans and the environment were recognised and the environment valued, are discussed in the final section. The chapter concludes by assessing whether these disruptions might indicate a moment of transition, that the value attributed to the environment in decision-making might be changing.

Environmental value is a significant theme evident throughout the findings of this research; it is the focus of the final chapter. Chapter 8 contends that conceptions of environmental value are restricted by prevailing rationalist assumptions in participatory decision-making processes. It notes that law struggles to account for the intrinsic value of the environment. The forms of environmental value embedded in the principle of sustainable development are particularly relevant as the balancing of different values underpins sustainable development. Assessing whether values attached to the environment might be shifting, the chapter then

⁷ This flags an interesting dilemma present in the data. The data seemed to show that the inquiry preferred scheme-specific knowledge, but that it also favoured abstract knowledge. These two tendencies would seem to be in conflict with one another. This tension is explored in these chapters; more broadly, this tension exemplifies the challenges and the appeal of using empirical data.

⁸ This is a point on which my thinking developed over the course of the thesis. Initially, I was interested in the differential treatment of, and constructions of, reason and emotion at the inquiry. But during data collection and analysis, I saw patterns emerging across different issues; I felt that the valuable insight to draw from this was not the treatment of reason and emotion, but the processes of abstraction that shaped the treatment of emotion, among other factors, at the inquiry.

⁹ I attended one site visit and was struck by how different it felt from the inquiry as it took place in the inquiry room. The aspects of the site visit that felt distinctive are explored in Chapter 6 section 5.1.

considers how the environment is valued in recent developments in Welsh sustainable development legislation, specifically the Wellbeing of Future Generations Act 2015. Chapter 8 identifies obstacles to change, highlighting challenges within this Act, within Welsh planning law and within the public local inquiry process that restrict a more intrinsic understanding of environmental value. The chapter concludes on an optimistic note; it looks to the future and to the prospects for a more inclusive understanding of environmental value. It foregrounds public participation as a route for transformation, suggesting future approaches for the planning process and possible strategies for environmental objectors facing similar cases.

2 Theoretical Context

1 Introduction

This chapter explores the fields of thought that inform whether rationalist assumptions negatively impact the treatment of the environment in decision-making processes. Firstly, this chapter investigates the key concerns of Enlightenment rationalist philosophy in order to understand what assumptions might have particular relevance to the environment. Staying with rationalist philosophy, the chapter then explores how later rationalist thinkers develop these core assumptions. It considers the work of Jürgen Habermas, whose theory of communicative rationality has relevance for public participation. From there, it discusses Max Weber's work on rationalisation. Weber investigated aspects of rationalist philosophy from which emerged oppressive processes of rationalisation. He was particularly interested in processes of rationalisation as they emerged in legal systems. The chapter then moves from rationalist philosophy to consider public participation, its advocates and its critics. It reflects on the prominence of public participation within environmental law. This then leads to a discussion of environmental justice scholarship. Criticism of rationalist philosophy within environmental justice scholarship, in particular eco-feminist scholarship, is highlighted.

Having investigated core rationalist assumptions and criticisms of rationalist philosophy within environmental justice scholarship, this chapter proposes that rationalist dualisms are a key feature of rationalist philosophy that might limit understanding of the environment and thus be damaging to the environment. As such, dualisms and their critics merit further consideration. The final section of this chapter explores dualisms in greater detail and discusses environmental justice and new materialist criticism of rationalist dualisms. These fields of study are diverse and complex; it would be impossible to engage with the full nuance and scope of these areas effectively in the space I can set to the task. Therefore, this chapter aims to focus on the aspects of these fields of study most relevant to the research question, and in doing so inspire and inform subsequent analysis.

2 Rationalist Philosophy

2.1 Roots of rationalist philosophy

2.1.1 *The infinite, innate nature of Reason*

A belief in the innate nature of reason is a defining characteristic in rationalist thought.¹⁰ For rationalist philosophers, the finite beings that make up the observable world are fragments, copies of the infinite.¹¹ We catch a glimpse of these perfect concepts with the infinite part of our own being, our mind. The mind, the rational part of the soul, is integral to the pursuit of knowledge; knowledge and the parts of humans that deal with knowledge are “non-sensory, general and unchanging or eternal”.¹² Rationalist philosophers, notably Descartes, contend that ideas are either innate or invented; they have an intellectual, innate source, or a sensory, adventitious source.¹³ He further suggests that humans are able to understand innate ideas from birth:

[W]hen we say that an idea is innate in us, we do not mean that it is always there before us. This would mean that no idea was innate. We simply mean that we have within ourselves the faculty of summoning up the idea.¹⁴

Here, Descartes argues that as we explore innate concepts, we realise that our minds are perfectly designed to comprehend these concepts that seemingly have no corporeal existence.¹⁵ The innate part of human beings that has an affinity with these innate concepts can be termed the human capacity for reason. Our capacity for reason is not applicable to all forms of knowledge and of deduction. What we can understand with our capacity for reason, without any sensory involvement, are innate truths. Descartes classifies them as “geometric truths”.¹⁶ These are considered ideas of pure intellect, as the senses play no role in their reasoning. For Descartes, sensory involvement in intellectual ideas is only possible as an accompaniment or an inspiration,¹⁷ as when the use of an analogy enables a deeper insight into an intellectual concept. This understanding of ideas underlines Descartes’ position that not only is there a distinction between intellectual/rational and sensory/empirical knowledge, but that rational knowledge is superior to empirical knowledge. A hierarchical distinction is then already set between rational and empirical knowledge. This is further explored below.

¹⁰ While I discuss the work of Enlightenment rationalist philosophers in this section, primarily Descartes, I have engaged with their work through later commentary rather than the original work. This approach is taken because this research is less a detailed investigation of their work and more an examination of its impact and legacy. Following sections that discuss the work of more central authors to the research project, e.g. Habermas and Weber, engage more closely with original works.

¹¹ Alan Jean Nelson, 'The Rationalist Impulse' in Alan Nelson (ed), *A companion to rationalism* (Blackwell 2005) 6

¹² Ibid 4

¹³ René Descartes, as discussed in Lex Newman, 'Descartes' Rationalist Epistemology' in AJ Nelson (ed), *A companion to rationalism* (Blackwell 2005) 181

¹⁴ René Descartes in J Cottingham, R Stoothoff and D Murdoch (1984) in *ibid* 186

¹⁵ Descartes, as quoted in *ibid* 192

¹⁶ Descartes, in J Cottingham, R Stoothoff and D Murdoch (1984) as quoted in *ibid* 179

¹⁷ Descartes, as discussed in *ibid* 182

2.1.2 *Rationalism as a counterpoint to empiricism*

A simple distinction between empiricism and rationalism is that empiricists privilege sensory knowledge over reason, whereas rationalists privilege reason over sensory knowledge. Empiricists develop hypotheses based on sensory information and contend that reality is revealed to human's rational intellect through the senses.¹⁸ For rationalist philosophers such as Descartes, Spinoza and Leibniz, understanding of the world is founded in the intellect rather than the senses.¹⁹ In demonstrating reason's hierarchy over sensory knowledge, Descartes contends that bodies have primary and secondary qualities; their primary qualities include motion, shape, etc. and their secondary qualities include colour, taste, sound etc. When seeking to understand these bodies, their primary qualities, available to our reason, are more helpful than their secondary qualities, which are available to our senses.²⁰ Descartes contends that our senses are unreliable; we cannot be certain that they provide us with accurate information. He places greater faith in human capacity for reason; "[were the mind] released from the prison of the body, it would find them [innate truths] within itself".²¹ It is the mind and not the body that has the capacity to capture these innate truths. It is further proposed that this withdrawal from the sensory world into the world of the mind is a practice consciously developed by rationalist thinkers, enabling a deeper engagement with the primary qualities of the body under consideration and consequently with the innate concepts that shape our world.²²

2.2 **Habermas and communicative rationality**

2.2.1 *Beyond Enlightenment rationality*

Jürgen Habermas is a prominent contemporary rationalist thinker; his theory of communicative rationality is particularly relevant to this research. There is a tendency among twentieth century thinkers loosely linked to the rationalist school of thought to emphasise distance between their work and the narrow framing of rationality evident in Enlightenment philosophy.²³ Habermas was keen to restore to rationalist thought its emancipatory potential, isolating its positive capacity from rationality as a 'negative social condition', as a school of thought employed to legitimize domination.²⁴ In advocating for rationalism to be understood as a positive force, Habermas is aided by the linguistic turn in twentieth century philosophy which transformed the world of the Enlightenment, peopled by individual subjects, into an intersubjective world.²⁵ This key development is particularly evident in Habermas' theory of communicative rationality. Habermas considers the ethical responsibility inherent in the linguistic turn and the implications of this vulnerability and intersubjectivity for rationalist thought. He seeks to extend the rationalist project to incorporate twentieth century insights on intersubjectivity:

¹⁸ Nelson (n11) xiv

¹⁹ Gary Hatfield, 'Rationalist Theories of Sense Perception and Mind-Body Relation' in Alan Nelson (ed), *A companion to rationalism* (Blackwell 2005) 31

²⁰ Descartes, as discussed in Newman (n13) 185

²¹ Descartes, in J Cottingham, R Stoothoff, D Murdoch and A Kenny (1991) in *ibid* 181

²² *Ibid* 183

²³ William Outhwaite, *The Habermas reader* (Polity Press 1996) 16

²⁴ Nick Crossley and John M Roberts, *After Habermas: new perspectives on the public sphere* (Blackwell Publishing 2004) 7

²⁵ *Ibid* xv

The recognition of our dependence and vulnerability... can change our ways of looking at a world that as Habermas reminds us, overemphasizes mastery, control, and achievement of efficiency to the detriment of intersubjective forms of relationship.²⁶

While Habermas seeks to reconfigure rationalist philosophy as a liberating school of thought, away from the limiting, dominating logics of Enlightenment rationality, he is hesitant to dismiss their work entirely. He is critical of Rorty and others who refute rationalist claims of universality and innate reason, arguing that while the validity claims of one person are always context-specific, the validity they claim is transcendent.²⁷ Habermas considers that human motivation develops from social values and norms and that these values and norms have an “immanent relation to truth”.²⁸ Truth is arrived at in the process of understanding, the process of understanding here indicating not merely the similar understanding of a linguistic expression, but the existence of an agreement between two people on “the rightness of an utterance in relation to a mutually recognised normative background”.²⁹ It is Habermas’s commitment to universalist notions of Reason and developing them in light of the linguistic turn in philosophy that draws most criticism from environmental theorists; Eckersley for example contends that Habermas maintains the duality between humans and nature by theorizing that human action can be understood through communicative rationality but that nature is understood with instrumental rationality.³⁰ This thesis considers another way in which Habermas’s theory of communicative rationality might have indirect negative impacts on the environment. This is noted in the final chapter (section 5.3).

2.2.2 *Habermas’s theories of communication*

Habermas’ interest in communication and its influence on social and political structures is first developed in *The Structural Transformation of the Public Sphere*. Here, Habermas identifies the factors that facilitated the emergence of the public sphere among the bourgeoisie of Germany, France and Britain in the eighteenth century. He notes that it develops alongside the increased presence of the state in people’s lives, which inspired the conviction that people had a right to be involved in state policy.³¹ The development of the public sphere is further linked to increased individualism and the rise of the private subject during the eighteenth century.³² Critics of Habermas point to his tendency to present the eighteenth century bourgeois in France, Germany and Britain as an idealised ‘public sphere’, despite this ‘public sphere’ existing in a particular time and space.³³ Moreover, he equates this ‘public sphere’ with the public; is this ‘public’

²⁶ Crossley and Roberts (n24) xiv

²⁷ Outhwaite (n23) 16

²⁸ Jürgen Habermas, *Legitimation crisis* (Polity Press 1973, 1997) 95

²⁹ *Ibid* 119

³⁰ Robyn Eckersley, ‘Habermas and Green Political Thought: Two roads diverging’ (1990) 19 *Theory and Society* 739, 745

³¹ Outhwaite (n23) 7

³² Crossley and Roberts (n24) 3

³³ *Ibid* 2

representative? It is a public predominantly peopled by middle-class, white men; what impact might these historical and social circumstances have on Habermas' notion of the public sphere?³⁴

Habermas's work on communicative action is further developed in his theory of communicative rationality. Habermas argues it is a naïve realism to contend that we live in a world "immediately and identically accessible to all without intersubjective checking or collaborative interpretation".³⁵ Knowledge and moral beliefs are not arrived at in solitary contemplation; rather, Habermas proposes that social conventions are agreed upon and established through discussion,³⁶ through people reflecting on and defending their beliefs. Further, Habermas argues that norms must be defended by justifiable, reasonable argument.³⁷ Habermas identifies logical steps underpinning his theory of communicative rationality. When we agree with one another, we recognise the validity-claims inherent in our respective positions, acknowledging the comprehensibility and/or 'rightness' of the corresponding argument.³⁸ Habermas argues that this is a rational process:

If the acceptability of speech act offers rests on the possibility of redeeming the validity claims they contain, then the acceptability of speech act offers is also tied to reason.³⁹

When people communicate, they mutually understand one another, facilitating consensual, co-operative action.⁴⁰ Discourse underpins legal and moral norms, shaping not only the structure of political bodies, but also the culture within which these bodies develop and operate. This culture is influenced by the availability of public information and of education, by the ability to debate issues that challenge social norms, and by the character of public debate.⁴¹ The normative aspects of the theory of communicative rationality inform Habermas' political philosophy, his notions of political legitimacy, of justice and freedom.⁴² These influences will be explored in later chapters.

2.2.3 *Communication as a route to Reason*

Inherent in Habermas' belief that reason is attainable through communication is the idea that discussion brings about better understanding, and through this, better political decisions. In parallel with the creation of the public sphere, thinkers in eighteenth century Western Europe were developing tools of rhetoric and argument, enabling a more rigorous engagement with the political ideas of the time.⁴³ Habermas states that truth is found in rational discourse; when the *kommunikationsgemeinschaft*, the group of people talking together

³⁴ Crossley and Roberts (n24) 12

³⁵ Georgia Warnke, 'The idea of communicative rationality' in Stephen K White (ed), *The Cambridge companion to Habermas* (Cambridge University Press 1995) 125

³⁶ Outhwaite (n18) 13

³⁷ Habermas (n28) 105

³⁸ Ibid 119

³⁹ Warnke (n29) 123

⁴⁰ Ibid 120

⁴¹ Ibid 13

⁴² Emilia Steuerman, *The bounds of reason: Habermas, Lyotard, and Melanie Klein on rationality* (Routledge 2000) 9

⁴³ Crossley and Roberts (n24) 4

affected by the issue or norm in question, test the 'validity claims' of these norms, are persuaded of them with reasonable argument and conclude that they are 'right' or 'true'.⁴⁴ This presupposes a form of 'best-practice' discourse, where "no force except that of the better argument is exercised"... "and that, as a result, all motives except that of the cooperative search for truth are excluded".⁴⁵ The legitimacy of claims arrived at through democratic discourse thus rests on the presuppositions that allow 'better' arguments to come to the fore in these discourses.⁴⁶ This idea that reasonable discourse engenders decisions that are 'right' or 'true' underpins the legitimacy of democratic political systems. It further highlights that norms that bind the public in some way, for instance through state policy, are only seen as having a legitimate claim to rationality inasmuch as they develop through open discussion in a free public.⁴⁷

There is an underlying assumption of objectivity in this theory of communication; it proposes a view of arguments and of 'arguing actors' where the actor is prepared to be persuaded of the 'better argument' and is 'seeking truth'.⁴⁸ There is a degree of evaluation here as well; there is acceptable ground from which to argue a point and some arguments are better than others.⁴⁹ However, what makes a better argument and what makes a more persuasive argument might be very different in the everyday reality of decision-making processes.⁵⁰ The first is unattainable if one does not accept the existence of an objective reality 'out there' that can be accessed from outside one's own experience. Some theorists worry that the inability to discern what makes a better or more persuasive argument is hidden by claims to universality;⁵¹ this ambiguity might further perpetuate power inequalities and injustices. The oppressive tendencies of rationalist philosophy are further explored in the work of Max Weber, the focus of the following subsection.

2.3 Weber's theory of rationalisation

This section will briefly discuss the work of Weber, as his work considers aspects of legal rationality that serve as tools of domination in society.⁵² His social theory primarily explores processes of rationalisation. This section will foreground key social institutions - the economy, science and law - in which processes of rationalisation are intensified. The final section will focus on technical knowledge and its role in these processes as this is particularly relevant in environmental law.

⁴⁴ Habermas (n28) 105

⁴⁵ Ibid 108

⁴⁶ Jürgen Habermas, 'Three Normative Models of Democracy' in S Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996) 24

⁴⁷ Crossley and Roberts (n24) 7

⁴⁸ Ibid 393

⁴⁹ Jürgen Habermas, *The theory of communicative action / Vol.1, Reason and the rationalization of society* (Polity 1991) 22

⁵⁰ Examples of limits on argument in decision-making processes are identified in Chapters 5,6 and 7, and further highlighted in light of Habermas's concept of the ideal speech situation in Chapter 8.

⁵¹ Tine Hanrieder, 'The false promise of the better argument' (2011) 3 *International Theory* 390, 390

⁵² Susan S. Silbey, 'Everyday Life and The Constitution of Legality' in Mark Jacobs and Nancy Hanrahan (eds), *The Blackwell companion to the sociology of culture* (Blackwell Publishing 2005) 333

2.3.1 *Weber's theories of rationality and rationalisation*

Weber's work explores the processes through which rationality became a dominant force in Western society, which he terms rationalisation. Weber was not interested in the abstract notion of rationality but in the processes through which rationality became a dominant force in Western society. He contended that modernity witnessed a development in forms of domination, demonstrated by the increasing prevalence of formal legal rationality.⁵³ Weber distinguishes two forms of rationality, formal and substantive rationality.⁵⁴ These are described below:

Formal, in one sense means abstract or generic, a form or pattern into which specific content (substance) may be fitted... Thus, for Weber the substantive validity of money is the actual possibility of exchanging it against other items, while its formal validity is its theoretical or legal standing as an accepted means of payment and (confusingly) the compulsion so to employ it.⁵⁵

Ritzer notes that assembly-line working during the 'Automobile Age' exhibited a high degree of formal rationalisation.⁵⁶ The dominance of formal rationality is considered by some to be a negative and restrictive social condition. This is particularly true in Western societies,⁵⁷ which tend to promote "a distorted understanding of rationality that is fixed on cognitive-instrumental aspects and is to that extent particularistic."⁵⁸ Processes of rationalisation concern one kind of rational action, what Habermas terms "purposive-rational action".⁵⁹ Theories of rationalisation contend that rationalisation cannot be produced or maintained through measures of external enforcement, such as laws; it must be embedded at a deeper level in society, through a system of norms and values.⁶⁰

2.3.2 *Rationalisation in the market, in science and in law*

Weber saw rationalisation as an inherently capitalist process. According to Weber, the market is shaped by "rational, purposeful pursuit of interests".⁶¹ The market requires calculable behaviour and thus encourages other sectors of society to adopt these kinds of behaviours. This influence is evident in the rationalisation of legal institutions; as the market requires predictable, rule-governed behaviour, the law developed to meet that need. Weber notes however that economic factors have only an indirect influence on law, inasmuch as

⁵³ Silbey (n52) 333

⁵⁴ Weber acknowledges that substantive rationality is more ambiguous and harder to define than formal rationality. He states that actions that are formally rational are goal-oriented and based on "rational calculation", and therefore easier to discern. Substantive rationality is not so limited; actions conforming to substantive rationality, or "value rationality", apply "certain criteria of ultimate ends, whether they be ethical, political, utilitarian, hedonistic, feudal, egalitarian, or whatever". Max Weber, *Economy and Society: an outline of interpretive sociology, vol I* (Bedminster Press 1968) 85

⁵⁵ Arnold Eisen, "The Meanings and Confusions of Weberian 'Rationality'" (1978) 29 *The British Journal of Sociology* 57, 64

⁵⁶ George Ritzer, *The McDonaldization of society* (Pine Forge Press 2000) 27

⁵⁷ Max Weber, *The Protestant ethic and the spirit of capitalism* (Routledge 2001) xxxviii

⁵⁸ Habermas (n49) 66

⁵⁹ *Ibid* 219

⁶⁰ *Ibid* 219

⁶¹ Max Weber, *Economy and Society: an outline of interpretive sociology, vol II* (Greenwood Press 1969) 636

there are rationalisations of economic behaviour, such as the market economy and contracts, these inevitably engender conflicts of interest that then need to be “resolved by legal machinery”.⁶²

Noted above, Weber was concerned with formal legal rationality. The Weberian view of legal rationality presents a view of the law where adjudications are expected to be efficient and “decisions are logically referable to authoritative normative rationales transparent to trained professionals”.⁶³ The law presents itself as an internally consistent, “gapless system of rules”.⁶⁴ Formal procedures are further entrenched by the professionalization of law, through increasing reliance on highly trained legal and administrative professionals.⁶⁵ Silbey traces how this view of law became the dominant view of law in the twentieth century, noting that, “Law became defined primarily in terms of the processes of creating and enforcing formal rules, as machine rather than meaning”.⁶⁶ Reflecting on the domestic legal context, it is argued that British law is firmly rooted in a pragmatic, even anti-rationalist, legal tradition.⁶⁷ Gee and Webber argue that this anti-rationalist tradition is being displaced by a growing dependence on principles in UK public law that suggests an excessive reliance on rationalism; they worry that this leads “public lawyers to prioritise the universal over the local, the uniform over the particular and, ultimately, principle over practice.”⁶⁸

Weber highlighted the rise of modern science and the associated ‘disenchantment of the world’ after the Enlightenment as a key factor in the development of rationalisation.⁶⁹ Developments in modern science require a high degree of systematic, problem-oriented thinking; this can be termed cognitive rationality. While valuable in scientific endeavours, this kind of thinking can dominate in contexts where it is not perhaps so well-suited. Habermas argues that the reification of scientific rationality in Western societies leads to a dominance of this form of rationality in people’s everyday relationships and practices, and in their relationship to nature.⁷⁰ The dominance of ‘cognitive instrumental’ rationality, in conjunction with the predictable and calculable modes of operation required by capitalism, encourage the progress of rationalisation across the main institutions of society.

⁶² Weber (n61) 655

⁶³ David Kettler and Volker Meja, 'Legal Formalism and Disillusioned Realism in Max Weber' (1996) 28 *Polity* 307, 312

⁶⁴ Weber (n61) 656

⁶⁵ Habermas (n49) 256

⁶⁶ Silbey (n52) 334

⁶⁷ Alexander Horne and Gavin Drewry, *Parliament and the law* (Second edn, Hart Publishing 2018) 322. The influence of pragmatism within (primarily) English environmental law is further explored in Ben Pontin, *The Environmental Case for Brexit: a socio-legal perspective* (Hart 2019).

⁶⁸ Graham Gee and Grégoire Webber, 'Rationalism in Public Law' (2013) 76 *Modern Law Review* 708, 708. The existence of these two tendencies within the legal system of England and Wales is important to bear in mind. When the thesis focus turns to fieldwork and how rationalist assumptions might be present at the inquiry, it is helpful to consider this anti-rationalist tendency; which prevails at different points? Where might there be points of tension?

⁶⁹ Weber (n57) 3

⁷⁰ Habermas (n49) 66.

2.3.3 *Rationalisation and technical knowledge*

The treatment of knowledge is integral to processes of rationalisation. Brubaker argues that bureaucracy is an example of a highly rationalised process because of its efficiency, its formalism and its reliance on technical, rational knowledge.⁷¹ But what kinds of knowledge constitute rational knowledge? Habermas proposes that the rationality of knowledge claims can be evaluated by the extent to which their claims to truth can be defended.⁷² In focusing on rational knowledge, rationalised institutions tend to distinguish technical knowledge from practical knowledge. Weber argues this is particularly evident in legal education. He contends that the “rational, systematic character” of legal concepts serve to distance them from mundane ways that people avail themselves of the legal system.⁷³ This concerns Gee and Webber, who worry that the devaluing of practical knowledge, knowledge acquired by practice as opposed to taught, encourages abstraction and allows one understanding of the world to dominate.⁷⁴ Technical knowledge is demanded by the growing complexity of the modern world. It is further encouraged by the rise of modern science, where it is supposed that subjects under investigation can be understood and mastered with sufficient knowledge and thought by ‘technical means and calculations’.⁷⁵

This section has considered key insights of rationalist philosophy, focusing on Enlightenment rationality and on the work of Habermas and Weber. Habermas’s theory of communicative rationality provides an intersubjective conceptualisation of rationalist philosophy, helpful when thinking about theories of public participation; he further keeps hold of the idea that reason is transcendent and innately human, an idea to which this thesis returns in later chapters. Weber is more critical of rationality and focuses on processes of rationalisation, exploring their oppressive tendencies in modern society. This research seeks to investigate rationalist assumptions that might negatively impact the environment. As such, it is interested in what theorists critical of rationalist philosophy say. The separation of mind and body, an assumption underpinning rationalist philosophy seems to have particular significance for the environment. This will be explored later in this chapter. Firstly, this chapter considers public participation and its potential impact in environmental decision-making

⁷¹ Rogers Brubaker, *The limits of rationality: an essay on the social and moral thought of Max Weber* (Routledge 1991) 21

⁷² Habermas (n49) 8

⁷³ Weber (n61) 789

⁷⁴ Gee and Webber (n68) 714

⁷⁵ Brubaker (n71) 31

3 Public Participation

3.1 Public participation: its advocates

3.1.1 *Public participation is transformative*

McAuslan describes the potential impact of a genuine commitment to public participation, contending that it demands that,

Greater attention [be] paid to social, community and ecological factors in decision-making and less attention paid to economic and technological factors which assume or are geared to reproducing the same kind of society that exists at present.⁷⁶

This description highlights the transformative capacity of public participation in decision-making; it is well-placed to look beyond the factors that maintain the current system. Transformative capacity here suggests a move to consider alternative approaches to those set by dominant socio-economic forces; what McAuslan terms ‘status quo’ approaches and what many today, in particular with regards to sustainable development, would term ‘business as usual’ approaches.⁷⁷ The transformative capacity of public participation is engendered by its deliberative method, the multiple perspectives it incorporates and its solution-focused approach; these characteristics are described in greater detail below. Healey highlights the positive role of public participation; she builds on the work of Habermas to develop the concept of ‘collaborative planning’ in which she calls for an approach to planning that opens up the expert-dominated debate that informs decision-makers. She contends that collaborative planning encompasses local and other forms of knowledge in order to “make sense together”.⁷⁸

3.1.2 *Public participation enhances democratic decision-making*

There is an emphasis on democracy in participatory decision-making, in line with its emphasis on the voice of ‘ordinary people’. Deliberation and its relative merits and weaknesses come up frequently in discussions around public participation. As it is described by Sagoff, Steele, Fung and Wright, the ideal form of deliberation resembles the ideal form of discussion in Habermas’ communicative rationality.⁷⁹ Steele stresses that deliberation is a collective process. It is more than a form of decision-making that takes account of all perspectives; rather, in deliberation, citizens take part in the process fully by reflecting on their own views and by persuading others.⁸⁰ Echoing communicative rationality, deliberation underscores the importance of reasoned argument,⁸¹ connecting reason with more legitimate decision-making.⁸²

⁷⁶ Patrick McAuslan, *The ideologies of planning law* (Pergamon 1980) 6

⁷⁷ Nicolas Kosoy and others, 'Pillars for a flourishing Earth: planetary boundaries, economic growth delusion and green economy' (2012) 4 *Current Opinion in Environmental Sustainability* 74, 74

⁷⁸ Patsy Healey, *Collaborative planning: shaping places in fragmented societies* (2nd edn, Palgrave Macmillan 2006) 48

⁷⁹ Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 *Oxford Journal of Legal Studies* 415; Archon Fung and Erik Olin Wright, 'Deepening Democracy: Institutional Innovations in Empowered Participatory Governance' (2005) 29 *Capital & Class* 182

⁸⁰ Steele (n79) 428

⁸¹ Steele (n79) 428

⁸² *Ibid* 430

Theories of deliberation are foregrounded with public participation due to its focus on reasonable, purposeful decision-making.⁸³ Public participation grounds decision-making by empowering citizens to bring their situated knowledge into the decision-making process.⁸⁴ Participatory decision-making bodies are considered to be solutions-focused; they are generally linked to specific actions and are geared towards achieving genuine consensus.⁸⁵ These positive attributes are particularly evident on environmental issues. Environmental issues benefit from a forum where the long-term, complex challenges associated with environmental policy can be addressed.⁸⁶ It moves environmental governance on from individual preference-counting; while an individual might not always act in an environmentally sustainable manner, they might nevertheless view environmental protection as an essential aspect of the world in which they want to live.⁸⁷

3.1.3 *Public participation enhances fairness*

Smith and McDonough cite Habermas's work on ideal speech situations as an approach to public participation that is "more explicitly congruent with justice theory", and is consequently more likely to be seen as fair by those participating in the process.⁸⁸ Habermas' approach to public participation requires that there are no barriers on attendance or on initiating discourse and that every participant has the ability to influence the decision. It is notable that this approach does not countenance any hierarchies of knowledge or of access to decision-making. Both Healey, and Smith and McDonough, employ the theories of Habermas to promote an approach to public participation that is democratic in its consideration of forms of knowledge. This trend is identified by Lane as part of "the declining authority of scientific-rationalism [which] forced a reconsideration of the nature and role of reason".⁸⁹ Where then are experts located within this approach to public participation? These approaches to public participation seem to suggest that expert input should not be valued over non-expert input.⁹⁰ However, in counter to this, Smith and McDonough's 2001 study found that a belief that logic was embedded in the public participation procedure engendered a feeling of trust and of fairness; they further contended that this logic was explicitly linked to expert knowledge; "[respondents'] concern about rationality in decision-making was supported by the desire for experts to make the decisions, and the need for accurate information".⁹¹

⁸³ Crossley and Roberts (n24) 7

⁸⁴ Steele (n79) 437

⁸⁵ Crossley and Roberts (n24) 17

⁸⁶ Ulrich Beyerlin, 'Aligning international environmental governance with the 'Aarhus principles' and participatory human rights' in Anna Grear and Louis Kotze (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015) 336

⁸⁷ Steele (n79) 424

⁸⁸ Maureen H McDonough and Patrick D Smith, 'Beyond Public Participation: Fairness in Natural Resource Decision Making' (2001) 14 *Society & Natural Resources* 239, 241

⁸⁹ Marcus B Lane, 'Public Participation in Planning: an intellectual history' (2005) 36 *Australian Geographer* 283, 295

⁹⁰ The treatment of expertise in public participation procedures will be revisited in Chapters 5, 6, 7 and 8.

⁹¹ McDonough and Smith (n88) 246

3.2 Public participation: its critics

3.2.1 *Transformative?*

Calls for public participation assume that increased public participation in governance will result in improved decision-making. However public participation excites cynicism and criticism as well as praise. Advocates of a strong role for public administration might question the role for public participation; they might consider public servants to be best placed to advocate for the public good and so see little need for an active participatory public.⁹² This view of public participation often associates participating publics with a kind of 'NIMBY'-ism⁹³, and assumes that they are solely concerned with protecting their private interests. This view contradicts Sagoff's concept of the dual role of the individual in society; that an individual can act and think as a self-interested consumer and as a citizen, "capable of embracing and advancing values which do not reflect their own selfish interests, but define the kind of society in which they wish to live".⁹⁴

Public participation in decision-making is purported to have a transformative capacity; it is argued that it has the potential to move decision-making processes past traditional considerations and established forms of dialogue. However, some contend that public participation procedures rarely fulfil this transformative potential.⁹⁵ Why is this the case? Thinking about the planning system specifically, McAuslan contends that the voice of the public is separated from decision-making;⁹⁶ Adshead notes that despite a growing acceptance of a duty of public participation, the greater powers of private property interests and of public officials in the planning system serve to marginalise members of the public in the decision-making process.⁹⁷ Howard and Sandercock argue that when public participation procedures reproduce existing power imbalances, their ability to be transformative is significantly limited. Howard frames this as a dissonance between public participation legislation and implementation;⁹⁸ Sandercock is more disparaging, characterising the increased acceptance of public participation as a 'populist red herring'.⁹⁹

3.2.2 *Democratic?*

While increased public participation often results in an increase in citizens' rights,¹⁰⁰ some question the impact of the growing importance of citizen groups on representative governance – who speaks for 'the

⁹² This is further explored in discussion of McAuslan's Ideologies of Planning Law, Chapter 3 section 2.2.

⁹³ Not In My Backyard. This term is used to describe local opposition to schemes for land use that are undesirable, possibly due to the environmental cost they place on the local community. Jessica Kelly, 'NIMBY' in Mulvaney D and Robbins P (ed), *Green Politics: an A-to-Z Guide* (Sage 2011) 285

⁹⁴ Steele (n79) 424. See also Joanne Hawkins, 'Fracking and the scope for public dissent' (2019) 21 *Environmental Law Review* 128 which discusses the case of the 'Frack Three' and the reduced scope for public dissent within traditional channels.

⁹⁵ Sandercock (1994) in Lane (n89) 285; Tanya Howard, 'From international principles to local practices: a socio-legal framing of public participation research' (2015) 17 *Environment, Development and Sustainability* 747

⁹⁶ McAuslan (n76) 11

⁹⁷ Julie Adshead, 'Revisiting the ideologies of planning law' (2014) 6 *International Journal of Law in the Built Environment* 174, 193

⁹⁸ Howard (n89) 753

⁹⁹ Sandercock (1994) in Lane (n89) 285

¹⁰⁰ Steele (n79) 416

people' here? How do these groups work with representative forms of governance?¹⁰¹ However, the counterargument to this would be that public participation benefits representative governance. A dominant political paradigm in present society is that of libertarianism, where "the state is the problem, not the solution".¹⁰² Public participation encourages a more pro-active approach to governance where citizens are encouraged to 'join in' governance and work towards solutions. By encouraging more active citizenry one could argue that participatory governance improves representative governance as it builds a positive political culture, necessary for a robust democracy.¹⁰³ Others contend that the emphasis on rational argument limits the inclusivity of these forums, privileging some voices over others and drawing the outsider perspective into the centre, thus encouraging conformity rather than a diversity of opinion.¹⁰⁴ Steele responds to this concern, stating that some 'cross-pollination' is inevitable and can be a positive force as well; true deliberation requires all participants to be willing to question and possibly change their perspectives.¹⁰⁵

Participatory governance, or 'rule by the people', stands opposed to 'rule by experts'.¹⁰⁶ This conflict is foregrounded in environmental regulation. UK environmental regulation has historically been closed to the public, a discussion limited to the regulators and the regulated body, existing within the strict parameters of scientific expertise.¹⁰⁷ Both of these voices, those of the expert and of the citizen, appeal to different kinds of legitimacy in law-making; namely, is the law effective or is the law democratic? Scientific expertise and the role it plays in legal decision-making is a subject of rich scholarship; it is an area of relevance to this field site.¹⁰⁸ The work of Jasanoff is particularly relevant here as she investigates not only the quality of scientific expertise used in legal decision-making but also its position within the decision-making process; how much deference should it be owed, and what should decision-makers do when faced with conflicts and uncertainty over knowledge-issues and value-issues.¹⁰⁹ Steele and others contend, echoing Habermas, that effective regulation ought to reflect not only the relevant data, but also public concerns on the issue under consideration. Public participation is useful when weighing different perspectives on risk, and when taking into account the diverse values that any particular issue might touch upon.¹¹⁰

¹⁰¹ Ibid 416. Public participation and its relationship to representative governance is discussed in greater detail in Chapter 8, section 6.1.2.

¹⁰² Fung and Wright (n79) 6

¹⁰³ Ibid 5

¹⁰⁴ Steele (n79) 436

¹⁰⁵ Ibid 436

¹⁰⁶ Elizabeth Fisher, 'The Enigma of Expertise, Review of S Owens (2015) Knowledge, Policy and Expertise: The UKRC on Environmental Pollution 1970-2011' (2016) 28 *Journal of Environmental Law* 551, 552; Expertise is explored in Chapters 5, section 2.1, Chapter 6, section 2.2 and Chapter 8, section 5.2.

¹⁰⁷ Steele (n79) 418

¹⁰⁸ While themes of expertise emerge in the data, this research focuses on assumptions embedded in the decision-making process under investigation and might inform the treatment of expertise in this process. The insights emerging from this research on expertise will be explored in future work.

¹⁰⁹ Sheila Jasanoff, 'Serviceable Truths: Science for Action in Law and Policy' (2015) 93 *Texas Law Review* 1723, 1724

¹¹⁰ Ibid 424. The idea that public participation incorporates diverse values is revisited in Chapter 8, section 6.1.

This chapter has explored theories of public participation and communicative rationality, and has considered the different kinds of knowledge and argument that shape and are heard in legal decision-making processes; it is evident therefore that the work of systems theorists bears some relevance to this research. Most notably, the work of Luhmann on the legal system as an autopoietic system¹¹¹ is relevant to this research. Luhmann describes how law exists only as communication, not only as the action of communication but in communication as “a synthesis of information, communication and comprehension”¹¹², and that this is a way of understanding how the unity of the legal system can be maintained and reproduced. The work of Luhmann and Teubner, while deeply insightful, focuses on communications in the legal system; I intend to approach the research from multiple perspectives, looking at the role of knowledge and communication but also the materiality of the site and the role of non-human participants. Consequently, while these theories speak to themes that are relevant to this research, they are not the theoretical framework through which the site is understood.

3.3 Public participation and environmental decision-making

3.3.1 History of public participation in environmental decision-making

Public participation has traditionally held a prominent place within environmental law.¹¹³ It was present in the Stockholm Conference in 1972, a landmark event in international environmental governance; it was inspired by, and subsequently empowered, new kinds of international environmental actors, i.e. international organisations, NGOs and individuals.¹¹⁴ This prominent position is underpinned by the 1998 Aarhus Convention and the 1992 Rio Declaration (Principle 10). The Aarhus Convention identified the following three pillars for public participation:

- Access to Information
- Participation in decision-making
- Access to Justice.¹¹⁵

Aarhus explicitly recognises the rights of the concerned public, and not just those who are directly affected, to take part in environmental decision-making:

One or more natural or legal persons, and, in accordance with rational legislation or practice, their associations, organisations or groups (A2(4)), as well as ‘the public concerned’, ‘the public

¹¹¹ “A system produces and reproduces its own elements by the interaction of its elements”. Gunther Teubner, ‘Autopoiesis in Law and Society: A Rejoinder to Blankenburg’ (1984) 18(2) *Law & Society Review* 291, 292

¹¹² Niklas Luhmann, ‘The Unity of the Legal System’ in G Teubner (ed.), *An Autopoietic Law - A New Approach to Law and Society* (De Gruyter 1987) 17

¹¹³ Public participation is also prominent within the planning law system of England and Wales. *People and planning: report of the Committee on Public Participation in Planning* (Skeffington Report) discussed public participation in planning, outlining how participation duties set out in the Planning Act 1968 s3(1) could be implemented. Public participation in planning is further explored in Chapter 3, section 2.2 and 3.3.

¹¹⁴ Beyerlin (86) 334

¹¹⁵ Aarhus Convention 1998

affected or likely to be affected by, or having an interest in, the environmental decision-making (A2(5)).¹¹⁶

The emphasis on public participation in environmental law can partly be explained by the unique nature of the value-issues raised in environmental law. Environmental impacts are long-term and diffuse; they do not fit neatly into short-term legal and political structures, thus raising questions of ethics and legitimacy in environmental decision-making.¹¹⁷

3.3.2 *Why is public participation valued in environmental decision-making?*

Underpinning calls for greater participation is the belief that transformative social action occurs when people who disagree make an effort to find common ground.¹¹⁸ Some argue that public participation in environmental decision-making can enrich the understanding of environmental value in decision-making processes, that “publics do not adhere to the logically consistent reasoning of philosophers, but intuitively construct and reconstruct their environmental value positions in the light of personal experiences, relationships and events”.¹¹⁹ Davies suggests that plans that rely on “expert-led designatory systems” can feel abstracted from the public; public participation in decision-making allows for a more diverse and holistic understanding of environmental value to be included in these contexts.¹²⁰ With stakes for effective environmental action as high as they are, there is an urgent need to develop “transcommunal alliances” that engage with value-conflicts and with the “fleshly realities of social-ecological interdependence”.¹²¹ Debates on environmental justice can be divisive. They are shaped by power relationships and are constantly shifting.¹²² Susceptible to the same issues of injustice as any discourse, environmental justice debates need to be mindful of the fairness of the process as well as the value of their outputs.

3.3.3 *The environmental citizen*

Considerations of people’s motivations for and methods of participation in environmental decision-making are key areas of concern in environmental justice scholarship. The concept of the environmental citizen is influential here. Sagoff contends that individuals in a society are both consumers and citizens; that they are capable of supporting policies that might not benefit them directly but that build the kind of society in which they aspire to live.¹²³ Dobson and Bell provide a different perspective. While they agree that individuals are typically driven by self-interest, they argue for a broader understanding of what constitutes

¹¹⁶ Beyerlin (86) 337

¹¹⁷ Ibid 423

¹¹⁸ Anneleen Kenis, 'Ecological citizenship and democracy: Communitarian versus agonistic perspectives' (2016) 25 *Environmental Politics* 949, 953

¹¹⁹ Anna Davies, 'What Silence Knows - Planning, Public Participation and Environmental Values' (2001) 10 *Environmental Values* 77, 98

¹²⁰ Ibid 98. These themes are revisited in Chapter 8, section 6.1.

¹²¹ Giovanna Di Chiro, 'Living environmentalisms: coalition politics, social reproduction, and environmental justice' (2008) 17 *Environmental Politics* 276, 279

¹²² Ibid 280

¹²³ Steele (n79) 424

self-interest, contending that individuals might seek positive changes for the environment as they believe this ultimately would be to their benefit.¹²⁴

The notion of the ‘liberal environmental citizen’¹²⁵ underpins policy considerations around public engagement with environmental issues. This can be problematic, as environmental policies encouraging sustainable consumption do not always treat people as active citizens.¹²⁶ What MacGregor terms the “triumph of the ultimate neo-liberal subject” is that environmental policy in Western society is often predicated on the assumption that the best way to combat climate change is through lifestyle change.¹²⁷ Kenis underlines the political benefit in this emphasis on consumers. To treat personal change as equivalent to political change is to divert attention from the entrenched political issues and power imbalances revealed by the environmental crisis.¹²⁸ While Dobson and Bell do not necessarily view these policies as a deliberate attempt to disguise the need for structural change, they do consider it unwise to rely on a market-based approach, arguing that “overwhelming confidence has been placed in the efficacy of fiscal sticks and carrots in this connection”.¹²⁹ They advocate for policies that focus on changing people’s attitudes to the environment, rather than their behaviours, maintaining that market-based approaches might achieve the latter, but are unlikely to achieve the former.¹³⁰ Following on from this discussion of environmental citizenship and public participation, the next section explores strands of environmental justice scholarship relevant to this research project.

4 Environmental Justice

4.1 Overview of environmental justice

4.1.1 History of environmental justice

Environmental justice came to prominence in the latter half of the twentieth century. In the US, community groups across the country protested the disproportionate number of environmental hazards located near disadvantaged communities and their ineffective regulation, explicitly framing these issues as justice

¹²⁴ Andrew Dobson and Derek Bell, *Environmental citizenship* (MIT Press 2005) 2. These diverging understandings of self-interest are evident in research conducted by Swaffield and Bell, exploring the beliefs of climate champions in large organisations. When asked to think about their colleagues’ motivations concerning the environment, the climate champions assumed that their colleagues would only be driven by a narrow understanding of self-interest; whereas, when reflecting on their own motivations, the climate champions tended to draw upon a wider range of beliefs and discourses. Joanne Swaffield and Derek Bell, 'Can 'climate champions' save the planet? A critical reflection on neoliberal social change' (2012) 21 *Environmental Politics* 248, 263

¹²⁵ Derek Bell, 'Liberal environmental citizenship' (2005) 14 *Environmental Politics* 179

¹²⁶ Kenis (n118) 950

¹²⁷ Sherilyn Macgregor, 'Only Resist: Feminist Ecological Citizenship and the Post-politics of Climate Change' (2014) 29 *Hypatia* 617, 624

¹²⁸ Kenis (n118) 952

¹²⁹ Dobson and Bell (n124) 1

¹³⁰ Ibid 3. This idea is revisited, in part, in the findings of this thesis, Chapter 8.

issues.¹³¹ This emphasis on social justice was reflected in the work of environmental activists in vulnerable communities across the world. An environmentalism of the poor emerged, with connections between these movements reinforced by the deaths of Chico Mendes in Brazil and Ken Saro-Wiwa in Nigeria,¹³² and by the growth of the global peasants' movement La Vía Campesina.¹³³

Environmentalists have at times faced criticism for ignoring the relationship between social justice issues and the environment.¹³⁴ By adding a justice focus,¹³⁵ environmental justice actors diversify the approaches available to environmental campaigners. This is evident in early environmental justice campaigning in the US, which was strongly influenced by the American Civil Rights movement. In framing their concerns as justice concerns, environmental justice activists could access a range of political tools; highlighted in their demands for the 1987 Commission for Racial Justice report, *Toxic Wastes and Race in the United States*.¹³⁶ A divide developed between environmental justice activists and 'mainstream' environmental organisations, in terms of class, background, tactics and focus;¹³⁷ environmental justice actors remain suspicious of environmental sustainability discourses that omit any reference to social issues.¹³⁸ Some environmental justice actors are also critical of debates that draw a line between 'nature' and 'society',¹³⁹ contending that for the environmental movement to be effective, it must find a means of connecting global environmental justice issues to "an environmentalism of everyday life".¹⁴⁰ This change of approach signals a theoretical shift. As argued by Agyeman et al, paraphrasing Whatmore,

Such action insists that we shift away from traditional notions of 'environment', the indifferent stuff of a world 'out there', articulated through notions of 'land', 'nature' or 'environment', to the intimate fabric of corporeality that includes and redistributes the 'in here' of human beings.¹⁴¹

This raises provocative questions for those who are concerned with issues of justice beyond humans. Some environmental justice theorists have criticized the mainstream environmental movement for focusing on an abstracted idea of nature over issues of social justice.¹⁴² This criticism seems to polarise issues of social and ecological justice, which will be discussed in a later section (4.1.3).

¹³¹ Joan Martínez-Alier and others, 'Is there a global environmental justice movement?' (2016) 43 *The Journal of Peasant Studies* 731, 732

¹³² *Ibid* 732

¹³³ Annette Aurélie Desmarais, *La Vía Campesina: Globalization and the Power of Peasants* (Pluto Press 2007) 5

¹³⁴ Di Chiro (n121) 278

¹³⁵ Julian Agyeman and others, 'Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Just Sustainabilities' (2016) 41 *Annual Review of Environment and Resources* 321, 326

¹³⁶ Robert Bullard and Glenn Johnson, 'Environmental justice: Grassroots activism and its impact of public policy decision making' (2000) 56 *The Journal of Social Issues* 555,556

¹³⁷ Agyeman and others (n135) 328

¹³⁸ *Ibid* 326

¹³⁹ Di Chiro (n121) 279

¹⁴⁰ *Ibid* 294

¹⁴¹ Agyeman and others (n135) 332

¹⁴² Di Chiro (n121) 285

Environmental justice scholars are mindful of keeping their research grounded in the environmental justice movement.¹⁴³ Mirroring other critical approaches, justice theory and activism are deeply intertwined; developments in justice theory typically reflect the evolution of justice movements of the twentieth century.¹⁴⁴ It is important to consider both the normative and the practical aspects of environmental justice,¹⁴⁵ and to highlight that the understanding of environmental justice in the environmental justice movement has evolved more quickly than in the academic world.¹⁴⁶ This is due in part to the greater theoretical flexibility available outside of academia. Actors in the environmental justice movement are at ease operating within a heterogeneous discourse; they employ multiple conceptions of justice and are more comfortable applying notions of justice to groups as well as individuals, and to nature as well as humans.¹⁴⁷

4.1.2 *Developments in environmental justice*

Rawls developed the defining theory of justice of the twentieth century.¹⁴⁸ He argues that justice is a “set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation”.¹⁴⁹ This perspective is reflected in early environmental justice theory, which focused on unequal environmental distribution,¹⁵⁰ where poor communities encountered more environmental harms and fewer environmental benefits.¹⁵¹ However, environmental justice theory has expanded in recent years, recognising that an understanding of environmental justice that focuses solely on issues of maldistribution does not adequately address complex forms of environmental injustice. These developments can be categorised as capacity-focused justice, procedural justice and recognition as justice. Sen and Nussbaum developed the concept of capacity-focused justice, finding injustice not only in an uneven distribution of benefits and harms but in a person’s ability to flourish.¹⁵² By centring on people’s capabilities, this theory of justice calls attention to factors that might limit a person’s agency and to the forces that produce and perpetuate these injustices.

Issues of process are integral to environmental justice; justice theorists must consider whether the process as well as the outcome is fair.¹⁵³ This includes, but is not limited to, people’s rights to information and

¹⁴³ There are several examples of this feature of environmental justice scholarship. It is comprehensively described in Joan Martinez-Alier, 'Between activism and science: Grassroots concepts for sustainability coined by environmental justice organizations' (2014) 21 *Journal of Political Ecology* 19; a US perspective is set out in Dorceta E. Taylor, 'Introduction: The Evolution of Environmental Justice Activism, Research, and Scholarship' (2011) 13 *Environmental Practice* 280

¹⁴⁴ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007) 45

¹⁴⁵ Eric Brandstedt and Anna-Karin Bergman, 'Climate rights: feasible or not?' (2013) 22 *Environmental Politics* 394

¹⁴⁶ Agyeman and others (n135) 328

¹⁴⁷ Schlosberg (n144) 4

¹⁴⁸ Peri Roberts and Peter Sutch, *An introduction to political thought: A conceptual toolkit* (2nd edn, Edinburgh University Press 2012) 187

¹⁴⁹ John Rawls, *A theory of justice* (Rev edn, OUP 1999) 5

¹⁵⁰ Schlosberg (n144) 5

¹⁵¹ *Ibid* 3

¹⁵² *Ibid* 3

¹⁵³ Teea Kortetmäki, 'Reframing Climate Justice: A Three-dimensional View on Just Climate Negotiations' (2016) 19 *Ethics, Policy & Environment* 320, 322

inclusion in decision-making processes.¹⁵⁴ With its roots in grassroots campaigns, issues of procedural justice are fundamental to the environmental justice movement.¹⁵⁵ Environmental justice actors highlight that the consistent exclusion of vulnerable communities from the decision-making process exacerbates injustices, which are compounded as the concerns of the most affected communities are typically marginalised.¹⁵⁶ Linked to procedural justice is the concept of recognition. Environmental justice actors contend that a lack of recognition for other ways of life lies at the heart of environmental injustices. This troubling lack of recognition is evident in the continued privileging of Western neo-liberal values over the values of indigenous groups whose understanding of the relationship between nature and culture is antithetical to the nature/culture dualism present in Western thought.¹⁵⁷ Indigenous groups contend that a lack of respect for indigenous ways of life underlies the capacity to commit environmental injustices.¹⁵⁸ Considering capacity-focused, procedural and recognition-focused justice enables a nuanced understanding of the many challenges facing environmental justice.¹⁵⁹ Schlosberg, the key proponent of this multi-faceted approach,¹⁶⁰ further contends that it enables a combined engagement with environmental and ecological justice, the focus of the next section.

4.1.3 *Ecological justice*

The scope of the environmental justice movement has expanded considerably over the past twenty years. One of its key conceptual developments has been a re-evaluation of the relationship between the human and non-human world.¹⁶¹ The relationship between environmental justice and ecological justice, which focuses on “the relationship between those human communities and the rest of the natural world”, can be an uneasy one. Many environmental justice initiatives are not concerned with the natural world as separate from humans.¹⁶² While there are indigenous groups that see demands of justice for humans and justice for nature as wholly interdependent, others argue that the notion of justice is inherently anthropocentric.¹⁶³ As previously noted, some environmental justice activists consider the ‘mainstream’ environmental

¹⁵⁴ Christopher Shaw, 'The role of rights, risks and responsibilities in the climate justice debate' (2016) *International Journal of Climate Change Strategies and Management* 514

¹⁵⁵ *Ibid* 508

¹⁵⁶ Kortetmäki (n153) 328

¹⁵⁷ Kortetmäki (n153) 327. This is revisited in greater detail in Chapter 7.

¹⁵⁸ Agyeman and others (n135) 325. The term ‘indigenous’ is an ambiguous and contested one, poorly suited to narrow or rigid definitions. The term ‘indigenous peoples’ as it is used in this thesis refers to peoples with close, often spiritual, ties to particular land whose ancestors held that land prior to colonisation. To understand ‘indigenous’ as referring solely to people who are born in a place ignores the history of and particular oppression faced by indigenous peoples. Wendy Shaw, Douglas Herman and Rebecca Dobbs, 'Encountering indigeneity: re-imagining and decolonizing geography' (2006) 88 *Geografiska Annaler: Series B, Human Geography* 267, 268. There are some common traits of indigenous perspectives on the environment, which include a genealogical bond with the land, a sense of human and non-human interrelatedness and respect for nature. This is explored in greater detail in Laurie Anne Whitt and others, 'Indigenous perspectives' in Dale Jamieson (ed), *A companion to environmental philosophy* (Blackwell Publishers 2001). Aspects of indigenous perspectives on the environment that emerge at the research field site) are highlighted in Chapter 7, section 5.1.1.

¹⁵⁹ Kortetmäki (n153) 322

¹⁶⁰ Discussed in more detail in the following section.

¹⁶¹ Agyeman and others (n135) 330

¹⁶² Schlosberg (n144) 5

¹⁶³ Kostas Koukouvelis, 'Climate Change Social Movements and Cosmopolitanism' (2017) 14 *Globalizations* 746

movement's focus on 'abstracted' notions of wilderness, rather than matters of social justice, highly problematic, linking it to a kind of neo-colonialism where Western values are foisted on communities through restrictive environmental regulations.¹⁶⁴

However, certain ecological justice theorists counter this argument, advocating for an understanding of environmental justice that does not prioritise the needs of humans for the following reasons: humans and the natural world are mutually implicated in their struggle for existence; justice should be concerned with redressing inequalities and therefore should recognise the substantial inequalities shouldered by the non-human world; and lastly, the nature/culture dualism underpinning Western philosophical thought is both culturally contingent and theoretically inadequate.¹⁶⁵ Most ethical environmental philosophers have now moved beyond absolute anthropocentrism, and concede that non-humans make a moral claim, distinct from their potential benefit to humans.¹⁶⁶ It has proven theoretically challenging to develop a theory of justice that encompasses the needs of humans, non-human species and the material world.¹⁶⁷ Schlosberg seeks to apply a pragmatic, multi-faceted framework for environmental and ecological justice, combining distributive, capacity-focused, procedural and recognition-based justice.¹⁶⁸ However, incorporating a respect for the intrinsic value of nature into theories of justice is troubling to liberal theorists,¹⁶⁹ who consider it to be a preference not shared by all that consequently undermines the impartiality of justice. Schlosberg counters this argument, asserting that nature is no ordinary 'good', that the existence of a functioning ecosystem is essential to human survival.¹⁷⁰ However, others question how readily theories of justice can be applied to the non-human world. Cripps wonders how predation, essential to the flourishing of some species and highly damaging to the existence of others, sits with existing conceptions of justice.¹⁷¹

4.2 Criticism of rationalist philosophy within environmental justice scholarship

4.2.1 *Rationalist philosophy instrumentalises the environment*

Rationalist philosophy is criticised for promoting an instrumentalist view of nature that prioritises economic progress and fails to recognise environmental value.¹⁷² The intrinsic value of nature is ignored when it is only seen in terms of its use for economic progress. Rawls, recognising that environmental problems are not sufficiently addressed in his theory of justice, argues that environmental problems happen when

¹⁶⁴ Eleanor Shoreman-Ouimet and Helen Kopnina, 'Reconciling ecological and social justice to promote biodiversity conservation' (2015) 184 *Biological Conservation* 320, 321

¹⁶⁵ Shoreman-Ouimet and Kopnina (n164) 321

¹⁶⁶ Katie McShane, 'Anthropocentrism in Climate Ethics and Policy' (2016) 40 *Midwest Studies in Philosophy* 189

¹⁶⁷ Martha C. Nussbaum, *Frontiers of justice: disability, nationality, species membership* (Harvard University Press 2006) 21

¹⁶⁸ Schlosberg (n144) 103

¹⁶⁹ The intrinsic value of nature is explored throughout the thesis, in particular in Chapters 7 (section 4.1) and 8 (section 2).

¹⁷⁰ *Ibid* 107

¹⁷¹ Elizabeth Cripps, 'Saving the Polar Bear, Saving the World: Can the Capabilities Approach do Justice to Humans, Animals and Ecosystems?' (2010) 16 *Res Publica* 1,1

¹⁷² Eduardo Gudynas, 'Buen Vivir: Today's tomorrow' (2011) 54 *Development* 441, 447; this criticism re-emerges throughout the thesis, in Chapter 6, 7 and 8.

externalities, i.e. environmental damage, are not properly accounted for in the market.¹⁷³ Rawls' critics argue that this maintains an instrumentalised view of nature and does little to counteract the destructive impact of this view of nature.¹⁷⁴ Burke and Pomeranz highlight that an instrumentalist view of nature that treats aspects of nature as replaceable is highly damaging, and describe how the instrumentalised treatment of the Rhine river in Germany as a resource for industry has destroyed the river as a habitat.¹⁷⁵

4.2.2 *Rationalist progress and the environment*

Critics of rationalist philosophy contend that the rationalist view of nature is entangled with the capitalist notion of progress.¹⁷⁶ Plumwood argues that the capitalist notion of progress, “whose simple, abstract rules of equivalence and replaceability do not fit the real, infinitely complex world of flesh and blood, root and web on which they are so ruthlessly imposed”, is implicated in the present precarious state of the environment.¹⁷⁷ This is supported, *inter alia*, by the dramatic increase in the rate of environmental destruction with the intensification of global production in the latter half of the twentieth century.¹⁷⁸ The Latin American concept of Buen Vivir is pertinent here, as it is positioned as an alternative to the rationalist paradigm. Translated as Good Living, Buen Vivir promotes the achievement of a good quality of life, which is only possible when living in harmony in a community, nature being part of that community.¹⁷⁹ Buen Vivir,

Prioritises harmony, co-operation and humility over possessive individualism, Eurocentric rationality, turbo-charged capitalist consumption, and technological fetishism that leads to hubristic illusions over domination over nature.¹⁸⁰

The above description by Adelman foregrounds Buen Vivir as a counter-narrative to dominant discourses around nature and progress. In international environmental law, Buen Vivir is treated with ambivalence. It is a way of life followed by some of the communities most affected by environmental degradation and is enshrined in the constitutions of Bolivia and Ecuador; it is also included in *The Future We Want*, the outcome document of the Rio+20 talks.¹⁸¹ However, this recognition of alternative conceptions of the human-nature relationship is given while re-affirming signatories' commitment to economic development; “we note that some countries recognise the rights of nature in the context of the promotion of sustainable development”.¹⁸² The rights of Mother Earth were declared at the World People's Conference on Climate

¹⁷³ Breena Holland, 'Justice and the Environment in Nussbaum's "Capabilities Approach": Why Sustainable Ecological Capacity Is a Meta-Capability' (2008) 61 *Political Research Quarterly* 319, 319

¹⁷⁴ Martha C. Nussbaum, 'Philosophy and Economics in the Capabilities Approach: An Essential Dialogue' (2015) 16 *Journal of Human Development and Capabilities* 1, 6

¹⁷⁵ Edmund Burke and Kenneth Pomeranz, *The environment and world history* (University of California Press 2009) 20

¹⁷⁶ Val Plumwood, *Environmental culture: the ecological crisis of reason* (Routledge 2002) 14

¹⁷⁷ *Ibid* 14

¹⁷⁸ Di Chiro (n121) 281

¹⁷⁹ Gudynas (n172) 441

¹⁸⁰ Sam Adelman, 'Epistemologies of mastery' in A Grear and LJ Kotze (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015)

¹⁸¹ United Nations General Assembly, 'The Future We Want', UNGA Res 66/288 (27 July 2012), II, B, 39

¹⁸² United Nations General Assembly, 'The Future We Want', UNGA Res 66/288 (27 July 2012), II, B, 39

Change and the Rights of Mother Earth at Cochabamba, Bolivia in 2010.¹⁸³ However, when Bolivia asserted the rights of Mother Earth at the 2013 UN Climate Change Conference held in Warsaw, this received little attention;¹⁸⁴ Kortetmaki suggests that submissions like these are discredited and treated as irrational.¹⁸⁵ The criticisms highlighted here are developed in the final section of this chapter, which considers rationalist dualisms and their damaging impact on the environment. It further highlights the work of environmental justice and new materialist scholars who criticise rationalist tendencies within society and foreground the implications of these dualisms.

5 Rationalist dualisms and their critics

5.1 Dualisms in rationalist thought

5.1.1 *Human-nature dualism a defining feature of rationalist thought*

Embedded in the foundations of Western philosophy is the notion that humans are different from the rest of the natural world;¹⁸⁶ this is discussed in the first section of this chapter. The ability to reason is held by rationalist philosophy to be the defining trait of being human;¹⁸⁷ nature, in contrast, is not equipped with reason. This duality is polarising and hierarchical; being human is seen as being different from and better than nature.¹⁸⁸ In this understanding of the world, nature is seen as external and instrumental to humans.¹⁸⁹ It is informed by the work of Kant, who further reinforces the essential difference between humans and nature, and human superiority. Kant's moral agent is autonomous; he resists his natural passions.¹⁹⁰ This understanding of the human-nature relationship underpins the conception of the person in Western legal systems.¹⁹¹ The following sub-section examines three rationalist dualisms in further detail; human-nature dualism, mind-body dualism and reason-emotion dualism.

¹⁸³ World People's Conference on Climate Change and the Rights of Mother Earth, *Universal Declaration of Rights of Mother Earth* (Bolivia 22 April 2010)

¹⁸⁴ Bolivia's submission is noted here: UNFCCC, Conference of the Parties 19th session, 'Gender and climate change: Options and ways to advance the gender balance goal: submissions from Parties and observer organisations: Addendum', FCCC/CP/2013/MISC.2/Add.1 (Warsaw 15 November 2013) 4; no reference to the agenda item on gender (the forum in which Bolivia made this submission) or to Bolivia's broader point is included in the closing reports.

¹⁸⁵ Kortetmäki (n153) 328

¹⁸⁶ Or most Western philosophy; Spinoza is a notable exception. A brief, helpful description of Spinoza's monist philosophy and its implications for the environment is provided in Paul S MacDonald, 'Benedict Spinoza 1632-77' in JA Palmer-Cooper, PB Corcoran and DE Cooper (eds), *Fifty key thinkers on the environment* (Routledge 2000)

¹⁸⁷ Nelson (n11) 6

¹⁸⁸ Val Plumwood, 'Ecofeminism: an overview and discussion of positions and arguments' (1986) 64 *Australasian Journal of Philosophy* 120, 131

¹⁸⁹ Plumwood (n176) 4

¹⁹⁰ Roger J. Sullivan, *An introduction to Kant's ethics* (Cambridge University Press 1994) 15

¹⁹¹ Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2 *Journal of Human Rights and the Environment* 23, 26

5.1.2 *Human-nature, mind-body and reason-emotion dualisms*

The mind-body relationship was a major philosophical concern of the seventeenth century. Prevailing theorists, among them Descartes, were inspired in part by the scientific developments of the early modern period; for example, Newton's work on optics, that imagined "boundaries of separate entities with clearly demarcated interiors and exteriors".¹⁹² Descartes claims that the mind and body are composed of two distinct substances. Ideas that are seemingly derived from sensory experience are the result of a union between these two distinct substances; what Descartes terms, with an illuminating use of the definite article and possessive pronoun, "the close and intimate union of our mind with the body".¹⁹³ Kant reinforces this division between mind and body. In seeking to detach Reason from a belief in the Divine, Kant reinforces the binary distinction of mind and body, and also of human and other; instead of Reason deriving from an Infinite Being, Kant proposes that human understanding is the source of itself, of the principles that underpin reasoning.¹⁹⁴ The distinction between humans and non-humans remains fundamental for twentieth century rationalists, among them Habermas.¹⁹⁵ These fundamental dualisms, mind/body and human/non-human, are replicated in many forms throughout modern thought. They find their fulfilment in the political and economic system arising from liberal humanism, neo-liberalism, which considers individual human subjects, and promotes rationality and competitive, power-seeking behaviour.¹⁹⁶

Humans continue to be defined by that which distinguishes humans from nature, namely reason, which enables complex decision-making. Habermas contends that human-nature dualism is embedded in modern human society. He contends that processes of technological development seek to control and exploit nature, and that these processes adhere to the structure of purposive-rational action, "which is in fact the structure of *work*".¹⁹⁷ Habermas questions theorists (namely Marcuse) who propose a different relationship to nature without recognising this fundamental position. In the capabilities approach proposed by Sen and Nussbaum, Nussbaum defines the identified capabilities as being essential for human life; these capabilities "mark the presence or absence of human life" and can be realised in a "truly human way, not a merely animal way".¹⁹⁸ Nussbaum's theory of justice then contemplates ideas of what is human and 'not animal'. Building on Kant's notion that autonomy from natural instincts through reason defines humans, Fuller contends that, "the whole point of social organization is specifically to combine in ways that go against the natural course of things".¹⁹⁹

¹⁹² Bronwyn Davies, 'Ethics and the New Materialism: A Brief Genealogy of the "Post" Philosophies in the Social Sciences' (2018) 39 *Discourse: Studies in the Cultural Politics of Education* 3

¹⁹³ Newman (n13) 185

¹⁹⁴ Henry E. Allison, 'Kant and the Two Dogmas of Rationalism' in AJ Nelson (ed), *A companion to rationalism* (Blackwell 2005) 346

¹⁹⁵ Gulshan Ara Khan, 'Vital Materiality and Non-Human Agency: An Interview with Jane Bennett' in GK Browning, R Prokhovnik and M Dimova-Cookson (eds), *Dialogues with contemporary political theorists* (Palgrave Macmillan 2012) 52

¹⁹⁶ Davies (n192) 2

¹⁹⁷ Jürgen Habermas, *Toward a Rational Society: Student Protest, Science, and Politics* (Heinemann 1971) 87 (Italics in original)

¹⁹⁸ Nussbaum, 1992 in Holland (n173) 326

¹⁹⁹ This quote is taken from a debate held at the International Knowledge and Discourse Conference in June 2002 between Steve Fuller and Bruno Latour, published in this article. Colin Barron, 'A Strong Distinction between Humans

Administrative and legal decision-making processes entrench reason-emotion dualism in their “elimination from official business [of] love, hatred, and all purely personal, irrational and emotional elements which escape calculation”.²⁰⁰ It is evident in these processes in their focus on objective, reasonable evidence and in their discouragement of emotive evidence.²⁰¹ Nussbaum argues that this differential treatment demonstrates a misunderstanding of reason and emotion, as emotions and thoughts are entangled in one another. Emotions often incorporate complex thinking, and it would be impossible to separate them.²⁰² Emotions perform an evaluative function that this approach fails to capture.²⁰³ Law and the reasons underpinning legal decisions can be explicitly emotional. Nussbaum in particular cites laws relating to disgust and shame to illustrate this point.²⁰⁴

5.2 Rationalist dualisms and the environment

5.2.1 *Rationalist dualisms are embedded in environmental legislation*

Modern environmental legislation has developed in an anthropocentric manner.²⁰⁵ Critics of rationalist dualisms contend that the relationship between humans and non-humans established in Enlightenment rationalist philosophy underpins environmental legislation, making it more difficult to envisage and therefore to protect the environment as an irreducible whole. “Anthropocentrism, individualism and economism” reinforce the idea that the environment is secondary to human wellbeing, encouraging an instrumentalist view of nature as material for economic progress.²⁰⁶ Bosselmann argues that the human-nature dualism embedded in law makes it harder to recognise the value of nature as an integrated whole.²⁰⁷ Tarlock among others contend that this reflects a failure of environmentalists to,

Construct a system of neo-Kantian environmental ethics that covers both humans and flora as fauna around Aldo Leopold’s dictum that ‘[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.’²⁰⁸

That is to say, the preservation of the integrity of the ecosystem above all else is not yet a central value in Western society and is not reflected in our processes for prioritising and ascribing value. The forms of value attributed to the environment will be further discussed throughout this thesis.²⁰⁹

and Non-Humans is no Longer Required for Research Purposes: A Debate Between Bruno Latour and Steve Fuller' (2003) 16 *History of the Human Sciences* 77, 83

²⁰⁰ Weber, in Brubaker (n71) 3

²⁰¹ Bruno Latour, *The making of law: An ethnography of the Conseil d'Etat* (2011) 212

²⁰² Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press 2004) 10. This is explored in greater detail in Chapter 7, section 1.2.

²⁰³ Martha C. Nussbaum, *Political emotions: why love matters for justice* (Harvard University Press 2013) 6

²⁰⁴ Nussbaum (n202)

²⁰⁵ Klaus Bosselmann, 'Losing the forest for the trees: Environmental reductionism in the law' (2010) 2 *Sustainability* 2424, 2425

²⁰⁶ *Ibid* 2431

²⁰⁷ *Ibid* 2432

²⁰⁸ Dan Tarlock, 'Is There a There There in Environmental Law?' (2004) 19 *Journal of Land Use & Environmental Law* 213, 241

²⁰⁹ Environmental value is explored in Chapters 5, 7 and 8.

5.2.2 *Rationalist dualisms are damaging to the environment*

Ecofeminist scholars frame the environmental crisis as a crisis of reason, generated by, as Grosz terms it,

The historical privileging of the purely conceptual... over the corporeal... a consequence of the inability of western knowledges to conceive their own processes of (material) production, processes that simultaneously rely on and disavow the role of the body.²¹⁰

Rationalist thought positions the material world as inferior to world of ideas. Plumwood among others contends that the environmental crisis stems from a refusal to accept human materiality, and ultimately mortality, resulting in a disregard for material reality, attaching significance only to the transcendent, mental world.²¹¹ Part of this process is the polarisation of mind and body and of humans and nature, establishing reason as the defining characteristic of humans, and framing nature as external, inferior and instrumental to human life; it is not unique, but rather is passive and tradeable.²¹² Plumwood highlights that dualisms embedded in rationalist thought are particularly damaging due to their oppositional and hierarchical nature.²¹³ Not only are mind/body, human/nature, reason/emotion and culture/nature distinct from one another, they are defined by their opposite pair and one is better than the other; this leaves no room for complexity or overlap. Hierarchical dualisms can be seen as expressions of a 'patriarchal logic' that underpin the structures through which Western society oppresses nature and women.²¹⁴ For Plumwood, the ultimate objective of ecofeminism is the resolution of dualisms and the development of an 'environmental culture' that values the natural world and the dependence of human society within this world.²¹⁵ Similar to Habermas, some ecofeminists distinguish between rationalism and reason, highlighting that while reason has the capacity to liberate, rationalism is a doctrine of reason that has been "corrupted by systems of power into hegemonic forms that establish, naturalise and reinforce privilege".²¹⁶

Eco-feminist theorists contend that the human-nature, mind-body and reason-emotion dualisms are implicated in one another. As Plumwood writes,

Special relationships with... or empathy with particular aspects of nature as experiences rather than with nature as abstraction are essential to provide a depth and type of concern that is not otherwise possible... This is based not on a vague, bloodless, and abstract cosmological concern but on the formation of identity, social and personal, in relation to particular areas of land, yielding ties often as special and powerful as those to kin, and which are equally expressed in very specific and local responsibilities of care".²¹⁷

²¹⁰ Elizabeth Grosz, 'Bodies and Knowledges: Feminism and the Crisis of Reason' in Linda Alcoff and Elizabeth Potter (eds), *Feminist epistemologies* (Routledge 1993) 187

²¹¹ Plumwood (n188) 122

²¹² Plumwood (n176) 4

²¹³ Plumwood (n188) 131

²¹⁴ Mary Phillips, 'Embodied care and Planet Earth: Ecofeminism, maternalism and postmaternalism' (2016) 31(90) *Australian Feminist Studies* 468, 471

²¹⁵ Plumwood (n176) 3

²¹⁶ Plumwood (n176) 17

²¹⁷ Val Plumwood, 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 316, 16

Plumwood argues that abstract considerations of nature cannot account for the full value of nature, which is demonstrated by personal connections with and responsibilities to one's environment. She further suggests that caring for nature and recognising our embodied, material reality is out of step with Western liberal theory and requires a different way of understanding the world, and the human-nature relationship.

5.2.3 *Rationalist dualisms subordinate other perspectives on the human-nature relationship*

Highlighted above, human-nature dualism underpins Western philosophy.²¹⁸ However there are philosophies and cultures outside of Western philosophy that value and recognise human interdependence with the natural world; many indigenous groups link oppression of their communities with a dismissal of their group's understanding of the human-nature relationship.²¹⁹ Building on this idea, Holland contends many of Nussbaum's capabilities are violated for indigenous communities when animals²²⁰ are not treated as having equivalent value to humans:

For the members of many pre- and non-Western indigenous communities, colonial oppression is expressed as a barrier to cultural autonomy, which would otherwise allow them to live in ways that recognize the equal dignity of nature and non-human life.²²¹

Holland argues that in order for theories of justice to better recognise the human-environment relationship as a meta-capability, i.e. a relationship upon which human existence is thoroughly contingent, it is essential to work with communities who have deeper relationships with nature; "we must have a more inclusive conversation with those humans who have different and sometimes deeper experiences with animals, for it is in those relationships that the capabilities of animals are revealed to us".²²²

This chapter has discussed aspects of environmental justice discourse that draw upon indigenous perspectives on the human-nature relationship and attachment to land. These perspectives re-emerge in later chapters. It is also pertinent to note Western scholarship that explores connections to land and nature. Sax, for example, has explored how humans define themselves and how they might more appropriately understand themselves and their relationship with nature, by recognising that:

It is largely through our interaction with animals that we define ourselves, both as individuals and as members of the human race. This interdependence is so intimate that it may not make very much sense to attempt to balance 'our' interests against 'theirs'.²²³

²¹⁸ Phillips (n214) 471

²¹⁹ Agyeman and others (n135) 325

²²⁰ She argues animals not nature here, but the same argument can be made for nature.

²²¹ Breena Holland, 'Working With and For Animals—A Response to Nussbaum' (2018) 19 *Journal of Human Development and Capabilities* 19, 20

²²² *Ibid* 22

²²³ Boria Sax, 'What is this Quintessence of Dust? The Concept of the 'Human' and its origins' in Boddice R (ed.) *Anthropocentrism: Humans, Animals, Environments* (BRILL 2011). This topic is further explored by Ingold, noted in Chapter 7, section 1.

Similar insights are developed in the work of space and place geographers like Relph and Tuan;²²⁴ they are concerned with social constructions of place and space, with the complex interconnections between humans, the sensory world and the broader environment they inhabit. Legal geographers take these analytic tools and apply them to legal systems; they describe how law is “worlded”, how legal rules and categories interact with particular spaces, developing understanding of where and how law happens.²²⁵

5.3 New Materialism as a critical lens on rationalist dualisms

5.3.1 *New Materialism and rationalist dualisms*

New materialist theorists offer valuable critiques of dualisms; they contend that dualisms have had an extremely damaging effect on modern society. As rationality valorises human agency, it minimises the worth of non-humans; the oppositional nature of these dualisms leads to a conception of the non-human as passive, inert, without vitality.²²⁶ New materialist thought suggests a perspective which seeks to overcome these dualisms. It is by no means the only, or indeed the first, school of thought to question rationalist dualisms and the power dynamics that are inherent in them. However, due to its monist approach, it is well positioned to dismantle these dualisms.

There is a significant group of thinkers within new materialism for whom the crisis of Enlightenment thinking and its impact on the planet drives their search for new ways of thinking. Bennett terms her theorisation of ‘vibrant matter’ a response to the “political-ethical problem” of our time, namely the challenge of developing a way of thinking, feeling and being more ecologically aware than we are currently, within the dominant paradigm of growth, progress and waste.²²⁷ Through decentring the human, dispersing agency among non-human bodies, embracing complex interrelationships and dismantling the dualisms through which rationalist assumptions are upheld, new materialist thought enables a deeper understanding of the complex relations of the material world; new materialist thinkers are attentive to the ethical duty inherent in new materialism and inspired by the transformative potential of this new way of thinking.²²⁸ The following sub-sections explore key insights with which new materialism overcomes these dualisms, namely materiality and entanglements.

²²⁴ See Edward Relph, *Place and Placelessness* (Pion, 1976) and Yi-Fu Tuan, *Passing Strange and Wonderful: Aesthetics Nature And Culture* (Island Press 1993)

²²⁵ David Delaney et al, ‘Introduction: Expanding the Spaces of Law’ in Delaney D, Kedar A, Braverman I and Blomley NK (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford 2014) 1

²²⁶ Khan (n195) 51

²²⁷ Ibid 48

²²⁸ Samantha Frost, ‘The Implications of the New Materialisms for Feminist Epistemology’ in Heidi Grasswick (ed), *Feminist Epistemology and Philosophy of Science: Power in Knowledge* (Springer 2011) 77; William Connolly, ‘The ‘New Materialism’ and the Fragility of Things’ (2013) 41 *Millennium - Journal of International Studies* 399, 400

5.3.2 *Lively matter*

New materialist attention to matter is driven in part by a recognition of the damage caused by theoretical perspectives that describe the social world “as if material and absolute space did not matter”.²²⁹ Abstract theory imagines a world where material realities are irrelevant. Material reality is subordinated; awkward, unique moments are shaved off to better construct a model that is neater and more exchangeable, but that is less accurate. It is especially troubling for rights to be detached from their specific contexts; highlighted by David Harvey, rights mean little if the rights-holder cannot connect them to the material reality of their everyday lives.²³⁰ The prevailing conception of matter in contemporary thought derives from the work of Newton, where matter is understood to be passive and inert, ontologically opposite, and inferior, to the dynamic, active human subject.²³¹ This understanding of matter underlies modern thought.²³² It is in this staid world, where matter is either to be ignored or to be fully comprehended, that new materialists start to question, what is not captured here? What is lost, when we excise materiality, when we ignore, as Jane Bennett states, “the active powers of material formations, such as the way landfills are, as we speak, generating lively streams of chemicals and volatile winds of methane...”²³³

5.3.3 *Entanglements*

Materiality is a concept with profound implications. Crucially, the notion of human agency is disbanded; agency, instead of being a product of an all-powerful human subject, is now distributed among a multiplicity of material bodies.²³⁴ Variations of this idea are explored in Deleuze’s assemblage theory and Barad’s concept of intra-action. Agencies are not the product of one discrete, bounded entity, but rather are produced in the interactions between entities.²³⁵ Instead of drawing upon an ontology of being, where bodies are independent, whole and available to fully comprehend, this perspective draws upon an ontology of becoming-with, where bodies are constantly interacting and changing, and are understood through their relations with other bodies:

[Bodies] ... materialise in socialised interaction among humans and non-humans... “Objects” like bodies do not pre-exist as such. Similarly, nature cannot pre-exist as such, but neither is its existence ideological. Nature is a commonplace and a powerful discursive construction, effected in the interactions among material-semiotic actors, human and not.²³⁶

Here, Haraway describes the material and discursive nature of new materialist entanglements. Deleuze and Guattari find an effective means of describing this complex notion; that “there is no difference between

²²⁹ Diana Coole and Samantha Frost, *New materialisms: ontology, agency, and politics* (Duke University Press 2010) 25

²³⁰ David Harvey, *Justice, Nature and the Geography of Difference* (Blackwell 1996) 331. This is part of a broader discussion on notions of justice existing in constant tension between particularity and universalism.

²³¹ Coole and Frost (n229) 7

²³² Khan (n195) 45

²³³ Ibid 43

²³⁴ Ibid 42

²³⁵ Jane Bennett, 'The Force of Things: Steps toward an Ecology of Matter' (2004) 32 *Political Theory* 347, 353

²³⁶ Donna Jeanne Haraway, *The Haraway reader* (Routledge 2004) 68

what a book talks about and how it is made'.²³⁷ This precludes the idea that the world, or even an object, is available for us to fully understand; as entanglements are always already in a state of becoming, it is impossible to fully capture their affects.²³⁸

If humans have no separate existence, if we are completely entangled with the world, if we are no longer masters of the universe, then we are completely responsible to and for the world and all our relations of becoming with it. We cannot ignore matter (e.g. our planet) as if it is inert, passive, and dead. It is completely alive, becoming with us, whether we destroy or protect it.²³⁹

As Barad suggests in this quote, this re-evaluation of matter invites a new ethical approach. It contends that since humans are immersed in and dependent on the world, we are consequently responsible to the multiple bodies, living and non-living, that make up the world.²⁴⁰

5.3.4 *Evaluating New Materialism*

New materialist thought provides useful tools with which to investigate questions of rationalist dualisms and assumptions. Its monist philosophical approach²⁴¹ and its related concepts of materiality and entanglements, or assemblages, are helpful to this thesis for exploring the effects of rationalist assumptions. These concepts helped spark and inform data analysis, encouraging a relational understanding of the site.²⁴² There is a temptation, when employing an emerging, radical philosophy, to focus attention on justifying its use; in doing this, an opportunity for open engagement is lost. This subsection briefly outlines my key concerns with new materialist thinking and highlights why, despite these concerns, this field of thought provides helpful insights for this research. My central criticism of new materialism is its tendency towards abstraction. This tendency is problematic, as new materialist theory purports to ground theory in embodied, material reality. New materialist theorists claim that these concepts are particularly effective as they recognise the inequalities affecting bodies, both human and non-human, whose worth is marginalised, or dematerialised. However, despite these aspirations, new materialist philosophy is typically expressed in profoundly abstract language and in concepts that seem poorly equipped for travel outside of the academy. Ultimately, these limitations meant that I did not rely on it as the primary theoretical and methodological framework. I felt its abstract language would make it harder to be led by the data in this research, and further, might create issues of accessibility with my research participants, as I intended that my research participants would be able to make use of my findings when the thesis was completed. In part, the dense

²³⁷ Gilles Deleuze and Félix Guattari, *A thousand plateaus: capitalism and schizophrenia* (Athlone 1988) 4

²³⁸ Connolly (n228) 405

²³⁹ Karen Barad, in Elizabeth St. Pierre, Alecia Jackson and Lisa Mazzei, 'New empiricisms and new materialisms: Conditions for new inquiry' (2016) 16 *Cultural Studies - Critical Methodologies* 99, 101

²⁴⁰ This touches on notions of intrinsic value, explored in greater detail in Chapter 8, in particular section 2.1.1.

²⁴¹ This is a dense field of scholarship and one I do not focus on in this thesis. The monist antecedents of new materialist thought can be found in the work of, amongst others, Spinoza and Bergson – useful discussion of their monist philosophical approaches can be found in the following works: Elizabeth Grosz, 'Bergson, Deleuze and the Becoming of Unbecoming' (2005) 11(2) *Parallax* 4, and Arnold Wolf, 'Spinoza' (1927) 5(2) *Journal of Philosophical Studies* 3.

²⁴² Their influence on data collection and analysis is further explored in Chapter 4 Section 2.

language seems to be a result of the ‘new’ and radical nature of these concepts. However, I believe that there must be a clearer means of expressing these concepts; if there is not, then this is surely a serious blow to the democratising intentions of new materialist thought. Ultimately, new materialist philosophy provides a helpful and illuminating frame through which to investigate my research questions. Despite a tendency towards obfuscating language, the concepts themselves are valuable. New materialist thought tips over the fundamental assumptions that underlie the way we think; this will always be challenging, but it is also radical and useful. There is plenty of work that employs the concepts of new materialism with great effect, generating valuable insights. This is particularly evident in the work of new materialist theorists who ground their work in pragmatic focus and in empirical research, scholars like Jane Bennett, Samantha Frost and Maggie MacLure.

6 Conclusion

In this chapter, I have explored theoretical contributions of rationalist philosophy, public participation and environmental justice, focusing on rationalist dualisms and scholarship that has critiqued these dualisms, primarily the work of environmental justice and new materialist theorists. This chapter served two functions, firstly to outline the theoretical context of the research question and secondly, to focus the scope of this research. By way of conclusion, I will trace the line of inquiry for my research project suggested by these fields of study. This research project seeks to investigate whether rationalist assumptions negatively impact the treatment of the environment in decision-making processes. How do the fields of thought explored in this chapter spark this investigation?

Enlightenment thinking establishes the underpinning assumptions of rationalist philosophy, namely the transcendental nature of reason. Through the theory of communicative rationality, this research can explore an understanding of objective reason that is conceptualised within an intersubjective reality. Communicative rationality further adds to our understanding of public participation. The normative assumption that rational, reasoned argument leads to ‘better’ decisions underpins the theory of communicative rationality and likewise underpins notions of public participation. Public participation is embedded within environmental justice because it has the potential to be transformative; it broadens and diversifies the voices heard in decision-making processes. This is essential, because as we see with Weber, rationalisation narrows legal decision-making, prioritising technical expertise and calculable behaviour. The rationalist separation of mind and body, replicated in a separation of human and matter and human and nature, have had a damaging impact on human-nature relations. Likewise, there are rationalist dualisms embedded in notions of ‘good’, ‘reasonable’ argument that might inform the treatment of the environment in decision-making. New materialist and some environmental justice scholars contend that these dualisms are a distorting and destructive influence in modern thought and seek to overcome them. New materialist scholarship further

overlaps with environmental justice scholarship through their monist theoretical perspective, and their questioning of the anthropocentricity of the modern world.

Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophy and becomes a method, cultivated by philosophers, for dealing with the problems of men.²⁴³

The theoretical perspectives explored in this chapter might seem far removed from a public inquiry outside of Newport, Wales. However, following the advice of Dewey above, my intention is to keep these theoretical insights firmly grounded in the work at hand. These insights provide valuable context for the law and legal theory explored in the following chapter.

²⁴³ John Dewey, in Khan (n195) 54

3 Legal Context

1 Introduction

The previous chapter explored the theoretical perspectives that inform this research question, namely, what are the rationalist assumptions that might negatively impact arguments for the environment in participatory decision-making processes. This chapter sets out the legal context for these questions and for the case study. Building on ideas explored in the previous chapter, this chapter aims to set the legal theoretical context in which this inquiry operates. This requires looking with a more legal lens at questions considered in the previous chapter, i.e. theories of public participation, and in part means considering what case law illuminates. A fascinating but challenging aspect of studying law is that applied and theoretical perspectives feed off one another. Concepts in legal theory shape the legal environment in which legal actors operate; for instance, notions of fairness proposed by legal theorists are picked over in case law. These notions of fairness are further embedded in policy and guidance for decision-makers, such as *The Judge over your Shoulder*, produced by the Government Legal Department, which might shape the thinking of inquiry actors.²⁴⁴ This chapter further outlines the legal context of the case study, the M4CAN inquiry. It sets out the legislative context in which this inquiry operates, i.e. the laws governing inquiries in England and Wales and any legislation specific to Wales, as planning and the environment are devolved competences.²⁴⁵

This chapter will firstly consider planning law in England and Wales, establishing its history and touching on the forces that might account for its development; this section relies on the work of Patrick McAuslan. From there, the chapter charts the development of planning law in Wales since 1998, briefly discussing devolution as it is relevant to the development of Welsh planning law.²⁴⁶ The impact of The Wellbeing of Future Generations Act 2015 (WFGA) will be discussed as it plays a significant role in the inquiry and therefore merits particular attention. The chapter then turns to public participation. It looks for possible roots of public participation in administrative jurisprudence, in the fundamental principle of *audi alteram partem* (the right to a fair hearing). Moving from the theoretical to the practical, the role of the public local inquiry as a public participation procedure will be examined. The last section focuses on the M4CAN inquiry, introducing the scheme and setting out its timeline, and considering the scheme's legal and policy context. The legal and policy context set out by both the proposer, i.e. the Welsh Government, and by the environmental objectors are considered, underlining that these policies and laws are presented by both sides as objective facts but that the emphasis placed on them, and the choice of policy, are political acts, intended to persuade.

²⁴⁴ Government Legal Department, *The judge over your shoulder - a guide to good decision making* (2018) 4

²⁴⁵ Government of Wales Act 2006 Schedule 7A. Any area not listed in Schedule 7A is devolved to the National Assembly for Wales.

²⁴⁶ The intricacies of devolution fall outside the scope of this thesis; the focus of this section is its effect on Welsh planning law.

2 Planning law in England and Wales

This section provides an overview of planning law in England and Wales and from there explores the dominant ideologies that have shaped its development. The final part of this section considers the ways in which planning law has developed in Wales since devolution, paying close attention to the impact of the Wellbeing of Future Generations Act 2015.

2.1 Overview of planning law in England and Wales

The Town and Country Planning Act 1947 set the framework for the modern planning system in England and Wales. For the most part its scaffolding has remained in place, with periodic consolidations, amendments and clarifications.²⁴⁷ The key achievement of the Town and Country Planning Act 1947 was to establish land use as a national concern. It recognised that questions of land use stretched beyond the applicant and their neighbours,²⁴⁸ and that aspects of land use required national regulation.²⁴⁹ Government control over private land use is extensive in the current planning system; landowners must seek permission to make changes to their land and must abide by planning regulations. The long-standing tensions between private landowners and public planning authorities and their impact in the planning system is discussed in greater detail below.

The Town and Country Planning Act further established a level of ministerial oversight. While the planning system functions at multiple levels of governance, ultimate responsibility for planning decisions rests with the Secretary of State, typically the Secretary of State for communities and local government.²⁵⁰ The argument for a hierarchy in planning decision-making is outlined by Lord Clyde in *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*:

Planning and the development of land are matters which concern the community as a whole, ... They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured...

Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament.²⁵¹

²⁴⁷ Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental law: text, cases, and materials* (OUP 2013) 792

²⁴⁸ *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*, House of Lords, 9 May 2001 [2001] UKHL 23, 300

²⁴⁹ Malcolm Grant, *Urban planning law* (Sweet and Maxwell 1982) 6

²⁵⁰ Victor Moore, *A practical approach to planning law* (13th edn, OUP 2014) 10. In Wales, the National Assembly for Wales exercises the power of the Secretary of State. This is further described in section 2.3.1 (footnote 260).

²⁵¹ *Alconbury* (n 248) 344

2.2 Ideologies of planning law

What social and cultural forces can account for the planning system as it exists today? This section draws on the work of Patrick McAuslan, namely *The Ideologies of Planning Law*, to reflect on this question. In this work, McAuslan challenges the notion of law as a “neutral framework” for power that is not itself influenced by, and an influence on, the ideologies attached to power.²⁵² McAuslan argues that three ideologies²⁵³ have shaped the processes of the planning system. These are:

1. That “the law... should be used to protect private property”; the ideology of private property
2. That “the law... should be used to advance the public interest”; the ideology of public interest
3. That “the law... should be used to advance the cause of public participation against both the orthodox public administrative approach to the public interest and the common law approach of the overriding importance of private property”; the ideology of public participation.²⁵⁴

McAuslan contends that evolving expectations of rights and responsibilities around land use reflect the prevailing political ideology.²⁵⁵ The 1909 Act was a response to growing concerns around public health regarding the unacceptable living conditions of urban workers. These restrictions on land use were met with opposition from landowners; the public health movement was seen as a direct challenge to the “prevailing ethos of the sanctity of the land owners’ rights to develop and use property as and how they desired”.²⁵⁶ Changing perceptions of acceptable land use thus produced and were a product of tension between public officials and landowners, as public officials endeavoured to enforce proper land use through regulation and landowners sought to protect their rights through the courts.²⁵⁷ This can be understood as a conflict between two of McAuslan’s ideologies, the ideologies of private property and of public interest.

According to the ideology of public interest, public interest is best advocated for by public officials.²⁵⁸ It comes into conflict with the ideology of public participation over who gets to decide what is in the public interest.²⁵⁹ The ideology of public interest was reinforced by the growth of systems of public administration after the First World War and after the Second World War.²⁶⁰ Gradually the underpinning purpose of the planning system evolved from a belief that the government has the right or duty to stop improper use of

²⁵² McAuslan (n76) 1

²⁵³ In the preface, McAuslan describes ideology as the “values, attitudes, assumptions, “hidden inarticulate premises” that may not be well thought out and are usually disguised rather than spoken out loud”. Ibid xii. In the following chapter, the appropriateness of ethnography as a research method for investigating these kinds of phenomena will be discussed.

²⁵⁴ Ibid 2

²⁵⁵ Ibid 265

²⁵⁶ Jane Holder, Maria Lee and Sue Elworthy, *Environmental protection, law and policy: text and materials* (2nd edn, Cambridge University Press 2007) 470

²⁵⁷ McAuslan (n76) 3

²⁵⁸ Ibid 4

²⁵⁹ This conflict is further discussed below; constructions of and assumptions regarding the public interest and who is best placed to advocate for it emerged at the inquiry; see Chapter 7, section 4.2.

²⁶⁰ Christopher Forsyth and William Wade, *Administrative law* (11th edn, OUP 2014) 3

land to a belief that land use should promote the public good.²⁶¹ This was part of a Keynesian trend in government policy in post-war Britain, characterised by the position that markets do not inherently operate in the public interest.²⁶² The idea that there are social obligations attached to land use touches upon notions of private property as a ‘norm of social obligation’.²⁶³

Scholarship on the ideologies shaping planning law has developed in the intervening years. While Adshead contends that the central insights of McAuslan’s analysis remain relevant today,²⁶⁴ others like Lees and Shepherd suggest that the strength of McAuslan’s thesis should not blind us to other ideologies influencing ‘English’ planning – they highlight as examples spaces of governance and ideologies tied to sustainable development and localism.²⁶⁵ Others contend that recent reforms in planning law have brought about a neo-liberalisation of the planning system that favours developers, and that the notion of ‘public interest’ in planning is superseded by ‘national significance’, which tends to mean major developments, making the distinction between ideologies of public interest and private property no longer wholly accurate.²⁶⁶ These developments remind us that while McAuslan’s evaluation of the ideologies underpinning the planning system provides an invaluable framework, it is still a framework and does not always provide a nuanced perspective. When applied to a specific example such as the M4CAN inquiry, it can lead to more questions. Are the actions of an individual landowner taking part in a public participation procedure representative of the ideology of private property or of the ideology of public participation? Can they be both at the same time? What about environmental objectors who are landowners, as are present at the M4CAN inquiry?²⁶⁷

2.3 Planning law in Wales

2.3.1 Planning law in the Welsh devolved context

This chapter has so far considered planning law in England and Wales; however, it is important to take into account the particular features of Welsh planning law and their relevance to this research. While it is beyond

²⁶¹ Moore (n250) 1

²⁶² JM Keynes, ‘The End of Laissez-Faire’ (1963) in David Marquand and Anthony Seldon, *The ideas that shaped post-war Britain* (Fontana 1996)

²⁶³ Ben France-Hudson, ‘Surprisingly Social: Private Property and Environmental Management’ (2017) 29 *Journal of Environmental Law* 101, 112. This ties in with Radin’s work on personal relations and property; Radin critiques classic liberal notions of property and seeks to develop an understanding of property that recognises the personal relationships embedded within the property relationship. She states: “Humans need roots too. We conceive of the well-developed human person as capable of making bonds with other people and with things, as existing in the continuity of these relationships over time, and indeed as needing these continuing relationships in order to exist continuously as a person.” Margaret Radin, *Reinterpreting Property* (University of Chicago Press 1993) 31. This touches on notions of land and community discussed by Plumwood, highlighted in Chapter 2, section 5.2.2.

²⁶⁴ Adshead (n97) 192

²⁶⁵ Emma Lees and Edward Shepherd, ‘Incoherence and incompatibility in planning law’ (2015) 7(2) *International Journal of Law in the Built Environment* 111, 114

²⁶⁶ Alexander Lord & Mark Tewdwr-Jones, ‘Getting the Planners Off Our Backs: Questioning the Post-Political Nature of English Planning Policy’ (2018) 33(3) *Planning Practice & Research* 229, 240

²⁶⁷ Indeed, the position of Gwent Wildlife Trust (environmental objector) as an affected landowner meant they were statutory objectors. Consequently, they were in a stronger position to advocate for the protection of the Gwent Levels at the inquiry, a statutory objector being “any owner..., lessee or occupier of land which is likely to be required for the execution of any of the highway works”. The Highways (Inquiries Procedure) Rules 1994 s 2

the remit of this thesis to set out the complex world of devolution, a summary understanding is helpful.²⁶⁸ The National Assembly for Wales had limited law-making powers upon its establishment in 1999. Welsh law-making power progressed with the Government of Wales Act 2006; the capacity to enact primary legislation was enshrined in Part 4 of this Act and was activated by the significant majority gained in the 2011 referendum.²⁶⁹ The Wales Act 2017 Part 1, 3 states that the legislative competence of the National Assembly for Wales has moved from a conferred powers model to a reserved powers model, thus significantly increasing the law-making power of the Assembly.²⁷⁰ The impact of this increased devolved capacity on planning law will be explored below.

Legislative competence in planning and environmental matters was devolved to the National Assembly in the Government of Wales Act 1998.²⁷¹ Key areas relevant to planning law (with a few exceptions)²⁷² are now under the authority of the Welsh Government.²⁷³ Welsh planning law has developed some efficient processes that have influenced its evolution. The establishment of unitary authorities as the single tier of principle local authorities in Wales in the Local Government (Wales) Act 1994 is one such feature, with the subsequent introduction of unitary development plans;²⁷⁴ following on from this was the introduction in 1995 of a unified national planning policy statement, now called Planning Policy Wales, which predated the National Planning Framework in place in England.²⁷⁵ The Planning and Compulsory Purchase Act 2004 empowered the National Assembly for Wales to prepare the Wales Spatial Plan;²⁷⁶ every local planning authority is to develop their local development plan with regard to the Wales Spatial Plan.²⁷⁷ This central element of the Welsh planning system will be examined in later sections that consider its relevance to the M4CAN scheme. The Planning Act 2008, a principal piece of planning legislation that was enacted after

²⁶⁸ The trio of articles by Williams and Jenkins in the *Journal of Planning & Environment Law*, cited below, provide a helpful outline of devolved law in Wales and the planning system.

²⁶⁹ Huw Williams and Victoria Jenkins, 'The Planning (Wales) Act 2015: A case study in evidence-based planning reform under devolution' (2016) 2016- *Journal of Planning and Environment Law* 637, 639

²⁷⁰ Wales Act 2017 Part 1, 3. In a conferred powers model, the central governing body (Westminster) confers powers to a devolved governing body (National Assembly for Wales), allowing the devolved governing body to legislate in specified areas. In a reserved powers model, the devolved body has powers to legislate in any area apart from those specifically reserved to the central body. David Moon and Tomos Evans, 'Welsh devolution and the problem of legislative competence' (2017) 12 *Br Polit* 335, 336

²⁷¹ Moore (n250) 10

²⁷² Section M3 of Schedule 1 of the Wales Act 2017 sets out reserved matters in planning; these include (but are not limited to) issues of compensation, regulation and planning relating to nationally significant infrastructure projects, railway lines, harbours and Crown land. This became relevant to the M4CAN inquiry when on 22 August 2016 the Secretary of State for Transport appointed the inspectors under Section 5 of the Acquisition of Land Act 1981 to consider and report on the scheme's impact on the Port of Newport.

²⁷³ Williams and Jenkins (n269) 639

²⁷⁴ Unitary authorities exist in England, but they are not the only local authority structure; in Wales the local government system is more streamlined. Barry Cullingworth, *Town and country planning in the UK* (15th edn, Routledge 2015) 60 and 73.

²⁷⁵ *Ibid* 638; Moore (n250) 25

²⁷⁶ Planning and Compulsory Purchase Act 2004 Part 6 s 60I; Williams and Jenkins (n269) 638

²⁷⁷ Planning and Compulsory Purchase Act 2004 Part 6 s 62 (amended by Planning (Wales) Act 2015) Moore (n250) 75

the 2007 election, gave powers to the National Assembly for Wales over planning in Wales equivalent to those of the Secretary of State in England.²⁷⁸

Devolution in Wales has developed incrementally since the Government of Wales Act 1998;²⁷⁹ the legislative powers of the National Assembly evolved from the powers to enact secondary legislation to an increase in legislative powers for the National Assembly with the Government of Wales Act 2006. Finally, with the implementation of the Government of Wales Act 2006 Part 4 after the 2011 referendum, the National Assembly had powers to enact primary legislation.²⁸⁰ These constraints on Welsh law-making shaped the development of Welsh planning law; some elements of planning law were conferred to the National Assembly and some were not.²⁸¹ As noted above, statutory plan making was conferred; however, the development control system was not.²⁸² Planning was one of the 20 conferred subjects over which the National Assembly had powers to pass primary legislation after the 2011 referendum;²⁸³ the Welsh approach to planning has thus continued to develop some distinctive features. Based on a 2012 report of the Independent Advisory Group looking into the Welsh planning system,²⁸⁴ the Planning (Wales) Bill was introduced in 2014 and received royal assent in 2015. The Planning (Wales) Act 2015 is part of a suite of legislation along with WFGA, the Environment (Wales) Act 2016 and the Historic Environment (Wales) Act 2016.²⁸⁵ The subjects of these Acts reflect Welsh Government attention to sustainable development,²⁸⁶ evident across all areas of governance but of particular relevance to planning.²⁸⁷ Alongside sustainable

²⁷⁸ The distinction between the Welsh Ministers and the National Assembly for Wales in planning law is complicated. In the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003, the National Assembly for Wales exercises the power of the Secretary of State. However, in the section of the Planning Act 2008 pertaining to Wales entitled 'Powers of National Assembly for Wales', the legislation refers to the 'Welsh Ministers' throughout, and states that "no order may be made by the Welsh Ministers under this section unless a draft of the instrument containing the order has been laid before, and approved by resolution of, the National Assembly for Wales" (Planning Act 2008, s 29(9)). In the M4CAN inquiry, the decision-maker is identified as the 'Welsh Ministers'.

²⁷⁹ Alistair Mark Cole and Ian Stafford, *Devolution and governance: Wales between capacity and constraint* (Palgrave Macmillan 2015) 5

²⁸⁰ *Ibid* 7

²⁸¹ Williams and Jenkins (n269) 639

²⁸² *Ibid* 639

²⁸³ *Ibid* 639

²⁸⁴ Independent Advisory Group, *Towards a Welsh Planning Act: Ensuring the Planning System Delivers: Report to the Welsh Government by the Independent Advisory Group* (June 2012)

²⁸⁵ Williams and Jenkins (n269) 640

²⁸⁶ Outside of the Historic Environment (Wales) Act 2016, these Acts make specific reference to sustainable development. WFGA requires public bodies to make decisions in accordance with the sustainable development principle, Wellbeing of Future Generations Act 2015, introductory text; The Planning (Wales) Act 2015 requires that the planning system in Wales, in exercise of its functions, is in accordance with the sustainable development principle, The Planning (Wales) Act 2015 part 2, s 2(2); The purpose of part 1 of the Environment (Wales) Act 2016 is to maintain and enhance the resilience of ecosystems in accordance with the sustainable development principle, Environment (Wales) Act 2016, part 1 s 3.

²⁸⁷ Planning decisions concern a balance of competing economic, social and environmental priorities, thus making the principle of sustainable development particularly relevant. The importance of sustainable development in planning is recognised by Future Generations Commissioner for Wales. Planning is a priority area for the Future Generations Commission. This is partly guided by public response; the majority of letters received by the Commission in 2017-18 related to planning decisions. Future Generations Commissioner for Wales, 'Future Generations Commissioner for Wales: Priority Areas: Planning' <https://futuregenerations.wales/priority_areas/planning/> accessed 2 December 2019. Whether or not the planning system does enough to facilitate planning policy that is consistent with the sustainable development principle and aligns with the ambitious scope of WFGA is discussed in Chapter 8, section 4.

development, democratic decision-making was highlighted in the Planning bill's passage through the Assembly. Responding to criticisms that decision-making had become overly centralised, the bill was amended to require stakeholder consultation as part of the adoption of the National Development Framework.²⁸⁸

The Planning Act (Wales) 2015 has sought to set a fair framework for the planning system. It builds upon a strong evidence-base,²⁸⁹ and places sustainable development principles at the heart of the planning system in Wales.²⁹⁰ However, it is hampered by the existing planning framework.²⁹¹ The Planning Act (Wales) 2015 is enacted by an amendment to the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning Act 1990; it is challenging to ascertain which provisions in these acts apply to England only or to England and Wales.²⁹² In response to these challenges, the Law Commission has recommended the development of a simpler and more comprehensive planning code for Wales.²⁹³ They produced a final report in November 2018, and the Welsh government provided an interim response in May 2019.²⁹⁴

2.3.2 *The Wellbeing of Future Generations Act 2015*²⁹⁵

Lauded as a visionary act²⁹⁶ and a marker of Welsh Government intentions regarding sustainable development, WFGA has been the focus of much attention.²⁹⁷ The extent to which it has achieved these aims in its first five years is debatable, and beyond the scope of this thesis, certainly the scope of this section.

²⁸⁸ Williams and Jenkins (n269) 650; however, Plaid Cymru's attempt to introduce a 'community right of appeal' to the bill was defeated (by one vote) in the third stage reading of the bill, an indication perhaps that there is some ambivalence in the Assembly regarding public participation in planning decision-making. Huw Williams and Victoria Jenkins, 'Planning law in Wales: Part 2: lessons in law-making for Wales' (2016) 9 *Journal of Planning & Environment Law* 860, 873

²⁸⁹ Williams and Jenkins (n269) 637

²⁹⁰ Commitment to WFGA and sustainable development duties is found in Planning (Wales) Act 2015 s2(2). The Act embeds commitment to WFGA in the planning system; however, the extent to which this has filtered through to decisions in the planning system in Wales is discussed in further detail in Chapter 8, section 4.

²⁹¹ Huw Williams and Victoria Jenkins, 'Planning law in Wales: Part 3 further developments' (2017) 2017 *Journal of Planning and Environment Law* 669, 674

²⁹² *Ibid* 674

²⁹³ Law Commission, *Planning Law in Wales: Final Report | Cyfraith Cynllunio yng Nghymru: Adroddiad Terfynol* (Her Majesty's Stationery Office 2018)

²⁹⁴ Law Commission, 'Law Commission: Reforming the law: Planning Law in Wales' (*Law Commission Website*) <<https://www.lawcom.gov.uk/project/planning-law-in-wales/>> accessed: 5 August 2019

²⁹⁵ Relevance of WFGA to this research is outlined in Chapter 1.

²⁹⁶ Future Generations Commissioner for Wales, 'Future Generations Commissioner for Wales: Our Work: International' (2019) <<https://futuregenerations.wales/making-it-happen/international/>> accessed 5 August 2019

²⁹⁷ There have been many articles and conference papers on WFGA, including the following: Haydn Davies, 'The Well-being of Future Generations (Wales) Act 2015-A Step Change in the Legal Protection of the Interests of Future Generations?' (2017) 29 *Journal of Environmental Law* 165; Haydn Davies, 'The Well-being of Future Generations (Wales) Act 2015: Duties or aspirations?' (2016) 18 *Environmental Law Review* 41; A. Pigott, 'Imagining socioecological transformation: An analysis of the Welsh Government's policy innovations and orientations to the future' (2018) 6 *Elementa*; Rhys Jones, 'Governing the future and the search for spatial justice: Wales' Well-being of Future Generations Act' (2019) 197 *Fennia: International Journal of Geography* 8; Natalie Jones, Mark O'Brien and Thomas Ryan, 'Representation of future generations in United Kingdom policy-making' (2018) 102 *Futures* 153; Cathy Weatherup, Mariana Dyakova and Mark Bellis, 'The Welsh experience: Well-being of Future Generations (Wales) Act 2015' (2016) 26 *European Journal Of Public Health* 243

The aim of this section is to outline the Act’s objectives, and how they inform the legislative background of the inquiry.

As stated in the introductory text of the Act,²⁹⁸ the purpose of the Act is to set out a way of working that requires public bodies in Wales to make policy decisions in a manner consistent with the sustainable development principle, defined in the Act as ensuring “that the needs of the present are met without compromising the ability of future generations to meet their own needs”.²⁹⁹ The Act enumerates seven wellbeing goals; a prosperous Wales; a resilient Wales; a healthier Wales; a more equal Wales; a Wales of cohesive communities; a Wales of vibrant culture and thriving Welsh language, and a globally responsible Wales.³⁰⁰ The Act establishes a Commissioner for Future Generations to “advise and assist” public bodies in acting in accordance with the Act³⁰¹ and establishes public service boards in local authority areas to plan around this Act.³⁰²

Evident in this brief description, WFGA is ambitious in its aims. It is also process-driven.³⁰³ Its purpose is not to set a test for whether a given policy is consistent with the sustainable development principle. Rather, it seeks to embed within public bodies in Wales ways of working that are in accordance with the sustainable development principle and have the aim of achieving the seven wellbeing goals. Significantly, the Act signals an intention to move past a traditional approach to sustainable development that seeks to balance economic, environmental and social needs, as it was argued that this balancing inevitably ends up privileging economic interests over environmental and social interests.³⁰⁴ The Act seeks to redress this balance by making provisions for policy-making bodies consider these principles from the outset. Commentators have flagged areas of ambiguity in the Act; Davies notes a lack of clarity over the length of time understood by “long-term” in the Act,³⁰⁵ and ambiguity over how to assess the duty on public bodies to “take all reasonable steps” in meeting their well-being objectives.³⁰⁶ With very limited resources and ambiguity clouding its enforcement and accountability measures, there are doubts as to how the ambitious aims of the Act will be met.

²⁹⁸ “An Act of the National Assembly for Wales to make provision requiring public bodies to do things in pursuit of the economic, social, environmental and cultural well-being of Wales in a way that accords with the sustainable development principle; to require public bodies to report on such action; to establish a Commissioner for Future Generations to advise and assist public bodies in doing things in accordance with this Act...”

²⁹⁹ Wellbeing of Future Generations Act 2015, part 2 s 5(1)

³⁰⁰ Wellbeing of Future Generations Act 2015, part 2 s 4

³⁰¹ Wellbeing of Future Generations Act 2015, introductory text

³⁰² Wellbeing of Future Generations Act 2015, part 4

³⁰³ Davies, ‘The Well-being of Future Generations (Wales) Act 2015: Duties or aspirations?’ (n297) 44

³⁰⁴ Kosoy and others (n77) 74; Neil K. Dawe and Kenneth L. Ryan, ‘The Faulty Three-Legged-Stool Model of Sustainable Development’ (2003) 17 *Conservation Biology* 1458, 1459

³⁰⁵ Davies, ‘The Well-being of Future Generations (Wales) Act 2015—A Step Change in the Legal Protection of the Interests of Future Generations?’ (n297) 175

³⁰⁶ Davies, ‘The Well-being of Future Generations (Wales) Act 2015: Duties or aspirations?’ (n297) 55. These ambiguities are discussed in greater detail in Chapter 8, sections 3 and 4.

There are several important aspects of this Act, e.g. objectives, indicators, reporting duties; this brief overview has focused on the aspects of the Act most relevant to the M4CAN inquiry. The M4CAN scheme was a major infrastructure proposal, affecting several communities and areas protected by environmental legislation. One could argue that it pitted different wellbeing goals against one another and conceivably challenged the notion that the Act engendered a new way of balancing priorities and managing conflicts between opposing policy objectives. Conflicts arising between the inquiry actors over the meaning of the Act are explored in greater detail in section 4.4 of this chapter.

3 Public participation

3.1 Introduction

This section considers public participation, its legal precedents and mechanisms. It looks for the potential roots of public participation in administrative law jurisprudence, in the fundamental principle of *audi alteram partem* (the right to a fair hearing) as it plays out in administrative decision-making. This section also examines the role of the public local inquiry as a public participation procedure and reflects on the understanding of appropriate legal principles likely influencing the inspectors presiding over public local inquiries.³⁰⁷

3.2 Public participation and the principles of natural justice

3.2.1 Overview

The ideology of public participation is a more recent influence on the planning system in comparison with the ideologies of private property and of public interest,³⁰⁸ however it has grown in importance over the last 60-80 years. The 1957 Franks Report identified openness, fairness and impartiality as essential to good administration,³⁰⁹ and these remain the values cited in the mission of the Planning Inspectorate.³¹⁰ Openness, fairness and impartiality are thus identified as key values guiding the mechanisms of public participation. Why are these the values that are prioritised in debates around public participation, and what does openness, fairness and impartiality look like in these forums? Moreover, how are these moral principles guiding legal practice embedded in public participation, a relatively recent concept? Does public participation as a concept perhaps draw upon more established legal principles? This section briefly explores principles of natural justice as a source of law which might inform contemporary understandings of public

³⁰⁷ The factors affecting public participation in the public local inquiry are an important element of both the analysis and findings; this is covered in Chapters 2, 5, 6, 7 and 8.

³⁰⁸ See earlier discussion of McAuslan's ideologies of planning law in section 2.2.

³⁰⁹ Oliver Shewell Franks, *Report of the Committee on Administrative Tribunals and Enquiries* (HMSO 1976) 5

³¹⁰ 'The Planning Inspectorate | Yr Arolygiaeth Gynllunio, "The Inspectorate's mission, values and objectives' (*Planning Inspectorate Website*, 2018) <<http://planninginspectorate.gov.wales/whatwedo/mission/?lang=en>> accessed 20 July 2018

participation in law and will consider whether these principles inform how public participation has developed and has been articulated in decision-making procedures.

3.2.2 *The principles of natural justice*

The common law principles of natural justice act as a check on law-making and governance, seeking to ensure procedural fairness. Wade and Forsyth identifies two key principles of natural justice: the rule against bias and the right to a fair hearing.³¹¹ Jackson suggests that a third principle might also exist,³¹² that proposed by Lord Hewart in *R v Sussex JJ, ex p McCarthy*, that “it is... of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.³¹³ This nascent principle affirms the importance of the appearance of fairness in legal decision-making processes, where it instils trust in the procedure and thereby enhances its effectiveness.³¹⁴ The section will examine the right to a fair hearing, as it has clearest relevance to public participation.

3.2.3 *The right to a fair hearing*

[The] so-called rules of natural justice are not engraved on tablets of stone. ... what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. ... the courts will ... readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness” (emphasis added).³¹⁵

Lord Bridge in his judgment in *Lloyd v McMahon* identifies the key features that constitute the right to a fair hearing that are relevant when considering how this right might relate to public participation. The duties entailed in the right to a fair hearing have been teased out in many judgments. The key considerations of these judgments can be grouped under the following questions: does this right apply in decision-making bodies other than courts of justice? To which parties does this right apply? What does a fair hearing entail? These questions will frame the following discussion.

Firstly, what right to a fair hearing do people have in decision-making bodies other than courts of justice? Haldane LC in *Errington v Minister of Health* held that government departments, in order to fulfil the right to a fair hearing, were required to follow a level of fair procedure:

They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be

³¹¹ Forsyth and Wade (n260) 372. These principles were first grouped together in *Spackman v Plumstead District Board of Works* (1885) 10 app Cas 229. Ibid 374

³¹² Paul Jackson, *Natural justice* (2nd edn, Sweet & Maxwell 1979) 84

³¹³ *R v Sussex JJ, ex p McCarthy* [1924] 1 KB 256

³¹⁴ McDonough and Smith (n88) 241

³¹⁵ *Lloyd v McMahon* [1987] AC 625, 702-3

come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.³¹⁶

This was challenged in *Franklin v Minister of Town and Country Planning*. In this case, objectors argued that the Minister of Town and Country Planning did not consider the inquiry report impartially as he had responded to hecklers at a public meeting before considering the report, “it is no good your jeering it is going to be done”.³¹⁷ The House of Lords held that there was no judicial or quasi-judicial³¹⁸ duty imposed on the minister in this case, that they were only obliged to follow statutory procedure.³¹⁹ The duty on ministers to ensure a fair hearing to parties in administrative processes was reaffirmed in *Ridge v Baldwin*; this case concerned the wrongful dismissal of a chief constable in Brighton. Lord Reid stated that the term ‘judicial’ had been misinterpreted in previous cases, that it was not a question of whether or not a body had judicial or quasi-judicial power, but rather that a decision-making body has a duty to observe the principles of natural justice where the decision-making power affects a person’s rights or interests.³²⁰ This was reinforced by Megarry J in *Gaiman v National Association for Mental Health*, who stated that courts could apply principles of natural justice to all decision-making powers unless excluded by specific circumstances,³²¹ thus underlining the notion that what is required by the principles of natural justice is to a certain extent context-dependant, but that parties in decision-making bodies other than courts of justice can expect some degree of a right to a fair hearing.

In order to identify who is entitled to a right to a fair hearing, one must assess who is covered by the decision-maker’s obligation to hear from a person who might suffer as a result of their decision;³²² does this extend to people who want to air their concerns regarding an issue in their locality? Lord Reed in *Osborn v The Parole Board* held that “justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected”.³²³ This approach is supported in legal scholarship³²⁴ and in previous case law, for example in Lord Diplock’s judgment in *AG v Ryan* which held that the right to be heard must also be observed in decision-making procedures that affected the rights of individuals.³²⁵ Early cases concerning the right to a fair hearing considered an individual’s right to appeal and to be informed of ministerial decisions that affected them, such as the demolition of their house³²⁶ or dismissal from their

³¹⁶ *Errington v Minister of Health* [1935] 1 KB 249, 256

³¹⁷ *Franklin v Minister of Town and Country Planning* [1948] AC 87, 90

³¹⁸ Wade defines ‘quasi-judicial’ as, “certain kinds of powers wielded by ministers or government departments but subject to a degree of judicial control in the manner of their exercise”. H. W. R. Wade, ‘Quasi-Judicial’ and its Background’ (1949) 10 *The Cambridge Law Journal* 216

³¹⁹ *Franklin* (n317) 102

³²⁰ *Ridge v Baldwin* [1964] AC 40, 53

³²¹ *Gaiman v National Association for Mental Health* [1971] Ch 317, 333

³²² Forsyth and Wade (n260) 405

³²³ *Osborn v The Parole Board* [2013] 3 WLR. 1020 para 68; *ibid* 374

³²⁴ T. Koopmans, ‘Natural Justice Rediviva? The Right to a Fair Hearing in European Law’ (1992) 39 *Netherlands International Law Review* 175, 175

³²⁵ *AG v Ryan* [1980] AC 718 727

³²⁶ *Local Government Board v Arlidge* [1915] AC 120

occupation.³²⁷ Are all people whose rights are affected then afforded the same right to be heard? Are all participants in a public local inquiry entitled to this right? Wade and Forsyth distinguish between inquiry participants with affected rights and “otherwise”, suggesting that not everyone who has an interest in the subject of an inquiry can be said to have their rights affected by the inquiry outcome, and that those whose rights are directly affected and those who are indirectly affected might not receive the same treatment.³²⁸ This distinction is mirrored in inquiry procedure, where for example residents with affected property rights will be treated differently from those who do not.³²⁹

The last question to consider is to what extent and in what ways might the right to a fair hearing be upheld in administrative decision-making bodies. Lord Reid states in *Ridge v Baldwin* that fair procedure is “what a reasonable man would regard as fair procedure in particular circumstances”.³³⁰ This points to judges’ unwillingness to be overly prescriptive to decision-making bodies regarding fair procedure and also recognises that the requirements of the principles of natural justice are set by circumstances of the case and the relevant statute. Lord Shaw in *Local Government Board v Arlidge* expressed concern that the courts would interpret fair procedure to be court procedure and felt that this would be an “usurpation” of the self-determination of administrative decision-makers.³³¹ In *Bushell and others v Secretary of State for the Environment*, Viscount Dilhorne considered what the right to a fair hearing might demand in the context of a public local inquiry:

Why a ‘fair hearing’ as a requirement?... It is for the sake of what the hearing affords, of what protection the law gives to the individual whose rights are to be interfered with. The question becomes: what does that protection amount to? Not merely that the local authority should take the individual's representations into account, ... Natural justice has always meant a higher standard than the mere administrative test of "taking into consideration."³³²

Dilhorne’s account of the right to a fair hearing touches on expectations of public participation. It is not enough that a local authority hears the individual’s representations. As Lucas states, “the right to be heard carries with it the right to be heeded”; cases where the public is heard but not heeded, i.e. where public concerns are not clearly considered as part of the decision-making process, violate the right to a fair hearing.³³³

³²⁷ *Ridge* (n320) 40

³²⁸ Forsyth and Wade (n260) 805. This distinction is blurred and contested; see discussion of participation in Chapter 8, section 5.3 and regarding the *Walton* case, Chapter 7, section 3.3.

³²⁹ Highways (Inquiries Procedure) Rules 1994 s 24(3)

³³⁰ *Ridge* (n320) 65

³³¹ *Local Government Board* (n 326) 138

³³² *Bushell and others v Secretary of State for the Environment* 1980 3 WLR 2285 88

³³³ John Lucas, *Democracy and participation* (Penguin 1976) 117. Lucas refers to *Franklin v Minister of Town and Country Planning*, where the Minister in question told objectors that regardless of what they said at the public inquiry, he would go ahead with his proposal.

3.3 Public local inquiries

3.3.1 *Public local inquiry as a legal mechanism*

Public local inquiries are a common mechanism of public participation in the planning system;³³⁴ they are described as ‘an institution of the British regulatory state’,³³⁵ and as a forum in which members of the public expect to be heard and to be heeded.³³⁶ Public local inquiries are appropriate to more complex proposals (smaller, less complex proposals are often subject to a public hearing, which is less formal³³⁷), where there is likely to be substantial third party representation and a need for cross-examination.³³⁸

The M4CAN inquiry is a highway inquiry, which are covered by the Highways (Inquiries Procedure) Rules 1994;³³⁹ they follow a similar process to other forms of public local inquiry.³⁴⁰ The Secretary of State calls for an application for a highway and then holds a public local inquiry into the proposal.³⁴¹ The inspector reports their recommendations to the Secretary of State and should the Secretary of State disagree with the recommendations of the inspector, they must notify people likely affected of their disagreement, and must afford them the opportunity to make written representations within 3 weeks of the date of notification.³⁴² It is pertinent that in highway inquiries it is typically the developer who is also the decision-maker, as they are typically government schemes.³⁴³ Inquiries into major infrastructure projects are often protracted and expensive;³⁴⁴ reforms introduced in 2005 (in England but not Wales) sought to address these issues and make the process more efficient. These reforms include limits on public participation, underlining the long-standing conflict between efficiency and democracy in public inquiries, discussed later.³⁴⁵

3.3.2 *The M4CAN public local inquiry*

Under the Highways Act 1980, the Acquisition of Land Act 1981 and the relevant regulations, it is necessary to hold a Public Local Inquiry into the case for the proposed M4 Corridor

³³⁴ Brian Wynne, *Rationality and ritual: the Windscale inquiry and nuclear decisions in Britain* (British Society for the History of Science 1982); Forsyth and Wade (n260) 793. Public participation in public local inquiries is further discussed in Chapter 8, section 5.3.

³³⁵ Adam Burgess, ‘The changing character of public inquiries in the (risk) regulatory state’ (2011) 6 *British Politics* 3,3

³³⁶ Lucas (n333) 117

³³⁷ Moore (n250) 349

³³⁸ *Ibid* 352

³³⁹ The Highways (Inquiries Procedure) Rules 1994 s 3(1)(a)(i)

³⁴⁰ The Highways (Inquiries Procedure) Rules 1994 s 24 and Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 s 15 both concern ‘procedure at inquiry’ and are similar, with a few small differences. For example, under The Highways (Inquiries Procedure) Rules 1994 s 24(2), the promoting authority shall begin and shall have final right of reply. Under the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 s 15(4), the local planning authority is to begin and the appellant is to have final right of reply.

³⁴¹ *Alconbury* (n248) 311

³⁴² The Highways (Inquiries Procedure) Rules 1994 s 26(4)

³⁴³ McAuslan (n76) 55; The fact that the government often plays two roles in these inquiries, as ‘scheme-proposer’ and as ‘scheme-developer’, raises concerns around principles of natural justice (namely the rule against bias), as they are deciding whether or not to approve of a scheme that they have proposed. These concerns arose in *Alconbury* (n248), to be explored in the following subsection.

³⁴⁴ Adshead (n97) 188

³⁴⁵ Moore (n250) 516; These are set out in Office of the Deputy Prime Minister, *Planning Inquiries into Major Infrastructure Projects: Procedures* (2005).

around Newport Scheme and the objections to the Welsh Government's draft Scheme and draft Orders, where a statutory objection remains outstanding.

The Welsh Government gave notice of its intention to hold a Public Local Inquiry on 30 June 2016 and a Pre-Inquiry Meeting was held on 18 July 2016 in accordance with The Highways (Inquiries Procedure) Rules 1994 and The Compulsory Purchase by Ministers (Inquiries Procedure) (Wales) Rules 2010.³⁴⁶

The Welsh Government statement above outlines the legal obligations that necessitated the M4CAN public local inquiry. It establishes that it is a highway inquiry. Highway inquiries typically assess large-scale projects and often encounter a high degree of public opposition.³⁴⁷ The M4CAN scheme is also classified as a 'recovered case', meaning that it is the Welsh Ministers³⁴⁸ who make the decision after considering the recommendation of the inspectors.³⁴⁹ Recovered cases in which a dispute arising from the execution of a particular policy is settled by the Minister with responsibility for that policy can raise natural justice concerns. The leading case on this issue is *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions (Alconbury)*. Here, the House of Lords held that the Secretary of State was not an independent and impartial tribunal; however, they found that he was not purporting to be so.³⁵⁰ They found that this decision was not incompatible with Article 6(1) of the European Convention of Human Rights³⁵¹ because an impartial and independent tribunal reviewed the case and the decision of the Secretary of State was subject to judicial review.³⁵² Judicial reasoning in *Alconbury* underlined the significance of the public local inquiry to the fairness of the planning process. Were the Welsh Ministers to disregard the recommendations of the inspectors, they would have to justify this decision; further, the inquiry could be re-opened.³⁵³

The importance of the inspector was demonstrated in *Alconbury*; indeed, the inspectors³⁵⁴ played a crucial role in this inquiry and will be key characters in the analysis chapters of this thesis. McAuslan notes the importance of public officials like the inspectors to the belief in the inquiry as a 'fair' process in which the

³⁴⁶ Welsh Government, *M4 Corridor around Newport: Statement of Case Part 1* (2016) 4

³⁴⁷ McAuslan identifies some of the reasons why highway developments are particularly conducive to public opposition: they are intrusive on landscape and community; there is typically little local input into the proposal as they are usually part of a larger national plan, and their advantages are hypothetical. McAuslan contends that the inquiry becomes a forum for debating points of the proposed highway and the larger argument of whether there should be a highway in the first place is withheld from public debate. McAuslan (n76) 50

³⁴⁸ Morag Ellis QC explains that while the Welsh Ministers are the relevant highway authority, "the convention throughout the inquiry has been to refer to the scheme-proposing arm as "Welsh Government" and the Scheme-confirming arm as "Welsh Ministers". Morag Ellis QC on behalf of the Welsh Government, *Closing Submissions on the behalf of the Welsh Government, M4 Corridor around Newport, Newport Public Local Inquiry* (2018), 12

³⁴⁹ Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003, s 19(1)(c)

³⁵⁰ *Alconbury* (n248) 318

³⁵¹ Article 6(1) states that a person is, "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", European Convention of Human Rights 1950, Art 6(1)

³⁵² *Alconbury* (n248) 297

³⁵³ *Ibid* 360. Indeed, the First Minister did disregard the recommendations of the inspectors; the inquiry was not re-opened in this case.

³⁵⁴ Inspectors and not inspector, as this inquiry had a lead inspector and an assistant inspector.

public have a genuine opportunity to participate.³⁵⁵ This feeling of fairness is instilled by the inspectors leading the inquiry process. The applicant and objectors have the chance to present their views, to hear and to cross-examine witnesses. The inspector is typically an experienced professional, and though they take account of policy relevant to their particular inquiry, they are seen as independent of the Secretary of State. Their judgement is evidently respected; in 95% of the cases noted by the House of Lords in *Alconbury* the Secretary of State accepted the recommendation of the inspector.³⁵⁶ This statistic is rather dated; more recent statistics, while less marked, still find that the Secretary of State tends to agree with the inspector's recommendation.³⁵⁷

3.3.3 *The judge over your shoulder*

Reflecting on the public local inquiry as a legal mechanism and the standards to which it must adhere, it is evident that as the decision-maker in the public local inquiry, the inspector carries particular responsibility in ensuring that these standards are met. However, inspectors in public local inquiries are typically not judges. How do they understand their role and what tools can they draw upon to ensure that their administrative process upholds appropriate legal standards? The Government Legal Department has set out guidance for administrative decision-makers, entitled *The Judge over your Shoulder* (JOYS).³⁵⁸ This guidance document has gone through several editions since its first publication in 1987.³⁵⁹ As outlined in JOYS 2018,

JOYS will help you to understand the potential legal risks of your actions (by introducing to you some of the legal concepts that a Judge in the High Court or Tribunal will be looking to when considering a challenge to a decision).³⁶⁰

Its purpose is thus to introduce and clarify for administrative decision-makers the relevant legal principles that ought to underpin their decision-making; the clear purpose being that these principles need to be demonstrably present in case the decision is subject to judicial review proceedings. JOYS 2018 sets out the following legal principles that should be upheld in administrative decision-making:

A decision-maker must act: lawfully; fairly (with particular emphasis on procedural fairness); reasonably; without breaching human rights; without breaching EU law; without discrimination.³⁶¹

³⁵⁵ McAuslan (n76) 58

³⁵⁶ *Alconbury* (n248) 318.

³⁵⁷ The Secretary of State disagreed with the inspector in 1 in 6 recovered applications and appeals between September 2017 to August 2019 (9 of 54 cases). These statistics cover planning cases in England; the Planning Inspectorate Wales did not respond to my Freedom of Information request. Planning Inspectorate, 'Planning Inspectorate Appeals Data' (21 March 2018) <<https://www.gov.uk/government/statistics/planning-inspectorate-appeals-database>> accessed 8 January 2020

³⁵⁸ This title foregrounds the perceived risk of judicial review for administrative decision-makers. This is a well-founded concern; the financial year 2014-15 saw over 20,000 judicial review cases being made against government decisions. Government Legal Department (n244) 4

³⁵⁹ *Ibid* 4

³⁶⁰ *Ibid* 4

³⁶¹ Government Legal Department (n244) 18. The principle of reasonableness has been interpreted narrowly by the Courts. For a decision to be deemed to be unreasonable, it would need to be 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question

“Fairly” in this instance is understood to be aligned with procedural fairness.³⁶² This guide sets out the principle-context of administrative processes. It is interesting to note that the issues that emerged in case law regarding the principles of natural justice are evident in this guidance. The inspectors at the M4CAN inquiry were aware of these principles.³⁶³ How might this affect the running of the M4CAN inquiry?

3.3.4 *Public local inquiry as a public participation procedure*

Public local inquiries are ubiquitous within the planning system³⁶⁴ and, illustrated in the descriptions above, can represent “a standing invitation to participation”.³⁶⁵ However, there are barriers to public participation inherent in the mechanism of the public local inquiry. A long-standing tension found in the inquiry process is the conflict between efficiency, understood in terms of the speed of the process, and democracy, understood in terms of its levels of inclusivity. These objectives are seen to be in conflict with one another; in the case of reforms to the highway inquiries process (relevant to the research field site), it is frequently the ‘democratic’ side of this see-saw that loses out.³⁶⁶ The prohibition placed on the discussion of government policy at public local inquiries further undermines the democratic credentials of the inquiry process.³⁶⁷ Public local inquiries are often described as formal, regulated spaces and this formal nature is sometimes seen as a barrier to inclusivity.³⁶⁸ However, McAuslan notes that whether the public local inquiry is formal or not, it is rarely the public that benefits. Where an inquiry is formal, this gives an advantage to the landowner and “his principle professional adviser, the lawyer”. Where an inquiry is less formal, the role of the public official becomes crucial to the fair running of the inquiry and thus, this “further increases the scope of the ideology of public interest”.³⁶⁹

Morag Ellis QC brought notions of logic and rationality into the M4CAN inquiry in the Welsh Government closing statement, quoted below:

We were informed during the course of this Inquiry that human beings dislike cognitive effort and like to rely upon rules of thumb to guide their actions. Avoidance of cognitive effort is

could have arrived at it” or “beyond the range of responses open to a reasonable decision maker” (the Wednesbury principles). *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 K.B. 223

³⁶² Government Legal Department (n244) 48

³⁶³ This is discussed in greater detail in Chapter 8, AMC Interview (SII) 24 July 2019

³⁶⁴ Forsyth and Wade (n260) 802

³⁶⁵ Lucas (n333) 270

³⁶⁶ McAuslan (n76) 56. The assumption that public participation is a cause of delay serves a political purpose and can be inaccurate. In the inquiry into the fifth terminal at Heathrow Airport, public participation was held to be the cause of significant delay, when in fact the government and the developer (British Airways) were responsible for much of the delay. Adshead (n97) 188

³⁶⁷ The Highways (Inquiries Procedure) Rules 1994, s 12; this was reinforced by the verdict in *Bushell* (n332). This is explored in greater detail in Chapter 5, section 2.3.

³⁶⁸ Lucas (n333) 267. The adversarial nature of public inquiries in particular is highlighted as an inhibiting factor; this is examined in M Harris, 'Fairness and the adversarial paradigm: an Australian perspective' (1996) PL 508, and is further explored in subsequent chapters.

³⁶⁹ McAuslan (n76) 42; This tension emerges in the findings of this thesis, Chapter 8.

not a luxury open to those in government, nor to those charged with presiding over public local inquiries.³⁷⁰

Calls for rationality chime with calls for greater efficiency in the inquiry process; they imply that administrative concerns around time and money demand a “hard-headed realism” that might be out of step with the input of some members of the public.³⁷¹ Implicit in this is the idea that members of the public might bring an irrational element into proceedings that needs to be managed.³⁷² This assumption then evolves from an idea that the public might be irrational to an idea that some members of the public might be irrational; this then justifies some form of selection process, assessing which members of the public can participate.³⁷³ The prioritising of expert knowledge over local knowledge through undermining the credibility of non-expert witnesses or through non-experts being required to use the technical language of experts can broadly be seen as part of this same process.³⁷⁴

It is sometimes assumed that members of the public are not best placed to advocate for the public interest as they are mainly concerned with their own private interests.³⁷⁵ This view is supported by Wade and Forsyth’s description of the purpose of a public inquiry, which is “to provide the minister with information about local objections so that he can weigh the harm to local interests and private persons against the public benefit to be achieved by the scheme”.³⁷⁶ This description establishes demarcated zones of interest for people participating in an inquiry. What happens to arguments that do not fit within these zones? What happens to the arguments of local people who are concerned about a harm the scheme might inflict on the wider public? McAuslan surmises that as there are many examples of people concerning themselves in issues that stretch beyond their own private interests, for instance through involvement in local conservation groups, this characterisation of public participation by public administrators serves a political purpose, namely that it serves to de-legitimise this ideology.³⁷⁷ As was previously discussed, government planning policy is largely shaped by the ideology of public interest, while according to McAuslan, society as a whole is guided by the ideology of private property:

³⁷⁰ Morag Ellis QC on behalf of the Welsh Government (n348) 272. The dismissal of ‘rule of thumb’ approaches in this extract merits consideration. It touches on a long-standing debate among policymakers, practitioners and academics working in environmental regulation, described by Hawkins as a conflict between equitable and utilitarian approaches and by Holdgate as an argument between subjective and mathematical approaches. This conflict emerges as actors in different roles implement regulation for different purposes, and advocate for regulation that is primarily useful, practical, fair or logical. Each of these aspirations result in a different use of the regulation. This suggests that ‘rule of thumb’ approaches are more complex than was presented by Ellis QC; ‘rule of thumb’ approaches and their relationship to rationality will be examined in greater detail in subsequent chapters. Keith Hawkins, *Environment and enforcement: regulation and the social definition of pollution* (Clarendon Press 1984) 24; Martin Holdgate, *Penguins and Mandarins: Memories of Natural and Unnatural History* (The Memoir Club 2003) 165

³⁷¹ McAuslan (n76) 23. This builds on contradictions in rationalist and anti-rationalist tendencies evident within the legal system of England and Wales, Chapter 2, section 2.3.2.

³⁷² This is further explored in Chapter 2, section 3.2.

³⁷³ McAuslan (n76) 68. This is explored in Chapters 5, 6 and 8.

³⁷⁴ This echoes insights found in Mhairi Aitken, ‘Wind Power Planning Controversies and the Construction of ‘Expert’ and ‘Lay’ Knowledges’ (2009) 18 *Science as Culture* 47, 62

³⁷⁵ This builds on discussion of public participation in Chapter 2, section 3.

³⁷⁶ Forsyth and Wade (n260) 806

³⁷⁷ McAuslan (n76) 18

Underlying those conflicts is a common interest in combating the ideology and practice of public participation, for just as the ideology threatens the power and position of the bureaucracy in government so it also threatens the power and position of private property in society.³⁷⁸

McAuslan contends that the groups in society who benefit from the existing system are powerfully motivated to maintain this system and to discredit ideologies that threaten it, and that this would include the ideology of public participation.³⁷⁹ It is in this contested space that mechanisms for public participation such as the public local inquiry develop.

4 The M4CAN scheme and public local inquiry

4.1 Introduction

Having provided an overview of planning law in England and Wales and considered the legislation and legal principles influencing public local inquiries, the final section of this chapter focuses on the M4CAN scheme and inquiry. It sets out the broad timeline of the scheme and explores its legislative and policy context. The laws and policies identified by the proposer, i.e. the Welsh Government, and by the environmental objectors are both considered. It would not be helpful to repeat the arguments put forward by the Welsh Government and the environmental objectors. Instead, this section will outline their key arguments as they relate to relevant legislation, underlining that these policies and laws are treated as facts but that the emphasis placed on them and the choices made are political acts intended to persuade, and make up some of the tools available to the inquiry actors.

³⁷⁸ McAuslan (n76) 265

³⁷⁹ Ibid 265

4.2 Broad scheme timeline

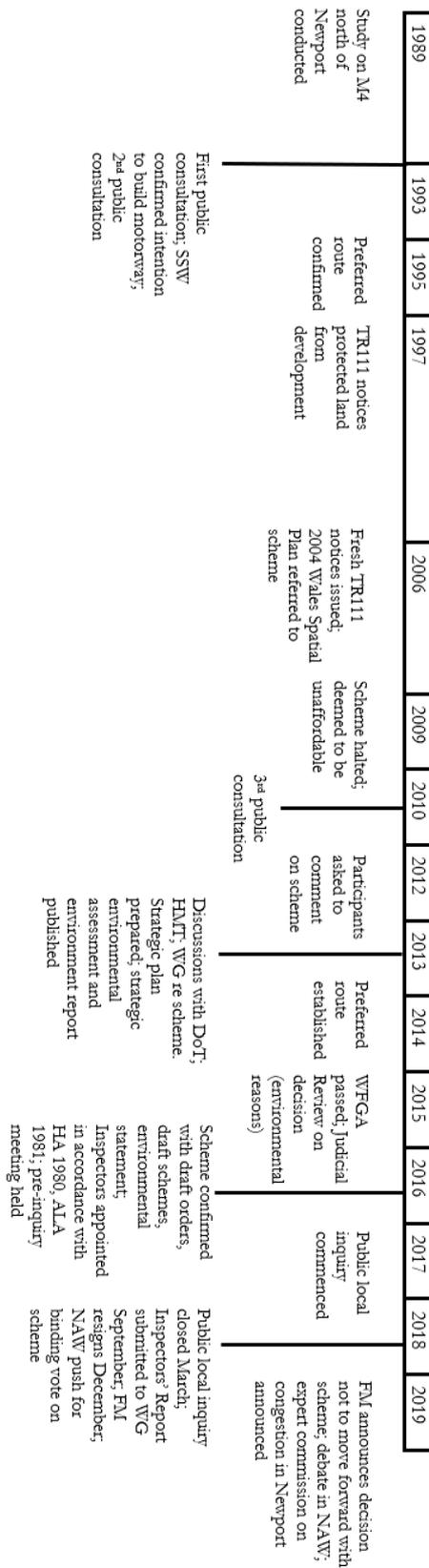


Figure 1: Timeline of key M4CAN events, 1989-2019

The key events marking the progress of the M4CAN scheme were set out in the Inspector's Report of the M4CAN inquiry, submitted in September 2018 and published in June 2019.³⁸⁰ Evident in Figure 1, this scheme was present in one form or another since 1989, though the Welsh Government counsel underlined that the scheme as it stood in 1989, before public consultation, was significantly different from the scheme brought before the inquiry.³⁸¹ There were four public consultations before the public local inquiry pertaining to this scheme. In 2015, there was a judicial review brought forward by Friends of the Earth Cymru against the Minister's (then Minister for Transport Edwina Harte) decision to choose the Black Route³⁸² as the Welsh Government's preferred route. This judicial review was unsuccessful,³⁸³ and in 2016 the scheme was confirmed and the pre-inquiry meeting was held.

4.3 Legal and policy context outlined by Welsh Government

It is clear that Wales needs a new road to address the problems on the M4 around Newport and this Scheme is the best option. We invite the inspectors to commend it to the Welsh Ministers.³⁸⁴

The Welsh Government argument in favour of the M4CAN scheme was that there was a problem, namely frequent traffic congestion on the M4 near Newport, that the M4CAN scheme was their preferred solution to this problem, and that this solution either abided by or was demanded by Welsh planning policy. In their Statement of Case, the Welsh Government set out the following policy documents as relevant to the scheme:

- The Wales Spatial Plan (Update) 2008;³⁸⁵
- One Wales: Connecting the Nation – The Wales Transport Strategy 2008;³⁸⁶
- Wales Infrastructure Investment Plan for Growth and Jobs 2012;³⁸⁷
- National Transport Plan for Wales 2010³⁸⁸ and its Finance Plan 2015;³⁸⁹
- Planning Policy Wales (Edition 8) 2016;³⁹⁰ and
- Trunk Road Forward Programme 2009.³⁹¹

The Wales Spatial Plan 2008 “provides the context and direction of travel for local development plans and the work of local service boards”,³⁹² and builds on the priorities set out in *One Wales*, the agenda for

³⁸⁰ Wadrup and McCooley (n4) 42-45

³⁸¹ Morag Ellis QC on behalf of the Welsh Government (n348) 71-73

³⁸² This is the name of the scheme proposed by the Welsh Government.

³⁸³ *R (Friends of the Earth England, Wales and Northern Ireland Ltd) v The Welsh Ministers* [2015] [2016] Env LR 1, 47

³⁸⁴ Morag Ellis QC on behalf of the Welsh Government (n348) 275

³⁸⁵ Welsh Assembly Government, *People, Places, Futures The Wales Spatial Plan 2008 Update* (2008)

³⁸⁶ Welsh Assembly Government, 'One Wales: Connecting the Nation: The Wales Transport Strategy' (2008)

³⁸⁷ Welsh Government, *Wales Infrastructure Investment Plan for Growth and Jobs* (2012)

³⁸⁸ Welsh Assembly Government, *National Transport Plan for Wales 2010* (2010)

³⁸⁹ Welsh Government, *National Transport Finance Plan 2015* (2015)

³⁹⁰ Welsh Government, *Planning Policy Wales (Edition 8)* (2016)

³⁹¹ National Assembly for Wales, *Trunk Road Forward Programme November 2009* (2009). These policy documents are listed in the Welsh Government Statement of Case, Welsh Government (n348) 11

³⁹² Welsh Assembly Government (n368) 1

government decided on after the 2007 election.³⁹³ It categorises as essential measures to alleviate congestion around Newport and other areas of congestion on the M4.³⁹⁴ The Welsh Government's strategy for transport is set out in *One Wales: Connecting the Nation - The Wales Transport Strategy 2008*. It provides strategic direction for national transport plans;³⁹⁵ it is further informed by the Wales Spatial Plan.³⁹⁶ Regarding the M4 around Newport, *One Wales* states that,

The M4 between the Severn Crossings and Swansea is a vital link with traffic levels well above its capacity. The Wales Spatial Plan assesses the improvement of capacity along this corridor as a key strategic issue.³⁹⁷

The Welsh Government describes the M4CAN scheme as an important part of the Wales Infrastructure Investment Plan.³⁹⁸ In the 2012 Wales Infrastructure Investment Plan, the M4 Corridor Enhancement Measures programme, the data gathering procedure that recommended the M4CAN scheme, is discussed:

The M4 Corridor Enhancement Measures (CEM) programme is examining the options for improvement of the M4 strategic corridor, enhancing its ability to cope with current journey levels and enable more journeys to be made than are now... We will be making a formal announcement of how this will be progressed in due course.³⁹⁹

The scheme had clearly progressed by the Wales Infrastructure Investment Plan review in 2018 where it is described as a “flagship commitment”, delivery of which is “subject to the outcome of the public inquiry”.⁴⁰⁰

The National Transport Plan 2010 builds on the strategic priorities set out in the *One Wales: National Transport Strategy*.⁴⁰¹ It discusses the M4 around Newport in ‘Chapter 4: The East-West Corridor in south Wales’, highlighting congestion issues on this section of the motorway:

It does however [despite being a key corridor for the economy of south Wales] suffer congestion during peak periods and is, in parts, vulnerable to closures without appropriate alternatives being available.⁴⁰²

³⁹³ Labour Party Wales and Plaid Cymru, *One Wales: A progressive agenda for the Government of Wales: An agreement between the Labour and Plaid Cymru Groups in the National Assembly* (27 June 2007)

³⁹⁴ Ibid 113

³⁹⁵ Welsh Assembly Government (n386) 5

³⁹⁶ Ibid 8

³⁹⁷ Ibid 50

³⁹⁸ The Wales Infrastructure Investment Plan aims to embed cross-departmental ways of working across the Government and implements the Programme for Government. Welsh Government (n387) 97

³⁹⁹ Welsh Government (n387) 35

⁴⁰⁰ Welsh Assembly Government, *Wales Infrastructure Investment Plan Mid-point Review 2018: Building prosperity for all* (2018) 26

⁴⁰¹ Welsh Assembly Government (n386) 1

⁴⁰² Ibid 27

The National Transport Plan notes that local traffic using the motorway for short trips is a key factor causing congestion and further notes that congestion in this area is a long-standing issue.⁴⁰³ It is interesting to consider the solutions to this problem presented by the report and the context in which they were written. It states that solutions should focus on local access needs and should be planned,

With a view to providing a system that shifts people to... more sustainable and healthy modes of travel. This approach will enable a more sustainable approach to dealing with the transport issues in this area.⁴⁰⁴

Intervention 91 commits the Welsh Government to,

Deliver a package of measures designed to improve the efficiency of the M4 in south-east Wales, including public transport enhancements, making the best possible use of the motorway and improving the resilience of the network.⁴⁰⁵

This is far from an explicit commitment for the Welsh Government to construct an M4 Relief Road. The National Transport Plan was published one year after the Deputy Minister pronounced the proposed relief road scheme to be unaffordable; this evidently (and unsurprisingly) had an impact on planning policy. It is in line with the Trunk Road Forward Programme 2009, which states that the M4 relief road at Newport scheme was on hold as it was unaffordable.⁴⁰⁶ By 2015, the National Transport Finance Plan, which states that it is “not a policy document” but a list that provides the timescale for financing and delivering transport schemes,⁴⁰⁷ identifies the M4CAN scheme as a solution to congestion problems on the M4 at Newport. In its Delivery Schedule, it identifies the scheme like so:

Improvements to the M4 Corridor around Newport – a new section of motorway south of Newport and complementary measures including; reclassification of the existing M4 between Magor and Castleton,

And states that it will begin in 2015/2016 and will continue beyond 2020.⁴⁰⁸

Planning Policy Wales 2016 does not mention the M4CAN scheme; it is a strategic planning document and does not cite specific examples. It sets out land use planning policies of the Welsh Government, supplemented by Technical Advice Notes. The Welsh Government in their closing statement further noted that Planning Policy Wales considers the implications of WFGA and the Planning (Wales) Act 2015. They maintained that the M4CAN scheme complies with Planning Policy Wales and consequently with these two Acts as well.⁴⁰⁹ It is worth highlighting that both the Welsh Government and objectors can point to the

⁴⁰³ Welsh Assembly Government (n386) 29

⁴⁰⁴ Welsh Assembly Government, *National Transport Plan* (n388) 29

⁴⁰⁵ Ibid 30

⁴⁰⁶ National Assembly for Wales Members' Research Service, *Trunk Road Forward Programme* (November 2009) 10

⁴⁰⁷ Welsh Assembly Government (n389) 2

⁴⁰⁸ Ibid 17

⁴⁰⁹ Morag Ellis QC on behalf of the Welsh Government (n348) 27

Planning Policy Wales objectives that support their case, i.e. either with objectives that focus on environmental sustainability, or with objectives that promote economic development. This will be revisited when considering the position of the scheme's environmental objectors.

What does this examination of Welsh planning policy with relevance to the M4CAN scheme reveal? Firstly, it has demonstrated the complex nature of Welsh planning policy; there are multiple policy documents that inform this scheme, operating at different levels, speaking to different audiences and operating with different objectives. It demonstrates that, unsurprisingly with an infrastructure project of this scale, the scheme has evolved in parallel with Welsh planning policy. This scheme has existed in one form or another since 1989.⁴¹⁰ Has this perhaps affected its treatment in planning policy? It further highlights the multiple roles played by the Welsh Government, as previously discussed. The Welsh Ministers are scheme-proposer and decision-maker. Moreover, they play a significant role in setting the planning context in which the scheme is evaluated. From here, the arguments of the environmental objectors to the scheme will be considered. One assumes that the environmental objectors will rely on different ideologies than those of the scheme-proposers in their arguments; will they also draw upon different legislation to accomplish this?

4.4 M4CAN: environmental objectors' position

4.4.1 Environmental protections

Below is listed the environmental legislation affected by the M4CAN scheme, as cited in the Inspector's Report and in the Inquiry Library.⁴¹¹

- The Wildlife and Countryside Act 1981
- SSSI Citations
 - Countryside Council for Wales Citation – Magor Marsh
 - Countryside Council for Wales Citation – Nash and Goldcliff
 - Countryside Council for Wales Citation – Redwick and Llandeveyney
 - Countryside Council for Wales Citation – Rumney and Peterstone
 - Countryside Council for Wales Citation – St Brides
 - Countryside Council for Wales Citation – Whitson
 - Countryside Council for Wales Citation – Newport Wetlands
 - Countryside Council for Wales Citation – River Usk (Lower Usk)
- The Planning (Listed Buildings and Conservation Areas) Act 1990
- European Directive 92/42/EEC on the Conservation of Natural Habitats and Wild Flora and Fauna
- The Environment Act 1995, chapter 25
- Hedgerows Regulations 1997

⁴¹⁰ Welsh Government (n346) 9

⁴¹¹ Wadrup and McCooney (n4); Persona Associates, 'The M4 Corridor Around Newport Public Local Inquiry' 2018) <<http://m4-newport.persona-pi.com/>> accessed 10 August 2018

- The Countryside and Rights of Way Act 2000
- Water Environment (Water Framework Directive) (England and Wales) Regulations 2003
- The Natural Environment and Rural Communities Act 2006
- The Highways (Environmental Impacts Assessment) Regulations 2007
- The Highways (Assessment of Environmental Effects) Regulations 1999, SI 2007 No. 1062
- The Marine Works (Environmental Impact Assessment) Regulations 2007, SI 2007 No. 1518
- The Climate Change Act 2008
- The Conservation of Habitats and Species Regulations 2010
- The Wellbeing of Future Generations Act 2015⁴¹²
- The Environment (Wales) Act 2016
- The Conservation of Habitats and Species Regulations 2017

This gives some indication as to the range of the scheme’s environmental impacts. It suggests the extent to which environmental protections are enmeshed in planning law. It further highlights the range of legal avenues available to environmental objectors, and the sheer number of law and policy documents with which they needed to be conversant.⁴¹³

4.4.2 *Legal and policy context outlined by environmental objectors*

Environmental objectors to the M4CAN scheme contended that the scheme contravened Welsh sustainability, environmental and planning legislation. These concerns were raised in GWT’s closing statement, quoted below:

This non-conformity with Welsh Government sustainability policies and legislation is a significant departure from legislative intention and is a serious matter. It represents a deliberate decision that is contrary to legislation, made in the full knowledge that there are many low carbon, zero carbon, and less ecologically damaging alternatives to the most damaging option.⁴¹⁴

Significantly, they contended that it contravened WFGA. They were supported in this by Sophie Howe, Future Generations Commissioner.⁴¹⁵ Brendon Morehouse on behalf of the environmental objectors⁴¹⁶ rejected the Welsh Government’s argument and underscored its conflict with WFGA:

⁴¹² WFGA is sustainable development legislation and consequently relevant to environmental issues; it is not environmental legislation.

⁴¹³ This idea of the documents being overwhelming is discussed in greater detail in Chapter 6, section 2.1.2.

⁴¹⁴ Brendon Morehouse on behalf of Gwent Wildlife Trust, Friends of the Earth, CPRW and the Woodland Trust, *Closing Statement in the matter of: Public Local Inquiry into the M4 relief road around Newport: The effects of the proposed M4 extension across the Gwent Levels* (27 September 2017) 14

⁴¹⁵ *Letter from Sophie Howe, Future Generations Commissioner* (submitted to the Inquiry on 13 September 2017). The Future Generations Commissioner submitted written evidence to the inquiry, she did not provide oral evidence.

⁴¹⁶ A number of environmental organisations banded together to object to the M4CAN scheme as one unit, with Gwent Wildlife Trust and Wildlife Trust Wales taking the lead. These organisations were Gwent Wildlife Trust, Friends of the Earth Cymru, Campaign for Rural Wales (CPRW) and the Woodland Trust.

The problems around Newport are not unique, and neither is the Welsh Government's proposed solution. The proposed solution is neither 'innovative' nor 'low carbon', both of which are required under the Well-being of Future Generations Act definition of a 'Prosperous Wales'.⁴¹⁷

Environmental objectors highlighted that the M4CAN scheme would have a dangerous carbon impact and that this impact contravened WFGA, as acting on climate change is integral to three of WFGA's seven wellbeing goals.⁴¹⁸ This is linked to another contention of the environmental objectors, that the scheme would make it harder to comply with international and national climate change obligations, to be discussed later in the section. The Future Generations Commissioner argued that the Welsh Government⁴¹⁹ misinterpreted WFGA, in stating that,

The ways of working [set down in WFGA] acknowledge the fact that there may be trade-offs between desirable objectives and goals. The sustainable development principle therefore involves striking a balance between different desiderata.⁴²⁰

Howe demonstrated concern with this statement, contending that,

Not only is this an incorrect interpretation of the Act but it could set a damaging precedent which could undermine the spirit and intention of the legislation. The Act moves us away from the traditional trades-offs approach to one of balancing in a more literal sense.⁴²¹

She underlined that it is wrong for one pillar, in this case the economic pillar, to take precedence over the other pillars.⁴²² In response, the Welsh Government in their closing statement contended that the Future Generations Commissioner and the environmental objectors "over-simplifie[d]... the subtleties of the statutory drafting of WFGA", and moreover, that their interpretation was in conflict with Planning Policy Wales.⁴²³ The Welsh Government noted that Planning Policy Wales had been updated to better reflect WFGA and its related suite of legislation; they contended that they were relying on an understanding of balance employed in updated planning policy documents and that this was the understanding of balance employed throughout the planning sphere.⁴²⁴

Environmental objectors argued that even when evaluated with evidence compiled by the Welsh Government, the M4CAN scheme was unnecessary; in this instance they relied on the Welsh Government

⁴¹⁷ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 9

⁴¹⁸ Ibid 42; A Prosperous Wales, A Resilient Wales and A Globally Responsible Wales. Wellbeing of Future Generations Act 2015, Part 2 Art 4

⁴¹⁹ Although she identifies the argument-maker here as Morag Ellis QC, who is lead counsel for the Welsh Government – perhaps a way of avoiding coming into direct conflict with the Welsh Government?

⁴²⁰ Howe (n415) 4

⁴²¹ Ibid 4

⁴²² Ibid 4

⁴²³ Morag Ellis QC on behalf of the Welsh Government (n348) 199

⁴²⁴ Ibid 199

National Development Framework–Integrated SA Scoping Report.⁴²⁵ This report aims to identify the reasons for Wales’ poor economic performance. Morehouse, on behalf of the environmental objectors, noted that these reasons include low educational attainment and a disproportionately old, rural population, but that it did not list transport as a reason for poor economic performance.⁴²⁶ Environmental objectors were primarily concerned however with environmental planning policy, and where they argued the M4CAN scheme diverged from this policy. Environmental objectors highlighted the Welsh Government Natural Resources Policy and its statement regarding transport, which they contended was out of sync with the M4CAN scheme:

Through the Wales National Transport Strategy and Finance Plan we are promoting a more sustainable road transport network and a modal shift away from roads for people and freight... We are committed to improving active travel opportunities and promoting public transport. In taking this action forward we will: take action on our transport network that enhances the resilience of our ecosystems and reverses the decline of biodiversity.⁴²⁷

Moreover, environmental objectors argued that the mitigation strategies proposed by the Welsh Government would not ‘entirely’ mitigate the predicted loss of species and habitat in the SSSIs, and that therefore the Welsh Government would fail in their commitment to “maintain and enhance biodiversity” and to “promote the resilience of ecosystems”, as set out in the Environment (Wales) Act 2016,⁴²⁸ thereby also failing to comply with the ‘A More Resilient Wales’ goal in WFGA.

Elaborating on the previous point, environmental objectors argued that ineffective mitigation measures would leave the Welsh Government in contravention of key pieces of landscape and nature conservation legislation. This was underlined by Morehouse in the GWT closing statement:

Building this 6-lane motorway over approximately 10kms of nationally important ecological wetlands will have a significant and long-lasting impact on the SSSIs which cannot adequately be mitigated. Along with the direct loss of habitat beneath the concrete footprint of the motorway, one of the largest losses of SSSI land anywhere in the UK, the M4 bypass would rupture the essential cohesion of the place, acting as an impermeable barrier to all flightless wildlife, isolating wild animal populations on either side of the divide.⁴²⁹

Morehouse further highlighted the evidence of NRW where they stated that the scale of damage to SSSIs would be unprecedented and that it would constitute a failure to comply with statutory duties outlined in the Wildlife and Countryside Act 1981 s28(g).⁴³⁰ They contended that this lack of confidence regarding mitigation measures left the scheme in contravention of EU law. In the Gwent Wildlife Trust (GWT) legal

⁴²⁵ Welsh Government, *Consultation on the draft Integrated Sustainability Appraisal Scoping Report for the National Development Framework* (2017) 20

⁴²⁶ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 10

⁴²⁷ Welsh Government, *Natural Resources Policy* (2017) 28

⁴²⁸ Environment (Wales) Act 2016, Part 1 s 6(1)

⁴²⁹ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 11

⁴³⁰ Ibid 12

note dated 5 April 2017, Charles Streeten (counsel to GWT) set out that according to Article 4 of the Treaty on the EU, Member States at all their levels of governance must “refrain from action which could jeopardise the fulfilment of EU law obligations”.⁴³¹ Articles 12 and 16 of the Habitats Directive require that there should be “no reasonable scientific doubt” regarding the effectiveness of mitigation measures;⁴³² environmental objectors argued that there was ‘reasonable scientific doubt’ as to the effectiveness of Welsh Government mitigation measures, and that therefore the Welsh Government were in contravention of EU legislation.⁴³³

As previously highlighted, environmental objectors contended that the M4CAN scheme would significantly hamper the Welsh Government’s ability to adhere to international commitments on climate change, specifically that the scheme would “not help Welsh Government reduce greenhouse emissions by 80% by 2050”.⁴³⁴ They further contended that the Environment (Wales) Act 2016 placed an obligation on the Welsh Government to lead by example and that the M4CAN scheme represented a failure in this regard.⁴³⁵ In closing, Morehouse cited Professor Kevin Anderson, an expert witness for the objectors:

The M4 scheme is emblematic of a failure to acknowledge the challenges enshrined in the Paris Agreement. If it proceeds it will illustrate the Welsh Government’s disregard for its climate change commitments, and the impacts of unchecked emissions on future generations of Welsh citizens and those poorer and climatically vulnerable communities elsewhere in the world today.⁴³⁶

Morehouse characterised the M4CAN scheme decision as “the first test case of both the Environment (Wales) Act and the Wellbeing of Future Generations Act”, underlining the significance of this case for environmental legislation.⁴³⁷

The inspectors, and some of the actors who were seeking to convince the inspectors, would have seen their remit as constrained by the legal tests applied to the different issues under consideration, as going beyond these tests would impact the legality of the decision; for inquiry participants, it would impact the effectiveness of their argument. Statutory constraints vary with context; in this case, the parameters within which the inspectors were evaluating evidence were set by highways law, planning law, WFGA, and Welsh and English environmental law. The inquiry heard different interpretations of the scope of the duty to ‘take reasonable steps’ set out in the Wildlife and Countryside Act 1981 s28(g); the tolerance for doubt in the success of mitigation strategies under the EU Habitats Directive was similarly debated. As described above, the Welsh Government and environmental objectors had conflicting interpretations of the duty established

⁴³¹ Gwent Wildlife Trust, *Legal Note* (submitted to the Inquiry on 5 April 2017) 2

⁴³² *Ibid* 3

⁴³³ *Ibid* 6

⁴³⁴ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 12

⁴³⁵ *Ibid* 44

⁴³⁶ Professor Kevin Anderson, *Proof of Evidence, Professor Kevin Anderson: On Behalf of Gwent Wildlife Trust, In the matter of: Public Local Inquiry into the M4 relief road around Newport: Climate Change Implications*, February 2017, 12

⁴³⁷ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 44

in WFGA and its relevance to this scheme. These different arguments highlight that inquiry participants, both objectors and proposers, needed to frame their arguments in terms of the relevant legal tests; this shaped the arguments they were making and the modes of argument they employed. However, while keeping in line with the relevant legal tests, the environmental objectors and the scheme proposers employed different framings and developed their case building on different values and perspectives.

The Welsh Government case proposed that the Welsh economy was negatively affected by traffic congestion on the M4 and that this problem was recognised, and their solution recommended, by planning policy documents. They primarily relied on tertiary legislation specific to Welsh planning and transport to make this case.⁴³⁸ The environmental objectors to the scheme argued that the scheme was unnecessary and that it contravened national law (in particular they argued that it was in conflict with WFGA), EU and international environmental law.⁴³⁹ The environmental objectors largely relied on primary legislation in their arguments. Reflecting on these legal arguments, it is evident that the two sides made their cases employing different tools, different pieces of legislation and policy, and employing different approaches when referring to the same piece of legislation or policy.⁴⁴⁰ Their arguments tended to come into direct conflict with one another only when one side was countering a claim of the other, as when the Welsh Government disputed the environmental objectors' interpretations of WFGA, and vice versa. This illustrates the separate priorities of the two sides in this inquiry; one side had its focus on economic and transport policy, and one side had its focus on environmental legislation. This further justifies the decision of the environmental objectors to focus on WFGA, as it seemed likely that the decision in this inquiry would be arrived at in the balance between economic and environmental considerations.

5 Conclusion

Setting out the legal context for this research site is no small task, and this chapter has only touched upon the most pertinent points of law. It has provided an overview of planning law in England and Wales, and the ideologies that have shaped its development. It has reflected on public participation and its roots in the principles of natural justice, as illustrated by administrative justice case law. It has further reflected on the public local inquiry as a legal mechanism and a public participation procedure. Lastly, it has outlined the timeline of the M4CAN scheme and the policy context for the M4CAN scheme as proposed by both

⁴³⁸ Outlined in section 4.3 above.

⁴³⁹ Outlined earlier in this section. They contended that the scheme was in conflict with: WFGA; the Environment (Wales) Act 2016; the Wildlife and Countryside Act 1981; the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora 1992, and the Paris Agreement of the United Nations Framework Convention on Climate Change (UNFCCC) 2015.

⁴⁴⁰ I would contend that the Welsh Government and environmental objectors further employed different methods as part of their inquiry strategy; these methods will be explored in the analysis section of this thesis, in Chapters 5, 6 and 7.

developers and environmental objectors at the inquiry. Throughout the chapter, attention was drawn to points of particular relevance to this research, including WFGA and the pivotal role of the inquiry inspectors. These subjects will be revisited as we move into the analysis section of this thesis. Having described the fields of thought underpinning this research project and established the legal context for this research, the following chapter will outline the methods with which the empirical part of this research project was undertaken. Having established this theoretical, legal and methodological framework, the thesis will be well placed to explore the insights gained at the M4CAN public local inquiry.

4 Methodology

Previous chapters have explored the theoretical insights that inform this research project and have outlined its legal context. The present chapter sets out the methodological framework that guides the research. A narrow doctrinal legal research design would not easily facilitate an exploration of rationalist assumptions and their possible impacts on the treatment of the environment in decision-making processes. Consequently, this research project primarily relies on ethnographic fieldwork in order to explore these questions. It relies on a mix of doctrinal, theoretical and empirical research. It is informed by academic literature from across a range of disciplines and relies on a close reading of case law; policy documents; assembly debates; legislation; consultations, newspaper articles and a range of inquiry documents. Analysis of these sources has informed this research project; this analysis remained rigorous, reflective and focused on the research question. However, this thesis is driven by the data gathered at the field site; ethnographic fieldwork remains the primary method of data collection and analysis in this research. Therefore, the focus of this chapter is on the ethnographic methodologies and methods employed in this research project.

I have conducted ethnographic research of the M4CAN public local inquiry in order to best explore the questions this research provokes. It is socio-legal ethnographic research, informed by new materialist philosophy. This chapter will outline the methods and methodologies that are directly relevant to this research project and will further explore the reasons underpinning this methodological approach. It will firstly introduce the research site, the M4CAN public local inquiry. From there, the methodological approach will be considered, describing the key features of this socio-legal ethnographic approach. With the methodological framework established, this chapter will consider its specific methods of data collection, namely participant observation and interviewing. Lastly, the challenges unique to this research site will be assessed and possible mitigation strategies suggested.

1 The Site

This research project investigated the public local inquiry into the proposed M4 Corridor around Newport. The inquiry (hereafter referred to as the M4CAN inquiry), was in session for 83 days, from 28 February 2017 to 28 March 2018.⁴⁴¹ The pre-inquiry meeting took place on 18 July 2016.

⁴⁴¹ The inquiry was closed by the inspector on 28 March 2018; however, the inspector gave unique leave to the Newport Port Security Authority to make written confirmation of their position after this date. They withdrew their objection on 17 April 2018 and the inquiry was finally closed on 18 April 2018. Persona Associates, 'Final Close of Inquiry' 2018) <<http://m4-newport.persona-pi.com/news/title/close>> accessed 1 August 2018

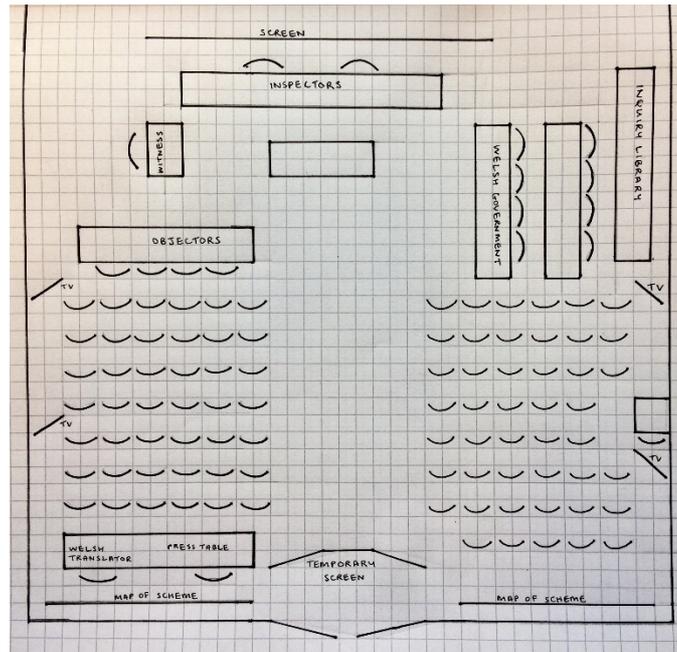


Figure 2: The M4CAN Inquiry room

The M4CAN inquiry was held at the Lysaght Institute on the outskirts of Newport, a city in South Wales; it moved between three rooms, depending on room availability and estimated attendance of the session. The Welsh Government team⁴⁴² were based in a temporary building in the car park of the institute. Inquiry documents were held in the inquiry library, situated in the programme officer's office on the ground floor;⁴⁴³ this library, along with a provisional programme and other matters, was available online on the M4CAN inquiry website.⁴⁴⁴ Arriving at the institute, you were greeted by signs in blue font stating, 'M4 Corridor around Newport: Public Local Inquiry', directing you up the stairs.⁴⁴⁵ Outside the inquiry room there was a register to sign and an inquiry staff member at a table. There were documents on the table, including the Welsh Government Statement of Case and a 'What you need to know' guide produced by the Welsh Government. As you entered the room, the inspectors were sitting on a dais at the front. At some of the inquiry sessions, the door was obscured by a light grey-blue screen. Screens by the back walls on either side of the door displayed large maps of the proposed route. Behind the inspectors were screens that said in large letters, *Coridor yr M4 o amgylch Casnewydd: M4 Corridor around Newport: Ymchwiliad Lleol Cyhoeddus: Public Local Inquiry: Sefydliad Lysaght Institute*. On the left as you entered was a press table and a Welsh translator sat with headsets for those who wanted to take part in Welsh.⁴⁴⁶ Seats were laid out for members of the public on either side of the centre aisle in seven rows; the front rows were reserved (but not with reservation

⁴⁴² It seemed that inquiry staff also used this facility. The overlapping roles of the inquiry staff and the Welsh Government team is discussed in later chapters.

⁴⁴³ There was confusion as to where hard copies of the inquiry library documents were kept; I discovered where they were after the inquiry closed.

⁴⁴⁴ Persona Associates (n411)

⁴⁴⁵ This was the main location of the inquiry; as it continued it moved into smaller rooms downstairs.

⁴⁴⁶ This service was availed of once in the 83 sessions of the inquiry.

notices)⁴⁴⁷ for active participants at the inquiry. On the left of the door sat the objectors. They sat, as with members of the public, facing the inspectors. In front of them and to the right of the inspectors, not facing the inspectors, was the witness seat. To the right as you entered (to the left of the inspectors), sat the Welsh Government team, not facing the inspectors but facing the witness seat. There were two rows here, four chairs to a row. There were large folders on bookshelves behind the Welsh Government team, holding the documents required for their case. The key participants at the inquiry were the inspector and assistant inspector, the Welsh Government and their legal team, which included the Queen's Counsel who led the team and assistant counsel, the Chief Witness for the Welsh Government⁴⁴⁸ and a number of other regularly attending individuals, the objectors and their legal teams (these changed throughout the inquiry), the witnesses on both sides, and members of the public who were interested and stayed as observers or in some cases gave evidence. The Welsh translator, the programme officer and their assistants were other regular inquiry participants.

I attended 21 of 83 sessions of the inquiry, 20 of which took place at the Lysaght Institute, and one of which was a site visit on the Gwent Levels.⁴⁴⁹ I observed the mundane activities and moments of surprise at the inquiry. I was keen to note the taken-for-granted routine of the inquiry and how this was established. In line with my research questions, I was particularly drawn to aspects of the inquiry that concerned the environment, and to considerations of rationality, reasonableness and irrationality, and how these played out at the inquiry. The ethnographic approach taken in this research is explored in greater detail in the following section. Supplementing these observations, I conducted interviews with inquiry participants. The approach to interviewing applied in this research is discussed in a later section. Having introduced the field site, the following section will discuss the methodological approach taken in conducting research at this site.

2 The Methodological approach

This research employs a socio-legal ethnographic methodology. This section explains what is entailed with this methodology and why it is the most appropriate methodology for this research. The ethnographic approach taken in this research is informed by new materialist concepts, explored in Chapter 2.⁴⁵⁰ New

⁴⁴⁷ There were no reservation notices on these chairs, yet every day I attended the inquiry the front row was taken by people who played an active role at the inquiry. How did this reservation take place? Because the people up there were in suits and looked as though they were at work? Because they seemed to know one another? Because that is what is usually done in these kinds of situations? Because of reticence on the part of those who were not used to inquiries? This level of detailed consideration is central to ethnographic research and will be the focus of later chapters.

⁴⁴⁸ The Chief Witness for the Welsh Government is a project engineer for the Welsh Government; he was the lead engineer on the M4CAN scheme and a regular attendee at the inquiry. He seemed to manage and prepare the documents the Welsh Government was required to provide at the inquiry. Matthew Jones, *Proof of Evidence, Matthew Jones BEng (Hons), CEng, MICE, Welsh Government, Chief Witness* (2017)

⁴⁴⁹ Access to and attendance of the inquiry will be discussed in the final section of this chapter.

⁴⁵⁰ See Chapter 2, section 5.3.

materialist thought brings into focus certain aspects of the research site and methodology. It is an epistemological approach that foregrounds questions of anthropocentrism and of materiality at the field site. New materialist concepts and their influence on the methodology will be explored as relevant.

2.1 A socio-legal approach

Interdisciplinary work, so much discussed these days, is not about confronting already constituted disciplines... To do something interdisciplinary it's not enough to choose a "subject" and gather around it two or three sciences. Interdisciplinarity consists in creating a new object that belongs to no one.⁴⁵¹

This research is interdisciplinary, in the questions that it asks and in its methods of answering them. More specifically, it is socio-legal. Before outlining why socio-legal ethnography is the most appropriate methodology for this research, the interdisciplinary nature of this research will briefly be considered. As highlighted above by Barthes, interdisciplinary research consists in creating a 'new object'. While interdisciplinary research has become more prominent since Barthes described it so, it remains a new and disruptive form of research. Moreover, it remains a challenging type of research, as by its very nature interdisciplinary research demands knowledge of multiple disciplines and consists of applying questions drawn from one area of work, or type of knowledge, to another area of work. Not only does interdisciplinary research disrupt by asking new questions in new disciplines, it questions the very notion of disciplinarity. As Fitzgerald and Callard argue it is the existence of disciplines that require justification, and not the traversing of these disciplines; researchers more and more are contending with the realisation that,

Those boundaries [between disciplines] are pasted across objects which are quite indifferent to a bureaucratic division between disciplines; and that scholars and researchers of all stripes invariably attend to, and live among, objects whose emergence, growth, development, action, and disappearance do not at all admit of neat cuts between the biological and the social, or between the cerebral and the cultural.⁴⁵²

This research recognises the unique challenges and insights interdisciplinarity provides, while being aware that the scaffolding of these disciplines themselves is far from secure. The particular insights and challenges of socio-legal studies will be explored in the following section, specifically the challenges and merits of socio-legal ethnography.

Why have I chosen to conduct a socio-legal ethnography? Why is this the most appropriate methodology for my research questions? There are many reasons underpinning this choice. Firstly, this research attends to the taken-for-granted assumptions that shape processes of participation and the arguments that take place within these processes. Ethnography is well-suited to foregrounding the mundane, particular activities of the social world under investigation. This is especially relevant, if challenging, for legal research, as law

⁴⁵¹ Roland Barthes, 'Jeunes Chercheurs' in James Clifford, 'Introduction: Partial Truths' in J Clifford and others (eds), *Writing culture: the poetics and politics of ethnography* (University of California Press 1986) 1

⁴⁵² Felicity Callard and Des Fitzgerald, *Rethinking interdisciplinarity across the social sciences and neurosciences* (Palgrave Macmillan 2015) 23

has a tendency to dematerialise; as Lee states, “Law has both carefully expressed and wholly unspoken ways of knowing”.⁴⁵³ This refers not only to embedded modes of behaviour that underpin legal processes, but also to law’s reliance on processes of abstraction in order to reinforce the legitimacy of its authority.⁴⁵⁴ By appealing to ideals of objectivity and rationality,⁴⁵⁵ and by ‘cleaning’ law of the material particularities of any given case with which it contends, legal processes can struggle to recognise the inequalities that might beset the legal system. This argument is made by Silbey:

The experiences of law in everyday life may be rendered irrelevant by an abstracted, rational, and reified conception of law as expressed in the story of law as a game. Any singular account of the rule of law conceals the social organisation of law by effacing the connections between the concrete particular and the transcendent general. Consequently, power and privilege can be reserved through what appears to be the irreconcilability of the particular and the general.⁴⁵⁶

Socio-legal scholarship has long held a commitment to investigating the everyday, particular elements in the law; it is concerned with how law is perceived by those who use it and live in it.⁴⁵⁷ Evident in this description of socio-legal studies is its inherently critical stance as a discipline. This mirrors a critical trend within ethnographic research, ethnographies’ critical stance stemming from its attention to the particular, as Marcus puts it, “redefining capitalist [in this instance] structure itself in human terms”.⁴⁵⁸ Silbey, who along with Patricia Ewick developed the concept of legal consciousness,⁴⁵⁹ argues that the purpose of legal consciousness and of socio-legal studies more broadly is to investigate the processes of legal hegemony, to ask, “why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality?”.⁴⁶⁰ Legal hegemony, derived from “long habituation to the legal authority that is almost imperceptibly infused into the material and social organisation of ordinary life”,⁴⁶¹ can be captured in the everyday practices represented in ethnographers’ fieldnotes. Ethnographic research, and in particular its relevance to this research project, will be the focus of the following section.

2.2 An ethnographic approach

Ethnography can be understood as “the peculiar practice of representing the social reality of others through the analysis of one’s own experience in the world of these others.”⁴⁶² Inextricably linked to the method of

⁴⁵³ Maria Lee, 'Knowledge and landscape in wind energy planning' (2017) 37 *Legal Studies* 3, 12

⁴⁵⁴ Lydia Hayes, *Stories of care: a labour of law. Gender and class at work* (Palgrave 2017) 24. This touches on notions of abstraction explored in Chapter 6.

⁴⁵⁵ Susan S. Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 349

⁴⁵⁶ *Ibid* 350

⁴⁵⁷ John M. Conley, *Rules versus relationships: the ethnography of legal discourse* (University of Chicago Press 1990) 167

⁴⁵⁸ George E. Marcus, 'Contemporary Problems of Ethnography in the Modern World System' in J Clifford and others (eds), *Writing culture: the poetics and politics of ethnography* (University of California Press 1986) 178

⁴⁵⁹ Legal consciousness is a key concept in socio-legal studies; researchers of legal consciousness investigate “the ways law is experienced and understood by ordinary citizens”. It signals a commitment to understand law not through the decisions of judges, but through the ways ordinary citizens interact with law. Merry 1985, in Silbey (n455) 326; Scott Barclay and Susan S. Silbey, *Understanding Regime Change: Public Opinion, Legitimacy, and Legal Consciousness* (OUP 2008) 668

⁴⁶⁰ Silbey (n455) 323

⁴⁶¹ *Ibid* 331

⁴⁶² John Van Maanen, *Tales of the field: on writing ethnography* (2nd ed, University of Chicago Press 2011) xiii

ethnography, it is a particularly pragmatic and adaptive research methodology. Atkinson describes it as “craft knowledge” as much as scientific method.⁴⁶³ Seeking to distance ethnography from its roots in travel writing and in early anthropological studies roundly criticised for exoticising non-Western cultures, Atkinson and others assert that ethnography is more than evocative description; “it is about the analysis of social action and social organisation”.⁴⁶⁴ It is a form of cultural analysis. The unique challenges of this analysis, as Geertz describes it, “guessing at meanings, assessing the guesses, and drawing explanatory conclusions from the better guesses, not discovering the Continent of Meaning and mapping out its bodiless landscape”,⁴⁶⁵ form the fundamental questions with which ethnography contends. In line with its attention to the complex, particular and situated meanings present at the site under investigation, ethnographic research typically follows a broadly inductive approach to analysis. This research follows a similar approach; this specific approach to data collection and analysis followed in this research will be explained in further detail in section 3 of this chapter.

2.2.1 *Ethnography as complex*

The aspects of things that are most important for us are hidden because of their simplicity and familiarity.⁴⁶⁶

I am interested in the taken-for-granted assumptions of inquiry participants. Ethnography is ideally suited to this kind of investigation as it is concerned with ‘thick’ descriptions of the social world in all its complexity. Noting the tendency in ethnographic research towards ‘thick’ descriptions that recognise the complexity of the social world illustrates the overlap between ethnographic and new materialist approaches. The new materialist concept of relational ontologies in particular is relevant here. With this ontological perspective, the researcher recognises that the bodies being researched are not discrete subjects but assemblages⁴⁶⁷ of inter-related humans, materials, concepts and environments.⁴⁶⁸ New materialist research focuses on the relations between bodies and sees these relations as emergent and continuously changing. It invites the researcher to take a more holistic view of the field site. Scholars wary of this trend in qualitative research maintain that there is order, or orderliness, in the social world, even if this order is “fluid, improvised and even fragile”.⁴⁶⁹ While agreeing with new materialist scholars that codes, structures and bodies under investigation are not static, as they have been conceived of in some strands of social research,⁴⁷⁰ they maintain that this does not negate the need for rigorous analysis of these codes, structures and bodies; “the fact that everyday life is a process of becoming does not mean that it has no organisation,

⁴⁶³ Paul Atkinson, *For ethnography* (Sage 2015) 10

⁴⁶⁴ *Ibid* 7

⁴⁶⁵ Clifford Geertz, *The interpretation of cultures: selected essays* (Fontana Press 1993) 20

⁴⁶⁶ Ludwig Wittgenstein, *Philosophische untersuchungen: Philosophical investigations* (3rd edn, Blackwell 1968) para 129

⁴⁶⁷ See Chapter 2, section 5.3 for a description of assemblages.

⁴⁶⁸ Nick J. Fox and Pam Alldred, 'New materialist social inquiry: designs, methods and the research-assemblage' (2015) 18 *International Journal of Social Research Methodology* 399, 402

⁴⁶⁹ Atkinson (n463) 19

⁴⁷⁰ Alan Bryman, ‘The End of the Paradigm Wars?’ in Pertti Alasuutari, Leonard Bickman and Julia Brannen, *The Sage handbook of social research methods* (Sage 2008) 13

no structure and no methods for its making”.⁴⁷¹ Codes, though fragile and shifting, do exist, and can be subject to analysis. Ethnographic research understands these codes as being constituted by the interactions that make up everyday life; this epistemological position underpins ethnographers’ focus on these meaning-making practices and processes.⁴⁷² Building on this, while I am not explicitly conceiving of the M4CAN inquiry as an assemblage in this research, I find the concept of relational ontologies to be a helpful research frame. I employ the concept to re-assert the inter-related nature of every aspect of the field site. What insights does this provide? During analysis, it reminded me that inquiry participants are not bounded subjects; they are not roles being performed but rather are complex, relational bodies. They might hold contradictory opinions and occupy multiple social and cultural roles.⁴⁷³ It further reinforced that the Gwent Levels is not only an environmental concern to be negotiated and represented at the inquiry. It is a place of considerable social and ecological diversity, of great significance to some inquiry participants and not to others; the various ways in which the Gwent Levels was presented at the inquiry will be discussed in later chapters.

2.2.2 *Ethnography as particular*

[An ethnographer] “confronts the same grand realities that others... confront in more fateful settings: Power, Change, Faith, Oppression, Work, Passion, Authority, Beauty, Violence, Love, Prestige; but he confronts them in contexts obscure enough... to take the capital letters off them. These all-too-human constancies, “those big words that make us all afraid”, take a homely form in such homely contexts.”⁴⁷⁴

It has been highlighted that the strength of ethnographic research derives from its attention to the everyday practices of the social world. This is a defining feature of ethnography, and one that merits further consideration. Ethnographers present a perspective on the social world in all its intricate, contradictory and vivid detail. This is not only to make their accounts more enjoyable for their readers (although narrative skill is not dismissed in ethnographic writing as it is in other forms of social science⁴⁷⁵); it serves a methodological purpose. Presenting the social world as complex and multi-dimensional, drawing out “the intricate ways individuals and groups understand, accommodate, and resist a presumably shared order”,⁴⁷⁶ is appropriate for research that seeks to question embedded norms.⁴⁷⁷ It is exactly this focus on small, everyday actions that makes it appropriate to this kind of research; the focus on interactions, the first-hand experience of particular social events,⁴⁷⁸ not just what is said, but how it is said, to whom, when, and how. This reinforces my interest in the particular ways in which participants negotiate interactions at the inquiry.

⁴⁷¹ Atkinson (n463) 30

⁴⁷² Paul Rock, 'Symbolic Interactionism and Ethnography' in P Atkinson and others (eds), *Handbook of Ethnography* (Sage 2002) 30

⁴⁷³ The conflicts inherent in people taking part in an adversarial process are discussed in Chapters 5, 7 and 8.

⁴⁷⁴ Geertz (n465) 21

⁴⁷⁵ Van Maanen (n462) vii

⁴⁷⁶ *Ibid* xviii

⁴⁷⁷ Hayes (n454) 22

⁴⁷⁸ Vicki Smith, 'Ethnographies of Work and the Work of Ethnographers ' in P Atkinson and others (eds), *Handbook of ethnography* (Sage 2007) 225

I am interested in what it is like to take part in the inquiry; I think that these practices are illuminating, and that they might not always gel with how inquiry participants would see themselves. The social world is performed in ways that are known implicitly by those who perform it, and rarely questioned.⁴⁷⁹ Actors are knowledgeable about the codes of their particular social world,⁴⁸⁰ although not every actor is as equally well-versed in these social practices. This might have particular relevance at a temporary setting, such as the M4CAN inquiry. How do we act and how do we know how to act at a public local inquiry? How do we argue, and how are behaviours and ways of arguing prioritised and policed? How quickly are the rules of the game set, and who remembers the rulebook from before?

While ethnographic research has critical potential, moving between the grand concepts of legal theory and the situated detail of ethnographic study is fraught with challenges. Marcus highlights this issue, noting that even in ethnographic work that purports to investigate macro-political structures, “the larger frameworks of local politics have usually been treated in separate theoretical or conceptual discourse with some ethnographic detail added for illustration.”⁴⁸¹ The part that ‘large worlds’ play in ‘little worlds’ is often ignored, or is mentioned but not analysed in detail. This is also the case in socio-legal research; Silbey identifies the challenge of bridging “the micro worlds of individuals and macro theories of ideology, hegemony, and the rule of law” as a key concern for scholars of legal consciousness,⁴⁸² and argues that research that takes examples from the social world and considers how they are affected by legal processes does not fulfil the ambitious brief of legal consciousness scholarship. Silbey urges her readers to fully consider greater theoretical questions, such as the role of legal hegemony, through analysis of the implications of law in everyday life.

2.2.3 *Ethnography as physical*

[Sensory, physical and geographic factors] are not just matters of ‘local colour’, or of gratuitous ethnographic detail. They are fundamental to the local organisation of social action and interaction. Actors do not only interact with one another; they also interact with the material circumstances of their everyday lives.⁴⁸³

This research project requires an attention to the complex detail of everyday social processes at the inquiry. It further requires a methodology that allows for consideration of material influence at the research site. In line with some of its key theoretical concerns, this research project foregrounds matter and non-verbal data. It is essential, in order to assess the possible impact of rationalist dualisms such as human–nonhuman dualism, to take account of nonhuman, nonverbal data at the research site. Social research methods such as surveying or interviewing would leave me unable to attend to this data. Ethnography investigates a material, social world. It understands social actors to be embodied actors; they further use (or interact with)

⁴⁷⁹ Erving Goffman, *The presentation of self in everyday life* (Penguin 1959, 1978) 28

⁴⁸⁰ Atkinson (n463) 16

⁴⁸¹ Marcus (n458) 166

⁴⁸² Silbey (n455) 351

⁴⁸³ Paul Atkinson, *Thinking ethnographically* (Sage 2017) 130

material objects. Social action happens in a particular place and materialises in a way that is unique to that time and place, therefore “always an emergent property of collaboration and conflict”.⁴⁸⁴

Attention to matter is thus central to ethnographic research; unsurprisingly, it is also integral to new materialist thought. New materialist thinkers contend that social theorists have an incomplete understanding of the world when they ignore materiality. Ethnographic researchers reject this categorisation and argue that to view reality as socially constructed is not to view reality as immaterial.⁴⁸⁵ Atkinson contends that ethnographic study has traditionally attended to the material world:

Participant observation has always meant that ethnographers are immersed in the totality of the world about them... We have smelled the places and people about us; we have heard and listened; we have observed and photographed or filmed – we have felt bodily the effort of being in the field; walking, standing, crouching...⁴⁸⁶

The specificity of matter is bound up in the ‘muchness’ of human life; it also works against material artefacts being easily recorded and abstracted in social theory.⁴⁸⁷ What then is revealed when we attend to the material world? And how do we attend to it? New materialist research requires the researcher to be aware of the role of material objects at the research site, both in data collection and analysis. At the inquiry, this might include an awareness of physical space, the room and the area affected by the proposed scheme, and an awareness of the effects of participants’ bodies at the inquiry; it would further include a change in materiality at the heart of the inquiry, matter potentially changing from land designated SSSI to a motorway. Linked to an attentiveness to matter is a receptivity to aleatory moments at the research site. Matter is linked with creativity; it adds an unpredictable element to our thinking and to the research site, an intimation of a world outside of human control.⁴⁸⁸ New materialist methodology encourages the researcher to attend not only to matter but to ‘the data that glows’.⁴⁸⁹ This includes being flexible when presented with moments that do not fit within the pre-set research frame. It further encourages the researcher to experiment with creative methods, to keep the mind nimble and awake to unexpected data. While I am not using creative methods, this impetus has inspired me to ask about physical objects at the inquiry in interviews and to be aware of matter at the inquiry. It has encouraged me to be awake to unexpected turns and connections in the data, and to be aware of moments in fieldwork that are awkward. Examples of such moments are explored in later chapters.

⁴⁸⁴ Atkinson (n463) 15

⁴⁸⁵ Ibid 21

⁴⁸⁶ Atkinson (n483) 125

⁴⁸⁷ Ian Hodder, 'The Interpretation of Documents and Material Culture' in N Denzin and Y Lincoln (eds), *Sage Handbook of Qualitative Research 2nd Ed* (Sage 2000) 707

⁴⁸⁸ Bennett (n235) 361

⁴⁸⁹ Kate McCoy, 'Toward a Methodology of Encounters: Opening to Complexity in Qualitative Research' (2012) 18 *Qualitative Inquiry* 762, 762

2.2.4 *Ethnography as reflexive*

The importance of reflexivity in research methods is closely bound with consideration of ethics in qualitative research, and so, the reflexive approach taken in this research will be explored in a later section. Here, its relevance to ethnographic research methods is discussed. The researcher is in the site that they research and consequently plays a role in their own research; this is an inescapable fact of ethnographic study. Not only is the ethnographic researcher as a social actor implicated in the scene they are studying, they are further entangled in what they are studying because they are studying culture. Culture is not an object ‘out there’, available for the perusal of the researcher. In fact, as Van Maanen neatly states, culture “must be interpreted by, not given to, a fieldworker”.⁴⁹⁰ The ethnographic researcher is therefore doubly present in the data they collect, by being an active part of the site they are investigating and by being the tool through which the site is understood.

This consideration of the role of the researcher is echoed in new materialist thought. New materialist thought is concerned with entrenched hierarchies between researcher and researched and between human and non-human. In conducting and analysing research data, I was aware of my position at the research site and of my potential impact and was further aware of my partial perspective; I was not the all-seeing eye over the inquiry. I kept reflexive fieldnotes and kept this hierarchy in mind throughout data collection. Part of addressing established research hierarchies is recognising that they are not fully dismantled despite our best efforts. It is essential that this project engages in reflexive fieldwork; however, no amount of reflection will alter the fact that I conducted the data analysis and that it is my name as author of the thesis. It is important to acknowledge the extent to which a hierarchy continues to be maintained. New materialist methods enable the researcher to recognise the hierarchy, making it a considered approach and not a taken-for-granted assumption.

While my research builds on theoretical insights that question the role anthropocentrism plays in questions of environmental justice, its primary focus is the impact of rationalist assumptions in participatory decision-making processes. My research methods include observing a public inquiry, talking to humans and reading documents written by and for humans. How can I challenge this anthropocentric focus? Partly, this can be achieved by attending to matter in the inquiry. Additionally, the role of nature can be emphasised in the formulation of my research questions. The project this inquiry is investigating intends to build on a place of national environmental significance. I have visited this place in the course of data collection; attending to the materiality of this place and its inhabitants further broadens the focus of the research beyond humans. I was aware of matters of ecological justice as they emerged at the inquiry. The treatment and discussion of nonhumans at the inquiry is integral to the research approach taken and a key concern in later chapters.

⁴⁹⁰ Van Maanen (n462) 3

2.3 Staying with the mess

Do your methods properly; eat your epistemological greens. Wash your hands after mixing with the real world... then you will lead the good research life...⁴⁹¹

For Law, reality is messy, and methodologies that seek to convert this mess into coherent and precise data lose something in the process. Further, Law contends that tidying processes in research methods can reproduce inequalities. This affirms new materialist suspicion of strict methodological rigour, that the complexity and diversity of life is sacrificed so to keep research clear and ordered.⁴⁹² The heterogeneous nature of reality is suppressed as a consequence of researchers' desire for clarity and generalisability,⁴⁹³ despite the applicability of these validity criteria to qualitative research being contested. Qualitative research benefits from a closer interrogation of why popular representations of the social world tend to be a poor match to the reality we study; if the same categories of thing are repeatedly absent, might that point to inequalities in the processes of social research? Researchers need to be clear about their methodological decisions. What is necessary? Is getting rid of mess a political act? Can it sometimes be, as ably argued by Law, a form of Othering?⁴⁹⁴ Remembering the mess in my own research design reminds me of the political choices I make at every stage of the process, as I choose what I consider relevant at the field site and commit it to paper or to spreadsheet, and organise them together to make an argument. It encourages me to reflect on what I make absent in my research. What Haraway calls 'staying with the trouble' promotes an awareness of a tendency in social science methods to tidy up, to rationalise and to narrow focus, and enables the researcher to be mindful of the scaffolding of traditional modes of argument and research.⁴⁹⁵

3 The Methods

The previous section describes the methodological approach taken in this research project. This section describes the methods with which I am applying this methodology and what is envisioned in employing these methods. The chosen methods are participant observation and interviewing.⁴⁹⁶

⁴⁹¹ John Law, 'Making a mess with method' in W Outhwaite and S Turner (eds), *The SAGE Handbook of Social Science Methodology* (Sage 2007) 596

⁴⁹² Similar to questions of methodological order in law, and the central concept of legal stability. Notions of orderliness and demonstrable reasoning in law will be discussed in later chapters. Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017) 24

⁴⁹³ Law (n491) 596

⁴⁹⁴ Ibid 599

⁴⁹⁵ Donna Haraway, *Staying with the trouble: making kin in the Chthulucene* (Duke University Press 2016)

⁴⁹⁶ As the start of the research project, I intended to additionally conduct document analysis. While inquiry documents were analysed in this research, I did not conduct detailed document analysis. This was because it was not necessary in the end; I had ample data from participant observation and interviewing and did not feel that analysis of inquiry documents would add much to my understanding of the field site. This decision was reinforced by the fact that as the research project progressed, I thought it would be valuable to re-interview participants and to interview stakeholders in order to reflect on my findings. Ultimately, I decided that this was a much better use of my time.

3.1 Ethnography as method

These methods fall under the broader category of ethnographic methods. It is relatively typical to triangulate qualitative data in this way, to diversify the types of lens with which one views the field site and, in this way, mitigate for the challenges that frequently beset ethnographic research. It is worth underlining however, that it does not provide the researcher with a ‘true’ account of the social world under investigation;⁴⁹⁷ rather by gathering multiple accounts of the social world, researchers aim to present more of its depth and diversity.⁴⁹⁸ Ethnographers study first-hand a social world in order to make theoretical insights into its culture.⁴⁹⁹ It is therefore interpretive, it is concerned with the micro-interactions in a given social situation, and it seeks to capture fleeting moments of social interaction and note them down for subsequent analysis.⁵⁰⁰ Ethnographic methods reflect a belief that experiencing the social world gives the researcher a unique insight into its workings,⁵⁰¹ that by participating in the social world under investigation, “a rich, concrete, complex, and hence truthful account of the social world being studied is possible”.⁵⁰²

3.1.1 Participant observation

The ethnographic researcher experiences a particular world to gain insight of it. What does this entail? Primarily, this entails the researcher observing and participating in the world, in one or multiple particular settings, over a relatively long time.⁵⁰³ Different scholars prioritise different aspects of this work; for some, the length of time in the field is integral to ‘true’ ethnographic fieldwork;⁵⁰⁴ for others, the participatory nature of the research is key. The ethnographer does not sit outside the social setting and observe; they take part in the relationships that make up that social setting.⁵⁰⁵ They enter the world as a stranger,⁵⁰⁶ investigate and interact with the people for whom this world is everyday and for whom this world is also unknown; they affect this world and are affected by it.⁵⁰⁷ This raises provocative questions regarding my own research. My fieldwork consisted of 21 days of the inquiry over the course of a year. Is that long enough? Did I participate enough? Was it a transformative experience for me? If the answers to any of these questions is ‘no’, does that mean I did not conduct ethnographic research? What was it then? I would contend that this research does constitute ethnographic research. Further, I suggest that research does not pass a threshold of a particular number of days, or inhabit a particular role, in order for it to ‘become’ ethnographic research.

⁴⁹⁷ David Silverman, *Interpreting qualitative data* (5th edn, Sage 2014) 92

⁴⁹⁸ Smith (n478) 227

⁴⁹⁹ Hayes (n454) 17

⁵⁰⁰ Geertz (n465) 20

⁵⁰¹ It is interesting to consider this in light of the traditional conflict between rationalist and empiricist philosophy, see Chapter 2, section 2.1.

⁵⁰² Van Maanen (n462) 3

⁵⁰³ Robert M Emerson, Rachel I Fretz and Linda L Shaw, 'Participant Observation and Fieldnotes' in P Atkinson and others (eds), *Handbook of ethnography* (Sage 2007) 352

⁵⁰⁴ Van Maanen (n462) 3

⁵⁰⁵ Van Maanen (n462) 9

⁵⁰⁶ Ethnographic accounts frequently refer to the researcher as stranger. The reality is somewhat less precise, however. While the M4CAN inquiry was the first inquiry I had ever attended, I was not a complete stranger to the process. I had a situated understanding of formal settings in the UK on which to draw. I broadly knew where to sit, when to speak, etc.

⁵⁰⁷ Van Maanen (n462) 9

Rather, research is ethnographic because of the questions that it asks, what it seeks to discover and how it endeavours to do so. I am drawn to the aspects of the social world that are illuminated in ethnographic research; the mundane, material behaviours and practices that make up the lived culture of a particular social world, in this case the M4CAN inquiry.⁵⁰⁸ I participated as a member of the public attending the inquiry and interacted with its participants. It was a transformative experience for me as it was for many members of the public, as I was a stranger to the process and learned as I went. In the time I spent at the inquiry I experienced repeated practices that gave me insights into what I suggest are some of the underlying codes affecting the inquiry.

The ethnographer “inscribes” social discourse, he writes it down.⁵⁰⁹

The ethnographer first observes and interacts with elements of the social world under investigation; then, they must write it down. Both these actions require the researcher to be selective and to prioritise what they consider meaningful. Notes taken in the field are interpretations and representations that allow the ethnographer to repeatedly return to and review the data.⁵¹⁰ It is important to emphasise the significance of this step in the process; a social world that is unruly, rich and intense is transformed into a written account where some of its aspects are ignored and some are prioritised.⁵¹¹ This underscores the problem of authorship in ethnography; fieldnotes are the product of one partial perspective on the social world.⁵¹² Writing at the field site can also be a troublesome activity; it can sometimes isolate the researcher and can serve as a reminder of their role.⁵¹³ I was fortunate in that it was quite easy for me to sit and write at the inquiry; I was not expected to regularly interact with other participants. The day of the site visit underlined this for me. Writing on this day was challenging; in fact, I could not write until I left the site. It would have been off-putting, and I would have missed out on opportunities to interact with other participants. On this day, the vast majority of my notes were written on my return to the office. Indeed, on every day of fieldwork my notes were augmented by reflections as I returned to the office and wrote up my fieldnotes. This reaffirms a point made by Van Maanen;

Ethnography as a written product, then, has a degree of independence... from the fieldwork on which it is based... Writing an ethnography is office work or desk-work, not fieldwork.⁵¹⁴

Again, this behoves the researcher to remember that the social world they study is changed by their interactions, that it is interpreted and narrowed by what they choose to observe, and that this interpreting

⁵⁰⁸ It is worth underlining that I am not describing the inquiry itself as ‘small’ or mundane; indeed, the inquiry holds great importance for its participants and for the greater public. Rather, the practices I am interested in are small and mundane – e.g. where people look as they talk, the set-up of a room, change in tone of voice etc. Ethnographic research attends to these ‘small’ practices in order to understand the interactions that make up our social worlds.

⁵⁰⁹ Geertz (n465) 19

⁵¹⁰ Emerson, Fretz and Shaw (n503) 353

⁵¹¹ Van Maanen (n462) 1

⁵¹² Emerson, Fretz and Shaw (n503) 352

⁵¹³ Ibid 355

⁵¹⁴ Van Maanen (n462) 4

and narrowing occurs again by what they write down in fieldnotes, and repeatedly throughout the process of writing and analysis. This point is reinforced by fieldnote extracts included below. These cover the same moment at the inquiry, but one is written at the field site and the second is written later at the office; the shift towards analysis is evident in the second fieldnote (and the luxury I was afforded by note-taking at an inquiry; most ethnographic fieldnotes written ‘in the field’ are far briefer than the ones that I took).

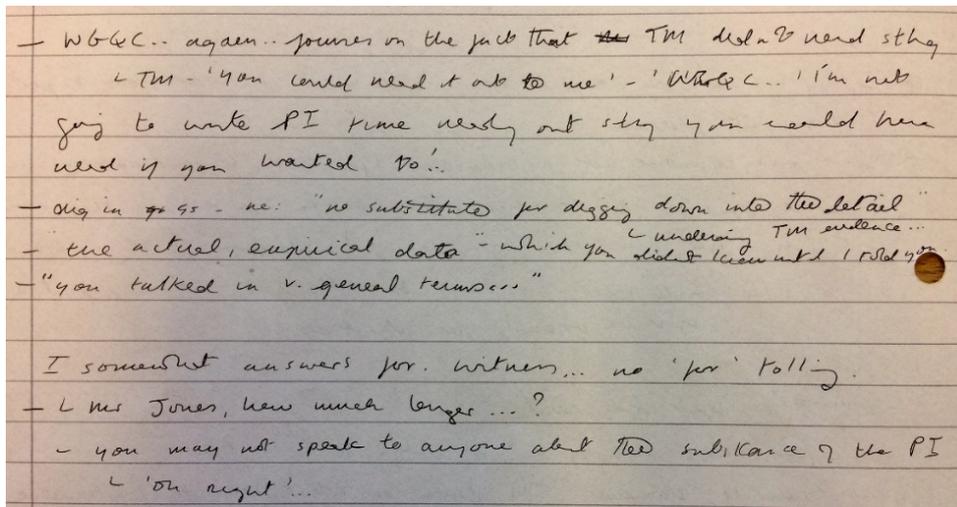


Figure 3: Fieldnote Extract 1, 26 September 2017

WGQC – again... focuses on the fact that TM didn't read something – TM 'you could read it out to me' – WGQC – 'I'm not going to waste PI time reading out something you could have read if you wanted to...'

Dig in qs re: "no substitute for digging down into the detail..." – undermining TM evidence; "the actual, empirical data" – which you didn't know until I told you..." "you talked in v general terms..."

(REFLECTIONS ON WRITING IT UP... link being made between expertise and specificity? This also/ getting in the way of powerful/ effective/ complete/ comprehensive environmental arguments/ thinking?

Also, effort made/ to attach expertise/ witness legitimacy to specific, narrowing things, and then undermine those things...)

I somewhat answers for witness... no 'for' tolling... Mr Jones, how much longer...? Time for a break

- you may not speak to anyone about the substance of the PI - 'oh right'...

Figure 4: Fieldnote Extract 2, 26 September 2017

3.1.2 Interviewing

As part of this research project, I conducted interviews with inquiry participants and stakeholders. I conducted interviews in two stages. In the first stage, termed 'data collection', I conducted 9 interviews with inquiry participants. In the second stage, termed 'reflection', I conducted 13 interviews, 9 with previously interviewed inquiry participants, three with inquiry participants and one with a stakeholder in the Welsh planning system. Interviews ranged in length from one hour to three and a half hours. What was captured with interviewing that was not captured with participant observation? Interviewing inquiry participants enabled me to learn about the inquiry from their perspective, to better understand how they

interpreted the inquiry and their role at the inquiry. Below, I have identified two ways in which interview data enhanced my understanding of the inquiry; these examples will be explained briefly here and elaborated on in later chapters.

- *I could check what I felt and assumed others had felt against others' own responses to the inquiry.*

I assumed that members of the public would be daunted by the experience of attending and participating in the inquiry. While this was true for some members of the public, it does not account for the full experience of the inquiry. One participant noted that while it was intimidating at times, at other times it was quite friendly, the inspectors in particular; they were keen to highlight the ways in which the inquiry was welcoming.⁵¹⁵

- *I could gather opinions from different people on the same issue.*

Members of the public and environmental objectors frequently described the inquiry as formal and court-like. When interviewing the counsel for the environmental objectors however, it was interesting to note that he found it informal and was surprised to learn that others found it formal. As someone with extensive experience of courts, the counsel saw a world of difference between the inquiry room and a court room.

The interviews at the data collection stage covered a range of topics, guided by the research question. Topics included interviewees' experience of the inquiry, their opinions on public participation, the treatment of the environment and emotion at the inquiry. Interviews revealed how participants rely on particular ideologies in interpreting these issues, and drew upon these ideologies to make their points, underlining that interviews, much like participant observation, provide the researcher not with an accurate picture of the field site, but with various accounts. As Becker notes, "the stories people tell one another, to explain who they are and what they are doing ... give us a picture that is only partial but nevertheless adequate for some purpose".⁵¹⁶ These accounts were highly illuminating for my research. Below I have set out some of the interview questions. To re-iterate, these questions were not prescriptive; they were an aid to my memory, ensuring I covered the topics I wanted to cover and asked questions in the most suitable format.

Interview Questions:

The Experience of the Inquiry:

Tell me about your best/worst day at the inquiry.

Did you go on a site visit? Was it different from a typical inquiry day? If so, how?

Tell me about a time the inquiry felt emotional.

Did a particular object/thing stand out to you at the inquiry – if so, tell me about it.

Making a case for the Environment:

How was the environment treated at the inquiry?

What were the challenges/benefits in advocating for the environment? Anything surprise you?

⁵¹⁵ The role of the inspectors in the inquiry is discussed in greater detail in Chapter 2, section 2.2.2.

⁵¹⁶ Howard Becker 2007, in Helen Blakely and Kate Moles, 'Interviewing in the 'interview society': making visible the biographical work of producing accounts for interviews' (2017) 17 Qualitative Research 159, 170

Tell me about the Gwent Levels.
How is expertise treated at the inquiry?

These questions demonstrate the methodological approach and the focus of this research. I asked the interviewees about the environment, about possible obstacles to participation, about emotions and expertise, and about the possible influence of material objects at the inquiry. Moreover, the open-ended nature of the questions – ‘tell me about’, ‘how does’... - reveals my desire for interviewees to turn inward, to tap into their memory and tell a story about their experience of the inquiry. Every interview I conducted was unique and spun off in different directions. This highlights that while some might consider interviewing to be safer and more formulaic than observation, in fact interviewing is “persistently slippery, unstable, and ambiguous from person to person, from situation to situation, from time to time”,⁵¹⁷ highlighting again the constructed nature of the accounts represented to and by the interviewer. Further to this, I have included a brief section of interview transcript, demonstrating that the question on the page is said differently and received differently in the fast, improvised flow of conversation.

- C Did that feel quite different from, the days at the actual inquiry hall though?
R Yeah, so yeah, it’s a very different tone but that’s also, probably cause almost like the um, I suppose the legal team, from Welsh Government’s side, weren’t there, (laugh) in such an adversarial way/
C /Yeah, yeah/
R /And, I mean, I was genuinely pretty surprised by how confrontational they were
C Hm
R Both, not just myself but also to you know people who, had loads of local knowledge and grown up on the Levels who almost seemed undermined because they didn’t have doctorates to their name and stuff, which, but they do have a lifetime’s experience of, being in the area and on the Levels and, living and working in the area? So, it’s strange that, um, yeah, they were, tr-, an attempt was made it seemed to try and make them feel really inferior/
C /How/
R /To the other witnesses.
C How do you feel that was done? When you saw it?

I conducted a thematic analysis of the fieldnotes and interview transcripts, informed by the research questions and by what themes emerged from the data. I did not take a strictly inductive approach; this would not have been appropriate, as I had initial ideas developing from the research question and ongoing theoretical investigation. Rather, I took what O’Reilly terms an iterative-inductive approach to ethnographic analysis;⁵¹⁸ I moved between close readings of the data and of theory to develop insights from the data. This process can broadly be organised into phases. The first phase of analysis was coding, an example of which is provided below. Working through the data, I identified 18 broad themes; some stemming from the research questions, e.g. ‘environment’, and some emerging from the data, e.g. ‘time’. The second phase of analysis I have termed collating. Here I returned to the data and assessed what insights could be drawn from these themes, and what patterns could be seen across these themes. This close reading of the data was

⁵¹⁷ Andrea Fontana and James H Frey, 'The Interview: From Structured Questions to Negotiated Text' in NK Denzin and YS Lincoln (eds), *Handbook of qualitative research* (2nd edn, Sage 2000) 654

⁵¹⁸ Karen O’Reilly, *Key Concepts in Ethnography* (Sage 2009) 16

accompanied by memo-writing, developing ideas, reading relevant theory and considering the data in line with the research question. Lastly, I focused the analysis around key insights, developing analysis around three key themes that would become the three analysis chapters. Analysis is an iterative process; these were not strictly demarcated phases but rather stages of analysis with different priorities and with conflict and overlap.

I – let me help you... explains the notion of a design year – 2037 – 15 years after completion.

WGQC – again... focuses on the fact that TM didn't read something – TM 'you could read it out to me' – WGQC – 'I'm not going to waste PI time reading out something you could have read if you wanted to...'

Dig in qs re: "no substitute for digging down into the detail..." – undermining TM evidence; "the actual, empirical data" – which you didn't know until I told you..." "yu talked in v general terms..."

(REFLECTIONS ON WRITING IT UP... link being made between expertise and specificity? This also/ getting in the way of powerful/ effective/ complete/ comprehensive environmental arguments/ thinking?

Also, effort made/ to attach expertise/ witness legitimacy to specific, narrowing things, and then undermine those things....)

I somewhat answers for witness... no 'for' tolling... Mr Jones, how much longer...? Time for a break

- you may not speak to anyone about the substance of the PI - 'oh right'...

WGQC – (broad paraphrase) – your laudable aims have been looked at/ combined into

Figure 5: Fieldnote Extract 3, 26 September 2017: Analysis

When fieldnotes and interview transcripts were analysed and the analysis chapters drafted, I conducted a second round of interviews. The purpose of these interviews was to reflect on tentative findings from the research with interview participants, assessing whether my observation of the inquiry aligned with their own experiences. Secondly, I reflected on findings from the analysis with a senior Welsh planning officer and with inquiry participants who were unavailable at the time of the first round, namely the inspector and the Welsh Government counsel. These interviews with participants and planning and environmental stakeholders informed my discussion of the overall findings of the analysis, helping me to clarify my conclusions and highlighting their implications for the planning system and for environmental organisations.

4 Challenges in research

Having explored the methodologies and methods with which I am approaching this research site, this section will examine some of the challenges encountered in embarking on fieldwork. Some of these are common to empirical research and some are specific to this research project. They fall into two categories: accessing and sampling, and considerate research.

4.1 Access and sampling

Smith speaks of issues of access and time with workplace ethnographies; she highlights that the researcher does not know how long they will have access to the site and that access requires ongoing negotiation.⁵¹⁹ The M4CAN inquiry is a public local inquiry and therefore open to access. Issues of access emerged around interview participants. I approached inquiry participants for interviews as I became a 'regular' of a sort and a little better known to them. Access to the inquiry was partly delayed as there were other potential field sites attached to my research project at the start. The inquiry had commenced before I had begun to consider changing field sites. Moreover, I was ambivalent about the site at the start; I felt lukewarm about researching a road inquiry. I started off as a volunteer writing notes for Gwent Wildlife Trust and took a little time to assess the inquiry as a field site. Ultimately, I realised the exciting potential of the inquiry for my research and the provocative questions it raised around rationality, materiality, nature and public participation; however, by this time it had been in session for six months. Additionally, access was somewhat impeded by the location of the inquiry. It took place outside Newport; I do not have a car and so I took the train and cycled to get there. The inquiry was in session intermittently after the first six months. There were days I could not attend, days I did not hear about in time, days I planned to stay for the day only to discover upon arrival that the timetable had changed and it would only be in session for an hour. These minor issues were small impediments to accessing the site, and I recognise these issues are very minor in comparison with the access challenges faced by other researchers. As highlighted above, my access to the inquiry was at points limited by various factors. Likewise, I generally attended the inquiry on days when environmental issues were being raised. That I did not attend every day of the inquiry and focused on sessions dealing with environmental matters influences the data. This is mitigated for in the data analysis, in part by data derived from interviews.

This research project focuses on one site, the M4CAN inquiry. While this approach is fairly typical in ethnographic research, it is less common in empirical legal research. Therefore, I will briefly outline the justification for this approach. Expecting a greater number of case studies makes the error of evaluating qualitative ethnographic research using criteria meant for quantitative research. As explored above, ethnographic research engages with the particular and contradictory detail of the field site; whether looking at one inquiry or five inquiries, this detail would not be generalisable to all UK inquiries. Qualitative research should be generalisable to theory and not to population; therefore, the focus in selecting a field site should not be on finding multiple representative sites (whatever that might entail), but on finding a site with relevance to the research questions.⁵²⁰ The methodological approach taken in this research therefore allows me to make analytic generalisations, to draw conclusions built on theoretical insights developed from descriptive contextual detail of the inquiry. The three themes explored in the analysis chapters and the findings they set out are theoretical findings; they propose that these assumptions were present at the

⁵¹⁹ Smith (n478) 226

⁵²⁰ Alan Bryman, 1988, in Silverman (n497) 62

inquiry, that they shaped its processes and the actions of its actors, that they were utilised and fought against by these actors. It does not allow me to say that every public local inquiry plays out in the same way.

O'Reilly contends that ethnographic research sometimes includes modest generalisations on population, where ethnographic findings suggest that we might find processes play out in similar situations in a similar way.⁵²¹ The M4CAN inquiry would be challenging to make these kinds of generalisations from; as previously noted, the M4CAN inquiry was unique in terms of its scale. Moreover, highway inquiries, where the government can often be the scheme-proposer and the decision-maker, are also quite distinctive.⁵²² Can I make any 'modest' generalisations from this data? This research seeks to make insights derived from empirical data about the assumptions that shape these processes and their impact on the environment; at points, these insights are connected to aspects of the legal culture and context that might be present in other decision-making processes, e.g. legal environmental protections, inquiries procedure and the adversarial legal culture of the UK. However, given the nature of ethnographic research and its commitment to specific, situated contexts, these kinds of generalisation must be very modest, and contingent upon an understanding that another decision-making process is going to have its own specific context.

Researchers must also be aware of sampling within the field site, terms of both time and perspective. Ideally, data gathered at the inquiry would draw upon the views of participants from across different positions in the inquiry. This is more easily achieved in the participant observation element of the fieldwork. Sampling becomes more of an issue with interviewing. When arranging interviews, I found that environmental objectors were more amenable to being interviewed than the inquiry staff and Welsh Government team members. Some were hesitant or unable to take part in the research until the publication of the Inspector's Report. This hesitation might also have been triggered by the extent to which the participant was invested in the process. Those on the 'scheme-proposing' team and inquiry staff were less inclined to take part in research that sought to uncover assumptions and potential inequalities of the process. Environmental objectors were more comfortable discussing these issues. The 'reflection' interviews conducted at a later stage in the research project further mitigated for this imbalance in perspective, as it gave certain actors who were unavailable for the data collection interviews an opportunity to participate. Moreover, a discussion of research findings perhaps seemed less daunting than a discussion of one's experience of the inquiry.⁵²³ Reflecting on the various perspectives captured in the data, one takes account of the kind of language used at the inquiry. Typically, ethnographies are concerned with informal talk, with conversation and chatter.⁵²⁴ However, the inquiry is full of self-conscious talk. This certainly informs the tenor of my

⁵²¹ O'Reilly (n518) 85

⁵²² Some relevant features of highway inquiries are outlined in Chapter 3, section 3.3.1.

⁵²³ Another possible reason that participants were more eager to take part in the second round of interviews was that these interviews took place over a year after the inquiry closed and shortly after the First Minister's decision. The inquiry was a major event in people's lives and in the Welsh news cycle. Participants might have appreciated the opportunity to return to and reflect on their involvement in this significant event.

⁵²⁴ Eipper, 1998 in Marlene de Laine, *Fieldwork, participation and practice: ethics and dilemmas in qualitative research* (Sage 2000) 103

research. The moments where social actors move from the naturalistic ‘back-stage’ to the performed ‘front-stage’ are well-established ethnographic motifs;⁵²⁵ these moments were captured in the fieldnotes and provide valuable insight into the workings of the inquiry, underlining that it is a performed, rule-bound space. These insights will be explored in later chapters.

4.2 Considerate research

Attentive to the many assumptions and political choices embedded in qualitative research, ethical considerations have informed every aspect of my research design. I have sought to mitigate for any negative impacts that the research process might have on the participants and on myself. Further, it is important to consider the ways in which insights gleaned in this research are portrayed to its readers. Van Maanen describes these concerns as considerations of the observed, the observer and the tale.⁵²⁶

4.2.1 *The observed*

While the inquiry was open to the public and therefore required no clearance to attend, it is still appropriate to be mindful of the people mentioned in this research and the impact this might have on them. For some participants, it is their area of work; they might work at other public local inquiries. This risk was mitigated for in terms of interviewing by ensuring that participants were aware that informed consent was not a ‘one-time offer’ and that their degree of involvement and anonymity stayed firmly in their hands.⁵²⁷ As regards participants not interviewed but included in fieldnotes, I must trust that whatever they were happy to state in a public forum they would be happy to have included in a thesis. Being written about can be an unsettling experience;⁵²⁸ my account, while truthful to my experience of the inquiry, is also mindful of this fact. Lastly, rapport, while a handy tool for the ethnographic researcher, has ethical implications. Rapport can help the researcher understand a participant’s perspective;⁵²⁹ however, can it make it harder for the participant to be honest? Would they possibly tell the researcher what they want to hear, or would it be harder for them to extricate themselves from the research project? Rapport is a delicate thing; during fieldwork, I was careful to be friendly and approachable, but not to impress my perspective upon inquiry participants. I also tried to maintain a slight formality regarding the research project, so as to avoid participants feeling constrained by politeness, or feeling that they ought to take part in the research. This can be seen as a situated understanding on my part and on the part of my participants of what a researcher should act like; keeping within this role helped to reassure potential participants.

⁵²⁵ Goffman (n479) 123

⁵²⁶ Van Maanen (n462) xv

⁵²⁷ Hayes (n454) 17. It was made clear to participants that the field site would be identified, and so their contribution could only be anonymised within the context of a named field site (e.g. the contribution of the inspector could not really be anonymised at all).

⁵²⁸ Josselson, 1996, in Elizabeth Murphy and Robert Dingwall, 'The Ethics of Ethnography' in P Atkinson and others (eds), *Handbook of ethnography* (Sage 2007) 341

⁵²⁹ Fontana and Frey (n517) 655

4.2.2 *The observer*

This is a topic often avoided by researchers for fear of being indulgent and my initial response was to do the same. I did not face safety concerns at this site and I did not encounter traumatic stories or vulnerable individuals. However, the stress of the “uncertain role of the researcher, balanced between proximity and distance”⁵³⁰ sometimes took its toll. In order to allay this stress, it was helpful to remember that feeling at sea is not a sign of incompetence but an understandable response to new surroundings, that struggling between identifying with another’s position and losing sight of one’s own is a frequent occurrence in ethnographic research, and that it passes. It is helpful to remember that the feeling of being lost, of coming across unexpected data, while sometimes uncomfortable for the researcher, is an essential part of conducting original research.

As highlighted above, the ethnographic researcher is a presence in the site they research. This brings with it ethical considerations. Moreover, as a researcher and a social actor, I come to the site from a particular position and view the site and its participants in a particular way. The notion of ‘the stranger’ is viewed with suspicion by some ethnographic researchers, who question how much anyone can see a site as a new actor on the scene and stand apart from it. Fine argues that being a stranger is a practice more than a position. It is a kind of detachment practised by the ethnographer, so that they do not become a voice for the group they are studying.⁵³¹ This practice becomes more challenging,⁵³¹ and more relevant, in the case of critical research. Conducting a piece of environmental justice research, I start from the position of there being a problem that I want to better understand. Therefore, I already take a position alongside actors who see a problem. How did my position and my preconceived notions about the site affect data collection and analysis? I will consider this firstly in terms of its effect on data collection and then its effect on analysis.

I was introduced to the site as a volunteer for GWT. It was (correctly) assumed by inquiry participants that I am in favour of strong environmental protection and that I did not want the scheme approved. I did not discuss my opinions concerning the environment or the scheme with the inspectors or with Welsh Government actors, and not in any detail with any of the inquiry participants. To a point, this position facilitated a rapport with environmental objectors. It might have had a slight effect on developing rapport with Welsh Government actors, and it did not seem to have an effect on rapport with the inspectors. While the inquiry was in session however, I was unable to interview any inquiry or Welsh Government actors. At points in interviews with scheme proposers and planning stakeholders after the inquiry, there was a slight defensiveness in participants’ responses. I sought to mitigate the effect of my position primarily by exercising detachment. I do not think that I can stand separate from the site; however, as a researcher I can seek to minimise my impact on the site. This is described by Fine: “The ethnographer is not just any stranger. She is a stranger trained in observation, analysis, and theory construction. The field-worker’s

⁵³⁰ De Laine (n524) 94

⁵³¹ Gary Alan Fine, ‘Relational Distance and Epistemic Generosity: The Power of Detachment in Skeptical Ethnography’ (2019) 48(4) *Sociological Methods & Research* 828, 829

distance from the group permits ethnographic authority.”⁵³² I did this by avoiding discussing my opinions of the scheme, though they seemed assumed, and by moving to the background (easy enough while sitting in the inquiry public gallery), observing rather than playing an active role at the site. Keeping a reflexive diary was an important element of this practice; crucially, it kept me aware of my position and preconceived notions during analysis. It flagged assumptions I held about the field site, not only concerning the importance of the environment, but also concerning the evidence heard; I noted early on that I had an implicit trust in expert knowledge. It is this kind of embedded assumption that close reflection alongside data collection and analysis can bring to the surface. Conducting a second round of interviews also helped to identify and clarify assumptions I made from the data. For example, the adversarial nature of the inquiry seemed to be an important aspect of the inquiry and something that might negatively impact public participation and the treatment of the environment. This would indicate that hearings might be more appropriate than inquiries for dealing with environmental issues. Discussing this with interviewees in the second round added nuance to this reflection.

4.2.3 *The tale*

Ethnographic writings can properly be called fictions in the sense of “something made or fashioned”. But it is important to preserve the meaning not merely of making, but also of making up, of inventing things not actually real. ... [Ethnographers’] rhetoric empowers and subverts their message. ... Purportedly irrelevant personal or historical circumstances will also be excluded... In this view, more Nietzschean than realist or hermeneutic, all constructed truths are made possible by powerful “lies” of exclusion and rhetoric. Even the best ethnographic texts – serious, true fictions – are systems, or economies, of truth. Power and history work through them, in ways their authors cannot fully control.⁵³³

The last concern to be addressed in this section is how insights from the data are depicted in ethnographies. As described above by Clifford, ethnographers strive to present their readers with a detailed, convincing study of their research site. However, authenticity is an unattainable goal for ethnographers; by participating in the field site and by writing down observations of the field site, authenticity is compromised. Ethnography does not conceive of a social world ‘out there’ to be measured and analysed; there is no ‘authentic’ reality to be compromised. How then can I ensure the honesty of my account? Firstly, I can be honest to the experiences of participants at the inquiry, even when they contradict my own experience; e.g. if a participant remembers an event differently from my own memory.⁵³⁴ Secondly, I can recognise that I affected the site. Pratt highlights that personal narrative provides the ethnographer with a means of acknowledging their presence at the site while allowing them to move past this to consider the experience of the whole site.⁵³⁵ In writing this ethnographic account I must resist the temptation to write it as a story with a narrative and ending. This is a particular risk for ethnographers, for whom vivid writing plays a

⁵³² Fine (n531) 834

⁵³³ Clifford (n451) 6

⁵³⁴ The account of the tree/ pylon is a useful example of this; it will be discussed in Chapter 6, section 2.1.

⁵³⁵ Mary Louise Pratt, 'Fieldwork in Common Places' in J Clifford and others (eds), *Writing culture: the poetics and politics of ethnography* (University of California Press 1986) 32

valuable role.⁵³⁶ The M4CAN inquiry has a beginning and an end; it would therefore be tempting for this ethnography to follow a similar structure. However, this would not be authentic to the participants' involvement in the inquiry, nor to the themes that this research seeks to address.

I am also mindful of the ethical concerns in the way this account is written. It has become academic convention to write about ethical concerns as if they were devoid of consequence, or urgency. Nussbaum argues that this trend seems driven,

Not by any substantial conception at all, not even by the model of science, but by habit and the pressure of convention: by Anglo-American fastidiousness and emotional reticence, and above all by the academicization and professionalization of philosophy.⁵³⁷

I recognise the truth of this and, following Nussbaum, seek to gently push against this trend within academic scholarship. The ethnographic account that follows is not about the present environmental crisis; however, it is sparked by it. It is an evident concern for me and for many of the research participants. This account explores the love of nature and emotional connection to the local environment described by participants. The particular and passionate elements of the research are not removed from this account; instead they greatly inform it. Questions of ethical approaches to research are overlap with commonly held assumptions in rationalist philosophy. Rawls claims that to be available for scrutiny, ethical theory must be general and universal; for Nussbaum, the ethical theory she draws from literature evinces “a commitment to the ethical relevance of particularity and to the epistemological value of feeling”.⁵³⁸ In taking this approach, the epistemological framework of this research is in agreement with theorists critical of rationalist philosophy. It takes a side in this debate.

5 Conclusion

Discussing the methods with which a task is to be accomplished, thoughts inevitably turn to the task itself. Having outlined the theoretical, legal and methodological groundwork for this research project, focus eagerly moves to analysis and to the insights captured in the ethnographic research. Throughout the chapter, allusions to subsequent chapters have appeared. These have included aspects of the inquiry that provoke analysis, for example perceptions of the M4CAN inquiry as a formal space and as a performed space, the relationships between inquiry participants, the role played by inquiry documents and non-human impact at the inquiry, seen in the treatment of the Gwent Levels, and the case of the tree/pylon. The chapter has also drawn attention to methodological factors to be considered in the analysis, such as the imbalance of perspectives collected in the interviews and the intention not to ignore moments at the inquiry that are

⁵³⁶ Marcus (n458) 183

⁵³⁷ Martha C. Nussbaum, *Love's knowledge: essays on philosophy and literature* (OUP 1992) 20

⁵³⁸ Ibid 175

difficult to code. Lastly, the interplay between ethical considerations and rationalist assumptions has been highlighted. The following chapters of this thesis contend with analysis of data collected at the M4CAN inquiry. These chapters consider three rationalist assumptions present at the inquiry, emerging from the data analysis: processes of compartmentalisation, abstraction and human-nature dualism.

1 Rationalist decision-making requires processes of compartmentalisation

1.1 Introduction

This chapter proposes that rationalist approaches to decision-making require processes of compartmentalisation and that this adversely impacts treatment of the environment in these processes, as the environment is complex and interconnected and should be understood holistically. There are several claims in this proposal that require further investigation. The theoretical basis of these claims will be outlined; however, this chapter will chiefly draw upon the experience of the M4CAN inquiry, examining inquiry processes and how they might have informed the treatment of the environment at the inquiry. This section will consider the first claim, that rationalist approaches to decision-making require processes of compartmentalisation. It returns to Weber, examining his theories of rationalisation for what they reveal about processes of compartmentalisation in decision-making, focusing on the key institutions that perpetuate rationalisation.

1.2 Weber and compartmentalisation

1.2.1 *Compartmentalisation as a hallmark of rationalisation*

Weber recognises certain hallmarks of rationality across different spheres of society in which rationality is present and is produced.⁵³⁹ He includes, “the depersonalisation of social relationships, the refinement of techniques of calculation, the enhancement of the social importance of specialised knowledge, the extension of technically rational control over both natural and social processes.”⁵⁴⁰ These hallmarks highlight the importance of compartmentalisation (seen in ‘techniques of calculation’) to processes of rationalisation. Patterns of work that exhibit a high degree of formal rationalisation are highly compartmentalised and rule-bound.⁵⁴¹

1.2.2 *Compartmentalisation in the market, in law and in science*

Weber highlighted that rationalised processes were essential to a capitalist society. The market requires predictable behaviour, and thus encourages other sectors of society to adopt these kinds of behaviours. Weber contends that this influence is evident in the rationalisation of legal institutions; as the market requires rule-governed behaviour, the law develops to meet that need. As society in nineteenth century Europe grew more complex, the administration of the legal system grew more complex; this increased demand for specialised legal knowledge.⁵⁴² It further entrenches the formality of legal procedures. The law

⁵³⁹ Brubaker (n71) 9

⁵⁴⁰ Ibid 2

⁵⁴¹ Ritzer (n56) 27

⁵⁴² Weber (n61) 775

is supposed to be as calculable as a machine, logically ordered and reliant on formal procedures.⁵⁴³ The growing complexity of planning law serves as a relevant example of this increased formality and reliance on technical knowledge, emphasising its reliance on legal professionals within the system.⁵⁴⁴

Cognitive rationality is prevalent in fields of modern science and has led to significant achievement in these fields. It is problematic however when this kind of rationality becomes prevalent in contexts outside of modern science where it is not perhaps so well-suited. The dominance of scientific, or ‘cognitive instrumental’, rationality, in conjunction with the predictable and calculable modes of operation required by capitalism, enable the progress of rationalisation across the main institutions of society and embeds a compartmentalised treatment of knowledge.⁵⁴⁵ This treatment of knowledge is integral to processes of rationalisation. In focusing on rational knowledge, rationalised institutions tend to prioritise technical knowledge.⁵⁴⁶ Technical knowledge is demanded by the growing complexity of the modern world, and of its bureaucratic and economic systems.⁵⁴⁷

This brief discussion of rationalisation, touching on ideas explored in greater detail in Chapter 2, serves to highlight the ways in which the rationalisation of social institutions tends to favour compartmentalised ways of working. The following section explores how these processes of compartmentalisation played out at the M4CAN inquiry; it begins with a fieldnote extract.

2 Processes of compartmentalisation at the inquiry

14 December 2017, M4CAN inquiry

Despite being December, it is a sunny day in Newport. The inquiry room is bright and not too cold. I am a little late as my bike got a puncture on my way from the station but arrive just in time for the start of the session. The focus of today’s session is the impact of the end of the Severn Crossing tolls. The main witness for the Welsh Government is Mr Whitaker, a traffic modelling expert, with the other witnesses following on from his evidence. Mr Whitaker is a tall man with greying hair and a Yorkshire accent. He makes his way to the witness chair.

‘It’s been so long Mr Whitaker, you’ve forgotten where to go!’ The inspector exclaims.

Mr Whitaker is told where to begin to read from in his evidence, and informed that he will be interrupted from time to time for points of clarification. The inspector then promptly interrupts him. Mr Whitaker is asked about the change in analysis between 2016 and 2017. Guided by Welsh Government counsel Mr

⁵⁴³ Eisen (n55) 61

⁵⁴⁴ This is discussed in greater detail in Chapter 8, section 4.3.

⁵⁴⁵ Brubaker (n71) 31

⁵⁴⁶ Ibid 21

⁵⁴⁷ This echoes insights from work on constructions of knowledge in law, in particular the contention by Knorr Cetina that “there is a widespread consensus today that contemporary Western societies are in one sense or another ruled by knowledge and expertise”. Themes in this research speak to this rich field of scholarship; however, epistemologies of legal knowledge are not the focus of this thesis. The contributions this research makes to these fields will be explored in future work. Karin Knorr Cetina, *Epistemic Cultures: How the Sciences Make Knowledge* (Harvard University Press 1999) 5

Jones, he traces the history of these changes, referring to a range of inquiry documents and developments in modelling methodology. This evidence is very dry and technical, tracking the impact of the elimination of Severn Crossing tolls on traffic projections and changes in traffic modelling methodologies; I find it hard to follow. The assistant inspector is taking notes, the inspector is not. He is looking towards Mr Whitaker, his head balanced on his hand.

‘Say it again, please... it’s more than double the original 12%?’ The inspector questions a change in the updated model. The Welsh Government counsel interrupts, seeking to clarify and to move the evidence along.

‘Let’s just take it step by step, Mr Jones’.

The inspector and the assistant inspector are reading Mr Whitaker’s evidence as he presents it; this serves to underline the complexity of the evidence being presented to the inquiry. Typically, the inspectors and legal teams are provided with hard copies of the evidence beforehand, so they would have had a chance to look over it and prepare questions if need be. They ask Mr Whitaker questions throughout. The sound of his voice is different when he is answering questions rather than reading from the evidence; the attention in the room changes.

Mr Jones asks a question of Mr Whitaker regarding the evidence; he smiles, hesitating, and says, ‘it’s a technical explanation’.

‘To put it simply, then?’

The cross-examination and re-examination of Mr Whitaker having finished, he moves to leave the witness chair.

‘Well, hang on’.

The Inspector stops him and asks if members of the public have questions for Mr Whitaker. Ms Picton raises her hand to ask a question. Ms Picton is a local resident, petite and with striking red hair. Ms Picton attended almost every one of the 83 sessions of the inquiry.

‘Ah! You weren’t here this morning were you, Ms Picton?’ The Inspector greets her from the dais.

‘I was.’

‘Oh right, you were hidden by one of these big men...’.

The Inspector refers to the seven men in suits in the first two rows of the public gallery by the Welsh Government team. Besides these men, four of whom I recognise as expert witnesses for the Welsh Government, and the Welsh translator at the back, Ms Picton and I are the only people in the public gallery. Ms Picton starts, ‘As an amateur, and you are an expert in modelling...’.

She asks Mr Whitaker how effective traffic models generally are.

‘That’s a very good question, Ms Picton.’

Mr Whitaker replies that, provided the models have all the correct input data, they should be accurate to 15%. Though, smiling, he says that this being one of his models, he would expect it to be better.

Ms Picton then asks Mr Whitaker about the predicted rise in house prices in South Wales. However, the inspector interrupts her at this point, stating that this question is outside the subject area that Mr Whitaker is there to answer questions on.

The inspector turns to Mr Whitaker and notes, ‘You haven’t covered that this morning have you, so that’s not relevant for cross-examination, Ms Picton.’

Mr Whitaker looks quite keen to answer Ms Picton on this point, but she continues with more questions, and he addresses them, clearly and enthusiastically. He seems keen to persuade her of the strength of the Welsh Government case, but she doesn’t look convinced. Finished with Ms Picton’s questions, Mr Whitaker is told that he can leave the witness chair. Ms Picton chats with him on his way out; they are smiling and friendly with one another.⁵⁴⁸

This fieldnote extract brings a few different details to light, for example the distinction between resident and expert and the scientific evidence upon which the inquiry relied. It highlights the rules of procedure governing the inquiry. It also highlights the informal role played by the inspector in softening these rules. While the inquiry is quite formal and intimidating as a setting and therefore noticeably different from my

⁵⁴⁸ Fieldnotes 14 December 2017

everyday life, it is also so mundane and so ‘regular’ that you can look at it at first and think, there is nothing here to describe, to write about, to see with ethnographer’s eyes.⁵⁴⁹ It is not, at first, a live human drama. Rather it is policy documents and men in suits, big screens and blue office chairs. For many people attending the inquiry, the evidence presented was dense with jargon and difficult to understand. This made evidence seem inaccessible. Inaccessibility was mirrored by the court-like nature of the inquiry, evident here in the strict rules monitoring when someone can speak and on what they can ask questions. Evidence at the inquiry was for the most part presented by technical experts who had titles outlining their specialisation.⁵⁵⁰ The complexity of the scientific evidence being discussed was mirrored by the complexity of the process; the evidence submitted to the inquiry kept changing and being updated, demonstrated by Mr Whitaker’s return to the witness chair almost one year after his original proof of evidence was submitted to the inquiry.

This section explores how these processes of compartmentalisation played out at the M4CAN inquiry. It describes how legal regulations and the role of the inspectors encouraged compartmentalised argument, as did the adversarial nature of the inquiry as a legal-administrative process. Limits on, and opportunities for, broader discussion at the inquiry will also be discussed. Firstly however, this section will consider how the inquiry process compartmentalised evidence. The inquiry process strictly defined what constituted valuable evidence, firstly by treating lay-person and expert testimony differently, and then by prioritising specialised expertise over general expertise. This has relevance for an established body of literature around expertise, as noted briefly in Chapter 2, section 3.2. Wynne suggests that the differential treatment of expert and lay knowledge stems from dualisms of modernity, of nature and society.⁵⁵¹ He further argues that research on conflicts between lay public and experts have tended to frame non-expert knowledge as “epistemically vacuous”. Wynne contests this framing, seeking to describe the ways in which lay perspectives interact with expert knowledge.⁵⁵² Shrader-Frechette contends that expert knowledge is prioritised over layperson knowledge in risk assessment (as opposed to risk management) because risk assessment is seen as a scientific process, and normative considerations of risk to which lay involvement could contribute are typically ignored.⁵⁵³ The work of Shrader-Frechette, Wynne and others in this field provide valuable insights on issues highlighted in this data.⁵⁵⁴

⁵⁴⁹ Atkinson (n463) 39

⁵⁵⁰ Persona Associates, ‘M4 Corridor Around Newport: Proofs of Evidence’ (2018) <<http://m4-newport.persona-pi.com/1-proofs-of-evidence>> accessed 8 February 2019

⁵⁵¹ Brian Wynne, ‘May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Knowledge Divide’ in Lash SM et al (eds), *Risk, Environment and Modernity: Towards a New Ecology* (Sage 1996). 45

⁵⁵² Ibid 62

⁵⁵³ Kristin S. Shrader-Frechette, ‘Evaluating the Expertise of Experts’ (1995) 6(2) *Risk: Health, Safety & Environment* 115, 117

⁵⁵⁴ This research has valuable insights concerning expertise and the role of experts in decision-making processes. This is a rich area of scholarship and has great relevance for the field of public participation in environmental decision-making. This theme is discussed again in Chapter 8 section 5.1, and briefly in Chapter 6, section 2.2. However, expertise is not a key consideration in this thesis. This rich theme in the data will be explored in future work.

2.1 Expertise narrowly defined

2.1.1 Residents and Experts

As an amateur, and you are an expert in modelling...⁵⁵⁵

Ms Picton, the resident who asked the question of the Welsh Government expert in the extract above, captures in this comment an assumption pervasive at the inquiry, that members of the public and expert witnesses were to be placed in different categories. She returns to this idea in an interview:

I prepared myself the best as I could, and I felt I did myself justice... I didn't want to go into any expert witness field because they were the expert witnesses, you know, and I didn't want it to be a NIMBY presentation. It was just that this is an area that I happen to live in, that should be valued for ever, and preserved and protected for ever and that the SSSI status was meaningless because they could dispense with it at will.⁵⁵⁶

Several interview participants felt that lay-person and expert testimony was treated differently at the inquiry. The process seemed better suited to hear expert witness evidence; lay-person testimony could sometimes feel somewhat awkward or out of place. The first resident I saw give evidence at the inquiry powerfully evoked this sense of awkwardness.

The resident is a nurse who lives on the Gwent Levels. Speaking to the inspectors from the witness chair, she states, 'I'm finding this inquiry awesome'.

From the start, she is very nervous and appears close to tears. She is emotional in her response to the inquiry and to the scheme as a whole. She becomes tearful as she speaks about the impact that the natural environment of the Gwent Levels has on its community, and particularly on its children. Throughout her testimony, the resident appears shaky and vulnerable, and her explicit emotional response to the inquiry underscores how out of place she seems. She appears defeatist, seemingly convinced that the inquiry process would favour the scheme and that there was little value attached to her testimony. She ends her testimony with a quote from Sir Stephen Sedley in the judicial review of the Newbury bypass inquiry decision, who in expressing his regret that he could not overturn the Minister's decision in that case, remarked that, 'One can appreciate the force of the view that if the protection of the natural environment keeps coming second, we shall end by destroying our own habitat'.⁵⁵⁷

This would suggest that for this resident, testimony was a tool for protest rather than part of a process of information-gathering.⁵⁵⁸ The generalised nature of her objection does not gel with the assumption within planning law that residents provide the public local inquiry with local-specific information.⁵⁵⁹ Neither did it fit well within the parameters of inquiry procedure. The Welsh Government Queen's Counsel, Ms Ellis, highlighted that the points raised by the resident went 'beyond the scope of the inquiry'.⁵⁶⁰ Where the resident discussed more technical issues such as mitigation strategies, her points were politely but firmly

⁵⁵⁵ Fieldnotes 14 December 2017

⁵⁵⁶ AP Interview 8 January 2018

⁵⁵⁷ *R v Secretary of State for Transport and Secretary of State for the Environment* [1997] Env. L.R. 80 (QBD) 89

⁵⁵⁸ This is further discussed in Chapter 8, section 6.

⁵⁵⁹ Forsyth and Wade (n260) 806; the conflicting purposes of public local inquiries is further discussed in Chapter 8, section 5.3.2.

⁵⁶⁰ The treatment of testimony that went beyond the 'scope' of the inquiry will be considered in more detail in the final part of this section.

dismissed. In presenting testimony that was emotive and broad in its scope, this resident foregrounded the ‘out of place’ nature of much lay-person testimony at the inquiry.⁵⁶¹

The ‘out of place’ nature of lay-person testimony could work to its advantage. It could work as a kind of disruptive force; as it was described by one objector, ‘The public inquiry is a technical process, there are skilled practitioners in the room, and then suddenly something comes from the outside.’⁵⁶² This perspective on the power of public participation chimes with Davoudi’s work on public participation.⁵⁶³ This is not echoed in the views of most participants, however. There was concern that expert testimony was the focus of the inquiry.⁵⁶⁴ One resident powerfully described the challenges of participating in the inquiry and of engaging with technical expert evidence; ‘I’m not an expert and am relying on experts to fill in the picture’.⁵⁶⁵ This statement suggests an inequality between these two positions. Evidence at the inquiry is presented in a language with which many members of the public attending the inquiry are not conversant; they must then rely on the experts to explain things to them and to make the right decision on their behalf.⁵⁶⁶ This second aspect significantly undermines the participatory credentials of the inquiry process.

Echoing concerns that expert evidence was prioritised over effective public participation, several members of the public were concerned that expert testimony was further prioritised over lay-person testimony. This was identified by a community councillor and four residents who presented their evidence collectively. The councillor, presenting on behalf of the group, expressed concern that the Welsh Government had ‘run roughshod’ over the residents of Magor and Undy. She stated, ‘We fear our voices are again drowned out by experts’.⁵⁶⁷ Lay-person testimony was in part restricted by the expected language of inquiry evidence. Lay-people frequently presented their evidence in specialised language, despite sometimes demonstrating a lack of comfort or confidence with it.⁵⁶⁸ The councillor and residents used technical language in their evidence. However, the evidence was presented in a highly self-deprecating manner, littered with phrases such as, ‘I’m not qualified in law’, ‘I’m not an economist’, ‘as a lay-person’, ‘I’m not an expert’ etc.⁵⁶⁹ This

⁵⁶¹ This touches on issues of framing, in particular the idea that lay public and policy-makers might have different understandings of risk, as they have different perspective on the issue the risk relates to, i.e. whether it is a ‘justice-related’ risk or a ‘science-related’ risk. The conflicting framings of risk held by lay populations and experts are explored by Vaughan and Seifert in Elaine Vaughan and Marianne Seifert, ‘Variability in the Framing of Risk Issues’ (1992) 48(4) *Journal of Social Issues* 119. As with expertise scholarship, this research contributes to this literature but it is not the focus of this thesis. This theme will be explored in future work.

⁵⁶² IR Interview 23 January 2018

⁵⁶³ Simin Davoudi, ‘The Legacy of Positivism and the Emergence of Interpretive Tradition in Spatial Planning’ (2012) 46 *Regional Studies* 429

⁵⁶⁴ However, in a later interview, the assistant inspector disagreed with this perspective on the place of expert testimony at the inquiry. This is explored in Chapter 8, section 5.1

⁵⁶⁵ Ann Picton, *OBJ0203 Mrs Picton Closing Statement of Evidence* (2018) 8

⁵⁶⁶ This points to a tension between the participatory role of the inquiry as a vehicle for public participation and as a vehicle for gathering together and evaluating a significant amount of technical information; the impact of these diverging purposes will be discussed in Chapter 8, 5.3.2.

⁵⁶⁷ Fieldnotes 27 June 2017

⁵⁶⁸ This insight echoes with Aitken’s findings in her 2009 study. Aitken (n374).

⁵⁶⁹ Fieldnotes 27 June 2017

approach was fairly common among lay-people I saw and spoke with. It suggests a discomfort, a fear that there is a gap between the level of a person's knowledge and the level of knowledge required of a witness at a public inquiry. I would further contend that this fear was exacerbated by the sense that a witness would be attacked on any statement that went beyond what they could say with confidence.⁵⁷⁰

There was a sense at the inquiry, evident in the defeatist attitude of the resident whose evidence was described above, that lay-person testimony was treated as being of lesser value. This feeling was endemic, despite the fact that the outcome of the inquiry was unknown during my interviews and there was no way to know how the inspectors evaluated the evidence they heard. This feeling was partly produced by a sometimes dismissive attitude towards lay-person testimony;⁵⁷¹ laypeople attributed this attitude to counsel in particular.⁵⁷² At points, lay-person testimony was directly compared with expert testimony. This was highlighted by one interview participant:

I mean, I lost track of how many times I heard... a phrase which would go something like, 'thank you for your opinion but, the national expert on this, Dr So and So...'⁵⁷³

Framing resident testimony as emotional further served to devalue it at the inquiry, as evidenced by the Welsh Government closing statement:

Cadw have been consulted; they do not oppose the listed building application and have not commented on the proposed relocation. Mr Smith asserted the opposite and, whilst the strength of his feeling 'of course' cannot be denied, his disagreement with the expert witnesses was not supported by analysis.⁵⁷⁴ ['of course' was said; it is not in the written closing statement].

While this devaluing of lay-person testimony is troubling, it is important to note that it was not uniform. There were several moments at the inquiry where lay-people's participation was encouraged and where their testimony was respected. The interaction between Mr Whitaker and Ms Picton recounted in the first extract demonstrates this. The inspectors in particular went to great lengths to encourage residents' participation. They spoke to regular attendees during the break; they were friendly and amenable. Moreover, they did not seem to dismiss lay-person testimony out of hand, even when it contradicted the testimony of an expert.⁵⁷⁵

⁵⁷⁰ This concern around adversarialism is explored in more detail in a later section and in Chapter 8 section 5.2.

⁵⁷¹ MW Interview 14 December 2017; IR Interview 23 January 2018; RB Interview 13 August 2018

⁵⁷² This tendency is not unique to the M4CAN inquiry; indeed, it is a phenomenon recognised by Aitken, Rydin and others. Aitken (n374); Yvonne Rydin, Maria Lee and Simon J. Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139

⁵⁷³ RB Interview 13 August 2018

⁵⁷⁴ Morag Ellis QC on behalf of the Welsh Government (n348) 54. Treatment of emotive testimony is further explored in Chapter 6 Section 2.3.2.

⁵⁷⁵ Fieldnotes 27 June 2017. When a resident discussed the problems of the Brynglas tunnels, the inspector seemed very interested and took notes.

2.1.2 *‘There is no substitute for digging down into the detail’*

The expertise of generalist witnesses was often dismissed in favour of witnesses with scheme-specific knowledge. Lack of specific expertise was repeatedly highlighted during cross-examination, with comments like, ‘you’re not a qualified architect, are you?’, ‘you’re not a lawyer?’⁵⁷⁶ The evidence of Professor Marsden, sustainable development expert for the Gwent Wildlife Trust (GWT), demonstrates this trend. The Welsh Government counsel in their cross-examination argued that Marsden’s lack of scheme-specific knowledge meant his evidence had little value.

Counsel started their cross-examination focused on the economic aspect of Marsden’s evidence.

‘So, you’re an economic expert?’

‘Yes’, Marsden replied, ‘I see myself as an interdisciplinary scholar’.

Counsel then asked Marsden whether he had read the documents regarding the economic impact of the scheme submitted by Mr Bussell, the witness for the Welsh Government, and highlighted the documents that Marsden said he had not read. Counsel seemed to attach great weight to this, explicitly linking expertise and academic rigour to having read these documents.

‘It doesn’t matter if you’re the best sustainability expert in the whole world, you didn’t do that. You didn’t read these documents. Collaborating means reading people that you don’t agree with’.

Counsel then moved on to transport planning. Asked about his expertise in transport planning, Marsden replied, ‘I am not an expert in transport planning’.

‘Sorry, you’re not a transport specialist, so your opinion here is the opinion of someone who lives in South Wales and uses the roads?’

‘No, I’m an expert in spatial planning. This scheme needs an interdisciplinary taskforce and that’s what I have expertise in’.⁵⁷⁷

The value attached to expertise is fought over in this cross-examination. Expertise is first narrowed in scope from its broader field to a specific knowledge of the scheme; from there it narrows to a knowledge of inquiry documents.⁵⁷⁸ We see the witness repeatedly assert the value of his generalist expertise. Throughout the inquiry, witnesses were pushed to be specific and detailed in their testimony. Particular aspects of their evidence were narrowed in on in cross-examination. Frequently, counsel would ask a direct, ‘yes or no’ question regarding their evidence;⁵⁷⁹ witnesses’ reluctance to answer these kinds of questions would be cast as unreasonable, difficult behaviour. Again, this is evident in the treatment of Professor Marsden’s evidence. Professor Marsden is not a specialist on the Gwent Levels; rather, he is an expert on sustainable development. His testimony was generalist in its scope, and this evoked frustration in the Welsh Government counsel.

Counsel: Do you agree with me that it is better for climate change to travel a shorter distance?

Marsden: I suppose so.

Counsel: Why did it take 5 goes to extract that admission? You don’t need to be a director of a sustainable development institute to answer that surely.

Marsden: The point is, this is more complex than distance alone, or any single factor taken alone.

⁵⁷⁶ Fieldnotes 26 April 2017; Fieldnotes 28 March 2018

⁵⁷⁷ Fieldnotes 26 September 2017

⁵⁷⁸ The work done by documents at the inquiry will be further explored in Chapter 6, section 2.1.2.

⁵⁷⁹ This focus on detail seemed at times an attempt to corral the witness, a legal technique that again points to the adversarial tone of this inquiry.

Counsel: I get that. How about if the route is more or less congested?

While Professor Marsden sought to keep his evidence at more general level, counsel repeatedly tried to tie him down on details; on whether he was supportive of the Cardiff Capital Region Metro scheme, and whether this would impact his support or hostility towards the scheme; what his alternative to the M4CAN scheme would be; what his cost breakdown of this scheme would be, whether the M4CAN would impede the movement towards electric vehicles, and so on. In the Welsh Government closing statement, objectors' witnesses were described as not having 'appropriate expertise'. Their submissions were described as outdated, prevaricating and unspecific.⁵⁸⁰

2.2 Legal processes reinforced compartmentalising processes

This previous section examined the treatment of witnesses and their evidence at the inquiry. It suggested that the inquiry prioritised specific, specialised knowledge and discouraged generalist knowledge and testimony. This section explores the impact of legal requirements on statutory bodies, the duties of the inspectors and adversarialism in the inquiry, and how these processes contributed to compartmentalisation.



Figure 6: Wildflowers field on site visit, 19 July 2017

⁵⁸⁰ Fieldnotes 8 March 2018; Morag Ellis QC on behalf of the Welsh Government (n348) 144

2.2.1 Legal protections

The fifth stop of the day, the last place we go before lunch, is to a field where NRW have successfully developed a reen.⁵⁸¹ This is important as the Welsh Government mitigation strategy for reens relies on them being able to create ecologically rich, diverse reens from scratch, and the environmental objectors argue they cannot do this. NRW are taking us to a reen that they developed from an existing ditch; they point to the unique set of circumstances that mean that this reen creation was successful.

We go over a gate to get into the field. It is a very overgrown field with about seven cows in it, and a few horses, but they keep away. The grass and wildflowers are a mess and a mix; in parts they reach up to my waist. It has got lots of wildflowers, so the representative from the Bumble-bee Conservation Trust is trying to find the Shrill Carder Bee. It is on the threatened species list for the inquiry, and the Inspector had mentioned that he had not seen it yet.⁵⁸²

This brief extract from fieldnotes from the site visit draws attention to the importance attached to protected species at the inquiry. It was argued by some that this led to identified species becoming the focus at the expense of nature more broadly. This perspective was neatly summed up by the GWT reserves officer:

So, a few lucky species get high levels of protection... in a way I would be much happier if habitats were protected... I feel that also was reflected in the inquiry, where rarity value, legal protection was the underlying remit not, what are we actually losing? You know it was more like what legally protected wildlife are we losing, not what's important about this and why are we losing it?⁵⁸³

The focus of environmental protection thus moves from protecting the environment to protecting particular species. The stronger the legal protection, the greater the amount of inquiry time and energy a species would receive. The NRW coordinator at the inquiry noted that dormice, which are a European Protected Species and are therefore covered by the Habitats Directive,⁵⁸⁴ excited a 'massive amount of activity behind closed doors', as the Welsh Government sought to ensure that NRW were satisfied with dormice mitigation measures and would withdraw their objections.⁵⁸⁵ The focus on protected species inevitably resulted in some species being devalued, including species not afforded specific protection and ostensibly less appealing species. This tendency was exacerbated by the limited time and resources facing parties in the inquiry, highlighted by the NRW coordinator:

We had to prioritize the areas we get involved in a big scheme like that, and that's why we stick to statutory duties rather than saying, there's going to be an impact on hedgehogs or some species that's not got environmental protection... We have to be focused on what we have got the resources to deal with, but for a lot of the protected species we're then looking at their wider habitat requirements so it's not purely on the numbers, it's that sort of wider connectivity... we're advising in relation to statutory requirements very specific to protected

⁵⁸¹ Definition of reen, from Countryside Council for Wales 2008 brochure, *Gwent Levels: Whitson Site of Special Scientific Interest: Your special site and its future*. "Traditionally, fields [on the Gwent Levels] are drained by a system of ridge and furrow or 'grips' (shallow trenches) into the extensive system of interconnected ditches that surrounded each field. The larger of these are known as reens."

⁵⁸² Fieldnotes 19 July 2017

⁵⁸³ RB Interview 13 August 2018

⁵⁸⁴ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206

⁵⁸⁵ JP Interview 8 November 2018; This points to the differential treatment of NRW and other environmental objectors, which is further discussed in Chapter 8, section 6.3.

species, and therefore looking at impacts in a particular way, rather than looking at the wider, holistic environmental impacts.⁵⁸⁶

Underlined above, the inquiry tended to focus on protected species and on particular aspects of the laws that enshrined those protections. It became challenging then to consider broader issues. Arguments were tied to specific legal requirements and elements of nature protected by particular legal requirements carried greater weight. In a forum where time and resources are limited and everyone is motivated to put forward their most persuasive case, these legal requirements geared the inquiry towards a narrower consideration of nature.

2.2.2 *The role of the inspectors*

The inspectors played a central role in the day to day experience of the inquiry, and as such they are recurring characters in these chapters. Here, their role in encouraging compartmentalisation at the inquiry is considered. As highlighted before, the inspectors were friendly, affable people who seemed to take their role in facilitating participation at the inquiry seriously. They were also concerned with the timely running of the inquiry. The importance of timeliness was intensified by the scale of the scheme and perhaps by the fact that it had been delayed from the start.⁵⁸⁷ In order to move the inquiry on, the inspectors encouraged similar testimony to bunch together,⁵⁸⁸ and interrupted witnesses or counsel if they were going off topic.⁵⁸⁹ They sometimes looked a little irritated if a line of questioning was repetitive, with the assistant inspector once grumbling, 'I do find the answers have a lot of qualification and going back to general points; it's certainly not helped me in my note-taking. We've got the point; we don't need it said 57 times'.⁵⁹⁰

The quasi-judicial nature of the public local inquiry process, and the possibility of judicial review,⁵⁹¹ underscores the importance of arguments tied to legal duties and the need for transparent, compartmentalised reasoning. The quasi-judicial nature of the role of the inspector clearly weighed on the chief inspector's mind; twice in one session, he referred to his role as 'the judge'; 'the judge would say...'.⁵⁹² The inspectors seemed uncomfortable in those moments where the inquiry moved away from proper procedure. This was highlighted at one session of the inquiry, when members of the inquiry were stood around a table in the middle of the room, looking at a map on the table. This would happen from time to

⁵⁸⁶ The coordinator here recognises the focus on protected species but disagrees with the notion that a focus on the 'few lucky species' undermines the protection afforded the wider habitat. They argue that in considering the species' requirements, the wider habitat is accounted for. I suggest however, that assuming that 'most' of the wider habitat is included through particular species' requirements is not the same as viewing the wider habitat, or nature itself, as a value in and of itself.

⁵⁸⁷ Persona Associates, 'Delay to public inquiry will not impact on M4 project completion date' (*Persona Associates M4 Corridor around Newport Public Local Inquiry*, 2016) <<http://m4-newport.persona-pi.com/news/title/pli-delay>> accessed 9 February 2019

⁵⁸⁸ RW Interview 9 November 2018

⁵⁸⁹ Fieldnotes 24 March 2017

⁵⁹⁰ Fieldnotes 26 September 2017

⁵⁹¹ The possibility of judicial review meant that it was imperative that the inspectors' recommendations were clear, reasonable and transparent. This is discussed in greater detail in Chapter 3 section 3.3.3.

⁵⁹² Fieldnotes 27 May 2017

time at the inquiry, where some visual object, usually a map, was being discussed. The inspectors at these moments would make an effort to welcome members of the public to go up and stand around the table as well. There was an odd feeling to these moments; the typical format and hierarchy of the inquiry room would be disrupted. On this occasion, the two inspectors, Welsh Government counsel, legal team, an expert witness for the Welsh Government, the councillor and four residents who combined their testimony and some members of the public, including myself, were stood around the table. The councillor and residents were asking the witness about some aspect of the scheme and pointing to a particular area on the map. This then developed quite conversationally to members of the public asking questions of the witness. It was apparent that the assistant inspector was uncomfortable with this interaction; his expression was unhappy, and he looked as if he wanted to interrupt. Finally, he stopped a question from a member of the public that he felt moved too far away from the topic under examination, which the witness would have prepared for. He stated as justification, ‘this is a public inquiry...’.⁵⁹³

2.2.3 *The adversarial nature of the inquiry*

Reflecting on the M4CAN inquiry seven months after it ended, the coordinator for NRW voiced a frustration echoed in several interviews and in my own experience of the inquiry. Did the inquiry have to be so adversarial in nature? What were the unintended consequences of this approach?

‘I was sometimes frustrated’, she remarked, ‘that because the inquiry was a proper public inquiry with cross examination and so on, ... I wonder sometimes if that actually is the best way for the inspectors to find out what they need to know. ... I think it would have been useful to also have had some roundtable discussions, not just those sort of impromptu ‘let’s gather round a map [moments]’ but more like, okay, this week, we are going to discuss impacts on the Gwent Levels as a whole rather than in the kind of different boxes.’⁵⁹⁴

The NRW coordinator highlighted that the formal, adversarial procedures of the inquiry seemed to inhibit holistic approaches to issues, entrenching the compartmentalisation and prioritising of different kinds of knowledge.⁵⁹⁵ The impact of this process on the treatment of scientific knowledge is of particular relevance to the environmental case and will be considered here.

The whole inquiry seemed geared up more towards opposing professional consultants having a consistent, almost like a standard battle or discussion against each other? Do you know what I mean?⁵⁹⁶

The GWT reserves officer identifies a fundamental problem with the treatment of scientific knowledge at the inquiry;⁵⁹⁷ it was seen as something to fight over. Two opposing sides were proposing their own, ‘better’ scientific knowledge to the inquiry. It was highlighted that experts typically stuck to their ‘side’ and would

⁵⁹³ Fieldnotes 27 June 2017

⁵⁹⁴ JP Interview 8 November 2018

⁵⁹⁵ Highlighted in the Introduction (Footnote 6), the adversarial nature of the inquiry was a striking feature of the inquiry from the start; it is discussed throughout the analysis as a way that rationalist assumptions were at play, and also in terms of its impact on the participatory nature of the inquiry; this is explored in Chapter 8, Section 5.2. Adversarialism as a theme of its own will be explored in greater depth in future work.

⁵⁹⁶ RB Interview 13 August 2018

⁵⁹⁷ Scientific expertise draws upon a considerable literature. The work of Sheila Jasanoff (see bibliography) is particularly valuable here. Highlighted in section 2 (Footnote 542), this rich theme of enquiry is briefly explored in Chapter 8 Section 5.1, and in greater depth in future work.

not acknowledge the validity of a point made by the ‘other side’.⁵⁹⁸ This jars with the norm of communality underpinning the scientific research community,⁵⁹⁹ and points to the influence of outside factors, such as the ‘win or lose’ culture of the inquiry.

At one point, frustrated by the defensiveness of one of the witnesses, the Welsh Government counsel exclaimed, ‘I am simply trying to ensure we get the facts accurate’.⁶⁰⁰ This claim obscures the fact that the role of counsel was not to identify accurate facts so much as it was to lead the Welsh Government case. Further, it postulates that there are right and wrong facts and it is the purpose of the inquiry to identify the right facts.⁶⁰¹ It highlights that both sides often presented their arguments as if scientific knowledge were black and white. In areas of scientific uncertainty, this ‘black and white’ treatment of scientific knowledge can be problematic.⁶⁰² For example, reflecting on their cross-examination and its treatment of screening, the GWT reserves officer remarked:

I mean, without knowing... there’s so many factors in there aren’t there, without the height of vegetation, proximity to the road, the angle of the slope, you can’t make a yes or no argument, can you?⁶⁰³

Highlighted in this comment, many factors affecting the environmental impacts of this scheme were unknown. This is fairly inevitable in ecology, acknowledged to be an imprecise science.⁶⁰⁴ Despite this uncertain knowledge, both sides sought to assert the validity of their scientific approach, with methodology often used as a validity criterion.⁶⁰⁵ In asserting the validity of one’s approach one tended to dismiss the methodology of the other side. This adversarial approach is exemplified in this extract from the Welsh Government closing statement:

Professor Anderson... gave an estimate for the capital carbon of the Scheme. He... criticized Mr Chapman[s] methodology and suggested it was insufficiently rigorous. However, his estimate was in the region of a quarter of Mr Chapman’s assessment and one eighth of

⁵⁹⁸ Fieldnotes 26 September 2017

⁵⁹⁹ Robert Merton, ‘The Normative Structure of Science’, *The Sociology of Science: Theoretical and Empirical Investigations* (University of Chicago Press 1973)

⁶⁰⁰ Fieldnotes 29 June 2017. It is interesting to consider this claim against Shapiro’s analysis of the role of law in constructing the modern understanding of ‘fact’; Shapiro notes that in the early law courts, “fact did not carry an intrinsic connotation of truth but was rather a matter whose truth was in contestation”, that facts were assertions to be argued in court, not truth statements. Barbara Shapiro, “‘Fact’ and the Proof of Fact in Anglo-American Law (c.1500-1850)” in Sarat A, Douglas L and Umphrey MM (eds), *How Law Knows* (Stanford University Press 2007) 60

⁶⁰¹ The epistemological perspective this reveals, and the challenges it raises within a public participation procedure, are explored in Chapter 8, section 5.3.2.

⁶⁰² Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press 1990) 11. Concerns with law’s use of scientific knowledge, in particular in terms of the rise of the economic-focused empirical risk assessment approach to environmental legal regulation, are explored in Douglas Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press 2010)

⁶⁰³ RB Interview 13 August 2018

⁶⁰⁴ Jeff Houlahan et al, ‘The priority of prediction in ecological understanding’ (2017) 126 *Oikos* 1, 2

⁶⁰⁵ This is aptly demonstrated by Mr Evans, noise and vibration expert for the Welsh Government, while under cross-examination: ‘We have used the same methodology used by every other [similar] scheme in the UK, we used the right methodology’. Fieldnotes 27 June 2017

Professor Whitelegg's. Clearly it is not possible for Professor Whitelegg and Professor Anderson to be correct. We submit that both are wrong.⁶⁰⁶

The adversarial nature of the inquiry affected the treatment of scientific knowledge; it discouraged a nuanced approach and encouraged a dismissive treatment of experts and their expertise. The problems inherent in this approach were heightened by the two sides' financial disparity; one side was better equipped to play the game and were in a better position to set its rules. Financial inequality intensified the impacts of the adversarial nature of the inquiry.⁶⁰⁷

2.3 Limits on broader discussion at the inquiry

This section has considered some of the ways that compartmentalising at the inquiry was encouraged; it has examined the differential treatment of lay-people and experts, the prioritising of specialised expertise, the role of legal regulations and inquiry procedures, and the adversarial nature of the inquiry. Lastly, this section will consider the restrictions placed on discussion of policy at the inquiry.

The purpose of a local inquiry is to provide the minister with information about local objections so that he can weigh the harm to local interests and private persons against the public benefit to be achieved by the scheme. The policy behind the scheme, as opposed to its local impact, should therefore be taken for granted. ... Statutory rules of procedure normally provide that the inspector shall disallow questions directed to the merits of government policy.⁶⁰⁸

Outlined by Wade and Forsyth above, the purpose of an inquiry is to focus on local issues, putting broader questions of policy to one side. Were an inquiry to consider policy matters, it would overstep its boundaries and do the work of government. However, this division proved problematic at the M4CAN inquiry. Many objectors raised arguments against the scheme that touched on wider issues. The Welsh Government in their closing statement noted that people objected to the scheme in a way that was inappropriate, both procedurally and substantively, for the purpose of the inquiry:

Many of those who presented evidence to the inquiry have objected to the idea of the Scheme without doing justice to its detail; there have been suggestions that the proposals, as a matter of principle and law, are inconsistent with environmental legislation. Those contentions are wrong, as we shall demonstrate. The time for challenging the idea of the Plan for this road is past; the judicial review tested the Plan on a number of alleged environmental grounds and it was roundly dismissed.⁶⁰⁹

It is particularly challenging to draw distinctions between local issues and 'policy issues' when dealing with environmental concerns. This tension came up frequently when discussing the challenges of making a case for the environment, as highlighted below:

⁶⁰⁶ Morag Ellis QC on behalf of the Welsh Government (n348) 259

⁶⁰⁷ This is discussed in greater detail in Chapter 8, section 5.2.

⁶⁰⁸ Forsyth and Wade (n260) 806

⁶⁰⁹ Morag Ellis QC on behalf of the Welsh Government (n348) 5

[Some of our witnesses were] saying I don't think it should go ahead, and you can imagine the sarcasm, 'oh, you're a lawyer are you... It's not for you to say, whether it should go ahead or not, you're just the bat person, so you, you know, tell us about bats and go away'. So that's really how it worked... we were given very much the impression that the inquiry was not a place for a discussion of the rights and wrongs of things.⁶¹⁰

As noted by this environmental objector, the restrictions of broader discussions at the inquiry were sharply defined. It frustrated objectors who felt that the greater question of whether or not the scheme should go ahead was not available for those participating in the inquiry to consider. Where the public local inquiry sits in the decision-making process further narrows its scope; by the time a public local inquiry is held, detailed plans already exist.⁶¹¹

Conversely, some participants argued that the inquiry did provide opportunities for broader discussion. One resident expressed surprise at the breadth of evidence heard at the inquiry:

I was quite pleased actually with the way in which [the inspectors] were allowing to be given in evidence a very wide range of detailed evidence about species, bats and otters etc, which obviously objectors felt was relevant to the road, but which you know, a lot of road engineers and traffic engineers were saying, what's that got to do with [it]... one might have expected, in a brutal world, that the assembly government would have written the rules such that you can only raise objections on subjects which have a substantive and very significant impact on the proposals.⁶¹²

Similarly, the counsel for the environmental objectors felt that the public inquiry was an appropriate forum for broader arguments.⁶¹³ These reflections speak to the conflicting purposes of the public local inquiry; while Wade and Forsyth foreground its focus on local issues and restrictions on policy discussions, others highlight that it is a public participation procedure, and consequently ought to facilitate inclusive discussions. These diverse responses to the inquiry and to the range of inquiry evidence further underline the complexity of this event. For some, the inquiry was frustratingly narrow and restricted in its scope of evidence, for others, the inquiry heard testimony covering an impressively wide range of evidence; while the value attached to this testimony was questioned, it was important that the testimony was heard. Having outlined some of the ways in which processes of compartmentalisation were encouraged at the M4CAN inquiry, the following section of this chapter considers negative implications of these processes on the environment.

⁶¹⁰ MW Interview 14 December 2017

⁶¹¹ This is further discussed in Chapter 3, section 3.3 and in Chapter 8, section 5.3.

⁶¹² RW Interview 9 November 2018. While this gives a positive account of the treatment of the environment, it should be remembered that certain environmental impacts are required to be discussed to comply with legal obligations; environmental legislation cited at the inquiry is outlined in Chapter 3, section 4.4.1.

⁶¹³ BM Interview 12 July 2018

3 Processes of compartmentalisation negatively impact the environment

The first half of this chapter examined the ways in which rationalist approaches to decision-making require processes of compartmentalisation. It considered the theoretical basis for this claim and then described how these processes of compartmentalisation emerged at the M4CAN inquiry. The second half of this chapter considers how these processes might adversely impact the treatment of the environment in decision-making processes. This section will set out the theoretical basis for this claim; it proposes that these processes adversely impact the environment in the following ways:

- They do not recognise the interconnected nature of the environment and consequently make it difficult to capture cumulative environmental impact.
- They do not appreciate the full value of the environment.
- They do not allow space to provide a range of responses or to make broader arguments.

This section will address these points in turn before exploring how processes of compartmentalisation affected the case for the environment at the M4CAN inquiry.

3.1 The interconnected nature of environment is not accounted for

Several environmental theorists contend that interconnections between human and non-human are dismissed in prevailing Western philosophies,⁶¹⁴ and that the foundations for this relationship established in Enlightenment rationalist philosophy underpin environmental legislation. This makes it more difficult to envisage and therefore to protect the environment as an irreducible whole.⁶¹⁵ Bosselmann contends that modern environmental legislation has developed in an anthropocentric manner and claims that the human-nature relationship central to rationalist philosophy engenders a fragmented treatment of nature in law; this is a result of some of the processes of modernity, whose effects are mutually reinforcing and damage the “ecological notion of interconnectedness”.⁶¹⁶

Cumulative impacts of human development are having a catastrophic impact on the environment. While specific species’ extinctions are starting to be linked to these cumulative impacts, the complexity of these processes makes them difficult to capture.⁶¹⁷ This problem is exacerbated by the varying timescales at which these processes operate, ‘impact lifetimes’ and ‘eco-system recovery times’ often working on longer-term scales than election cycles and development plans.⁶¹⁸ The dominance of a compartmentalised view of nature makes it harder to account for cumulative impact. While some instruments of environmental law, such as

⁶¹⁴ Plumwood (n176) 4; this is discussed in Chapter 2, section 4.2.

⁶¹⁵ Bosselmann (n205) 2425

⁶¹⁶ Bosselmann (n205) 2431

⁶¹⁷ Chris J. Johnson, Libby P. W. Ehlers and Dale R. Seip, 'Witnessing extinction – Cumulative impacts across landscapes and the future loss of an evolutionarily significant unit of woodland caribou in Canada' (2015) 186 *Biological Conservation* 176

⁶¹⁸ M. Lenzen, C. J. Dey and S. A. Murray, 'Historical accountability and cumulative impacts: The treatment of time in corporate sustainability reporting' (2004) 51 *Ecological Economics* 237

the Environmental Impact Assessment (EIA) Directive,⁶¹⁹ attempt to ensure proper consideration of cumulative impacts on the environment, the success of these measures is questioned. Several studies have noted the unsatisfactory treatment of cumulative impact in the EIA process in the UK, Europe and North America.⁶²⁰ Some recommend improved guidance and definitions; however, others argue that systemic issues account for the unsatisfactory treatment of cumulative impact. Kørnøv *et al* in their study of the Danish EIA system and its failure to provide a more holistic view of the environment found that the concept of the environment used by Danish authorities was broad but that it narrowed as the significance of environmental impacts was assessed, in particular when it was assessed in relation to infrastructure and industry projects.⁶²¹

3.2 The full value of the environment is not recognised

There are men charged with the duty of examining the construction of the plants, animals, and soils which are the instruments of the great orchestra.

These men are called professors, each selects one instrument and spend his life taking it apart and describing its strings and sounding board. The process of dismembering is called research. The place for dismemberment is called a university. A professor may pluck the strings of the instrument but never that of another, and if he listens for music he must never admit it to his fellows or to his students.

For all are restrained by an inbound taboo which decrees that the construction of instruments is the domain of science, while the detection of harmony is the domain of poets.⁶²²

In this extract from his seminal work, *A Sand County Almanac*, Aldo Leopold suggests that an exclusive focus on ecological science leaves the environmental scholar with a limited understanding of nature. He further highlights that any approach that is deemed unscientific is often dismissed as sentimental. As discussed in Chapter 2, some theorists, among them eco-feminists and advocates of Buen Vivir, criticise rationalist philosophy for promoting an instrumentalist view of nature that prioritises economic progress and fails to recognise environmental value.⁶²³ It is argued that law tends towards a fragmented view of nature and does not recognise the value of nature as an integrated whole.⁶²⁴ This is evidenced by the scale of the environmental crisis,⁶²⁵ and in the inadequacy of existing legal and political means of addressing it.

⁶¹⁹ Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment OJ 26/1 Art 5(1)(f)

⁶²⁰ Elizabeth A.E. Masden, 'Cumulative impact assessments and bird/wind farm interactions: Developing a conceptual framework' (2010) 30 *Environmental Impact Assessment Review*; Alister Scott and others, 'Evaluating the cumulative impact problem in spatial planning: a case study of wind turbines in Aberdeenshire, UK' (2014) 85 *The Town Planning Review* 457; Lourdes M. Cooper and William R. Sheate, 'Cumulative effects assessment: A review of UK environmental impact statements' (2002) 22 *Environmental Impact Assessment Review* 415

⁶²¹ Lone Kørnøv, Per Christensen and Eskild Holm Nielsen, 'Mission impossible: does environmental impact assessment in Denmark secure a holistic approach to the environment?' (2005) 23 *Impact Assessment and Project Appraisal* 303

⁶²² Aldo Leopold, *A Sand County almanac & other writings on ecology and conservation* (Library Of America 2013) 153

⁶²³ Gudynas (n172) 447

⁶²⁴ Bosselmann (n205) 2432; this is further discussed in Chapter 2, section 5.2.2.

⁶²⁵ *Ibid* 2425

This is a pessimistic view of humans' ability to make decisions that reflect the full value of the environment. On a more optimistic note, some argue that public participation in environmental decision-making can enrich the understanding of environmental value in these contexts, that "publics do not adhere to the logically consistent reasoning of philosophers, but intuitively construct and reconstruct their environmental value positions in the light of personal experiences, relationships and events".⁶²⁶ Davies suggests that plans relying on "expert-led designatory systems" can feel abstracted from the public; public participation in decision-making allows for a more diverse and holistic understanding of environmental value to be included.⁶²⁷

3.3 The range of acceptable responses to the environment is limited

Implicit in the notion that greater public participation in decision-making processes enriches the understanding of environmental value is the idea that a diversity of voices in decision-making benefits the environment.⁶²⁸ Furthermore, it is implied that this diversity is frustrated by processes of compartmentalisation. Kørnøv *et al.* found that public participation in the EIA process encouraged a broader understanding of the environment, "by introducing new and broader aspects of the cases in question and ensuring that many interests were taken into account in the decision-making".⁶²⁹ This echoes approaches within environmental justice scholarship⁶³⁰ that seek to relate global environmental concerns to local environmental issues,⁶³¹ that recognise that decision-making processes need to be responsive to inter-related global and local environmental impacts. However, decision-making processes that consider the environmental impact of particular schemes do not tend to recognise inter-related global and local level environmental impacts; neither do they make much allowance for emotive responses. Consequently, another part of the picture of the environment is lost. Tarlock contends that an over-reliance on technical knowledge in environmental decision-making is partly to blame:

Environmental law is science-based; science is the primary but not controlling influence. At some point, the normative conclusions drawn from science must be recognized as much. Environmentalism has deep roots in the aesthetic and emotional appeal of nature worship as well as in rationality. However, the environmentalism that drives policy and law is a product of the Enlightenment's faith in reason and knowledge, as opposed to theology, to benefit society.⁶³²

An over-reliance on scientific knowledge encourages a compartmentalised treatment of the environment. There is an assumption that all that is needed to solve environmental problems is scientific knowledge. This

⁶²⁶ Davies (n119) 98

⁶²⁷ Ibid 98; the potential of public participation to enrich the understanding of value present in decision-making is highlighted in Chapter 2 section 3 and further discussed in Chapter 8 section 6.1.

⁶²⁸ Kørnøv, Christensen and Nielsen (n621) 313

⁶²⁹ Ibid 308

⁶³⁰ This is a narrow and relatively recent development within the field. See Julie Sze and Jonathan K. London, 'Environmental Justice at the Crossroads' (2008) 2 *Sociology Compass* 1331, 1347

⁶³¹ Di Chiro (n121) 294; This is discussed in Chapter 2, section 4

⁶³² Tarlock (n208) 243

ignores the possibility that scientific knowledge is not the only tool required for the task. Environmental decisions require value-judgements as well as assessments of information. Scientific research generates valuable information but does not always provide the environmental decision-maker with everything they need. Decision-making processes as they are predominantly set up in England and Wales are ill-equipped to factor the interconnected nature of the environment into their assessments, thus significantly undermining the weight attached to environmental considerations in these processes.

4 Processes of compartmentalisation adversely impacted treatment of the environment at the inquiry

The following section will consider the impact of processes of compartmentalisation on the environment at the M4CAN inquiry. These processes had a disproportionately negative impact on the environmental objectors' case. They created silos, meaning that issues were addressed in isolation and their cumulative impact was not effectively considered. Environmental arguments were further narrowed by a focus on individualised mitigation strategies. The reactive role of the environmental objectors exacerbated these impacts.

4.1 The inquiry process addresses issues in isolation

4.1.1 Creating silos

In the months following the close of the inquiry, I spoke with several participants about their experiences. Two environmental objectors shared their frustrations with the public inquiry process, illustrating these challenges with metaphor:

Take an example of the camel. If I was holding up a piece of straw and saying, is this going to harm that camel, you'd have to say, 'no'. You would have to say 'no' for every piece of straw I demonstrated to you as I piled them up. Is this going to hurt the camel? Well, no, this one won't. But eventually, you will break the camel's back... you might get some warning signals, the camel's knees are starting to totter a bit, but it's that critical thing that each of those individual ones you look at and think, this isn't a problem in its own right.⁶³³

The challenges are about putting it into perspective, that it isn't just this M4 case, it's not in silo. It's about the cumulative and in combination losses, the continual losses of 'death by a thousand cuts'. And then they'll say, that's not our business, this is just this case, but it's not just this case. ... that's ridiculous!⁶³⁴

These descriptions approach the 'silo' problem from different perspectives; JB worries that the scheme's broader environmental impacts are not captured when it is detached from its wider context. For JD, the

⁶³³ JD Interview 1 November 2018

⁶³⁴ JB Interview 18 October 2018

scheme's environmental impact is not fully captured by considering environmental threats individually. Both perspectives are discussed, with the risks identified by JD considered first.

The importance of designing holistic responses to environmental challenges was raised repeatedly at the inquiry. It was raised frequently in evidence concerning climate change, a global environmental issue that requires a systemic approach.⁶³⁵ GWT in their closing statement reiterated that climate change could not be addressed in isolated interventions, and that consequently the implications of this scheme could not be detached from their greater climate impact. They feared that the scheme would keep the Welsh economy tied to carbon-intensive processes.⁶³⁶ Interconnectivity issues specific to the Gwent Levels were also mentioned.⁶³⁷ The Gwent Levels are 5,856 hectares of marshland habitat, consisting of a complex drainage system of reens, locks, and grips.⁶³⁸ 2,755m of the reens and 9,373m of the field ditches that criss-cross the area would be lost to the scheme.⁶³⁹ These are home to a range of rare invertebrates and aquatic species who are reliant on this rich and interconnected system; many of these rare species are particularly sensitive to changes in habitat.⁶⁴⁰ While these issues were frequently raised, it was felt that they were not adequately recognised at the inquiry; interview participants frequently highlighted their frustration with what they saw as a lack of recognition of the complex, interconnected nature of the habitat.⁶⁴¹

4.1.2 *Issues treated individually*

Environmental issues were addressed individually; this could have the consequence of making them look smaller. Interview participants noted that objections were tied to specific issues which the Welsh Government would then seek to address.⁶⁴² Inherent in this approach is the assumption that all environmental issues can be individually identified and addressed; it further suggests that these individual concerns can co-exist with the scheme. Some environmental objectors, among them GWT, did not accept this and consequently did not enter into talks with the Welsh Government, feeling that they would lose more than they would gain.⁶⁴³ This approach will be discussed in more detail in the final section of this chapter.

⁶³⁵ Fieldnotes 27 September 2017

⁶³⁶ Fieldnotes 27 September 2017

⁶³⁷ JP Interview 8 November 2018, "...we're talking about 6,000 hectares and this huge area of interlinked drainage and so on, you could sort of make the point much more holistically I suppose about those areas..."

⁶³⁸ Jessica Poole, *Proof of Evidence on the Gwent Levels Sites of Special Scientific Interest of Jessica Poole on behalf of the Natural Resources Body for Wales* (2017) 9

⁶³⁹ Ibid 17

⁶⁴⁰ Ibid 14. The sensitive nature of these species and their reliance of very specific habitats is described in Chapter 6 Section 5.1.

⁶⁴¹ JD Interview 1 November 2018, "...it's a familiar problem to me and one of things I, have had to specialise in is cumulative impacts of development, and, I've mentioned the Thames and Heath SPA to you, and I'll use it again as an example here..."; JB interview 18 October 2018, "...the environment gets trashed, it's constantly getting degraded, there's a 56% decline in biodiversity in the UK in the last 50 years, but no, no it's fine because we'll stick a motorway through something..."

⁶⁴² AP Interview 8 January 2018, "...they agree to changes because of what discussions they've had with the Welsh Government, you know, if I can't access my field for the cows, right we'll change that and we'll accommodate that..."

⁶⁴³ IR Interview 23 January 2018

The Welsh government will say, it's really not an issue because we will provide mitigation. And there's never a feeling of incisiveness in that... it's almost a tick-box exercise, it's like well have we considered this? Tick. If the problem is dealt with then it goes away, rather than actually... a question of principle... will this be a point at which we say, the scheme shouldn't happen.⁶⁴⁴

As highlighted above, the space to make the argument that the scheme should not go ahead for environmental reasons did not seem to exist at the inquiry.

4.1.3 *Ascribing value to the environment*

You know, there will be a slot for water voles, a slot for dormice, possibly a slot for bats and birds... but the super-rare mollusc barely gets a look in, does it?⁶⁴⁵

The value ascribed to the environment can be constricted by compartmentalisation. These processes are better equipped to capture economic value; the value of different factors including environmental factors is typically understood in terms of economic value, which can be problematic.⁶⁴⁶ By concentrating on economic value, the value of the environment is considerably reduced. This was evident during the cross-examination of the Welsh Government sustainable development witness, where they noted that climate change had a cost and that it was a serious issue; 'I accept that. Not everyone does, I certainly do'.⁶⁴⁷ Climate change was framed in a way that made it sound less drastic. This was partly achieved by focusing on the economic cost of climate change. A focus on economic value encourages an instrumental view of the environment, highlighted below:

There's a very technical response to development, which is if you destroy this much, you must mitigate by this much... if you treat nature as a bankable asset then you can, on paper, make abstract movements from one to another in mitigation.⁶⁴⁸

The participant refers to mitigation as a way in which the environment is treated instrumentally; this will be explored in further detail in a later section.

4.1.4 *Recognising broader contexts*

JB argued that the scheme's broader environmental impacts were not captured when detached from its wider context. There are two aspects to this; firstly, that this scheme is being considered at a time of

⁶⁴⁴ JD Interview 1 November 2018. This ties in with concerns around risk-based environmental regulation discussed in Chapter 8, section 2.1.3.

⁶⁴⁵ RB Interview 13 August 2018

⁶⁴⁶ This is explored in greater detail in Chapter 2, section 4.2 and in Chapter 8, section 2.1.3. Conversely, some would argue that the Wellbeing of Future Generations Act 2015 seeks to make space for these deeper understandings of environmental value in decision-making processes; this perspective, and its success/limitations, is explored in greater detail in Chapter 8.

⁶⁴⁷ Fieldnotes 26 September 2017

⁶⁴⁸ IR Interview 23 January 2018

planetary crisis. The lack of acknowledgement of the global environmental context was underlined by the GWT counsel in his cross-examination of the witness sustainable development:

Counsel	You appreciated in the course of your balancing act that the world is undergoing a catastrophic rate of species extinction?
Witness	What I factored in was the evidence of the specific scheme. I don't think there's evidence of extinction. ⁶⁴⁹

This line of questioning seemed to frustrate the witness. Asked whether WFGA was meant to recalibrate the way in which the Welsh Government balanced environmental and economic considerations, he retorted, "I do not take the Act as meaning you can't build any more roads".⁶⁵⁰

The second aspect of the scheme's wider context to be considered is the historical and future development of the Gwent Levels. Historically, the planning system has not arguably protected the Gwent Levels; this is well captured by a participant, who describes what he likes about the area:

It's surprisingly big. I mean, some of it is spoilt, quite a lot of it is spoilt one way or another, but it's got a lot of unique character... It's a bit of a mixed picture, isn't it? Because it's pretty well dead flat, and what you see most of is just electricity pylons and steel works! You see many, many reens, and if you look at the good things, it's brilliant. You just have to get used to the pylons and the wind turbines and all that. It's a different environment and I can see it's not immediately beautiful in the way that the west of Ireland might be, you know, you've got to work at it a bit, but it's on our doorstep.⁶⁵¹

It was seen as another way that the cumulative impact of the scheme was not accounted for at the inquiry, as one objector remarked,

I mean the Levels have lost hundreds if not thousands of hectares of worth of land already to development, and yet they want to stick another motorway through it?⁶⁵²

Environmental objectors were keen to situate the scheme in the context of excessive development already affecting the integrity of the Gwent Levels. While the Welsh Government sought to allay these fears,⁶⁵³ objectors highlighted the risk of future development attached to the scheme, arguing that it was inevitable that the northern section of the Levels, now cut from the larger southern section and sandwiched between the M4CAN and the 'old' M4, would be soon be lost to development as well, as its environmental integrity would be compromised by the scheme.⁶⁵⁴

⁶⁴⁹ Fieldnotes 26 September 2017

⁶⁵⁰ Fieldnotes 26 September 2017

⁶⁵¹ RW Interview 9 November 2018

⁶⁵² JB Interview 18 October 2018

⁶⁵³ "The nature of balanced decision-making required here means that the Scheme would not create a precedent for further development if approved because of its unique nature". Morag Ellis QC on behalf of the Welsh Government (n348) 222

⁶⁵⁴ Fieldnotes 26 April 2017

4.2 The focus on mitigation limited the case for the environment

4.2.1 *Mitigation strategies were compartmentalised*

I was also disappointed that in NRW's proposals for mitigation that there was a separation of where they were doing mitigation for ditches from mitigation for grazing marsh or wet pasture or whatever you want to call it, you see what I mean, it was almost like taking separate units. And here, we have reens and ditches in amongst a kind of wet grazing marsh habitat, but it was almost like you could mitigate for reens and ditches here, you could mitigate for grazing marsh somewhere else?⁶⁵⁵

The GWT reserves officer met with me a few months after the inquiry closed. It was a warm August day and so we walked around the reserve and around the land directly affected by the scheme. Reflecting on the inquiries' treatment of the environment, he noted that mitigation strategies addressed different elements of the affected environment separately and did not recognise that these elements co-exist. He drew on the field we were walking through to illustrate this point. The species in the reens exist alongside the species of the wet marshland; they are utterly entangled with one another, and yet they were dealt with separately at the inquiry. He feared that this isolated approach would undermine the success of the mitigation strategies.

Some participants felt that while environmental impacts were considered, they did not seem integral to the scheme's success or failure. Mitigation strategies were a key constituent of this. While it was important that a mitigation strategy was prepared, the success of the mitigation strategy seemed less important. Mitigation as a 'tick-box' exercise was repeatedly raised in interviews, including in the conversation with the GWT reserves officer. He noted that there had been a greater focus on the mitigation strategies of certain protected species. He worried that, while invertebrates were more sensitive to the impact of the scheme and were in many ways the characteristic species of the Levels, they did not receive adequate attention at the inquiry.⁶⁵⁶ Voicing his frustration with mitigation strategies, he argued,

If you make a bat roost, you've done your bit for wildlife and you can just carry on with your development... and if your bat roost hasn't been used but you've displaced a load of bats, well, you've still done your bit... it's always a negative outcome for wildlife isn't it... monitoring of mitigation proposals as far as I'm aware is really small and even if something negative comes up... it's just like, 'oh well that's unfortunate isn't it?'⁶⁵⁷

This underlines the danger of a compartmentalised approach to mitigation, where not only are the different elements requiring mitigation treated separately, but the processes of mitigation strategy are treated separately from its overall impact.

4.2.2 *Success of mitigation strategies was contested*

Counsel for the Objectors	There's a possibility even with remediation it won't work.
Ecology Expert	It's a small possibility, in my opinion.
Counsel for the Objectors	But a possibility?

⁶⁵⁵ RB Interview 13 August 2018

⁶⁵⁶ RB Interview 13 August 2018

⁶⁵⁷ RB Interview 13 August 2018

Environmental objectors challenged the compartmentalised nature of mitigation presented at the inquiry and also the likely success of these strategies. Mitigation strategies were treated by some objectors as a mechanism through which they could hold the Welsh Government to a higher standard.⁶⁵⁹ Echoing the discussion on expert knowledge earlier in the chapter, the debate around mitigation strategies turned on the validity of the science underpinning the strategy. The expert quoted above, in response to their mitigation strategy being dismissed as “no more than an aspiration”, countered that it was “based on good science and professional judgement”.⁶⁶⁰ Some environmental objectors expressed frustration with the inconsistent treatment of subjective assessments, such as ‘professional judgement’; the ambiguity allowed in the mitigation strategies seemed to reflect inequalities present in the system:

It’s very difficult to get much purchase [on SSSI policy]; in my experience the standard sort of response you get is, it’ll all be fine. You’re saying, no, it won’t be, and they’re saying oh, but we’ll provide mitigation it’ll be fine, and they can be wonderfully woolly about exactly what that mitigation is.⁶⁶¹

GWT’s closing statement reiterated their concerns regarding the Welsh Government mitigation strategies. It highlighted the insufficient consideration of long-term operational aspects (regarding bat mitigation⁶⁶²) and pointed to a lack of empirical scientific support (regarding ancient woodland mitigation⁶⁶³). GWT counsel argued that mitigation measures demanded confidence beyond reasonable scientific doubt and that the expert opinion of GWT witnesses demonstrated the existence of such doubt.⁶⁶⁴

4.2.3 *Mitigation strategies were insufficiently tested*

Interview participants noted that they felt that mitigation strategies were not adequately examined. The reed mitigation strategy in particular was highlighted. This again demonstrates the treatment of scientific knowledge at the inquiry. The NRW coordinator described their objection to the reed mitigation strategy:

We’ve got experience of developments on the Gwent Levels [and have seen] how hard it is to replace reens; you can do it from an engineering point of view, but we still don’t know quite how to get the ecology right.... It was a tricky one because we’re not saying we’re sure it won’t

⁶⁵⁸ Fieldnotes 27 June 2017

⁶⁵⁹ JD Interview 1 November 2018

⁶⁶⁰ Fieldnotes 27 June 2017

⁶⁶¹ JD Interview 1 November 2018. While environmental objectors felt that the mitigation strategies were ‘woolly’ in parts, the Welsh Government firmly disagreed. As noted in Chapter 3, section 4.4, there was disagreement between the Welsh Government and environment objectors over the nature of the relevant duties in the Wildlife and Countryside Act 1981 and the EU Habitats Directive, over what constituted ‘reasonable steps’ and ‘strict tests’. The inspectors agreed with Welsh Government interpretation of these duties.

⁶⁶² Fieldnotes 27 September 2017

⁶⁶³ Fieldnotes 27 September 2017

⁶⁶⁴ Fieldnotes 27 September 2017. Summarised in the words of their principle ecological expert witness Sir John Lawton, “we agree that the mitigation strategy is comprehensive; it is just not effective”.

be successful, but we can't say that it will be so. That's a difficult one to balance up I guess from their point of view.⁶⁶⁵

It seems that the inquiry did not effectively manage scientific uncertainty. Regulations around mitigation require confidence in the success of mitigation strategies;⁶⁶⁶ objectors argued this was out of step with the levels of scientific uncertainty demonstrated at the inquiry. It seems as if doubts concerning individual mitigation strategies, while serious and numerous, are treated as separate and un-related areas of scientific debate. There is no space to consider the aggregate impact of these uncertain mitigation strategies on the environment as a whole.

This section will lastly consider the role of NRW regarding mitigation. Environmental objectors at the inquiry were a disparate group with disparate objectives. As a statutory body, NRW's principal aim at the inquiry was to find common ground with the Welsh Government over mitigation strategies as it is their duty to ensure that the Welsh Government adheres to environmental legal obligations.⁶⁶⁷ This meant that the focus of NRW and a considerable proportion of their time and resources was spent on reaching an agreement with the Welsh Government. NRW noted in their closing statement that their objections to the scheme had considerably narrowed; there had been 68 bi-lateral and multi-lateral meetings between the Welsh Government and NRW over the course of the inquiry.⁶⁶⁸ This underlines that NRW was not in a position to object to the scheme on principle; their role was to consider the scheme's individual environmental impacts. The mitigation strategies proposed by the Welsh Government were a key mechanism through which they did that.

4.3 The reactive role of environmental objectors

4.3.1 Objectors responses were individual and separate

The preference the inquiry exhibited for silo-ed, individualised approaches came up frequently when discussing the challenges of making an environmental case. This preference was exacerbated by the fact that the case of the environmental objectors was inevitably reactive. The case for objectors is thus shaped by the case of the proposing side.⁶⁶⁹ Objectors found that they were supposed to respond to individual elements of the proposed scheme, making it challenging for them to construct an alternative narrative to that proposed by the scheme-developers.⁶⁷⁰ Moreover, they noted that the environment is one of many factors considered in the inquiry.⁶⁷¹ Objectors to the scheme came from many different perspectives and

⁶⁶⁵ JP Interview 8 November 2018

⁶⁶⁶ European Commission, 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC' final, February 2007, 48

⁶⁶⁷ The prioritised position of NRW evidence is discussed in Chapter 8, section 6.2.2.

⁶⁶⁸ Fieldnotes 21 March 2018

⁶⁶⁹ This is heightened by the possibility of overlap between the Welsh Government body that proposes the scheme and the Welsh Government body that sets the policy context in which the scheme is developed, further discussed in the Legal Context Chapter, section 4.3.

⁶⁷⁰ JD Interview 1 November 2018

⁶⁷¹ JD Interview 1 November 2018

had different purposes; it would be almost impossible for the objectors to develop a coordinated response. Environmental objectors often expressed concern that environmental factors did not seem integral to the scheme's viability. The position of environmental objectors stands in clear contrast to the position held by the Association of British Ports (ABP).⁶⁷² ABP was an objector with considerable resources and influence at the inquiry. They spent far less time in the inquiry room than environmental objectors; however they had greater impact, evidenced by the fact that the settlement reached between the Welsh Government and ABP, which led to ABP withdrawing their objection, added £135 million to the final estimated cost of the scheme.⁶⁷³ ABP's concerns regarding the scheme were utterly removed from environmental objectors' concerns.⁶⁷⁴

4.3.2 *The scale of the scheme*

Even where we've been able to spot that error, it doesn't mean we spotted every error... there might be a hundred errors in there, but we don't know because we don't have time to study all the documentation. We're reduced to saying, well here are some examples of the errors the Welsh Government have made... but of course the Welsh Government will say these are trivial errors; in the grand scheme of things they'll have made no impact on the overall level of pollution.⁶⁷⁵

The environmental objectors' reactive role was further intensified by the scale of the scheme. Taken in conjunction with strict timelines and response periods, it left objectors with limited time to respond to the scheme. The NRW coordinator noted that the NRW statement was repetitive as a result of the short timeframe they were operating under,⁶⁷⁶ and supposed that the Welsh Government environmental statement was repetitive for the same reason.⁶⁷⁷ The large scale of the scheme and short time-frame of the inquiry process meant that environmental objectors had to quickly focus in on aspects of the scheme where they could respond with sufficient expertise. This underlines that opportunities to consider the wider environmental impact of the scheme were limited.⁶⁷⁸

5 Environmental objectors' response to processes of compartmentalisation

This chapter has outlined a theoretical and empirical basis for the claim that rationalist approaches to decision-making require processes of compartmentalisation and that this adversely impacts the treatment

⁶⁷² ABP is the owner, operator and statutory harbour authority for Newport Docks. They own and operate 21 separate ports across England, Wales and Scotland. They were objector to the scheme due to the impact it would have on port operations. Matthew Kennerley, *The M4 Corridor around Newport Public Local Inquiry: Proof of Evidence Matthew Kennerley: Associated British Ports: Principle Witness* (2017) 4

⁶⁷³ Brian Meechan, 'Newport's M4 relief road delayed and to cost £135m extra' (*BBC News Wales*, 2017) <<https://www.bbc.co.uk/news/uk-wales-42425803>> accessed 8 February 2019

⁶⁷⁴ BM Interview 12 July 2018

⁶⁷⁵ MW Interview 14 December 2017

⁶⁷⁶ Highways (Inquiries Procedure) Rules 1994, s 26(4)

⁶⁷⁷ JP Interview 8 November 2018

⁶⁷⁸ JP Interview 8 November 2018

of the environment in decision-making processes. Analysis has drawn upon the experience of the M4CAN inquiry in exploring these claims. It is important to recognise however that the processes considered in this chapter are not impassive and unyielding structures, and that the environmental objectors at the inquiry were not passive pawns, stuck in a process over which they had no control. Environmental objectors were more than aware of the challenges posed by these processes. In fact, they sought to disrupt them. This ‘push back’ will be the final subject of investigation in this chapter.

5.1 Unique response of environmental objectors

We knew we couldn’t defeat this if we just stayed in our little silo and said, you’re going to destroy wildlife, because they knew they were going to do it. We could have just said, our witnesses... [will] say that your mitigation is terrible, because it is, but I doubt that they would have cared. There’s provision within planning policy that you’ve got weigh up... will the economic development outweigh the environmental harm? And virtually anything that government or business propose, they will always say, the economics work out, so we’re trashing the environment because, we got some jobs out of it, or people will get somewhere faster...⁶⁷⁹

Throughout their submissions to the inquiry and cross-examinations, GWT consistently advocated for a holistic approach to environmental impact; this was encapsulated in their closing statement.⁶⁸⁰ This was a deliberate strategy to counter processes of compartmentalisation at the inquiry. Counsel for GWT highlighted that this strategy relied on there being a person available to coordinate the effort, to liaise with the various environmental organisations objecting to the scheme, with pro-bono legal support and with expert witnesses. This is a role that someone carved out for themselves; it is not an established role in public local inquiries.⁶⁸¹ In fact, many interview participants considered the approach taken by GWT in this inquiry to be quite unique.

5.2 Taking a wider perspective

What never happened in the inquiry was to take a global or a national view; the virtual entire inquiry was about this road... so in the closing statement I talked about the global biodiversity loss, and this was part of it, and I talked about the UK biodiversity loss, and this was part of it, and I talked about the Welsh biodiversity loss, and this was part of it, and I talked about the loss of, impact on the Gwent Levels, from other development, and this was part of it.⁶⁸²

In the extract above, the GWT coordinator notes that the purpose of the closing statement was to introduce broader perspectives into the inquiry. This strategy responds to some of the issues explored in this paper, for example the difficulty in taking global environmental impacts into consideration at the inquiry. It certainly seemed to sit outside the typical inquiry process. What made environmental objectors in this case decide to do this? Were there opportunities that enabled this approach?

⁶⁷⁹ JB Interview 18 October 2018

⁶⁸⁰ Fieldnotes 27 September 2017

⁶⁸¹ BM Interview 12 July 2018, “...it was so important to have someone in that role and I don’t think you would get that and things like that you have a sense of public inquiries... I don’t think that’s normal...”

⁶⁸² JB Interview 18 October 2018

Wales, and the world, are facing a ‘man-made perfect storm’ of truly cataclysmic proportions, comprising synergistic crises of: catastrophic climate change (devastating hurricanes, droughts, floods, heatwaves and irreversible sea level rise), and the mass extinction of biodiversity... representing a “frightening assault on the foundations of human civilisation”.⁶⁸³

For many environmental objectors, the decision to implement a strategy that emphasised the wider context of the scheme was a moral imperative, directly related to the precarious state of the environment. Illustrated above, the GWT closing statement underlined the connections between this scheme and the global environmental context; it further drew upon the NRW State of Nature Report for evidence on the troubling state of biodiversity in Wales.⁶⁸⁴ This sense of urgency came through in many of the interviews, illustrated below:

There’s a lot more to play for than just, whether or not they plant X metres of hedgerow or dig X kilometres of ditch in mitigation for that they destroyed and so on. I think the context for everything is of course the biodiversity crisis. If you look at the State of Nature reports, what’s obvious is that the good stuff that’s left is now isolated and under threat, so in a way, we have to fight tooth and nail for what we’ve got.⁶⁸⁵

5.3 The Wellbeing of Future Generations Act 2015

How do we make a sustainable Wales? We don’t make a sustainable Wales by building a motorway across a fragile wetland habitat.⁶⁸⁶

GWT strategy was inspired by the context of the global environmental crisis. It was further enabled by WFGA. WFGA aims to move Wales towards a more sustainable future, and to re-envision the way in which policy priorities are balanced;⁶⁸⁷ it is hardly surprising therefore that this Act became a focus of inquiry attention. The contested interpretation of the Act was evident during the evidence of the GWT expert witness on sustainable development.

Professor Marsden began his evidence with the definition of sustainable development set out in the 1987 Brundtland Report, which emphasised the importance of finding ‘new ways’ to approach problems concerning the environment, the economy and society.⁶⁸⁸ He described that the Wellbeing of Future Generations Act 2015 as a response to the fact that “problems are becoming A much more urgent and B much more complex”.⁶⁸⁹ Professor Marsden is a good speaker; the inspectors seemed to be listening intently to what he was saying, writing notes from time to time. The counsel for GWT prompted him on the detail

⁶⁸³ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 4 [emphasis in original]

⁶⁸⁴ Fieldnotes 27 September 2017; *ibid* 17

⁶⁸⁵ IR Interview 23 January 2018

⁶⁸⁶ MW Interview 14 December 2017

⁶⁸⁷ Wellbeing of Future Generations Act 2015; Howe (n415)

⁶⁸⁸ Fieldnotes 27 September 2017; World Commission on Environment and Development, *Our common future* (OUP 1987) 16

⁶⁸⁹ Fieldnotes 27 September 2017

of the issues facing the environment, underlining the urgency of the global environmental context. Professor Marsden highlighted that the global context could not be extricated from the local context of the scheme,

‘Wales is a small country, the UK is a small country, the globe is small, and getting smaller’.

Moving to the scheme, Professor Marsden was asked whether he thought it was sustainable.

‘No, I don’t think it is’.

He thought it was an ‘interesting test case for implementing a framework for sustainability in Wales’, and that it was a dangerous moment; he argued that Wales could not afford to link itself to ‘legacy developments’ that would lock Wales into a carbon-based economy. In their cross-examination, counsel for the Welsh Government questioned Professor Marsden on the differing interpretations of the Act, trying to pin him down on whether he thought that the Welsh Government was ‘in breach’ of the Act. Uncomfortable with this phrase, Professor Marsden contended that he did not think the scheme adhered to the ‘spirit, goals, and ways of working of the act’. He argued that the Act could be understood as a ‘set of regulations and as a change in perspective and mission’ and spoke more to this second aspect of the Act.⁶⁹⁰

Whether by providing hooks for a legal argument, or by setting out a new approach to sustainable development, WFGA was cited by several environmental objectors as a crucial tool in their arsenal.⁶⁹¹ However, while this Act provided an opportunity, it was unclear, untested and hard to use. Furthermore, it was a new addition to an existing environmental legislative context; inquiry actors were adept at using existing mechanisms and unsure how to use the Act. This is illustrated below:

WFGA brings in wider considerations, but because all this primary legislation that we were still working with requires us to advise very specifically, that’s what we’re focused on... and that sort of wider consideration I think, because it’s new legislation those kind of ideas, those Welsh Government requirements haven’t really been tested, and I guess, this was a test ... I mean, it was in my evidence... I can’t remember the wording in terms of what was required... that sort of wider ecosystem consideration, so, I had something in my evidence about that but yeah, I was nervous of getting questioned on that, I don’t really know what’s now required.⁶⁹²

This description illustrates the discomfort in using the Act felt by some of the inquiry actors; it suggests that in the two roles of the Act outlined above, as a ‘set of regulations’ and ‘as a change in perspective and mission’, environmental objectors at the inquiry were better able to use the Act as a ‘change in perspective and mission’.

⁶⁹⁰ Fieldnotes 27 September 2017

⁶⁹¹ IR Interview 23 January 2018, “...what we decided in the context of the change of direction of Welsh government legislation towards sustainable development was to broaden the scope of our opposition...”

⁶⁹² JP Interview 8 November 2018

1 Rationalism in decision-making requires processes of abstraction

Before examining how processes of abstraction might have emerged at the M4CAN inquiry, this chapter briefly considers the theoretical basis for the claim that rationalism in decision-making encourages processes of abstraction. As the theoretical groundwork for this thesis has been set out in Chapter 2, the purpose of this section is to highlight some key elements and to signpost the reader to sections of the theoretical groundwork chapter that more substantively engage with these theoretical elements. This section traces out the theory supporting the argument that rationalist assumptions, present in decision-making processes, encourage processes of abstraction. The theoretical basis for this argument is rooted in the following two claims:

- Abstraction produces and is a product of dualisms inherent in rationalist philosophy
- The rationalist tendency towards abstraction is encouraged in decision-making processes.

1.1 Abstraction produces and is a product of dualisms inherent in rationalist philosophy

Explored in Chapter 2, enlightenment rationalist philosophers prioritise the mind over the body; this is a fundamental dualism in rationalist philosophy. The mind is the rational part of the human; it can therefore use reason, and connect with the infinite.⁶⁹³ Enlightenment rationalist philosophers, notably Descartes, contend that ideas have an innate source (i.e. intellectual, from the mind) or an invented source (i.e. sensory, from the outside world).⁶⁹⁴ A division is thus established between rational and empirical knowledge. Rationalist philosophy understands the world by seeking out and describing universal concepts. It proposes a way of understanding the world that looks for universal truths and seeks to be objective; it necessarily understands its object of study as existing outside of its embodied reality. Certain fields of scholarship, noted below, are critical of this tendency within rationalist thought; in consequence they seek to bring specific, embodied reality back into theoretical understandings of the social world.⁶⁹⁵ There are tropes within rationalist thought that eco-feminist scholars argue perpetuate damaging assumptions that harm women, nature and discriminated groups; these include “the autonomous self of liberal theory, the rational egoist of market theory, [and] the falsely differentiated self of object-relations theory”.⁶⁹⁶ Eco-feminists and new materialist theorists explore connections between mind-body dualism, human-nature dualism and theory-materiality dualism; they argue that these dualisms need to be dismantled in order to develop an

⁶⁹³ This is explained in greater detail in Chapter 2, section 2.1.

⁶⁹⁴ Newman (n8) 181

⁶⁹⁵ Frost (n228) 75; P Hinton, “Situated knowledges’ and new materialism(s): rethinking a politics of location’ (2014) 25(1) *Women* 99, 100; Section 5 in Chapter 2 considers new materialist and feminist thought and their criticisms of this tendency within rationalist thought.

⁶⁹⁶ Plumwood (n217) 6

understanding of nature that is not mechanistic.⁶⁹⁷ They maintain that this inter-related view of the world enables a richer understanding of environmental value and would facilitate rights being accorded to the natural world.⁶⁹⁸ Further, these theorists advocate for research that moves away from abstracted and generalised perceptions of reality and considers particular, situated knowledge.⁶⁹⁹

Reason-emotion dualism is prominent in rationalist philosophy. It is evident in administrative decision-making processes where it is embedded by processes of rationalisation, highlighted by Brubaker below:

In the domain of administration, rationalisation entails dehumanisation: it requires the complete elimination from official business [of] love, hatred, and all purely personal, irrational and emotional elements which escape calculation.⁷⁰⁰

This dualism is evident in administrative and legal decision-making processes in their focus on objective, reasonable evidence and in their discouragement of emotive evidence.⁷⁰¹ As highlighted by feminist and new materialist scholars, this dualism does not take into account ways in which human actors experience and employ reason and emotion simultaneously.⁷⁰² Moreover, the ‘emotion’ in this dualism typically encompasses some types of emotion, and not others.⁷⁰³ What then are the types of emotion that are more acceptable in decision-making contexts? Which emotions are privileged, and which are dismissed?

Eco-feminist theorists contend that human-nature, mind-body and reason-emotion dualisms are implicated in one another.⁷⁰⁴ Plumwood argues that abstract considerations of nature cannot account for the full value of nature, and contends that caring for nature and recognising our embodied reality is out of step with Western liberal theory and requires a different way of understanding the world and the human-nature relationship.⁷⁰⁵

1.2 This tendency towards abstraction is encouraged in decision-making processes

Rationalist assumptions within decision-making processes tend to prioritise abstracted arguments that rely on universal claims. This is proposed in Habermas’s theory of communicative rationality,⁷⁰⁶ in which he contends that we persuade one another of our point of view by adhering to recognised validity-claims. Habermas argues that validity-claims are time and context specific, but that the validity they assert is

⁶⁹⁷ See Chapter 2, section 5.1; for new materialist scholarship on this topic, see Frost (n228). For an example of eco-feminist work here, see Plumwood (n176)

⁶⁹⁸ Plumwood (n217) 18

⁶⁹⁹ Ibid 6; Jane Bennett discusses the ethical implications of this change in perspective in research, see Chapter 2 section 5.3.

⁷⁰⁰ Brubaker (n71) 3

⁷⁰¹ Latour (n201) 212

⁷⁰² This is discussed in further detail in Chapter 2 section 5.

⁷⁰³ Renata Grossi, 'Understanding Law and Emotion' (2015) 7 *Emotion Review* 55, 57

⁷⁰⁴ This is considered in greater detail in Chapter 2, section 5.2.

⁷⁰⁵ Plumwood (n217) 16

⁷⁰⁶ This is discussed in more detail in Chapter 2 section 2.2

universal.⁷⁰⁷ Habermas contends that when we engage in reasonable argument, we call upon universal principles that give weight to our claims.⁷⁰⁸ This perspective assumes a level of objectivity; it proposes a view of arguments and of 'arguing actors' where the actor is prepared to be persuaded of the 'better argument'.⁷⁰⁹ However, what makes a better argument and what makes a more persuasive argument are different propositions; these differences are magnified in the everyday reality of decision-making processes. What makes a more persuasive argument is specific to particular contexts and to the internal processes of the people being persuaded, therefore it is difficult, if not impossible, to evaluate. Hanrieder notes that the universality of claims is assessed as a means of gauging which argument is more persuasive. She worries that this claim to universality hides the normative judgements underlying these assessments.⁷¹⁰ As dominant structures can lay a claim to universality to justify oppressive behaviour, this ambiguity might further perpetuate power inequalities.⁷¹¹

The last point to consider here is whether there is a particular tendency towards abstraction within legal decision-making processes. Chapter 5 explored the ways in which law compartmentalises. Some theorists argue that law also generalises and abstracts. It does this by taking concrete cases and through legal reasoning abstracting them to principles.⁷¹² Similarly, and more applicable to common law systems, the law arguably judges the parties before it as abstract and equal beings, their particularities disregarded, and against general standards applicable to all.⁷¹³ While this is argued to be a fair and necessary function of law, it can also be unfair; when people and their circumstances are different, it can be unfair not to acknowledge these differences and to treat them as uniform subjects.⁷¹⁴ It is argued that participatory decision-making processes can disrupt these tendencies towards abstraction and being different forms of evaluation into the frame. Public participation can enable concrete, specific concerns to be considered alongside arguments based on abstract legal principles.⁷¹⁵ The following section turns to the M4CAN inquiry; it will assess whether processes of abstraction were evident at this inquiry, and whether the inquiry as a mechanism for public participation provided a means of incorporating situated knowledge into the decision-making.

⁷⁰⁷ Outhwaite (n23) 16. This notion of intersubjective reason, how reason can be reached through communication is explored in more detail in Chapter 2, section 2.2.

⁷⁰⁸ Hanrieder (51) 400

⁷⁰⁹ Ibid 393

⁷¹⁰ Hanrieder (51) 390

⁷¹¹ See Chapter 2, section 5.2.3

⁷¹² Weber (n61) 655; this is discussed in further detail in Chapter 2 section 2.3.

⁷¹³ William Lucy, 'Abstraction and the Rule of Law' (2009) 29 *Oxford Journal Of Legal Studies* 481, 482

⁷¹⁴ Ibid 491

⁷¹⁵ Davies (n119) 97; this is discussed in further detail in Chapter 2, section 3.

2 How did processes of abstraction work at the inquiry?

This section proposes that the M4CAN inquiry abstracted the particular experience of nature on the Gwent Levels. The inquiry could feel removed from people's everyday lives; processes of the inquiry could sometimes intimidate participants and could narrow the kinds of testimony that felt appropriate. This was evident in the processes of the inquiry, including inquiries' formal and informal procedures and inquiry documents. The treatment of different kinds of knowledge at the inquiry further illuminated these processes of abstraction.⁷¹⁶ Previously noted, public participation is seen as a means of grounding decision-making processes and diversifying the forms of knowledge feeding into them. The section closes with an examination of how public participation and emotional responses were managed at the inquiry.

2.1 The processes of the inquiry

2.1.1 *The inquiry as a legal procedure*

21 March 2018, M4CAN inquiry

It is a sunny day in March, and the day of NRW's closing statement. It is a morning session; we are in the smaller room downstairs. Their counsel begins reading the statement. He notes that this would be a brief statement; this was unexpected, a consequence of the extent of agreement reached between WG and NRW. He goes through the remaining objections. Nearing the end of the statement, counsel for NRW states that a certain point is not central to the NRW case. Counsel for WG states that they recognise this. The inspector states that he recognises this. They then put on record the thanks and appreciation of both sides and NRW evidence at the inquiry is thus closed.⁷¹⁷

The formality of the inquiries' legal processes could make the inquiry feel somewhat removed from people's everyday lives.⁷¹⁸ This formality is evident in the small extract above. This sense of detachment was exacerbated by the fact that the rules of inquiry etiquette⁷¹⁹ were not known equally by all who attended. Objectors further noted that the legal language of the inquiry could make it feel a little abstract;⁷²⁰ it could also feel intimidating.⁷²¹ The NRW coordinator recalled her reaction when their counsel in preparing their case used legal terminology:

It just makes you feel, gosh, is this just like going to be in court?! It is the terminology that is then used in the inquiry I suppose, your evidence in chief and cross-examination, all of these kinds of terms sort of makes you, ooh! So, that side of things is daunting.⁷²²

⁷¹⁶ The treatment of resident and expert testimony at the inquiry is further discussed in Chapter 5, section 2.1.

⁷¹⁷ Fieldnotes 21 March 2018

⁷¹⁸ AP interview 8 January 2018; this is similar to tendencies observed by Latour observed in the similar (if especially formal) context of the Conseil D'Etat. Latour (n201) 244

⁷¹⁹ This includes but is not limited to who was allowed to speak and when, and whether a member of the public could request a copy of the evidence under examination.

⁷²⁰ JD Interview 1 November 2018, "...I can understand exactly why the local residents were frustrated was unless you're sitting in the inquiry, every day, you haven't gotten a clue exactly what's going on..."

⁷²¹ IR Interview 23 January 2018

⁷²² JP Interview 8 November 2018

Participation in the everyday business of the inquiry required a certain amount of practical accomplishment.⁷²³ Language at the inquiry was generally formal. There were terms that would be unknown to a person unfamiliar with inquiry processes, e.g. ‘evidence in chief’, ‘statement of common ground’, and terms that required knowledge of the planning process in Wales, such as ‘environmental impact assessments’, WelTag,⁷²⁴ and ‘compulsory purchase orders’. There were also implicit language codes; the broadly similar way that the inspector would begin and end the sessions, and the way counsel would bring forward different areas for examination. These codes, in their formality, regularity and professional character, contributed to the inquiry feeling ‘legal’ and in this way removed from a lay-person’s everyday experience.⁷²⁵

There were unseen actions that facilitated the smooth running of the inquiry; practicalities like making sure the room was ready and ensuring the inspectors had the evidence beforehand. Every day the inquiry was in session, additional duties were identified and allocated, often by the inspectors to the Welsh Government Chief Witness,⁷²⁶ to ensure the inspectors would have everything they needed to make their recommendation; e.g. testimony was stopped so the inspectors could ask for a map of the area in question,⁷²⁷ and amendments to evidence were highlighted to be included as inquiry documents.⁷²⁸ There was work that was necessary for ‘doing’ an inquiry; then there was doing the inquiry well. Interview participants highlighted moments where they or others demonstrated effective ‘inquiry-work’. One resident suggested that as legal professionals had good memories and were comfortable with formal process and technical detail, they had an advantage over lay-participants.⁷²⁹ Another participant noted the attention to detail required of an inquiry witness, described below:

[One had to be] very organised with the papers you needed, and I was really pleased actually that that went well, I had everything I needed to hand... I felt that if I could get to the information she was asking about before she did, somehow that’d make you feel good... so that side of things was really important, you know, I’m not a super-organised person but I realised I needed to be for that.⁷³⁰

This demonstrates that participating in the inquiry required preparation; a level of organisation, a comfort with legal language and spaces would also be helpful. These aspects of participating in the inquiry were typically overlooked; their impact is explored in greater detail in section 4 of this chapter.

⁷²³ By accomplishment I mean the practical work and existing knowledge that constitutes social interactions. The methodological approach underpinning this perspective is described in Chapter 4, section 2.2.

⁷²⁴ Welsh transport appraisal guidance (WelTAG)

⁷²⁵ This speaks to work in legal consciousness (See Silbey (n455) and (n459)); this field of scholarship provides valuable insights for this research but is not the focus of the thesis. The contributions that this research makes to this field of research will be explored in future work.

⁷²⁶ This role is briefly explained in Chapter 4, section 1.

⁷²⁷ Fieldnotes 13 December 2017

⁷²⁸ Fieldnotes 26 April 2017

⁷²⁹ AP Interview 8 January 2018, “...they’ve got legal brains and obviously have good memory banks...”

⁷³⁰ JP Interview 8 November 2018

2.1.2 Documents as abstraction

A significant amount of inquiry time and energy was spent on inquiry documents. It would not be entirely accurate to say this ‘stood out’ in my memory, as the business of documents at the inquiry was so mundane that it barely seemed worth including in fieldnotes. A lot of time was spent ensuring the inquiry library was up to date. The inspectors would check every new addition to the inquiry library, submit inquiry questions and request documents. This was called ‘housekeeping’; the chief witness for the Welsh Government seemed to be in charge of this. Examples of ‘housekeeping’ duties included: corrections to existing documents;⁷³¹ highlighting where there was a difference between what a witness said and the document said;⁷³² additions to the library;⁷³³ whether an inquiry document was the Welsh or English version of the document;⁷³⁴ identifying letters whose origins were unclear;⁷³⁵ clarifications on legal designations;⁷³⁶ and so on. One of the key reasons that the inquiry focused on documents was to ensure that everyone had the most up-to-date information. For witnesses, it was important that they could ensure their evidence was up-to-date and that they could justify their expert position with reference to documents. For the inspectors, it was linked to the threat of judicial review;⁷³⁷ it was essential that inspectors could justify their position and that they had all relevant and up-to-date information to hand as they made their recommendation.

I would suggest that this focus on documents at the inquiry illuminates the processes of abstraction at play.⁷³⁸ Inquiry time was focused on the documents that set out the evidence of the parties, creating a sense of detachment between the affected area and community and inquiry arguments. Documents could also act as a barrier between the facts of the scheme and the members of the public. Documents could seem inaccessible or convoluted; in one session, the inspector laughed as he noted that one supplement to the environmental statement included both an update and an addendum.⁷³⁹ Inquiry documents could be intimidating, exacerbated by their inaccessibility. They could be hard to find and hard to read. They could intimidate members of the public who were interested in some aspect of the scheme that affected their land. The size of the library could also be intimidating. As highlighted by one objector, the sheer number of possibly relevant documents could be overwhelming:

I can imagine the average resident being totally daunted because if you’re living on the route... there are so many documents that will potentially have some relevance to the... immediate area that you’re concerned with on a linear scheme like that.⁷⁴⁰

⁷³¹ Fieldnotes 26 September 2017

⁷³² Fieldnotes 13 December 2017

⁷³³ Fieldnotes 26 September 2017

⁷³⁴ Fieldnotes 26 April 2017

⁷³⁵ Fieldnotes 26 September 2017

⁷³⁶ Fieldnotes 5 December 2017

⁷³⁷ Town and Country Planning Act 1990, s 288; Government Legal Department (n244) 60

⁷³⁸ For a richer exploration of documents in law, read: Latour (n201) 202

⁷³⁹ Fieldnotes 5 December 2017

⁷⁴⁰ JD Interview 1 November 2018

Documents could be intimidating for people giving evidence at the inquiry because they increased the level of preparation required. This was highlighted when discussing the testimony of the GWT witness.⁷⁴¹ His manager described the amount of preparation required to give evidence with a degree of confidence, and to counter what they considered to be errors in the Welsh Government statement:

The thing to remember that's missing from, (thumps the table) the analysis, when you focus on the process of the inquiry, is the volume (thump) of paperwork (thump) behind it (thump)... it is astonishing. I mean it's, astonishing... if you're talking about public participation, the sheer intimidation of the paperwork, I mean that's one of the key elements; who in this day and age has the time to sit there and read all that stuff?⁷⁴²

It is to be expected that in a scheme of this consequence and cost the witnesses taking part in the inquiry should do their 'homework'. However, there is some concern that the high number of documents required in some decision-making processes excludes the public from decision-making.⁷⁴³ Furthermore, it highlights the financial inequality of inquiry participants. Where substantial preparation is needed for effective participation, it is relevant if some participants get paid for doing their homework and some do not. The actors who have the time and resources to undertake comprehensive preparation are at a considerable advantage.⁷⁴⁴

2.1.3 *Vocalising as abstraction*

The inquiry was performed by its actors;⁷⁴⁵ this formal, performative element further distanced the inquiry from everyday experience. It seemed an important aspect of the inquiry process that evidence was said out loud.⁷⁴⁶ This would include complex, detailed evidence. This was particularly striking in the case of the Welsh Government closing statement; this document ran to 529 pages and took a day to 'speak'.⁷⁴⁷ Inquiry actors spoke normally at the inquiry; they also 'orated', which could seem a little strange. This was highlighted at the start of the Welsh Government closing statement, where the Queen's Counsel was chatting through inquiry business, then took a pause and 'began', "The M4...".⁷⁴⁸ This kind of tone-change highlighted the inquiries' performative aspect. As Goffman notes, performance is an element of all everyday social interactions; it is for the benefit of other people.⁷⁴⁹ When vocalising stood out, it seemed to underline the formal nature of the inquiry. It highlighted that the inquiry is both a process, a mechanism for evaluating

⁷⁴¹ The level of preparation required was noted by several participants; interview participants in the Planning Inspectorate and the WG counsel agreed participation required considerable preparation, but felt this was an unavoidable aspect of the inquiry, as evidence needed to be tested and witnesses needed to be challenged. AMC Interview (SII) 24 July 2019; TT Interview (SII) 16 August 2019; ME Interview (SII) 24 September 2019

⁷⁴² IR Interview 23 January 2018

⁷⁴³ This is discussed in Chapter 3, and in: Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 *Journal of Environmental Law* 33, 60; Sheila Jasanoff, 'Transparency in Public Science: Purposes, Reasons, Limits' (2006) 69 *Law and Contemporary Problems* 21

⁷⁴⁴ This is explored in greater detail in Chapter 8, section 5.2.

⁷⁴⁵ This is considered in greater detail in Chapter 4.

⁷⁴⁶ The broader context for this is discussed in Chapter 3, section 3.3.

⁷⁴⁷ Fieldnotes 28 March 2018

⁷⁴⁸ Fieldnotes 28 March 2018

⁷⁴⁹ Goffman (n479) 28

information and coming to a decision, but also a product, a performance. Inquiry actors did a lot of preparation and relied on a lot of props, e.g. documents, room layout, to perform their roles; for example, the inspectors were aided in their ‘judge’ role by their position in the room and the dais upon which they were seated. Not all participants at the inquiry could play these roles or had access to these props or this preparatory work.⁷⁵⁰

What was the function of evidence being said out loud? It served a legal purpose; participants who gave oral testimony as opposed to written testimony were afforded more rights; it was understood by inquiry participants that a person could cross-examine a witness only if they had made themselves available for cross-examination.⁷⁵¹ For the inspector, it would seem that speaking out loud was bound with notions of fairness. On one occasion the inspector stated that he said something so that it was ‘noted as said in the inquiry’; this despite the fact that there was no inquiry stenographer.⁷⁵² Despite much of the evidence being of a level of complexity that it would be extremely difficult to understand were one to listen to it once, inquiry time was devoted to evidence being said out loud.⁷⁵³ However, inquiry actors who were required to understand the evidence, i.e. legal teams and the inspectors, had copies of the evidence beforehand, and often read along as the person was giving evidence. This availability of documents and the practice of ‘speaking out’ evidence at the inquiry thus served to differentiate participants, and made it more difficult for lay-people to engage with the process.

2.2 Treatment of knowledge at the inquiry

2.2.1 *Local knowledge*

So, this field, that field, the field over there, the one beyond and the one on the left, is all part of the reserves ... and this is the pylon which was turned into a tree...⁷⁵⁴

⁷⁵⁰ For example, it was harder for some participants to access the evidence under discussion that day (it would be unlikely that infrequent attendees would know what evidence was being examined that day, or would know that they could ask the programme officer for copies of the evidence); inquiry officers moved around the backstage area of the inquiry, members of the public did not.

⁷⁵¹ Several interview participants noted this rule. The Highways (Inquiries Procedure) Rules 1994 s 24(3) notes that the appellant, local planning authority and statutory parties are entitled to call evidence and to cross-examine other persons giving evidence, but that other people who want to call evidence or cross-examine other persons giving evidence can do so only at the inspector’s discretion. Inquiry procedure is set by regulation and by the common law principles of natural justice, Moore (n250) 348. In order for the process to be fair, a person who wishes to cross-examine should leave themselves available for cross-examination as well. This is implied in the Welsh Government Closing Statement, where it notes that, “GWT led no evidence on water voles. Nevertheless... they were permitted to cross-examine [WG Witness] on his proof”. Morag Ellis QC on behalf of the Welsh Government (n348) 271

⁷⁵² Fieldnotes 26 September 2017

⁷⁵³ Fieldnotes 14 December 2017

⁷⁵⁴ RB Interview 13 August 2018



Figure 7: Tree-pylon at Barecroft Common, 13 August 2018

One moment concerning local knowledge stands out at the inquiry, from the testimony of the GWT reserves officer. His manager recalls this moment below:

They said I refer you to this map, and he said well I'm not going to comment on this map, and they said why, and he said it's been doctored and they said, What are you talking about?! And he said well, go three fields to the left of the thing that you're looking at and you'll see a big tree in the middle of a field casting a long shadow; can you see that? The whole room, including the planning inspectors were looking at it, [said] yeah. He said, that's a pylon. You've photo-shopped a tree over a pylon which means the entire map is doctored so I'm not commenting on it.⁷⁵⁵

The reserves officer remembers it like so:⁷⁵⁶

I'd taken some screen grabs of their video [and] I started to seek an admission that screening would be, substantial form of, planting on the edge of the motorway, and ... mentioned some of what they were presenting including you know, the pylon that had been transformed by the computer graphics into a large tree. Every tree ... had been modified by computer graphics, so they must have taken a detailed overlay and composed trees to get a realistic image, but without actually knowing the trees in the area, or the pylons even, it would be hard for an external person to spot that I suspect.⁷⁵⁷

⁷⁵⁵ IR Interview 23 January 2018

⁷⁵⁶ See Chapter 4, section 4.2.2: while I was there on this day and I remember the moment, I do not mention it in my fieldnotes. I remember the moment as an embarrassment to WG, but I did not recognise its greater implications. This, while a little frustrating, is unsurprising. As an ethnographic researcher, I am making fieldnotes while the findings of the analysis are unknown to me.

⁷⁵⁷ RB Interview 13 August 2018

This was a funny moment at the inquiry; the GWT chief executive recalls seeing the inspector smile, and it was mentioned in both interviews with some laughter. The key point comes at the end of the extract. 'Without knowing the trees in the area', no one would notice the difference. This highlights the importance of deep knowledge of the local environment. The reserves officer felt there was a lack of faithfulness to the specific detail of the area that he identified as a result of his in-depth knowledge of the land in question.

The Welsh Government evidence on the screening of the motorway was based not on specific knowledge of the land in question but on an image which, by some error committed on a computer, did not provide an accurate representation of the land. This suggests an undervaluing of local, situated knowledge. However, some participants, for example the NRW coordinator, felt that local knowledge was taken seriously.⁷⁵⁸ There were a few moments where practical knowledge was privileged; the inspector explicitly noted that he found grounded detail important for his understanding of a particular issue. Explaining his desire to conduct a site visit to the farm of a statutory objector, he noted that, 'There's some fog in my mind [on this matter]; there's no substitute for looking over the hedge [and seeing it first-hand].' Public local inquiries are held as a means of bringing local knowledge into broader issues of public policy.⁷⁵⁹ There is some confusion then, regarding the value of local, situated knowledge and the abstracted knowledge of experts. This is evident in the following extract, which describes a moment where local knowledge was treated with weight at the inquiry.

A councillor and four residents are giving evidence. It is late afternoon. Members of the inquiry are stood around a table in the centre of a room, looking at a map; expert witnesses, the councillor, residents, inspectors and legal teams. The councillor and residents were discussing the tranquillity of a particular area. They say that the scheme will have an adverse impact on the tranquillity of the area. However, the Welsh Government witness notes that the area was not that tranquil. The inspectors say that they had conducted a site visit to that area and agreed it was not particularly tranquil. Then one of the residents, a local farmer, with some hesitation, asked the inspector, 'Can I ask what time you visited?' The Inspector thought for a second and answered, 'Approximately 2.30pm'. 'So, close to the shift change then'.

Attention heightened around the table as it was evident that neither the inspectors nor the expert witnesses had taken this piece of local knowledge into consideration, that local factory workers finished and began their shifts at this time and so the roads would be busier.⁷⁶⁰

This is an example of local, experience-based knowledge being considered at the inquiry. This piece of knowledge provided by a local resident was greeted with some surprise by inquiry actors however, suggesting that this treatment of local knowledge as equivalent to expert knowledge was anomalous.

⁷⁵⁸ JP Interview 8 November 2018

⁷⁵⁹ Forsyth and Wade (n260) 806

⁷⁶⁰ Fieldnotes 27 June 2017

2.2.2 Local knowledge vs expert knowledge

Residents and experts were treated differently at the inquiry.⁷⁶¹ This was explicitly required in accordance with equality of arms;⁷⁶² it was held to be unfair to subject a resident to the rigorous cross-examination faced by an expert witness.⁷⁶³ However, some interview participants noted that this distinction was ignored when a resident ‘acted’ like an expert, for instance when they conducted studies (as in the case of RW⁷⁶⁴) or when they analysed academic sources.⁷⁶⁵ This difference was augmented by the different kinds of knowledge presented to the inquiry by these two groups; residents would often present knowledge that dealt with the detail of their local area, highlighted below:

You wheel out a world expert on stone curlews, and you’ve got the locals turning up and saying well I disagree with that because I’ve got them at the end of my garden... and that’s really difficult because the expert is looking at the overall trends.⁷⁶⁶

To treat local and expert knowledge differently, they first needed to be identified. The first section of a proof of evidence submitted by a witness to the inquiry outlined their academic and professional background and their justification for presenting to the inquiry.⁷⁶⁷ Some participants wondered what weight was attached to this kind of identification, this ‘big long string of letters’.⁷⁶⁸ Others noted that they consciously avoided discussing their background at the inquiry because they did not want to be flagged and thus treated like an expert, as they did not feel qualified to be treated as such.⁷⁶⁹ While this helped to delineate local and expert knowledge, this distinction was not always clear; for example, the GWT reserves officer could be classified as an expert witness whose expertise was primarily based in his local knowledge. This suggests that the division between these kinds of knowledge could be somewhat blurred, as something that was produced and maintained by inquiry participants.⁷⁷⁰

Different witnesses brought different kinds of environmental information to the inquiry; expert witnesses typically described the generally observable trends for that species/habitat, while residents had a clearer understanding of the particular idiosyncrasies of the area. These kinds of knowledge would be useful to the inquiry on different issues. The inquiry concerns a large scheme with long-lasting environmental

⁷⁶¹ This is further discussed in Chapter 5, section 2.1.

⁷⁶² Equality of arms requires under Article 6 of the European Convention for the Protection of Rights and Fundamental Freedoms that parties have a fair balance of opportunities in litigation; i.e. that both sides can cross-examine witnesses. *re F (A Child) (Financial Provision: Legal Costs Funding)* [2016] 1 WLR 4720, 4724

⁷⁶³ AMC Interview (SII) 24 July 2019; ME Interview (SII) 24 September 2019

⁷⁶⁴ RW Interview 9 November 2018

⁷⁶⁵ AP Interview 8 January 2018, “she did a presentation on motorway accident statistics and she was cross-examined by Welsh Government counsel, because I think she presented almost as an expert witness...”

⁷⁶⁶ JD Interview 1 November 2018

⁷⁶⁷ Persona Associates (n550)

⁷⁶⁸ RB Interview 13 August 2018

⁷⁶⁹ RW Interview 9 November 2018

⁷⁷⁰ The criteria for assessing the value and validity of evidence employed at the inquiry by the inspectors and the means of distinguishing layperson and expert testimony had some overlap but were not one and the same; this was a complicated process of evaluation for inquiry participants, including the inspectors. This is further described in Chapter 8, section 5.

implications; the recommendations of the inspectors must be made with potential future implications in mind as well as its present-day impacts. Both kinds of knowledge, one could argue, are needed to make this kind of evaluation; what happens when these kinds of knowledge come into conflict?

2.2.3 *Maps at the inquiry*

As is evident in the extract above, the use of maps could sometimes produce exceptional moments at the inquiry. They could disrupt the hierarchy of the room layout, described below; they could also bring situated knowledge into the inquiry. In my fieldnotes of the day the reserves officer gave evidence, I noted that at the beginning of his evidence, he highlighted that the maps at the bottom of the hall were inaccurate as they had omitted some of the SSSIs.⁷⁷¹ As a result, the main inquiry actors walked down to the maps to see for themselves. They were stood around out of their typical place, and he was able to demonstrate his detailed knowledge of the area.⁷⁷² Not only did this establish his expertise, it also established the kind of expertise he had, i.e. detailed knowledge of the affected land. The use of maps further served to equalise the inquiry, highlighted in the following interview extract with an environmental objector:

Everyone has to stand shoulder to shoulder with the other side, so the expensive suit doesn't look quite so smart; you've got some poor little conservation guy who's usually out in his wellies and he's got his wedding and funeral suit he's dug out from the back of his wardrobe.⁷⁷³

Maps brought grounded knowledge into the inquiry; referring to maps highlighted a person's specific knowledge of the area and brought the inquiry down to the specific, situated detail of the area. Maps further disrupted the hierarchy of the inquiry room; people were up and out of their seats, inspectors next to residents next to counsel. This all takes place within the confines of the inquiry room however; in section 5, we move outside of the inquiry room and consider the disruptive potential of the site visits as a tool for incorporating grounded knowledge into the inquiry decision-making process.

2.3 **Participating at the inquiry**

2.3.1 *Reasonableness at the inquiry*

While the previous subsection described the treatment of knowledge, this subsection discusses the differential treatment of reasoned and emotional testimony at the inquiry. It further considers how this treatment affected the quality of participation and the diversity of response gathered at the inquiry.

⁷⁷¹ RB Interview 13 August 2018

⁷⁷² Fieldnotes 10 May 2017. The use of maps highlights that the treatment of different kinds of knowledge at the inquiry was complicated. The testimony of this witness was valued in part for its detailed, local knowledge, emphasised by his use of the maps. This data does not support a black-and-white argument that expert knowledge was always preferred over local, layperson knowledge. Rather, it shows that different kinds of knowledge, framed in different ways, were heard at the inquiry, and that these kinds of knowledge were treated in different ways for a range of reasons, and that at times this seemed to privilege expert, abstract knowledge. The nuance of this prioritising and its impacts are further explored in sections 4 and 5 of this chapter.

⁷⁷³ MW Interview 14 November 2017

Participants were encouraged to be objective and unemotional in their submissions to the inquiry.⁷⁷⁴ Most interview participants felt that emotive arguments were not effective, that they would not be persuasive. One participant felt that this was a consequence of the inquiry being a quasi-judicial procedure, subject to judicial review; “the inspectors are there to answer a question and they know that there are going to be judges over their shoulder, at the end of this”.⁷⁷⁵ Linked to this notion of objectivity and detachment is a notion of reasonableness; the inquiry ought to focus, not on what is emotive, but on “what is law, what is policy, is it a correct and reasonable application of that law and policy”.⁷⁷⁶ The inquiry process expected its participants to behave reasonably; this expectation could also be used as an adversarial weapon. The reasonableness of a participant or their evidence could be contested. I observed a tendency at the inquiry for one ‘side’ to imply, sometimes jokingly, that the other ‘side’ was being ridiculous or excessive; to take one example, counsel for the Association of British Ports (ABP) in an inquiry session in December 2017 implied that the Welsh Government were being unreasonable in making ABP wait, and countering this charge, Queen’s counsel for the Welsh Government claimed that ABP was being excessively demanding.⁷⁷⁷ This supports Nussbaum’s contention that reasonableness is a key concept in law, and one that shifts with shifting cultural norms;⁷⁷⁸ it is not a constant, instead it is constructed and contested. The GWT chief executive argued that notions of objectivity and reasonableness at the inquiry, and in Western society more generally, served to marginalise environmental advocates; a person’s arguments did not need to be credited, or countered, if they could be dismissed as the views of “an old leftie, a tree hugger”.⁷⁷⁹

2.3.2 *Emotion at the inquiry*

Following Habermas’s concept of reasoned, justified argument, one might assume that the inquiry would discourage emotion and would seek to be an objective decision-making process. This is partly true; emotion was sometimes framed as a problem at the inquiry. This framing is present in my fieldnotes when witnesses were emotive during their testimony, e.g. with the resident who I described as tearful in my fieldnotes.⁷⁸⁰ It is present in the response of the chief witness,⁷⁸¹ when asked about emotive arguments. He expected the inspectors would take the participant’s case on their merits, and that the emotion of the testimony would not be a barrier to this.⁷⁸² There was no thought that it would be a benefit. Visible emotion can influence perception of a person’s strength and power; this is demonstrated by my account of the first time I saw the Welsh Government Queen’s Counsel. I assumed that I always considered this actor to be one of the inquiry’s most powerful actors. However, the first time I saw the Queen’s Counsel I noted that they

⁷⁷⁴ Most of the time. The final section of this chapter highlights moments where objectors seemed to prefer emotive testimony.

⁷⁷⁵ JD Interview 1 November 2018. Reasonableness as a principle guiding administrative decision-making is further explored in Chapter 3, section 3.3.3.

⁷⁷⁶ JD Interview 1 November 2018

⁷⁷⁷ Fieldnotes 5 December 2017

⁷⁷⁸ Nussbaum (n202) 12

⁷⁷⁹ IR Interview 23 January 2018

⁷⁸⁰ See Chapter 5, section 2.1.1. Fieldnotes 10 May 2017

⁷⁸¹ See Chapter 4, section 1.

⁷⁸² Fieldnotes 18 July 2017

appeared ‘vulnerable’, ‘combative and harsh’.⁷⁸³ I excised this view of them as ‘vulnerable’ from my memory.⁷⁸⁴ Linked to this understanding of emotion as a vulnerability, arguments that were considered emotional were sometimes discredited. One example of this comes from the last day of the inquiry, where the Welsh Government Queen’s Counsel commented on correspondence from the local action group Campaign Against the Levels Motorway, CALM; the counsel repeatedly joked about the “uncalm comments by CALM”.⁷⁸⁵

This view of emotion at the inquiry fits with the idea that the inquiry was a detached space in which rational actors reasoned with one another, contributing to the understanding of the inquiry as an abstracted process. However, the inquiry was influenced by emotion; inquiry actors employed emotion and emotive response as a conscious tactic. Discussing what makes an argument persuasive, the GWT counsel noted that,

That’s humanity isn’t it, for all its flaws... that’s actually the way it works, in people’s minds... it isn’t a reasoned argument in the sense that, yes, people should objectively look at arguments, but they don’t.⁷⁸⁶

The GWT coordinator sheepishly acknowledged using charm to influence the inquiry, and the seeming irrationality of this approach:

You know, I would talk to the inspector about golf, and the deputy inspector about Ireland, about anything other than the inquiry! Just to get to know them on a bit more personal level, so they [would] be a bit fairer to us, further out, as we get into it.⁷⁸⁷

These two actors acknowledge the paradox in what they say; that as inquiry actors, they want to put forward the strongest, most logical case, in-keeping with the understanding of the inquiry as a rational, legal decision-making process. However, they recognise that the inquiry is a social production, and that they must also engage with inquiry actors as emotional beings.

The inquiry could elicit strong emotional reactions in its participants. For people unfamiliar with the process, the inquiry could be very stressful; it could also be stressful for those who were relatively familiar with the process. As highlighted previously, the Welsh Government Queen’s Counsel was a highly competent inquiry actor; one would assume that they felt at ease in these surroundings. However, this was not always the case. During their closing statement, the Queen’s Counsel stopped reading to have a drink of water. The inspector said he would take the opportunity to make a note of something, and the Queen’s

⁷⁸³ Fieldnotes 26 April 2017

⁷⁸⁴ In fact, I did not quite believe my fieldnotes when I returned to them and had to double-check the original notes. I cannot remember why I thought they were vulnerable. It is difficult for me to admit the possibility that unconscious bias was at play; the counsel was a woman, and this might have led me to assume they were vulnerable. They were a powerful character in the inquiry and so that idea of them as vulnerable disappeared from my memory.

⁷⁸⁵ Fieldnotes 28 March 2018

⁷⁸⁶ BM Interview 12 July 2018

⁷⁸⁷ JB Interview 18 October 2018

Counsel remarked, ‘That’s terrifying, sir’. While said jokingly, it demonstrates that this powerful actor was not immune from the nerves elicited by the inquiry process. Emotional stress was compounded for those who felt responsible for other people, powerfully evoked by the GWT coordinator:

Every time we had an expert witness being cross-examined, I felt like I was being cross-examined. I felt like my chest was constricting... I was working with our expert witnesses, I was prepping them, and I was saying, please do it because it’s really important, and then when they were getting attacked, I felt like either I’d not prepared them properly, or... they’re going through this horrendous ordeal because they’re doing me a favour! I expected them to come off the stand and go, how dare you put me through that!⁷⁸⁸

In addition to the stress induced by the inquiry’s formal nature, the inquiry could be an emotional place due to the impact that the scheme under evaluation could have on the lives and livelihoods of local participants. In interviews, participants noted that emotion was heightened when the inquiry considered the impact the scheme would have on the local community.⁷⁸⁹ This further distinguished the experience of the inquiry for residents and for expert witnesses without an emotional connection to the affected land.⁷⁹⁰

2.3.3 *Participation at the inquiry*

This is a public inquiry which has involved a large amount of technical evidence but one where people have also been able to present their cases in their own ways, assisted by the understanding of the inspectors. There has been flexibility and consideration in terms of timing appearances... to ensure that everyone who wanted to speak had the chance to do so in an atmosphere of order but not of undue formality. The Public Inquiry forum has therefore been accessible to all of those who might wish to participate.⁷⁹¹

This extract from the Welsh Government closing statement presents an idealised version of public participation at the inquiry. However, it also acknowledges the inquiry’s focus on technical detail. One resident noted that the Welsh Government knew the scheme in detail, ‘you know, entries and exits, and what sort of junctions there were’; despite being a local resident for over 40 years, she found it hard to follow.⁷⁹² This gap in understanding was sometimes, though rarely in my observation, used in order to deal quickly with lay-people’s objections; deciding what to do regarding a late alternative scheme proposed by a member of the public, the inspector suggested that the Welsh Government provide the individual with ‘one page of engineering speak’.⁷⁹³

⁷⁸⁸ JB Interview 18 October 2018

⁷⁸⁹ JD Interview 1 November 2018; BM Interview 12 July 2018

⁷⁹⁰ This reflects an understanding of the human-nature relationship that recognises an ethics of care for nature, proposed by Plumwood in Chapter 2, section 5.2.2, and speaks to scholarship in space and place geographies. Contributions this research can make to this literature, particularly in relation to the site visit (explored in section 5 of this chapter), lie outside of the scope of this thesis, but are a fruitful area for future work.

⁷⁹¹ Morag Ellis QC on behalf of the Welsh Government (n348) 173. This flags a dissonance between the understanding of the purpose of public participation in planning and its purpose, or potential, in environmental decision-making scholarship. These tensions are discussed in Chapter 8, section 6.

⁷⁹² AP Interview 8 January 2018

⁷⁹³ Fieldnotes 5 December 2017. This was in response to a late objection setting out an alternative to the proposed scheme; the inspector directed the chief witness to provide the objector with a page of ‘engineering speak’ setting out why this alternative would not be viable.

It is questionable to what extent the vision of participation outlined in the extract above chimes with the experience of lay-participants. That being said, it has been noted throughout the thesis that the inspectors made considerable effort to encourage public participation. The chief witness noted that the inspector kept an eye on levels of comprehension in the public gallery.⁷⁹⁴ The chief inspector would frequently explain more complex engineering terms in lay-person's terms, and seemed to enjoy this role. At one session, a resident asked a question concerning a temporary construction road and the risk of it being on a "high water table"; the inspector looked very pleased with the technical question and beamed at the resident.⁷⁹⁵ GWT counsel noted the effort made by the inspectors with members of the public, recalling that they remembered people's name and were patient. The counsel described his experience of other tribunals where the tribunal chair was far more passive; he felt that these inspectors genuinely paid heed to the participatory nature of the inquiry process.⁷⁹⁶

Some inquiry actors felt that the public made a valuable contribution to the inquiry. The chief witness felt that 'public involvement' in a scheme provided a cross-section of views, and increased awareness and support for the proposed project.⁷⁹⁷ The NRW coordinator recalled a particular resident whose point "really hit home with the inspectors".⁷⁹⁸ Others spoke about their pride in seeing the commitment of some members of the public.⁷⁹⁹ Ms Picton was specifically mentioned by inquiry actors; this is hardly surprising. By her own reckoning, Ms Picton attended 70-something of the 83 sessions.⁸⁰⁰ In closing the last session of 2017, the inspector paid special tribute to Ms Picton, stating, "on behalf of the inquiry fraternity, thank you", noting that there were times when she was the only person in the public gallery and that she "kept us proper".⁸⁰¹ Ms Picton received further recognition in the Welsh Government closing statement, highlighted below:

Mrs Picton... has come to occupy a central role in the inquiry... Her questions have been thoughtfully put to witnesses, and she has received assistance from the inspectors on occasions to refine them so as to get to the heart of the points which have interested her... When it came to her own evidence, however, she said... that she wanted to give a different type of evidence from that given by experts in the various technical disciplines... This she ably did and, having answered a few questions of clarification, was, quite properly, not cross examined on matters so close to her heart.⁸⁰²

⁷⁹⁴ Fieldnotes 18 July 2017

⁷⁹⁵ Fieldnotes 27 June 2017

⁷⁹⁶ BM Interview 12 July 2018

⁷⁹⁷ Fieldnotes 18 July 2017

⁷⁹⁸ JP Interview 8 November 2018. Ironically about the inquiries' lack of inclusivity; he had missed a day's work to attend a particular session and the timings had been moved around.

⁷⁹⁹ JB Interview 18 October 2018

⁸⁰⁰ AP Interview 8 January 2018; she noted she was uniquely placed to do as a retired person.

⁸⁰¹ Fieldnotes 13 December 2017

⁸⁰² Morag Ellis QC on behalf of the Welsh Government (n348) 173

This recognition of Ms Picton, while appreciative, flags an issue in the treatment of lay-people at the inquiry. Adhering to ‘equality of arms’, members of the public who gave evidence at the inquiry were not subject to the same level of rigorous cross-examination as expert witnesses.⁸⁰³ Some participants worried that this produced a second-tiering of testimony, that if one’s testimony was subject to little or no cross-examination, it felt as if it had little merit. This is described by one resident below:

Sometimes you feel if you’re given a soft ride by the opposition, they’re not actually bothered about your evidence at all. Being given a hard ride is... a pretty good indication that they’re taking you seriously and that what you said might just be hitting home.⁸⁰⁴

This is a challenge for the inquiry process. How can the process fairly consider different kinds of testimony from different kinds of actors? I suggest that this illustrates a tension between the multiple roles of the inquiry, one as a mechanism for public participation and one as a means of gathering and assessing complex information. This tension will be further explored in Chapter 8.

This section sought to highlight those moments where the inquiry was in tension with itself. The inquiry was constructed with codes of language and behaviour; however, it was also accomplished with practical knowledge and experience. While emotion was perceived to be a barrier to effective argument in some instances, emotion was also consciously employed by inquiry actors. While the inquiry process at points undermined public participation and favoured expert knowledge over local knowledge, participation was also encouraged at the inquiry. These moments of emotion, experience and participation illustrate the ways in which the inquiry was a formal, abstracting process but also a human, emotional, experienced and participatory space.

3 Processes of abstraction have a negative impact on the environment

The first half of this chapter proposed that rationalist approaches to decision-making encourage processes of abstraction, and that these processes of abstraction were evident at the inquiry. The following section outlines the theoretical basis of the second claim made in this chapter. It contends that processes of abstraction have a negative impact on the treatment of the environment for the following reasons:

- It is easier to treat nature instrumentally when viewed in abstract
- Love of nature is dismissed by viewing nature out of its context
- Understanding of nature is limited when de-contextualised from its situated, material reality.

⁸⁰³ However, as highlighted above, this distinction was quite blurred. Moreover, the notion of equality of arms did not account for the considerable disparity in resources between the Welsh Government and organisations, such as environmental organisations, who participated in the inquiry.

⁸⁰⁴ RW Interview 9 November 2018

3.1 It is easier to treat nature instrumentally when viewed in abstract

Eco-feminists among others argue that capitalism encourages an abstracted treatment of nature.⁸⁰⁵ Burke and Pomeranz highlight that an instrumentalist view of nature that treats aspects of nature as replaceable is highly damaging. They further note that these harms are intensified in the present social and environmental global context; environmental harms are displaced globally, undermining environmental gains in Western post-industrial regions.⁸⁰⁶ They provide the Rhine as an example of how treating nature as a site for industry can destroy nature:

This artificial Rhine epitomised Renaissance and Enlightenment ideas about how to use nature... a perfect servant of industry in one of the world's most productive regions – never flooding, easy to navigate, useful for heating, cooling and dumping – the river was all but destroyed as a habitat.⁸⁰⁷

While they link this destructive treatment of the Rhine with 'Renaissance and Enlightenment ideas', Burke and Pomeranz question the assumption that Western capitalist philosophy is exclusively to blame for the destruction of nature. They argue that humans have been trying to control nature for the past 10,000 years,⁸⁰⁸ and that the relationship to nature manifest in Enlightenment and Renaissance science and taken up in Western capitalist culture, epitomised by Bacon's intention to "torture Nature until she gives up her secrets", is an intensified form of an older phenomenon.⁸⁰⁹

While the philosophy that underpins the desire to control nature is contested, this desire is prevalent across societies. Despite this prevalence however, nature remains to a certain extent unpredictable.⁸¹⁰ This unpredictability is exemplified by the arrival of the cranes on the Gwent Levels. These are the first pair of breeding cranes in Wales in the last 400 years.⁸¹¹ They were not mentioned in the original environmental impact assessment (EIA) because they had not yet arrived. They arrived as the environmental statement was being prepared, described by the NRW coordinator below:

I think they arrived that summer ... I remember [the Welsh Government's ecology witness] telling me about them when they first arrived, so we did know almost as soon as the Welsh Government survey team had discovered them. But they weren't officially part of the EIA... There was a desire not to publicise where they were... Everyone was keen that the nest location was kept confidential... and the nest location is literally under the route of the road, it's not even like it's to the side...⁸¹²

⁸⁰⁵ Plumwood (n176) 14; this is explored in more detail in Chapter 2, section 4.2.

⁸⁰⁶ Burke and Pomeranz (n175) 13

⁸⁰⁷ Ibid 23

⁸⁰⁸ Ibid 20

⁸⁰⁹ Ibid 5

⁸¹⁰ The unpredictability of nature and how deeper consideration of this unpredictable characteristic might offer new ways of working with nature is explored in greater detail in Carolyn Merchant, *Autonomous Nature: Problems of prediction and control from ancient times to the scientific revolution* (Routledge 2016)

⁸¹¹ Royal Society for the Protection of Birds, *Proof of Evidence: RSPB M4 Written Submissions* (2017) 41

⁸¹² JP Interview 8 November 2018

The arrival of the cranes provides a clear example of the unpredictability of nature disrupting the inquiry process. This unpredictability can also make it difficult to assess environmental impact where information is generalised to population; this can cause conflict between expert and local knowledge, especially where the species in question is particularly skittish or unpredictable, as with cranes.⁸¹³

3.2 Love of nature is dismissed by viewing nature out of its context

The GWT Counsel began their closing statement with the following description of the Gwent Levels.

It is easy to forget due to the vast amounts of reports and technical detail at this inquiry, just how special the Gwent Levels are – both for people and wildlife. Therefore, before we dive into a summary of the above... we must highlight what the Gwent Levels are and what they mean to people.

The Gwent Levels is one of the jewels in the crown of Wales, with immense cultural and historic significance. They are a unique, low-lying area wedged between the river estuary and the hills that rise to the north and are a designated cultural monument in Wales, a Landscape of Outstanding Historic Interest. They are an ancient, hand-crafted mosaic of fields, villages and grazing marsh, riddled by narrow waterways, which has been reclaimed from tidal saltmarsh since Roman times. ...⁸¹⁴

This extract from the GWT closing statement captures the unique nature of the Gwent Levels and of the approach taken by GWT. When there is no recognition of attachment to nature or to place, this can adversely impact the treatment of the environment. By recognising people's love of nature and making space for people to talk about their love of nature, the idea that nature has intrinsic value is acknowledged.⁸¹⁵ Love of nature is a somewhat contested notion, however. It can be viewed as a luxury, even elitist.⁸¹⁶ The following interview extract explores this idea. The participant catches herself adhering to this 'elitist' narrative, and begins to interrogate her own relationship with nature:

- A Sometimes I just think, they're just so busy trying to survive, I mean what people in your opinion become interested in the environment!? Why am I interested? Why are you interested? Is it because we've got enough to manage our lives that you can turn to-, but then I've always been interested...
As a child, I was always taken to lonely places, you know, quiet places; my dad would see the crowds, right we're going the other way... We'd go to Ireland, we'd go to Wales, we'd go to Cumbria ...
- C That's really nice.
- A Maybe it was... why are you interested?
- C Well, you know, a dad who likes lonely places as well, really.
- A Yeah? Maybe it's something that's been, sort of, engendered, developed in me from a child... I like to walk, I like to look at stuff, I like to appreciate things⁸¹⁷

⁸¹³ JD Interview 1 November 2018, "...then you wheel out a world expert on stone curlews and you've got the locals turning up and saying well I disagree with that because I've got them at the end of my garden... and that's really difficult because the expert is looking at the overall trends and trying to understand that..."

⁸¹⁴ Fieldnotes 27 September 2017; Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 19-20

⁸¹⁵ These ideas are explored in greater detail in Chapter 2, section 4.2, and in Chapter 8 section 2.

⁸¹⁶ Thomas Crowley, 'Climbing mountains, hugging trees: A cross-cultural examination of love for nature' (2013) 6 *Emotion, Space and Society* 44, 45

⁸¹⁷ AP Interview 8 January 2018

Linked to a love of nature is a fear regarding the threats facing nature. All of the environmental objectors interviewed spoke with passion about the environmental damage caused by this scheme. For some objectors, this passion separated the two ‘sides’ of the inquiry:

I’m kind of welling up as I speak, because it’s not in the abstract... it’s not that we kind of go, oh well, let’s go on to the next thing! What’s the next project we can work on? You know, for members of the public, it’s really, really important because they live there... And for us as environmentalists, it’s really important because it’s another huge nail in the coffin for wildlife.⁸¹⁸

Some participants were hopeful that the inspectors would take these different perspectives into consideration, and would recognise that it spoke to the passion and concern of lay-participants that they were taking part in the process at all, when unlike professional consultants and legal teams they were not getting paid.⁸¹⁹ However, other inquiry participants were frustrated with the dispassionate manner with which environmental impact was treated, which seemed to minimise the scale of the threat; this was reflected in my fieldnotes.⁸²⁰

3.3 Understanding of nature is limited when de-contextualised from its material reality

All interview participants spoke about their experience of the Gwent Levels and nature more generally; almost all participants knew the Levels very well. I had the opportunity to visit the Gwent Levels during data collection. Seeing the land and the species affected by the scheme gave me an understanding of the affected environment that would have been challenging to achieve without this experience.⁸²¹ The risk the scheme posed to the local environment was also more evident for those who had extensive knowledge of the area.⁸²² Reliance on local environmental knowledge reflects the value of situated knowledge. This was evident on the site visit which will be discussed in the final section of this chapter.⁸²³ Ecofeminist scholars contend that the discrediting of situated knowledge in rationalist philosophy derives from the rationalist tendency to privilege the world of ideas over the material world.⁸²⁴ Plumwood and others cite the privileging of ‘conceptual over corporeal’⁸²⁵ as an underpinning cause of the environmental crisis.⁸²⁶

⁸¹⁸ JB Interview 18 October 2018

⁸¹⁹ RB Interview 13 August 2018

⁸²⁰ Fieldnotes 26 April 2017

⁸²¹ See Chapter 2, section 5.3.

⁸²² AP Interview 8 January 2018

⁸²³ Fieldnotes 18 July 2017

⁸²⁴ This is explored in further detail in Chapter 2, section 4.2.

⁸²⁵ Grosz (n210) 187

⁸²⁶ Plumwood (n188) 122

4 Processes of abstraction adversely impacted treatment of the environment at the inquiry

Having considered the theoretical basis for the claim that processes of abstraction can adversely impact the environment, this section returns to the M4CAN inquiry. It describes the materiality of the inquiry process, building on the processes of the inquiry outlined in section 2. From there, the section considers the treatment of knowledge at the inquiry and suggests that the treatment of local knowledge adversely affected the treatment of the environment. It further examines the treatment of public participation and its impact on the environment at the inquiry.

4.1 Material impacts dismissed

4.1.1 *The inquiry process*

The inquiry process is a somewhat dematerialised process; the presentation of the inquiry and the daily experience of the inquiry are slightly different. When interviewing people on their experience of the inquiry, I assumed that their experience of the inquiry would be similar to mine, namely that they experienced the inquiry by sitting in the inquiry room. However, for several of the interview participants, their main experience of the inquiry took place out of the inquiry room.⁸²⁷ NRW attended 68 meetings with the Welsh Government.⁸²⁸ ABP was probably the most powerful objector to the scheme, and they were rarely in the inquiry room. Instead, they met frequently with the Welsh Government outside of inquiry sessions.⁸²⁹ The experience of the inquiry for some of the environmental objectors consisted of days in the inquiry room, but also of phone calls and meetings, trying to arrange legal counsel and expert witnesses, strategising, briefing witnesses and counsel, and so on. This indicates that the inquiry had two aspects; it was both a named, formal event, and also a range of activities that are occluded by the idea of the inquiry. I suggest that the disjuncture between the idea of the inquiry and the practice of the inquiry facilitated some of the intimidating and dematerialising effects of the inquiry, described below.

4.1.2 *Inquiry as an intimidating space*

Interview participants described the inquiry room as like a “court of law”,⁸³⁰ as “deliberately hierarchical”,⁸³¹ “intimidating”,⁸³² and “threatening”.⁸³³ The quote below captures this formal and intimidating nature:

⁸²⁷ IR Interview 23 January 2018; “... CS: the time that you took part in the inquiry, you didn’t spend it in the inquiry room; IR: No, that’s right, the number of days I was at the inquiry was about 10 in total probably...”

⁸²⁸ Natural Resources Wales, *Closing Submissions on behalf of Natural Resources Wales: M4 Corridor around Newport Public Local Inquiry*, 2018) 2

⁸²⁹ I could not find the number of these meetings anywhere, only that they were “extensive” and “detailed discussions”. Brian Greenwood, *Public Inquiry Document ID/196: Statement from Associated British Ports to the Inquiry* (Persona Associates M4 Corridor around Newport Public Local Inquiry 2018) 2

⁸³⁰ AP Interview 8 January 2018

⁸³¹ IR Interview 23 January 2018

⁸³² MW Interview 14 December 2017

⁸³³ RB Interview 13 August 2018

I'm not sure I'm remembering this correctly, but were the inspectors raised? They may have a reason for that in terms of acoustic or visual impact, but it makes it a lot more judicial rather than inquisitorial ... the way the tables were all set out, you literally were on opposite sides. So, it felt very much more judicial than inquisitorial, and therefore more stressful.⁸³⁴

Highlighted in this extract, the room layout seemed to intensify the adversarial atmosphere of the inquiry.⁸³⁵ Some interview participants described feeling uncomfortable in the space, highlighting its awkward set up. The NRW coordinator recalled watching witnesses give evidence in the sessions before her own evidence. The witness chair was an office chair, set on wheels, and it kept rolling away. She recalls watching in dread as witnesses struggled with the chair, thinking, "Oh God! Everyone's having this nightmare with the chair, and that's going to be me!"⁸³⁶

Witnesses had to take part in a strange game of eye contact, necessitated by room layout and inquiry procedure. In one session, I noted that the Welsh Government counsel asked a question (in cross-examination) and looked at the witness when asking the question; the witness sometimes looked back at the counsel when answering, and sometimes at the inspector.⁸³⁷ Sometimes counsel asked a question of a witness while looking at the inspectors. This difficulty was noted by several interview participants. Below, the NRW coordinator describes the practical challenges of giving evidence:

I think, just the fact that it was in such a big room, so... when giving evidence, you're focused on, well, Morag Ellis [the Welsh Government Queen's Counsel] it was generally, speaking to her but you're aware that the inspectors are also very much engaged and asking questions, but then also, focused on the audience, for want of a better word? It's almost like you're talking to three groups of people at the same time.⁸³⁸

Giving evidence at the inquiry was a challenging experience for some participants; cross-examination could be gruelling, and it could be stressful to have one's evidence rigorously questioned. These reflections highlight that it could also be a physically awkward experience. It is very easy to ignore these minor challenges; their impact however is captured below by a resident who gave evidence:

You can prepare for the bigger things, well you can try and prepare for them and obviously you can get awkward and difficult questions, curveballs and that sort of thing, but in the main, you can write things down, and you can look at your notes so if you've prepared well, you shouldn't make too much of a mess of it, but there'll always be these smaller things that can unsettle you.⁸³⁹

⁸³⁴ JB Interview 18 October 2018

⁸³⁵ The adversarial nature of the inquiry is highlighted throughout the analysis, in particular in Chapter 7, section 4.2 and in Chapter 8, section 5.2.

⁸³⁶ JP Interview 8 November 2018

⁸³⁷ Fieldnotes 26 April 2017

⁸³⁸ JP Interview 8 November 2018

⁸³⁹ RW Interview 9 November 2018

These ‘smaller’, material elements of the inquiry process could destabilise participants and could raise obstacles to them making their case. The material experience of giving evidence does not seem to form part of the decision-making process.⁸⁴⁰ As the material experience of the inquiry was ignored, the inquiry process similarly seemed to dematerialise kinds of knowledge. This process favoured some kinds of knowledge and presentation of knowledge over others. The GWT witness described how he felt better able to draw on his local knowledge when he was out in the environment, and that this was difficult to do in the inquiry room:

You’re slightly more empowered on a site visit because it’s an area you know well and you’re in your territory, aren’t you, so you can say, we found harvest mice nests in these margins, and I know this ditch is really good and we’ve had loads of surveys on it ... but as soon as you’re out of context and in a public inquiry room...⁸⁴¹

4.1.3 *Inquiry as an unequal space*

It is important to note that while some people felt awkward and intimidated in the inquiry room, others would have felt comfortable and at ease. Some interview participants felt that the room layout underlined the sense that this was the Welsh Government inquiry, that it was their ‘house’, and that the objectors were visitors. This is described by an objector below:

It feels quite daunting... I think particularly the fact that the Welsh Government side, it’s their inquiry isn’t it? It’s set up for them. They obviously had a big team of people in there all the time, and then giving evidence you were sat opposite however many people, they would have about 8 people at those desks so that that felt daunting... The Welsh Government’s boxes of documents... they’ve got everything there in hard copy, they can just reach for it. You’re either looking at it on the screen when they’re putting it up or you’re trying to hastily rifle through your box of stuff that you think has got everything you’re going to need... that makes you feel at a disadvantage because they’ve got that whole set up... it makes you feel like this is their inquiry and they’re in control.⁸⁴²

The Welsh Government team and the shelves of documents behind them were highlighted by other interview participants as being intimidating,⁸⁴³ and as instilling a sense of control.⁸⁴⁴ Thus, not only was the materiality of the inquiry a factor in the experience of, and the evidence heard at, the inquiry, it was a factor that disadvantaged one ‘side’ over another.

4.1.4 *The human effort of the inquiry*

The inquiry required considerable effort from its participants. Mirroring the discussion above, this effort was not really acknowledged at the inquiry and was not felt equally by all participants. The inquiry was a demanding process in part because of its length. Highlighted by one environmental objector,

⁸⁴⁰ While the Inspector’s Report notes that the change to the scope of the inquiries was unfortunate as it resulted in increased technical documentation and increased inquiry time, it was stated that no interests were prejudiced as a result. Wadrup and McCooney (n4) 368

⁸⁴¹ RB Interview 13 August 2018; this idea is explored in more detail in Chapter 6.

⁸⁴² JP Interview 8 November 2018

⁸⁴³ AP Interview 8 January 2018

⁸⁴⁴ MW Interview 14 December 2017

The sheer length of time of the inquiry, the sheer level of intensity that was required to be maintained over a period of months was actually a major barrier to the ability of environmental objectors to maintain their case, because maintaining that level of intensity is very fatiguing.⁸⁴⁵

The length of the inquiry was particularly demanding for the inspectors. By December 2017, my fieldnotes have multiple references to the inspectors seeming tired and frustrated with delays to the inquiry schedule.⁸⁴⁶ Being a witness at the inquiry demanded a significant commitment of time and energy. The GWT witness described giving evidence as “probably one of the most stressful things I’ve ever done”, remarking that he took time off work after appearing at the inquiry.⁸⁴⁷ He described the stress of the experience below:

You feel like your sticking your head above the parapet, and there’s an entire team of people there who are trying to collect information to erode what you say and why you said it...well it’s a degree of pressure that isn’t normally there is it, in day to day life.⁸⁴⁸

This was not a unique experience. One participant recalled a witness saying they would never do that again;⁸⁴⁹ another participant spoke of a witness coming off the ‘stand’ and crying with relief.⁸⁵⁰ Both witnesses in these examples were expert witnesses. The pressure of participating was intensified by the formal nature of the process and by the fact that its requirements were unclear, as is noted below:

It’s an extremely formal process and I didn’t understand until later, that, em, I don’t know if there was a dress code (slight laugh).⁸⁵¹

Inquiry actors who spent time in similar processes tended to feel more comfortable at the inquiry. It could quickly become less intimidating; I note in fieldnotes after two months attending the inquiry that, “being at the inquiry decreases my awe”.⁸⁵² One environmental objector noted that counsel’s comfort in the inquiry room could be employed as an adversarial tool; for example, they seemed better at projecting their voices.⁸⁵³ Witnesses’ discomfort could also be encouraged by interrupting the witnesses and hurrying them along.⁸⁵⁴ Comfort with the inquiry process could be used as a means of asserting privilege. This was evident during the Welsh Government closing statement, when the Welsh Government Queen’s Counsel discussed Hickinbottom J’s dismissal of Friends of the Earth Cymru’s legal challenge to the scheme; Hickinbottom J

⁸⁴⁵ MW Interview 14 December 2017

⁸⁴⁶ Fieldnotes 5 December 2017

⁸⁴⁷ RB Interview 13 August 2018

⁸⁴⁸ RB Interview 13 August 2018

⁸⁴⁹ MW Interview 14 December 2017; a later interview gave more context to this event. A witness, a recognised expert in a certain species, was asked whether they were a member of any professional body and whether in this capacity or in any other they were required to give an oath not to lie. The witness was offended by this approach, which they took as an attack on their personal integrity. JB Interview (SII) 29 August 2019

⁸⁵⁰ JB Interview 18 October 2018

⁸⁵¹ AP Interview 8 January 2018

⁸⁵² Fieldnotes 17 May 2017

⁸⁵³ MW Interview 14 December 2017

⁸⁵⁴ Fieldnotes 10 May 2017

described one of the claims as a “bold submission”.⁸⁵⁵ Counsel noted the use of the word, ‘bold’, remarking that “those of us who are used to judges”, “know this is quite rare”.⁸⁵⁶ This is quite alienating language; it privileges those with legal expertise, and highlights that there were many in the room who were not ‘used to judges’.

In these examples, the inquiry is described as intimidating, unequal and taking a toll on its participants that is not typically recognised. Why might this adversely impact the environment? On a theoretical level, it is damaging because it reaffirms the separation of humans and their material world which includes the environment. On a practical level, environmental objectors are likely to be under-resourced; they also are likely to have less time to prepare their case, reacting to the scheme as objectors.⁸⁵⁷ Consequently, they are likely to be more negatively affected by these challenges.

4.2 Treatment of practical and local knowledge

It has been noted throughout the chapter that the testimony of lay-people regarding the environment could be more emotive and more grounded in local knowledge.⁸⁵⁸ The final part of this section examines the kinds of knowledge that were side-lined when lay-people’s testimony was side-lined, and the ways this could be damaging for the environment.

4.2.1 *Treatment of local knowledge*

People who had loads of local knowledge... almost seemed undermined because they didn’t have doctorates to their name, which, but they do have a lifetime’s experience of being on the Levels and living and working in the area? ... An attempt was made, it seemed to me, to try and make them feel really inferior to the other witnesses.⁸⁵⁹

Demonstrated above, some participants felt local knowledge was not respected at the inquiry. This knowledge seemed to be perceived as ‘back garden knowledge’; it was not respected, especially where it conflicted with expert witness evidence. This is described in the following extracts:

If a member of the public had said well, I’ve lived here for 50 years and there’s a really good population of a really rare species, they would just get squashed. People would say well we’ve done the environmental impact and we didn’t find that species there... that sort of local knowledge would have no traction at all.⁸⁶⁰

⁸⁵⁵ The claim Hickinbottom J took issue with was that the Welsh Government did not properly understand the nature of their duty under s 28(g) Wildlife and Countryside Act 1981; Morag Ellis QC on behalf of the Welsh Government (n348) 217

⁸⁵⁶ Fieldnotes 28 March 2018

⁸⁵⁷ See Chapter 5 section 4.3.

⁸⁵⁸ However, as noted in section 2.2.2 of this chapter, this was not always the case. The boundary between layperson and expert knowledge at the inquiry was fuzzy, with layperson testimony at times utilising the tools of ‘expert knowledge’, academic sources, studies etc.

⁸⁵⁹ RB Interview 13 August 2018

⁸⁶⁰ MW Interview 14 December 2017

I think you've got someone who says, I'm an expert and has sort of letters after their name, and they've been presented by a barrister to support an argument, one way or another... they tend to be treated with greater credibility than the locals... I sometimes wonder whether the inspectors go oh well, it's the locals, of course they'll say that there's something there.⁸⁶¹

GWT counsel, conversely, remarked that in comparison with the narrow parameters for evidence accepted in a criminal case, he found it “amazing really that such a range of views is... being considered”, “from the person whose back garden is being destroyed to scientists on global [impacts]”.⁸⁶² However, despite the diversity of views that were heard in the room, he acknowledged that the impact of lay-person testimony,

From a legal point of view has very minimal import ... the way that seemed to manifest itself to me was whenever anyone raised issues about particular locations with the tribunal, [e.g.] a particular house being knocked down... the tribunal chair regularly [disagreed with them, saying], ‘well yes in fact I was just down there last weekend and I’ve seen the area that you’re talking about’... my own assessment of that is he was being very polite... [but] that they in no way inform a significant part of any decision.⁸⁶³

4.2.2 *Treatment of local knowledge had a negative impact on environment*

Environmental objectors feared that the undervaluing of local knowledge had a negative impact on the environment. Walking with the GWT reserves officer over the land affected by the scheme, he noted that he identified several errors in the Welsh Government’s evidence:

- R Going through the documents... it’s very clear it’s a whole kind of team of people working in isolation who have limited local knowledge... The hydrology report had a suggestion that water from the reserve comes from a ditch that’s on the east side of those houses. But I know it doesn’t, it comes from a spring in the reserve here, and I checked the issue with the reen inspector from the internal drainage board, and actually no water comes from that ditch onto the reserve at all.
- C How did you know it, then?
- R Well, so I suppose you know, from actually just seeing the flows... ⁸⁶⁴

Errors made by the Welsh Government were, for the reserves officer, directly related to a lack of local knowledge. Equally, his ability to identify these errors derived from his strong local knowledge. He returned to this topic after a little while:

[They were] saying aquatic invertebrates would not be lost in this field. Well, it’s obvious they wouldn’t be lost in this field because they’re an aquatic invertebrate. So that highlights some of the holes in Welsh Government’s barrister’s knowledge of the area and the wildlife in the area. They’re obviously expert in what they do, they don’t have the knowledge of the area, or the wildlife. To them it’s probably just a Latin name in a document I suspect. To a lot of people, it’s a Latin name in a document isn’t it.⁸⁶⁵

The GWT reserves officer acknowledged that the counsel’s errors are understandable; they were not

⁸⁶¹ JD Interview 1 November 2018

⁸⁶² BM Interview 12 July 2018

⁸⁶³ BM Interview 12 July 2018

⁸⁶⁴ RB Interview 13 August 2018

⁸⁶⁵ RB Interview 13 August 2018

required to have an in-depth knowledge of the species and habitat of the Gwent Levels. However, this lack of in-depth knowledge suggests a disconnect between the inquiry and the affected land. The comment, 'to a lot of people it's a Latin name in a document' suggests that for the reserves officer, these species are not merely Latin names; it suggests an emotional attachment to the affected environment. It suggests that embedded within situated knowledge is an emotional connection to the local environment.⁸⁶⁶ Problems related to local knowledge being undervalued at the inquiry are intensified by the scale of the scheme and by its adversarial nature. If there are multiple errors, which do you choose to challenge?⁸⁶⁷ The people with local knowledge who are going to spot these errors typically do not have time or resources to devote to the inquiry process.

Somebody could draw you a lovely plan to say there won't be any kind of muck or whatever in ditches but when you know the whole site is going to flood, it's just not going to be...⁸⁶⁸

Similarly, there seemed to be a discrepancy between what was theoretically achievable and what happened 'on the ground', described in the quote above. The scheme calls for significant construction on a high water table. The reserves officer noted that poor road quality by the current M4 toll plaza affirms that building in this area has repeatedly proven extremely difficult and expensive.⁸⁶⁹ This reliance on novel engineering solutions to avoid the mistakes of the past seems to ignore local knowledge, the abstracted understanding of the area again privileged over local, material experience.

4.3 Participation and emotion at the inquiry

This final subsection considers the treatment of emotive responses to the environment at the inquiry; it notes that talking about the importance of their area is a form of testimony expected from laypeople participating at the inquiry. The subsection closes by considering the abstract nature of the public inquiry as a participatory process, and the impact of the divergence between the experience of the public inquiry and the expectations placed upon it as a public participation procedure.

4.3.1 Love of nature viewed in negative terms

As previously discussed, love of nature is seen as a luxury within parts of Western society, as a perspective associated with privilege.⁸⁷⁰ This was highlighted by environmental objectors, when reflecting on the treatment of the environment in society more broadly:

Generally, there is a perception about the environment as being ... kind of like a luxury, it's nice to have but not essential, so you know, we got a traffic problem, well we have to find a

⁸⁶⁶ See Chapter 2, section 5.2.2

⁸⁶⁷ RB Interview 13 August 2018

⁸⁶⁸ RB Interview 13 August 2018

⁸⁶⁹ RB Interview 13 August 2018. This was demonstrated in December 2018 when a truck carrying out survey work for the scheme got stuck. BBC Wales, 'Barecroft Common protected wetlands damaged by M4 survey work' 6 December 2018) <<https://www.bbc.co.uk/news/uk-wales-46467278>> accessed 14 November 2019

⁸⁷⁰ This is highlighted in section 3 of this Chapter.

solution to the traffic problem. And if you're raising the environment then you're out of touch, you don't understand the real world and the way it works.⁸⁷¹

Interview participants felt that wider society seemed to view people who cared about the environment were “eco-warriors”,⁸⁷² “wackos”,⁸⁷³ or “emotive hippies”.⁸⁷⁴ This negative perception was reflected in the inquiry. Some objectors said that testimony reflecting a love of nature felt awkward, and this awkward feeling led to testimony being ignored:

- I Well this member of the public stood up and was really emotional, and you know, clearly has a deep attachment to this landscape in a way that's very profound... um, nowhere. Didn't even register [at the inquiry].
- C How about registering with the inspectors?
- I Well he listened... he's a human being.⁸⁷⁵

Others stated that this testimony fell outside the remit of the inquiry:

You can't make an emotional case, you can't say the Gwent Levels is just an amazing place and if it were in England it would be a national park, it's just an incredible place and you can go there in dawn and see the sun come up, and you'll never forget it. You can't make those sorts of cases, because saying something is amazing and shouldn't be got rid of is an impertinence; it's not our job to say it shouldn't be damaged. It's our job to argue how damaging [the proposal] would be.⁸⁷⁶

Other interview participants argued that testimony reflecting a love for nature would not be in line with the inquiries' need for persuasive, reasoned argument. When asked how one decided whether or not to make emotive arguments at the inquiry, one participant described it like so:

What is required is for you to make arguments that are convincing to the audience that you're presenting to... so if I was talking to a member's group, I could get really impassioned about it, say just how wrong it is and how much we're going to fight and I would get rounds of applause, but if I tried that in a public inquiry, I'm going to be told to dial it down and focus on the issues at hand, so it's very much being aware of what is the hard-nosed case we can make about this.⁸⁷⁷

Participants felt that emotive arguments would not be effective, highlighting the inspectors' need for reasoned arguments in light of the “judges over their shoulder”, i.e. the possibility of judicial review.⁸⁷⁸

⁸⁷¹ JD interview 1 November 2018

⁸⁷² AP Interview 8 January 2018

⁸⁷³ AP Interview 8 January 2018

⁸⁷⁴ JD Interview 1 November 2018. The extent to which wider society values the environment is difficult to estimate. The last 9 British Social Attitudes Survey reports featured one environmental issue, climate change (in 2018). It found that 93% agreed climate change was happening; just over a third (36%) believed it was caused by humans and one quarter were very or extremely worried about it. The National Centre for Social Research, *British Social Attitudes 35: Climate Change* (2018) 1

⁸⁷⁵ IR Interview 23 January 2018

⁸⁷⁶ MW Interview 14 December 2017

⁸⁷⁷ JD Interview 1 November 2018

⁸⁷⁸ JD Interview 1 November 2018

4.3.2 *Abstract nature of public inquiry as participatory procedure*

- C I think one of the challenges is if [the public local inquiry] is painted as something that's fully inclusive where everyone will not only be heard but heeded...
- B Yeah, but it can't be, they can't be. Heeded.⁸⁷⁹

The last aspect of the inquiries' abstract nature to be considered is the gap between the experience of the inquiry and the expectations placed upon it as a public participation procedure. The impact this has on the treatment of the environment is considered. Public participation is explored from various perspectives throughout the thesis. The focus of this section is on the space between the normative and the lived experience of the inquiry for members of the public; it posits that this is another form of abstraction, as the public is treated somewhat instrumentally to fulfil a role within the inquiry.

The role of the public at the inquiry is questioned in the quote above. The GWT counsel felt that a quasi-judicial process that had to evaluate a huge amount of complex information and whose decision was subject to judicial review could not realistically heed the input of members of the public; that the duty of the inquiry was to hear them, but not necessarily to heed them.⁸⁸⁰ The extent to which the public could engage with the process was further questioned by a Welsh Government expert witness. We spoke about my research on the site visit; he was interested in the notion of public participation in environmental decision-making. He questioned the extent to which the public could engage with complex scientific information, and worried that the public were given inaccurate information, implying that they had been misinformed by objectors.⁸⁸¹ This perspective highlights the uncertain role of public participation at the inquiry.

The assigned role for members of the public at the inquiry was indicated by the GWT coordinator when describing the adversarial nature of the inquiry:

There was a guy ... who was an ex-head of the internal drainage board in the Gwent Levels, so I think he might have got more cross-examination, but like pure members of the public, like A, would have got things a little bit easier.⁸⁸²

This suggests that members of the public were expected to give testimony that was anecdotal and emotional. Members of the public, then, can take part in the inquiry but are not necessarily heeded. They might not have the expertise or experience necessarily to engage with the complex information that comprises the focus of the inquiry; however, they are not expected to provide this kind of testimony. They are expected to provide emotive, 'back garden' testimony, which can feel out of place at the inquiry. This out-of-place feeling is exacerbated by language, codes of behaviour and the inquiries' adversarial nature. This raises problems for public participation at the inquiry, encapsulated by the chief executive of GWT below:

⁸⁷⁹ BM Interview 12 July 2018

⁸⁸⁰ This is discussed in greater detail in Chapter 3; Lucas (n317) 117

⁸⁸¹ Fieldnotes 19 July 2017

⁸⁸² JB Interview 18 October 2018

The process is so clearly distant from meaningful public participation. It's an intimidating atmosphere... If you claim an expertise or a vocabulary, you immediately push out people because as far as you're concerned they don't know what they're talking about, they don't even know how to say the things right... you might have a member of the public who's got very reasonable grounds on which to appeal against a development like a motorway and they won't know how to get that across in the terms that are being used. They certainly won't know how to get it across in a way that renders a QC neutral.⁸⁸³

It seems that the government, the public and the inquiry actors have contested expectations of the role of the public at the public inquiry.⁸⁸⁴ The role of the public at the M4CAN inquiry was unclear.⁸⁸⁵ This is not the fault of any particular actor at the inquiry; as previously noted, the inspectors were friendly and made conscious effort to be inclusive. However, the distance between the lived experience of public participation and its normative role can be seen by the inquiry actors and by the public.⁸⁸⁶ This distance might engender a sense of disillusionment.⁸⁸⁷ Public participation in these decision-making processes is seen as a marker for living in a healthy democratic society, further reinforcing the significance of this issue. Discussion in this section has focused exclusively on challenges facing the participation of humans in the inquiry process. However, as exclaimed by one interview participant, "Nobody talks about democracy for beetles!"⁸⁸⁸ While the inquiry process seemed at times removed from the public affected by the scheme, the recognition or involvement of non-human species affected by the scheme was limited. This underlines the notion that the inquiry was abstracted from the material reality of the Gwent Levels; these considerations of human and non-human interaction with the inquiry are explored in Chapter 7.

This section contended that processes of abstraction at the M4CAN inquiry had a negative impact on the inquiry by dismissing material impacts and by the treatment of public participation and local knowledge. The following section considers the response to processes of abstraction and their adverse impact on the treatment of the environment; these responses happen from within the process, with the site visit, and from outside the process, from environmental objectors seeking to disrupt these processes of abstraction.

⁸⁸³ IR Interview 23 January 2018

⁸⁸⁴ This is discussed in Chapter 3, section 2.2

⁸⁸⁵ This stems in part from the dual role of the inquiry, explored in greater detail in Chapter 8, section 5.3.2.

⁸⁸⁶ This is evident from letters of objection submitted in response to draft statutory orders. There were 319 written objections and 5870 virtually identical objectors' emails (linked to RSPB, GWT and Woodland Trust campaigns). Of the 319 written objections, 1 in 8 (12.5%) expressed disillusionment with the participatory decision-making process. A little over 1 in 8 (13%) found the consultation process to be deficient in some way (these were mostly complaints that information provided was inaccurate and/or inadequate). Persona Associates (n411)

⁸⁸⁷ This is discussed in Chapter 2, section 3.

⁸⁸⁸ IR Interview 23 January 2018

5 The response to processes of abstraction at the inquiry

The final section of this chapter explores how the inquiry responded to these processes of abstraction. Chapter 5 described how environmental objectors responded to processes of compartmentalisation by seeking to disrupt them. While environmental objectors similarly sought to disrupt processes of abstraction, there were also mechanisms within the inquiry process that sought to mitigate some of their adverse impacts. These two responses, one from inside the inquiry process and one from the outside, are investigated. Firstly, the response from the inside, the site visit, is discussed. 16 site visits were conducted during the course of the M4CAN inquiry;⁸⁸⁹ I attended one of these visits. This site visit is described, focusing on how it facilitated enjoyment of nature, how it foregrounded situated knowledge and how it disrupted the inquiry structure. From there, the responses from the ‘outside’ are explored, how objectors tried to incorporate situated knowledge and emotive testimony and how they sought to challenge instrumentalist views on nature and the ‘script’ of the inquiry.

5.1 From within the process: the site visit

5.1.1 *The site visit foregrounds situated knowledge*

Today we are going to on a site visit to the Gwent Levels. Attendees include the inspectors, NRW, RSPB, GWT, the Bumblebee Conservation Trust, members of the Welsh Government team and ecological consultants. They intend to visit existing reens and the proposed sites for reen mitigation, the cranes’ nesting site and the proposed site for crane mitigation. I get to Lysaght Institute at 9.30am and they are already briefing. It will be a long day. We are on the bus at 10am and return at 4pm; we visit seven sites.

The First Site: the big reen by the sea

The first stop is close to the sea. While it’s not sunny, it’s not cold. No one is wearing a jacket. We walk around a big reen that is perpendicular to the coast; we examine a gate that controls the water going out. The inspectors ask a few questions.

The man from NRW tells us about reens and reen management, and how they rely on local knowledge. As we walk on, I ask him about local knowledge. He says that most of the people working on the gates and reens are local. They make unconscious decisions that he totally relies on and tries to make conscious. It is a sophisticated, old and complicated system. He mentions clay pipes, called noggles, that connect reens.

‘Say there could be an issue with the water level in one section’, he gives an example, ‘One of the locals will say, oh, it’s probably a blockage in the pipe two miles away, and they will be right’.

He goes on to say that reen management is a community effort; everyone looks out for issues affecting the reens.

As we walk down by a bigger reen, someone asks the man from NRW whether more hands-off technology could be used. The management he is describing requires regular visual checks and cranking the gates by hand. He said they looked into telemetry but that there was no saving to be made with it. The woman from NRW says the tactility of coming down and making the changes to the gate by hand is valuable.

Having walked a bit down the reen and back again, we get back into the bus.⁸⁹⁰

⁸⁸⁹ The two inspectors conducted multiple unaccompanied site visits; for the 16 noted here, they were accompanied by representatives from the Welsh Government and objectors. Wadrup and McCooey (n4) 15

⁸⁹⁰ Fieldnotes 19 July 2017

This extract from the fieldnotes highlights some aspects of situated knowledge foregrounded by the site visit. The man from NRW talked about the role of the community in reed management, underlining how essential local knowledge is in the sustainable management of the area. The woman from NRW highlighted the importance of tactility, that people working in the local environment benefit from doing things by hand and seeing things with their eyes, and that the natural local environment benefits from the everyday physical engagement. Discussing the role of site visits, the GWT reserves officer (who led a visit at Magor Marsh) said that he felt empowered on the site visit, and that site visits better reflected local knowledge than the inquiry proper.⁸⁹¹



Figure 8: Reen, Gwent Levels, 19 July 2017

The Fourth Site: the big reen with duckweed

We drive slowly through this area which is all SSSI. It is very quiet and green, and flat. At this stop, we have to go over a gate into a field. I ask the man from NRW how long it takes to prepare for a visit like this. At first, he thinks I mean getting clearance from landowners; when I clarify I mean preparing what to talk about, he bats this away, saying they breathe this stuff. He knows it inside out, and so finds it easy to talk about.

The woman from NRW is enthusiastic about this reen; it is big, with large banks that are great for invertebrates and for flora. She throws the grapple into the reen and drags it out. She looks at what is now attached to it, which includes a SSSI-listed species, hairlike pondweed (*Potamogeton trichoides*).⁸⁹² She gets a species that she says is her favourite. It feels like polystyrene; it is a tiny sphere, SSSI-listed, called rootless duckweed (*Wolffia arrhiza*). It is the smallest flowering vascular plant in the world.⁸⁹³ She gives it to the assistant inspector, who shows it to everyone. She notes that this rare plant was here but not in the first place she threw the grapple in, demonstrating that these species thrive in a very delicate, specific balance. Some of the group are circled around the grapple. Answering a question, the NRW coordinator says, ‘ecology is not a precise science like engineering’.⁸⁹⁴

⁸⁹¹ RB Interview 13 August 2018

⁸⁹² Poole (n638) 12

⁸⁹³ Ibid 12; Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 21

⁸⁹⁴ Fieldnotes 19 July 2017

This extract underlines the in-depth local knowledge of the NRW officers, that they are at ease discussing these subjects because their knowledge derives from everyday experience. This extract also highlights that ecology is imprecise; that these species exist in a fine balance, suggesting the relevance of local knowledge over general knowledge in this area.

The Sixth Site: the crane mitigation site

RSPB are leading on the sixth site, a possible site for crane relocation. It is flat here and in the distance you can see the Severn Bridge. The motorway is visible and audible. It has a very different atmosphere to the places we visited this morning. Where they were full of growth with big hedges and trees, this place feels starker with a heavier human imprint. The RSPB objectors draw attention to these differences and recalls what they have already said about the cranes; that they are shy, solitary and like to keep away from humans. They say that the cranes chose the site they are in now, and that it would be extremely challenging for humans to pick a site for them.

The NRW coordinator highlighted that the land they were on constituted the amount of SSSI land lost in the scheme. The inspector took this in, and said, ‘So that’s 126 hectares of SSSIs, lost to tarmac...’. Perhaps conscious of the environmentally sympathetic tenor of what he said, he clarified, ‘I’m just trying to get it in the context of what I see now’.⁸⁹⁵

This extract illustrates that environmental impact is effectively understood by experiencing it. This is demonstrated by the reaction of the inspector at the end of the extract. In a later interview, the NRW coordinator remarked that this site was particularly valuable for demonstrating to the inspectors the actual scale of SSSI land loss.⁸⁹⁶ Reflecting on how the knowledge gained in site visits was incorporated into the inquiry room, it is pertinent that at the start of the GWT reserves officer’s testimony, the inspector asked him to trace out the route of their site visit on the map, in this way helping to bring the experience of their site visit in to the inquiry.⁸⁹⁷ Discussing the purpose of the site visit, the RSPB objector noted that,

It’s about translating or interpreting the arguments that you have already made and demonstrating how they apply on the site in particular. One of the key things we said through our crane evidence was the site by the toll booth is totally inappropriate; it’s too open, it’s too noisy and so on. You get to the other site and it’s enclosed, it’s quiet... that was the critical thing for them to take away, was to walk in and get a sense of the difference.⁸⁹⁸

This description of the purpose of the site visit again underlines the site visit’s key role in foregrounding situated knowledge and in allowing inquiry actors to experience the local environment. It highlights that sensitivity to the significance of place is important to our understanding of place-specific issues.⁸⁹⁹

5.1.2 The site visit facilitates enjoyment of nature

The Second Site

⁸⁹⁵ Fieldnotes 19 July 2017

⁸⁹⁶ JP Interview 8 November 2018

⁸⁹⁷ Fieldnotes 10 May 2017

⁸⁹⁸ JD Interview 1 November 2018

⁸⁹⁹ The site visit yielded rich data, and has resonance with the work of space and place geographers (see for example, Edward Relph, *Place and Placelessness* (Pion, 1976)); it is not the focus of this thesis, but will be explored in greater detail in future work.

Back on the bus, I ask the Welsh Government ornithologist if he can tell swallows from swifts; there are a lot of them at the first few sites. He smiles and says he can. The Welsh Government ecological consultant gets involved, saying even he can tell them apart. One of the RSPB objectors gets involved too... The three men are all keen to explain the difference to me, even getting their phones out. This is an ongoing topic of conversation for the rest of the day, with all of them pointing out swallows and martins to me.⁹⁰⁰

As this extract demonstrates, site visit attendees were keen to tell me about different aspects of the environment. While this might be influenced by a few factors, for instance the fact that I was a student and a younger woman,⁹⁰¹ it also highlights that these actors on both ‘sides’ of the inquiry had spent years learning about and working with the environment, and were inevitably interested in the environment. The chief executive of GWT noted that on the Magor Marsh site visit, the inspectors showed, “a vast amount of interest in everything that was going on in the ground, in the water, in everything... they’re very curious people”.⁹⁰² The site visits encouraged this engagement with nature.

The Third Site: the cranes’ nesting site

We get out of the car at an industrial site near a pond that’s lime-green; it is very polluted and there is a fence around it. It is very quiet and secluded. This is where the pair of cranes have made their nest. The RSPB objectors highlight that this place is very far from people, very hidden away. They talk about how skittish cranes are; they fly away from humans quickly. They like arable fields. The RSPB objectors want the inspectors to take note of the quiet peace of the area and keep it in mind when they see the possible crane mitigation site.

I am talking to the inspector when the Welsh Government ecological consultant comes up to tell me about the birds that are zooming under and over the abandoned factory. These are swallows; he notes the difference between swallows and house martins. As we walk to the bus, we hear a Cetti’s warbler, another SSSI-listed bird. As we stop to listen, we hear the call of a crane. The Welsh Government ornithologist turns to me excitedly, saying, ‘That’s a combination of calls you wouldn’t have been able to hear for 400 years’.⁹⁰³

In this extract, the RSPB objectors were eager for the inspectors to experience the secluded nature of the place the cranes had chosen. The joy of being in nature is also evident, with the calls of the crane and the Cetti’s warbler. These small, incidental moments demonstrate the easy enjoyment of being in nature. Every time we stopped at a site, people would walk around and point things out. This kind of attachment to nature, so challenging to convey in the inquiry room, seemed to be present at the site visit. It is impossible to know how this could play a role in the inspectors’ decision-making; it suggests however that the site visit might provide more scope for broader considerations of environmental value.

⁹⁰⁰ Fieldnotes 19 July 2017

⁹⁰¹ These issues are further explored in Chapter 4, section 4.2.2. The gender of the researcher and its impact on participants is explored from a different angle in Sam J Hanks, ‘Embodying masculinity in female dominated research settings: A male reflection of ‘doing research’ in massage parlours’ (2019) *Sexualities* 1, 6

⁹⁰² IR Interview 23 January 2018

⁹⁰³ Fieldnotes 19 July 2017

5.1.3 *The site visits disrupt the inquiry process*

There were no counsel present at site visits,⁹⁰⁴ which moderated the adversarial nature of the inquiry. The hierarchy of the inquiry room was further relaxed; site visits had an informal atmosphere, where inquiry actors explored the site together with people who lived and worked in the area.⁹⁰⁵ These simple changes provided space for dialogue. The site visits demonstrated a commonality between people who would be on opposing ‘sides’ at the inquiry. This was in part a result of site visit attendees sharing an enjoyment of nature, evident in the extracts above. This was also, perhaps, a result of sharing an experience outside of the inquiry room. This perspective is described by an interview participant:

You dissolve the subtle barriers of alienation that people are forced to work in an environment like a public inquiry. So, you put them next to each other physically... everybody’s brought down to the same level, they’re equally wet, they’re equally uncertain about where they’re going ... so they might have been in opposition within the room, or they might have been ideologically opposed, but they’re sat next to you and they’re going to find a commonality.⁹⁰⁶

On the site visit, inquiry actors were cast out of a relatively strictly bound social structure into a situation they are obliged to negotiate for themselves; they were encouraged to find a common ground. While this uncertainty can engender tension, it also makes possible new connections. This was facilitated by a more informal and convivial atmosphere; the grounded nature of the site visits, for some participants, further enabled this conviviality.

However, the uncertain parameters of the site visit could sometimes engender adversarialism. The chief executive of GWT felt that the adversarial nature of the inquiry was maintained at the site visit, that “the planning inspectors are like a blob of bread and the people around them are like goldfish”.⁹⁰⁷ He remarked that at the Gwent Levels site visit, he said something in passing to one of the Welsh Government team, and “then it popped up in the inquiry the next day”.⁹⁰⁸ For him then, the blurred lines of the site visit constituted a risk as well as an opportunity. The GWT reserves officer noted that it could be difficult to figure out what could and what could not be said on a site visit.⁹⁰⁹ This reflects the variety of perspectives on the site visit held by environmental objectors at the inquiry. NRW and RSPB objectors tended to view site visits as an opportunity to make a stronger environmental case. GWT objectors tended to be more circumspect regarding site visits; in interviews with two of the GWT objectors, there was an implication that no mechanism within the existing inquiry process could be truly disruptive and thus beneficial to the environment.⁹¹⁰ The next section explores the ways that environmental objectors challenged processes of

⁹⁰⁴ IR Interview 23 January 2018; This was the case for the Magor and Caldicot/Wentlooge Levels site visits.

⁹⁰⁵ AP Interview 8 January 2018

⁹⁰⁶ IR Interview 23 January 2018

⁹⁰⁷ IR Interview 23 January 2018

⁹⁰⁸ IR Interview 23 January 2018

⁹⁰⁹ He wondered when conversation went out of bounds, what counted as new information, etc. RB Interview 13 August 2018

⁹¹⁰ JB Interview 18 October 2018; IR Interview 23 January 2018

abstraction from ‘outside’ the process, considering how they included emotive testimony, how they challenged the ‘script’ of the inquiry and how they challenged instrumentalism.

5.2 From outside the process: environmental objectors challenging abstraction

5.2.1 Objectors disrupting the ‘script’ of the inquiry

[It would be like] bringing in a massive bucket of water from one of the reens and just sticking it on the table, saying, everybody just watch life in there for 10 minutes and do not say a word... it would be nature coming in, humanity coming in... in hindsight I wish we’d bloody done that, cos that would’ve been brilliant...a fish tank! Fizzing with life! And just stick it on the table and say this is what we got out of the reen, the species density within that is the same as the rainforest.⁹¹¹

In this extract, the chief executive of GWT describes what he wished GWT had done at the inquiry. He describes what he sees as the power of this act, that it would bring something missing from the inquiry process. This imaginary act reveals some of what GWT intended to do with their strategy for the inquiry; it is inherently disruptive, and it foregrounds nature. It suggests that this actor and his organisation are not satisfied with the present perception of the environment in the inquiry process.

The different approaches taken by GWT and NRW were represented by their closing statements; as previously discussed, the GWT closing statement attempted to link this scheme with global context and historic development on the Levels and sought to communicate the broader value of the Gwent Levels. GWT sought to challenge instrumentalist treatment of the environment at the inquiry. This is demonstrated by the evidence of the GWT sustainable development witness; this witness challenged the instrumentalist assumption that environmental harm in one area can be offset elsewhere. The witness argued that this approach was no longer tenable, that environmental issues are global issues and that the environment is too damaged; “Wales is a small country, the UK is a small country, the global is small, and getting smaller...”⁹¹² This approach was in contrast to that taken by NRW. The NRW closing statement was legal in style; it did not try to make the ‘bigger’ point but effectively identified and targeted specific legal issues.⁹¹³

5.2.2 Objectors bringing in emotion

This chapter has explored moments at the inquiry where emotional responses to nature seemed inappropriate. It is interesting to note however that there were occasions where inquiry actors explicitly evoked emotive responses. This is evident in the testimony of the GWT reserves officer. The reserves officer was nervous as he gave evidence; his manner was understated, his language precise and unemotional. GWT counsel gently tried to encourage him to give more emotive responses.⁹¹⁴ It suggests they thought the testimony would have greater strength if it was more emotional, that his particular perspective on the

⁹¹¹ IR Interview 23 January 2018

⁹¹² Fieldnotes 26 September 2017

⁹¹³ Fieldnotes 21 March 2018

⁹¹⁴ Fieldnotes 10 May 2017

Levels was relevant to his testimony. Similarly, the GWT closing statement evokes an emotional connection to the Gwent Levels environment; it describes the Levels as “one of the jewels in the crown of Wales”, that it enjoys a habitat that is “fizzing with a density of life comparable to the rainforest”.⁹¹⁵ This appears to be a deliberate strategy. Why might objectors consider this a valuable strategy? I would suggest they felt that it was important to communicate the greater value of the environment at the inquiry, rather than view the environment solely in terms of its economic value. The possible implications of this approach in the First Minister’s decision are explored in the final chapter of this thesis.

⁹¹⁵ Fieldnotes 27 September 2017

1 Human-nature dualism is an underlying assumption in rationalist philosophy

Abstract concepts like human-nature dualism can seem difficult to attach to and to see in the everyday world. They can appear almost self-evident, hard-wired in what we think. Yet conversely, their abstract nature can make them feel removed from everyday experience;⁹¹⁶ does the rationalist assumption of a separation between human and nature really have an impact on people's decision-making? How so? This chapter attempts to bridge this gap, to look for evidence of the impact of human-nature dualism in the M4CAN inquiry. This chapter will firstly outline some of the key aspects of human-nature dualism; however, these theoretical questions are more comprehensively explored in Chapter 2. Here, the roots of human-nature dualism in Enlightenment rationality will be discussed, along with interrelated mind-body and reason-emotion dualisms. Unfolding debates around human-nature dualism will then be explored, with an eye on how this dualism might inform decision-making processes like the M4CAN inquiry.

1.1 Enlightenment rationality separation of human and nature

What is a human being? What does it mean to be human? To the first question, we might answer: a species of nature, a particular subdivision of the primate order. But we tend to answer the second question differently. To be human, we say, is to transcend the world of nature, to be more than a mere organism. Thanks to this transcendence, humans can look into the mirror of nature and know themselves for what they are.⁹¹⁷

Highlighted by Ingold above, distinctiveness from nature defines what it is to be human.⁹¹⁸ He notes this difference and the fact that this difference is a defining characteristic of human-ness. He further alludes to the superiority entangled in this idea of difference. Humans *transcend* nature; human reason and progress is contingent upon human ability to transcend the material bounds of nature. Ingold describes the “double-barrelled, subspecific appellation” as the “existential dilemma”; we know ourselves in the world only by renouncing being part of the world.⁹¹⁹ The human as a reasoning, autonomous moral agent, separate from and superior to nature, typically male,⁹²⁰ is embedded in Western thought,⁹²¹ and underpins the conception of the person in Western legal systems.⁹²²

⁹¹⁶ This has implications for empirical research; how does the qualitative researcher gather their insights? Do the insights ‘emerge from the data’, or, as May contends, are they dragged? These problems are discussed in greater detail in Chapter 4, section 2.2, and in Kathryn A May, 'Abstract Knowing: The Case for Magic in Method' in JM Morse (ed), *Critical issues in qualitative research methods* (Sage 1994) 10

⁹¹⁷ Tim Ingold in Agustín Fuentes and others, 'On Nature and the Human' (2010) 112 *American Anthropologist* 512, 513

⁹¹⁸ Enlightenment roots of this assumption are explored in Chapter 2, section 2.1.

⁹¹⁹ Ingold in Agustín Fuentes and others (n917) 514

⁹²⁰ Plumwood (n188) 122

⁹²¹ Barron (n199) 84

⁹²² Gear (n191) 26

1.2 Mind-Body dualism and Reason-Emotion dualism

Enlightenment philosophers were concerned with the relationship between the mind and the body. This relationship has parallels with the separation between human and nature, as it is the human's capacity to reason, a capacity inherently linked to the mind, that separates humans and nature.⁹²³ Rationalist thought is underpinned by the assumption that the ability to reason is the innate human characteristic, and thus holds the world of matter and the body to be inferior to the world of ideas.⁹²⁴ Latour claims that this understanding of the material world and the world of ideas, in which "things do not count", has been ubiquitous in social science and philosophy since the era of the Enlightenment;⁹²⁵ "subjectivity counts, language counts, social structures count, and things are there as mere support for a society and language to be moulded or to be carved".⁹²⁶ The natural world falls in to the same category in this perspective; matter, nature and the human body are defined as separate from and inferior to the part of the human being that can reason. While these material elements might not be explicitly treated as inferior in legal systems, they may be deemed irrelevant.⁹²⁷ Where reason is prioritised in legal decision-making, it is often privileged at the expense of emotion; this is the next dualism to be explored.

The place of emotion in law is highly contested and a subject of deep and lively debate;⁹²⁸ the focus in this section is limited to the interplay between reason and emotion in law.⁹²⁹ The work of Martha Nussbaum is especially relevant here; she makes a powerful case for a more inclusive and nuanced consideration of emotions in public life. Nussbaum contends that the disavowal of emotion in legal decision-making is founded in an overly broad and inaccurate categorisation of emotion. There is an assumption, commonly attributed to Aristotle,⁹³⁰ that law is 'reason without passion'; this assumes that emotions are irrational and therefore 'good' law should be based in reason alone.⁹³¹ Nussbaum argues that this misunderstands reason, emotion and law. If we take irrational to mean 'devoid of thought', emotions cannot be irrational. Alternatively, irrationality could mean 'bad' thinking;⁹³² if this were the case, could emotions then be seen as irrational and rightly separated from legal decision-making? The problem with this approach however is that emotions and thoughts are not so easily distinguished. Emotions and thoughts are entangled in one another.⁹³³ Pardo and Patterson's critique of the ambitious claims of neuro-legalists is illuminating here. They conceive of the mind as a wide range of psychological capacities, including cognition and sensation,

⁹²³ Nelson (n11) 4

⁹²⁴ Grosz (n210) 187

⁹²⁵ Barron (n199) 79

⁹²⁶ Ibid 79

⁹²⁷ Kyle McGee, 'The Fragile Force of Law: Mediation, Stratification, and Law's Material Life' (2015) 11 *Law, Culture and the Humanities* 467, 489

⁹²⁸ A thoughtful overview of the field is provided in Grossi (n673)

⁹²⁹ The understanding of reason in Habermas's notion of the reasoned, justifiable argument is further discussed in Chapter 2, section 2.2.

⁹³⁰ This can be traced to the following extract from Aristotle's *Politics* (400-300 BC): "...but he that would have man govern adds a wild animal also; for appetite is like a wild animal, and also passion warps the rule even of the best men. Therefore the law is wisdom without desire". Aristotle, *Politics* (Harvard University Press 1932)

⁹³¹ Nussbaum (n202) 5

⁹³² Ibid 11

⁹³³ Nussbaum (n202) 10

perception, beliefs, intentions, emotions and moods.⁹³⁴ Law and the reasons underpinning legal decisions can be explicitly emotional. This dualism is moreover highly selective; some emotions are deemed inappropriate or irrelevant to decision-making, and some are not. Nussbaum highlights that the notion of reasonableness, held as a feature of ‘good’ decision-making, is itself a product of a particular time, place and perspective:

Judgments of reasonableness in the law are normative judgments, using a hypothetical image of the “reasonable man”. Not surprisingly, these images are responsible to existing social norms... Law, then, does not just describe existing emotional norms; it is itself normative, playing a dynamic and educational role.⁹³⁵

This selectiveness relates to another insight from Nussbaum, that there is a desire in much of public decision-making to “rise... above the messiness of the “merely human””.⁹³⁶ This desire feeds into perceptions of decision-making as objective, invulnerable and detached, thus reinforcing notions of transcendence and superiority embedded in rationalist dualisms.

1.3 Recent debate around the human-nature dualism

Human-nature dualism remains embedded in twenty-first century Western political thought.⁹³⁷ The idea of humans rising above, or moving beyond nature, is reflected in the work of some contemporary political theorists.⁹³⁸ Fuller contends that human resistance to nature is a defining element of what it is to be human; “the whole point of social organization is specifically to combine in ways that go against the natural course of things”.⁹³⁹ An interesting addition to attempts to define humans in their opposition to nature is the field of scholarship exploring cognitive and behavioural differences between humans and animals. Holland notes that behavioural science traditionally shied away from attributing meaning to animal actions for fear of being accused of anthropomorphising animals and thus discrediting their field. This tendency encouraged a view of animals and humans where humans were the only living beings with thoughts and feelings and therefore inherently superior.⁹⁴⁰ Ongoing research suggests that traits once thought to distinguish humans

⁹³⁴ M. Pardo and D. Patterson, 'Philosophical foundations of law and neuroscience' (2010) 2010 *University of Illinois Law Review* 1211

⁹³⁵ Nussbaum (n202) 12

⁹³⁶ Nussbaum (n203) 16

⁹³⁷ The pushback to human-nature dualism in contemporary thought is discussed in Chapter 2, section 5, and briefly considered in section 3 of this chapter. Khan (n195) 52

⁹³⁸ There is, on the other hand, a growing body of literature exploring the interconnections between humans and the environment. Jane Bennett is prominent among these (see Jane Bennett, *Vibrant matter: a political ecology of things* (Duke University Press 2010)). Recent contributions to this debate in environmental legal scholarship include Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91 and Emily Barritt, 'Conceptualising Stewardship in Environmental Law' (2014) 26 *Journal of Environmental Law* 1

⁹³⁹ Barron (n199) 83

⁹⁴⁰ Holland (n221) 19

from other living creatures, e.g. language,⁹⁴¹ empathy,⁹⁴² complex decision-making,⁹⁴³ culture,⁹⁴⁴ sophisticated social structures⁹⁴⁵ and self-awareness,⁹⁴⁶ are not as unique as previously assumed. This brief discussion suggests some ways in which human-nature dualism might affect decision-making processes, like the M4CAN inquiry. Human-nature dualism establishes the autonomous, moral human in legal decision-making; while it is understood that people have biases and assumptions, this remains the idea of the person to which legal processes are directed. This is tied up with notions of reasonableness in decision-making. The following section looks at how human-nature dualism might have appeared at the M4CAN inquiry.

2 How does human-nature dualism appear at the inquiry?

Having explored the roots of human-nature dualism in rationalist philosophy, this section will consider how this dualism emerged at the M4CAN inquiry. Human-nature dualism separates human and nature; human-ness is defined by its separation from nature; it is further defined as superior to nature. The idea that humans are superior to nature is closely bound up with the idea that this dualism adversely affects nature. This section will touch upon this idea; however, the negative impact of human-nature dualism on the environment will be explored in greater detail later in this chapter.⁹⁴⁷ It will consider how humans were treated separately from the environment at the inquiry, in its argument and in its processes, and how this separation could make environmental interests feel peripheral to the inquiry process.

2.1 Humans and the environment treated separately at the inquiry

The separate treatment of humans and the environment was embedded in the inquiry; in the way arguments were detached from their situated reality,⁹⁴⁸ in the compartmentalised treatment of issues at the inquiry,⁹⁴⁹ and in the way various issues facing the inquiry were dealt with and prioritised. This separation was illustrated in those moments where the scheme was said to be environmentally damaging, and where the Welsh Government sought to counter these objections by appealing to a kind of common sense, universalist logic. When an environmental objector giving evidence at the inquiry argued that the scheme did not align with the principles of WFGA, the Welsh Government Queen's Counsel retorted that the Act

⁹⁴¹ Anon, 'Biologists interpret the language of sperm whales' (2011) 62 Marine Pollution Bulletin 1383

⁹⁴² Range Friederike and others, 'The absence of reward induces inequity aversion in dogs' (2009) 106 Proceedings of the National Academy of Sciences 340

⁹⁴³ CT Hemingway, MJ Ryan and RA Page, 'Rationality in decision-making in the fringe-lipped bat, *Trachops cirrhosus*' (2017) 71 Behavioral Ecology And Sociobiology

⁹⁴⁴ Jenny Allen and others, 'Network-based diffusion analysis reveals cultural transmission of lobtail feeding in humpback whales' (2013) 340 Science 485

⁹⁴⁵ Darren P. Croft, *Exploring animal social networks* (Princeton University Press 2008)

⁹⁴⁶ Abigail Z. Rajala and others, 'Rhesus Monkeys (*Macaca mulatta*) Do Recognize Themselves in the Mirror: Implications for the Evolution of Self-Recognition (Monkey Self-Recognition)' (2010) 5 PLoS ONE e12865

⁹⁴⁷ This section will therefore be briefer than its equivalent sections in Chapters 5 and 6.

⁹⁴⁸ Explored in Chapter 6

⁹⁴⁹ Explored in Chapter 5

did not require “we put all life on hold” in the transition to a more environmentally sustainable society.⁹⁵⁰ Similarly, during cross-examination of the Welsh Government sustainable development witness, GWT counsel discussed the scheme’s potential conflicts with the Act’s seven wellbeing goals objectives.⁹⁵¹ GWT counsel questioned whether Welsh cultural heritage was enhanced by putting a motorway through a 2,000 year old habitat. The witness expressed exasperation with this point, stating it was not the aim of the scheme; “Welsh Government hasn’t set out to destroy habitats, it set out to solve an existing problem”.⁹⁵²

Welsh Government responses to environmental objectors in these examples suggest that the only relevant impact is human impact. In the second example, the focus is on a ‘human’ problem, traffic congestion; the fact that the solution to this problem will destroy habitat is unfortunate. This position does not take into account that humans also live in the affected habitat. The first example demonstrates a particular understanding of ‘life’; what ‘life’ is being put on hold here? It does not seem to include affected flora and fauna. It suggests that ‘life’ comprises of economic development and infrastructure projects. These examples point to an underlying assumption that humans and nature are separate; this is further articulated by an environmental objector who felt that that the low value placed on the environment was underpinned by the feeling that the environment was detached from people’s ordinary lives:

If it was a heritage interest, if there was a listed building or something like that... it’s like hey, this is our history, our ancestors etc. Because it’s related to humans, it’s possibly got more resonance with people than the environment. Because people can get their human environment, but the natural environment isn’t necessarily relevant to most people.⁹⁵³

Certain environmental objectors, in particular GWT, sought to counter this detached view of humans and nature, outlined below by the chief executive of GWT:

The traditional areas for wildlife trusts to participate in these types of things, tends to be restricted to purely ecological elements... what we decided in the context of the change of direction of Welsh government legislation towards sustainable development and so on was to broaden the scope of our opposition, so we looked at a range of things including economic, ecological, um, health wellbeing sustainability and so on.⁹⁵⁴

Evident in this extract, changes in Welsh legislation, namely WFGA, provided environmental objectors with an opportunity to question and to re-position the human-nature relationship. This opportunity, and their approach, will be discussed in the final section of this chapter.

⁹⁵⁰ Fieldnotes 26 April 2017

⁹⁵¹ Wellbeing of Future Generations Act 2015, s4

⁹⁵² Fieldnotes 26 September 2017

⁹⁵³ JD Interview 1 November 2018

⁹⁵⁴ IR Interview 23 January 2018

2.2 Separate treatment facilitated by the inquiry process

Certain aspects of the inquiry process seemed to reinforce the separation of human and nature. These are likely unintended consequences of the public local inquiry being a rationalist legal decision-making process.⁹⁵⁵ Some of these aspects of the inquiry process are explored below.

The inquiry process was expected to run like a machine. It was part of an industry; the company, Persona Associates,⁹⁵⁶ that managed the inquiry was involved in multiple inquiries at the same time. At one session, the inspector noted that the programme officer was working on three other inquiries in addition to the M4CAN inquiry.⁹⁵⁷ It was a large inquiry that dealt with a very high level of technical detail; this required a fastidious, efficient approach. The reason for this fastidiousness was underlined by the inspector as he confirmed whether his and the assistant inspector's documents were up to date, described in a brief fieldnote extract.

We are in the smaller room today; the session starts around 10.30am. there are twelve in attendance, though people come and go. The inspector and the Chief Witness are going through 'housekeeping'. With regard to a particular document, ID7a, the inspector noted, "You know I have a bee in my bonnet about this". Explaining why he was intent on chasing this, the inspector said to the public gallery, "Ladies and Gentlemen, when inspectors read something out of date, the inspectors' thought process is out of date. [And now that this document is amended], it is out of date again".⁹⁵⁸

Evidence submitted to the inquiry and managed for the inspectors therefore required meticulous consideration. The demand for efficiency and accuracy was perhaps intensified by the late running of the inquiry.⁹⁵⁹ Subsequent issues, such as the withdrawal of the ABP's objection, would cause considerable delay at the inquiry.⁹⁶⁰ The level of organisation and detail required at the inquiry does not necessarily entail a separation of human and nature. It does however mean that it is a process that does not handle change or ambiguity very well.⁹⁶¹ It encouraged the inquiry to keep a detailed, compartmentalised focus. Echoing aspects of the inquiry explored in Chapter 5, this compartmentalised approach made it difficult to account for cumulative impact and interconnected issues; it kept a focus on complying with legislation, rather than broader environmental protection. Human impacts and environmental impacts were treated separately; the separation of human and nature in this dualism unavoidably subordinates nature. Therefore, environmental impacts were treated separately from and secondary to human impact.

⁹⁵⁵ Key aspects of the public local inquiry are further considered in Chapter 3, section 3.3.

⁹⁵⁶ Persona Associates (n411). One week before thesis submission, the company managing public inquiries changed hands. The inquiry website is now run by a company called Gateley Hamer.

⁹⁵⁷ Fieldnotes 24 October 2017

⁹⁵⁸ Fieldnotes 24 October 2017

⁹⁵⁹ Delay to public inquiry will not impact on M4 project completion date (n572). The inconsistent response to the late running of the inquiry itself suggests a subordinate treatment of the environment; the NRW coordinator for the inquiry noted that when NRW requested additional time to prepare their advice due to the scale of the scheme and its level of environmental impact, this request was refused, due to the strict schedule of the inquiry. JP Interview 8 November 2018

⁹⁶⁰ Greenwood (n829). The inquiry was delayed as Welsh Government sought to come to an agreement with ABP so that they would withdraw their objections to the scheme. Inquiry sessions were postponed for several months to facilitate this.

⁹⁶¹ This also feeds into issues of compartmentalisation, further explored in Chapter 5.

The public local inquiry took place at a late stage in the decision-making process;⁹⁶² this further affected the treatment of humans and nature as it limited the scope of arguments that could be raised at the inquiry. These limitations were evident at the public consultation for the scheme, described by an environmental objector below:

I can't remember the actual acronym but the idea was 'the M4 corridor project', okay, so what are our objectives for the project, and I gather what JB did was put his hand up and said well my objective for this project is no damage to wildlife, no, no, no, what we mean is what are your objectives in terms of highways... the debate was already constrained.⁹⁶³

The narrow, pre-defined scope of the inquiry encouraged this separate treatment of human and the environment and had an impact on the treatment of humans and the environment at this inquiry. This was described by the same environmental objector, quoted below:

By the time you get to the inquiry it's a black and white question basically, it's black route or nothing. So the Welsh Government QC was able to deploy that in attacking our side because if one of our witnesses said, I think this is damaging to otters... and it shouldn't go ahead then the QC was able to say well, it's not for you to say is it, you're not a lawyer are you... what you're saying is it's more the wildlife is more important than the people getting to work, is that what you're saying?⁹⁶⁴

As noted above, environmental interests were viewed as separate from human interests in part because of the adversarial nature of the inquiry; the most prominent environmental advocates in the inquiry were objectors. The consequences of this reactive role will be further explored in section 4 of this chapter.⁹⁶⁵

3 Human-nature dualism negatively impacts the environment

The 'control of nature' is a phrase conceived in arrogance, born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man. ... It is our alarming misfortune that so primitive a science has armed itself with the most modern and terrible weapons, and that in turning them against the insects it has also turned them against the earth.⁹⁶⁶

Illustrated by Rachel Carson above, the separation of human and nature has had a deeply negative impact on the environment, stemming in part from its emphasis on controlling nature, and the focus on human progress at the expense of nature. This section looks at the theoretical underpinnings of this impact in a little more detail. It considers the relationship between human-nature dualism and oppression, and how

⁹⁶² The position of the M4CAN inquiry in the decision-making process is outlined in Chapter 3, section 3.3 and section 4.2. It is further discussed in Chapter 8, section 5.3.3.

⁹⁶³ MW Interview 14 December 2017

⁹⁶⁴ MW Interview 14 December 2017

⁹⁶⁵ This is also considered in Chapter 5, section 4.3.

⁹⁶⁶ Rachel Carson, *Silent spring* (40th anniversary edn, Houghton Mifflin 2002) 257

this dualism encourages a devaluing of non-Western worldviews and the worth of non-humans. It further considers the influence of human-nature dualism on modern views of progress, and recent debates advocating a more interconnected understanding of humans and nature, and of ideas and matter.⁹⁶⁷

3.1 Dualisms withhold value

3.1.1 *Oppressive nature of dualisms*

Several theorists who are critical of rationalist dualisms, such as ecofeminists, argue that rationalist dualisms underpin structures of oppression. They impose a hierarchy that devalues the second of the pair; nature in human-nature, body in mind-body, and so on. Ecofeminists relate the devalued treatment of women to the devalued treatment of nature.⁹⁶⁸ The ability to reason is withheld from both these groups,⁹⁶⁹ and this justifies the oppression of the group. That reason is withheld from these groups underlines the connection between these dualisms and demonstrates how “injustice to humans and animals is intertwined in the subjugation of particular bodies, populations, genders, and spaces that are deemed inferior and less valuable to society”.⁹⁷⁰ Conflicting perspectives on the human-nature relationship and on the role of Western philosophy are proposed and critiqued in a debate between Steve Fuller and Bruno Latour. Where Fuller views humans ‘resisting the flow’ as a positive development that separates human and nature in positive ways,⁹⁷¹ Latour argues that ‘resisting the flow’ is a “specific historical European, colonialist, imperialist, capitalist view of philosophy”,⁹⁷² firmly connecting this idea to oppressive political structures.

3.1.2 *Devaluing non-humans and other ways of life*

Highlighted above, rationalist dualisms, whether man-woman, human-nature, mind-body, or reason-emotion, use the ability to reason as a marker to differentiate one of the pair from the other. Woman/nature/body/emotion are marked as irrational in these dualisms. Moreover, rationalist philosophy assigns agency to humans and affords nature no agency. Therefore, nature and matter are without reason, and are passive and inert.⁹⁷³ This is a view of matter that derives in part from the work of Newton.⁹⁷⁴ New materialist theorists and eco-feminists contend that the precarious state of the planet is in part a consequence of dominant worldviews that afford no intrinsic value to the material world.⁹⁷⁵ Many environmental theorists argue that Western conceptions of the human-nature relationship are privileged over other conceptions of the relationship,⁹⁷⁶ and note that many indigenous groups see the oppression of

⁹⁶⁷ These contemporary debates are explored in greater detail in Chapter 2, section 5.

⁹⁶⁸ Plumwood (n188) 120

⁹⁶⁹ Ibid 132

⁹⁷⁰ Holland (n221) 21

⁹⁷¹ This is further discussed in the first section of this chapter.

⁹⁷² Barron (n199) 91

⁹⁷³ Khan (n195) 51

⁹⁷⁴ Coole and Frost (n229) 7

⁹⁷⁵ Ibid 25; this is described in greater detail in Chapter 2, section 5.2.3.

⁹⁷⁶ This is described in greater detail in Chapter 2, section 5.1.

their way of life as inherently linked to the oppression of their understanding of the human-nature relationship.⁹⁷⁷

3.2 Progress without material, environmental limits

Critics of rationalist dualisms contend that the view of nature present in the human-nature relationship is embedded in the capitalist notion of progress, itself another damaging consequence of this dualism.⁹⁷⁸ There are no material or environmental limits to economic growth in neo-liberal capitalism;⁹⁷⁹ this is a significant factor in the current state of the environment.⁹⁸⁰ Push for constant growth assumes infinite resources. This infinite resource does not exist, and thus, the finite world in which we live is taxed beyond its capacity. This exemplifies an instrumentalised view of nature; the intrinsic value of nature is ignored when it is only seen in terms of its use for economic progress. Rawls' critics contend that his theory of justice facilitates this instrumentalised view of nature, a criticism which he has acknowledged and sought to address.⁹⁸¹ These concerns are revisited in a later section that considers the interplay between the economy and the environment evident at the inquiry.

3.3 Moving past dualisms

Holland, drawing on Nussbaum's capability theory of justice, argues that a flourishing environment is a meta-capability; it underpins the fulfilment of other capabilities,⁹⁸² thus underlining that humans are embedded in and dependent on the environment. In a similar vein, recent contributions in ecological justice theory and animal ethics advocate for extended theories of justice that recognise the rights of nature and seek to understand nature beyond the instrumentalised view of nature dominant in Western liberal thinking, underscoring the value of nature outside of a relationship to humans. These theories recognise that humans are dependent on nature for their existence and understand human-nature dualism to be a culturally contingent product of Western philosophical thought.⁹⁸³ While the idea of rights for nature pushes at the limits of what is seen as sensible for some justice theory scholars, others such as Holland and Nussbaum contend that limit is already clearly breached;⁹⁸⁴ Nussbaum highlights several examples where the dignity of nonhuman animals, or where their right to a dignified existence, is recognised, including the judgment of a court in India and the writings of Aristotle.⁹⁸⁵ There are others who argue that justice is inherently anthropocentric, and that legal systems are organised around the assumption that rights and entitlements only concern humans.⁹⁸⁶ However, even in the anthropocentric world of the UK courts, this exclusive understanding of humans as rights-holders and legal persons is being questioned. This is evident in Lord

⁹⁷⁷ Agyeman and others (n135) 325

⁹⁷⁸ Plumwood (n176) 14

⁹⁷⁹ The relationship between dualisms and the notion of progress are explored in Chapter 2, section 4.2.

⁹⁸⁰ Di Chiro (n121) 281

⁹⁸¹ This is explored in greater detail in Chapter 2, section 4.2.1.

⁹⁸² Holland (n173) 324

⁹⁸³ Shoreman-Ouimet and Kopnina (n164) 321

⁹⁸⁴ Holland (n221) 20

⁹⁸⁵ Nussbaum (n167) 325, 348.

⁹⁸⁶ Koukouzelis (n163) 753

Hope's judgment in the 2012 Supreme Court case, *Walton v The Scottish Ministers*, where he states that "quality of the natural environment is of legitimate concern to everyone", and the rights of wild creatures (he illustrates his reasoning with the example of an osprey disturbed by a wind turbine) can be heard in the court by those who would speak on their behalf.⁹⁸⁷

In addition to the questioning of human-nature dualism, the relationship between the ideal and material world is being questioned. This dualism is a key concern for many new materialist and feminist scholars,⁹⁸⁸ evident in the prioritising of materiality in new materialist thought,⁹⁸⁹ and of situated knowledge and embodiment in feminist philosophy.⁹⁹⁰ New materialist scholars contend that the world is material-semiotic, and that this has profound implications for our understanding of the world and the methods we use to investigate it. Nussbaum further highlights the problematic tendency in social and political thought to separate the ideal from the real. "Ideals are real";⁹⁹¹ they are real in the documents that enshrine them, and in the rights that feel particularly real to those who fight for them. They should not feel too far detached from the bodily, needy mess of life.⁹⁹²

4 How did human-nature dualism negatively impact the environment at the inquiry?

Explored in section 2, human interests and environmental interests were often treated separately at the inquiry, typically by the proposers of the scheme.⁹⁹³ This section considers how this separate treatment might have adversely impacted the case for the environment at the M4CAN inquiry. It firstly considers the prominence of instrumentalist views of the environment at the inquiry; this is embedded in human-nature dualism and the de-valuing of non-humans highlighted in Chapter 2 and briefly in section 3. This made it more difficult to advocate for the intrinsic value of the environment. Secondly, this section explores how human interests and environmental interests were framed as being in conflict with one another. The final section of this chapter considers the aspects of the M4CAN inquiry that transcended human-nature dualism.

⁹⁸⁷ *Walton (Appellant) v The Scottish Ministers (Respondent)* [2012] UKSC 44, 46,47.

⁹⁸⁸ New materialist theory concerning this dualism is explored in Chapter 2, section 5.3.

⁹⁸⁹ Hinton (n695) 100

⁹⁹⁰ Davies (n192) 114

⁹⁹¹ Nussbaum (n203) 383

⁹⁹² *Ibid* 383

⁹⁹³ There were also issues where environmental interests and human interests overlap; e.g. air quality. I suggest that where this happened, the inquiry was not focused on the interests of the environment, but those aspects of the environment that are a resource for humans. This builds on notions of instrumental and intrinsic value explored in this chapter and in Chapter 8.

4.1 Human-nature dualism devalued the environment at the inquiry

4.1.1 Instrumentalist view of the environment embedded at the inquiry

Environmental objectors were concerned that the environment was treated instrumentally at the inquiry.⁹⁹⁴ They flagged that this instrumentalist view of nature was particularly evident in Welsh Government mitigation strategies, as mitigation strategies work on the assumption that affected species and habitats can be displaced and replaced. This approach was criticised by environmental objectors' counsel and by residents, who highlighted that displacement was supposed to be the last resort of mitigation,⁹⁹⁵ and that the rehoming strategies proposed by the Welsh Government were unlikely to be successful.⁹⁹⁶ Environmental objectors feared that the assumption underpinning the mitigation strategies was that nature could always move somewhere else.⁹⁹⁷ For the chief executive of GWT, this attitude to mitigation was not only found among developers but also among ecologists. This is illustrated below:

- I I think that that's part of the problem - you hear it sometimes from councillors, so they'll say something like, oh birds and bees can go somewhere else
- C Yeah and then the ecologist goes well actually they can't
- I Yeah, but unfortunately increasingly, ecologists are saying yeah, they can and this is how they can do it.⁹⁹⁸

The inquiry tended to focus on the economic value of the environment,⁹⁹⁹ or more specifically, on a 'strict' instrumentalist understanding of environmental value (described below) that privileged an understanding of the environment as a resource for economic development. Other forms of environmental value were heard at the inquiry, but this view often seem preferred. An economic rational approach to decision-making is inherently instrumentalist, and as seen above, an instrumentalist approach to nature undervalues nature. This made some environmental objectors suspicious of approaches to environmental protection that focused on the economic value of the environment, such as 'natural capital' and 'biodiversity offsetting', illustrated below:

If you treat nature as a bankable asset then you can on paper make abstract movements from one to another, in mitigation, and that's already taking place so it's part of the biodiversity offsetting.¹⁰⁰⁰

Viewing the environment as replaceable ignores its intrinsic value and lends itself to treating environmental interests as less important than the inquiry's more 'realist' economic considerations.¹⁰⁰¹ The treatment of

⁹⁹⁴ More specifically, they were concerned that a 'strict' instrumentalist approach to the environment was taken at the inquiry. The notion of differing degrees of instrumental approach is discussed in the following subsection.

⁹⁹⁵ Fieldnotes 10 May 2017

⁹⁹⁶ Fieldnotes 10 May 2017

⁹⁹⁷ RB Interview 13 August 2018; "...it was almost like you could mitigate for reens and ditches here, you could mitigate for grazing marsh somewhere else..."

⁹⁹⁸ IR Interview 23 January 2018

⁹⁹⁹ This is further discussed in Chapter 5, section 4.1.3.

¹⁰⁰⁰ IR Interview 23 January 2018

¹⁰⁰¹ This touches on Kysar's argument in *Regulating from Nowhere: Environmental Law and the Search for Objectivity*, where he argues that we forget the moral aims and the political context of environmental regulation when we assume it is wholly a matter of economic theory, of risk-based, cost-benefit mechanisms. How this research might contribute to

the intrinsic value of the environment is discussed in the following subsection.

4.1.2 *Intrinsic value of environment not recognised*

Instrumental value and intrinsic value are not necessarily mutually exclusive, and it is perhaps more appropriate to think of these approaches to valuing the environment in terms of a spectrum rather than a binary.¹⁰⁰² However, a ‘strict’ instrumentalist approach, i.e. a perspective that prioritises economic value, can make it harder to acknowledge intrinsic environmental value. Building on the idea that the instrumentalist view of nature present at the inquiry prioritised economic value, this section argues that the intrinsic value of the environment was marginalised at the inquiry. It discusses the lack of consideration of emotional attachment to nature at the inquiry, and from there suggests that love of nature could be perceived in quite negative terms. To say that the environment has intrinsic value is to say that it has value in and of itself. Consequently, this form of value does not need to be proven; this makes it harder to evidence at the inquiry.

This subsection describes the emotional attachment to nature expressed by some participants. The intrinsic value of nature is not proven by the fact it gives people pleasure; that would be another form of instrumental value as it would still concern what nature can provide for humans. I argue that there is a difference between a ‘strict’ and an ‘expansive’ understanding of instrumental environmental value. As described above, a ‘strict’ instrumental understanding views the environment as a resource for economic development. An ‘expansive’ instrumental understanding values human benefits of the environment, for example the enjoyment of landscape, the health benefits of being in nature etc. An important distinction between ‘strict’ and ‘expansive’ instrumental understandings is that an ‘expansive’ instrumental understanding of environmental value requires a healthy environment. An ‘expansive’ instrumental understanding where people recognise the benefits they enjoy from a healthy environment facilitates a recognition of the intrinsic value of the environment. Further, participants who advocated for the intrinsic value of the environment at the inquiry often did so with reference to their own attachment to the environment.¹⁰⁰³ This is a complex and overlapping position; I am not arguing that those describing their emotional attachment to the environment at the inquiry did so fully from the perspective of the intrinsic value of the environment and without any (expansive) instrumental or anthropocentric notions of environmental value. Rather, testimonies where people described their emotional attachment to the environment serve to demonstrate the perspective of people who, in part, see the environment as having intrinsic value.¹⁰⁰⁴

One of your questions I think is around what evidence appeals more to them and I think factual stuff appeals to them. Mine was emotive, and I feel that the QCs sort of... just listened, and almost paid lip-service. I felt... whatever I said was discounted because it was not based

epistemologies of legal knowledge, of which Kysar’s work is an example, is explored in future work. Douglas Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press 2010)

¹⁰⁰² The intrinsic and instrumental value of the environment are further discussed in Chapter 8, section 2.

¹⁰⁰³ This point is further explored in Chapter 8, section 2.1.1.

¹⁰⁰⁴ Whitt et al argue that respecting the environment requires an appreciation of the environment’s intrinsic value. Whitt and others (n158) 15

on anything factual, it was based on the premise that this is an area that should be cherished and valued and kept forever for future generations, and they just weren't interested in that.¹⁰⁰⁵

This resident, reflecting on what evidence was persuasive in the inquiry process, felt that her testimony that focused on the intrinsic value of the area was heard at the inquiry but not really listened to. This view was prevalent among interview participants.¹⁰⁰⁶ Some however considered it appropriate; the purpose of an inquiry was to establish facts, and subjective opinion was not relevant to this purpose.¹⁰⁰⁷ Other objectors felt the value of the environment was 'paid lip service' to because it directly opposed economic factors:

[The inspectors] have an appreciation for the site and I'm sure one of the inspectors said if we needed extra site visits, more than happy, so he obviously likes his wildlife and likes being out there, but that's obviously up until there being the point of economic perceived consequences isn't it, I suspect.¹⁰⁰⁸

This objector illustrates a belief that the inquiry was a contest between the economy and the environment. They contend that this antagonistic position made it difficult for the inquiry to acknowledge environmental value; if a decision had an economic impact, environmental value meant little. This unequal treatment of economic and environmental value exacerbated the antagonistic dynamic between economic and environmental factors present at the inquiry. The prioritised understanding of nature at the inquiry was an understanding of nature that best suited an economic rational model, that treated nature as replaceable and moveable. It seemed difficult and out of step with the inquiry process to recognise the value of the environment outside of its economic value.¹⁰⁰⁹

4.1.3 *The environment treated as unimportant*

Echoing objectors' concerns highlighted earlier in this chapter, there were moments at the inquiry where the environment seemed to be treated as having little value. This perception of the environment as unimportant seemed to be expected by interview participants. This was illustrated in an interview with a resident; when discussing the treatment of the environment at the inquiry, this resident felt that it was treated well, that in fact he was surprised with the breadth and detail of environmental evidence heard at the inquiry.¹⁰¹⁰ While this resident gave a positive account of the treatment of the environment at the inquiry, one could argue it sets quite a low bar. That environmental impact is being discussed at the inquiry is seen as a pleasant surprise. However, planning legislation requires certain environmental impacts to be discussed at the inquiry to comply with legal obligations. Consequently, the fact that environmental impacts

¹⁰⁰⁵ AP Interview 8 January 2018

¹⁰⁰⁶ Of the nine stage I interview participants (all of whom were objectors), eight subscribed to this view; one neither agreed nor disagreed. Two of the four stage II interviews (who were not objectors, but a proposer and the inspector) disagreed with this in part, feeling that evidence on the intrinsic value of the area was taken into consideration.

¹⁰⁰⁷ RW Interview 9 November 2018

¹⁰⁰⁸ RB Interview 13 August 2018

¹⁰⁰⁹ That is not to say that these forms of value were not present at the inquiry; the inquiry heard testimony on intrinsic value of the environment, as noted above. It was just that these forms of value seemed to carry less weight. This ties in to notions of intrinsic and instrumental value explored in section 3, and in Chapter 8.

¹⁰¹⁰ RW Interview 9 November 2018

were discussed does not necessarily demonstrate they were high importance issues at the inquiry. The way in which environmental impacts are discussed needs to be investigated; this is the focus of the following section.

There was a feeling prevalent among interview participants that the environment had little importance at the inquiry. One resident described the environment as being “very, very, very much neglected” by the Welsh Government at the inquiry.¹⁰¹¹ Some felt that the proposals for mitigating environmental damage demonstrated this low importance, as noted below by the GWT chief executive:

We weren't prepared to cede anything, so therefore we did not engage in any of the mitigation discussions. Especially when they were mad stuff, you know, we're going to plant a woodland for future generations. I mean, that doesn't carry a lot of meaning, in an ecological sense, or anything else.¹⁰¹²

There was also a sense that while the environment was discussed and while efforts were made to mitigate against environmental damage, the environment was never going to prove pivotal to the success or failure of the scheme.¹⁰¹³ This was evident at the inquiry when the Welsh Government at points seemed to argue that environmental damage would be mitigated to the extent that it would no longer be an issue and that ‘there will always be nice habitats in the way’.¹⁰¹⁴ This sense was also present in interviews, demonstrated below by the NRW objector and the RSPB objector:

I don't think environmental issues were dealt with as if they were incidental; you know there was a vast amount of time spent on the environment... I think perhaps what you sort of felt was a sort of expectation that environmental issues could be dealt with.¹⁰¹⁵

Rightly or wrongly I got the impression that [cost benefit analysis of different routes] was the main element of the inquiry and the wildlife stuff was slightly adding on to that... I never got the feeling that the wildlife, the environmental side would ever be seen as so important that it would stop it.¹⁰¹⁶

Nature in this way is seen as incidental, as something separate from and less important than human. This perception of nature as being incidental and separate from human experience is underlined in the perceived treatment of love for nature at the inquiry. One resident felt that environment advocates were not given their due respect in the inquiry process.¹⁰¹⁷ People who loved nature felt that demonstrating this love of

¹⁰¹¹ AP Interview 8 January 2018

¹⁰¹² IR Interview 23 January 2018

¹⁰¹³ Counter to this, questions concerning the environment took up a lot of inquiry time and a lot of space in the inspectors' report. In this way, they seemed to be important. Moreover, it is interesting to consider this view in light of the First Minister's decision. This is discussed in more detail in the final section of this chapter and in Chapter 8, section 3.2.2.

¹⁰¹⁴ Fieldnotes 10 May 2017

¹⁰¹⁵ JP Interview 8 November 2018

¹⁰¹⁶ JD Interview 1 November 2018

¹⁰¹⁷ AP Interview 8 January 2018

nature marked them as unreasonable; they felt like “wackos”,¹⁰¹⁸ or like an “emotive hippy”.¹⁰¹⁹ A love of nature is portrayed by these participants as something unreasonable that would weaken their position at the inquiry, and yet it is something they feel strongly about. Environmental objectors interviewed described their passion for the environment feeling alienated from the inquiry process.¹⁰²⁰ What assumptions around nature, emotion and reasonableness does this view draw upon?¹⁰²¹ If the environment was treated as having equal importance to other factors, e.g. economic factors, what might be different?

I think if society started... saying we must have a high-quality environment, that is the top priority, it would be a lot easier to present an environmental case... The way that the values are stacked at the moment, if you say, in environmental terms there are insurmountable problems, well we decide the scheme has got to go ahead anyway in the economic interest.¹⁰²²

According to the RSPB objector above, this would impact the likely success of an environmental case; he contended that the challenges of making an environmental case were inherently linked to the low value attached to the environment at the inquiry, that it was viewed as unimportant in comparison with other factors, such as economic factors. This conflict between environmental and economic factors is explored in the following subsection.

4.2 Humans and nature in conflict

4.2.1 *Trade-off between human interests and environmental interests inevitable*

Human-nature dualism was evident in the separation of human and nature at the inquiry; this underpinned one of the most problematic tendencies of the inquiry for environmental objectors. Not only were human and nature separated, but they were treated as if they were in competition with one another. The Welsh Government counsel repeatedly asserted that some level of trade-off between environmental interests and human interests was inevitable, and that the environmental objectors and the government were only divided on their assessment of the appropriate balance to be struck between economic benefit and environmental risk. This was evident in the cross-examination of the head of the Campaign to Protect Rural Wales (CPRW) and of the GWT witness on sustainable development. The Welsh Government counsel returned to the idea of balance repeatedly in their cross-examination of the head of CPRW, in particular regarding the witness’s testimony regarding WFGA (the witness argued that the government failed to adhere to the principles of the Act¹⁰²³). They put it to the witness that, “balance lies at the heart of the Wellbeing of Future Generations Act, doesn’t it?”

¹⁰¹⁸ AP Interview 8 January 2018

¹⁰¹⁹ JD Interview 1 November 2018. These emotionally charged descriptions touch on the notion of reasonableness explored in Chapter 6.

¹⁰²⁰ JD Interview 1 November 2018; RB Interview 13 August 2018; IR Interview 23 January 2018. However, objectors also utilised attachment to the environment in their arguments, as in the GWT closing statement (see Chapter 6, section 3.2).

¹⁰²¹ This is discussed in Chapter 2, section 5.1 and explored in further detail in Chapter 8, section 2.

¹⁰²² JD Interview 1 November 2018

¹⁰²³ Peter Ogden, *Public Local Inquiry into the Draft Scheme and Draft Orders for the proposed M4 Corridor around Newport: Proof of Evidence: CPRW*, 2017) 21

Counsel contended that the Welsh Government did not dispute that there would be negative impacts, but that the need outweighed the damage.¹⁰²⁴ They then argued that it was the duty of government and not of this witness to consider the “balance striking” between the needs of ‘public interest’ and environmental impact.¹⁰²⁵ As with the ‘life’ that gets ‘put on hold’ previously discussed in this chapter,¹⁰²⁶ one wonders what is included in this account of the ‘public interest’. One might assume from this description of balancing priorities that it does not include environmental protection.¹⁰²⁷

The GWT witness on sustainable development and the Welsh Government counsel spent a substantial proportion of the cross-examination discussing trade-offs. As the witness described the evolving policy response towards sustainability, contending that it was no longer viewed as a lifestyle issue but rather as a systemic challenge that required government leadership, counsel interrupted him, saying, “That’s all very helpful, but the act doesn’t lay down [policy responses], it standardises priorities”.

He asserted, “A balance needs to be struck between competing aspects”.

The witness refuted this, arguing that trade-offs were not inevitable and that the objective of the Act was to encourage synergies between these issues. The witness and the counsel spoke over each other during this exchange.¹⁰²⁸ It seemed to be an important point that neither party wanted to relinquish. While the Welsh Government were happy to frame the issue as a question of where on the spectrum between environmental harm and economic benefit the marker would rest, environmental objectors wanted to avoid this framing. They wanted to move past this idea of a competition between economic benefit and environmental harm. This is perhaps because the objectors recognised that arguments claiming economic benefits were typically highly persuasive, and that it was often damaging for the environment to be seen as an obstacle to economic development; this echoes the opinion of the RSPB objector in the subsection above. One interview participant described the GWT approach to the inquiry as an attempt to chip away at this narrative:

By saying, actually it’s more damaging than you think, it won’t necessarily bring economic development, it’s not necessarily needed, and there are reasonable alternatives, so that’s how we tried to counter their narrative.¹⁰²⁹

4.2.2 *Environment vs Economy*

Highlighted above, environmental objectors sought to move the inquiry beyond a framing of ‘environmental harm vs economic benefit’ as this frame tended to disadvantage the environment. Implicit in this framing, and in what is understood to be included in the ‘life’ that gets ‘put on hold’ and in the ‘public interest’, is that human interest and environmental interest are separate; additionally, this framing seems to suggest that human interest and economic interest can be treated as interchangeable. This blurring

¹⁰²⁴ Fieldnotes 26 April 2017

¹⁰²⁵ Fieldnotes 26 April 2017

¹⁰²⁶ Section 2.1 of this chapter.

¹⁰²⁷ Further discussion of the public interest can be found in Chapter 3, section 2.2.

¹⁰²⁸ Fieldnotes 26 September 2017

¹⁰²⁹ MW Interview 14 December 2017

of human interests and economic interests can be problematic, as highlighted by one interview participant. Voicing concerns regarding current trends in environmental activism, he noted that,

[We] got ourselves into a position where we think it's possible to blame humans. Now I think that serves a very good ideological purpose, which is it hides the actual forces that are driving the crisis.¹⁰³⁰

For this objector, the forces driving the crisis are not all humankind but the forces of neo-liberal capitalism. This chapter does not seek to identify the one reason or force causing environmental damage; rather it seeks to explore what was framed as the counter to environmental interests at the inquiry. If human interests were framed as the counter to environmental interest, which human interests were these exactly?

The Welsh Government Queen's Counsel noted in their closing statement that "everyone agrees that you can't put a monetary value on everything".¹⁰³¹ While this might be the case, economic costs and benefits were closely considered at the inquiry; they seemed essential to its outcome. Environmental costs and benefits were not treated in the same close manner. For example, Ms Picton's proposed alternative to build a tunnel underneath the Gwent Levels was quickly dismissed during the Welsh Government closing statement (it was dealt with previously during the inquiry and is discussed in the Inspector's Report¹⁰³²). It was noted that it had an "untenable cost" and that its "only advantage" was its lack of effect on the Gwent Levels; for these reasons it did "not merit further consideration".¹⁰³³ It is noted in the Inspector's Report that the tunnel was estimated to cost £4.9 billion, approximately £2.9 billion more than the 'Black Route'. This is no small difference. However, the Report further stated that the tunnel "would produce a BCR (benefit cost ratio) considerably lower than that of the published scheme".¹⁰³⁴ This is somewhat misleading. Environmental impact was not included in the BCR set out in the evidence of the Welsh Government economic expert.¹⁰³⁵ This is out of line with the requirements of the Environment Wales Act 2016, as was highlighted in the evidence of Professor Jones, the GWT economic expert witness.¹⁰³⁶ This example foregrounds the difficulty of making a case for the environment at the inquiry; while economic interests and environmental interests were treated as competing with one another, economic factors seemed to be prioritised.

As highlighted above, human interest was assumed to be in opposition with environmental protection, with human interest being treated as synonymous with economic interest. Throughout the inquiry, different

¹⁰³⁰ IR Interview 23 January 2018

¹⁰³¹ Fieldnotes 28 March 2018; Morag Ellis QC on behalf of the Welsh Government (n348) 247; this was in reference to the eco-systems services assessment conducted by the Welsh Government ecological expert witness in February 2018.

¹⁰³² Wadrup and McCooey (n4) 360-361

¹⁰³³ Fieldnotes 28 March 2018

¹⁰³⁴ Wadrup and McCooey (n4) 361

¹⁰³⁵ Stephen Bussell, *M4 Corridor around Newport Proof of Evidence – Economics*, 2017) 32

¹⁰³⁶ Calvin Jones, *Proof of Evidence by Professor Calvin Jones: on behalf of Gwent Wildlife Trust, in the matter of: Public Local Inquiry into the M4 relief road around Newport: Economic Case*, 2017) 9

'human/economic interests' were argued to be threatened by overly rigorous environmental protection. Some interview participants felt that the environment was framed as standing in the way of employment, noted below:

It comes down to that traditional, jobs versus the environment; it's like, outrageous, look... billions of pounds of benefit, all these jobs, for what a few grotty wet fields, you're just being totally unreasonable about it.¹⁰³⁷

Others felt that the environment was being framed as a "brake on development",¹⁰³⁸ and in particular, a brake on building. The chief executive of GWT worried that while he and others loved the Gwent Levels, "in the minds of many people they're just a flat area next to the motorway that's ideal for building things".¹⁰³⁹ Environmental objectors complained that the planning system was geared towards building, that environmental protections were nothing more than hurdles to be "dealt with or to be got out of the way so they can get on with the important thing, which is building".¹⁰⁴⁰ GWT argued that the scheme represented a conflict between the environment and transport, arguing in their closing statement that the scheme presented a transport solution that was not essential to the Welsh economy, whose time savings were either small or uncertain and that would result in "one of the largest losses of SSSI habitat in the UK".¹⁰⁴¹ While moving away from economic interests, this argument reproduces the frame where environmental interests are pitted against human interest.

While environmental objectors sought to move away from it, the Welsh Government stuck to the 'economic benefit vs environmental risk' frame. There were several moments at the inquiry where the Welsh Government expressly framed the issue in these terms. Moreover, the idea of choosing environmental interests over economic interests was portrayed as unreasonable. During the cross-examination of the Welsh Government sustainable development witness, GWT counsel pressed the witness on their interpretation of WFGA; the witness replied, "I do not take the Act as meaning you can't build any more roads...".¹⁰⁴² It seemed ridiculous to suppose that the Act would make it impossible to build any more roads. In the same cross-examination, seemingly irritated by the list of global environmental threats the counsel suggested should have been considered by the witness in their assessment of the scheme, the witness argued that the scheme sought to alleviate the "intolerable situation on the M4".¹⁰⁴³ This emotive language indicates how the witness had prioritised the interests affected by the scheme. Traffic congestion on the M4 was described as "intolerable". This was the urgent interest; competing interests, in this instance the environment, did not evoke the same sense of urgency.

¹⁰³⁷ JD Interview 1 November 2018

¹⁰³⁸ IR Interview 23 January 2018

¹⁰³⁹ IR Interview 23 January 2018

¹⁰⁴⁰ JD Interview 1 November 2018

¹⁰⁴¹ Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 11; Fieldnotes 27 September 2017

¹⁰⁴² Fieldnotes 26 September 2017

¹⁰⁴³ Fieldnotes 26 September 2017

Environmental objectors worried that the inquiry was geared towards economic interests; the interests of the environment consequently could feel peripheral. One of the issues that illustrated this peripheral position is captured below by GWT counsel, describing the role of the GWT coordinator:

JB was there, doing his thing, and I suspect that's very much a personal effort on his part, it wasn't institution-led... and without that, there would have been nothing. And... that's a major significant thing... what stood out for me is that gap.¹⁰⁴⁴

The effects of economic interests and environmental interests being framed in competition with one another was exacerbated by the fact that those arguing for economic interest were typically better resourced than those arguing for environmental interest at the inquiry. The interests of the environment were effectively defended at the M4CAN inquiry; however, this defence was distinctive in several respects, in that it moved beyond the subjects where environmental objectors more typically give evidence.¹⁰⁴⁵ It was individual-led and unfunded. Highlighted by counsel above, this approach relied heavily on a few key individuals. Environmental objectors received no public funds;¹⁰⁴⁶ while they had a legal team and provided expert witnesses, this was pro-bono and ad-hoc.

4.2.3 *Time and shifting priorities*

Given time – time not in years but in millennia – life adjusts, and a balance has been reached. For time is the essential ingredient; but in the modern world there is no time.¹⁰⁴⁷

Captured by Rachel Carson in *Silent Spring*, the pace of human endeavour and the pace at which environmental change occurs are out of step with one another. This tension was recognised at the M4CAN inquiry, where the delicate balance achieved in the reens of the Gwent Levels was repeatedly cited by objectors. They argued that Welsh Government mitigation was unrealistic, illustrated by an environmental witness below:

Some of Welsh Government's people were suggesting that, oh, within a year or so, it would be green and it'd be fine, but the difference is just, it's black and white isn't it; there's one which has taken a phenomenally long time to evolve with the operations of man to this point and you've got another ditch which will be barren for a fair time, and then will be colonised... it'll be green quite quickly, but it won't be comparable.¹⁰⁴⁸

Time was argued over in various ways at the inquiry. Described in the GWT closing statement as “building a motorway to bypass a motorway”,¹⁰⁴⁹ objectors argued that the scheme was dated, out of step with the modern political climate and in particular out of step with WFGA. Objectors argued that competing visions

¹⁰⁴⁴ BM Interview 12 July 2018

¹⁰⁴⁵ This is discussed in more detail in Chapter 5, section 5.

¹⁰⁴⁶ Objectors' concerns that this affected Equality of Arms were addressed in the Welsh Government closing statement, citing two cases in particular, *R v The Secretary of State for the Environment Transport and the Regions ex p. Challenger 2000* and *Pascoe v. First Secretary of State 2007*. Morag Ellis QC on behalf of the Welsh Government (n348) 165-167. Concerns relating to disparities in resources are further explored in Chapter 8, section 5.

¹⁰⁴⁷ Carson (n966) 24

¹⁰⁴⁸ RB Interview 13 August 2018

¹⁰⁴⁹ Fieldnotes 27 September 2017; Brendon Morehouse on behalf of Gwent Wildlife Trust (n414) 10

of the future were being presented at the inquiry, and that the impact of the scheme on the Gwent Levels represented an attack on the future.¹⁰⁵⁰ These conflicting time-scales and competing visions of the future merged in the evidence of the GWT sustainable development witness, who argued that the idea of a trade-off between economic benefit and environmental harm made no sense when one considered long-term time-scale of these environmental threats, that the long-term view of these threats made them untenable.¹⁰⁵¹ Different perceptions of time point to what society considers important and what its vision for the future might be; these conflicting notions of time and the different ways that time was perceived at the inquiry suggest that views on these issues are currently in transition. This moment of transition will be considered in greater detail in the final section of this chapter.

This section has explored how human-nature dualism made it difficult to advocate for the environment at the inquiry, that it devalued nature and framed nature as being in opposition with economic interests. The final section of the chapter reflects on the ways that human-nature dualism was contested at the inquiry.

5 How was human-nature dualism contested at the inquiry?

This chapter has explored the theoretical foundations of human-nature dualism in rationalist philosophy, and the negative impact this dualism might have on the treatment of the environment, at a general level and at the M4CAN inquiry. The final section of the chapter will consider the ways in which the inquiry moved past human-nature dualism, investigating those moments where the interconnections between humans and nature were highlighted, where the materiality of the inquiry was acknowledged and where nature was treated as having intrinsic value. It will lastly consider the unique moment of the inquiry itself, that the inquiry took place while Welsh, national and global understandings of nature and the human-nature relationship are perhaps in a state of transition.

5.1 Humans and the environment interconnected

5.1.1 Gwent Levels as an interconnected environment

The Gwent Levels was highlighted by several participants to be uniquely appropriate for contradicting arguments that pitted humans against the environment. It was a habitat in which humans and the environment had been closely interconnected for millennia.¹⁰⁵² The conditions that led to the Gwent Levels' marshland ecosystem are described below by the NRW coordinator:

Like a lot of SSSIs, they're not pristine wilderness... the fact they exist is because of the co-existence of what human management has done to a particular area. It's very marked in areas

¹⁰⁵⁰ Fieldnotes 13 December 2017

¹⁰⁵¹ Fieldnotes 26 September 2017

¹⁰⁵² This thesis contends that all habitats are habitats where humans and nature are interconnected. This point is not meant to dispute the inherent fundamental interconnectedness of humans and nature; it suggests that interconnections between humans and nature in the Gwent Levels were explicit and therefore harder to ignore.

like the Gwent Levels... that man's intervention to drain that land has created that ecosystem by default. Obviously, they didn't do it deliberately, but it's created conditions for particular animals and plants to live.¹⁰⁵³

The NRW coordinator emphasises that most SSSIs depend on careful human-nature co-existence; in a country like the UK with high population density and a long history of agriculture and industry, this interconnected relationship is unsurprising. Yet often, the environment is assumed to exist separately from human populations. The problems inherent in this assumption and the way in which it is undermined by the Gwent Levels are highlighted below:

It's what they [the Gwent Levels] represent in history. Because it's a wholly man-made landscape, Romans started draining it, that process carried on. It's an example of a co-evolved environment, where you've got high levels of biodiversity attached to high levels of human settlement... and in an age where the environmental message tends towards the misanthropic, right, where human beings are inherently bad, destructive, when you see an environment like that, you think, well, it's clearly not the case.¹⁰⁵⁴

Worldviews that recognise the entangled human-nature relationship tend to be associated with cultures in the Global South, typically Latin America.¹⁰⁵⁵ These perspectives on the human-nature relationship are less typically associated with the UK. It is valuable therefore to recall that evidence of the entangled human-nature relationship can be found not only in ways of life that might be considered exotic or unfamiliar, but also in small, mundane aspects of everyday life and local environment. Mundane aspects of everyday life that point to the entangled human-nature relationship can be found on the Gwent Levels.¹⁰⁵⁶

The GWT reserves officer noted in his evidence that the Magor Marsh Reserve on the Gwent Levels was the oldest and most visited of all of the Trust's reserves and saw 10,000 visitors per year, 3,000 of which were schoolchildren.¹⁰⁵⁷ The reserves officer returned to the importance of community participation in his interview:

I mean, we're not the biggest nature reserve in the world, but it's been going a long time, and... you know it's really lovely that there's so much local support for it. It's so integrated with everybody in the area. Like, occasionally I'll meet somebody who's visited on a school trip 20 years ago and still remembers their day.¹⁰⁵⁸

The GWT reserve on the Gwent Levels provides a place for people to connect with their local environment, and in the experience of the reserves officer, this seems to be appreciated.

¹⁰⁵³ JP Interview 8 November 2018

¹⁰⁵⁴ IR Interview 23 January 2018

¹⁰⁵⁵ See Chapter 2, section 4

¹⁰⁵⁶ Highlighted in the discussion of the site visit in Chapter 6, section 5, this understanding of the human-nature relationship contributes to scholarship in space and place geographies. This is a fruitful area for enquiry, but falls outside the approach taken in this thesis. The contribution this research can make to this scholarship will be further explored in future work.

¹⁰⁵⁷ Richard Bakere, *Proof of Evidence: Richard Bakere, on behalf of Gwent Wildlife Trust: Public Local Inquiry into the M4 relief road around Newport: The effects of the proposed M4 extension across the Gwent Levels*, (2017) 6

¹⁰⁵⁸ RB Interview 13 August 2018

5.1.2 Participation as evidence of interconnectedness

Greater involvement with the environment seemed to encourage participants' sense of interconnectedness with the Gwent Levels. One resident pointed to his increased involvement with the Gwent Levels as a reason for his attachment to the area:

Volunteering down at the Magor Marsh reserve has made me much more aware of... the Levels generally. It's quite a precious resource and it's being whittled away... The more you get involved the more you want to protect it really, and you think, the motorway is going to go slap, literally, slap through the middle of that land, and people tell you well you can't really mitigate for that.¹⁰⁵⁹

A stronger attachment to the area seemed in this instance to intensify the sense that something precious was being lost. Some participants took part in the M4CAN inquiry as a result of their strong attachment to the Levels, further evidence of the interconnected relationship between humans and the environment. This builds on the idea highlighted at the start of this chapter¹⁰⁶⁰ and noted by Lord Hope in *Walton v The Scottish Ministers* that humans can speak on behalf of the environment in legal proceedings, where the environment is affected but unable to participate.¹⁰⁶¹ Some participants believed that the inquiry as an instrument of the planning process was inherently anti-environment and pro-development (echoing the dualism explored in the previous section);¹⁰⁶² consequently, they felt they had a duty to represent the environment in these proceedings, vividly described below:

We're like the union reps for wildlife. Our job is to stand up and fight for better terms and conditions for biodiversity to exist, and for people to enjoy it.¹⁰⁶³

This demonstrates that while the public inquiry process does not perhaps provide the best forum for thinking beyond human-nature dualism for reasons previously explored in this chapter, perspectives that recognise the interconnected human-nature relationship are held by some of its participants and so make their way into the inquiry process.¹⁰⁶⁴

5.2 Complexity of the environment recognised

Described in Chapter 6, the GWT witness worried that his knowledge of the environment, clear and confident whilst on the reserve, felt minimised in the inquiry room. Our conversation was recorded as we walked around the reserve; there are countless moments in the transcript where his knowledge of the local

¹⁰⁵⁹ RW Interview 9 November 2018

¹⁰⁶⁰ Section 1.1

¹⁰⁶¹ *Walton* (n987) 47. This notion of environmental guardianship was proposed by Christopher Stone in Christopher D. Stone, 'Should trees have standing?: toward legal rights for natural objects' (1972) *Southern California Law Review* 450

¹⁰⁶² IR Interview 23 January 2018

¹⁰⁶³ IR Interview 23 January 2018

¹⁰⁶⁴ Ways in which the public local inquiry and the planning system might be able to better engage with notions of intrinsic environmental value, and a wider range of perspectives on the human nature relationship, are further explored in Chapter 8, section 6.

environment comes through, in highlighting water vole burrows and the lawns they tend to make around the entry, noting the peaty quality of the land by Petty Reen, and recalling when reens were last cleared out, or when surveys were last taken, to name a few examples.¹⁰⁶⁵ He feared that the richness of local knowledge of the environment was not accurately represented at the inquiry. Specifically, he feared that the ambiguity and complexity of environmental knowledge could not be captured in a process that does not easily accommodate nuance or uncertainty, highlighted below:

We just don't know it all. I mean, there's so many invertebrates on the reserve here, I think it's kind of up to about a thousand or something on the species list, and not all of their life cycles are known. And even if they were, you couldn't possibly make a management plan that was optimal for all of them. You know, there's an awful lot of people who say they know everything isn't there?! The reality is that we don't know it all, at all.¹⁰⁶⁶

This concern was shared by several inquiry participants. At times, the inquiry dealt with ecological knowledge in black and white terms. However, it is important to acknowledge the moments where the inquiry heard evidence that preserved the nuance and uncertainty of ecological knowledge. The evidence of the GWT witness was identified by other interview participants as having successfully preserved the subtlety and specificity of the environment, and the risk of “bludgeoning” into the area without proper understanding.¹⁰⁶⁷

Site visits provided a route through which the specificity of local environmental knowledge could be included at the inquiry. Several interview participants noted that site visits enabled the inspectors to ‘experience’ the argument being made. No new evidence could be presented at site visits; instead, arguments that had already been presented could be impressed on the inspectors. This is further described below:

Then we got onto the fields, and you basically realised the moment you step inside that hedgerow, you really can't see what's going on in the road; it's totally private and the hedges are sort of 15, 20 feet high... I think that was a critical thing of the site visit, and it doesn't come across on maps, it's the sort of thing you have to live and breathe the site to understand.¹⁰⁶⁸

The role of site visits in grounding environmental arguments is explored in greater detail in Chapter 6. Here it is worth underlining that for environmental objectors, site visits were valuable because they enabled the inquiry process to recognise the complexity of the affected environment.

5.3 The environment valued

This chapter previously considered ways in which the environment seemed unimportant at the inquiry, where it did not feel pivotal to the scheme's success and where a love of nature felt unreasonable.¹⁰⁶⁹ There

¹⁰⁶⁵ RB Interview 13 August 2018

¹⁰⁶⁶ RB Interview 13 August 2018

¹⁰⁶⁷ MW Interview 14 December 2017

¹⁰⁶⁸ JD Interview 1 November 2018

¹⁰⁶⁹ The idea that love of nature is unreasonable is further explored in Chapter 6.

were also moments at the inquiry where the environment did seem important, and there were participants who clearly demonstrated their love of nature. One could argue that these moments and these participants were less foundational to the process; however, they were still a part of the inquiry. Environmental objectors, when asked about their relationship to the environment, joked that they did not work for the environment “for the pension”¹⁰⁷⁰ or for the “work life balance”.¹⁰⁷¹ Environmental objectors were typically passionate about the environment. Participants noted that they would not have pushed through the challenges of the inquiry were it not for this love of the environment. This inquiry process thus made space for people who participated on behalf of nature, due to their love of nature. While passion for the environment might have felt unreasonable or awkward within the inquiry, to a certain extent the inquiry process still expected to hear passionate contributions.¹⁰⁷² This passion pushed objectors to strongly underline the level of threat faced by the Gwent Levels.¹⁰⁷³ Participants stated that they felt a responsibility to the Gwent Levels to describe its unique value.¹⁰⁷⁴ While several interview participants felt the environment never seemed essential to the scheme’s viability, at points the environment did seem quite important, especially strongly protected elements of the environment.¹⁰⁷⁵

5.4 A moment of transition

People start coming back from the break. As people head in and take their seats, there’s an informal chat about Roman remains. They’re talking about remains in Caer Leon, and then someone mentions a housing development in Cirencester that was built over Roman remains.

The Welsh Government ecological consultant remarks jokingly, “but that was in the seventies, when they didn’t really care about that kind of thing”.

The Inspector starts the session again, asking for updated information on statutory undertakers, and querying whether all statutory undertakers were objectors.¹⁰⁷⁶

The informal conversation described in this fieldnote extract captures the impact that changing public perceptions can have on public policy and vice versa. While it is terrible that a housing development was built over a valuable cultural heritage site, that was something that would happen in the seventies; it is implied that we would not be so ignorant as to do that now. I suggest that value attached to the environment is undergoing a similar re-evaluation, and that the conflicting narratives produced by this re-evaluation were thrown into sharp relief throughout the inquiry process.

¹⁰⁷⁰ RB Interview 13 August 2018

¹⁰⁷¹ JD Interview 1 November 2018

¹⁰⁷² This is captured by the Welsh Government counsel in their interview: “When I’m advising and appearing for local residents I normally say to them, don’t try and take clever points against clever people; you are an expert at being a local resident. You are an expert at telling the inspector what it is about this place that makes it a good place to live or a place, at any rate, that you don’t want to change. Focus on that because the inspector can’t get that really from anybody else.” ME Interview (SII) 24 September 2019. This is further explored in Yvonne Rydin and others, ‘Local voices on renewable energy projects: the performative role of the regulatory process for major offshore infrastructure in England and Wales’ (2018) 23 *Local Environment* 565

¹⁰⁷³ Fieldnotes 26 April 2017

¹⁰⁷⁴ Fieldnotes 27 September 2017

¹⁰⁷⁵ Particular species got a lot of focus, such as dormice. See discussion of dormice in Chapter 5, section 2.2.1.

¹⁰⁷⁶ Fieldnotes 24 October 2017

This re-prioritising of environmental value seems in part catalysed by WFGA. The principles enshrined in the Act were repeatedly cited in NRW and GWT evidence.¹⁰⁷⁷ The Act was described as a radical legislative change for Wales in the GWT closing statement;¹⁰⁷⁸ it seeks to refocus the work of public bodies in Wales to be more economically, socially, environmentally and culturally sustainable.¹⁰⁷⁹ This approach recognises that humans and the environment are interconnected, that human communities rely on the environment for their survival and that the environment has its own intrinsic worth.¹⁰⁸⁰ The ambitious changes envisioned in the Act are difficult to implement,¹⁰⁸¹ and these difficulties were evident at the M4CAN inquiry. The treatment of the environment and the human-nature relationship within the inquiry process illustrates a clash between different perspectives of the environment; the emerging perspective, that recognises the intrinsic value of the environment and the interconnectedness of humans and nature, and the established perspective, where the environment has instrumental value and is separate from humans. This clash was highlighted by environmental objectors. The GWT chief executive described it as a peculiar tragedy of the scheme; he saw, during the inquiry, “two versions of human history playing out against each other”; the version exemplified by the co-evolution of human and nature present on the Levels, and the version where economic interests were prioritised over the environment.¹⁰⁸² Others felt that it demonstrated a hypocrisy within the Welsh Government, highlighted by one environmental objector:

You know they're the first government on this planet to have a sustainable development act, but then at the same time there's a narrative that you could pick from the 1970s ... we need more people to drive, to promote economic development, so you've got two narratives that are totally at odds with each other which the Welsh Government pursues, at the same time.¹⁰⁸³

While for some participants the Act represents a radical change in how the environment is valued, others were more circumspect. The chief executive of GWT, reflecting on the likely outcome of the inquiry, felt that it was highly unlikely that the inspector would go against the scheme; “he will err in the current and prevailing culture towards quantity not quality and that's what will rule the day”.¹⁰⁸⁴ While he acknowledged changing perspectives on the environment evident at the inquiry, he did not think that these changes would affect the ultimate recommendation of the inspectors.¹⁰⁸⁵

Lastly, as to whether the change in perspective towards the environment indicated during the M4CAN inquiry and foregrounded in WFGA might become established, several environmental objectors noted that

¹⁰⁷⁷ JP Interview 8 November 2018. Although this was not without difficulty; see Chapter 5, section 5.3

¹⁰⁷⁸ Fieldnotes 27 September 2017; Brendon Morehouse on behalf of Gwent Wildlife Trust (n414n) 7

¹⁰⁷⁹ Wellbeing of Future Generations Act 2015, introductory text

¹⁰⁸⁰ This perspective is demonstrated in the Welsh Government Sustainable Development Scheme that confirms sustainable development as the central organising principle of the Welsh Government and Welsh public sector. Welsh Assembly Government, *One Wales: One Planet: The Sustainable Development Scheme of the Welsh Assembly Government* (2009) 44

¹⁰⁸¹ See Chapter 3, section 2.3.2

¹⁰⁸² IR Interview 23 January 2018

¹⁰⁸³ MW Interview 14 December 2017

¹⁰⁸⁴ IR Interview 23 January 2018

¹⁰⁸⁵ The impact that this moment of transition might have had on the inquiry, and on the decisions that took place after the inquiry, will be discussed in greater detail in Chapter 8.

the planning process needed significant change in order to implement the change in priorities envisioned in the Act. It required policy-makers to “think outside the box” (as mentioned by Ms Picton in her evidence¹⁰⁸⁶); participants argued that there was no space for imaginative solutions in the current planning system.¹⁰⁸⁷ Opportunities for change in the planning system will be discussed in further detail in Chapter 8.

¹⁰⁸⁶ Fieldnotes 13 December 2017

¹⁰⁸⁷ MW Interview 14 December 2017; “...how do we actively and courageously seek an imaginative solution to this problem of congestion in south east wales within the uh context of sustainable development...”

8 Exploring Research Implications

1 Introduction

This thesis has explored the impact of rationalist assumptions on the treatment of the environment in legal decision-making processes. It started by setting a research question, namely how might rationalist assumptions present in legal processes adversely impact the environment? The thesis suggested three rationalist assumptions; processes of compartmentalisation, processes of abstraction and human-nature dualism. The thesis identified these assumptions and explored their various impacts on the consideration of the environment, describing how they shaped and had a negative impact on the treatment of the environment at the inquiry. It explored how these assumptions were contested, how they were produced, and how they informed other themes shaping the inquiry, for example the treatment of expert knowledge and the inquiries' adversarial nature. In proposing and exploring these three assumptions then, Chapters 5, 6 and 7 answer the research question; these are the rationalist assumptions that I contend had an adverse impact on treatment of the environment at the M4CAN inquiry. But what does this answer tell us?

Returning to considerations of the generalisability of findings flagged in Chapter 4,¹⁰⁸⁸ it is important to recall that this was a distinctive inquiry. It was the largest inquiry of its kind in Wales and, likely to remain so, according to the Head of Planning Inspectorate Wales.¹⁰⁸⁹ As a highways inquiry, it also has some distinct characteristics.¹⁰⁹⁰ The specific instances of this inquiry cannot be generalised to other inquiries; moreover, ethnographic research relies on specific, situated data that cannot be broadly generalised to other populations. The extent to which findings from this research can be generalised to other processes must be modest and carefully considered. Where the three rationalist assumptions explored relate to aspects of the legal context that are specific to inquiry procedure (e.g. abstracted treatment of issues encouraged by the role of the inspectors and the focus on inquiry documents) or legal environmental protections (e.g. compartmentalised treatment of issues encouraged by narrow legal protections), one might expect to see these aspects have similar effects in other decision-making processes. However, other aspects that are closely linked to the distinct nature and scale of the inquiry (e.g. financial inequalities of parties and scale of scheme heightening issues of 'environment vs economy' framing) must be recognised as being particularly informed by this distinct context. Importantly, whether or not these assumptions play out in similar ways in other decision-making contexts is peripheral to the key findings of this research. The key findings of this research provide insights about these assumptions and how they might interact within legal decision-making contexts in ways that negatively affect the environment. It develops our understanding of these assumptions and identifies themes that can be followed up in subsequent work (this is highlighted in the conclusion). Exploring the broader implications of these findings will be the focus of the following chapter. This chapter

¹⁰⁸⁸ Section 4.1

¹⁰⁸⁹ TT Interview (SII) 16 August 2019

¹⁰⁹⁰ See Chapter 3, section 3.3.1

proposes that rationalist assumptions and their impact in legal decision-making processes make it harder to account for the intrinsic value of the environment. Moreover, the embedded nature of these assumptions means they are entrenched within valuing and decision-making processes. This chapter will first consider instrumental and intrinsic value and how the environment is valued in law. This chapter focuses on changing environmental norms within Welsh sustainable development legislation rather than environmental legislation because firstly, sustainable development foregrounds the balancing of priorities and values, and secondly, the landmark piece of Welsh sustainable development legislation, WFGA, can be seen as a driver of change in how Wales values the environment. Factors entrenching instrumental environmental value and factors inhibiting change in environmental value in Welsh sustainable development and planning law will be considered, as well as factors inhibiting change in the public local inquiry. The chapter will pay attention to public participation as a possible route for transformative action. This chapter will end with an optimistic focus, suggesting possibilities for change in the planning system and recommendations for environmental objectors.

2 How is the environment valued in legal processes?

2.1 Law struggles to account for the intrinsic value of the environment

2.1.1 *Instrumental and intrinsic value and the environment*

Thinking about how the planning system could more effectively take issues of environmental protection into consideration, one objector asserted that there needed to be a change in value:

They must find a way of taking intrinsic worth seriously. I don't [know how but] it's got to happen. Because otherwise, if they treat ecology as a purely technical subject, we will just see biodiversity loss.¹⁰⁹¹

Environmental ethicists investigate the different forms of value attached to the environment and explore the impact of these forms of value on the treatment of the environment. Des Jardins notes that basing an environmental ethics on instrumental value is unstable, as “emphasising only the instrumental value of nature effectively means that the environment is held hostage by the interests and needs of humans”.¹⁰⁹² Des Jardins explores the idea of the environment having intrinsic or inherent worth, meaning that it should be valued for itself and not for its usefulness to humans.¹⁰⁹³ Des Jardins notes that we fail to adequately describe intrinsic value. We also tend to prioritise quantifiable, economic value over non-quantifiable,

¹⁰⁹¹ IR Interview (SII) 15 August 2019

¹⁰⁹² Joseph R. Des Jardins, *Environmental ethics: an introduction to environmental philosophy* (Wadsworth 1993) 144

¹⁰⁹³ *Ibid* 144

subjective value.¹⁰⁹⁴ Ethical approaches that recognise the intrinsic value of the environment dismantle the separation between human and nature embedded in rationalist philosophy.¹⁰⁹⁵

Where the intrinsic value of the environment is not recognised, the environment can seem unimportant. Returning to the M4CAN inquiry, interview participants felt that the environment, while given prominence at the inquiry, still felt inconsequential. One participant, reflecting on 14 years as an environmental objector in the planning system, noted that he still felt that the environment was treated as unimportant; “seriously? You’re arguing about the birds? Aren’t there more important things?”¹⁰⁹⁶ In this, the M4CAN seems typical of aspects of the legal system in England and Wales that tend to treat the environment as having instrumental rather than intrinsic value. Its worth is measured; Bosselmann contends that legal processes tend to compartmentalise the environment and not recognise its inherent worth.¹⁰⁹⁷ Several theorists highlight the emphasis on measurable value in environmental law and policy.¹⁰⁹⁸ This treatment of the environment stands in contrast to the legal treatment of other issues whose intrinsic value is recognised, i.e. human life.¹⁰⁹⁹

I contend that where environmental value is perceived in instrumental terms, it is easier to dismiss. Moreover, legal processes that consider environmental concerns will have a more accurate perception of environmental value if they consider its intrinsic value rather than merely its instrumental value. ‘Instrumental value’ is understood to mean environmental value measured in terms of human benefit; it sees the environment as mechanistic and measurable, without value outside of its benefit to humans. Instrumental perceptions of environmental value are difficult to reconcile with an understanding of humans and nature as interconnected; where the environment is seen as a resource, the human-environment relationship is an exploitative relationship. ‘Intrinsic value’ is understood to mean that the environment has value regardless of its benefits for humans. That is not to say that humans and nature need to be viewed

¹⁰⁹⁴ Ibid 146. For the purposes of this argument, I am eliding two of Des Jardins’ categories here. He discusses the intrinsic value of the environment, e.g. its beauty, and the inherent worth of the environment. I have used the term ‘intrinsic value’ throughout the thesis to refer to what Des Jardins terms ‘inherent worth’. The aspects of the environment he describes as having intrinsic value are aspects like landscape etc that have a value to humans; thus, this category is still anthropocentric and partly instrumental. I contend that participants who championed the intrinsic value of the environment at the inquiry frequently did so by reference to their own emotional attachment to the environment. It is a way that the intrinsic value of the environment can be demonstrated, but this emotional attachment is not required for the intrinsic value of the environment to exist. The environment has intrinsic value whether or not people have an emotional attachment to it.

¹⁰⁹⁵ See Chapter 2, section 5

¹⁰⁹⁶ JD Interview (SII) 7 August 2019

¹⁰⁹⁷ Bosselmann (n205) 2432; Plumwood (n176) 14; See Chapter 5

¹⁰⁹⁸ Sheila Jasanoff, ‘Law’ in D Jamieson (ed), *A companion to environmental philosophy* (Blackwell 2001) 336; See Chapter 5; this is covered in greater detail below where we look at risk-based regulation.

¹⁰⁹⁹ Debates around the value of human life in law, whether it should be conceived of as the ‘sanctity of life’, the ‘inviolability of life’ or as ‘reverence for life’, are concerned with how law responds to complicated decisions concerning human life, such as end-of-life care and physician-assisted suicide; that human life has inherent value is not contested in these debates. Rob Heywood and Alexandra Mullock, ‘The value of life in English law: revered but not sacred?’ (2016) 36 *Legal Studies* 658, 663; It is interesting to note that debates around sanctity of life worry about religious overtones confusing this ethical debate, this concern itself evidence of shifting societal values and their impact on law.

separately to understand environmental value; indeed, the separation of humans and nature inhibits perception of intrinsic environmental value. Drawing on Nussbaum's defence of compassion, identification is seen as a key stage in feeling compassion with another. Emphasising difference is a common strategy for diminishing compassion.¹¹⁰⁰ Recognising the intrinsic value of the environment does not separate humans and the environment; rather, it recognises that environmental value is not contingent upon the environment's value to humans, and further recognises that humans depend on the environment. This is not to suggest that laws written by, for and about humans should not be concerned with human benefit. However, where these laws also affect the environment, they should also concern environmental benefit, and environmental benefit should not be understood solely through the frame of human benefit but as a good in and of itself. Decisions which address a conflict between a human benefit or harm and an environmental benefit or harm are more likely to be fair to the environment if the environment is recognised as having value outside of its value to humans, i.e. if its intrinsic value is recognised.

2.1.2 *What kind of environmental value is embedded in environmental law?*

The codification of environmental law around the world during the last three decades of the twentieth century can justly be seen as an achievement of humankind's enhanced capacity to reflect upon its place in nature. With this body of legislation, the governments of virtually all the nations of the earth announced their intention to safeguard the environment through systematic regulatory action, and to subordinate the desires and appetites of their citizens to the needs of other species and biological systems on the planet.¹¹⁰¹

Jasanoff above offers an optimistic description of environmental law, its mission and its scope.¹¹⁰² It represents humankind reimagining its relationship with nature and gives evidence that humankind can prioritise environmental protection over its own desires. Human desires are "subordinate" to the needs of other "species and biological systems" in this description. From this, one would hope that environmental law recognises intrinsic environmental value. There are certain pieces of UK and Welsh environmental legislation that present the environment as having value outside of its potential benefits for humans. The Pollution Prevention and Control Act 1999 provides an expansive definition of harm caused as a result of environmental pollution. It covers:

- (a) harm to the health of human beings or other living organisms;
- (b) harm to the quality of the environment, including—
 - (i) harm to the quality of the environment taken as a whole,
 - (ii) harm to the quality of the air, water or land, and
 - (iii) other impairment of, or interference with, the ecological systems of which any living organisms form part¹¹⁰³

¹¹⁰⁰ Martha C. Nussbaum, 'Compassion: The basic social emotion' (1996) 13 *Social Philosophy & Policy* 27, 35

¹¹⁰¹ Jasanoff (n1098) 331

¹¹⁰² She also refers to the codification of environmental law, not the creation of environmental law. Reflecting on the particular focus of this research, elements of environmental protection have existed within the legal system of England and Wales for longer than the last few decades. The extent to which environmental value in law is a new phenomenon is an important question, and one that is considered in more detail later in the chapter when it explores the idea of cultural change.

¹¹⁰³ Pollution Prevention and Control Act 1999 s 1(3)

This suggests an understanding of the environment having intrinsic value. One could argue that there has been a gradual shift in how environmental law treats the environment, where it is seen to have value outside of human interest. This shift is evident in some environmental law but not all, however. Environmental policy that assigns value-blocks to aspects of the environment encourage instrumentalised treatment; this is evident in biodiversity offsetting, and, relevant to the planning process, mitigation strategies.¹¹⁰⁴

2.1.3 *Risk-based environmental regulation and instrumental value*

Risk-based environmental regulation has become prominent in environmental legislation.¹¹⁰⁵ It tends to view harm in measurable terms, thus encouraging an instrumentalised treatment of the environment.¹¹⁰⁶ Risk analysis comes from the financial sector and is, in the words of Jasanoff,

Appealingly comparable. Risks can be offset against benefits, and environmental laws often prescribe that policy-makers should regulate economic activity only when its benefits are outweighed by the risks it poses to health or the environment.¹¹⁰⁷

The roots of risk assessment highlight the parallels between risk-based regulation and economic policy; environmental regulation framed in terms of risk is easier to align with market-based mechanisms and other ‘green economy’ approaches within environmental law.¹¹⁰⁸ A study by Brown et al noted environmental protection goals in environmental risk assessments were often generic and that more specific protection goals were frequently tied to environmental legislation requiring retrospective risk assessment.¹¹⁰⁹ The authors contended that this undermined risk assessments’ effectiveness as, “given the variability and complexity of ecosystems, it is difficult to determine whether these generic protection goals are being met.”¹¹¹⁰ This suggests that risk-based approaches might not be best suited to the complex, incompletely known and interconnected nature of the environment. The itemised approach favoured in risk-based regulation ends up minimising negative impacts on the environment, as ‘smaller’ issues get side-lined.¹¹¹¹ This echoes the narrowing effect of adversarial, time and resource-limited argument present at the M4CAN inquiry. This tidying process can be seen as a trait of rationalising argument, where less compelling arguments and less crucial issues are dropped;¹¹¹² this might make it more difficult to advocate for broader understandings of the environment in legal processes. Moreover, Jasanoff worries that risk-based regulation

¹¹⁰⁴ Sian Sullivan, 'Banking Nature? The Spectacular Financialisation of Environmental Conservation' (2013) 45 *Antipode* 198; Morgan M. Robertson, 'The neoliberalization of ecosystem services: wetland mitigation banking and problems in environmental governance' (2004) 35 *Geoforum* 361, 362

¹¹⁰⁵ S. Jasanoff, 'The Songlines of Risk' (1999) 8 *Environmental Values* 135, 135

¹¹⁰⁶ A. Ross Brown and others, 'Toward the definition of specific protection goals for the environmental risk assessment of chemicals: A perspective on environmental regulation in Europe' (2017) 13 *Integrated Environmental Assessment and Management* 17, 33

¹¹⁰⁷ Jasanoff (n1098) 336

¹¹⁰⁸ Karen Morrow, 'Rio+20, the Green Economy and Re-Orienting Sustainable Development' (2012) 14 *Environmental Law Review* 279

¹¹⁰⁹ A retrospective environmental risk assessment is an assessment of risks conducted after the specific substance under assessment is already in the environment. An overreliance on retrospective environmental risk assessments is in conflict with the precautionary principle in EU environmental law.

¹¹¹⁰ Ross Brown and others (n1106) 17

¹¹¹¹ This issue is further explored in Chapter 5, section 2.2.1.

¹¹¹² Jacqueline Best, 'Bureaucratic ambiguity' (2012) 41 *Economy and Society* 84, 86

tends to conceive of environmental harm caused by human action as the exception rather than the rule. This then encourages ‘small’ solutions to ‘small’ problems, as underlying issues for human action causing environmental harm are ignored. It makes it more difficult to ask radical questions about the “underlying philosophies of development, consumption, or resource use” and their destructive environmental impact.¹¹¹³

Risk-assessment mechanisms tend to rely on “traditional bureaucratic virtues of rationality, expertise, insulation and authority.”¹¹¹⁴ By seeing environmental problems in terms of risk, some people are empowered as experts and other people are seen as “inarticulate, irrelevant or incompetent”.¹¹¹⁵ Risk can privilege expertise in decision-making, thus intensifying feelings of public alienation from decision-making, in particular on contested issues.¹¹¹⁶ Discussions around risk regulation can entrench the separate treatment of reason and emotion;¹¹¹⁷ as stated by Hilson, “whether regulators should take into account ‘unscientific’ emotions or be guided purely by scientific rationality is a key question within the literature on risk regulation”.¹¹¹⁸ Jasanoff elaborates on this point, arguing that as risk is a cultural construct,

It makes very little sense to regulate risk on the basis of centralised institutional authority, insulation from public demands, and claims to superior expertise. Environmental regulation calls for a more open-ended process, with multiple access points for dissenting views and unorthodox perspectives.¹¹¹⁹

This echoes arguments advocating for public participation explored in Chapter 2.

2.2 Value and experience

2.2.1 *Experiencing facilitates valuing*

There are two claims here. Firstly, by recognising people’s attachment to nature it is easier to recognise nature as something with intrinsic value, as opposed to a repository of services. The idea that communities become attached to their local area and attach greater value to it is powerfully described by Cecilio Blacktooth, chief of the Cupeño tribe addressing US government commissioners in 1903:¹¹²⁰

You ask us to think what place we like next best to this place where we always lived. You see the graveyard there? There are our fathers and our grandfathers. You see that Eagle-nest mountain and that Rabbit-hole mountain? When God made them, He gave us this place. We have always been here. We do not care for any other place... We have always lived here.¹¹²¹

¹¹¹³ Jasanoff (n1098) 336

¹¹¹⁴ Jasanoff (n1107) 138

¹¹¹⁵ Ibid 137

¹¹¹⁶ Ibid 139; See Chapter 5, section 2.1.

¹¹¹⁷ Fisher, Lange and Scotford (n247) 482

¹¹¹⁸ Chris Hilson, *Climate Populism, Courts, and Science* (OUP 2019)

¹¹¹⁹ Jasanoff (n1107) 150

¹¹²⁰ See Chapter 2, section 5.2.3. The Cupeños are a Native American tribe from Southern California; they are members of several federally recognised tribes including Los Coyotes Band of Cahuilla and Cupeño Indians. Barry Pritzker, *A Native American encyclopedia: history, culture, and peoples* (OUP 2000) 125

¹¹²¹ T.C. McLuhan, *Touch the Earth: a self-portrait of Indian existence* (Abacus 1986) 28. This speaks to literature on social constructions of space and attachment to land explored in space and place geographies, as briefly discussed in Chapter

Secondly, environmental issues are easier to understand when they are experienced. This was agreed by the assistant inspector when discussing the value of site visits. He noted that they were helpful in “seeing exactly what the issue is... You need to go around and look at the site for yourself and get a flavour of where things are.”¹¹²² The NRW coordinator noted that arguments on environmental harm did not seem to have the same impact in the inquiry room as on the site visit;¹¹²³ underlining the importance of site visits, and also, the risk in conceptualising of environmental harm separated from its reality.

2.2.2 *Legal processes have a tendency towards abstraction*

As discussed in Chapter 6, processes at the inquiry had a tendency towards abstraction. This is captured below by the GWT reserves officer:

In the inquiry space, you're not actually referring to reality, are you? You're referring to submissions...¹¹²⁴

Through a process that “involves abstracting processes of translating physical relations into legal problems, principles and precedents”, arguments were detached from lived reality.¹¹²⁵ Cutting the link between experiencing and advocating for the environment at the inquiry might make it harder to value the environment; it might also make it easier to dismiss environmental harm. The language of environmental mitigation can make the level of threat suffered by the environment seem less severe. This is captured by the GWT reserves officer below. He felt that it was disingenuous to say that populations affected by the scheme's mitigation strategies are moved, when the reality is that most often, depending on the sensitivity of the species, a significant proportion of them will die.¹¹²⁶

They're just going to move... it's always move isn't it, not die... the birds fly away and yeah, they're all fine... you're not killing, you're just displacing.¹¹²⁷

2, section 5.2.3. This field of scholarship lies outside the focus of this thesis; however, as noted in Chapter 6, this research can make a valuable contribution to this field, in particular in relation to the site visit. This contribution will be the subject of future work.

¹¹²² AMC Interview (SII) 24 July 2019 53.50; See Chapter 6, section 5.1

¹¹²³ JP Interview (SII) 9 July 2019

¹¹²⁴ RB Interview (SII) 25 July 2019

¹¹²⁵ See Chapter 6. Nicole Graham, Margaret Davies and Lee Godden, 'Broadening law's context: materiality in socio-legal research' (2017) 26 Griffith Law Review 480, 495

¹¹²⁶ Very few studies monitoring success of ecological mitigation measures seem to exist, and 'success' within these studies is not always defined by amount of species surviving. The few studies that do exist suggest that firstly, more research needs to be done in this area and secondly, ecological mitigation measures are unsatisfactory. Katherine Drayson and Stewart Thompson, 'Ecological mitigation measures in English Environmental Impact Assessment' (2013) 119 Journal of Environmental Management 103; Sabine Tischew and others, 'Evaluating Restoration Success of Frequently Implemented Compensation Measures: Results and Demands for Control Procedures' (2010) 18 Restoration Ecology 467; Jo Treweek and Stewart Thompson, 'A review of ecological mitigation measures in UK environmental statements with respect to sustainable development' (1997) 4 International Journal of Sustainable Development & World Ecology 40

¹¹²⁷ RB Interview (SII) 25 July 2019

Linking this back to notions of value and attachment, attachment to nature denotes a greater emotional connection to and concern for the threats facing nature. Discussed in Chapter 6, this emotional and urgent response was not always well accommodated very well at the inquiry.¹¹²⁸

3 How is the environment valued in Welsh sustainable development legislation?

The public local inquiry as a mechanism within the planning system must take into consideration environmental and sustainability legislation. These areas of law are both concerned with environmental value; however, they approach this concern differently. Environmental legislation seeks to monitor the relationship between the environment and forces that might cause environmental harm, e.g. pollution, resource use, carbon emissions, and so on. Sustainability legislation addresses the balance of possibly conflicting economic, environmental and social priorities. Trends within sustainable development can start from the assumption that economic benefits are privileged at the expense of social and environmental priorities.¹¹²⁹ Some contend that the principle of sustainable development prioritises the environment with its focus on future generations.¹¹³⁰ This section assesses what forms of value are attached to nature in WFGA and in the principle of sustainable development and consider whether the forms of value attached to the environment in part account for inadequacies in this legislation.

3.1 Environmental value in Welsh sustainable development legislation

3.1.1 Intrinsic or instrumental value in sustainable development

Sustainable development has been a key principle shaping environmental law since at least as far back as the Rio Declaration in 1992.¹¹³¹ The fundamental aim of sustainable development is to change the relationship between humans and the environment.¹¹³² As noted by Banerjee,

Sustainable development... it is about rethinking human–nature relationships, re-examining current doctrines of progress and modernity, and privileging alternate visions of the world.¹¹³³

This description underlines the principle's radical implications and its foregrounding of the human-nature relationship. As discussed above, acknowledging the interdependent relationship between humans and the environment necessarily means acknowledging intrinsic environmental value. Holland notes that sustainable development promotes values of justice, wellbeing and the intrinsic value of nature, putting the

¹¹²⁸ The counter to this, explored in Chapter 6 section 5, is the role of the site visit.

¹¹²⁹ Kosoy et al (n77) powerfully sets out the prioritising of economic factors, and the negative impact of this prioritising; Howe (n415) further highlights the weight previously afforded to economic factors.

¹¹³⁰ These contentions are explored in the following section.

¹¹³¹ See Chapter 2, section 4; United Nations Conference on Environment and Development, The Rio Declaration on the Environment and Development 1992. It is also present in the Environment Act 1995 s 4(1).

¹¹³² Morrow (n1108) 280

¹¹³³ Banerjee (n2) 169

value of nature “in its own right” as a key element of sustainable development.¹¹³⁴ However, sustainable development is also criticised for maintaining a ‘business as usual’ approach, by assuming that a balance can be struck between economic, social and environmental priorities.¹¹³⁵ Dawes and Ryan criticise the sustainable development paradigm of the ‘three-legged stool’, contending that it continues to conceptualise humans as existing outside their environment. They argue that this approach to sustainable development is inherently flawed because, “it continues to place us outside those limits. And while we may be able to think outside the limits, we cannot live outside the limits”.¹¹³⁶

The Brundtland Report remains central to sustainable development policy and legislation, and defines sustainable development like so:

Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs (emphasis added). The concept of sustainable development does imply limits - not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth.¹¹³⁷

This definition expresses environmental value in instrumental terms; actions are to be undertaken to ensure that humans can continue to benefit from the environment. It further claims that economic growth and adequate environmental protection are mutually compatible:

Economic growth always brings risk of environmental damage... But policy makers guided by the concept of sustainable development will necessarily work to assure that growing economies remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support growth over the long term.¹¹³⁸

Some aspects of the sustainability discourse therefore view the environment as having intrinsic value and some aspects view it as having instrumental value. These approaches can be placed on a spectrum between strong sustainability approaches that prioritise environmental protection and weak sustainability approaches that prioritise human wellbeing.¹¹³⁹ Environmental advocates worry that proponents of weak sustainability, in order to ensure human wellbeing, will allow the degradation of the environment.¹¹⁴⁰ Achieving the appropriate balance between economic, environmental and social priorities has traditionally been a problem in sustainable development.¹¹⁴¹ However this ‘balancing’ elides human and economic wellbeing and does

¹¹³⁴ Alan Holland, 'Sustainability' in D Jamieson (ed), *A companion to environmental philosophy* (Blackwell Publishers 2001) 393

¹¹³⁵ Morrow (n1108) 281

¹¹³⁶ Dawe and Ryan (n288) 1459

¹¹³⁷ World Commission on Environment and Development (n688) 16

¹¹³⁸ Ibid 39

¹¹³⁹ Holland (n1134) 396

¹¹⁴⁰ ibid 396

¹¹⁴¹ Sue Chadwick, 'Sustainable development: residual issues with the tilted balance?' (2017) 8 *Journal of Planning & Environment Law* 796; Bosselmann (n205) 2437

not recognise the interconnected relationship between humans and the environment. This section will consider recent sustainable development legislation in Wales. Do these laws adopt an instrumental view of the environment, one that continues the traditional ‘balancing’ approach, or do they recognise the intrinsic value of the environment, allowing for more innovative approaches?

3.1.2 *Instrumental and intrinsic value in WFGA*

Sustainable development was prioritised early on in the devolved Welsh administration; a duty to make a scheme outlining how the Welsh Assembly would promote sustainable development was attached to the Government of Wales Act 1998,¹¹⁴² and further included in the Government of Wales Act 2006.¹¹⁴³ Sustainable development is the central organising principle of the Welsh Government.¹¹⁴⁴ WFGA extends the duty to act in accordance with the sustainable development principle to public bodies in Wales.¹¹⁴⁵ Section 5(1) of the Act states that,

In this Act, any reference to a public body doing something “in accordance with the sustainable development principle” means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.¹¹⁴⁶

Evident here, the Act keeps close to the Brundtland Report definition of the principle of sustainable development. However, there are some important differences. Adding to the social, economic and environmental model, WFGA states that ““sustainable development” means the process of improving the economic, social, environmental and cultural wellbeing of Wales”.¹¹⁴⁷ WFGA’s focus on cultural wellbeing is interesting when one considers the need for cultural change inherent in the principle of sustainable development. By keeping relatively close to the Brundtland Report definition of the principle of sustainable development however, WFGA has kept its issues with instrumental value. It maintains an anthropocentric focus, with two of the seven wellbeing goals discussing the environment.¹¹⁴⁸ However the treatment of the environment in the Assembly debates highlighted that economic priorities should not override environmental priorities.¹¹⁴⁹ Members highlighted that the Act signified a change in approach to governance, in particular environmental governance. Alun Davies (Labour AM for Blaenau Gwent) in the Stage 3 reading of the bill reiterated that,

This definition of sustainable development will drive forward a way of working in Wales that is very different to that which we’ve seen in the past, but also that we will have a more

¹¹⁴² Government of Wales Act 1998 s 121(1)

¹¹⁴³ Government of Wales Act 2006 s 79(1). This is described in greater detail in Victoria Jenkins, ‘Placing sustainable development at the heart of government in the UK: the role of law in the evolution of sustainable development as the central organising principle of government’ (2002) 22 *Legal Studies* 578, 591

¹¹⁴⁴ Welsh Assembly Government (n1039) 5

¹¹⁴⁵ The Act is described in more detail in Chapter 3, section 2.3.2

¹¹⁴⁶ Wellbeing of Future Generations Act s 5(1)

¹¹⁴⁷ Wellbeing of Future Generations Act s 2

¹¹⁴⁸ 3 of 7 if you include that ‘a globally responsible Wales’ says the word ‘environmental’ – it doesn’t engage in any detail with the environment, however.

¹¹⁴⁹ Alun Davies, in *Well-being of Future Generations Stage 3 Deb* 10 March 2015, 16:13

profound and a more holistic understanding of the meaning of sustainability in the future than perhaps we've had in the past.¹¹⁵⁰

This highlights the importance of transformation embedded in WFGA and in the concept of sustainable development more broadly. It is driven by a need for change, “the kinds of wholesale changes—in thinking and practices—that are deemed necessary to address some of the most pressing environmental challenges of the 21st Century.”¹¹⁵¹ The fourth section of this chapter considers the extent to which this Act can effect change, and what might limit its transformative potential.

3.2 Change in value

3.2.1 *Need for a culture change*

The principle of sustainable development aims to facilitate culture change. While proponents of sustainable development often highlight its capacity to engender change, some see this as simplistic. Bonneuil and Fressoz question the broader tendency within environmental scholarship to see any change in response to the environment as a radical break with the past.¹¹⁵² The Act's capacity to facilitate change was highlighted by the then Minister for Natural Resources, Carl Sargeant, in response to a question on the implementation of WFGA from William Powell, (Welsh Liberal Democrats AM for Carmarthen East and Dinefwr):

The Act requires real culture change: a fundamental change to how we plan and operate as organisations, and making those decisions for the long term that will benefit current and future generations.¹¹⁵³

Sustainable development should facilitate alternative constructions of value while trying to connect with communities' present values and concerns; “this is the tension between seeking to connect with people where they are “now”, while also presenting radically alternative visions (and values) for the future.”¹¹⁵⁴ One could argue that at this level at least, in making space for alternative narratives, WFGA has been successful.¹¹⁵⁵ Pigott, in her analysis of the imaginaries constructed by the Act, praises the architects of WFGA for their attempts to align emerging and existing narratives of environmental value.¹¹⁵⁶ Several participants agreed that WFGA was effective in this way. Its ambiguity,¹¹⁵⁷ while problematic, provided space to discuss different forms of value.¹¹⁵⁸

¹¹⁵⁰ Alun Davies, in Well-being of Future Generations Stage 3 Deb 10 March 2015, 16:13

¹¹⁵¹ Pigott (n297) 1

¹¹⁵² Bonneuil and Fressoz (n1) 290. This is further explored in the Conclusion.

¹¹⁵³ Carl Sargeant, in The United Nations Goals and the Well-being of Future Generations (Wales) Act 2015 Deb 24 November 2015, 15:21

¹¹⁵⁴ Pigott (n297) 13

¹¹⁵⁵ CJ Interview (SII) 12 September 2019. One interview participant contended that, judging by the schedule of the Office and in their personal experience of attending meetings with Commissioner, this role did effectively employ its ‘soft’ power.

¹¹⁵⁶ Pigott (n297) 13

¹¹⁵⁷ Ambiguity inherent in the Act is discussed in further detail in Chapter 3, section 2.3.2.

¹¹⁵⁸ This was aptly described by the chief executive of GWT: [WFGA is] not as firm as we would like in terms of legal entity, [but] it does give us a bit more wiggle room to ask some profound questions and [to] talk about the spirit of the Act. IR Interview (SII) 15 August 2019

The Act provided a space for conversation. Was this conversation shared among actors in the planning system? Did it affect their decision-making? There is evidence that some actors in the planning system are taking sustainable development into consideration more pro-actively.¹¹⁵⁹ However, the implementation of new ways of thinking engendered by the Act is inconsistent.¹¹⁶⁰ This perhaps in part stems from the organisational culture within which planning actors operate.¹¹⁶¹ Several participants commented that it would be harder for inquiry actors within the planning system to make a decision that would undermine the foundations of their previous work. The GWT counsel felt that it was difficult for planners to acknowledge the need for change:

There's a disconnect between the planners... the people who have been brought up [in this system]... the inspector was a road engineer, that's his life, he's not going to suddenly think his life's work building things was nonsense and destroying the planet.¹¹⁶²

Others noted that the chief inspector had worked in planning for many years, and would have been used to traditional, or 'weak sustainability', understanding of sustainable development. He was perhaps less likely to engage with the new approaches to sustainable development that the Act seeks to establish.¹¹⁶³ This is supported by the Inspector's Report, where, in establishing why he favours the Welsh Government's interpretation of the Act over that of the Commissioner, he notes that, "sustainable development (the bedrock of the WCFG Act 2015) has been at the heart of government decision-making since 1998".¹¹⁶⁴

3.2.2 *Moment of change? WFGA and the M4CAN scheme*

WFGA aims to change how priorities are evaluated in decision-making processes; in particular, it seeks to prioritise the environment where in the past it has been undervalued.¹¹⁶⁵ While this change in values was not evident in the Inspector's Report, one could argue it was evident among the greater public. The inspectors made their recommendation in September 2018 (the inquiry having closed in March 2018); the First Minister Mark Drakeford announced his decision in June 2019. The inspectors made their

¹¹⁵⁹ CJ Interview (SII) 12 September 2019. In the experience of this interview participant, approaches to planning decisions on windfarms in Wales varied, suggesting some planning officers were more influenced by WFGA than others.

¹¹⁶⁰ This is perhaps partly a result of patchy take up in local government as well. Recent consultation documents on local government in Wales, Welsh Government, *Green Paper Consultation Document: Strengthening Local Government: Delivering for People* (2018) references WFGA and its mechanisms three times and makes no reference to sustainable development. This omission was noted by one of the consultation responses, Neath Port Talbot County Borough Council, *Joint Report of the Chief Executive and Assistant Chief Executive: Local Government Reorganisation* (30 May 2018).

¹¹⁶¹ While describing a very different type of workplace, namely the wildlife fighters of Arizona and the US Forestry Service, Desmond's analysis of organisational culture and values is insightful, and applicable to this case. Matthew Desmond, *On the fireline: living and dying with wildland firefighters* (Bristol University Press 2007) 117

¹¹⁶² BM Interview (SII) 12 August 2019

¹¹⁶³ MW Interview (SII) 6 August 2019

¹¹⁶⁴ Wadrup and McCooley (n4) 380. See Chapter 3, section 4.2. WFGA was enacted late in the M4CAN scheme timeline.

¹¹⁶⁵ Howe (n415). Evident in this section and throughout the thesis, the M4CAN inquiry came at an illuminating moment for WFGA. Its relevance to the scheme has been highlighted throughout the thesis, without being a focus. Future work will further discuss the insights that this research provides for this landmark Act.

recommendation that the scheme should go ahead, and the First Minister decided against the scheme. The First Minister stated that even were it not for the scheme's funding issues, he would have decided against it on the grounds of the unacceptable environmental impact on the Gwent Levels.¹¹⁶⁶ Does the difference between the Inspector's Report and the First Minister's decision indicate a change in public and political perspective on the environment? According to the GWT counsel, it did:

I do think it's indicative of that wider sea change... I think the minister's decision is far more reflective of the interpretation of the Environment Act and the Well-being Act because those are political decisions that that assembly had made, than the inspectors' interpretation of it. Ultimately the Welsh ministers knew what they had tried to achieve and implemented it.¹¹⁶⁷

The Inspector agreed with the Welsh Government's interpretation of WFGA over that of the Future Generations Commissioner. He agreed with the Welsh Government that the scheme would have "substantial environmental benefits" and "significant economic advantages across South Wales",¹¹⁶⁸ and that the Commissioner's interpretation of the Act's obligations was unrealistic:

For my part, I find this proposition [by the Future Generation Commissioner that "all of the wellbeing goals must be given equal weight in each decision"] to be unrealistic in the real-world situation of a major infrastructure proposal, particularly one that has reached a very advanced stage of delivery.¹¹⁶⁹

The First Minister specifically stated that he placed greater weight on environmental value:

I attach greater weight than the Inspector did to the adverse impacts that the Project would have on the environment... Ultimately, whilst I agree with the Inspector that "[t]here are valid and strong competing interests at issue here" [IR8.480], my judgement as to where the balance between the competing interests lies is different to that of the Inspector's.¹¹⁷⁰

This indicates that both the inspector and the First Minister conducted a balancing exercise between economic benefit and environmental harm. The First Minister did not object to the reasoning of the inspector, only to the value he placed on the environment.¹¹⁷¹ The NRW coordinator noted that the information available on environmental damage between September and June had not changed that much; the First Minister for example cited in his decision the State of Nature (SONAR) report that was included in NRW inquiry evidence.¹¹⁷² It was the weighing up of that information that changed.

For the assistant inspector, the difference between the First Minister's decision and the inspectors' recommendation was not about a change in the value attached to the environment. Rather it highlighted

¹¹⁶⁶ Mark Drakeford, *First Minister Mark Drakeford, Speech to Assembly on M4CAN Decision* (Senedd Debate, Cardiff, 4 June 2019) accessed 4 June 2019

¹¹⁶⁷ BM Interview (SII) 12 August 2019

¹¹⁶⁸ Wadrup and McCooey (n4) 381

¹¹⁶⁹ *Ibid* 380

¹¹⁷⁰ Mark Drakeford, *Letter 're: various schemes and orders in relation to the M4 Corridor around Newport'* (4 June 2019) 6-7

¹¹⁷¹ In fact, while it is not in his written decision but in the speech he delivered to the Assembly defending his decision, the First Minister noted that he did not disagree with the Inspectors' interpretation of WFGA. Drakeford (n1166)

¹¹⁷² JP Interview (SII) 9 July 2019

the differences in outlook of these decision-making procedures; it was about the political forum in which the First Minister made his decision. He stated that calls for substantial political action on the environment (e.g. climate emergency) would not affect his decision were he to make it again, as,

Those kinds of issues haven't made their way into policy or legislation or guidance – there's been no blanket ban on new road building... No, it wouldn't have changed our recommendation. But obviously our recommendation is written at a particular point in time in the lights of the evidence, policy etc that applies at that time.¹¹⁷³

The planning system adheres to relevant policy and legislation. It does not set the rules by which it operates, and therefore it is not as responsive to changes in public opinion as arenas of representative government, like the National Assembly, would be. This section has considered the different understandings of environmental value present in the principle of sustainable development and in Welsh sustainability legislation and the signs of change in environmental value in Wales. The next section discusses impediments to change in Welsh sustainability and planning law.

4 Impediments to change in Welsh sustainable development and planning law

4.1 Balance and environmental value

4.1.1 Traditional concepts of balance in planning system

Explored above, balancing human interests and environmental interests against one another undermines the notion that humans and nature are interconnected and as a consequence, the notion of intrinsic environmental value. However, the balancing of competing priorities underpins sustainable development policy; it is also a key factor in planning decision-making.¹¹⁷⁴ Striking a balance between different issues is a key step in coming to a decision; however, this becomes problematic when balancing leaves the environment consistently undervalued. One environmental objector voiced his frustration with balance in the planning system:

It should be about sustainable innovative solutions to planning problems. Biodiversity shouldn't be a tradeable asset where you have biodiversity up against jobs in a sort of winner takes all scenario and ... if you lose well, sorry environment, you've lost.¹¹⁷⁵

This objector further highlights with this quote that balancing in planning takes on a win-or-lose frame. The assistant inspector described the process of considering different kinds of evidence at the inquiry as one of weighing up benefits and adverse effects across many kinds of testimony.¹¹⁷⁶ The inspectors need to demonstrate that their reasoning process laid out in the Report is fair, consistent and within their

¹¹⁷³ AMC Interview (SII) 24 July 2019

¹¹⁷⁴ AMC Interview (SII) 24 July 2019, and TT Interview (SII) 16 August 2019; Cullingworth (n274) 11

¹¹⁷⁵ MW Interview (SII) 6 August 2019

¹¹⁷⁶ AMC Interview (SII) 24 July 2019

remit.¹¹⁷⁷ Undervaluing the environment in this reasoning process would not be captured by judicial oversight;¹¹⁷⁸ however, as argued below, WFGA can be seen as an attempt to address this issue and to set a new balancing approach.¹¹⁷⁹

4.1.2 WFGA – new balancing approach?

Concerned that the interpretation of the Act asserted by the Welsh Government at the M4CAN inquiry diverged from the interpretation promoted by the Office of the Commissioner, the Future Generations Commissioner described the approach the Act takes to balancing in a letter addressed to the inquiry:

...historically it has not been uncommon for the economic benefits to be given precedence but this is one of the reasons why legislation was needed to redress the balance between the different needs and the different core elements leading to decisions which are sustainable in the long-term. Under the Act, we must look for solutions which address the four pillars of well-being together and select the one which delivers best against the four pillars of well-being. One pillar cannot override the others.¹¹⁸⁰

What is described here is still a balancing exercise but one that looks for innovative approaches to avoid one pillar, the economic pillar, dominating the others. Inquiry participants questioned whether this approach was effective. GWT counsel noted that it was hard to make a legal challenge with the Act, as it was too vague to prove that considerations had not been appropriately balanced:

The problem with WFGA is that the implementation of it effectively requires a balancing act between competing interests, and such as economic and environmental, climate change, all those things you have to weigh up, so ... as long as a person can tick the box and say I've considered X, I've considered Y, I've considered Z, then their decision isn't challengeable.¹¹⁸¹

For GWT counsel then, the balancing issue has not changed. For the inspector, this was a fundamental part of the planning process that could not be avoided.¹¹⁸² He also noted that the First Minister agreed with the Inspectors' interpretation of WFGA.¹¹⁸³ This would suggest that while WFGA seeks to establish innovative approaches to balancing priorities, traditional forms of balancing remain a problem.

¹¹⁷⁷ The judge over your shoulder - a guide to good decision making 17

¹¹⁷⁸ The grounds upon which administrative decisions are subject to control by judicial review are identified by Lord Diplock as illegality, irrationality and procedural impropriety. Lord Diplock's Formal Statement on Judicial Review in Forsyth and Wade (n260) 833

¹¹⁷⁹ The Planning Inspectorate is not one of the public bodies cited in WFGA. The Welsh Planning Inspectorate, when it is established, could be added under Well-being of Future Generations Act 2015 s 52.

¹¹⁸⁰ Howe (n415)

¹¹⁸¹ BM Interview (SII) 12 August 2019; this is further explored in Chapter 3, section 2.3.2

¹¹⁸² AMC Interview (SII) 24 July 2019

¹¹⁸³ Or, more specifically, "I did not dissent from the view of the Inspector therefore that the requirements of the Act had been fairly represented by the Welsh Government". Drakeford (n1166); AMC Interview (SII) 24 July 2019

4.2 Challenges in WFGA

4.2.1 WFGA – a political rather than administrative act

WFGA was described by interview participants as a political rather than an administrative act.¹¹⁸⁴ Commentators have noted that the language of the Act frames the duties as political duties but not as legal duties, as they have no clear enforcement mechanism.¹¹⁸⁵ The Commissioner’s power of scrutiny over duty-bearers under the Act is relatively weak. They can only make recommendations to public bodies (with wellbeing duties); there is no enforcement or compliance role under the Act.¹¹⁸⁶ Viewing WFGA as a political rather than an administrative act reaffirms what was discussed above, that the Act is effective in creating a space for conversation. Pigott notes that while we are often told that ‘actions speak louder than words’, it is WFGA’s words and its ability to initiate discussion that underpins the transformative capacity of the Act,¹¹⁸⁷ and not its powers of enforcement. This reflects Habermas’s theory of communicative rationality wherein public discourse underpins the values held by society.¹¹⁸⁸

Objectors spoke about working with the ‘spirit’ of the Act.¹¹⁸⁹ However they noted that they relied on the ‘spirit’ of the Act in part, because they felt “it wasn’t clear to anybody in the process, the inspectors or anyone else... how the Act would affect the decision”.¹¹⁹⁰ Ambiguities in the Act have dogged its implementation.¹¹⁹¹ Discussed in Chapter 5, the NRW coordinator found the Act challenging to use. Similarly, the assistant inspector felt that the current edition of Planning Policy Wales was vaguer in terms of sustainable development obligations than earlier guidance and was consequently harder to use.¹¹⁹² The office of the Commissioner is a key innovation in the Act. This role is useful in that the Commissioner serves as a check on political decisions. However, in the inquiry the Commissioner was not treated as an authority on the Act. The GWT counsel felt that the input of the commissioner, “sits in the hierarchy... above the householder whose house is being destroyed but below the legal arguments, it sits in that middle zone somewhere”,¹¹⁹³ so seemingly not very persuasive.

¹¹⁸⁴ BM Interview (SII) 12 August 2019; this is further explored in Chapter 3, section 2.3.2

¹¹⁸⁵ Haydn Davies, 'Recent developments in environmental law in Wales' (2015) 27 *Environmental Law and Management* 175

¹¹⁸⁶ Wellbeing of Future Generations Act 2015 s 2(2)(3)(4). Moreover, the recent Commission on Justice in Wales report noted with concern that due to their restricted budget, the Future Generations Commissioner was unable to enforce the legal duties that are imposed by the Act. The Commission on Justice in Wales, *Justice in Wales for the People of Wales* (2019) 267

¹¹⁸⁷ Pigott (n297) 5

¹¹⁸⁸ See Chapter 2, section 2.2.

¹¹⁸⁹ IR Interview (SII) 15 August 2019

¹¹⁹⁰ IR Interview (SII) 15 August 2019

¹¹⁹¹ The Act was relied on unsuccessfully in a judicial review of a decision to close a school in Cymer Afan, Port Talbot, Wales; the counsel involved, Rhodri Williams, questioned the justiciability of the Act after this decision. Paul Martin, 'Law to protect future generations in Wales "useless" 2019' <<https://www.bbc.co.uk/news/uk-wales-48272470>> accessed 7 January 2020. S Nason and H Pritchard (forthcoming), *Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales*, *Australian Journal of Administrative Law*

¹¹⁹² AMC Interview (SII) 24 July 2019

¹¹⁹³ BM Interview (SII) 12 August 2019

WFGA is criticised for being ambiguous and therefore challenging to use. This Act persists in employing an instrumental understanding of environmental value; does this perception of environmental value add to this sense of ambiguity? Pigott argues WFGA is hampered by discourse around environmental boundaries that reinforces a separation between humans and nature while also emphasising the interconnected nature of humans and the environment.¹¹⁹⁴ Similarly, I suggest that WFGA aims to establish a strong sustainability approach that places a higher value on the environment while continuing to rely on instrumental views of the environment. This contradiction adds to its ambiguity. The former Minister for Natural Resources, describing the implementation of WFGA, noted that the “Act requires real cultural change”.¹¹⁹⁵ In the words of one objector however, “you cannot legislate for a culture change”.¹¹⁹⁶ Whether law can generate social change is a closely considered topic in socio-legal scholarship and in wider society.¹¹⁹⁷ Galanter suggests that the architecture of the legal system limits opportunities for using law as a means of social change,¹¹⁹⁸ thus partially supporting this objector’s claim. Riles proposes a view of law as a technical process; in this view, law has no normative power and is not a driver of social change.¹¹⁹⁹ Fuller contends that law slowly reflects changes in society;¹²⁰⁰ this perspective of law sees law as sitting *outside* society. Kostiner places law back *inside* society, proposing that,

The relationship between law and social change is a social construct that is constantly produced by the conversations and actions of social activists, of academics, and of ordinary people. Because people’s understanding is complex and contradictory, the understanding of law as a means for social change is sustained.¹²⁰¹

This perspective echoes Anleu’s research; she proposes that law generates uneven rates of change, that it can be a strategy, sometimes successful and sometimes failing, for social reform.¹²⁰² The strategies with which some inquiry actors used the legal system as a tool for change are explored later in this chapter. These tensions between law as a driver of political change and as a technical process emerge in the planning system; this is the focus of the next subsection.

4.3 Challenges in Welsh planning law

This section has considered how WFGA values the environment; it proposed that the focus on instrumental value present in WFGA might account for some of its challenges. This final part looks at planning law.

¹¹⁹⁴ Pigott (n297) 9

¹¹⁹⁵ Carl Sargeant, in *The United Nations Goals and the Well-being of Future Generations (Wales) Act 2015* Deb 24 November 2015, 15:21

¹¹⁹⁶ MW Interview (SII) 6 August 2019

¹¹⁹⁷ The broader context of this topic is outlined in the preface of Sharyn Roach Anleu, *Law and social change* (Sage Publications 2000) vii.

¹¹⁹⁸ Mark Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change' in R Cotterrell (ed), *Law and society* (Dartmouth 1994) 166

¹¹⁹⁹ Annelise Riles, 'A new agenda for the cultural study of law' in D Cowan, L Mulcahy and S Wheeler (eds), *Law and society: critical concepts in law* (Routledge 2014) 382

¹²⁰⁰ Lon L. Fuller, *The morality of law* (Rev. ed. edn, Yale University Press 1969) 79

¹²⁰¹ Idit Kostiner, 'Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change' (2003) 37 *Law & Society Review* 323, 365

¹²⁰² Anleu (n1197) 234

Planning law handles many environmental issues; however, it is not environmental law. It does not aim to protect the environment;¹²⁰³ rather it regulates land use.¹²⁰⁴ Do we see similar value-issues in Welsh planning law? How has the planning system, typically more technical in its focus, dealt with recent developments in sustainability legislation and changing environmental norms?

4.3.1 *Problems inherent in the planning system*

Environmental objectors and planning law scholars contend that, out of step with its former utopian ambitions, the UK planning system seems constrained and rigid.¹²⁰⁵ While the planning process is supposed to be grounded in local development plans that centre on local land-use problems,¹²⁰⁶ the focus on a specific solution can emerge quite early in the planning process. This point was made by GWT counsel, who argued that, “planning law [at the] local level should be looking at lots of things, transport etc, shouldn’t be focused on a specific development proposal, but 99% of the time it does”.¹²⁰⁷ This is reflected in the timeline of the M4CAN scheme.¹²⁰⁸ Patterns of behaviour are set by the development plans, making them hard to change; this makes it harder for environmentalists to initiate innovative WFGA-friendly solutions.¹²⁰⁹ By the time a scheme reaches the stage of a public local inquiry, the planning system is considering one particular solution and not the underlying problem. This was certainly true of the M4CAN inquiry; as the NRW coordinator noted, “The M4CAN inquiry was considering a road scheme, not sustainable transport solutions”.¹²¹⁰ The rigidity and solution-focused character of the planning system brings it into conflict with WFGA. WFGA came late in the M4CAN scheme timeline. This was problematic; as noted by the assistant inspector, it is a process-driven act and was not intended to serve as a final check on whether a decision is in accordance with the sustainable development principle. The chief executive of GWT contended that the Welsh Government should have gone “back to the drawing board” when the legislation was enacted in 2015 in order to ensure the scheme was in line with the new direction of travel within the Welsh Government.¹²¹¹ However, counsel for the Welsh Government at the M4CAN argued that their team worked hard to incorporate WFGA thinking into the scheme.¹²¹²

¹²⁰³ Environment Act 1995 s 4(1) Susan Wolf, *Wolf and Stanley on environmental law* (Environmental law, 5th ed. edn, Routledge 2011)

¹²⁰⁴ Grant (n249) 6. This is enshrined in the introductory text of the Town and Country Planning Act 1947, which provides the framework upon which subsequent legislation builds. See Chapter 3, section 2.

¹²⁰⁵ Healey (n78) 8; Hugh Ellis, *English planning in crisis: 10 steps to a sustainable future* (Policy Press 2016) 1

¹²⁰⁶ Cullingworth (n274) 125

¹²⁰⁷ BM Interview (SII) 12 August 2019

¹²⁰⁸ See Chapter 3, section 4.2 for a timeline of the scheme.

¹²⁰⁹ BM Interview (SII) 12 August 2019

¹²¹⁰ JP Interview (SII) 9 July 2019

¹²¹¹ IR Interview (SII) 15 August 2019 22.30; One could argue that this is what ultimately happened, as the First Minister called for a commission focusing on the problem of congestion in Newport; it remains to be seen at time of submission what form this commission will take.

¹²¹² ME Interview (SII) 24 September 2019

4.3.2 *Planning law and changes in environmental value*

The discussion above suggests that the planning process can be quite resistant to change.¹²¹³ Does this mean that planning is ill-equipped to accommodate the developments in sustainable development legislation that have emerged in the last five years in Wales?¹²¹⁴ Reflecting on this issue, the RSPB objector noted that while the planning process is expected to contribute to environmental protection, it remains to be seen whether recent changes in Welsh sustainable development legislation are being,

Sufficiently integrated into the system... [there are] layer after layer of new regulations and obligations that the planning system is being told to deliver, and no one has really stepped back and said okay, is this really working properly?¹²¹⁵

Discussing WFGA and its attendant obligations on the Welsh planning system, the Head of the Planning Inspectorate Wales noted that there had been a duty towards sustainable development present in the planning system since the eighties, and that consequently there was no need for major change.¹²¹⁶ This does not suggest that the Planning Inspectorate Wales recognises the new balancing approach brought in with WFGA. One environmental objector argued that it seemed to be sufficient to include a mitigation strategy to a scheme, and that in this way the planning system was failing the environment, as “just doing something for the environment is not enough”.¹²¹⁷ This does not suggest an intrinsic valuing of nature. The wellbeing goal mostly clearly relating to the environment, ‘A Resilient Wales’, aims for Wales to be a “nation which maintains and enhances a biodiverse natural environment and with healthy functioning ecosystems that support social, economic and ecological resilience”.¹²¹⁸ This indicates that the environment has value outside of its benefit to humans (though benefits to humans are also identified). If the planning system in considering competing interests placed greater weight on the environment, it would require more than adding a mitigation strategy to a scheme. I suggest it would require a more substantial change in approach that would align with the approach advocated in WFGA.

Earlier sections highlighted a possible shift in public perceptions of environmental value and noted that this shift was at best inconsistently reflected across the planning system. This would suggest that planning policy is not reflecting these changes in environmental value. Law can move slowly; however, policy should be more responsive. Have there been changes in planning policy that reflect the change in environmental value? Looking at the policies that informed the M4CAN, this seems doubtful. The developing change in environmental value evident in WFGA has not filtered through to the Technical Advice Notes (TANs).¹²¹⁹

¹²¹³ Cullingworth (n274) 10

¹²¹⁴ The Planning (Wales) Act 2015 makes little reference to the achievement of wellbeing objectives. This is discussed in greater detail in V. Jenkins, 'The proposals for the reform of land use planning in Wales' (2014) *Journal of Planning and Environment Law* 1063

¹²¹⁵ JD Interview (SII) 7 August 2019

¹²¹⁶ TT Interview (SII) 16 August 2019

¹²¹⁷ JD Interview (SII) 7 August 2019

¹²¹⁸ Wellbeing of Future Generations Act 2015 Part 2 s 4

¹²¹⁹ Technical Advice Notes (TANs) provide planners with detail, augmenting strategic plan set in Planning Policy Wales.

There are 24 TANs in Welsh planning. Of these 24, only five were published since WFGA. Only two of these five mention the Act (TAN (20) *Planning and the Welsh Language*¹²²⁰ and TAN (24) *The Historic Environment*¹²²¹), and only one TAN (TAN (24) *The Historic Environment*) mentions the principle of sustainable development. The M4CAN relied on nine TANs, one of which (and only in draft form) was published after WFGA (again, TAN (24) *The Historic Environment*).¹²²² However, WFGA is not the only piece of legislation or policy through which we can assess shifting environmental value. TAN (5) *Nature Conservation and Planning* (2009), relied on by the M4CAN inquiry, notes the intrinsic value of the environment, as evident in its description of biodiversity: “biodiversity is important in its own right and essential to maintain the life support system that allows life, including human life to exist on the planet”.¹²²³ TAN (5) *Nature Conservation and Planning* reminds us that WFGA is not the first piece of legislation or policy to reflect a more intrinsic understanding of environmental value, although it is a significant one. The slow pace at which planning policy has developed to reflect WFGA suggests that both legal and policy development struggle when they are required to deal with significant, fast-paced change, a challenge for environmental advocates.

5 Impediments to change in the public local inquiry

This chapter has explored the forms of environmental value found in Welsh sustainable development legislation and in the planning system and the factors inhibiting changes in environmental value in those contexts. This section looks in more detail at the public local inquiry mechanism and considers whether these value-issues are present. It specifically considers the expert-focused, lawyer-led and public nature of the public local inquiry.

5.1 The public local inquiry is expert-focused

5.1.1 *Expert testimony more convincing?*

I met with the inspector of the M4CAN inquiry in the months following the First Minister’s decision and suggested to him that expert evidence seemed to be treated with more weight than lay-person evidence at the inquiry.¹²²⁴ He argued that it was not about the qualifications of the person giving evidence but about how convincing their evidence was. A local resident could have stronger local knowledge and could thus be more convincing than an expert; he contended that, “if a point is well made... it doesn’t matter who’s making it”.¹²²⁵ Talking with GWT counsel weeks later, he expressed scepticism, doubting that a resident

¹²²⁰ Welsh Government, *Technical Advice Note 20: Planning and the Welsh Language* (2017)

¹²²¹ Welsh Government, *Planning Policy Wales Technical Advice Note 24: The Historic Environment* (2017)

¹²²² Persona Associates (n411)

¹²²³ Welsh Assembly Government, *Planning Policy Wales: Technical Advice Note 5: Nature Conservation and Planning* (2009)

¹²²⁴ As noted in Chapter 5, section 2 (Footnote 542), expertise is a dynamic theme running through this data, but one which sits on the periphery of the thesis argument. The valuable contribution this research makes to this field will be explored in future work.

¹²²⁵ AMC Interview (SII) 24 July 2019

could convince an inspector on a point that could stop a motorway being built.¹²²⁶ There was a feeling among objectors, demonstrated by the counsel's scepticism, that evidence from experts was more persuasive than evidence from laypeople.¹²²⁷ The inspector maintained that evidence from one kind of participant was not preferred over that of another, and that seems fair. However, the kinds of evidence that were more convincing at the inquiry, scheme-specific, knowledge-verified, integrity-verified¹²²⁸ and detail-oriented evidence, were perhaps more likely to be heard from expert witnesses than from lay-people.

According to Wade and Forsyth's definition, the public local inquiry is a conduit for local objections and local interests;¹²²⁹ why then is it not better suited to hearing the testimony of local participants? The chief executive of GWT contended that residents' arguments were often common-sense arguments; they were concerned about the destruction of their local area and drew upon environmental, historical and social perspectives to voice these concerns.¹²³⁰ The inquiry as a mechanism for evaluating technical fact does not seem to have space for these kinds of objections. It was rare that residents were cross-examined, and this reinforced the feeling that their submissions lay outside the technical process; as highlighted in Chapter 5 and reinforced by subsequent interviews,¹²³¹ this lack of engagement with residents' evidence, strongly contrasting with the rigorous cross-examination of expert witnesses, felt patronising to some residents. It touches on issues of being heard and not heeded, which will be discussed in the final part of this section.

5.2 The public local inquiry is lawyer-led

5.2.1 *Their adversarial nature*

There has been considerable emphasis... upon the importance of preserving informality of atmosphere in hearings before tribunals. ... We endorse this view, but... procedures may well assume an unordered character which makes it difficult, if not impossible, for the tribunal properly to sift the facts and weigh the evidence... The object to be aimed at in most tribunals is the combination of a formal procedure with an informal atmosphere.¹²³²

Evident in this recommendation from the 1957 Franks Report, the formal nature of administrative procedures has been a long-standing concern. Administrative procedures are not courts of law, and as such are supposed to be more accessible to members of the public; it was felt that an overly formal setting would undermine the public aspect of their role.¹²³³ The presence of legal representation heightens their formal

¹²²⁶ BM Interview (SII) 12 August 2019

¹²²⁷ This distinction between residents and experts is explored in greater detail in Chapter 5. This distinction is itself problematic, as, compellingly described by Silver, experts have their own biases and prejudices. They are not pure repositories of information. Nate Silver, *The signal and the noise: the art and science of prediction* (Penguin Books 2013); This touches on similar concerns raised in section 2.1 of this chapter, exploring risk and environmental value.

¹²²⁸ See footnote in Chapter 6, section 4.1

¹²²⁹ Forsyth and Wade (n260) 806; this description also assumes that local people only have local concerns, or that local projects do not have national consequences. For the M4CAN inquiry, which looked at a scheme with national significance and whose objectors had broader concerns, we see that this definition does not quite fit. This is discussed in more detail in Chapter 3, section 3.3 and in Chapter 5, section 2.3.

¹²³⁰ IR Interview (SII) 15 August 2019

¹²³¹ IR Interview (SII) 15 August 2019; AP Interview (SII) 5 September 2019

¹²³² Franks (n309) 15

¹²³³ Ibid 20-21

nature and inhibits their participatory function. It encourages an adversarial nature; it also limits participation as effective participation becomes more expensive.¹²³⁴ The impact of funding on the participatory nature of the public inquiry will be discussed later in this section.

The adversarial nature of the M4CAN inquiry was highlighted frequently in conversations with inquiry participants.¹²³⁵ The inspector noted that laypeople were often surprised by the adversarial nature of inquiries. He argued however that this was a normal part of the process for planning inquiries; “that’s how evidence is tested... scientific opinions, you might have two, they have to be tested, you have to see which is the more accurate.”¹²³⁶ Some interview participants felt that the adversarial, sometimes hostile, exchanges they witnessed at the inquiry did not seem to test the accuracy of scientific statements. The win-or-lose nature of these exchanges seemed more antagonistic than this description would suggest. Interview participants felt that hostile exchanges served to discredit a witness or their ‘side’, rather than verify evidence. The inspector again recognised that cross-examination could become heated, but contended that this was performance and that it counted for little in the decision-making process:

We can look past all that, we see the wheat from the chaff, basically. There is an element of performance in there... oftentimes, I can speak for my own experience, the big point the barrister thinks they’re making is not a big point at all... some of those cross-examination sessions that went on and on find very little room within the report.¹²³⁷

However, while this performance might not have the impact the counsel hopes for, it is not without impact. It has an impact on the layperson sitting in the public gallery. It intimidates people who might think of taking part,¹²³⁸ and it makes participants feel that they need to have suitable representation to withstand cross-examination.¹²³⁹

5.2.2 *Equality of Arms*

The Franks Report considered legal representation and the associated costs of taking part in an administrative procedure. Reflecting on whether or not there should be a ban on legal representation at administrative procedures, the report stated that to be fair, the lifting of the ban would have to be accompanied by a legal aid scheme for tribunals and other administrative procedures.¹²⁴⁰ The report further

¹²³⁴ Ibid. The Welsh Government counsel agreed with the Franks Report on its concern that legal representation could pose as a possible limit on effective participation and felt that the alienation that it might cause was further exacerbated by the increased complexity of the planning system. ME Interview (SII) 24 September 2019

¹²³⁵ It has been highlighted throughout this thesis. It is an interesting theme in the data that runs through the argument without being a focus. Future work looks in greater depth at the insights this research provides on the adversarial nature of participatory legal decision-making processes.

¹²³⁶ AMC Interview (SII) 24 July 2019

¹²³⁷ AMC Interview (SII) 24 July 2019

¹²³⁸ AP Interview (SII) 5 September 2019

¹²³⁹ JP Interview 9 November 2018

¹²⁴⁰ The report noted this would “largely destroy” the informality of these proceedings. Franks (n309) 20-21. The current climate for legal aid means that this isn’t likely to improve. It is difficult to find information on legal aid in public local inquiries specifically; however latest legal aid statistics state approximately 3,000 per year of legal aid applications granted relate to judicial review. Ministry of Justice: Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales* (2018) 9

made a specific recommendation that “Government Departments should not be permitted legal representation before a tribunal unless the citizen for his part employs a lawyer”.¹²⁴¹ The report thus considered representation and costs as issues that affected the fairness of the procedure; the risks for public participation of legal representation were recognised and recommendations were made to mitigate these risks. These concerns were validated by the M4CAN inquiry. I would suggest that the disparity of funds between inquiry participants affected the fairness and participatory nature of the inquiry. Objectors argued that funding affected their ability to take part in inquiry proceedings;¹²⁴² inequalities in resources were reflected in inequalities in participation and representation.¹²⁴³ Where environmental objectors had legal counsel, this counsel worked pro-bono (and so could only give a few days to the case). The Welsh Government Queen’s Counsel estimated that they spent two and a half years on this case.¹²⁴⁴ Where issues of equality of arms were cited in the Inspector’s Report and in the Welsh Government closing statement, they noted that no party made an application for funds for representation.¹²⁴⁵ It was not clear however how it would be known by participants unfamiliar with inquiry processes they could make an application for funds.¹²⁴⁶

This touches on a concern frequently raised by participants regarding equality of arms at the inquiry; that equality of arms was not ‘just about residents’ but about the different levels of representation.¹²⁴⁷ The key issue was the difference between parties with representation, in particular between the Welsh Government and the combined team of environmental objectors led by GWT.¹²⁴⁸ GWT counsel spoke candidly about inequality in representation. Speaking to him in the months after the decision, he said that there was a massive difference between the pro-bono legal team and the Welsh Government team; “how could there not be”.¹²⁴⁹ He and the other members of the team did not have the time to prepare the case as extensively as they would have liked. “These things are generally won and lost on preparation and skeleton arguments”,¹²⁵⁰ he contended. Echoing counsel, the GWT reserves officer highlighted the disparity between levels of representation, where the Government had counsel who were fully immersed in the case and were

¹²⁴¹ Franks (n309) 21

¹²⁴² IR Interview 23 January 2018, MW Interview 14 December 2017, JB Interview 18 October 2018, Interview (SII) 5 September 2019, BM Interview (SII) 12 August 2019

¹²⁴³ IR Interview (SII) 15 August 2019

¹²⁴⁴ ME Interview (SII) 24 September 2019

¹²⁴⁵ Wadrup and McCooey (n4) 28; Morag Ellis QC on behalf of the Welsh Government (n348) 171

¹²⁴⁶ AP Interview (SII) 5 September 2019; it was not mentioned in the pre-inquiry meeting notes. Moreover, it was noted by GWT counsel that GWT, a prominent objector with much less available funds than the Welsh Government, would likely not have been eligible for funds, as they were part of an umbrella organisation of Wildlife Trusts with a larger budget. BM Interview (SII) 12 August 2019

¹²⁴⁷ MW Interview (SII) 6 August 2019

¹²⁴⁸ It is worth highlighting that the strategy that GWT chose demonstrates that while they had minimal resources, they did have some experience of inquiries; resources and experience are two varying factors differentiating inquiry participants. The chief executive of GWT noted this experience in his interview, stating that, “we had a bit of a trial run at the public inquiry into the circuit of Wales, where we learned a lot of valuable lessons”. IR Interview 23 January 2018

¹²⁴⁹ BM Interview (SII) 12 August 2019

¹²⁵⁰ BM Interview (SII) 12 August 2019. The implications this raises for future strategy are discussed in section 6.3 of this chapter.

able to strategise throughout the length of the inquiry,¹²⁵¹ and several of the objectors were relying on pro-bono legal support and on a range of different counsel. The consistency of the Welsh Government team was a significant advantage for them. GWT counsel surmised that he would have spent about two months (non-consecutively) on the inquiry;¹²⁵² the Queen’s Counsel who led the Welsh Government legal team spent considerably more time.

Quality of representation, while maintaining professional standards, will be affected by whether or not the legal services are provided pro-bono; counsel providing services pro-bono will be working on other cases as well. The GWT chief executive noted that GWT spent £50,000 on the inquiry, a minimal proportion of which was spent on legal fees;¹²⁵³ the BBC freedom of information request found that the Welsh Government spent £1.1 million on legal fees and £8.7 million on consultants’ fees.¹²⁵⁴ This considerable disparity in resources would have had an impact on the evidence heard at the inquiry. It affected the equality of preparation, of strategy, and the rigour of evidence being tested. However, as the inspector noted, “the system isn’t easily going to account for that difference”.¹²⁵⁵ This uneven situation was acknowledged by the Welsh Government Queen’s Counsel, who felt that it was an inevitable consequence of the inquiry process. The promoters of a scheme will have more time to prepare their strategy than the objectors; “No one is going to want to work on it as collectively hard as the promoters do”.¹²⁵⁶ In this inquiry they also had more financial and legal resources. How, outside of a ban on legal representation, can this disparity be avoided?

5.3 The public local inquiry is public?

5.3.1 What kind of ‘public’ is the public local inquiry?

Lord Parmoor in *Local Government Board Appellants v Arlidge Respondent* cautioned against an overly generous expectation of public involvement in a public local inquiry:

This word [public] is said to have been used for the first time in the 1909 Act. In my opinion a public local inquiry means no more than that an inquiry should be held in the locality and be open to the public.¹²⁵⁷

One might expect that the understanding of the ‘public’ would have moved on considerably since 1915. While this is true to a certain extent, and while the rights of the public to be heard have expanded in the intervening century,¹²⁵⁸ some traces of this more restricted interpretation of public at the inquiry remain. The GWT counsel, echoing Lord Parmoor, felt that the public nature of the inquiry was to do with evidence being said out loud. The element of performance in the inquiry was tied up with this idea that evidence had

¹²⁵¹ RB Interview (SII) 25 July 2019

¹²⁵² BM Interview (SII) 12 August 2019

¹²⁵³ IR Interview (SII) 15 August 2019

¹²⁵⁴ Alun Jones, ‘M4 relief road inquiry cost over £11m’ (2018) <<https://www.bbc.co.uk/news/uk-wales-politics-44397864>> accessed 13 September 2019

¹²⁵⁵ AMC Interview (SII) 24 July 2019

¹²⁵⁶ ME Interview (SII) 24 September 2019

¹²⁵⁷ *Local Government Board* (n326) 143

¹²⁵⁸ See Chapter 3, section 3.2

to be heard in public;¹²⁵⁹ this was a key aspect of procedural fairness at the inquiry. He noted that it was important that arguments were raised in public in case they came up in appeal.¹²⁶⁰ Evidence being vocalised thus played an important role at the inquiry.¹²⁶¹ This hampered the inquiries' participatory nature, as it would be difficult for someone to understand, engage and question very complex evidence if they were hearing it for the first time, without reading it through beforehand or as it was being delivered (these two options would have been available to the inspectors and to other more prominent inquiry participants). Building on this idea that arguments were performed for the public inquiry, the GWT counsel contended,

I mean, how often are you really going to take experienced inspectors like this... and change their mind on something? I mean, seriously, are you going to do that? ... From judges I know, ... 95-98% of the time they will have looked at the skeleton arguments and formed their views already, and there's a very small opportunity to change that.¹²⁶²

This underlines the importance of preparation and research for inquiry participants; any funding available for legal representation at inquiries would need to recognise this. Inquiry participants had diverse expectations of the public nature of the public local inquiry. The GWT chief executive felt that public should feel empowered as active participatory decision-makers in the process.¹²⁶³ What legal rights concerning public participation are UK citizens entitled to? The Aarhus Convention is relevant here.¹²⁶⁴ The Aarhus Convention Article 6(2) states that, "The public concerned shall be informed... early in an environmental decision-making procedure, and in an adequate, timely and effective manner".¹²⁶⁵ While less ambitious than a right to empowering participation, it is perhaps easier to enforce a right to effective participation.

The public nature of the public inquiry was restricted to the inquiry room; important meetings took place outside of the inquiry room and out of public view, for example agreement between the Welsh Government and ABP on changes to the proposed route over the docks, and statements of common ground between the Welsh Government and NRW.¹²⁶⁶ Several interview participants were troubled by this, feeling that these decisions were hidden from the public.¹²⁶⁷ These meetings raise another issue for public participation at the

¹²⁵⁹ BM Interview (SII) 12 August 2019

¹²⁶⁰ BM Interview (SII) 12 August 2019

¹²⁶¹ This is discussed in greater detail in Chapter 6, section 2.1.3.

¹²⁶² BM Interview (SII) 12 August 2019

¹²⁶³ IR Interview (SII) 15 August 2019

¹²⁶⁴ The extent to which the rights of public participation enshrined in the Aarhus Convention apply in the UK is complicated. While the UK is a signatory to the Convention, it has not been incorporated into domestic law. However, the EU is also a signatory to the Convention and has legislated for some of the 'Aarhus' rights, for example in Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. The rights set out in these directives are legislated for in the UK. This complex subject is explored in greater detail in Karen Morrow, 'Worth the paper that they are written on? Human rights and the environment in the law of England and Wales' (2010) 1 66, 69

¹²⁶⁵ Aarhus Convention 1998 Art 6(2)

¹²⁶⁶ The influence of ABP is discussed in Chapter 5, section 4.1.3. Chapter 6, section 2.1 highlights the reduction in NRW's objections. However, all minutes to these meetings from NRW were made available for Freedom of Information requests. JP 9 July 2019

¹²⁶⁷ IR Interview (SII) 15 August 2019 and AP Interview (SII) 5 September 2019

inquiry, exacerbated by the scale and long duration of the inquiry. The NRW coordinator realised that she almost never saw residents give evidence (and so could not answer my questions regarding residents being cross-examined). She noted that these were the times,

When some of the Welsh Government witnesses felt they didn't need to be in the inquiry so could be having meetings with us about, other issues, you know dormice or flood risk or whatever was the issue at the time.¹²⁶⁸

This suggests that residents' testimony had a lower priority and that the out-of-inquiry room meetings could be scheduled on those days they gave evidence.

How 'public' was the M4CAN inquiry? Was it public because it was open for the public to attend and to take part? Is the public nature of the inquiry undermined if it is difficult for members of the public to take part, or if they feel ignored, or if key aspects of the process do not take place in public? What is fair to expect in terms of public participation? Echoing Lucas,¹²⁶⁹ should the public expect to be heeded as well as heard? If the inquiry is understood to be a forum for deliberative democracy as described by Habermas in his theory of communicative rationality, an opportunity to be heard does not meet the expectations of this forum, and thus undermines its democratic legitimacy.¹²⁷⁰ GWT counsel suggested that public voice had greater strength outside of the inquiry room, in the build-up of wider social pressure. This idea will be explored in a later section.¹²⁷¹

5.3.2 *The dual role of the inquiry*

The M4CAN inquiry seemed to have two roles, to be a mechanism for public participation in decision-making, and to gather and evaluate a vast amount of complex information. These two roles, I suggest, were at odds with one another at points during the inquiry. This is demonstrated in the differential treatment of lay-people and expert witnesses, e.g. with cross-examination,¹²⁷² and in how the inquiry sometimes struggled to deal with evidence that did not address technical details or facts. The assistant inspector did not see these roles as in conflict with one another. He reasoned that there were limited numbers in attendance for much of the inquiry, and that it was feasible to facilitate anyone who wanted to take part and to add their voice.¹²⁷³ The chief inspector was certainly very accommodating and happy to help people who wished to take part, something that was identified by every participant I interviewed;¹²⁷⁴ however the assistant inspector acknowledged that people who did not regularly attend the inquiry would not know that.¹²⁷⁵ While people were facilitated in taking part, concerns regarding these dual roles remain. There were members of the

¹²⁶⁸ JP Interview (SII) 9 July 2019

¹²⁶⁹ See Chapter 3, section 3.2

¹²⁷⁰ See Chapter 2, section 2.2

¹²⁷¹ Section 6.1.2 of this chapter.

¹²⁷² JP Interview (SII) 9 July 2019

¹²⁷³ AMC Interview (SII) 24 July 2019

¹²⁷⁴ BM Interview (SII) 12 August 2019

¹²⁷⁵ AMC Interview (SII) 24 July 2019

public who were intimidated when they attended and decided not to take part;¹²⁷⁶ moreover one could argue that the inquiry was better geared to consider technical evidence. This suggests that these two roles do not always work in harmony. This tension can in part be explained by the different epistemological standpoints underpinning both roles; this draws on Black's discussion of Habermas's theories of deliberative democracy and procedural law. Black states that communicative theory posits that insights are gained in the course of deliberations;¹²⁷⁷ a forum for public participation would follow this epistemological approach. However, the inquiry also gathers and assesses empirical facts; this relies on a more positivist epistemological approach.

5.3.3 *Public participation before the public inquiry*

This last section briefly considers public engagement in the M4CAN scheme prior to the public inquiry. Echoing Arnstein,¹²⁷⁸ and relevant to earlier discussions of WFGA, public consultations are intended to be key elements incorporating innovative approaches early in the planning process. Early public consultations should focus on the problems at hand and not on specific solutions. Talking with people who took part in public consultations for the M4CAN scheme prior to the inquiry, it seems that they did not provide opportunity for genuine public engagement. According to one resident, "there was [already] a line on a map".¹²⁷⁹ Objectors interviewed felt that there was no attempt in these early public consultations to gather feedback from residents; rather it felt like an opportunity to tell them about the route.¹²⁸⁰ One interview participant took part in a 2010 consultation as a statutory environmental body. Due to their official position and the early stage of this consultation (other participants attended the 2013 consultations), they participated in the scheme to a greater degree and were instrumental in getting the line of the road moved further north.¹²⁸¹ Despite the earlier stage of this consultation however, a line for the road existed. The problem was not discussed at this consultation, only aspects of the solution. For interview participants with experience advocating for the environment in the planning system, the M4CAN public consultations were typical, feeling like an obligation rather than meaningful involvement.¹²⁸²

6 **Prospects for change: participation, the planning system and advocacy**

This chapter has investigated the forms of environmental value underpinning Welsh sustainable development legislation and the planning system and contended that embedded instrumental value tips the balance in decision-making against the environment. It has identified aspects of the legislation and planning

¹²⁷⁶ AP Interview (SII) 5 September 2019

¹²⁷⁷ Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 597, 609

¹²⁷⁸ See Chapter 2, section 3.1

¹²⁷⁹ RW Interview (SII) 2 July 2019

¹²⁸⁰ AP Interview (SII) 5 September 2019

¹²⁸¹ JP Interview (SII) 9 July 2019. Referring to scheme timeline in Chapter 3, section 4.2, this would seem to have taken place at the third public consultation in 2010.

¹²⁸² MW Interview (SII) 6 August 2019

system that might serve as barriers to change and also considered the public local inquiry mechanism, highlighting what factors might encourage instrumental value and inhibit change in that setting. This final section considers opportunities for positive change. It is hoped that, despite the significance and entrenched nature of the challenges this thesis has investigated, this section might provide some grounds for optimism.

6.1 Public participation as a route for transformation

6.1.1 Public participation and environmental decision-making

I think if you pull the public into these things more, you get a different outlook.¹²⁸³

Public participation in decision-making is firmly embedded in environmental and planning law.¹²⁸⁴ Part of its relevance for environmental decision-making is its transformative potential; highlighted by the GWT counsel above, including more value-perspectives in the decision-making process helps bring in new approaches. This seems particularly important in environmental policy. The prominence of public participation in environmental decision-making seems related to the fact that the voices that traditionally would be heard in legal decision-making processes do not typically advocate for the environment. Reflecting on this in the light of concerns over legal representation and the costs of participating in public local inquiries, one could argue that those who can most readily participate in legal processes are those benefitting from the present social and economic structure, and those least inclined to transform them.¹²⁸⁵ While public participation is a right enshrined in the Aarhus Convention to which the UK is a signatory and while this right is legislated for in EU directives such as Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment,¹²⁸⁶ it would seem that this right is not always adequately provided for.

As noted at the end of Chapter 7, while the inquiry heard testimony advocating for a richer understanding of environmental value, it was limited in its capacity to hear a wide range of perspectives on the human-nature relationship. This is concerning, as public participation is promoted as an effective route for decision-making processes to better engage with understandings of intrinsic environmental value and more diverse understandings of the human-nature relationship. It suggests that there are distinct understandings of public participation active in environmental decision-making and in the planning system, and that this inconsistency inhibits the transformative potential of public participation. Public participation in the planning system seems to be understood as a democratic duty to consult with the public, so as to be compliant with legislation. As noted in Chapter 2,¹²⁸⁷ by encompassing a broader range of perspectives and values, public participation in environmental decision-making is seen as being inclusive and potentially

¹²⁸³ BM Interview (SII) 12 August 2019

¹²⁸⁴ See Chapter 2, section 3.3.

¹²⁸⁵ See Chapter 3, section 2.1.

¹²⁸⁶ United Nations Treaty Collection, 'Depositary: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Status of Treaties' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en> accessed 14 November 2019. See earlier in this chapter, section 5.3.1.

¹²⁸⁷ Section 3

transformative; this view of public participation chimes with McAuslan, Habermas and collaborative planners, e.g. Healey.¹²⁸⁸

Factors limiting public participation in the inquiry were highlighted in the previous section. They echo Black's criticism of Habermas's theory of communicative rationality. Black contends that Habermas requires that deliberation take place within an ideal speech situation but does not really account for difference and does not adequately address what it means for the quality of deliberation taking place outside an ideal speech situation.¹²⁸⁹ For deliberation to be legitimate, to be "cognitively rational", "it has to conform to the conditions of the ideal speech situation", which include equal and uncoerced participation, open questioning of issues and the equal treatment of all opinions, and that participants want to put forward arguments that other participants could reasonably accept.¹²⁹⁰ Challenges discussed in section 5 suggest that these conditions did not exist at the M4CAN inquiry. As noted in Chapter 2.2, the central criticism that environmental theorists aim at Habermas is that his work maintains the dualist understanding of humans and nature embedded in Enlightenment philosophy, and thus reproduces the damaging implications of this duality for the environment. However, I suggest that this thesis highlights further indirect impacts that Habermas's theories of public participation might have on the treatment of the environment. As Black and others have noted, failure to properly account for difference informs the presuppositions underpinning the ideal speech situation, leading to inequalities in the process. Outlined in the thesis, these inequalities are more likely to be felt by those advocating for the environment.¹²⁹¹

6.1.2 *Participation and representation*

- C So what does being heard....
B Mean? (C and B laugh). Being heard means... the wider build-up of pressure, those people maybe weren't heard by the inspectors but the wider public feeling about these sorts of things is where they are heard, so it's important that they're there...¹²⁹²

Several participants, when reflecting on the success or failure of the environmental objectors' approach, argued that public participation at the inquiry had to be viewed in the light of wider public involvement. Those involved in the GWT team described a two-track strategy, advocating with assembly members as well as submitting evidence to the inquiry. While the public local inquiry is a mechanism for public participation in the planning system, the structures in which it operates meant that it was ultimately less responsive to public voice than the Assembly, the mechanism of representative governance. As described by one environmental objector,

¹²⁸⁸ The perspective of public participation present in WFGA's five ways of working, namely 'involvement', seems more closely aligned with the 'environmental decision-making' view of public participation.

¹²⁸⁹ Black (n1277) 599

¹²⁹⁰ Ibid 609

¹²⁹¹ This criticism of Habermas is not the focus of the research but an implication from it; it merits further consideration in future work.

¹²⁹² BM Interview (SII) 12 August 2019

Social movements and the way in which they interact with organs of democracy, it's a much more dynamic relationship than someone standing up in a public inquiry and making a point about their community... so in a way, Mark Drakeford had to reflect what was going on in a broader picture, he couldn't duck it.¹²⁹³

This description foregrounds the shifting public environmental values and the policy objectives that sat outside the inquiry remit that influenced the Assembly and the decision of the First Minister.

It is important to underline however that this was not a case of one strategy failing and another paying dividends. It was the two strategies working in combination that were effective. The inquiry is a mechanism of public participation. It is a piece of machinery that has a set of functions, some intended by its developers and some not; it was used as a means of public participation in different ways from how it was intended. Assembly members were lobbied while the inquiry was in session; arguments made in the public inquiry were reiterated in talks with Assembly members and in the media.¹²⁹⁴ For some, as long as the inquiry process was not an embarrassment for environmental objectors, it would help their advocacy.¹²⁹⁵ Moreover, noted by GWT counsel, "if there wasn't an inquiry process, the road would have been built years ago".¹²⁹⁶ The inquiry process acknowledges the right of the public to be heard on an issue that affects their locality. It initiates a typically slow-moving process, that "gives you the time to build the voice against the people who've got the money, who drive these changes, who usually arrive very well prepared and ready to deal".¹²⁹⁷ It serves as a beacon for argument and for protest, providing an opportunity for a broader range of values to be heard and acknowledged. Thinking about how this might inform environmental advocates' future strategies, it is helpful to think of public participation as a liquid substance. It leaks around the mechanisms where it is supposed to operate and works where it is most effective. It is helpful for environmental advocates to recognise this and to be flexible in their strategic approach.¹²⁹⁸

6.2 Future approaches for the planning process

Inquiry actors and external stakeholders were interviewed in order to draw together the findings for this chapter; these participants provided thoughtful feedback and suggestions for future organisations taking part in similar procedures. These last sections will outline these recommendations for the planning system, for future environmental objectors and for environmental activists and scholars.

¹²⁹³ IR Interview (SII) 15 August 2019

¹²⁹⁴ Anon, 'Benefits of M4 relief road 'outweighs £1.1bn costs two to one' (n3); Anon, 'M4 relief road would 'damage historic landscape' (n3); Anon, 'M4 relief road objections still 'significant' - NRW' (n3)

¹²⁹⁵ MW Interview (SII) 6 August 2019

¹²⁹⁶ BM Interview (SII) 12 August 2019

¹²⁹⁷ BM Interview (SII) 12 August 2019

¹²⁹⁸ Section 6.3 of this chapter highlights the importance of consistent reflection and evaluation of the strategy. Consistent reflection would also help to identify what is working and what is not, as the actions that end up being strategically significant might be unexpected for objectors.

6.2.1 *Hearings favoured over inquiries*

When asked what aspect of the planning system they would most like to change, several interview participants identified the adversarial nature of the public inquiry as a major issue. They noted that hearings, typically conducted as roundtable discussions, often seemed more appropriate to the matters being deliberated. The RSPB objector felt that the win-or-lose nature of the inquiry was problematic; he did not find it illuminating, in particular for ecological issues which are often nuanced and uncertain.¹²⁹⁹ He contended that one could be more candid about uncertainty in a hearing or planning examination than one could in an inquiry.¹³⁰⁰ The NRW coordinator also preferred a roundtable discussion led by inspectors to the formal inquiry approach. She noted that cross-examination derailed the witness from the points they wanted to make and what they considered important; moreover, she felt that the abrupt transition between issues in the inquiry timetable exacerbated the compartmentalised treatment of the environment.¹³⁰¹ Reflecting on whether the hearing format was better suited to environmental questions than the inquiry, the GWT counsel noted that while hearings are less adversarial in the performative sense, the treatment of evidence in a hearing is just as rigorous:

If you were an outsider observing it, you'd find it far less adversarial I suppose. I work just as hard when I'm in that environment, because you're doing the same thing, the mental processes don't change, I suppose outside looking in it's different.¹³⁰²

The Head of the Planning Inspectorate Wales contended that the scale and complexity of some schemes meant they would have to be heard in an inquiry rather than a hearing format; the M4CAN scheme would fall into this group.¹³⁰³ Other participants noted that the decision-making process for nationally significant infrastructure projects (NSIPs) was closer to a hearing than an inquiry;¹³⁰⁴ these projects can also be of significant scale and complexity.¹³⁰⁵ The Head of Planning Inspectorate Wales further noted that planning had seen a shift away from inquiries in favour of hearings. This was also noted by the Queen's Counsel, who supposed that hearings were favoured over inquiries because hearings were cheaper and faster, and further that inquiries were becoming unpopular with the public as a consequence of their adversarial, formal nature.¹³⁰⁶

Hearings have one drawback over inquiries, which was highlighted by the inspector. Contemplating how differently the inquiry might have operated as an NSIP,¹³⁰⁷ the inspector noted it would have had less public

¹²⁹⁹ JD Interview (SII) 7 August 2019

¹³⁰⁰ JD Interview (SII) 7 August 2019

¹³⁰¹ JP Interview (SII) 9 July 2019. See Chapter 5.

¹³⁰² BM Interview (SII) 12 August 2019

¹³⁰³ TT Interview (SII) 16 August 2019

¹³⁰⁴ JD Interview 1 November 2018; The Infrastructure Planning (Examination Procedure) Rules 2010 s 14

¹³⁰⁵ Louise Smith, *Briefing Paper: Planning for Nationally Significant Infrastructure Projects* (House of Commons Library 2017) 4. The Head of the Planning Inspectorate Wales further noted that there was a difference in approach between England and Wales regarding what is classified as an NSIP; this is supported by *ibid* 7.

¹³⁰⁶ ME Interview (SII) 24 September 2019

¹³⁰⁷ Nationally Significant Infrastructure Plan

participation; it would have been inspector-led.¹³⁰⁸ The Welsh Government Queen's Counsel noted that while inquiries were more adversarial in tone, the route through which the public participate was clearer than in a hearing:

The hearing mode leaves a great deal, in terms of running it, up to the discretion of the individual inspector in each case and they do handle them quite differently ... And actually, I do think in many ways that's harder for residents to do than to have a set time in a public inquiry to come along and read their prepared statement.¹³⁰⁹

The greater informality of the hearing seems to bring with it greater uncertainty, according to the Queen's Counsel. Public procedures have an element of formality, tied with notions of procedural fairness. The Franks Report recommended that administrative procedures be as open to the public as possible, that except in cases which involved matters of security, intimate or financial circumstance or reputation, hearings before tribunals were to be held in public.¹³¹⁰ The report contended that public confidence in these procedures would be lost were they held in secret.¹³¹¹ The adversarial nature of public inquiries can make them appear intimidating; ironically however, it seems that less formal mechanisms while less adversarial might also be less amenable to public participation. In an inquiry, public participation is clear, but perhaps not very effective. Public participation in a hearing is less established, but might this ambiguity provide opportunities for effective participation? Future research on hearings is required to answer that question.

6.2.2 Implications for the planning system

Acknowledging the distance that seemed to exist between members of the public and the planning process, the inspector and the Head of the Planning Inspectorate both noted that PINS Wales had a future tour of community councils scheduled to discuss with members of the public how to best deliver their arguments at inquiries.¹³¹² This initiative, while positive and pro-active, places the responsibility for change on members of the public; it would be helpful if this were a two-way conversation and if community councils had an opportunity to feed back to PINS. Reflecting on how more appropriate measures of environmental value could be included in the planning system, the GWT counsel advocated for a low carbon reporting requirement for developments over a certain threshold, e.g. £5 million.¹³¹³ This would ensure that the alternatives were studied and included as a planning consideration; developers would have an obligation to look at alternatives and would have to justify choosing a scheme that did not have the lower carbon impact.

One last area for possible change in the planning process is the position of NRW. As the statutory environmental body, NRW is treated as environmental objector in chief; the Head of Planning Inspectorate Wales supported this, arguing that as an inspector he could not treat them any other way; as a statutory

¹³⁰⁸ AMC Interview (SII) 24 July 2019

¹³⁰⁹ ME Interview (SII) 24 September 2019

¹³¹⁰ Franks (n309) 92

¹³¹¹ Ibid 89

¹³¹² AMC Interview (SII) 24 July 2019; TT Interview (SII) 16 August 2019

¹³¹³ BM Interview (SII) 12 August 2019

body their opinion on any environmental issue should be the most relevant.¹³¹⁴ However their role is to provide guidance regarding the Welsh Government's legal environmental obligations; they are not in a position to vigorously object to a planning scheme. They do not have the remit to do this, however it is challenging for any other environmental organisation to object on an area to which NRW has not raised an objection.¹³¹⁵ The NRW coordinator noted that in future cases NRW would be better able to include wider environmental considerations promoted in the new legislation, e.g. WFGA, in their approach, although their focus would remain bound by their statutory duties:

Our priority is our statutory duties... and then the approach that the new pieces of legislation are promulgating sits alongside that. And I suppose the ideal is to sort of blend all of that into a single approach. But I think given the timescales and the timing we weren't able to do that in a way that we maybe would now. But I would feel we would still need to respond specifically under the primary pieces of statutory legislation that guide us.¹³¹⁶

It is suggested that different environmental organisations bring different perspectives and areas of expertise to the inquiry, and the inquiry mechanism might benefit from this more diverse perspective.

6.3 Future approaches for environmental objectors



Figure 9: 'We won, Wow!' sign at resident group's celebration, 13 July 2019

One resident remarked that the daring approach taken by GWT, submitting evidence outside of their area of expertise and relying on pro-bono counsel, was an approach available to them as a smaller organisation that might not be available to larger environmental organisations, who might be more constrained by fears of reputational damage.¹³¹⁷ GWT objectors recommended their diversified approach to other environmental organisations participating in inquiries; in particular, they recommended organisations take part in the wider advocacy process alongside the inquiry process. The human cost of this approach was

¹³¹⁴ TT Interview (SII) 16 August 2019

¹³¹⁵ This is noted in Chapter 5, section 4.2.3.

¹³¹⁶ JP Interview (SII) 9 July 2019

¹³¹⁷ RW Interview (SII) 2 July 2019

acknowledged, with one objector advising colleagues not to ‘beat themselves up’ if they felt intimidated by the inquiry process; “it’s very hostile and foreign territory for people working in environmental organisations”. They reiterated that the inquiry was only one part of the wider advocacy strategy, as noted previously in this section.¹³¹⁸

Other participants highlighted the unpredictable nature of the process.¹³¹⁹ The approach relied on a huge amount of effort and strategic thinking; however, it was also influenced by a chaotic sequence of events. The timing of the inquiry, the political and personal crises that beset Welsh Labour during this time¹³²⁰ and the developing Climate Emergency movement,¹³²¹ were all factors that affected the outcome. As one participant noted, if it happened again, would the same factors work out in the same way and would the same decision be reached?¹³²² If not, what does this tell us? It serves as a reminder that political events are not machines into which if we enter the correct inputs, we will achieve the desired outcome. They have multiple interactions over which we have no control and which cannot be replicated.¹³²³ It is helpful for future environmental organisations to be aware of this, to be flexible in their planning and responsive to unexpected events.¹³²⁴ One objector, reflecting on what they might do differently were they to take part in a similar inquiry, noted that they would prioritise securing funds for more consistent legal representation as early in the process as possible.¹³²⁵

Research that engages with theoretical questions can sometimes feel abstract and far removed from the world of action and legal decision-making. The campaign undertaken by GWT and others was reflective however, and aware of the theoretical and ethical context in which they were operating. They wanted their approach to the inquiry to address issues of cumulative impact and environmental value, demonstrating a thoughtful engagement with legal environmental theory. The chief executive of GWT noted that he and other objectors reflected on the philosophical underpinnings of their strategy throughout the process; he felt this was crucial in terms of strategising and for steadying the campaign. It meant that the strategy for environmental objectors while responsive to change, was not reactive.¹³²⁶ As long-term environmental activists, the ethical implications of this scheme resonated strongly with the objectors; they felt obliged to broaden the discussion and to embed the campaign in environmental principles, seeking to prioritise an

¹³¹⁸ MW Interview (SII) 6 August 2019

¹³¹⁹ AP Interview (SII) 5 September 2019

¹³²⁰ Jamie Grierson and Josh Halliday, 'Carl Sargeant, sacked Welsh cabinet minister, found dead' (*The Guardian*, 2017) <<https://www.theguardian.com/politics/2017/nov/07/suspended-welsh-labour-politician-carl-sargeant-has-died>> accessed 17 December 2019; Steven Morris, 'Carwyn Jones acted unlawfully over Carl Sargeant inquiry, court rules' (*The Guardian*, 2019) <<https://www.theguardian.com/politics/2019/mar/27/carl-sargeant-widow-wins-high-court-challenge-over-sacking-inquiry>> accessed 17 December 2019

¹³²¹ Lesley Griffiths, 'Cabinet statement: Written statement: Welsh Government declares Climate Emergency' 2019) <<https://gov.wales/written-statement-welsh-government-declares-climate-emergency>> accessed 17 December 2019

¹³²² RB Interview (SII) 25 July 2019

¹³²³ Coole and Frost (n229) 9

¹³²⁴ RW Interview (SII) 2 July 2019

¹³²⁵ JB Interview (SII) 29 August 2019. This echoes the point made in section 5.2.2 of this chapter regarding the value of early preparation for legal cases.

¹³²⁶ IR Interview (SII) 15 August 2019

intrinsic rather than instrumental consideration of environmental value. They further maintained the social relevance of the scheme, keeping the campaign grounded in its local community.¹³²⁷

7 Conclusion

This chapter has reflected on the insights gained in data analysis. Interviews with inquiry participants and with stakeholders in the planning system have added to these reflections. Rationalist assumptions identified in this analysis enforce a separation between humans and nature and encourage compartmentalised argument and processes of abstraction in legal decision-making processes. These processes limit the form of value ascribed to the environment, the result of which is that environmental value is consistently put in instrumental terms, thus making it harder to recognise the intrinsic value of the environment.

Assessing what this might mean for the treatment of the environment in the planning system in Wales, this chapter first considered how the environment is valued in law. From there it examined how the environment is valued in Welsh sustainable development legislation, namely WFGA, and in the principle of sustainable development that underpins this Act. It noted that while instrumental value is prominent in the Act, WFGA and the principle of sustainable development seek to engender a change in environmental value. This section considered to what extent a change in environmental value is developing in Wales and in the difference between the Inspector's Report and the First Minister's decision on the M4CAN scheme. While there is evidence of change in environmental values in Wales, obstacles to change exist. The fourth section suggested that traditional approaches to balance were an impediment to change in environmental value. Weaknesses in WFGA were also assessed, and the extent to which these weaknesses are exacerbated by embedded instrumental understandings of environmental value. The rigidity and solution-focused nature of the planning system were also identified as factors inhibiting change.

The chapter then returned to the public local inquiry and reflected what impediments to change in environmental value might be present in this forum. The expert-focused and lawyer-led nature of the inquiry were highlighted. The extent to which the inquiry was public was also discussed. This section noted that public participation is described as a mechanism that diversifies the perspectives underpinning decision-making. Thus, this section proposed that aspects of the inquiry that limit public participation also limit change. It should be noted that this thesis focused on the public local inquiry as a mechanism for public participation; however, there are opportunities for public consultation earlier on in the life of a development. Consultation at earlier stages in the planning process can afford more agency to members of the public and aligns more closely to the objectives of WFGA. There is scope for future research here,

¹³²⁷ IR Interview (SII) 15 August 2019

looking at opportunities for public participation earlier on in the process, and to what extent they incorporate understandings of intrinsic environmental value.¹³²⁸

Lastly, this chapter focused on areas for improvement and change. It highlighted that opportunities for public participation already exist in sustainable development and planning law and that this is a valuable route for transformation and for including understandings of intrinsic environmental value. Existing mechanisms for public participation need to be safeguarded and strengthened. Building on this, the section identified some possible areas for reform in the planning system, and some recommendations for environmental objectors.

¹³²⁸ CJ Interview (SII) 12 September 2019. This interview participant noted the different approach taken to public consultation into infrastructure projects, the later of the two better reflecting WFGA ways of working.

9 Conclusion

This research investigated the embedded assumptions that shape how legal decision-making processes treat environmental issues. Through an ethnographic study of the M4CAN inquiry, this research identified forces that entrench instrumentalised environmental value. Research further underscored the transformative role played by public participation procedures in environmental decision-making. What holds decision-making processes back from doing more to protect the environment? Frustration with the inadequate response to the environmental crisis served as the spark for this thesis. In exploring the M4CAN inquiry, this research represented a moment of shifting perspectives on and responses to the environment. The inquiry mechanism served as the focus of the research; in the Inspector's Report, the inspector approved of the scheme and recommended it be built, prioritising economic benefits over environmental costs. However, the First Minister disagreed with the Inspectors' recommendation and did not approve of the scheme. The treatment of the environment in the inquiry and in the broader political process were therefore out of step with one another. Turning to the inquiry, it seems inherently difficult for legal processes like the M4CAN inquiry to accurately reflect and respond to the catastrophic state of the environment. The environment surpasses dangerous boundaries;¹³²⁹ its condition grows ever more precarious. Yet, legal decision-making processes like the inquiry do not seem to respond with urgency, even while awareness of the precarious state of the environment is growing in wider society. This seems to be the case in even in participatory decision-making processes, which are supposed to take into account a more diverse range of views and are supposed to better reflect environmental value; the inclusive, transformative nature of public participation is discussed in Chapter 2 and revisited in light of analysis findings in Chapter 8.

There are major landmark pieces of legislation that aim to push forward cultural change to better protect the environment; in Wales, there is the Wellbeing of Future Generations Act 2015. While these pieces of legislation have considerable impact, if we examine how the environment is valued in administrative, technical decision-making, a more applied understanding of environmental value can be presented. With that in mind, socio-legal ethnographic research was conducted in a public local inquiry into a road scheme, a participatory decision-making process which ostensibly provides scope for gathering diverse forms of environmental value, but that also weighs environmental protection against other priorities. By examining how the environment is valued in the actual day-to-day running of decision-making processes like the M4CAN inquiry, this research presented the values at play. Conducting this research, I was interested in how the environment was treated. I also observed what stood out at the inquiry, things that were not directly related to the research question but told me something about the forces affecting the inquiry process. This follows the inductive approach of ethnographic research. Data collected at the inquiry illuminated fundamental assumptions that I suggest affected the treatment of the environment at the inquiry;

¹³²⁹ Johan Rockstrom and others, 'A safe operating space for humanity' (2009) 461 Nature 472

compartmentalisation, abstracted argument and human-nature dualism. These assumptions were identified throughout the analysis and explored in Chapters 5, 6 and 7.

This thesis was guided by the suspicion that the devaluing of the environment was shaped by underpinning assumptions stemming from rationalist philosophy, that fundamental beliefs around humans and their relationship to the environment played out in these decision-making processes. Chapter 2 discussed aspects of rationalist philosophy that might inform decision-making and the treatment of the environment in these processes. It demonstrated that rationalist dualisms are entrenched in how society and legal processes value the environment, thus making it difficult to move past an instrumentalist, anthropocentric view of environmental value. By identifying these three assumptions within the inquiries' modes of knowledge and knowing, we can see how these assumptions undermine understandings of environmental value. The inquiry process considered the issue before it in a compartmentalised manner. This made it difficult to make arguments in favour of environmental protection that emphasised interconnected effects. While mechanisms like EIA are supposed to allow for a consideration of cumulative environmental effects, objectors still worried that the interconnected nature of the environment was not sufficiently recognised at the inquiry. Where the inquiry sits in the wider decision-making process also meant that there are limits on making arguments about the environment that criticised government policy. A focus on legal protections and mitigation strategies likewise restricted environmental objectors in the arguments they could raise and in the persuasiveness of these arguments. While the rhetoric seemed to support efforts to protect the environment, the structures of knowledge, power and accountability they were embedded in limited this. Abstracted treatment of the environment similarly constrained the account of environmental value heard at the inquiry. Local, practical knowledge was harder to present and to consider in the detached, document-bound processes that played out in the inquiry room. Testimony that lay outside of technical expert responses to specific issues felt inappropriate at the inquiry; it was unclear how it would be evaluated. This included emotive responses to the local environment; there did not seem to be space to express a love of nature. These issues seemed to disproportionately impact the role played by laypeople at the inquiry. There were particular ways of knowing that were favoured, and others that were side-lined.

The contention that the instrumental value of the environment was privileged over its intrinsic value was made throughout the research. Instrumental perspectives of the environment understand nature as a pool of resources that benefit humans. They view the environment as static and as external to humans,¹³³⁰ ignoring the dynamic materiality of the environment as well as its intrinsic worth. Instrumental perspectives of the environment derive from rationalist accounts of the human-nature relationship; this defines humans by their capacity to reason, which sets them as separate from and superior to nature. This dualism was evident at the inquiry. It encouraged an argument-frame where environmental interests were seen as

¹³³⁰ Bonneuil and Fressoz (n1) 21

separate from and in competition with human interests. This instrumentalist perspective undermined the urgency of the environment issues raised and the broader environmental context.

Reflecting on the analysis, I contend that value attached to the environment in legal decision-making processes is confined by rationalist assumptions. The final outcome however, that the First Minister Mark Drakeford did not approve of the scheme despite the recommendation of the inspectors, might suggest a developing change in environmental value. Considering this possible change in value, the concluding chapter of this thesis explored how the environment is valued in sustainable development and planning law, questioning whether recent sustainable development legislation in Wales attempts to re-evaluate environmental value. This chapter contended that the principle of sustainable development entrenches traditional instrumentalist views of the environment where it foregrounds economic development. However, it can also enable intrinsic value to be prioritised over instrumental value. It can accomplish this, or more rightly the pieces of legislation into which this principle is embedded can accomplish this, in the space they create for debate and by diversifying the perspectives heard in decision-making, that is through mechanisms of public participation. The M4CAN inquiry was a mechanism for public participation; however, one could argue that it did not deliver on its transformative capacity. Why was this the case? What aspects of the inquiry might inhibit this route of change? Chapter 8 identified aspects of the inquiry process that limited the scope of public participation and inhibited its capacity for change. Inquiry actors might argue that this falls outside the inquiries' scope; that by the inquiry stage, capacity for meaningful public input is quite limited. This then indicates that earlier opportunities for public consultation could have greater scope for transformative impact driven by public participation than the inquiry. Where there was evidence of change and where the power of public voice was greatest was in the space outside the inquiry process, in the media and in advocacy with members of representative government. A broad range of environmental arguments were made in this space,¹³³¹ arguments demonstrating a love of nature and emphasising the urgency of the current state of the environment. One of the recommendations of environmental objectors for fellow environmental advocates facing similar processes is to utilise this approach, to see the inquiry process as one place where public voice is heard, but not the only place.

The thesis has explored rationalist assumptions and their impact on the environment and on the treatment of the environment in decision-making processes; it has investigated aspects of the planning system in Wales and developed insights for theories of public participation. The ambitious scope of this argument has meant that fascinating research strands have ultimately fallen outside the central focus of the thesis. These have been flagged throughout the thesis, and serve to indicate some of the future contributions that this research can make. Applying Habermas's theory of communicative rationality to this research has provided interesting insights on this theory that merit further development in future work. Similarly, the

¹³³¹ Ian Craig, 'M4 relief road decision is delayed again, as protest is held against controversial plan outside Senedd' (*South Wales Argus*, 2018) <<https://www.southwalesargus.co.uk/news/17275168.m4-relief-road-decision-is-delayed-again-as-protest-is-held-against-controversial-plan-outside-senedd/>> accessed 17 December 2019. This is further discussed in Chapter 8, section 6.1.2.

insights this research has for WFGA are a valuable strand of the research that deserve further consideration. This research can make valuable contributions to scholarship around expertise and epistemologies of legal knowledge, on the criteria with which the value of forms of knowledge was assessed at the inquiry. The adversarial nature of the inquiry is a significant theme in the research; future work will investigate what it reveals about how an inquisitorial mechanism operates within an adversarial legal culture, and how that might shape the achievement of fair outcomes. Lastly, the importance of attachment to land and the local environment came across strongly at the inquiry, in particular in the data around the site visit. Exploring this data and its insights for legal geographers and space and place geographers is an interesting, interdisciplinary route future work on this research could take.

The difference between the recommendation of the M4CAN inquiry inspectors and the decision of the First Minister might indicate a shift in how Welsh decision-makers, and perhaps broader society, value the environment. However, Bonneuil and Frescoz caution against seeing growing public concern for the environment as a moment of decisive change:

The contemporary moment is not one of a new awareness, nor one of a moral leap leading us towards a better humanity... We have not suddenly passed from unawareness to awareness, we have not recently emerged from a modernist frenzy to enter an age of precaution...¹³³²

The centuries of thought, plan, achievement, matter and accident that have shaped societal values cannot be neatly described as firstly ignoring the importance of nature because of the dominance of a philosophy that prioritises humans at the expense of nature, and then secondly realising that nature has value outside of its value to humans. This thesis discussed other perspectives on the environment that recognise its intrinsic value. It identified elements and actors within the legal and political system and within the inquiry process in fact that sought to account for the intrinsic value of the environment. There are moments where this is effective and moments where it is not. There are forces in our legal processes that entrench instrumentalist views of the environment and forces that seek to disrupt this view. What are the aims of this thesis, considering the complex and shifting nature of the field with which it is concerned? It aims to identify the forces that entrench instrumentalised environmental value. It asserts that recognising the intrinsic value of the environment is essential to ensuring that legal decision-making processes have due regard to the environment. It proposes that meaningful public participation in decision-making that affects the environment can serve as a mechanism through which intrinsic environmental value is better recognised. I hope that, in describing the treatment of the environment at the M4CAN inquiry and analysing the way that rationalist assumptions shaped this treatment, these aims have been realised.

¹³³² Bonneuil and Frescoz (n1) 290

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Appendices

1. Informed Consent Form: First stage interviews
2. Informed Consent Form: Second stage interviews
3. Participant Information Sheet: First stage interviews
4. Participant Information Sheet: Second stage interviews

TITLE OF RESEARCH: Being 'Reasonable': How do rationalist assumptions affect the treatment of environment in decision-making processes?

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Research Overview

I am interested in the underlying assumptions of our legal and political system and the limits they place on our ability to advocate for environmental justice. To explore this, I intend to conduct ethnographic and interview research in a forum for participatory environmental governance. This research will be led by the following research questions:

- Does the inquiry make space for different kinds of knowledge/ voice/ participant? If so, how?
- Does the inquiry encourage people to present their argument in a certain way?
- Are there some arguments that are more effective than others?
- How is rationality understood by actors in the inquiry?
- What might be seen as an 'irrational' argument at the inquiry? What happens to these submissions?
- What aspects, if any, of environmental objectors' arguments might be seen as irrational?
- Does it feel irrational, or strange, to talk about some things in the inquiry?

Involvement in Research

The information and insights you share, and the information the researcher observes and takes notes on, will be recorded in this research. If you agree, this information will be recorded in field notes and then transferred onto a computer. Data will be stored on a registered Cardiff University computer that will be password controlled, and will be used for research purposes only. You will only be identified in the research if you give consent for this to happen.

The researcher intends to present and publish the results from this research at academic conferences and in academic journals. The research is funded by the Economic Social Research Council, Wales Doctoral Training Centre.

Interview Consent Form

I understand that my participation in this project will involve being interviewed by the researcher on my involvement in the M4CAN public inquiry, and on topics relating to the research questions (i.e. topics relating to the environment; rationality; reason/emotion; expertise and local knowledge; inquiry procedures and so on).

I understand that participation in this study is entirely voluntary and that I can withdraw from the study at any time without giving a reason.

I understand that I am free to ask any questions at any time. If for any reason I experience discomfort during participation in this project, I am free to withdraw.

I understand that the information I provide will be held confidentially, such that only the interviewer can trace this information back to me individually. The data will be stored in accordance with the Data Protection Act.

Please indicate whether you agree with the following statements, please initial box:

	Initials
I have read and understood all the information provided, and have received adequate time to consider all the documentation.	
I have been given adequate opportunity to ask questions about the research.	
I am aware of, and consent to the written and/or digital recording of my discussion with the researcher.	
I consent to the information and opinions I provide being used in the research.	
I am happy for my contribution/ my job title/ this case study (i.e. the M4CAN Public Inquiry) to be identifiable in this research project.	

Interviewee Declaration

I consent to participate in the study conducted by Caer Smyth, Cardiff School of Law and Politics

Signature:

Print Name: Date:

Additional Contact Information	
Researcher's Supervisor	Ben Pontin PontinB@cardiff.ac.uk
Cardiff School of Law and Politics Research Ethics Committee (SREC)	This project has received ethical approval from the Cardiff School of Law and Politics Research Ethics Committee (SREC) on 14/11/2017 (Internal Reference: SREC/300517/15 and SREC/071117/06). The Cardiff School of Law and Politics Research Ethics Committee (SREC) can be contacted at: School Research Officer Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: LAWPL-Research@cardiff.ac.uk

TITLE OF RESEARCH: Being 'Reasonable': How do rationalist assumptions affect the treatment of environment in decision-making processes?

RESEARCHER: Caer Smyth

CONTACT DETAILS: Cardiff School of Law and Politics
Cardiff University
Law Building
Museum Avenue
Cardiff CF10 3AX
smythc@cardiff.ac.uk

Research Overview

I am interested in the underlying assumptions of our legal and political system and the limits they place on our ability to advocate for environmental justice. To explore this, I conducted ethnographic and interview research in a public local inquiry that considered, among other issues, environmental damage. This research was led by the following research questions:

- What assumptions are evident at the inquiry?
- How is the environment treated at the inquiry? How is it spoken about, and how is it valued?
- Does the inquiry process encourage or limit different kinds of participation?
- How is emotion treated at the inquiry? Are different emotions treated differently?
- What might feel unreasonable or inappropriate at the inquiry?
- Does it feel irrational, or strange, to talk about some things in the inquiry?
- How are different kinds of knowledge/ voice/ participant treated and valued at the inquiry?

Involvement in Research

The data for this research has been collected and analysed. The purpose of this interview is to reflect on the findings of the research project, and to think about possible implications of this research for organisations engaged in environmental advocacy and for participatory decision-making processes.

The information and insights you share will be recorded in this research. If you agree, this information will be recorded and then transferred onto a computer. Data will be stored on a registered Cardiff University computer that will be password controlled, and will be used for research purposes only. You will only be identified in the research if you give consent for this to happen.

The researcher intends to present and publish the results from this research at conferences and in academic journals. The research is funded by the Economic Social Research Council, Wales Doctoral Training Centre.

Interview Consent Form

I understand that my participation in this project will involve being interviewed by the researcher on my opinion of the findings of this research and its possible implications.

I understand that participation in this study is entirely voluntary and that I can withdraw from the study at any time without giving a reason. **However, date of thesis-submission is January 2020; therefore requests to withdraw data from the project must be submitted before 27 November 2019.**

I understand that I am free to ask any questions at any time. If for any reason I experience discomfort during participation in this project, I am free to withdraw.

I understand that the information I provide will be held confidentially, such that only the interviewer can trace this information back to me individually. The data will be stored in accordance with the Data Protection Act.

Please indicate whether you agree with the following statements, please initial box:

	Initials
I have read and understood all the information provided, and have received adequate time to consider all the documentation.	
I have been given adequate opportunity to ask questions about the research.	
I am aware of, and consent to the written and/or digital recording of my discussion with the researcher.	
I consent to the information and opinions I provide being used in the research.	
I am happy for my contribution/ my job title/ this case study (i.e. the M4CAN Public Inquiry) to be identifiable in this research project.	

Interviewee Declaration

I consent to participate in the study conducted by Caer Smyth, Cardiff School of Law and Politics

Signature:

Print Name: Date:

Additional Contact Information	
Researcher's Supervisor	Ben Pontin PontinB@cardiff.ac.uk
Cardiff School of Law and Politics Research Ethics Committee (SREC)	This project has received ethical approval from the Cardiff School of Law and Politics Research Ethics Committee (SREC) on 27/06/2019 (Internal Reference: SREC/180619/07). The Cardiff School of Law and Politics Research Ethics Committee (SREC) can be contacted at: School Research Officer Cardiff School of Law and Politics Cardiff University Law Building Museum Avenue Cardiff CF10 3AX Email: LAWPL-Research@cardiff.ac.uk

Some Information about this Research Project



Researcher: Caer Smyth, Cardiff University Law School PhD Candidate

Research Title: Being 'Reasonable': How do rationalist assumptions affect the treatment of environment in decision-making processes?

A: What does this mean?

For this research project, I want to look at how environmental issues are handled in forums for participatory decision-making, specifically in the M4CAN Public Inquiry. There are many interesting questions that inspire this research. For example:

- Does the inquiry make space for different kinds of knowledge/ voice/ participant? If so, how?
- Does the inquiry encourage people to present their argument in a certain way?
- Are there some arguments that are more effective than others?
- How is rationality understood by actors in the inquiry?
- What might be seen as an 'irrational' argument at the inquiry? What happens to these submissions?
- What aspects, if any, of environmental objectors' arguments might be seen as irrational?
- Does it feel irrational, or strange, to talk about some things in the inquiry?

I think these are important questions and I think there is a value in asking them. However, this research project won't change the world. It's extremely unlikely that it will change how inquiries are run. My hopes for this research is that it will develop our understanding of why it is that some arguments are prioritised over others, and further, how this prioritising has long-term and wide-ranging effects. If something needs to be changed, the first step is to pick it apart and look at it. This research won't directly change inequalities, but understanding inequalities is the first step in challenging them.

B: Who is being invited to participate?

I am asking certain participants in the M4CAN inquiry to participate in this research. These include environmental objectors; the inspector and assistant inspector; counsel on proposing and objecting sides; residents, and witnesses on the proposing and objecting sides.

C: What kind of information is being gathered?

I will sit in the inquiry and take notes; I will be taking notes specifically on aspects of the inquiry that relate to the questions highlighted above. I will not be taking notes on things I might see that are unrelated to my research project (e.g. personal or sensitive information). When the inquiry is over, I will ask some inquiry participants if they would be happy to be interviewed. If they are happy to be interviewed, I will conduct interviews with these participants on the same kinds of topics I have previously covered.

D: What happens if I want to withdraw?

If at any point you no longer want to take part in the project that is absolutely fine. You can end your participation at any time; you will not be included in any further notes, and you will not be included in the research.

E: Confidentiality and privacy

I promise to take all necessary steps to protect participants' confidentiality and privacy; this research will follow Cardiff University's Data Protection Policy 2014. Field notebooks not in use will be securely locked at the university; the field notebook in use will be on my person at all times. Data analysis will be stored on an external drive and locked at the university. No identifiable information will be saved on my laptop.

Should participants wish it, I am happy to anonymise this data. This would include making any changes necessary to ensure anonymity, including changing names, locations and any identifying details. I understand that if one participant wishes to remain anonymous, this will entail anonymising the project in its entirety.

F: Contact details

If you have any questions about this research project, you can contact me at my email address below. If you have any questions about the ethics procedures and guidelines at Cardiff University School of Law and Politics, you can contact the LAWPL Research Ethics Committee at the address below.

Name: Caer Smyth

Email Address: smythc@cardiff.ac.uk

Address: LAWPL Research Ethics Committee, Law Building, Cardiff University, Museum Ave, Cardiff CF10 3AX

Some Information about this Research Project



Researcher: Caer Smyth, Cardiff University Law School PhD Candidate

Research Title: Being 'Reasonable': How do rationalist assumptions influence processes of participatory environmental decision-making?

A: What does this mean?

For this research project, I investigated how environmental issues are handled in forums for participatory decision-making, specifically in the M4CAN Public Local Inquiry. There are many interesting questions that inspired this research. For example:

- What assumptions are evident at the inquiry?
- How is the environment treated at the inquiry? How is it spoken about, and how is it valued?
- Does the inquiry process encourage or limit different kinds of participation?
- How is emotion treated at the inquiry? Are different emotions treated differently?
- What might feel unreasonable or inappropriate at the inquiry?
- Does it feel irrational, or strange, to talk about some things in the inquiry?
- How are different kinds of knowledge/ voice/ participant treated and valued at the inquiry?

I think these are important questions and I think there is a value in asking them. However, this research project will not change the world. My hopes for this research is that it will develop our understanding of why some arguments might be prioritised over others, and further, how this prioritising might have long-term and wide-ranging effects. If something needs to be changed, the first step is to pick it apart and look at it. This research will not directly change inequalities, but understanding possible inequalities is the first step in challenging them.

The data for this research has been collected and analysed. The next step is to discuss the findings of the research with the research participants and with external stakeholders, to see if they agree with what I found. This is an important test of the validity of my findings. It is also an opportunity to think about how these findings might change how organisations advocate for the environment in these decision-making processes, and how these decision-making processes might treat environmental issues.

B: Who is being invited to participate?

I am asking people I already interviewed for this project to participate in these interviews. I also intend to interview members of environmental organisations that take part in participatory decision-making processes, and policy-makers that have a stake in these processes.

C: What happens if I want to withdraw?

If you no longer want to take part in the project that is absolutely fine. You can end your participation at any time (until 27 September 2019, a month before thesis submission); you will not be included in the research.

D: Confidentiality and privacy

I promise to take all necessary steps to protect participants' confidentiality and privacy; this research will follow Cardiff University University's Data Protection Policy 2014. Data analysis will be stored on an external drive and locked at the university. No identifiable information will be saved on my laptop.

I am happy to anonymise data from interview participants. However, interview participants need to be aware that their data cannot be completely anonymised as the fieldsite for this research project, the M4CAN public local inquiry, will be identified in the research. I am happy to discuss this with the interview participant, and to anonymise their data as much as possible within these limits.

E: Contact details

If you have any questions about this research project, you can contact me at my email address below. If you have any questions about the ethics procedures and guidelines at Cardiff University School of Law and Politics, you can contact the LAWPL Research Ethics Committee at the address below.

Name: Caer Smyth

Email Address: smythc@cardiff.ac.uk

Address: LAWPL Research Ethics Committee, Law Building, Cardiff University, Museum Ave, Cardiff CF10 3AX