COSTS BARRIERS TO ENVIRONMENTAL JUDICIAL REVIEW; A STUDY IN ENVIRONMENTAL JUSTICE

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This dissertation is submitted to Cardiff University in fulfilment of the requirements for the degree of
DOCTOR OF PHILOSOPHY
2013

Dedication

This thesis is dedicated to my Mother.

Summary

The thesis analysed unique data collected in the Environmental Law Foundation (E.L.F.), a London-based charity with a network of legal advisers located throughout the UK. It had two main purposes: firstly, to prove that costs constitute a barrier to judicial review and; secondly, to understand better the concept of environmental justice in light of polycentricity. Environmental justice focuses on patterns of disproportionate exposure to environmental hazards and promotes increased access to information and participation in decision-making. Adjudication is said to have a limited role in achieving environmental equity as it rarely addresses issues of political and economic distribution. The thesis analysed the UNECE Aarhus Convention which is binding in the UK. It is alleged that the UK Government is in breach of the Convention's third pillar which requires access to a review procedure not to be "prohibitively expensive" (art 9(4)). E.L.F. receives calls for support from primarily poor communities facing environmental problems and refers the viable ones to a legal adviser for free initial advice. The study reviewed 774 referrals focusing on 219 of these at various stages of judicial review. A half of these referrals received a negative opinion as to the prospects of success at judicial review and the remaining half were advised to proceed. In the latter pool there were 54 cases which were prevented by the cost barrier. A significant number concluded in out-of-court/in-court settlement. The latter sample consisted of planning law-based claims which are polycentric due to the variety of involved interests. The data was also matched with the Indices of Multiple Deprivation to show polycentricity. The findings were analysed through the participatory thesis of judicial review and the concept of limits of adjudication. Thus access to adjudication may create opportunities for engagement and contributes to achieving environmental justice.

Acknowledgments

I would like to thank my supervisor, Professor Robert Lee, for the support, advice, and helpful criticism of earlier drafts of this dissertation.

I would also like to thank the Economic and Social Research Council for providing funding for the completion of this dissertation

Thanks to Environmental Law Foundation for providing me with access to the documentation and guiding me through complex organisational issues. Particular thanks to Deborah Tripley, Emma Montlake, Tom Brenan and Emma Rippengal. I would also like to mention Peter Joshua Wiggins.

I was lucky to be based in the thriving intellectual environment of the ESRC Centre for Business Relationships, Accountability, Sustainability and Society I owe a lot to the BRASS Director Professor Ken Peattie and researchers for their helpful comments and continued encouragement.

Thanks also to staff and PhD scholars I have learned from this past 4 years in Cardiff Law School.

Finally, love and warm thanks to Elzbieta Slota, family, friends and Anton for keeping me afloat during difficult times and knowing how to celebrate during good ones and to family and friends for their support.

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Introduction

This thesis will analyse unique data collected in the Environmental Law Foundation (E.L.F.) with a particular emphasis on judicial review in context of environmental justice (environmental equity). Its main purpose is to understand better the environmental justice concept which originated in the US. Environmental justice focuses on patterns of disproportionate exposure to environmental hazards and promotes increased access to information and participation in decision-making. Adjudication has been said to have a limited use in the US due to environmental justice's political and economic character. Moreover, literature review suggests that environmental justice is polycentric thus unsuitable to adjudication and suitable to negotiation and settlement. In the UK the Supreme Court had favoured preventive public law based claims over private law claims requiring proprietary interests.

ELF is a London-based charity with a network of legal advisers located throughout the UK. It receives calls for support from primarily poor communities facing environmental problems and refers viable cases to a legal adviser for free initial advice. The study will review 774 referrals (between 2005-09) which concern various environmental matters. It will thereafter focus on 219 of these at various stages of judicial review from initial assessment to the full hearings. The research reviewed cases from all four UK jurisdictions. However, the vast majority of cases were filed by clients living in England and Wales. Thus, this author will focus on the English and Welsh law when discussing judicial review and other relevant mechanisms in this thesis.

Research questions

The study will attempt to answer the following questions by taking a pragmatist mixed method approach:

1. What are the key characteristics of the ELF clients whose cases have been referred to an adviser? Do these characteristics suggest polycentricity?
2. What are the key features of the referrals? Do these features suggest polycentricity?
3. What proportion of judicial review referrals received a negative opinion as to the prospects of success at judicial review? What is the proportion of judicial review cases where clients were advised to take further steps towards judicial review?
4. Given the answer to the above question, did clients not proceed primarily because of costs?
5. Are judicial review referrals polycentric?
6. What are the ramifications of the above findings for understanding of environmental justice?

The research questions intend to address two main purposes of the thesis: namely to prove that costs constitute a barrier to judicial review and; secondly, to understand better the concept of environmental justice in light of polycentricity.

The first purpose was negotiated with E.L.F. at the time of conducting preliminary research and the findings (covering slightly shorter study period until between January 2005-July 2009) were known shortly after the data has been collected and analysed via statistical software (SPSS) at the end of 2009. The charity allowed access to its documents in order to use the findings to inform the nation-wide debate over the UK's alleged incompliance with Article 9(4) of the United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-

making and Access to Justice in Environmental Matters (Aarhus Convention). The findings proved that, as regards E.L.F. cases, costs constitute barrier to judicial review in the UK. The findings were published in a BRASS/ELF report[1] which was officially launched at a high level reception in the House of Lords hosted by Lord Justice Woolf. The finding subsequently informed the debate in the UK and were cited by NGOs[2], the Aarhus Convention's Compliance Committee[3] and the UK Government[4].

The second wider purpose is closely associated with the first one and constitutes an attempt to understand better the ramifications of the above findings. Thus, environmental justice claims are said to be polycentric, that is, encapsulating many, often conflicting, interests and having impact upon other parties (or interests) in the space where the environmental hazard originated[5]. This thesis accepts a Lon Fuller's definition of polycentricity in context of adjudication, namely as disputes with "interacting points of influence"[6] which "normally involve many affected parties and a somewhat fluid state of affairs"[7]. As a result, adjudication may not be the appropriate avenue for resolving such conflicts which are political or economic in nature. The E.L.F. cases form an empirical base for measuring the variety of interests potentially involved in the environmental justice disputes. If the thesis proves that the E.L.F. claims are polycentric then it may be appropriate to consider the ramifications of the findings in light of the conclusions stemming from the first purpose of the thesis.

[1] Radoslaw Stech, Robert G Lee and Deborah Tripley, 'Costs Barriers to Environmental Justice' (Report for Environmental Law Foundation and BRASS, Alen & Overy 2009)
[2] WWF, 'European Commission Refers UK to European Court over Access To Environmental Justice' (WWF, 6 April 2011) < http://www.wwf.org.uk/wwf_articles.cfm?4815> accessed 6 April 2011
[3] Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland; adopted by the Compliance Committee on 24 September 2010, at 17
[4] Ministry of Justice, 'Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention' (Response to Consultation CP(R) 16/11) (London 2012)
[5] Laurence Etherington "Mandatory Guidance' for dealing with Contaminated Land: Paradox or Pragmatism?' (2002) 23(3) *Statute Law Review* 203
[6] Lon Fuller,'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353, 395
[7] Ibid 397

Broader regulation for environmental justice

This thesis concentrates on the role of judicial review in England and Wales in delivering environmental justice. The focus stems from the fact that, at the time of conducting the research and writing the thesis, the United Kingdom's government struggled to satisfy the access to justice provisions entrenched in the Aarhus Convention. However, this author acknowledges that judicial review is not the only available avenue to foster greater equality in terms of access to environmental goods. Broader regulatory approach has been pursuit early in the environmental justice paradigm in the United States. In 1993 John Lewis introduced[8] the Environmental Justice Bill which was not enacted. The Bill included a duty on federal agencies "to ensure that significant adverse health impacts that may be associated with environmental pollution [...] are not distributed inequitably"[9]. In 1994 President Clinton signed Executive Order 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" [10]. The order requires the federal agencies to include the goal of "achieving environmental justice" [11] as part of their strategies. The Executive Order did not create a new right enforceable by law since it was "intended only to improve the internal management of the executive branch"[12].

There is no dedicated environmental justice statute in England and Wales. Still, wider environmental laws, planning laws, human rights laws can contribute to achieving greater environmental equity. In Scotland, Mark Poustie wrote a seminal report[13] as to

[8] The Bill was re-introduced twice in the Congress in 1998 and in 1999 but was not enacted.
[9] Environmental Justice Bill H.R. 2105, S.2(6) Available at < http://www.govtrack.us/congress/bills/103/hr2105/text>
[10] *Executive Order 12898 of February 11, 1994*
[11] Ibid, at 1-101
[12] Ibid, at 6-609

[13] Mark Poustie 'Environmental justice in SEPA's environmental protection activities: a report for the Scottish Environment Protection Agency' (Strathclyde Law School, 2004); See also: Mark Poustie

how the Scottish Environmental Protection Agency (SEPA) could use existing environmental frameworks to foster environmental justice through its activity. The report recognised a number of opportunities embedded, *inter alia*, into the water pollution controls, integrated pollution controls, waste management controls, planning laws, contaminated land regime or statutory nuisance. It put forward a number of recommendations addressed to SEPA in context of enforcement of environmental law and some of these could also be applicable to the legal frameworks in England and Wales. Thus, for example, the Environment Agency in England could pay particular attention to environmental justice issues in relation to the public inhabiting special sites under the contaminated land regime[14]. Both Environment Agency in England and Natural Resources Wales act as statutory consultees in the planning decision process and could influence the respective planning authorities to pay particular attention to issues of inequality. Local authorities could also use their investigatory powers under Part III Environmental Protection Act 1990[15] to identify above average exposure to nuisance of certain sections of the society. Further, an earlier report by Environmental Justice Project[16] recognised a significant role of criminal justice system in removing environmental injustice. This could include stricter fines for polluters, effective handling of environmental cases by Magistrates Courts and granting stronger enforcement powers to the statutory agencies such as Environment Agency.

Judicial review – an avenue for success for environmental justice movement?

Overall, there are opportunities for using existing legal and regulatory environmental mechanisms in the environmental justice context. In principle, this author acknowledges

'SEPA and environmental justice' (2006) 115 *Scottish Planning and Environmental Law* 54

[14] See Part 2A Environmental Protection Act 1990 and Regulations 2 and 3 of Contaminated Land (England) Regulations 2006

[15] s. 79(1) Environmental Protection Act 1990

[16] Pamela Castle, Martyn Day, Carol Hatton, Paul Stookes 'A Report by the Environmental Justice project' (London 2003)

that such frameworks may be better suited for removing the deeply engrained environmental equalities than judicial review. The former are capable to address issues relating to wider population living in the large areas. Crucially, these mechanisms can provide benefits early in the decision-making processes, which result in the allocation of environmental hazards in particular areas, alongside the benefits of constant monitoring and enforcement. Judicial review, on the other hand, is largely limited in addressing environmental justice issues early in the decision-making processes. It is rather down to political pressure that is ancillary to an intended judicial review action; this pressure could influence the administrative decisions. Beyond that, the grounds for judicial review, costs and the restricted time limits severely reduce the opportunities for the wider public to redress the balance in relation to the availability of environmental goods and hazards. Thus, judicial review may not be the most effective way of removing environmental inequalities.

However, this author decided to centre on the usefulness of judicial review in this thesis. It is because judicial review constitutes an end on its own right especially in light of the Aarhus Convention provisions. As a result, the topic deserves an extended exploration to understand better the role of costs in inhibiting access to courts in England and Wales and wider implications of the barrier for environmental justice.

Meaning of success

The meaning of success in relation to environmental judicial review can be seen in narrower and wider contexts. The former relates to the mere possibility of filing a case in the High Court without a chilling threat of being exposed to large costs following the review. This carries opportunity for reviewing the relevant material facts followed by an order (such as a quashing order), court judgment or withdrawal. The wider context may be of particular importance for the environmental justice advocates. It carries ancillary

benefits of publicising the issues of inequalities and gaining wider political influence. In this sense it offers opportunities for addressing inequalities in the wider community rather than being restricted to the rights and claims of the particular applicant. Crucially, judicial review carries also opportunities for settlement both in court and out-of-court. Such settlement can also address wider environmental justice issues. This thesis focuses primarily on the narrow meaning of judicial review by assessing whether or not there is a cost barrier to courts on the basis of E.L.F. cases. However, it also looks into judicial review in the wider sense in the context of polycentricity.

Structure of the thesis

The structure of the thesis aims at presenting a literature review, the methodology and the findings in a coherent and transparent fashion. Nevertheless, it has been difficult to arrive at a final structure for the reasons explained below.

The access to the unique E.L.F.'s database had been negotiated and the author had to publish the findings relating to the first purpose of the thesis in the BRASS/E.L.F. Report in January 2010. There was then a period of follow-up research on E.L.F. database to collect additional data so as to extend the study period until December 2009. The collection of data ceased in June 2010 and the author decided to address the questions relating to the second purpose of the thesis. This has been underpinned by a pragmatist approach which allows a degree of experimentation with the data leading to inductive analysis. It could have been be viable approach to structure the thesis by starting with the statistical research relating to the first purpose of the thesis followed by literature review and then additional analysis of the data to measure polycentricity. However, such a structure might disturb the reader's perception and would result in

duplication as the same data would have to be analysed at the beginning and in later chapters of the thesis. As a result the following structure is proposed.

The thesis is organised into three main Parts: Part I focuses on the literature review and the overview of the main legal concepts. Part II explains the research settings, the E.L.F.'s modus operandi and the pragmatist methodology. Part III presents and analyses the statistical findings and discusses the ramifications of the findings in light of the concept of polycentricity. The analysis in the first two Chapters of Part III focuses on all 774 referrals and subsequent Chapter focuses on the referrals which have been identified to be at the judicial review stage during the study period. The three parts are divided into nine chapters the content of which is now summarised.

Part I

Chapter 1 will analyse the concept of environmental justice by looking into its inception, evolution and conceptualization. It will draw on both US and UK literature. It will show that environmental justice is multi-faceted as it has been extended to cover a range of issues beyond environmental hazards (such as medical issues). Crucially, it will show that environmental justice claims involve a variety of and, in many circumstances, conflicting interests. The Chapter will conclude with an attempts at conceptualizing the substantive and procedural polycentricity of environmental justice claims.

Chapter 2 will review the usefulness of adjudication in overcoming environmental injustice. It will start by reviewing the US literature which suggests a limited role for adjudication within environmental justice. The Chapter will then review the main features of private law based claims and judicial review in England and Wales and the link between human rights regime and environmental judicial review. The Chapter will

identify the main limitations of the legal avenues for environmental justice. It will also highlight the main difficulties in measuring polycentricity in legal claims. The Chapter will conclude by favouring the statistical approach to measure polycentricity of environmental justice claims over qualitative analysis of cases.

Chapter 3 will review the three pillars of the Aarhus Convention, namely the informational pillar, the participatory pillar and the access to justice pillar. The Chapter will then focus on tracing the implementation of each pillar in the UK. It will pay particular attention to the third pillar given the focus of the thesis.

Part II

Chapter 4 will review the research settings and explain the way in which E.L.F. handles environmental cases. It will also review the charity's funding arrangements to estimate the extent to which E.L.F.'s role falls within the Article 9(5) of the Aarhus Convention. The Article prescribes that the Parties to the Convention could establish assistance mechanisms to overcome the financial barriers to justice. If E.L.F. is primarily funded from the public purse then it could constitute such a mechanism.

Chapter 5 will describe and defend the ontological and epistemological underpinnings of the study, the choice of mixed methodology and, stemming from these, the ethical and political issues associated with the research. Furthermore, the Chapter shall illustrate how the author collected and analysed the data and how he incorporated procedures of reflection.

Part III

Chapter 6 will present results from the analysis of all 774 E.L.F. enquiries. It will measure the major characteristics of the clients thus will constitute an opportunity to

measure the interests involved in the cases. The following variables will be explored: regional representation; gender; age; employment status; income; registered disability; nationality; first language; ethnic origin; and client status.

Chapter 7 will also present results from the analysis of all 774 E.L.F. enquiries. It will measure the major characteristics of the referrals and their nature. The following variables will be explored: number of people affected; funding of cases; type of environmental problems; area of law; Human Rights and wellbeing; concerns over the Aarhus pillars; bias; and stages of cases. The analysis will also identify, so far as possible, polycentricity embedded into the referrals.

Chapter 8 will focus on 219 referrals which were at the stage of judicial review during the study period. The main purpose of the Chapter is to address the two questions relating to the first purpose of the study. Thereafter the Chapter will focus on measuring polycentricity of the judicial review cases which originated in England only. The author will match the clients' postcodes with the Indices of Multiple Deprivation in order to observe the wider context in which the cases are embedded.

Chapter 9 will discuss the ramifications of the findings and will be followed by a short conclusion.

Significance of the thesis

The thesis is important as the environmental justice concept has been channelled into the UK policy making. In 2005 the government published a sustainable development strategy[17] (hereafter SD strategy) in which it committed itself to adopt a number of indicators through which progress would be measured. The measures to be adopted

[17] Securing the future – delivering UK sustainable development strategy (Norwich, Stationery Office)

included a separate title of “Social justice/Environmental equality”.[18] The document put an emphasis on active community participation under the ‘Society’ heading. The inclusion of the environmental justice concept into the overall government strategy was endorsed by the Environment Agency.[19] It is also clear that the inclusion was informed by the sociological and spatial research, which was reviewed above in this Chapter[20] and against the background of the Aarhus Convention.[21] The current Coalition government committed itself to “a refreshed vision" and committed itself to "build on the principles that underpinned the UK’s 2005 SD strategy”.[22] The crucial commitment is to mainstream SD to guide other government policies. The understanding of sustainable development and environmental justice will inevitably be linked to the idea of Big Society thus promoting fairness through public empowerment and engagement.[23] Funding for Big Society projects will be available partly from the Big Fund of the National Lottery which supported E.L.F. in 2007.[24] The UK SD strategy has echoes in each devolved administration as these adopted their own strategies. In Scotland, sustainable justice concept was explicitly included into the strategy.[25] The Northern Irish and Welsh strategies use concepts of equity and social justice.[26]

[18] Ibid 144
[19] Environment Agency, ‘Addressing Environmental Inequalities’ (Position Statement) <http://www.environment-agency.gov.uk/static/documents/Research/ca221final_888457.pdf> accessed 2 June 2011
[20] See above, p. 50
[21] Environment Agency, ‘Addressing Environmental Inequalities’ supra note 19
[22]Department for Environment, Food and Rural Affairs, ‘Mainstreaming sustainable Development – The Government’s vision and what this means in practice’ <http://sd.defra.gov.uk/documents/mainstreaming-sustainable-development.pdf> accessed 10 June 2011
[23] Ibid 5
[24] See p. 176
[25]Scottish Executive, ‘Choosing our future: Scotland's sustainable development strategy’ (Edinburgh 2005). It was replaced by the Scottish Government's Economic Strategy which makes no mention of environmental justice or indeed sustainable development but focuses on 'increasing sustainable economic growth'. Compare with Scottish Executive, ‘The Government Economic Strategy’(Edinburgh 2011), p. 12.
[26] Northern Ireland Executive, ‘Everyone’s Involved. Sustainable Development Strategy’ (Belfast 2010), Welsh Assembly Government ‘One Wales, One Planet. A new Sustainable Development Strategy for Wales’ (Cardiff 2009)

Environmental justice and especially its procedural aspect has been entrenched into the UK legislation. The most notable example is the Aarhus Convention which was transposed into the UK law through the European directives and will be reviewed in this thesis. In England and Wales, the Sustainable Communities Act 2007 provides a mechanism for local people to generate and promote ideas to improve the economic, social and environmental wellbeing of their area. It is built on an assumption that local knowledge may be best to promote the sustainability of an area, and provides for local people to ask central government to take enabling action to improve the economic, social or environmental wellbeing. Embracing a holistic idea of sustainable development, the Act is wide ranging and, in line with a bottom up approach, places no limits on the type of action that could be put forward. In this way, the Sustainable Communities Act seeks to empower local communities, which have available a simple process whereby their ideas can be channelled through local authorities to central government following a "short-listing" process[27]. The Government is charged with reaching agreement on which of the short-listed proposals should then be implemented, but must respond to all short-listed suggestions. The Sustainable Communities Act also ensures greater transparency of information relating to local public spending through the publication of 'Local Spending Reports'. This is part of a programme to inform local communities of priorities set for the area in an attempt to pursue better-informed choices which will promote local sustainable development. The Act is significant therefore in creating an arena in which sustainability policy may be debated and generated.[28]

[27] Under s. 2 of the Sustainable Communities Act 2007 "The Secretary of State must invite local authorities to make proposals which they consider would contribute to promoting the sustainability of local communities".

[28] Robert G Lee and Radoslaw Stech, 'Mediating Sustainability: Constructivist Approaches to Sustainability Research' in Alex Franklin and Paul Blyton (eds), *Researching Sustainability: A Guide to Social Science Methods, Practice and Engagement* (Earthscan 2011) 178-179

Thesis in context

The thesis draws upon and elaborates research conducted in the Environmental Law Foundation which initial findings were published in BRASS/E.L.F. Report. The latter draws upon earlier research conducted in E.L.F. in 2003 and focused on an examination of E.L.F. referrals between January 1999 and December 2002 (hereafter "E.L.F. 2003 Study"[29]). This research reviewed 668 cases tracking the conclusions of these cases.

The E.L.F. 2003 Study analysed the following data: the type of environmental concerns affecting or potentially affecting the communities; the likely cause of action at law; and the number of people potentially affected by the environmental concerns. Further, the study examined the socio-economic profile of the clients contacting E.L.F. based upon information from an Equal Opportunities Forms.

The E.L.F. 2003 study reviewed the conclusions of the cases over a narrower timeframe between 2001 and 2002. This part of the study found that: 79 cases concluded successfully; 140 had unsuccessful conclusion; 49 remained ongoing; and 104 cases could not be determined due to a lack of recent data.

The study subsequently looked at those cases which concluded successfully and revealed that a significant body (46 percent) ended in "successful representation to planning committee meetings and appeals".[30]

Crucially, the study looked at the cases which did not conclude successfully and sought to establish the barriers to a satisfactory conclusion:

> "In 35% of these cases the clients were advised that there were no reasonable

[29] Paul Stookes, 'Civil Law Aspects of Environmental Justice'(Environmental Law Foundation, London, 2003)
[30] Ibid 25

> prospects of success. In a further 31 % of cases the cost of pursuing legal action was the main reason for its failure i.e., they were advised that they could reasonably pursue the matter and were likely to have done so but for the cost or potential costs they may be incurred".[31]

The other reasons identified, such as stress, personal reasons, or adverse court judgments, represented much smaller proportions of the cases. Thus, the E.L.F. 2003 Study identified costs as a major barrier to pursuing legal action in connection with environmental concerns"[32].

Originality

This thesis is original for a number of reasons relating to the methodology and theoretical underpinnings. Firstly, by following the previous research[33], it analyses newer data by applying innovative and more rigorous methodology. The quantitative data was input into SPSS statistical package and linked with socio-economic variables found in the Equal Opportunities Forms via postcodes. Secondly, the author conducted qualitative documentary analysis of the referrals leading to the creation of additional quantitative variables not found in the E.L.F. 2003 Study[34]. Thirdly, the data is reviewed specifically in the context of environmental justice, which is polycentric thus giving rise to conflicts between various interests. The polycentricity lies in the substantive and procedural aspect of environmental justice. The substantive polycentricity stems from the heterogeneity of parties claiming the right to better quality environment at various levels of governance (global, national, regional, local, family and individual). Thus, exposure to environmental hazards can be studied through

[31] Ibid 25
[32] Radoslaw Stech, Robert G Lee and Deborah Tripley, 'Costs Barriers to Environmental Justice' (Report for Environmental Law Foundation and BRASS, Alen & Overy 2009) 6
[33] Paul Stookes, 'Civil Law Aspects of Environmental Justice' supra note 29
[34] Ibid

numerous variables (age, disability etc) at these levels to measure the degree of environmental justice of different groups. Further, procedural rights, mainly access to information and participation in decision making, have twofold functions: as 'integral' part of environmental justice concept and as the catalyst for or tool through which environmental justice can be achieved.

In the first context procedural rights constitute the supplementary elements of the substantive environmental justice. Thus, availability of (or exposure to) the procedural rights can be studied through numerous variables at various levels of governance to measure the degree of environmental justice of different groups. In the second context the access to a better environment could be achieved through access to environmental information and participation in decision-making. Crucially, however, this access allows certain claimants to argue for *their own* central interest: that is, claim access to a better environment. In other words, the procedural elements of environmental justice, if distributed equally, can constitute a platform for exchange of information (including experience) and negotiation over the interest in the priority of groups. Illustratively, a waste site in a deprived local area may be prejudicial to health of all members of the community but, in particular, to children or people with respiratory problems. At the same time the waste site may provide jobs and may offer benefits of community waste management in the area thus benefit the majority of its citizens. The whole community which suffers environmental injustice will have to decide whether or not to give a priority to the children and those with respiratory problems and oppose the development. The interest of children may be undisputable but the interest of adults with the respiratory illness may give rise to conflicts in the community. Thus the withdrawal of the development may lead to the loss of jobs, impoverishment, poor diet, inactivity leading to illnesses and the acceleration of environmental injustice. On the

other hand, the withdrawal of the development may lead to fly-tipping and the situation whereby people may not have a chance to effectively dispose of their waste.

Part I Environmental justice: the concept and the law

This Part consists of three chapters providing a literature and law review relating to the concept of environmental justice. First Chapter will review the relevant sociological, political and, to some extent, medical research which underpins the concept. Second Chapter will review the legal avenues of challenge in context of environmental justice. Given the particular features of the environmental justice claims which involve wider public interest the author will focus on the public law mechanism and, in particular, judicial review and human rights regime. Moreover, given the particular emphasis attributed to the informational and participatory aspects of environmental justice the review of the relevant law is necessary. The most useful way of performing the analysis of such a large legal arena is to take the Aarhus Convention as a basis especially because of the link between the Convention and judicial review. Overall, the three Chapters aim at providing tangible foundation for the analysis of the author's data collected in the Environmental Law Foundation. It will follow from the review that environmental justice is multi-faceted and polycentric and that the pillars of the Aarhus Convention serve best in providing access to environmental justice without necessarily achieving it.

Chapter 1

Unwrapping Environmental justice

This chapter will analyze the concept of environmental justice by looking into its inception, evolution and conceptualization. The concept has been studied extensively and conceptualized in the US and borrowed and developed by researchers worldwide. Given that most of the UK scholars working on environmental justice refer back to the US roots, the author will take a similar approach. Academic research provides the evidence for understanding the concept; it has been predominantly quantitative sociological research concentrating on the spatial distribution of environmental hazards within disadvantaged communities. It follows from the research in the US that Black and low-income communities have suffered an overexposure to environmental hazards and risks. The review of the UK literature will show that the number of independent socio-economic variables is wider and includes gender, age and disability. This suggests the polycentric character of environmental justice claims because of the variety of interests that has to be addressed. Moreover, the review will note the recent trends of extending environmental justice claims to the spheres initially reserved for medical research, food justice, urban regeneration and others. This suggests that environmental justice is multi-faceted.

Evolution and early environmental justice research

The concept of environmental justice was explicitly coined following the clamorous demands of the mostly Black and poor people battling against environmental threats in the 1980s. Nevertheless, aspects of the concept had been discussed and mentioned intermittently before in the US[35] and in the UK. This section will provide a review of selected examples accordingly and provide an explanation for late conceptualisation of

[35] See also Jesse C McEntee and Diego Vazquez Brust 'Surveying the Field: Applying the Just Sustainability Paradigm to Survey Research' in Alex Franklin and Paul Blyton (eds), *Researching Sustainability: A Guide to Social Science Methods, Practice and Engagement* (Earthscan 2011)

environmental justice concept by reference to Taylor's 'paradigms theory'.[36] The next Chapter will show that an aspect of environmental inequity has been long entrenched into the UK legal system in the form of the locality rule in private nuisance.[37]

Early examples from the US

A Report of the Council of Hygiene and Public Health of the Citizens' Association of New York[38] is cited[39] as the first statistical account of the poors' urban environment in the US. The Report (like the earlier Chadwick Report[40] in the UK) described appalling conditions of the poors' housing being source of disease. The Citizens' Association noted also a threat of a spill-over to the middle-classes areas.

Half a decade later the Chicago School of Sociology's researchers focused their interests on urbanisation and saw the growing cities in the USA as the institution with "a moral as well as a physical organization"[41]. This was a perfect place to note certain human behaviour, which was said to mimic the behaviour in the natural world. McKenzie as early as in 1928 noticed that certain people tended to inhabit places closer to the industrial zones:

> "It is in the Seattle neighbourhoods, especially those on the hill-tops, that the conservative, law-abiding, civic-minded population elements dwell. The downtown section and the valleys, which are usually industrial sites, are populated by a class of people who are not only more mobile but whose mores

[36] Dorceta E Taylor, 'The Rise of the Environmental JusticeParadigm. Injustice Framing and the Social Construction of Environmental Discourses' (2000) 43(4) The *American Behavioral Scientist* 508
[37] See p. 77
[38] Citizens' Association of New York, 'Sanitary Conditions of the City' (Report by the Council of Hygiene and Public Health) (New York 1865)
[39] Julie Sze, *Noxious New York. The Racial Politics of Urban Health and Environmental Justice* (The MIT Press 2007) 34
[40] Supra note 54
[41] Robert E Park, 'The City: Suggestions for the Investigation of Human Behavior in the City Environment' (1915) 20(5) *The American Journal of Sociology* 577, 578

and attitudes, as tested by voting habits, are more vagrant and radical."[42]

Later, Wirth made more precise analysis of the factors influencing the settlement of the people in the cities:

> "Density, land values, rentals, accessibility, healthfulness, prestige, aesthetic consideration, absence of nuisances such as noise, smoke, and dirt determine the desirability of various areas of the city as places of settlement for different sections of the population. Place and nature of work, income, racial and ethnic characteristics, social status, custom, habit, taste, preference, and prejudice are among the significant factors in accordance with which the urban population is selected and distributed into more or less distinct settlements."[43]

Fuller considered irrigation and flooding in the context of distributive justice in the 1960s. Irrigation is brought to earth by the weather which allows the transfer of water to the soil and "places in human hands the responsibility for directing the available moisture to the proper places".[44] In this humans used a number of rules of justice to allocate the irrigation including "first come, first served, to each according to his contribution, to each according to his needs, to each according to the needs of society, to each according to the luck of the throw". Similarly flood control includes the question of distributive justice and leads to complex decision-making dilemma, especially when the needs of the less wealthy are opposed with the more affluent:

> "If a river is left without dikes, no one assumes responsibility for the precise

[42] R D McKenzie, 'The Ecological Approach to the Study of the Human Community' (1924) 30(3) *The American Journal of Sociology* 287, 301
[43] Louise Wirth, 'Urbanism as a Way of Life' (1938) 44(1) *The American Journal of Sociology* 1, 15
[44] Lon Fuller, 'Irrigation and Tyranny' (1965) 17 *Stanford Law Review* 1021, 1037-1038

> point where flood waters break through. If, however, the public undertakes a system of embankments to hold the river in its course, A, whose land is flooded, may complain that the dikes protecting his land were less well maintained than those protecting B's. Worse yet, if A's land is upstream and is deemed less valuable than B's, which is downstream, the question may arise whether the dikes protecting A's ought not to be opened deliberately to save B's land. Or, again, if this procedure is explicitly rejected, then B may complain that in effect his land was sacrificed to save the less valuable land of A."[45]

The above constitutes an example of polycentric disputes which Fuller developed in a later article to be discussed in Chapter 7[46] of this thesis. It is sufficient to note that such disputes "are inherently unsuited to adjudicative solution, involving as they do a complex interplay of diverse interests."[47] Fuller was convinced that the solution to such complex problems could only be provided by those who knew the interests of the parties "intimately"[48].

The early research considered the interplay between environment and medical conditions in occupational settings. Take for example a Lloyd's piece of research on respiratory problems of nearly 60 thousand steelworkers labouring in a coke-oven plant in Pensylvania published in 1971 and reported in the Lancet's Editorial[49]. The researcher found that the coloured workers' mortality from respiratory cancer was three times higher than the expected rate whereas the white workers' mortality rates were not influenced. The reason for the significant variation laid in an ethnically-driven division

[45] Ibid 1040-1041
[46] See Chapter 7, p. 315
[47] Ibid 1042
[48] Ibid
[49] A P R Wilson, 'Less Equal than Others' (Editorial) (1994) 343(8901) *The Lancet* 1

of labour, where 19% of the coloured workers toiled near the oven filled with coal compared with 3% of white workers.[50]

Early examples from the UK

The Industrial Revolution commenced in the UK and led to accelerated growth at the expense of the environment and environmental conditions of the working classes. Thompson[51]traced the development and evolution of English working classes including their urban environment, which deteriorated significantly, even "in some of the "high-wage" areas"[52] in the height of the Industrial Revolution. Moreover, the working conditions and urban environment at that time were subject to some statistical and sociological observations, which constituted a driving force for a legal reform. Holland proved the disparities in the Sheffield's inhabitants' quality of immediate environment to be dependent on wealth[53]. Most notably Chadwick conducted research, which could also be coined as socio-legal, on sanitary conditions of the working classes in Great Britain[54]. The report, upon closer analysis, is an environmental justice treatise including extended and detailed descriptions of the poor's environmental conditions, effectiveness of common law and legislation in addressing the inequalities and proposals for reforms. Chadwick exposed pollution of environmental elements such as water and soil and noticed working classes' disproportionate exposure to certain environmental factors such as smoke, stench and other substances (faeces). He noticed some effectiveness of legislation such as *the Chimney Sweepers and Chimneys Regulation Act 1840* which raised the minimum age of chimney sweepers to 16. The labour of children at that time

[50] W Lloyd, ' Long-term mortality of steelworkers, V: respiratory cancer in coke plant workers' (1971) 13 *Journal of Occupational Medicine* 53
[51] E P Thompson *The Making of the English Working Class* (Vintage Books 1966)
[52] Ibid 319
[53] George Calvert Holland, *The vital statistics of Sheffield* (1843) <http://books.google.co.uk/books?id=57kHAAAAQAAJ&pg=PA44&source=gbs_toc_r&cad=4#v=onepage&q=forty&f=false> accessed 1 June 2011
[54] Edwin Chadwick, 'Report on the Sanitary Condition of the Labouring Population and on the Means of its Improvement' (London, 1842)

is an example of one of the cruellest environmental injustices affecting children whose environment was literally limited to the claustrophobic space of a chimney. The legislation, including the later Chimney Sweepers' Acts, is an example of environmental justice law aiming at improving the conditions of the particular age groups in the poorest cohort.

In the age of industrial revolution it was easy to indicate the victims of environmental injustice yet it was much more difficult to find the culprits. According to Thompson all classes contributed to the deterioration thus the author placed the responsibility in the population growth, industrialism, "aggravated by the predatory drives of *laisez faire* capitalism"[55]. Similarly to Chicago School of Sociology, albeit much earlier, Holland saw the peoples' disposition to seek better environment for their retirement as part of the human nature:

> "All classes, save the artisan and the needy shopkeeper, are attracted by country comfort and retirement. The attorney,- the manufacturer,- the grocer,- the draper,- the shoemaker and the tailor, fix their commanding residences on some beautiful site [...] [W]e adduce it simply as a fact which is familiar to all, and presented in no exaggerated colours".[56]

In *Paris v Levy* the Common Bench noted that the work in poor environmental conditions could still lead to profits and liberation. The citation below can be seen as an example of early understanding of polycentricity of environmental justice in the UK:

> "There are several chimney-sweepers and dust-contractors in London who are

[55] Ibid 322
[56] Holland, 'The Vital Statistics... supra note 53

men of wealth and substance. Handsome investments can be made in chemical works for deodorizing manure. The process is not pleasant to the olfactory nerves; but the returns are, we hear, remunerative. Fortunes have been made in the cats' meat trade: sewer-hunters and mudlarks sometimes find gold watches and silver spoons during their unsavoury labours. George the Fourth's Major Hanger kept a coal and potato shed in Tottenham Court Road".[57]

Environmental justice paradigm

Taylor[58] provided a useful historic and evolutionary analysis of the environmental justice movement in the US context, which explains the fairly late framing of the concept. Framing echoes Thomas Kuhn's 'paradigm shift' theory[59]. She distinguished the mainstream environmentalist movement from the environmental justice one where the latter is rooted in the Nineteenth century. Environmentalists have evoked "images related to wilderness and wildlife protection to motivate their supporters" embedded in "Romantic/Transcendentalist environmental ideology" inspired by Jean-Jacque Rousseau[60] (hereafter Romantic Environmental Paradigm). The movement included pragmatic conservationists who supported wise and scientific approach to the development and business environmentalists such as hunters and explorers. It followed the "exploitative capitalist paradigm"[61] which justified environmental exploitation and was followed by "the new environmental paradigm"[62] rooted in the 1960s and 70s. The latter "enunciated a stronger pro-environmental stance" partly due to its membership

[57] *Paris v Levy* [1860] 142 E.R. 135
[58] Dorceta E Taylor, 'The Rise of the Environmental Justice Paradigm...' supra note 36
[59] Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962)
[60] Ibid 514
[61] Ibid 529
[62] Ibid 531

with weaker business connections[63]. New Environmental Paradigm's members directed their attention to environmental planning, risk avoidance, limits to growth and new politics including informational, participatory and wider human rights. The environmental justice movement followed in the 1980s by emphasising the experience of people of colour which differed significantly from paradigms "constructed by middle- and working class Whites" who had "accumulated the controlled resources by appropriating land and labor and by controlling the movement of people of color"[64]. Taylor elaborates socio-linguistic terminology and uses the terms of framing and submerged frames. The former "refers to the process by which individuals and groups identify, interpret, and express social and political grievances",[65] whereas the latter

> "identify problems in the society, make diagnostic attributions, and suggest solutions, but these problems are not the major focus of movement or framing activities""[66].

She finds that "environmental justice activism has been a submerged frame in the politics"[67] of the people of colour since 1800s. Taylor gives a number of examples where, for example, Blacks fought to improve their housing conditions, segregation in access to public parks and beaches in the city of Chicago. In the mid century the Blacks were engaged in the actions aiming at improving their "fishing rights [...], worker health and safety"[68] and worker rights. Later the Black activists focused on a number of other environmental problems such as waste, air pollution, and housing energy clearly reflected in the below review of environmental justice research. Moreover, the

[63] Ibid 533
[64] Ibid 533
[65] Ibid 511
[66] Ibid 516
[67] Ibid 534
[68] Ibid 535

environmental justice movement has been rooted in "with religious institutions and with community organizations and educational institutions"[69].

In summary, environmental justice problems have been present at least since 1980s in the US but hidden behind the mainstream environmental paradigms as submerged frames. As a result, early research discussed above did not use the environmental justice terminology but can be seen as an example of environmental justice research. The research provides a good example of the multi-faceted and polycentric character of environmental justice claims. The Chicago School's 'sociological observations',[70] Lloyd's 'medical observations' and Fuller's 'socio-legal observations' permeate the later research and environmental justice discourse.

Love Canal and Warren County

There are two incidents that are widely cited[71] as the major triggers for forming the environmental justice movement, the case of Love Canal in 1977 and the public protests in the Warren County in 1982. The first case concerned a legacy of the toxic waste, including dioxins and Polychlorinated biphenyls (PCBs), placed in an unfinished canal in Buffalo, New York between 1942 and 1952. The Hooker Chemicals and Plastics Corporation, which guaranteed to place the waste safely was reluctant to sell the land for residential purposes. Nevertheless, the land was subject to compulsory purchase and a location for future elementary school and housing project. The constructors damaged

[69] Ibid 549
[70] I borrow this term from Allison who used it when referring to Galanter's litigotiation mentioned in the final Chapter, see p. 324
[71] See for example David Harvey, 'ENVIRONMENTAL JUSTICE' in F Fischer and M Hajer (eds), *Living with Nature Environmental Politics as Cultural Discourse* (OUP 1999); J M Smith and P Pangsapa, *Environment and Citizenship. Integrating Justice, Responsibility and Civic Engagement* (Zed Books 2008)

the clay seal protecting the waste leading to the toxic dump. The Environment Protection Agency evacuated residents from the so called 'Ring 1' zone, said to be the most dangerous. The residents from outside the zone initiated a campaign highlighting the causal effect between the toxins and deteriorating health of children attending the school. The Love Canal features the problem of the contradictory scientific evidence. The residents in association with the nearby University of Buffalo found the causal effect, which was initially contested by the officials on the basis that it was compiled through unsystematic and unscientific methods. The case features also the way citizens organised themselves by making contacts with researchers and leaders of other groups, community leaders and religious representatives. In the end the officials performed a partial evacuation from outside the Ring 1 and bowed to the residents' pressure.[72] The second case featured a first national protest of Black people over environmental matters that took place in Warren County, North Carolina. The residents protested against the illegal dumping of PCBs – contaminated soil in fourteen counties of the state. Bullard, widely recognised as the leader of the environmental justice movement in the US, highlighted the socio-economic structure of the district:

> "Warren County has the highest percentage of blacks in the state and is one of the poorest counties in North Carolina. The county had a population of 16,232 in 1980. Blacks composed 63.7 percent of the county population and 24.2 percent of the state population. Per capita income for Warren County residents was $6,984 in 1982 compared with $9,283 for the state"[73]

Love Canal featured the participatory aspect of the environmental justice movement,

[72] M J Smith and P Pangsapa, *Environment and Citizenship*... Ibid 15-19
[73] Robert D Bullard, *Dumping in Dixie. Race, Class, and Environmental Quality* (3rd edn, Westview Press 2000) 30

where residents were encouraged to engage in scientific activities, whereas the Warren County highlighted the race-based aspect of the environmental injustice. The latter has been explored in various pieces of research in the following years.

The Love Canal incident, alongside the Times Beach incident in late 70s, prompted the government to establish the Superfund on the basis of the Comprehensive Environmental Response, Compensation and Liability Act 1980. It gives power to Environment Protection Agency to perform clean ups of, *inter alia*, hazardous waste sites or to compel responsible parties to do such clean-ups or cover the costs of the Agency-lead cleaning activities.

Environmental justice - Sociological research

Examples from the USA

The sociological research in the 1980s and 1990s proved that the minorities, especially the Blacks, were more likely to be exposed to environmental threats. Bullard proved that Black residents, though comprising 28% of the community, were more likely to live nearby waste disposal sites in Houston.[74] The United Church of Christ's national research focused on the surroundings of the 415 hazardous waste sites in the country. By compiling socioeconomic data from 1980s census and relating it to the locations by means of the post codes concluded that the greater number of the hazardous facilities was correlated with the greatest number of minority residents[75]. The researchers proved also that Black and working class families were more likely to be exposed to air

[74] Robert D Bullard, 'Solid Waste Sites and the Black Houston Community' (1983) 53 *Sociological Inquiry* 273

[75] United Church of Christ (UCC), 'Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics with Hazardous Waste Sites' (UCC 1987) <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf> accessed 1 January 2011

pollutants in Detroit and Louisville.[76] The 1990s were abundant in research proving that the poor, mainly Black and other ethnic minorities were more likely to be exposed to air pollution,[77] hazardous waste facilities,[78] toxic chemicals released by various facilities[79] and other environmental hazards. It had not been until 1994 when the researchers gained interest in the history of the hazardous sites, namely whether or not they were placed in the disadvantaged, ethnic minority areas. Been suggested that there were cases where environmental threats were located in both already disadvantaged communities and in communities that did not show such characteristics. This suggested that policy should focus on the process of sitting[80] the hazardous waste sites and the market forces that may lead ethnic minorities to live nearby such facilities.[81]

Research in the UK

In the UK, the initial sociological research was led by NGOs, government and academics. In 1999 Friends of the Earth correlated household income with the proximity to industrial facilities registered under Integrated Pollution Control. The researchers proved that "the poorest families (reporting average household incomes below £15,000) are twice as likely to have a polluting factory close by than those with

[76] Robert J Earickson and Irwin H Billick, 'The Areal Association of Urban Air Pollutants and Residential Characteristics: Louisville and Detroit' (1988) 8 (1) *Applied Geography* 5

[77] Victor Brajer and Jane V Hall 'Recent Evidence on the Distribution of Air Pollution Effects" (1992) 10 (2 *Contemporary Policy Issues* 63; Susan A Perlin and others, 'Distribution of Industrial Air Emissions by Income and Race in the United States: An Approach Using the Toxic Release Inventory' (1995) 29(1) *Environmental Science and Technology* 69

[78] Marianne Lavelle and Marcia Coyle, 'Unequal Protection: The Racial Divide in Environmental Law (1992) *National Law Journal* 2; Paul Mohai and Bryant Bunyan, 'Environmental Racism: Reviewing the Evidence' in Paul Mohai and Bryant Bunyan (eds), *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Westview Press 1992); Eric J Krieg, 'The Two Faces of Toxic Waste: Trends in the Spread of Environmental Hazards' (1998) 13(1) *Sociological Forum* 3; Tracy Yandle and Burton Dudley, 'Reexamining Environmental Justice: A Statistical Analysis of Historical Hazardous Waste Landfill Sitting Patterns in Metropolitan Texas' (1996) 77(3) *Social Science Quarterly* 477

[79] Liam Downey, 'Environmental Injustice: Is Race or Income a Better Prediction?' (1998) 79 (4) *Social Science Quarterly* 766

[80] The process will inevitably include negotiations.

[81] Vicki Been, 'Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?' (1994) 103 *Yale Law Journal* 1383

average household incomes over £60,000"[82]. DEFRA sponsored three studies concerning the correlation between air quality and social deprivation. The researchers focused specifically on the exposure to nitrogen dioxide (NO2) and fine particulates (PM_{10}). In the first, King and Stedman proved that there was positive correlation between the two variables in Greater London, Birmingham and Belfast.[83] In the second, Pye came to a similar conclusion with an exception of Cardiff where the opposite correlation was observed[84]. In the third study Pye, King and Sturman concluded that ambient air in the English most deprived areas is more likely to be contaminated from point sources. The authors could not establish a similar correlation for Wales. In addition, the authors looked at the age profile of the identified areas and found that the most deprived areas had a greater proportion of children (between 0-14 years old). The elderly (65+) were more likely to live in the least deprived areas in England. The authors concluded:

> "Relative to other age groups, inequalities appear to be even larger for the 0-14 age group, who experience higher average concentrations of pollutants (NO2 and PM10) in the most deprived deciles than other age groups. This is important because this group is more susceptible to the effects of air pollution, i.e. this compounds inequalities. The most deprived deciles have a greater proportion of children relative to other age groups. However, it is not possible to say that these

[82] Duncan McLaren and others, (Report) 'The Geographic Relation between Household Income and Polluting Factories' (Friends of the Earth Trust 1999) <http://www.foe.co.uk/resource/reports/income_pollution.html> accessed 1 January 2011

[83] Katie King and John Stedman, 2000 'Analysis of Air pollution and social deprivation' (Report AEAT/R/ENV/0241 for Department of the Environment, Transport and the Regions, The Scottish Executive, The National Assembly for Wales and Department of Environment for Northern Ireland) (AEA Technology 2000) < http://uk-air.defra.gov.uk/reports/cat09/aeat-r-env-0241.pdf> accessed 1 January 2011

[84] Steve Pye and others, ' Further analysis of NO2 and PM10 air pollution and social deprivation' (Report AEAT/ENV/R/0865 produced for DEFRA, The National Assembly for Wales and The Northern Ireland Department of the Environment) (AEA Technology 2001) < http://uk-air.defra.gov.uk/reports/empire/2001socialdeprivation_v4.pdf> accessed 1 January 2011

deciles are more susceptible than other decile populations overall, as they have lower numbers of the elderly population."[85]

The above report mirrors an earlier study published in the *Environment and Planning A* journal. The authors found the positive and clear correlation between pollution and deprivation in the 10% most deprived areas. Yet, the authors also noted that the inhabitants of the 10% least deprived areas were also exposed to the above average concentration of air contaminants. This led to the overall conclusion that "[t]he poorest tend to experience the worst air quality, but the least poor do not fair best".[86]

The authors highlighted that injustice was more obvious in relation to the poor yet noted examples of increased exposure to the environmental hazards by the wealthy. Interestingly, the authors tested the 'polluter pays principle', namely examined whether those who suffered from the worst air quality contributed most to the contaminated ambience. Specifically, in context of car ownership "a `polluter pays' situation operates, with people in areas of poorest air quality contributing most emissions per car".[87] The authors found that "those wards that emit the least NOx, but which experience the greatest NO2 concentrations, are very clearly the most deprived".[88]

In another study authors proved and argued that unequal access to good quality air was evident in both England and Wales. At the same time the researchers expressed doubts over linking the inequality with the unfairness:

[85] Steve Pye, Katie King and James Sturman, 'Air Quality and Social Deprivation in the UK: an Environmental Inequalities Analysis' (Final Report AEAT/ENV/R/2170 to Department of Environment, Food and Rural Affairs) (Netcen, AEA Technology 2006) < http://uk-air.defra.gov.uk/reports/cat09/0701110944_AQinequalitiesFNL_AEAT_0506.pdf> accessed 1 January 2011, p. 81

[86] Gordon Mitchell and Danny Dorling, 'An Environmental Justice Analysis of British Air Quality', (2003) 35(5) *Environment and Planning A*, 909, 920

[87] Ibid 924

[88] Ibid

> "The deprived that drive older more polluting cars, for example, may have little choice to do otherwise, due to a lack of access to public transport, and the higher cost of cleaner vehicles. Conversely, those that suffer higher air pollution in urban areas may choose to do so given the greater access to jobs and services, whilst others may be economically constrained to a particular more polluted location, without equivalent compensatory access. Thus in interpreting distributions of air quality (or other environmental 'bads') there is a need to consider the wider distribution of costs and benefits."[89]

Further, the empirical research demonstrated some occurrences of unequal exposure to the environmental 'bads' in relation to waste sites, flooding dangers and access to the river quality water in the UK. An Environment Agency study showed that landfill sites were more likely to be situated in the most deprived areas.[90] Another and later Environment Agency study which focused solely on Wales indicated that the most deprived were more likely to live closer to waste recycling and transfer sites. The landfill sites tended to be situated in the rural areas far from the populations and such correlation could not be established with certainty.[91] As for flooding hazards in England and Wales, one study found some evidence of inequality in relation to fluvial flooding,[92] whereas another one could not establish the correlation.[93] Research focusing

[89] Gordon Walker and others, 'Environmental Quality and Social Deprivation' (R&D Technical Report E2-067/1/TR) (Environment Agency 2003) <http://geography.lancs.ac.uk/envjustice/downloads/technicalreport.pdf> accessed 1 January 2011, 50
[90] Environment Agency, 'The Urban Environment in England and Wales: a detailed Assessment' (Environment Agency, Bristol 2002)
[91] Gordon Walker and others, 'Addressing environmental inequalities: flood risk, waste management and river water quality in Wales' (Science Report: SC020061/SR5) (Environment Agency, Bristol 2007) <http://www.staffs.ac.uk/schools/sciences/geography/links/IESR/downloads/SC020061_SR1%20report%20-%20inequalities%20%20flood%20risk.pdf> accessed 1 January 2011
[92] Walker at al, 'Environmental Quality... supra note 89
[93] Jane Fielding and Kate Burningham, 'Environmental inequality and flood hazard' *(2005) 10(4) Local Environment 379*

on Wales established a bias towards the population ranked in the middle of the deprivation deciles:

> "The least deprived are least at risk, but the highest proportions of people in flood risk areas are from the middle of the deprivation range."[94]

As for Scotland, the correlation between deprivation and population proximity was "less distinct" than in relation to air quality. The same study showed that population from both most and least deprived areas had good access to green spaces. However, when taking access to the woodland as the environmental justice variable the most deprived enjoyed the least access.[95]

Traditional environmental justice – theoretical perspectives

Crowder[96] highlights that the US researchers focusing on environmental racism are divided over the correlation between the disproportionate concentration of environmental threats on the one hand and the residential mobility and socioeconomic characteristics. The "racial income-inequality thesis" points out that the "racial differences in exposure and proximity to environmental hazards largely reflect group differences in socioeconomic resources"[97]. According to this the areas consisting of larger greater number of hazardous facilities causing rents prices to fall and attracting the poorer residents, which are predominantly non-Whites. The "residential discrimination thesis" suggests that the racial and ethnic differences in exposure and

[94] Walker et al, 'Addressing environmental inequalities...' supra note 91, 75
[95] John Fairburn, Gordon Walker and Graham Smith, 'Investigating Environmental Justice In Scotland: Links Between Measures Of Environmental Quality And Social Deprivation' (Final Report, Project UE4(03)01) (Scottish Executive 2005) 14
[96] Kyle Crowder and Liam Downey, 'Inter-neighborhood Migration, Race, and Environmental Hazards: Modeling Microlevel Processes of Environmental Inequality' (2010) 115(4) *American Journal of Sociology* 1110
[97] Ibid 1115

proximity to environmental threats result "from housing-market discrimination that restricts the housing options available to members of at least some minority groups".[98] According to this, the discrimination is caused by real estate agents, local governments and mortgage lenders create barriers for minorities' residential attainments.

The US theoretical work highlighted also a 'socio-economic inequality thesis' in Harvey's political and economic analysis. The author built his argument partly upon a former World Bank's chief economist's leaked internal memorandum, where Lawrence Summers wrote[99]:

> "A given amount of health-impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages...[...] I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that."[100]

Harvey saw this as "the characteristic discourse of a particular kind of political-economic power and its discriminatory practices".[101] This theory translates into practice through the 'market mechanism' forcing the impoverished populations to move to the areas in the proximity of noxious facilities property prices are generally lower. Moreover, the existence of such facilities causes "fewer disturbances to property values"[102] so that one can indicate where the poor communities live upon the existence of such noxious facilities. Finally, Harvey highlights the different response of the poor

[98] Ibid 1116
[99] The author decided to include this citation in light of the recent WikiLeaks scandal, where such internal documents have been deemed important and insightful as to the 'truth' of the current state of affairs.
[100] L. H. Summers cited in: The New York Times 'Furor on Memo At World Bank' (*New York Times*, 7 February 1992)
<http://query.nytimes.com/gst/fullpage.html?res=9E0CEEDC1430F934A35751C0A964958260> accessed 1 December 2010
[101] Harvey, 'The Environment of Justice' supra note 71, 155
[102] Ibid

and the rich to the payments covering some of the effects of the toxic amenities: the poor are likely to accept the transfer of money whereas the latter are "unlikely to give up"[103] whatever the price.

The above theoretical anthropocentric perspectives placed the issues of distribution of environmental goods at the centre of environmental justice. Schlosberg saw environmental justice beyond these factors and noted that it was also crucial to consider the concept through the lenses of 'recognition', 'capabilities' and 'participation'. The first refers to the recognition of nature and can be seen through "similarities and status injuries".[104] The former highlight the similarities between the natural world and human beings serving as a basis to create "a moral community and, through recognition of such similarities, a more inclusive theory of justice".[105] In addition, the author emphasises the notion that the human and natural world constitute integral systems. Recognising nature's potential to develop a self-regulating and directing autonomy we should recognise the human beings' abilities to create their integrity and flourish. The 'status injuries' premise dwells upon a notion that the crisis of sustainability was caused by "the exclusion of nature from theories of justice"[106] Thus, the sustainable development must include "recognition of, and bond with, the rest of the natural world".[107] The second major theoretical perspective of Schlosberg, 'capabilities' is a human project aiming at defining nature's capabilities and recognising that "there are a variety of animals, species, and systems"[108]. The project, if executed, would be ambitious and tedious as humans would have to understand and obtain enough information about the

[103] Ibid
[104] David Schlosberg, *Defining Environmental Justice. Theories, Movements, and Nature* (OUP 2007) p.132
[105] Ibid 136
[106] Ibid 142
[107] Ibid
[108] Ibid 155

way of life of various sets of animals and elements of nature. Finally, 'participation' is a procedure through which we can implement recognition and capabilities. "The goal is to establish full status as a partner or peer for those that have been subordinated both culturally and distributionally"[109] and this would include non human partners. Nevertheless, Schlosberg highlights that this would not have to necessarily include the conferral of voting rights to the world of nature but "the recognition of the consideration of the natural world in human decision-making."[110]

Beyond traditional research and understanding of environmental justice

Race and social class have been shown to be dominant factors by the environmental justice advocates, researchers and policy makers in the Twenty First Century. The case of Hurricane Katrina showed that the delayed and inadequate federal support put at considerable disadvantage Black communities facing the environmental hazard[111]. However, recently, the concept has been examined by taking other socio-economic variables such as gender, age and disability. The example of the terrorist attack below suggests that these variables may even be of lesser importance for environmental justice movement. Moreover, the emphasis on the proximity to tangible environmental hazards and access to quality air has been directed on less tangible environmental risks which will be reviewed below.

Beyond traditional variables

Firstly, environmental injustice has been examined from the viewpoint of established

[109] Ibid 157
[110] Ibid 158
[111] Glen S Johnson, 'Environmental Justice and Katrina: A Senseless Environmental Disaster' (2008) 32(1) *The Western Journal of Black Studies* <http://goliath.ecnext.com/coms2/gi_0199-9634541/Environmental-justice-and-Katrina-a.html> accessed 1 January 2011; see also: Adam Serwer, 'Justice Polluted: An Environmental-Justice Attorney Explains How the Civil Rights of Gulf Coast Residents Were Violated' (2009) 20(2) *The American Prospect* 22

communities living in a specific location. The vantage point can be redirected to a location creating environmental threat which attracts people, especially the rescue workers, to come. This is illustrated by the suicide terrorist attack on the World Trade Centre in New York, which led to the collapse of the buildings and killed nearly 3,000 people[112]. The collapsing towers released toxic fumes, dust and debris and caused serious health problems to 18,000 persons[113]. The event can be framed as an environmental disaster (hereafter 9/11 Environmental Disaster). Crucially, most of the affected people came to the location to provide rescue to the immediate victims and include "firemen, police officers, emergency workers, contractors and cleaning staff".[114] Vanderlinden showed that the immediate priority and response to the disaster was framed as 'war on terror' and "questions about the environmental impact and potential health costs of the disaster were muted by national security and economic concerns"[115]. It was reflected in the media reports which reported the official data proving allegedly low air contamination. Immediately in the aftermath *New York Times* reassured citizens that "health problems from pollution would not be one of the legacies of the attacks"[116]. Even in November the same newspaper repeated the reassurance "amid growing concerns to the contrary" [117] and, as Vanderlinden notes, the positive reporting lasted till mid-2004[118]. The contrary arguments and tests were provided by a journalist for the *New York Daily News*, Juan Gonzalez, and Joel Kupferman, an activist and lawyer working for the New York Environmental Law and Justice Program (NYELJP)

[112] David Shukman, 'Toxic dust legacy of 9/11 plagues thousands of people' BBC News US & Canada (1 September 2011) <http://www.bbc.co.uk/news/world-us-canada-14738140> accessed 1 September 2011
[113] Ibid
[114] Ibid
[115] Lisa K Vanderlinden, 'Left in the Dust: Negotiating Environmental Illness in the Aftermath of 9/11' (2011) 30(1) *Medical Anthropology* 30, 37
[116] Andrew C Revkin, 'After the Attacks: The Chemicals; Monitors Say Health Risk From Smoke Is Very Small' *New York Times* (New York, 14 September 2001) < http://www.nytimes.com/2001/09/14/us/after-attacks-chemicals-monitors-say-health-risk-smoke-very-small.html> accessed 1 September 2011
[117] Diane Cardwell, 'A Nation Challenged: Lower Manhattan; Workers and Residents Are Safe, Officials Say' *New York Times* (New York, 2 November 2001) < http://www.nytimes.com/2001/11/02/nyregion/a-nation-challenged-lower-manhattan-workers-and-residents-are-safe-officials-say.html> accessed 1 September 2011
[118] Vanderlinden, 'Left in the Dust...supra note 115, 37

> "whose independent tests in September 2001 revealed high levels of asbestos and fiberglass in Ground Zero dust [...]. Kupferman asserted that his test results were more accurate than the EPA's due to his more sensitive method of analysis, Transmission Electron Microscopy [...]. Under his leadership, NYELJP requested the release of complete EPA test data under the Freedom of Information Act, forcing the EPA to reveal more thorough accounts of its air quality testing, which showed elevated levels of other toxic contaminants, including benzene, dioxins, PCBs, lead, and chromium in the air and in the water near the WTC site [...]. Only after Kupferman contacted the Daily News with his test results did the EPA, presumably under threat of exposure, begin posting summary reports of lower Manhattan air quality to its website."[119]

On the 10th anniversary of the 9/11 Environmental Disaster the media reported findings that chronic illnesses, potentially deadly, will persist for another 20 years[120]. Interestingly, the NYELJP presents itself as an environmental justice organisation which believes "that environmental justice should be available to all people regardless of race, gender or age".[121]

Secondly, the feminist perspective underlined the distinct position and role of women. It is argued that women "suffered uniquely from environmental injustices"[122] in the American society where, overall, they enjoy a fairly privileged position as compared with other countries. At the same time, authors have emphasised a distinctive role in

[119] Ibid 38
[120] Troy Rosasco quoted in Shukman, 'Toxic dust legacy... supra note 112
[121] New York Environmental Law and Justice Program, 'About Us' < http://www.nyenvirolaw.org/> accessed 1 September 2001
[122] Nancy C Unger, 'The Role of Gender in Environmental Justice' (2008) 1(3) *Environmental justice* 115, 115

achieving the goal of environmental justice:

> "Women are often caretakers, the daily observers who are the first to notice what is amiss in the family, community, and local environment; so it is often female relatives or caregivers who mobilise in order to protect children and other loved ones from ills such as asthma or lead poisoning that are aggravated by environmental factors. These women challenge political leaders and health experts who ignore or belittle their suffering while blaming mothers for poor care."[123]

The above citation clarifies that the eco-feminists working under the umbrella of environmental justice (as opposed to environmentalism) distrust the government and the mainstream expertise just as the core, race-oriented, environmental justice in the USA. Cole and Foster suggested that this could lead to a fusion between these major groups in order to exert more political power.[124] This potential for such cooperation is said to be even greater because women form a large proportion, estimated at 60 percent, of the environmental justice movement leadership, organisers, researchers and policymakers and lawyers.[125]

Thirdly, age has always been implicitly included into the environmental justice struggle. This was especially noticeable in cases such as Love Canal[126] involving children, which prompted parents to express heightened alarm. The "Clear Skies" scheme regarding

[123] Rachel Stein, 'Introduction' in Rachel Stein (ed), *New Perspectives on Environmental Justice: Gender, Sexuality, and Activism* (Rutgers University Press 2004) 11
[124] Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press 2001)
[125] Dorcetta Taylor, 'Women of Color, Environmental Justice, and Ecofeminism' in Kareen J Warren (ed), *Ecofeminism: Women, Culture, Nature* (Indiana University Press 1997)
[126] See p. 46

cost-benefit analysis of air quality considered by the EPA in 2003 constituted one of the most notorious examples of age discrimination in relation to the environment. The Agency estimated the value of lives that could be saved through implementing stricter air quality standards. Each person was valued at $3.7 million except those in the 70s or over who were assigned a lower value of $2.3 million. Due to the public outrage the Agency scrapped the programme and one of the senior administrators declared that "E.P.A. [would] not, I repeat, not, use an age-adjusted analysis in decision making."[127] It is interesting to note that the plan was associated explicitly with the environmental injustice. Take for example the blunt statement of Senator Joe Lieberman who opposed the scheme:

> "Such an approach would no doubt understate the benefits of regulatory efforts to protect the environment because seniors are among the populations most vulnerable to pollution. [...] Selling out America's grandparents at a discount for the benefit of polluters is immoral and discriminatory."[128]

Recently age has become a free standing and independent variable in environmental justice thought, research and publications. In the UK the above reviewed[129] research studies included age considerations. Mitchell and Dorling established that the exposure to poor air in the UK was also determined by age. Babies (under 1), children (between 1-9) and young adults lived in most polluted areas as for 1999. Conversely, the adults

[127] Katharine Q Seelye and John Tierney, 'E.P.A. Drops Age-Based Cost Studies' *New York Times* (New York, 8 May 2003) < http://www.nytimes.com/2003/05/08/us/epa-drops-age-based-cost-studies.html> accessed 1 September 2010

[128] Joseph I. Lieberman cited in Senate Committee on Homeland Security and Governmental Affairs, 'Administration Policy Shows no Respect For Seniors. Americans 70 and Over Valued Less When Calculating Benefits of Regulation'(Press Release) (Washington, 20 May 2003) <http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=e4a3708c-d382-456d-a6a8-136216af6c8a> accessed 1 August 2010

[129] Gordon Mitchell and Danny Dorling, 'An Environmental Justice Analysis of British Air...' supra note 86

over 45 "were much less likely to be living in highly polluted wards"[130]. Despite the tangible statistical difference the authors rightly concluded that age inequality did not have to constitute evidence of injustice:

> "Childhood exposure is a product of parental location choices and, although there is a clear age-related inequality, it is debatable to what extent this is unjust given that parents are presumably making location choices intended to maximise family welfare."[131]

The qualitative studies suggest that older people may be disadvantaged in accessing procedural justice. The exclusion may be a subjective impression or result from the power relationship which ignores the opinion of the older generation.

Further, disability was explicitly included into the environmental justice paradigm by Cardiff University scholars[132]. Charles and Thomas emphasised the need of avoiding "a reductive notion of disability"[133] and recognising the deaf "as a group with a strong sense of social identity, which can and should form the basis for engagement in policy process"[134]. The authors noted that the disabled

> "have been marginal in the environmental movement may lead to a knee-jerk attempt to engage any disabled people who can be inveigled to cooperate, and to ignore the complexities that the term 'disability' may obscure — i.e. to use the

[130] Ibid 919
[131] Ibid 925
[132] Andrew Charles and Huw Thomas, 'Deafness and Disability—Forgotten Components of Environmental Justice: Illustrated by the Case of Local Agenda 21 in South Wales' (2007) 12(3) *Local Environment* 209
[133] Ibid 211
[134] Ibid

term in an administrative way rather than analytically."[135]

The authors conducted a study on the engagement of the deaf community into the Local Agenda 21 in South Wales. The findings suggest that the deaf are perceived as a generic category of disabled thus "their self-identification as a distinctive linguistic community"[136] is ignored. Further, the authors argued for greater inclusion of the "political arguments and conceptual innovations associated with Deafness in particular, and the disability movement more generally"[137] into the environmental movement.

Beyond traditional hazards

Numerous other issues and social problems have been connected with the environmental justice concept alongside the trend of highlighting the environmental justice consequences. The US Institute of Medicine's report concluded that the environmental justice permeates into the wide sphere of our existence and extended the meaning of the environment to include "all places where people live, work, and play"[138]. This thinking is inclusive of a range of issues beyond 'traditional' environmental hazards such as 'hazardous work sites and underemployment, substandard housing, toxic schools, economic disinvestment, deteriorating infrastructures, as well as numerous other physical/social ills"[139]. The US Commission on Civil Rights (hereafter USCCR) went beyond racial discrimination in its understanding of the concept and included issues such as:

"transportation equity and fairness in the placement of sound barriers along

[135] Ibid 212
[136] Ibid 218
[137] Ibid
[138] Institute of Medicine Committee on Environmental Justice, Health Sciences Policy Program, *Toward Environmental justice: Research, Education, and Health Policy Needs* (National Academies Press, 1999) 2
[139] Stein, 'Introduction' supra note 123 2

> freeways, the use of diesel buses in minority and low-income communities, light rail systems running underground in tunnels in affluent suburban communities and at street level in minority and low-income communities, and the placement of bus depots in minority communities."[140]

Horgen and Brownell, for example, refer to 'toxic environments'[141] when analysing the problem of childhood obesity stemming partly from the media message and advertising encouraging the fast food and unhealthy diet. The places possessing barriers to physical activity or encouraging tobacco or alcohol consumption can also be named as 'toxic environments' causing environmental injustice. Romley conducted research examining "disparities in the density of liquor stores and bars across racial groups nationwide"**[142]** They found that the Blacks had access to many more alcohol stores than the Whites and that "minorities in lower-income neighbourhoods have more liquor stores in their neighbourhoods than whites in lower-and higher-income neighbourhoods and minorities in higher-income neighbourhoods"[143]. The authors argued that the findings could not be skewed by the higher demand for alcohol among ethnic minorities since the US data showed lower consumption by such groups.

Recently Gottlieb called for adjusting the slogan 'where we live, work and play' to include "where, what, and how we eat"[144]. As a result, the author would reinforce the traditional link between food justice and environmental justice:

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[140] U.S. Commission on Civil Rights, 'Not in my Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice' (Report) (Washington 2003) 167

[141] K B Horgen and K D Brownell, 'Confronting the toxic environment: Environmental, public health actions in a world crisis' in T A Wadden and A J Stunkard (eds), *Obesity: Theory and Therapy* (Guilford Press 2002) 95

[142] John A Romley and others, 'Alcohol and Environmental Justice: The Density of Liquor Stores and Bars in Urban Neighborhoods in the United States' (2007) 68(1) *Journal of Studies on Alcohol and Drugs* 48, 54

[143] Ibid

[144] Robert Gottlieb, 'Where We Live, Work, Play . . . and Eat: Expanding the Environmental Justice Agenda' (2009) 2(1) *Environmental Justice* 7, 7

> "to address issues of health, globalization, worker rights and working conditions, disparities regarding access to environmental (or food) goods, land use and respect for the land, and, ultimately, how our production, transportation, distribution, and consumption systems are organized"[145]

Thus the extension of environmental justice aims at exposing environmental features in other areas especially those traditionally associated with health. It also aims at joining forces between separate movements to increase the overall impact.

The wider issues of environmental justice are also apparent in the UK for which tooth decay constitutes a good example. Fluoride has been proved to contribute to reducing cavities and even reversing early signs of tooth decay. It works by changing temporarily the chemical structure of saliva that prevents bacteria from growing excessively following a meal[146]. The constant exposure to fluoride is necessary to produce healthy teeth particularly during their formation in the childhood. Yet, overexposure, which exact levels are difficult to estimate[147] can cause fluorosis manifested with stained enamel. Tooth decay has been linked to social justice: empirical evidence proves that children and adults in deprived communities suffer most from cavities both in the US and the UK. The majority of scientists argue that water fluoridation can contribute to maintaining enough fluoride in the saliva thus contributing to oral health, and, effectively social justice. Since fluoridation must be performed under the supervision of environmental agencies the issue has been associated with environmental justice. There

[145] Ibid
[146] Ole Fejerskov, Anders Thylstrup and Mogens Joost Larsen, 'Rational Use of Fluorides in Caries Prevention'(1981) 39(4) *Acta Odontologica Scandinavica* 241
[147] Jenny Abanto Alvarez and others, 'Dental fluorosis: Exposure, prevention and management' (2009) 14(2) *Med Oral Patol Oral Cir Bucal* 103

is however large opposition to water fluoridation on the part of ordinary people in the UK. The propagators argue that the treatment contributes to the environmental (social) justice whereas the public is sceptical arguing to the contrary that fluoridation contributes to creating toxic environment.[148]

Further, a Sustainable Development Research Network's interdisciplinary study explored and summarised evidence in relation to environmental justice in the UK. The study focused on 21 topics divided into four groups, namely: "immediate locality front door issues, wider service issues, planning infrastructure and development issues" and "multiple environmental deprivation".[149] The study explored traditional environmental topics but also matters concerning local transport services, access to urban green spaces, access to procedural rights. It concluded by highlighting that environmental injustice existed in the UK. Still:

> "it is clear that **patterns of environmental injustice are varied and complex**. Therefore there is a need for some caution in making claims of inequality and to be wary of overgeneralisation."[150]

Criticism

Criticism of traditional environmental justice concept and research

Environmental justice concept and research reviewed earlier have received substantial criticism. Harvey criticised the environmental justice movement for deliberately choosing cases capable of gaining media coverage and instilling fear and “moral

[148] Gordon Walker, Helen Fay and Gordon Mitchell, ‘ Environmental justice Impact Assessment. An evaluation of requirements and tools for distributional analysis’ (A Report for Friends of the Earth) (Staffordshire University, University of Leeds 2005)
[149] Karen Lucas and others, 'Environment and Social Justice: Rapid Research and Evidence Review' (Final Report by Sustainable Development Research Network) (Policy Studies Institute, London 2004) 2-3
[150] Ibid 112 (emphasis in bold original)

outrage"[151] and using "quasi-religious language"[152]. Moreover, the author attacked the very core of paradigm that is the struggle for more equal distribution of environmental hazards by referring to Benton's 'liberal illusion'[153] which takes the following form:

> "In societies governed by deep inequalities of political power, economic wealth, social standing and cultural accomplishment the promise of equal rights is delusory with the consequence that for the majority, rights are merely abstract, formal entitlements with little or no *de facto* purchase on the realities of social life. In so far as social life is regulated by these abstract principles and in so far as the promise is mistaken for its fulfilment, then the discourse of rights and justice is an ideology, a form of mystification which has a causal role in binding individuals to the very conditions of dependence and impoverishment from which it purports to offer emancipation. The environmental justice movement has, by and large, seen through this illusory state of affairs"[154].

In similar fashion Cole argues that environmental justice activists encounter three myths in their work, namely: a) the truth will set them free; 2) the government is on their side; and 3) they need a lawyer. The first relates to the conviction that the advocates are right in their arguments underpinned with numerous studies and since it is 'true' they should win the struggle. It is a myth because

> "at the decision making level environmental justice struggles are not about right and wrong. They are not struggles about what is the best thing to do in a particular situation. They are struggles, about power. They are struggles about

[151] David Harvey, 'The Environment of Justice' supra note 71, 176
[152] Ibid 178
[153] Ted Benton, *Natural Relations: Ecology, Animal Rights and Social Justice* (Verso 1993)
[154] David Harvey, 'The Environment of Justice' supra note 71, 177

> political and economic power, and the exercise of that power. To win in an environmental justice struggle, one has to build that power. Just being right alone, or just hang truth on your side alone, does not win"[155].

The second myth, which is less shared by the communities of colour, reflects a conviction that multi-level government will respond to environmental justice claims. Cole strikes it by noting that governments "respond to power"[156] and in many situations the most powerful players are represented by the polluters. The latter deliberately choose to place their facilities where they will find "a not-as-powerful adversary"[157] and government grants the permits by responding to the *status quo*. Given the above the law is not the appropriate tool to provide a solution to environmental justice power struggle. The third myth is discussed further in the following Chapter.[158]

Bowen[159] provided extended and detailed criticism of environmental justice research in the US. The author reviewed a large body of empirical research, exemplified above[160], which supported the thesis that economically disadvantaged and Black communities were disproportionately exposed to environmental hazards. It follows from the criticism that some research would not pass the test of the peer review process by being inadequately planned or executed. Moreover Bowen attacked the issue of actual exposure as opposed to statistically observed patterns:

> "even assuming that the conclusions from it were strong, clear, and distinct—suggesting that patterns of disproportionate exposure have been systematically

[155] Luke W Cole, 'Environmental Justice and the Three Great White Myths of America' (2008) 14 *Hastings West-Northwest Journal of Environmental Law and Policy* 449, 451
[156] Ibid 452
[157] Ibid
[158] See p. 75
[159] William M Bowen *Environmental Justice Through Research-Based Decision-Making* (Garland Publishing 2011)
[160] See p. 47

> identified throughout the country—essentially none of the research is meaningfully linked to actual exposure and associated public health effects. As a consequence, little to nothing can be said with scientific authority regarding the existence of geographical patterns of disproportionate distributions and their health effects on minority, low-income, and other disadvantaged communities."[161]

Furthermore, Crowder and Downey[162]noted that "virtually all" sociological research is based upon "aggregate-level data to assess the correspondence between neighbourhood sociodemographic composition [...] and neighbourhood hazard levels".[163] Such approach leads to ecological fallacy:

> "[S]ome aggregate-level studies attempt to assess the relative effects of race and socioeconomic resources on exposure to pollution by regressing neighborhood hazard levels on average neighborhood income levels and the percentage of minorities living in the neighborhood. Any conclusions drawn from such tests, however, are based on the questionable assumption that higher neighborhood incomes necessarily reflect higher levels of income among individual minority residents of the area."[164]

Schlosberg[165] reiterates the industry and government criticism of environmental justice paradigm of racial or income discrimination. Basically, it is argued that the disadvantaged move to more polluted and toxic areas because of the availability of cheaper properties and specific jobs offered to working-class communities. Schlosberg gives an immediate response to such arguments stating that

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[161] Bowen, *Environmental Justice...* 179
[162] Kyle Crowder and Liam Down, 'Interneighborhood Migration... supra note 96
[163] Ibid 1113
[164] Ibid
[165] Schlosberg *Defining Environmental Justice...* supra note 104

> "Merely because the distribution is caused by, for example, market forces rather than targeting minorities does not mean that the overall process is just. Whether an industry purposefully locates in an overwhelmingly minority area, the very existence of so many polluting sites in poor and minority areas illustrates institutionalized racism, classism, and misrecognition."[166]

In UK context according to Stallworthy environmental justice term is "something of a misnomer"[167] emphasising that the concept is "is fundamentally about social justice, pressing anthropocentric concerns for equitable sharing of burdens"[168]. Stallworthy, in his environmental analysis of coastal erosion management in context of climate change, notes the complexity and polycentricity of environmental distribution. Further, the researchers who performed inquiry concerning the exposure to flooding reviewed above allowed themselves some self-criticism:

> "It is also the case that vulnerable people do not all live in deprived communities. Not all poor people will live in poor neighbourhoods and vulnerable people are not necessarily poor; vulnerabilities associated with age, gender and disability do not map simply onto measures of socio-economic status. In a number of respects, not enough is known about how different types of neighbourhoods are affected by flooding."[169]

The above citation concerns the problem which can be found in other research measuring exposure to any environmental hazards and is closely related to the above criticism of using aggregate-level data in US context. Pedersen[170]notes that, unlike in

[166] Ibid 59
[167] Mark Stallworthy, 'Sustainability, Coastal Erosion and Climate Change: An Environmental Justice Analysis'(2006) 18(3*) Journal of Environmental Law* 357, 363
[168] Ibid 367
[169] Walker et al, 'Addressing environmental inequalities...' supra note 91
[170] Ole W Pedersen, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law' (2011)

the US, the UK scholars and activists have omitted the discussion concerning the benefits which the environmental hazards may bring to the communities. Further, Pedersen suggests a possibility of framing the environmental hazards in light of 'compensation':

> "It could likewise be asserted that the deprived populations living in the most polluted areas are 'compensated' through cheaper house prices and thus stand to 'gain' from living in proximity to a facility".[171]

'Fat and proud' – criticism of the extended environmental justice concept

The attempts of expanding the meaning of environmental justice can also be criticised. This can be seen through an example of overweight and obesity, which has "more than doubled since 1980"[172]. The increase in the population's weight can produce an environmental hazard if not properly monitored by relevant public authorities. This is illustrated by an aircraft crash at take-off at Charlotte Airport in 2003. The plane was too heavy due to the outdated system of calculating the overall weight, that is, based on average weight of an American resident. The calculations have not been updated to take account of the increased weight of the population[173].

There is growing body of evidence supporting the thesis that the affliction is largely caused by environmental factors. The environmental contribution is understood as a set of factors which increase behaviour resulting in positive energy balance. These are divided into those that promote overeating and physical inactivity. The former include

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31(2) *Legal Studies* 279
[171] Ibid 289
[172] World Health Organisation, 'Overweight and obesity. Fact Sheet' (WHO, 2011, Geneva) <http://www.who.int/mediacentre/factsheets/fs311/en/index.html> accessed 1 June 2011
[173] National Transportation Safety Board, 'Loss of Pitch Control During Takeoff Air Midwest Flight 5481 Raytheon (Beechcraft) 1900D, N233YV Charlotte, North Carolina January 8, 2003' (Aircraft Accident Report NTSB/AAR-04/01) (Washington 2004) <http://www.ntsb.gov/doclib/reports/2004/AAR0401.pdf> accessed 1 January 2011

availability and portion size apparent especially in fast-food restaurants and of high-fat diets. The latter relate to the lack of physical activity among schoolchildren and adults.[174] The environmental factors have also been linked to race, class, sex and age to complement and justify the environmental justice approach. Thus African and Mexican American women were found to be significantly more overweight and obese than white American women. The similar correlation was found when African and Mexican American girls at the age between 6 and 19 were compared with white American children and adolescents. Conclusions were also drawn that overweight and obesity are more likely to afflict less educated people and those on a low income.[175]

There are similarities between the population weight and the problem of fluoridation. In a number of US jurisdictions such as Michigan and San Francisco the discrimination on the basis of weight is prohibited. It suggests that being overweight may be an inherent feature of life as is sex, gender, race which are subject to discrimination laws. It may serve a positive goal by reducing the instances of bullying or increasing the access to employment, as in Michigan[176]. However, it may also lead to potentially difficult scenarios where doctors are limited in giving advice and encouragement to lose weight before admitting obese patients for a complicated treatment[177]. A San Francisco lawyer explains how the law should work in practice during the doctor appointments:

> "The San Francisco ordinance says you may want to mention weight to the patient but if the patient says they do not want to talk about that then you are

[174] James O Hill and John C Peters, 'Environmental Contributions to the Obesity Epidemic' (1998) 280 *Science* 1371 <http://portalsaudebrasil.com/artigospsb/obes078.pdf> accessed 6 June 2011
[175] Wendell C Taylor and others, 'Environmental Justice: Obesity, Physical Activity, and Healthy Eating' (2006) 3(s1) *Journal of Physical Activity and Health* 30
[176] Consult Elliott-Larsen Civil Rights Act in Michigan
[177] The Week, 'Opinion brief' <http://theweek.com/article/index/215391/should-doctors-be-allowed-to-refuse-obese-patients> accessed 6 June 2011

asked to respect those wishes."[178]

Moreover, recent research published in *Journal of the American Medical Association* provided evidence that overweight, unlike underweight, and obesity, "was associated with significantly decreased all-cause mortality overall"[179]. Such uncertainty and contradictory information linked with the feeling of being discriminated leads some weight campaigners to issue statements of being 'fat and proud'[180].

Summary

Environmental justice is a concept which focuses on disproportionate exposure of certain groups of people to environmental hazards and risks. The literature review in this Chapter showed that issues of disproportionate environmental distribution have been a focus of attention of scholars in the nineteenth and twentieth century and were explicitly framed as environmental justice in the 1980s. Environmental justice is multifaceted as the environmental concerns on which it focuses range from specific environmental hazards to less tangible 'toxic environments'. Further, originally, environmental justice has been associated with the struggle of Black and pauperised communities in the US. Today, environmental justice concerns various groups and is measured through such variables as age, gender, disability. The 9/11 Environmental Disaster shows that environmental justice advocates can disregard these variables and focus on the whole population facing environmental problems regardless of income or race.

[178] Sondra Solway as cited in BBC News, 'Overweight 'should be protected'' BBC News Monday, 19 October 2009 < http://news.bbc.co.uk/1/hi/8314125.stm> accessed 6 June 2011
[179] Katherine M Flegal and others, 'Cause-Specific Excess Deaths Associated With Underweight, Overweight, and Obesity' (2007) 298(17) *Journal of the American Medical Association* 2028, 2037
[180] BBC London 'Fighting fat discrimination' *BBC London* (London, 16 October 2009) <http://news.bbc.co.uk/local/london/hi/tv_and_radio/newsid_8311000/8311220.stm> accessed 17 October 2009

The literature review suggests that environmental justice has two main aspects, namely substantive and procedural. The former emphasises the need to overcome the inequalities and provide certain groups (Blacks, women, children etc) access to better environment. The latter emphasises the procedural rights (such as access to information and participation in decision-making) through which the groups facing environmental problems can improve their situation.

Crucially, environmental justice is polycentric thus giving rise to conflicts within the environmental justice cohort. The environmental justice cohort brings together people who claim access to a healthier environment by reference to various characteristics such as age, ethnicity, disability or gender. The polycentricity lies in the substantive and procedural aspect of environmental justice. The substantive polycentricity stems from the heterogeneity of parties claiming the right to better quality environment at various levels of governance (global, national, regional, local, family and individual). Thus, exposure to environmental hazards can be studied through numerous variables (age, disability etc) at these levels to measure the degree of environmental justice of different groups. The substantive polycentricity is increased in situations involving doubts over the degree of environmental hazard or risk, as water fluoridation illustrates. Secondly, procedural rights, mainly access to information and participation in decision making, have twofold functions. Firstly, they serve as an 'integral' part of the concept of environmental justice and thereby a catalyst for or tool through which environmental justice can be achieved. Secondly as a corollary of substantive polycentricity, allowing various environmental justice parties to assert their rights to the healthier environment at the cost of other environmental justice parties.

In the first context the procedural rights constitute the supplementary elements of the substantive environmental justice. The exercise of these rights empowers the affected

communities to achieve the access to healthier environment at the cost of the more and most privileged. The availability of (or exposure to) the procedural rights can be studied through numerous variables at various levels of governance to measure the degree of environmental justice of different groups. In the second context the access to procedures allows the environmental justice claimants to argue for *their own* central interest. In other words, the procedural elements of environmental justice, if distributed equally, can constitute a platform for exchange of information (including experience) and negotiation to establish the priority of certain subgroups. This is especially important when a degree of environmental hazard is at doubt. Illustratively, a waste site in a deprived local area may be prejudicial to health of all members of the community but, in particular, to children or people with respiratory problems. At the same time the waste site may provide jobs in the area thus benefit the majority of its citizens. The whole community which suffers environmental injustice will have to decide whether or not to give a priority to the children and those with respiratory problems and oppose the development. The interest of children can be undisputable but the interest of adults with the respiratory illness may give rise to conflicts in the community. Thus the withdrawal of the development may lead to the loss of jobs, impoverishment, poor diet, inactivity leading to illnesses and the acceleration of environmental injustice.

Chapter 2

Environmental justice: a legal challenge

This Chapter will focus on the usefulness of adjudication. Given the purpose of this thesis this Chapter will pay a particular attention to the usefulness of judicial review in overcoming environmental inequality in the UK. It will initially look at the US literature which insisted that environmental justice movement should not resort to a legal challenge.

Environmental justice and the courts

Usefulness of adjudication

Various forms of legal challenge have been used by environmental justice activists since the beginning of the environmental justice movement. Bullard[181], for example, notes a 1980 class action against Olin Chemical Company, which had released residual chemicals affecting residents in Triana. The case was settled in 1983 and the company agreed to pay 25 million US dollars. Bowen[182] notes a case of residents of the West Dallas who were poisoned by lead. The challenge was brought on behalf of ill children and concluded in a 20 million dollars settlement. Both authors provide numerous other instances of lawsuits that concluded with a court judgment, out-of-court settlement or in a withdrawal of a case.

In light of the fact that the lawsuits were used by the environmental justice movement's

[181] Bullard 'Dumping the Dixie...' supra note 73
[182] W M Bowen *Environmental Justice through Research-Based Decision-Making* (Garland Publishing 2001)

activist, Cole analysed their overall strategies and published results in an academic journal. The third part of his work is titled explicitly as "The Politics of environmental justice Cases"[183] and opens with these words:

> "Because the struggles in the environmental justice movement are primarily *political* and *economic* struggles, not legal ones, as lawyers in the movement we strongly recommend *against* lawsuits whenever possible. But given the fact that sometimes a community group must go to court, the group 'should understand not only the legal angles of the suit, but its potential political ramifications as well. Environmental justice lawsuits must be brought in recognition of their political nature, in order to lift a community's morale, strengthen the community group, raise the profile of the group, and build the political momentum necessary to win such struggles."[184]

Cole is right in assuming that the environmental justice struggles are mostly political and economic in line with the review in the previous Chapter. The mere existence or additional provision of anti-discriminatory laws is not sufficient to eliminate inequalities, or, in abstract terms, bring justice. It is a truism that the human factors, such as the attitudes, mentality, and education alongside the wider economic and political factors must be observed. Yet Cole saw some benefits of the lawsuits in terms of local politics; bringing the case to the courts popularises the struggle, educates the community and raises its profile and creates opportunities for gaining allies. The 'political dimension of lawsuits' in general has been considered earlier in US

[183] Luke W Cole, 'Environmental Justice Litigation: Another Stone in David's Sling' (1994) 21 *Fordham Urban Law Journal* 687
[184] Ibid 687

literature[185] but Cole explicitly linked this with the environmental justice movement.

In the UK Hilson reviewed the environmental movement's recourse to political and legal means of achieving their objectives in planning development. In the early 1990s the environmental NGOs adopted a litigation strategy "despite the presence of access at various points in the administrative process"[186] such as participation in decision-making. The recourse to litigation stemmed partly from the Conservative Party's being in power and favouring liberal development thus hindering effective participation. The effectiveness of legal challenge was poor overall due to the barriers to standing and limited chances of success. The movement relied also on direct national action with mixed results. As Hilson notes, the recourse to political opportunity available in the European Union institutions was much more successful:

> "Access was relatively easy: as numerous studies have pointed out, the environmental movement was among the first to make the most of lobbying opportunities in Brussels. And a degree of success was often assured: the Commission and the Parliament were very pro-environment, and the use of qualified majority voting after the Single European Act (SEA) for environment legislation which could be tied to a single market goal14 meant that even the Council posed few problems for the passage of environmentalist legislation"[187].

[185] Derrick A Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 *Yale Law Journal* 470
[186] Chris Hilson, 'New social movements: the role of legal opportunity' 2002 9(2) *Journal of European Public Policy* 238- 245
[187] Ibid 247

Towards judicial review in the UK

Common law

In the UK the issue of environmental equity has been entrenched into nuisance jurisprudence, which established the locality rule. In *St Helen's Smelting Co v Tipping*[188] the Court drew distinction between nuisance resulting in damage to the property on the one and causing personal discomfort on the other hand. The latter was linked to the location:

> "the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs"[189]

In *Sturges v Bridgman*[190], the landmark case in nuisance, reiterated the locality rule where "what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey"*[191]. The case acknowledged the restricted liability in more deprived locations. In *Rushmer v Polsue & Alfieri*[192] Cozens-Hardy L.J. put limits on the locality rule upheld by Buckley J. in *Dennis v Ministry of Defence*[193]:

> "It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so

[188] *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642
[189] Ibid 651
[190] *Sturges v Bridgman*, (1879) 11 Ch.D. 852
[191] Ibid 866
[192] *Rushmer v Polsue & Alfieri*, Limited [1906] 1 Ch. 234
[193] *Dennis v Ministry of Defence* [2003] Env. L.R. 34

> worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy and that the defendant's machinery is of first-class character."[194]

Further in *Gillingham BC v Medway*[195] Buckley J. conferred immunity on a defendant facing a challenge in nuisance where the grant of planning permission changes the character of the area. In this case the naval dockyard was turned into a commercial port through a planning permission resulting in considerable disturbance to the residents. In *Wheeler v J.J. Saunders*[196] Staughton L.J. confirmed that the defendants could enjoy the immunity only in relation to the strategic planning decisions. In *Murdoch v Glacier Metal*[197] the claimant lived in a mixed residential and industrial area and complained about the noise for the nearby factory causing sleep deprivation. The noise exceeded the level set by the World Health Organisation yet the case was dismissed because of the nature of the neighbourhood located in proximity to a busy bypass. Moreover, Pill L.J. noted that there were no other complaints in relation to the noise travelling from the factory.

Judicial review and distributive justice

The above analysis suggests that it can be difficult to rely on the private law of nuisance

[194] *Rushmer v Polsue & Alfieri* 251-251
[195] *Gillingham BC v Medway (Chatham Docks) Co Ltd* [1993] Q.B. 343
[196] *Wheeler and Another v J.J. Saunders Ltd. and Another* [1996] Ch. 19
[197] *Murdoch and Murdoch v Glacier Metal Company Limited* [1998] Env. L.R. 732

in pursuing equity rights in a court of law. This is crucially because the inequality rule is deeply ingrained in common law. In light of the European Community law developments scholars argued that public law would be best suited in underpinning equality claims. As early as in 1996 Donson and Lee[198] argued that public law would be best suited in pursuing the environmental rights based claims in context of distributive justice. The authors argued that the public law offered a wider standing irrespective of proprietary interests and such claims could be preventive in nature. The prevention was primarily associated with the precautionary principle which has become the core principle of the EU law.

Judicial review process

Importantly, judicial review is not, in many cases, a one-off event, but is a complicated *process*.[199] It normally starts with a letter before claim. This provides an opportunity to resolve the matter before a formal application for judicial review. The latter commences by serving a claim form on the defendant and 'unless the court otherwise directs, any person the claimant considers to be an interested party'.[200] The courts will either grant leave for judicial review or give a refusing order with reasons; in the latter instance the claimant 'may request the decision to be reconsidered at a hearing'.[201] The use of the word 'reconsidered' is intentional as the oral hearing is not an appeal, but another opportunity to set out the grounds for judicial review. At this stage the courts may also either grant permission or issue a refusing order with an opportunity to apply 'to the Court of Appeal for permission to appeal'.[202] The substantive hearing will only begin when the claimant has been granted permission. It ends with a judgment unless the

[198] Fiona Donson and Robert Lee, 'Environmental Protection: Public or Private Law' (1996) 1 *Judicial Review* 56
[199] Emphasis deliberate by this author.
[200] Civil Procedure Rules 1998, r. 54.7.
[201] Ibid. at r. 54.12(3).
[202] Ibid. at r. 52.15.

parties agree to a consent order where 'all the parties agree the terms in which a judgment should be given or an order should be made'.[203] The judgment may be appealed to the Court of Appeal and could reach the Supreme Court in certain circumstances.[204]

Judicial review - standing

Initially UK courts expressed a limited approach to standing exemplified in *R v Secretary of State for the Environment ex parte Rose Theatre Trust*[205]. A more liberal approach to standing was established in *R v H.M. Inspectorate of Pollution ex parte Greenpeace (No 2)*[206] where Greenpeace challenged the authorization to discharge radioactive waste at Sellafield (Cumbria) granted to British Nuclear Fuels Plc (BNFL). The BNLF argued that the NGO had no *locus standi* in the case notwithstanding its reputation and interest in environmental protection. Otton J disagreed and saw it "appropriate to take into account the nature of the applicant and the extent of the applicant's interest in the issues raised"[207]. The test of nature was satisfied since Greenpeace, in pursuing its environmental objective, had 400,000 supporters nationally and 2,500 in Cumbria.[208] As regards interest, Otton J noted that the Greenpeace's "concern naturally leads to a *bona fide* interest in the activities carried on by BNFL at Sellafield and in particular the discharge and disposal of radioactive waste from their premises and to which the respondents' decision to vary relates"[209] Moreover, the court

[203] Ibid. at r. 40.6.
[204] Notwithstanding the possibility of reaching the Court of Justice of the European Union at any substantive change under Art. 267 of the Treaty on the Functioning of the European Union as in *R (Edwards & Pallikaropoulos)* v *Environment Agency & DEFRA* [2011] 1 WLR 79 (SC) and *R(on the application of Edwards)* v *Environment Agency* [2004] 3 All ER 21.
[205] *R v Secretary of State for the Environment ex parte Rose Theatre Trust* [1990] 2 WLR 186
[206] *R v H.M. Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 4 All ER 329
[207] Ibid 78
[208] Ibid 79
[209] Ibid 81

highlighted that the denial of standing to Greenpeace could lead to the overall postponement of the case by the BNLF employees or local residents: "[i]n this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace"[210]. Further, Otton J made a reference to good administration of resources. The less experienced claimants could bring a challenge but it would not make the best use of and provide assistance to the courts. In the words of the court:

> "a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."[211]

The fact that Greenpeace was granted *locus standi* partly on the basis of its expertise will be of utmost importance in the final analytical chapter in this thesis. As the above case concerned the *locus standi* of an established NGO, Lord Justice Sedley considered standing of an individual citizen in *R v Somerset CC ex parte Dixon*[212]. Mr Dixon, a parish councillor, opposed a planning permission for quarrying at Whatley Quarry in Somerset. The defendants' adviser proposed that Mr Dixon lacked sufficient interest as he did not have a proprietary interest in land which would be affected by the proposed quarry. Lord Justice Sedley disagreed and suggested that a citizen acting for the environmental benefit ought to enjoy standing:

> "Mr Dixon is plainly neither a busy body nor a mere troublemaker, even if the implications of his application are troublesome for the intended respondents. He is, on the evidence before me, perfectly entitled as a citizen to be concerned

[210] Ibid 82
[211] Ibid
[212] *R. v Somerset County Council and ARC Southern Limited* [1998] Env. L.R. 111

about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment"[213].

However, in *R v North Sommerset DC ex parte Garnett*[214], a similar case concerning quarrying permission, the applicants lived between three to four miles from an opposed development and were held not to have the *locus standi.* As a result the geographical proximity is taken into account when granting the standing[215]. Yet, in present case Popplewell J. noted also that the applicants had "slim"[216] chances of success and could enjoy the access to clean environment in the parks adjacent to their properties. Further, Justice Ellias in *Hereford Waste Watchers Ltd v Hereford City Council*[217] accepted that a limited company established for the purpose of instigating environmental judicial review would be granted the *locus standi.*

Judicial review – time limits

Judicial review resolves the problem of standing which is a hurdle in common law based nuisance challenges. Yet, given its preventive nature, the "leave to seek" judicial review procedure might create another hurdle namely the limited time within which the challenge must be lodged. Under Rule 54(5) of the Civil Procedure Rules 1998[218]:

"(1) The claim form must be filed –

(a) promptly; and

[213] Ibid 122
[214] *R v North Sommerset DC ex parte Garnett* [1997] EWHC (Admin) 318
[215] See also *R v North West Leicester District Council and East Midlands Airport Ltd ex parte Moses* (14 September 1999) CO/1684/99
[216] *R v North Sommerset DC ex parte Garnett* supra note 214
[217] *Hereford Waste Watchers Ltd v Hereford City Council* [2005] EWHC 191 (Admin)
[218] Civil Procedure Rules 1998 or CPR

(b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limit in this rule may not be extended by agreement between the parties.

(3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review".

The above rule gives some discretion to the courts to extend the time limits above the three month period of time. Yet, prior to the *Burkett* case[219] influenced by the Human Rights Act 1998 the courts established an informal rule that the application should be made within six weeks from the date when grounds for the application first arose.[220] In *Burkett* Lord Steyn prescribed that the three months limit could not be "contracted by a judicial policy decision"[221]. Moreover, Burkett provided certainty as to the 'date when grounds for the application' for judicial review arise. In the above *Somerset* case[222] Mr Dixon applied for judicial review within three months from the date of the planning decision in July 2006. The defendant's Counsel argued that the time should run from October 1995 when the Council "resolved to grant planning permission"[223] subject to certain conditions. Lord Justice Sedley disagreed with the defendant's advisers by noting that if Mr Dixon had applied for judicial review earlier his cases could have been "premature"[224] and dismissed. Yet, in *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd*[225] Laws J. rejected the NGO's application for judicial review of a 1997 decision to grant a licence to oil companies to explore North Sea oil. In Laws J.'s

[219] *R v Hammersmith London Borough Council ex parte Burkett* [2003] Env LR 6
[220] *R v Ceredigion County Council ex parte McKeown* (1998) 2 PLR 1
[221] Burkett case supra note 219
[222] Supra note 212
[223] Ibid 115
[224] Ibid116
[225] *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [1998] Env LR 413

view the application should have been lodged in 1995, when it was probable that the licence would be granted and "would have run no risk whatever of being declared theoretical or premature"[226]. Moreover, this case is a good example of why the time limit is important in the preventive judicial review as there were huge sums of money already invested in 1995 and 1996:

> "The oil companies are no less litigants of good faith than is Greenpeace. They have committed and are committing vast sums on the faith of the April 7, 1997 decision, and did so also before that date, as applicants for the licences. It behoved Greenpeace, not of course to entertain the least subjective sympathy for their position, but to recognise that the court would require damage to their interests to be minimised so far as was consistent with the administration..."[227]

Burkett case provided certainty by establishing that it should be the decision granting a permission from which the three month time limit should run[228].

Grounds for Judicial Review

Donson and Lee[229] recognised the primary limitation of judicial review in England and Wales which is focused on procedural rather than substantive impropriety[230]. judicial review aims at reviewing the way the decision was made and is not concerned with the facts of the matter[231]. In *Council of Civil Service Unions v Minister for the Civil Service*[232] Lord Dipock summarised the grounds for judicial review which include

[226] Ibid 436
[227] Ibid 440
[228] Supra note 219
[229] Supra note 198
[230] Donson and Lee, 'Environmental Protection...' supra note 198
[231] *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc (Alcounbury case)* [2001] 2 W.L.R. 1389
[232] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374

”illegality”, “irrationality” and “procedural impropriety”[233]. The first two are referred to as substantive grounds whereas the third one falls under the procedural heading. Illegality means that “the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it”[234].The common example of illegality is unlawful sub-delegation, the powers exercised for a different purpose than that envisaged by the law or ignorance of relevant considerations into the decision making[235]. Irrationality is often known as ‘Wednesbury unreasonableness’[236]. In the words of Lord Dipock:

> “It applies to 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 to be decided could have arrived at it.”[237]

Procedural impropriety follows the failure of the decision maker to follow the rules of the relevant legislative act or” failure to observe basic rules of natural justice.”[238] The latter include bias, right to a fair hearing and the duty to give reasons. Procedural impropriety served as a ground in *R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [239] where Greenpeace applied for a quashing order of the Secretary of State’s decision to commence a new nuclear build. The decision was announced in "The Energy Challenge Energy Review Report 2006"[240] following a

[233] Ibid 410
[234] Ibid
[235] *Padfield v Ministry of Agriculture, Fisheries and Foo*d [1968] A.C. 997
[236] *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223
[237] Supra note 232, p. 410
[238] Ibid 411
[239] [2007] EWHC 311 (Admin)
[240] Department of Trade and Industry, ‘The Energy Challenge: Energy Review Report 2006’ (Cm. 6887) (The Stationery Office 2006) <http://www.tsoshop.co.uk/bookstore.asp?Action=Book&ProductId=9780101688727> accessed 1 June 2011

White Paper[241] which promised "the fullest public consultation"[242] before reaching the decision. The government run a restricted, 12-week, consultation by way of issuing a consultation paper. The NGOs challenge the process by effectively arguing that the consultation did not amount to the 'fullest public consultation'. In effect, the process was unfair because the government breached the legitimate expectations of the consultees. Further, following the implementation of the European Convention of Human Rights by way of the Human Rights Act 1998, the claimant can challenge a decision on the ground that it is "incompatible with a Convention right".[243] The crucial difference between ordinary judicial review and judicial review based upon the HRA was put forward by Baroness Hale in *Belfast City Council v Miss Behavin' Ltd.*[244]

> "The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. If it were otherwise, every policy decision taken before the Human Rights Act 1998 came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was."[245]

[241] Department of Trade and Industry, 'Our Energy Future - Creating a Low Carbon Economy' (CM 5761) (The Stationery Office 2003) <http://www.tsoshop.co.uk/bookstore.asp?FO=1159966&ProductID=9780101576123&Action=Book> accessed 2 June 2011
[242] Ibid 61
[243] Human Rights Act 1998, s. 6(1)
[244] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19
[245] Ibid 31

Supreme Court and usefulness of judicial review

The House of Lords leant towards the public law to be regulating the issues of strict liability in relation to environmental risks:

> "[I]t is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability."[246]

Later in *Hunter v Canary Wharf*[247] the Law Lords explicitly suggested that public law is better suited in regulating the nuisance conflicts:

> "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law."[248]

Empirical research supports the House of Lords/Supreme Court's reasoning since the majority of the cases are pursued by established NGOs, local community groups or alliances of local residents. Sheridan found that out of 110 judicial review applications

[246] *Cambridge Water Co. Respondents v Eastern Counties Leather Plc* [1994] 2 A.C. 264, 305
[247] *Hunter v Canary Wharf Ltd* [1997] A.C. 655
[248] Ibid 710

between 1995 and 2001 there were only 42 brought by individuals.[249]

Nevertheless, judicial review seems to be the appropriate avenue of challenge for environmental justice campaigners given its liberal approach to standing. The challenge by way of judicial review can also be publicly funded by Legal Aid, supported with the Protective Costs Orders and the Aarhus Convention provides that the challenge should not be prohibitively expensive. Given the economic situation of the environmental justice campaigners this avenue provides some relief. Yet, judicial review is by no means perfect as it is focused primarily on procedural impropriety and not generally useful in reviewing the merits of a case. In addition, environmental justice campaigners and especially those who consider taking the action for the first time may struggle in satisfying the three month time limit.

Court order on costs and Protective Costs Orders

NGOs and community groups involved in environmental litigation can apply for a permission to apply for judicial review, and if successful, start the proceedings. The administrative costs associated with the applications are not high. In 2008 the fees for the application for permission amounted to £30 and the fees for substantive proceedings amounted to £180[250]. Recently, the costs have been raised and amount to £60 and £215 respectively[251]. The individuals and NGOs interested in protecting the environment through litigation should be able to meet these expenses. In particular, the fees for the permission stage are very low and allow the applicants to test the validity of their arguments. The most prohibitive barrier of access to courts is the principle whereby "the

[249] Sheridan M, 'United Kingdom Report' in N de Sadeleer, G Roller and M Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law, Groningen, 2005)

[250] UNECE 'Implementation Report submitted by the United Kingdom'(Third Meeting of the Parties to the Aarhus Convention 2008) 20 <http://live.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_GBR_e.pdf> accessed 1 May 2010

[251] The Civil Proceedings Fees (Amendment) Order 2011 (2011 No. 586 (L. 2) at 1.7 and 1.9

general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"[252] which is briefly referred to as 'costs follow the event'[253]. The applicant is practically exposed in the event that the application is unsuccessful to (at least) a proportion[254] of the winner's costs and disbursements.[255] The court may make another order and in issuing a decision it must:

> "have regard to all the circumstances, including-
>
> (a)the conduct of all the parties;
>
> (b)whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (c)any payment into court or admissible offer to settle made by a party which is drawn to the court's attention."[256]

The court must also have regard to the relevant factors in deciding the amount of costs. This should include the assessment whether costs were "proportionately and reasonably incurred" or "were proportionate and reasonable in amount".[257] Protective Costs Orders (PCOs) assume great significance in protecting litigants from hardship that might be caused by the rule that 'costs follow the event' applying without variation in judicial review cases, notwithstanding that the defendant is a public body. A 1999 Child Poverty Action Group case[258] laid down the essential principles underlying the making of such

[252] CPR, supra note 218 at 44.3(2)
[253] Dyson J in *R v Lord Chancellor, ex p Child Poverty Action Group (CPAG)* [1999] 1 WLR 347 at 353
[254] It is occasionally possible for an unsuccessful claimant to persuade the court not to make an adverse costs order. For an example in the environmental context see *R v Secretary of State for the Environment Food and Rural Affairs ex p Challenger* (2001) Env LR 12 where Harrison J took the view that 'their case was not only a genuine case but also that it did involve points which are potentially of some importance, albeit that I have held against them. They are also applicants of limited resources.'
[255] S Chakrabati, J Stephens and C. Gallagher, 'Whose cost the public interest?' (2003) *Public Law* 697; R Clayton, 'Public interest litigation, costs and the role of legal aid' (2006) *Public Law* 429
[256] CPR, supra note 218, at 44.3(4)
[257] Ibid 44.5(1a)
[258] Supra note 253

orders, which the court saw as an exceptional route available only for public interest cases. Being designed to assist public interest cases, PCOs are a significant element of judicial review applications. The CPAG principles were modified in the later case of *R (Corner House) v Department of Trade and Industry*[259], and in the light of that modification, the court must be satisfied that:

(i) the issues raised are of general public importance;

(ii) the public interest demands their resolution;

(iii) the applicant has no private interest in the outcome of the case;

(iv) bearing in mind the financial resources of the applicant and respondent, and the amount of costs involved, it is fair and just to make an order;

(v) unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.[260]

The Court of Appeal in *Corner House* sought to clarify the availability of PCOs in public law litigation, which it distinguished from private law matters by the necessity for the courts to resolve and elucidate the law rather than merely resolve the dispute between the parties. In the words of their Lordships:

> "This is a good example of the way in which PCOs can be harnessed in cases of general public importance where it is in the public interest for the courts to review the legality of novel acts by the executive in a context where it is unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge."[261]

[259] *R (Corner House) v Department of Trade and Industry* [2005] 1 WLR 2600
[260] Ibid 74(1)
[261] Ibid 52

This is an uneasy line to draw especially in the especially in the environmental arena. Even if one can recognise public interest cases at the margins, many judicial review cases, will involve at the same time a personal or local interest in the decision at hand, while maintaining that the manner in which the decision has been made is unreasonable or unlawful such that the public agency should be brought to account. Public law actions are neither uniformly altruistic nor brought by disinterested parties. Conversely a difficulty is also that in a judicial review application, the defendant is, almost by definition, a public authority asserting that administrative action is promoting the public good. The courts on more than one occasion have expressly referred to the diversion of public funds into litigation rather than other public benefit or welfare as a reason to be wary of PCOs. In *Goodson v HM Coroner for Bedfordshire*[262] Moore Bick LJ stated that "a public authority's resources are not unlimited and money spent on litigation is money that would otherwise be available for its ordinary operations". The line of reasoning was later repeated in other cases in English courts[263] and by one of the judges[264] sitting in the European Court of Justice.

In the *CPAG* case, Dyson J had established that the court should be satisfied that it "has a sufficient appreciation of the merits"[265] after hearing a short argument, before a PCO should be granted but in *Corner House* the Court of Appeal expressed doubts, over the criteria "Dyson J's requirement that the court should have a sufficient appreciation of the merits of the claim after hearing short argument tends to preclude the making of a PCO in a case of any complexity".[266] It becomes clear from the following wording that

[262] *Goodson v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172
[263] *R (A & ors) (Disputed Children) v. Secretary of State for the Home Department* [2007] EWHC 2494 (Admin) and *R (A and others) (Disputed Children) v The Secretary of State for the Home Department* [2007] EWHC 2494 (Admin)
[264] Sir Konrad Schiemann, 'The influence of European Union Law on Access to Justice in Environmental Cases' UKELA 2010 Garner Lecture, London, 18 November 2010
[265] *CPAG*, supra note 253 at 357
[266] *Corner House* supra note 259 at 71

'sufficient merits' test is higher that 'arguable case' or 'real prospects of success' which should become the minimum basis of granting a PCO in this respect:

> "It commonly happens when a court has to take an important decision at an early stage of proceedings that it must do no more than conclude that the applicant's case has a real (as opposed to a fanciful) prospect of success, or that its case is "properly arguable". To place the threshold any higher is to invite heavy and time-consuming ancillary litigation of the type that disfigured the conduct of civil litigation 25 years ago [...] we consider that no PCO should be granted unless the judge considers that the application for judicial review has a real prospect of success and that it is in the public interest to make the order."[267]

It was also suggested in *Corner House* that *pro bono* representation would likely improve the prospects of a PCO[268] and this perhaps ought to be so at least in that it indicates the likely discontinuance of proceedings if exposure to costs from the other side is faced by an applicant with free legal representation. At first sight this seems reasonable; the *pro bono* representation acts as an endorsement of the importance of the case. But advocates may act on a *pro bono* basis out of sympathy with an entirely private matter. Equally a claimant bringing a case via a conditional fee arrangement will put no money into the bringing of the case and may be no less impecunious or deserving than one represented by pro bono lawyers.

There is no one form of PCO "and the choice of the form of the order is an important aspect of the discretion exercised by the judge"[269]. An applicant may be protected from

[267] Ibid 73
[268] Ibid 74(2)
[269] Ibid 75, see also B Jaffey, 'Protective Costs orders in judicial review'11 *Judicial Review* 171

costs entirely. The courts may rule that neither party can recover costs as happened in *R (Refugee Legal Centre) v SSHD*[270] where the claimant had the benefit of *pro bono* advice. The Courts may also prescribe that a cap may be placed on the amount of costs to which the applicant is exposed. This was applied in *Campaign for Nuclear Disarmament v Prime Minister*,[271] where a partial PCO capped costs of a challenge to the legality of the war with Iraq at £25,000. The presence of a PCO may mean that the applicant should not expect other than 'modest', competent representation[272].

Group Litigation Orders

A number of the US environmental justice lawsuits have been based upon class-action litigation. Given the distributive nature of environmental equity, litigation addressing the grievances of a large group of people sharing common concerns is appropriate. Despite the availability of public funding and the requirements of Article 9(4) of the Aarhus Convention judicial review is highly expensive. Lord Woolf's Access to Justice final report[273] proposed a multi-party litigation (or Group Litigation Orders, hereafter GLOs) to foster access to justice in England and Wales. The report identified three main objectives of such a procedural avenue:

> "(a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
>
> (b) provide expeditious, effective and proportionate methods of resolving cases,

[270] *R (Refugee Legal Centre) v SSHD* EWCA Civ 1296
[271] *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777
[272] *King v Telegraph Group Ltd* (Practice Note) [2005] 1 WLR 2282
[273] Lord Woolf, 'Access to Justice - Final Report' (Final Report to the Lord Chancellor on the civil justice system in England and Wales) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm> accessed 1 March 2011

where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;

(c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."[274]

In *Boake Allen Ltd v Revenue & Customs Commissioners*[275]Lord Woolf emphasised the cost-reducing objective of the GLOs:

"All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought. In a system such as ours based on cost shifting this is of benefit to all parties to the proceedings."[276]

Despite the above objectives Lord Woolf noted also that the GLOs could lead to a contrary situation of mismanagement and increased costs "because of the sheer scale of the numbers involved"[277]. Such cases could require legitimate and illegitimate use of greater resources and expertise creating expensive ventures

[274] Ibid 17(1)
[275] *Boake Allen Ltd v Revenue & Customs Commissioners* [2007] 1WLR 1386
[276] Ibid 31
[277] Lord Woolf, 'Access to Justice...' supra note 273 at 17(8)

The regime is governed by Rule 19 of the CPR where "[t]he court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues".[278] The GLO must contain the following features:

> "(a) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered;
>
> (b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
>
> (c) specify the court (the 'management court') which will manage the claims on the group register."[279]

The judgment is "binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise"[280] and may be binding on the subsequent cases in the register. The Rule 48(6)A concerns the apportionment of costs following the GLO. A person can be liable for 'individual costs' concerning their individual litigation on the register and 'common costs' which may include the following:

> "(i) costs incurred in relation to the GLO issues;
>
> (ii) individual costs incurred in a claim while it is proceeding as a test claim, and
>
> (iii) costs incurred by the lead solicitor in administering the group litigation"[281]

Crucially, the claimants are liable severally for the equal proportion of 'common costs'.

[278] CPR Rule 19.11(1)
[279] Ibid 19.11(2)
[280] Ibid 19.12(1)
[281] Ibid 48.6A(2)

GLOs have been rare: there had been only 75 such orders until July 2010.[282] There have been a number of environmental cases concerning private[283] and public[284] nuisance, personal injury,[285] private nuisance and negligence.[286] Although most of the cases are based upon the common law, the claimants' advisers in *Austin & others v Miller Argent* argued that the case carried a "public law elements"[287] to rely on the PCO. Lord Justice Jackson did not approach the question whether the PCO would apply to public law litigation, dismissing the issue in the *Austin* case as "academic."[288]

Human Rights and Environmental justice

Human Rights in the UK are protected amongst other things by Human Rights Act 1998 which gives effect to The Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights). In 1949 the UK as one of ten founding countries took part in the establishment of the Council of Europe and was engaged in drafting the ECHR, which came into force in 1953. The Convention safeguards the fundamental and human rights which are enforced by the European Court of Human Rights sitting in Strasbourg (hereafter ECHR Court). It does not explicitly include the right to satisfactory environment and the ECHR organs were initially reluctant to consider the environmental claims[289]. *In X and Y v Germany* the ECHR Commission rejected the applicants' concern over the use of adjacent marshland for military purposes by stating explicitly that "no right to nature

[282] Her Majesty's Court Services, 'Group Litigation Orders' <http://webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm> accessed 1 June 2011
[283] *Austin & others v Miller Argent (South Wales)* Ltd [2011] EWCA Civ 928,
[284] *Anslow v Norton Aluminium Ltd* (Queen's Bench Division, 26 May 2010), *Corby Group Litigation v Corby District Council* [2009] EWHC 1944 (TCC)
[285] *AB v Ministry of Defence* [2010] EWCA Civ 1317 (*Atomic Veterans Group Litigation*)
[286] *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28 (*Mogden Group Litigation*)
[287] *Austin & others v Miller Argent* supra note 283 at 57
[288] Ibid 64

preservation [was] as such included among the rights and freedoms guaranteed by the Convention"[290]. In *X v Iceland* the applicant wished to rely on the Article 8 of the Convention to keep his dog in his home. The Commission asserted that it could not accept:

> "that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings, insofar as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationship within the private sphere"[291]

Yet, with time, Court has been active in interpreting a number of Convention articles dynamically to include the right to healthy environment in line with the changing circumstances. The following paragraph will review the most notable cases for environmental justice in relation to the Article 2 (right to life), Article 6 (right to a fair trial) Article 8 (respect for family right) and Protocol I, Article 1.

Article 8

> "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[290] *X and Y v Federal republic of Germany* N° 7407/76 Decision of 13 May 1976 on the admissibility of the application,161
[291] *X v Iceland* N° 6825/74 Decision of 18 May 1976 on the admissibility of the application, 87

The Article 8 contributed to developing a substantive right to healthy environment which obliges the state to act or "refrain from action impacting on the environment" or to ensure that the non-state actors act in a way guaranteeing decent environmental surroundings.[292]

Article 8 is an example of a qualified right and certain violations can be justified by the interest of the whole economy. The balancing exercise was performed, for example, in *Buckley v United Kingdom*[293] and *Hatton v United Kingdom*[294]. The former case concerned a British Gypsy mother who lived with her three children in a caravan on land bought by her. She did not hold the necessary planning permission and made a retrospective application which was rejected on three grounds. Firstly, there was an alternative accommodation available; secondly, the nearby road would not accommodate two vehicles safely; and thirdly, her

> "use of the land would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan which was to protect the countryside from all but essential development"[295]

The Mother was subject to enforcement proceedings requiring the removal of her caravan. She opposed the enforcement notice by arguing, inter alia, that the alternative accommodation was not appropriate for the young children and her enforced move would be incompatible with the Article 8 of the ECHR. The Court did not agree with

[292] Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21(3) *Oxford Journal of Legal Studies* p. 521, 527
[293] *Buckley v United Kingdom* (1996) 23 EHRR 101
[294] *Hatton v United Kingdom*, 37 Eur. Ct. H.R. 28 (2003)
[295] *Buckley v UK* supra note 293 at 14

her by giving a wide margin of appreciation to the local authority which would apply in relation to other environmental planning cases:

> "It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases [...] By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation."[296]

Hatton v UK was considered in two instances by the ECHR Court. The material facts concerned the applicants' sleep deprivation caused by the noise produced by the landing aircrafts at Heathrow Airport at night. Specifically, the claimants opposed the quota system which allowed the operator to maintain either fewer noisier planes or more quieter aircrafts in operation. The ECHR Court agreed at first instance with the applicants and ruled that the UK government failed to establish the appropriate balance between competing interests, where Heathrow operation was said to be beneficial for the whole British economy. The Grand Chamber reversed the ruling relying on the established wide margin of appreciation which governments are granted in relation to their human rights obligations. Thus, in the final ruling the economic incentives prevailed over the serious disturbances which the applicants experienced.

[296] Ibid 75

Lopez Ostra v Spain[297] was the first case in which the ECHR Court declared the breach of the Article in question and laid foundations for a substantive test of 'severe environmental pollution' which had to be satisfied by the victims. Mrs Ostra lived in an industrial town near to a waste-treatment plant "12 metres away from a source of smells, noise and fumes".[298] The applicant subsequently moved away but did not lose the status of the victim and her application was admitted. The ECHR Court explicitly asserted that

> "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health"[299]

The ECHR Court whilst acknowledging that the public authorities were not directly responsible for the nuisance, highlighted that they had agreed to the construction and operation of the plant and were oblivious to its continuous nuisance. The Court contended that the state failed in its balancing exercise between the interests of the town and the family pronouncing the breach of the Article 8.

In *Guerra v Italy*[300] the proximity to the environmental hazard and its direct effect on the applicant's family was crucial in admitting the case. Guerra lived about one kilometre away from a factory which manufactured fertilisers and caprolactam and had a history of accidents. A report commissioned by the Manfredonia District Council established that the toxic gases released by the factory were directly channelled towards

[297] *Lopez Ostra v Spain*, 20 Eur. Ct. H.R. 277 (1994)
[298] Ibid 42
[299] Ibid 51
[300] *Guerra v Italy*, 26 Eur. Ct. H.R. 357 (1998)

the town.[301] The Court declared a breach of Article 8, yet, it did so on the basis of procedural impropriety. The relevant authorities failed to provide adequate information on the risks posed by the factory pursuant to the relevant law including the Community Seveso I Directive[302].

In *Fadeyeva v Russia*[303] the applicant lived in a flat 450 metres from a steel plant in an industrial town of Cherepovets. The authorities established a buffer zone around the plant which was supposed to separate the residents from the pollution. The government established programmes which required the resettlement of the residents from the buffer zone in which the morbidity rate was found above the average.[304] The ECHR Court established the failure of the Russian state to implement the measures requiring the re-housing of the population from the polluted area in the proximity of the plant. The State failed also in offering the effective solution for the family to move elsewhere and overall, failed to strike the right balance of the interests of the whole community against the interest of the applicant. It pronounced the breach of Article 8.

The Court set the conditions of 'severe environmental pollution' to include: firstly, the direct effect posed by the environmental hazard on the victim's home, family of private life; and, secondly, "a minimum level of severity". The latter, more complex in practical analysis, should be considered on case-by-case basis and includes the intensity and duration of the nuisance and its health effect. The applicant should also be able to present the necessary evidence such as medical certificate. In *Lopez Ostra* case the test was satisfied given the close proximity to the hazard and the availability of the genuine

[301] Ibid 16
[302] Directive 82/501/EEC of the Council of the European Communities on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population
[303] *Fadeyeva v Russia*, 2005 IV 45 Eur. Ct. H.R. 10
[304] Ibid 10-19

medical record. In *Fadeyeva v Russia* although the applicant failed to adduce material medical evidence, the court was prepared to accept the official documents confirming the above average concentration of pollutants which would inevitably contribute to the deterioration of their health.[305] In *Tatar v. Romania*[306] judgment the causality was less obvious since the Court could not establish a causal link between a disaster and a medical conditions of Tatar's son. Here, the applicants lived in a proximity to a gold mine which operator had obtained a permission to use sodium cyanide. Following an accident in 2000 large amount of contaminated water permeated surrounding environment. The Court pronounced the breach of Article 8 due to the serious circumstances caused by the failure to take appropriate measures to assess the risk and protect the public. In another ruling, *Leon and Agnieszka Kania v Poland*[307] the ECHR Court dismissed a claim based on the minimum level of severity. The applicants lived near a craftsmen's cooperative causing severe nuisance yet they did not manage to present evidence that the noise exceeded permissible levels and necessary medical certificates which would prove the link between noise and their condition. Further, the Article 8 was also interpreted to be violated when public authorities failed to provide necessary information on potential environmental hazards.[308] Similarly, in *Furlepa v Poland*[309] the applicants failed to establish a minimum severity test. The Court was not convinced the pollution from a car repair garage adjacent to the applicants' property exceeded the safe levels. In addition, Furlepa was not able to substantiate her claim by presenting convincing medical record proving the casual link between their deteriorating health and environmental hazard.

[305] Ibid 80-81
[306] *Tatar v Romania* [2009] ECHR 88
[307] *Leon and Agnieszka Kania v Poland Judgment of 21 July 2009 Appl. No. 12605/03*
[308] See for example *Guerra v Italy (1998) 26 EHRR 357* and *Roche v United Kingdom (2006) 42 EHRR.599*
[309] *Furlepa v Poland*, Decision as to the admissibility of Application no. 62101/00

Article 8 contains an implicit procedural aspect of adequate participation as elaborated in *Taskin v Turkey*.[310] The ECHR Court pronounced that:

> "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8."[311]

In addition:

> "the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process."[312]

Taskin is an important case as it extended the severity test to less tangible likely exposure to environmental dangers. The ECHR Court has recently confirmed this approach in *Orlikowscy v Poland*[313].

Article 2

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

[310] *Taskin v Turkey* [2004] ECHR
[311] Ibid 118
[312] Ibid
[313] *Orlikowscy v Poland* [2011] (Application no. 7153/07)

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

The Article imposes a positive obligation on the contracting Party which must engage certain activity safeguarding the right to life such as establishing the enforcing agencies. The positive obligation has also been associated with the right to healthy environment in the *Öneryildiz v Turkey*[314] judgment. The case concerned a methane explosion near to slums inhabited by dwellers. An earlier report issued by the district council had alarmed the major of Istanbul about the probability of explosion. The fact that the latter did not take the necessary precautionary measures to prevent the incident, which killed 30 people, served as a basis of litigation in the ECHR Court. The Court agreed and highlighted that the Turkish authorities failed to provide the dwellers with adequate information relating to potential risks posed by the landfill site. This approach in which access to information was a primary obligation of the government to satisfy the obligation under Article 2 in relation to the environment was confirmed in *Budayeva v Russia*[315]. Here, the Russian authorities had been warned about the increased risk of mudslides in Tyrnauz which eventually occurred and killed eight persons. The ECHR Court confirmed the breach of the right to information by the State reflected in the failure to implement the necessary emergency relief policies. The breach was also associated with the state's failure to investigate the death of the applicant's husband.

[314] *Öneryildiz v Turkey* [2004] ECHR 657
[315] *Budayeva v Russia* [2008] ECHR*

The First Protocol, Article 1

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The right to healthy environment was also linked to the right to the peaceful enjoyment of one's possessions. This Article formed part of the argumentation by the applicants in the abovementioned *Öneryildiz v Turkey*[316]. The Court pronounced its breach even though the applicants did not have the right to occupy land on which they stayed. Notwithstanding the property lost during the explosion was sufficient to fall within the Article in question. In *Antonetto v Italy*[317] the applicant lived in a house close to a newly erected multi-storey block of flats. Antonetto brought a successful challenge by way of judicial review, which ordered the demolition. The order was not executed and following the 10 year long struggle in the domestic context Antonetto resorted to the ECHR Court. The applicant's property lost value due to restricted view and limited access to light. The Court pronounced the breach of the Article 1 of the First Protocol due to the authority's failure to comply with the order.

Article 6 (1)

> "In the determination of his civil rights and obligations or of any criminal charge

[316] Supra note 314
[317] *Antonetto v. Italy* (2003) 36 EHRR 10

against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

In *L M and R v Switzerland*[318] a nurse, teacher and a pensioner resided in a proximity to a railway station accommodating trains transporting nuclear waste. They complained that "they have been denied access to court in respect of their complaints about the dangers emanating from the rail transports of dangerous radioactive materials"[319]. The ECHR Commission held that Article 6(1) embodied "the right to a court" subject to limitations, which "must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right would be impaired"[320]. In *Zander v Sweden*[321] Article 6(1) applied to a situation involving perceived risk rather than a well grounded environmental hazard. The weight of perceived risk was later undermined in *Noel Narvii Tauira and Eighteen Others v France*[322] and in *Balmer-Schafroth and Others v Switzerland*[323]. In the latter case the applicants opposed a decision to extend a licence for operating a nuclear facility situated 4-5 kilometres from their residency. Here the Article 6(1) was not applicable because the applicants failed to prove "that power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent"[324]. De Merieux argued that it was difficult to see a difference between the above case and more liberal *Zander v Sweden* "unless it be that one involved a nuclear power station and nuclear policy".[325] Yet, the Court returned to the liberal approach in Taskin[326] and *Okyay and Others v Turkey.*[327]

[318] *L M and R v Switzerland* 22 EHRR CD 130
[319] Ibid 130
[320] Ibid 132
[321] *Zander v Sweden* ECHR Sers. A, No. 279B (1993).
[322] *Noel Narvii Tauira and Eighteen Others v France* (1995) 3 IELR 774
[323] *Balmer-Schafroth and Others v Switzerland* (1998) 25 EHRR 598
[324] Ibid 40
[325] Margaret DeMerieux 'Deriving Environmental...' supra note 292 548
[326] Supra note 310

Relationship between human rights and environmental justice

Despite the initial reluctance the ECHR Court has established a clear link between human rights and the environment. A question remains as to the extent to which human rights can contribute to achieving greater environmental justice. Poustie, for example, is very cautious by denoting that "[t]here may be a coincidence between infringements of Convention rights and environmental justice concerns"[328]. Indeed, the ECHR Convention does not provide a direct basis for considering the issues of environmental justice in a wider context that is beyond the rights of the victim. The focus on the victim constitutes a barrier to considering the broader interests at present time but also in the future in the context of intergenerational equity. Further, the threshold for pronouncing the infringement of the Convention articles in environmental context is very high. Cases under the Article 2 have involved the loss of life whereas the victims had to be exposed to 'severe environmental pollution' to obtain a remedy under the Article 8 of the Convention. This contrasts with the environmental justice advocates who highlight a more positive approach. They demand a fair share of a decent, healthy environment[329]. The ECHR approach is largely negative by rendering a tiny portion of the environment as the most polluted and toxic, and, in result, inhabitable. There is therefore a tension between environmental justice and human rights regime under the ECHR. This tension could be defused by lowering the severity test under the Article 8. This article has a potential for highlighting the right of the family, and potentially wider community, to a decent and a healthy environment unlike the absolute right to life under the Article 2, which concentrates on the most extreme scenarios. Obviously, the victim's rights under the Article 8 must be weighed against the economic or social interests of the wider community or even a country. The need to strike this balance may be negative and

[327] *Okyay and Others v Turkey* (2006) 43 EHRR 37
[328] Mar Poustie Report, supra note 13 p. 84
[329] See p. 61

positive in the context of environmental justice. On the one hand it is somewhat reminiscent of the 'locality rule' mentioned above in the context of private law in England and Wales. Thus the fact that some people must suffer greater exposure to environmental pollution becomes an imperative of the well balanced society. On the other hand, the need to strike the balance provides opportunities for recognising wider interests in the society and assessing the differences in terms of exposure. Certainly, a lower threshold under the Article 8 would constitute a more positive approach; when coupled with the need to strike the balance it would offer greater opportunities for striking a *fair balance* in the society. Then, however, one would have to consider the competency and capacity of the courts to make such wider-reaching judgments over. In more pragmatic terms, the suggested approach would surely strain the already limited ECHR resources.

It seems very unlikely that the wider environmental justice community would be effective by solely relying on the human rights legal regime. Further, as Lee[330] highlighted, some environmentalists and scholars are disinterested in designating human rights frameworks as a driver for greater environmental equity. They would be interested in recognising natural objects as possessors of rights[331]. If such recognition came to fruition the nature would require representatives in the courts which could also include environmental justice representatives. The latter would probably try to invoke a nature's intention to serve the society on equal basis leading to interesting debate over justice.

[330] Robert G. Lee 'Resources, Rights, and Environmental Regulation' (2005) 32(1) *Journal of Law and Society* 111
[331] Christopher D. Stone 'Should Trees have Standing? – Toward Legal Rights for Natural Objects' (1972) *Southern California Law Review* 450

Human Rights Act 1998

As mentioned above[332]Human Rights Act 1998 created an independent ground for judicial review. Lee conducted an analysis of the potential impact of the human rights regime on judicial review indicating that, save for standing, "consideration of human rights issues suggests a wider and more vigorous approach to judicial review".[333] In terms of the time limit the *Burkett*[334] judgment, clarifying the position relating to time limits, was significantly influenced by the Human Rights Act 1008. The narrow approach to standing results from the long-standing principle[335] that it is only victims who can start the proceedings; explicitly entrenched into the s7(3) of the Human Rights Act:

> "If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act."

It is very unlikely[336] that the narrow approach based on the 'victim test' would replace the 'sufficient interest test' reviewed above[337]. Yet, in *R. (on the application of Westminster City Council) v Mayor of London*[338] Maurice Kay J. refused the application by Westminster City Council to challenge a congestion charge in London because the latter was not the victim. The is significant in light of the *Greenpeace (No2)* liberal approach to *locus standi* of the representatives of individuals who may lack funds and expertise to bring individual challenges. The author agrees with Ligere:

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[332] See p. 86
[333] Robert G Lee, 'Judicial review and Judicial Developments after the Human Rights Act 1998: the Example of Environmental Law' in Monika Pauknerová and others (eds), *Changes of Judicial Culture and Decision Making in Different Branches of Law* (Univerzita Karlova v Prace 2007)
[334] Supra note 219
[335] *Norris v Ireland* (1989) 13 EHRR 186
[336] Lee, 'Judicial review...' supra note 333
[337] See p. 84
[338] *R. (on the application of Westminster City Council) v Mayor of London* [2002] EWHC 2440 (Admin)

> "It seems somewhat regrettable that an entity, such as a local authority, which is likely to be financially well placed to represent the interests of the individuals it seeks to represent, lacks standing for HRA challenges, whereas the individuals in question, who often lack the necessary resources to pursue such challenges can, in principle, do so. Further, challenges by some NGOs may serve to emphasise certain causes more than other, equally, if not more, deserving interests"[339].

As Lee noted:

> "[i]t may be wiser, therefore, for in certain human rights cases and in situations where the recognition of a campaigning group is in doubt to field and individual clearly within the category of victim or with a sufficient interest in the matter in question"[340].

Such a strategy was pursued in *R (on the application of Edwards) v Environment Agency*[341] where a homeless person challenged an Integrated Pollution Prevention Control permit issued to a cement company and authorising the use of tyre chips in addition to the conventional fuels. Mr Edward played no part in the formal consultation process preceding the grant of the permit and the Environment Agency argued that he lacked the sufficient interest. Yet, Keith J. found that he enjoyed *locus standi* as he would be affected by the decision.

The narrow approach to standing may also result in limiting the right to participation and appeal, mentioned above[342], to the victim. Another issue of appeal arose in *R. v*

[339] Edite Ligere, 'Locus standi and the public interest: a hotchpotch of legal principles' (2005) *Journal of Planning & Environment Law* 292 296
[340] Lee, 'Judicial review...' supra note 109, 46
[341] *R (on the application of Edwards) v Environment Agency* [2004] 3 All ER 21
[342] See p. 103; see also Alan Boyle, 'Human Rights or Environmental Rights. A Reassessment' (2007) 18

Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc (Alcounbury case)[343] relating to the decision-making powers of the Secretary of State in planning issues. The case was an appeal from the Divisional Court which found that the Secretary of State, who is also engaged in formulating the planning policy, "cannot be both policy maker and decision taker".[344]This would contravene the ECHR Article 6' s requirement of an access to "an independent and impartial tribunal established by law". In the words of their Lordships:

> "[P]arliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity in national planning can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not of law."[345]

The Lordships did not find the contravention of the ECHR as the latter required the separation of the judiciary from the executive and not from the administration. The Secretary of State's position ensures the uniformity of the planning system which is established for the public benefit. Crucially, judicial review allows the review of the Secretary of State's decision thus ensures the lawfulness of the system.

Further the HRA has sparked a discussion concerning the extension of the grounds of judicial review, where the Convention rights are at stake, so as to include

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Fordham Environmental Law Review 471 and C Hilson, 'Risk and the European convention on human rights: Towards a new approach' in *The Cambridge Yearbook of European Legal Studies* (Hart Publishing 2009)

[343] *Alcounbury case* supra note 231

[344] *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] H.R.L.R. 2 at 86

[345] *Alcounbury case* supra note 231 at 159

'proportionality', which could replace 'Wednesbury unreasonableness'. Proportionality was defined in Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing:*[346]

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."[347]

In *R (Daly) v Secretary of State for the Home Department*[348]*Lord Steyn* noted that "intensity of review is somewhat greater under the proportionality approach"[349]due to the three main reasons. Firstly, the court would have to "assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions". Secondly, the test would require the court's attention to "the relative weight accorded to interests and considerations" and, thirdly, the test would allow assessing the necessity of the human rights limitation and whether "the interference was really proportionate to the legitimate aim being pursued."[350] The proportionality test would not shift judicial review to "merits review".[351]

In *International Transport Roth GmbH v Secretary of State for the Home Department (Roth)*[352] 158 Laws L.J. suggested that the application of proportionality should include deference. Deference concerns the weight that the courts should distribute to particular laws, principles or law-makers in arriving at its decision. Deference was suggested to

[346] Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69
[347] Ibid 80
[348] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532
[349] Ibid 27
[350] Ibid
[351] Ibid 28
[352] *International Transport Roth GmbH v Secretary of State for the Home Department (Roth)* [2002] EWCA Civ 158

include the following four principles. Firstly, greater deference should "be paid to an Act of Parliament than to a decision of the executive or subordinate measure".[353] Secondly, there should be "more scope for deference "where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified"".[354] Thirdly, greater deference should be due to

> "the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts"[355];

and fourthly,

> "greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts."[356]

Yet, as Gordon[357] argues the Baroness Hale interpretation above [358] of judicial review in context of human rights makes the deference categorisation redundant:

> "It must follow from this that the weight to be placed by the court on any aspect of the evidence before it, derives not from any mesmeric force of an Act of Parliament or other supposed democratic imperative but, rather, through – and only through – the ordinary process of *adjudication* that is itself part of the courts' own constitutional function. No hierarchy that derives from

[353] Ibid 83
[354] Ibid 84
[355] Ibid 85
[356] Ibid 87
[357] Richard Gordon, 'Two Dogmas of Proportionality' (2011) 16(3) *Judicial Review* 182
[358] See p.86

proportionality is involved in this"[359].

The principle of proportionality received support in *Alconbury*[360] case and there have not yet been a clear indication from the House of Lords that the test would be accepted.

Polycentricity in litigation

The previous Chapter argued that polycentricity attached to the substantive and procedural aspect of environmental justice. The former stems from the heterogeneity of environmental justice parties claiming access to better environment and the fact that the substance of justice is often contested. The latter stems from the variety of parties using procedural rights to achieve their goals. Moreover, polycentricity in procedural environmental justice lies on the negotiating table where the environmental justice claimants themselves agree on their priorities and resolve the doubts over the degree of environmental risks. The question is whether these aspects are reflected in litigation.

Firstly, in terms of substantive polycentricity, litigation involves two clearly opposing parties thus it is difficult to identify the variety of interests involved by analysing the material facts of the cases. Further, litigation often follows a complex negotiating process resulting in one particular person or group taking action. Moreover, there are purely environmental justice cases involving one person or family or the whole community who suffered injustice. These cases flag the problems of a given party and conceal wider interests. Further, the difficulties in identifying the true polycentricity in environmental cases stem from the lack of wider public consultation on the expert findings concerning the substance of litigation.

Many environmental challenges concern complex issues which raise questions about

[359] Ibid, 188
[360] supra note 231

"the knowledge base itself"[361]. According to Fisk, science includes the already known and what remains to be known and requires a procedural separation between science assessment and risk assessment:

> "This means that the completed assessment does not aim to eliminate uncertainties, and that a second step of risk assessment is required to make a decision. This procedural separation then leaves the task of devising a science assessment process that minimises overestimation of what we know and underestimation of what is uncertain."[362]

The bias in assessments in litigation can result from the inclusion of the evidence from one expert. Even the peer review process may not eliminate the bias due to "disciplinary paradigm bias"[363]. The bias influences the outcome of legal challenges where the "lack of evidence only reflects lack of power in the investigation techniques".[364] Thus:

> "If a statistical analysis fails to find a 'statistically significant' correlation between exposure to a chemical and a rare disease this may simply mean that the sample is too small to detect the effect in the presence of random confounding factors"[365].

Yet, Fisk argues that the absence of evidence to support a conclusion is often "equivalent to the presence of evidence that refutes it"[366]. Yet, the sample collected in the field may not fully mirror the actual situation and there is a need to share the interim findings of the assessors with the wider public to capture comments. The process of

[361] David Frisk, 'Environmental Science and Environmental Law" (1998) 10(1) *Journal of Environmental Law* 33
[362] Ibid 3
[363] Ibid 5
[364] Ibid
[365] Ibid
[366] Ibid

public consultation should complement the peer review process.

Secondly, it is also difficult to identify the procedural polycentricity by analysing environmental cases. The affected parties will most likely rely on available participation in administrative process to negotiate the contested substance. An example would be the *Milner* case[367] concerning the dispute over fluoridation, which was said to be polycentric in the previous Chapter[368]. The issue came up before the courts in the UK, where only 10 percent of the population benefits from the water fluoridation. In the South Central Strategic Health Authority (hereafter SHA) decided, following public consultation, that fluoride should be artificially added to water in and around Southampton affecting approximately 195,000 citizens. The area was said to have incidents of tooth decay twice as average level in the UK. Ms Milner alongside a large portion of the local public opposed the project and filed a challenge, as a sole claimant, to the High Court. She emphasised that her challenge did not relate the facts[369] but the sole legality of the decision and specifically that:

> "the SHA unlawfully failed to have regard to (let alone act in accordance with other than for a good and stated reason) the applicable government policy (which was that no new fluoridation scheme should be introduced unless it can be shown that the local population is in favour)"[370].

The majority of the population opposed the fluoridation reflected in the consultation and accompanying statistical research and it was submitted that SCSHA breached the Water Fluoridation (Consultation) (England) Regulations 2005. Regulation 5 when it was debated in the Parliament closely resembled the following words:

[367] *Milner v South Central Strategic Health Authority* [2011] EWHC 218 (Admin)
[368] See p. 63
[369] Ibid 3
[370] Ibid 13

> "A Strategic Health Authority shall not proceed with any step regarding fluoridation arrangements that falls within section 89(2) of the Act unless the representations made by individuals affected and bodies with an interest are predominantly in support of it."[371]

whereas the final regulation took the following wording:

> "A Strategic Health Authority shall not proceed with any step regarding fluoridation arrangements that falls within section 89(2) of the Act unless, having regard to the extent of support for the proposal and the cogency of the arguments advanced, the Authority are satisfied that the health arguments in favour of proceeding with the proposal outweigh all arguments against proceeding."[372]

It is therefore clear that the draft regulation placed the decision-making responsibility on the public whereas the law finally adopted placed this responsibility on the SHA provided that the latter could present enough arguments in favour of fluoridation. The arguments would also have to outweigh the public opposition:

> "Clearly, the greater the weight of opposition to the proposal (as well as the weight of all arguments against proceeding), the greater the weight of the health arguments in favour of proceeding will need to be in order to prevail. That overall judgment has to be made by the SHA, but there is no rule or policy that they can only proceed if the balance of local public opinion is in favour."[373]

This reasoning was supported by the judge who was satisfied with the balance of arguments and ruled that the SHA did not err in its decision to proceed with the fluoride

[371] Ibid 22
[372] Regulation 5, Water Fluoridation (Consultation) (England) Regulations 2005
[373] *Milner* case, 62

enrichment. The case shows that the substance of environmental justice can be disputed and objected to by those who are supposedly deprived of it. It is impossible to determine whether fluoridation is an environmental good or bad and the balancing exercise becomes crucial. environmental justice is served when the public and authorities are engaged into the exchange of information and arguments to determine what would be the best in given circumstances. In this instance, the British Dental Association welcomed the ruling, which is likely to lead to fluoridation in other parts of the UK.[374]

Polycentricity in litigation – a need for socio-legal research

Given the above deliberations there are two avenues which can be taken to measure polycentricity in litigation. Firstly, it is possible to conduct documentary analysis of available cases and capture data on the variety of interests. This analysis would be limited given the scarcity of information in legal cases themselves. Secondly, it is possible to capture the geographical location of the particular environmental problem and/or the geographical origins of the claimants to assess the multitude of the interests. Further, it is possible to conduct analysis of various interests involved in a number of cases through statistical research which will be performed in this thesis.

[374] Robert G Lee, 'Fluoride Challenge Fails' (2011) 20(2) *Environmental Law Monthly* 11

Chapter 3 Aarhus Convention

This Chapter will review the evolution, principles and the pillars of the Aarhus Convention and its implementation in the UK. It will give a short overview of the process which led to signing the Convention and a particular attention will be paid to the principles found in the preamble. Each pillar will be reviewed in detail. The author will show that through its principles and structure the Convention is an instrument, which can support the attainment of environmental justice. However, it is neither explicitly nor implicitly restricted to environmental justice claims. It may as well serve the purely environmental objectives as well as serve those who oppose the environmental protection in favour of economic development. The Chapter will also provide a short overview of the implementation of each pillar in the UK. The Convention is effective in the UK through a number of EU directives. The compliance is also satisfied through a number of soft law provisions such as an expanded availability of information regarding each pillar in the country. Given the overall objectives of the thesis particular attention will be paid to the implementation of the third pillar.

Environment for Europe process as a catalyst for the Aarhus Convention

This section focuses on the Environment for Europe (EfU) process, though, it is widely recognised[375] that the origins of the Aarhus Convention can be traced back to the

[375] Casey- Lefkowitz S, Stec S and Jendroska J, *The Aarhus Convention: An Implementation Guide* (United Nations 2000); Jeremy Wates, (Secretary to the Aarhus Convention) 'The Aarhus Convention: A New International Framework Regulating Public Access to Environmental Information' (discussion paper) presented at: INFOTERRA 2000 – Global Conference on Access to Environmental Information, Dublin, 11-15 September 2000 <http://www.unep.org/infoterra/infoterra2000/Wates-rev.pdf> accessed 28 March 2009

Principle 10[376] of the Rio Declaration on Environment and Development:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[377]

The EfU process was created by the UN Economic Commission for Europe (UNECE), a subsidiary body of the UN Economic and Social Council. The UNECE itself was established in 1947 with the view to promoting "pan-European economic integration"[378]. It consists of 56 Member States, which include European, Asian states as well as The United States of America and Canada.[379]

The EfU process commenced with a conference that took place at Dobris Castle, near Prague in Czechoslovakia[380] in 1991. This was followed by five additional ministerial conferences: Lucerne (Switzerland) in 1993; Sofia (Bulgaria) 1995; Aarhus (Denmark) in 1998; Kiev (Ukraine) in 2003; and Belgrade (Serbia) in 2007.[381] Whereas the first

[376] It should be also recognised that the Principle 22 supports participation of indigenous people in achieving sustainable development by recognising their attachment to land, local knowledge and traditions. Interestingly, the Aarhus Convention does not mention 'indigenous people' though they would fall under the umbrella of the 'public'

[377] 'Rio Declaration on Environment and Development' adopted during the United Nations Conference on Environment and Development, Rio de Janeiro, 3 to 14 June 1992, Principle 10

[378] UNECE ,'About UNECE' <http://www.unece.org/about/about.htm> accessed 28 March 2009

[379] Ibid

[380] Czechoslovakia split into two sovereign states, Czech and Slovak Republics on 1 January 1993

[381] UNECE, '"Environment for Europe" Process' <http://www.unece.org/env/europe/> accessed 28 March 2009

conference aimed at analysing the current environmental situation in Europe and discussing the potential ways of strategic cooperation, the following three conferences were of great importance for the development of the Convention, including the portentous Aarhus Conference.

In Lucerne the participants recognised public participation as one of the crucial components of the long term strategic environmental process. The Ministers concluded: (1) that UNECE should work on proposals concerning "legal, regulatory and administrative mechanisms to encourage public participation in environmental decision making"[382], (2) that UNECE should pay particular attention to elaborating the ways of promoting participation in a cost-efficient manner as well as providing training and education for the public in order to increase their skills of understanding environmental information and (3) that public education should benefit from the support of the 'informal sector'.[383] Following the conference, senior advisers set up a task force[384], which aimed at realising the above obligations. The established 'Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making' were subsequently endorsed by ministers at the Sofia conference[385]. Interestingly, the guidelines consisted of expanded recommendations for developing the future informational and participatory pillars of the Convention. This cannot be said in relation to the third pillar since the guidelines recommended only that:

> "The public should have access to administrative and judicial proceedings, as

[382] Declaration by the Ministers of the Environment of the region of the united Nations Economic Commission for Europe (UN/ECE) and the Member of the Commission of the European Communities responsible for the Environment, Lucerne 28-30 April 1993 <http://www.unece.org/env/efe/history%20of%20EfE/Luzern.E.pdf> accessed 12 April 2009, art. 22(2)
[383] Ibid
[384] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit.
[385] Declaration by the Ministers of Environment of the region of the United Nations Economic Commission for Europe (UNECE) 25 October 1995, Sofia (Sofia Declaration) <http://www.unece.org/env/efe/history%20of%20EfE/Sofia.E.pdf> accessed 12 April 2009, art. 42

appropriate. Suitable legal guarantees should ensure that proceedings are fair, open, transparent and equitable. It is desirable that proceedings are not prohibitively expensive"

and that

"It is desirable that standing should be given a wide interpretation in proceedings involving environmental issues."[386]

As a result the Ministers in Sofia recommended that UNECE should work on "effective public access to judicial and administrative remedies for environmental harm"[387]. The Ministers recommended developing "a regional Convention on Public Participation"[388] and allowed NGOs to contribute to its creation.

The Convention's drafting process took place between 1996 and 1998 and involved careful considerations of the wording, various proposals of all participants, some of which have been accepted.[389] Crucially, the drafting sessions established the third pillar of the Convention, initially, by a tentative assertion that "the article" concerning access to justice would form an essential part of the agreement.[390] Later, during the second session in November 1996, the working group agreed that the Convention "should include a third substantial part on access to justice".[391] Substantial discussions followed,

[386] UNECE, 'Guidelines on Public Participation in Environmental Decision Making' (Sofia Guidelines), Geneva 1996 **)** < http://www.unece.org/env/documents/1996/Sofia_Guidelines_1996.pdf> accessed 12 April 2009, art. 25, 26

[387] Sofia Declaration, art. 41

[388] Ibid, art. 47

[389] The whole process of drafting has been transcribed including the discussions and proposals and is available from the sessions' reports: UNECE 'Reports of the Ad Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making' < httphttp://www.unece.org/env/pp/adwg.htm> accessed 12 April 2009

[390] Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making (Aarhus Working Group) 'Report of the First Session' (UNECE, Committee on Environmental Policy) <http://www.unece.org/env/documents/1996/cep/ac.3/cep.ac.3.2.e.pdf> accessed 12 April 2009, art 11

[391] Aarhus Working Group, 'Report of the Second Session' (UNECE, Committee on Environmental Policy) < http://www.unece.org/env/documents/1996/cep/ac.3/cep.ac.3.4.e.pdf> accessed 12 April 2009,

both formal and informal, in the subsequent session. Concluding negotiation sessions "involved an unprecedented level of participation on the part of NGOs"[392] and resulted in the adoption of the Aarhus Convention in Denmark in 1998 by 35 states including the European Union[393]. As of September 2012 there are 46 parties to the Convention.[394]

To sum up, the Convention's roots can be traced back to the Rio Declaration and Lucerne and Sofia conferences within the EfU process. It must be stressed however that the initial focus was on the first two pillars with considerably extensive guidelines and recommendations in the early 90s. Access to justice was seen as an underpinning article that was supposed to give some credibility to the Convention. The idea concerning the third pillar was formally considered and generated during the middle stage of the EfU process and the initial stage of drafting the Convention. This helps to shed some light on the present challenges with the third pillar of the Convention.

Aarhus Convention principles

The principles of the Aarhus Convention are non-binding obligations that can be found in the preamble and the first articles concerning the objective (Article 1), definitions (Article 2) and the general provisions (Article 3) of the Treaty. They are very useful in terms of placing the agreement in a wider socio-political context and can serve as background for interpretation of the specific procedural elements entrenched into the three pillars.

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art 6
[392] Casey- Lefkowitz, Stec and Jendroska ,'The Aarhus Convention...', op cit., p.2
[393] UNECE, '"Environment for Europe" Process: History of the process: from Dobris to Belgrade' <http://www.unece.org/env/efe/history%20of%20EfE/fromDobtoBelg.htm> accessed 12 April 2009
[394] UNECE Aarhus Convention, 'Status of Ratification" (September 2012) <http://www.unece.org/env/pp/ratification.html> accessed 26 September 2012

Floor, not a ceiling

The Convention sets the minimum standards that should be achieved by all Signatories and countries can preserve existing measures extending beyond those in the Convention or provide broader rights under the three pillars[395]. The Convention leaves considerable discretion to the national legal systems to establish certain measures and is flexible enough in order to accommodate most of the distinct features found in different legal traditions[396]. Whereas the states must achieve the minimum standards many strive to go beyond the that and share their best practice through a network of bodies and platforms for exchange of information.

Principle of sustainable development[397]

The concept of sustainable development arose from the attention to the harmful environmental impact associated with traditional development and ways of producing growth and wealth. There are two main and broad definitions of the concept, one which focuses on the intergenerational and intra-generational equity and second which highlights three pillars of development: social, economic and environmental. While there are multitude of variations of the principle of sustainable development the paragraphs below will refer to those two broad definitions.

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[395] Casey- Lefkowitz, Stecn and Jendroska, 'The Aarhus Convention...', op cit. 5
[396] As for example art. 9(2)
[397] It has been suggested that sustainable development is an objective. It was recognised as an objective by the Welsh Government (Welsh Government, A Sustainable Wales: Better Decisions for a Better Future (WG, 2012)). However, sustainable development has been widely recognised in international law as a principle. See for example: Christina Voigt *Sustainable Development as a Principle of International Law :*
Resolving Conflicts Between Climate Measures and WTO Law (BRILL 2009), Alan E. Boyle, David Freestone (eds.) International Law and Sustainable Development. Past Achievements and Future Challenges (OUP 1999), 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(4) *Legal Studies* 578.

Intergenerational equity

This definition of sustainable development, which received "a quasi official status"[398], was coined by the Brundland Report[399]:

> "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> - the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
> - the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs"[400]

The Convention mentions future generations in the preamble and in Article 1. Due to the importance of the latter (which, unlike the preamble, forms part of the Convention) it is worth citing the whole Article:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention"

The principle concerning the right to healthy environment is considered below; for now,

[398] Magraw Barstow D and Hawke D L, 'Sustainable Development' in Bodansky D, Brunnee J and Hey E, *The Oxford Handbook of International Environmental Law* (OUP 2007)
[399] Brundtland H G and others, ' Report of the World Commission on Environment and Development: Our Common Future' (OUP 1987)
[400] Ibid 43

it suffices to highlight that the Convention puts both present and future generations at the same level. However, it is difficult to establish how this objective can be realised, barring the fact that the Convention might exist and serve the same rights to future generations. In addition, the concept of future generations itself has not been grounded in any viable theoretical construct that would explain why and how such duties are accountable. Some argue that, according to a 'future person paradox', the future generations do not exist.[401]On the other hand, the intergenerational equity principle could be underpinned by various theories. According to a chain of love theory[402] our concerns about a well-being of future generations are driven by love for our children and their descendants. This could well underpin participation of local groups or indigenous people concerned with both their well being as well as that of their descendants. Another theory that could flesh out the concept of intergenerational equity is the restraint principle according to which:

> "no goods shall be destroyed unless unavoidable and unless they are replaced by perfectly identical goods; if that is physically impossible, they should be replaced by equivalent goods resembling the original as closely as possible; and if that is also impossible, a proper compensation should be provided"[403]

This principle, as Beekman argues[404]could serve both present and future generations. This could also work well through public participation allowing participants to negotiate for some sort of compensation if their interest is affected. Members of the present generation would participate in decision-making in order to fight for the same

[401] Carter A, 'Can We Harm Future People?' (2001) 10 Environmental Values 429–54
[402]Passmore J, *Man's Responsibility for Nature: Ecological Problems and Western Traditions* (Duckworth 1980)
[403] Wissenburg M, *Green Liberalism. The Free and the Green Society* (UCL Press 1998) 123
[404] Beekman V, 'Sustainable Development and Future Generations' (2004) 17 *Journal of Agricultural and Environmental Ethics* 3–22

possibilities for posterity; however, they may be better prepared to accept that there are some unavoidable decisions.

Moreover, the Convention mentions future generations in the 'objective' article without explicit reference to disadvantaged and poor people. The intra-generational equity principle is part of the Brundland definition of sustainable development and has not found any reference in the Convention. Crucially, the research shows that economically disadvantaged and marginalised groups are more likely to live in proximity to environmental hazards.[405] The Aarhus Convention does not make an attempt to address this issue, except that it puts much emphasis on the participation of NGOs, which may be insufficient.[406]

Three pillars of sustainable development

The alternative definition of sustainable development can be traced back to the Johannesburg Declaration,[407] which highlights "pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels".[408]

The social pillar of sustainable development is concerned with equality and justice and is well covered by both the Brundland Report and the Johannesburg Declaration. Shortly, the aim is to decrease the gap between haves and have-nots within countries and between countries with the ambitious goal of ending the poverty. The economic pillar recognises a link between environmental degradation and economic growth and is

[405] Schlosberg D, *Defining Environmental Justice. Theories, Movements, and Nature* (OUP 2007); Layfield D, 'New Politics or Environmental Class Struggle?' *(*2008) 17 (1) *Environmental Politics*, 3-19
[406] Lee M and Abott C, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66(1) *The Modern Law Review* 80-108
[407] UN World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (A/CONF.199/20 , 4 September 2002) < http://www.un-documents.net/jburgdec.htm> accessed 12 April 2009
[408] Ibid 5

preoccupied with "establishing the possibility of environmentally-benign economic growth, and economically beneficial environmental protection."[409] As a simple illustration, such growth can take place by means of economic modernisation, where industry makes effort to compete on the market by producing/selling environmentally-friendly products. The third pillar is concerned with environmental protection and with balancing this with social cohesion and equality and economic growth.

The Convention makes a reference to the second and the third pillar of sustainable development; it is set against the need to "protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development".[410] However, as mentioned above, the Convention does not refer to the problems of social inequality, injustice and the gap between the rich and the poor. It mentions only that "citizens may need assistance in order to exercise their rights". [411] In addition, Article 3 requires parties to:

> "promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters"[412]

This is insufficient because it ignores the divisions among citizens. We may suppose that both economically advantaged and disadvantaged might initially lack knowledge as to *how* they can obtain access to information or participation. However, once this basic requirement has been satisfied it might appear that the latter group still needs assistance in order to understand the information, and perhaps financial support in order to make a

[409] Lee M, *EU Environnemental Law. Challenges, Change and Decision-Making* (Hart Publishing 2005) 35
[410] Aarhus Convention, Preamble
[411] Ibid
[412] Ibid, art. 3(3)

meaningful contribution to participatory processes or in order to be able to access justice.

The right to healthy environment

The Convention, as mentioned above, highlights the need to protect the environment. Nevertheless, there has been a long-standing insistence that there should be recognition of a human right to the healthy and decent environment.[413]The emergence of such a right could offer another tool to disadvantaged citizens with which to pursue justice in the event of shortfalls in legislation.[414] The Convention makes direct reference to the human right to healthy environment in the Objectives of the Convention in Article 1 above. However, the right itself does not exist at the international level despite the fact that it has been recognised at national level in many countries.[415] The Convention's Implementation Guide argues that Article 1 "is the clearest statement in international law to date of a fundamental right to a healthy environment",[416] and that though "the Convention does not expressly state that the right exists, it does refer to it as an accepted fact".[417] As a result there is an assumption that the Convention can contribute to achieving the state of decent environment for every person through the procedural guarantees of access to information, participation and access to justice. [418]However, this is not straightforward, as Lee and Abbott argue, because there is no certainty that the public is always capable of putting the environmental concerns over their self-interest or short term economic benefits. In addition, there are certain areas in the field of environmental protection where particular tools, such as wind farms, are said to benefit

[413] P Gormley, *Human Rights and Environment: The Need for International Co-Operation* (A. W. Sijthoff, Leyden, 1976)
[414] Ole W Pedersen 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21(1) *Georgetown International Environmental Law Review* 73
[415] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit.
[416] Ibid 29
[417] Ibid
[418] Penderson, 'Environmental Human...', op. cit.

the environment. Yet, there are well acclaimed instances, where the public opposes such developments arguing that they could be harmful for the existing fauna and flora and can impede their quality of life.

The public participation principle

This principle is one of the most important principles in environmental law,[419] and the Convention itself forms part of environmental law. Although the Treaty provides procedural rights of participation there is a need to look at the benefits of participation acknowledged by the Convention. Thus the preamble recognises that:

> "in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns"[420]

First of all, the Convention refers to one of the most important reasons for public participation: the quality of decisions and their implementation. The former goes back to a thriving debate on extent to which the public can improve decision making by providing local knowledge and opinion. It is argued that the public perspective can complement the technical and highly specialised input of the decision-makers.[421] Even grassroots' opinion (which is not explicitly recognised in the Convention) is capable of environmental innovation[422]. The latter recognises data from research[423] that the

[419] S Bell and D McGillvray, *Environmental Law* (OUP 2008)
[420] Aarhus Convention, Preamble
[421] F Fischer, *Citizens, Experts, and the Environment. The Politics of Local Knowledge (*Duke University Press 2000)
[422] G Seyfang and A Smith, 'Grassroots innovations for sustainable development: Towards a new

inclusion of the public leads to the long-term viability of environmental projects. In addition, participation enhances citizens' environmental awareness and the possibilities for expressing concerns that might contribute to ecological citizenship.[424] Crucially, the Convention does not aim at delegating power to citizens; it does not even mention that the public should share the decision-making with public authorities through some kind of partnership. It mentions modestly that that authorities should take due account of the public's concerns.

Principle of transparency

The improved rights to participation and access to information, and justice contribute to achieving increased transparency. Not only does the Convention aim at increasing transparency in environmental decision-making (including highlighted decision-making concerning the genetically modified organisms) but it also recognises:

> "the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings"

The Convention therefore has an ambition beyond environmental matters as an example that could be employed by other branches of government. This also expresses the Convention's contribution to wider democratisation in the region, an important goal bearing in mind that part of the signatories are the newly democratic states. This is an ambitious goal; however the citizens might be confused by the exclusions from the right

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research and policy agenda' (2007) 16(4) *Environmental Politics* 584-603

[423] E.L.I. Research Report (1997) 'Transparency and Responsiveness: Building a Participatory Process for Activities Implemented Jointly Under the Climate Change Convention' Environmental Law Institute: Washington <http://www.elistore.org/reports_detail.asp?ID=412> accessed 6 July 2008

[424] Dobson A, *Citizenship and the Environment* (OUP 2003)

of access to information that can be found in the later text of the Treaty. Thus Aarhus Convention adheres to the principle of balanced transparency, which presumes that some sensitive information and avenues of participation can be refused in order to protect state security or corporate confidentiality.[425]

In addition, the Convention does not refer directly to corporate transparency or responsibility despite the fact that some of its provisions place obligations on the private sector.

The Aarhus Pillars

Having considered the background of the Convention in terms of its development and principles we will now consider the substantive text, under which the procedural rights are provided. All three pillars are considered in subsequent paragraphs.

Informational pillar

This pillar consists of two articles that mirror two forms of access to information: passive and active. Article 4 is titled 'Access to Environmental Information' and the Article 5 is titled "Collection and Dissemination of Environmental Information". Let us consider both of them in separate subparagraphs.

Passive access to information

Article 4 requires public authorities to respond to the public's requests for environmental information without requiring applicants to state their interest. The public is widely defined and includes natural and legal person(s), their associations,

[425] Fenster M, (2005-2006) 'The Opacity of Transparency' 91 Iowa L. Rev. 885

groups or organisations in accordance with the national legislation.[426] In addition, the public cannot be discriminated on grounds of their "citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities".[427] Environmental information is also widely defined and might concern the elements of environment itself, as well as other factors such as governmental plans and policies, human health and the state of cultural sites.[428] In other words the public, regardless of their location and interests, can submit a request to any public authority for information directly or indirectly linked to environment or human health. Information should be provided in the form requested with a possibility of imposing reasonable charges unless the information is already obtainable or it would be unreasonable to produce it in the form requested. It might be a case that information is ready to be viewed from a library located very far from the residence of the applicant. In this case the mere information about the existence of the data and refusal to produce and send copies "would probably not be a satisfactory response"[429]. Moreover, the authorities should disclose "copies of the actual documentation",[430] thus allowing the public to appreciate the context of the information rather than reviewing mere summaries. The public is still allowed to view the originals of the documents if they so request.

Public authorities are obliged to respond to requests for information as soon as possible; within one month at the latest. This period of time may be extended for up to two months if needed, but the public should be informed of the reasons for the extension.[431]

[426] Aarhus Convention, art. 2(4)
[427] Ibid, art. 3(9)
[428] Ibid, art. 2(3)
[429] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 55
[430] Aarhus Convention, art. 4(1)
[431] Ibid, art. 4(2)

The disclosure of information may be refused in certain circumstances, as shown in the Table 1 below. All grounds for refusals should be interpreted in a "restrictive way",[432] which assumes that the public authority cannot simply reject the release of information by mere reference to one of the exceptions. They should go through a process, whereby they assess the interests of the parties and decide whether the release could lead to "actual harm to the relevant interest".[433] Additionally, the grounds for refusal must be weighed against the "public interest served by disclosure"[434] and state of environment, especially when the information concerns emissions. Let us look at the problem of the public interest since this will have implications for the two remaining pillars of the Convention.

The Convention does not define 'the public interest served by disclosure', thus these are the Parties that should decide "how and when the public interest will be taken into account, in conformity with the principles and objective of the Convention".[435] The Implementation Guide refers to the Sofia Guidelines (described above), which Parties could take into account; according to this:

> "grounds for refusal are to be interpreted in a restrictive way with the public interest served by disclosure weighed against the interests of non-disclosure in each case"[436]

[432] Ibid, art. 4(4h)
[433] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 62
[434] Aarhus Convention, art. 4(4h)
[435] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 62
[436] Sofia Guidelines, op.cit. p. 6

The above instruction, the balancing process, puts an enormous pressure on public authorities. The officials might face problems of time resources let alone the limited intellectual capabilities to perform the balancing process, which might demand knowledge of various theoretical concepts. They will also have to make such decisions in the matters concerning the participatory pillar since there is a requirement to disclose information in order to allow the genuine participation of the public. As a result, there is an absolute need to have a strong and working third pillar, which will allow judges to decide whether the balancing process performed by the bureaucratic machine was proper and just. The Implementation Guide highlights that Parties should issue "substantial guidance on balancing so as to limit arbitrary distinctions and promote uniformity."[437]

The refusal should be communicated within the same timeframes and the public should be informed of the rationale behind the rejection.

[437] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 62

Table 1 Environmental information disclosure exceptions under the Article 4

Environmental information disclosure exceptions	
Internal reasons	*External reasons: if information could have adverse effect on:*
❖ information is not held by the relevant authority (but the public authority should direct to the relevant authorities)	❖ the confidentiality of public authorities' proceedings
❖ Request is formulated to generally or "manifestly unreasonable"	❖ international relations and national defence or security
❖ Information is being completed or relates to internal communication	❖ course of justice as persons' right to fair trial
	❖ corporate and industrial confidentiality
	❖ intellectual property rights
	❖ The confidentiality of personal information
	❖ interests of third parties that voluntarily provided information
	❖ Environment that information relates to as for example ecological reserve

Source: (UNECE 1998, Article 4)

Active access to information

Article 5 requires public authorities to collect, possess and disseminate specific information to citizens. First of all the authorities should possess and update information that is relevant to their functions[438]. This obligation forces the officials to establish workable systems whereby information flows continuously and can be properly archived from various sources such as researchers, private operators or monitoring agencies[439]. Moreover, the authorities are obliged to establish mandatory systems in

[438] Aarhus Convention, art. 5(1a)
[439] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 68

order to achieve "an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment".[440]The Parties may satisfy this by imposing requirements on public and private organisations as well as cooperating with research bodies. Furthermore, the dissemination of information must be immediate and directed towards public concerned in the event of serious or imminent threat to human health or environment.[441] It implies that the threat does not have to occur but there must be some anticipation of a threat in order to trigger the process of dissemination. There is also no distinction between threats caused by human activities or natural causes. The rapid dissemination in such situations is essential in order to prevent the potential loss of lives or mitigate the harm and can include reports of research and predictions.

According to Article 5(2) public authorities must ensure that their information is released in a transparent manner and made 'effectively accessible'. They should do this by informing the public about the type of information they possess and about basic procedures for granting the access. Not only does this involve the dissemination of environmental information but also the information about the means of access. Of course this requirement can be seen as a push to make public authorities effective 'educators' of the public. Public authorities should have identified relevant points of contact holding publicly accessible files, registers without imposing any charge and oblige officials to provide support to citizens. Thus, information should be disseminated in a 'user-friendly manner' allowing people to be granted access to libraries through the convenient location, office hours or the availability of specific office equipment.

Furthermore, the Convention requires the Parties to ensure that information becomes 'progressively' available electronically through public telecommunication networks. This information should include environmental reports, legislation, plans, policies and

[440] Aarhus Convention, art. 5(1b)
[441] Ibid, art. 5(1c)

programmes related to the environment.[442] The Parties should publish reports concerning the state of the environment every three-four years.

Whereas Article 5(1) requires Parties to establish mandatory systems to ensure that information flows continuously from (inter alia) private sector to public authorities, Article 5(6) places an obligation on the Parties to encourage the operators to disseminate information to the citizens. This relates especially to those operators whose "activities have a significant impact on the environment"[443] and may be achieved through various voluntary schemes such as eco-labelling or eco-auditing or "by other means".[444] This Article is very important because it may encourage the establishment of a relationship between the applicants and local citizens. As a result, it is addressed to both the public and the private sector. Earlier research[445] has shown that the public is often inclined to send their requests directly to the operators alongside their requests submitted to the public authorities. This is understandable since the process of obtaining information could significantly be shortened. Nevertheless, the Convention mentions schemes that are traditionally associated with the consumer market. As a result the operator might obtain an eco-label that they can put on their products sold far away from the place of production and the local public that could be affected by that production. The information that can be useful for consumers might not satisfy the local citizens. The Convention ignores the need for the establishment of healthy and decent relationships at a local level between citizens and the (private) operators. Such cooperation could be achieved through those 'other means' that could be explicitly mentioned. They could involve liaison committees, where citizens could be regularly updated on the actual environmental policy by an operator rather than expecting citizens

[442] Ibid, art. 5(3)
[443] Ibid, art. 5(6)
[444] Ibid
[445] Radoslaw Stech, 'Environmental Information, Participation and Citizen Activity: Case Studies from Poland and the UK' in Sivaram Vemuri (ed), Connected Accountabilities: Environmental justice and Global Citizenship (Inter-Disciplinary Press 2010)

to seek information through the channels adequate for the consumers. The wording and aim of Article 5(6) is especially weak when we look at Article 5(8) which requires Parties to:

> "develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices"[446]

It is surprising that the above Article does not mention eco-labelling or any other voluntary mechanisms that could be employed by private sector in order to help consumers to make the best environmental choices. It is therefore clear that the Article 5(6) has some ambition to encourage the establishment of a good relationship between the public and the private sector. However, it mentions instruments that are more appropriate for the Article 5(8), thereby, ignoring the needs of the local public that might be affected directly by the activity of a given operator. This reasoning is somewhat supported by the manner in which the Parties report on the implementation of the above articles to the Aarhus Convention Secretariat. Germany for example reports on both articles in conjunction by listing certain voluntary mechanisms that are in place in that country. Many other countries mention only eco-labelling and EMAS as means of implementing the Article 5(6).[447]

Article 5(9) expresses a need to establish, progressively, pollution inventories and registers, which should be based upon common methodology and accessible electronically. Finally, the requirement to disseminate information to the public is subject to the same exceptions as are found in Article 4(3) and Article 4(4). However, as the Implementation Guide highlights, the exceptions should not be applied in the face of

[446] Aarhus Convention, art. 5(8)
[447] http://www.unece.org/env/pp/mop3/mop3.docII.htm

imminent threats.

In summary, the informational pillar offers citizens a comprehensive procedural right of access to information concerning environmental matters. The provisions regulating the public authorities' obligations might be challenging especially for those states contending with the limited financial resources. In addition, the pillar requires more than just a mere investment in public registers or electronic means of providing information. It necessitates additionally the 'user-friendliness' of the officials that are supposed to be open and ready to provide assistance as well as to educate the public on how to gain access. The most problematic issue concerns the exceptions and the potential mistakes that could be made by the officials. It might be the case that the balancing process in some difficult cases could only be performed by the judiciary. In terms of the operators including the private sector, the Convention lacks the same robustness even though there is only a need to encourage (rather than oblige) the operators to disseminate environmental information to the public. The pillar pays more attention to the state of consumer knowledge rather than that of local communities whose wellbeing might be affected by the corporate activity.

The Participatory pillar

"The majority of scholars, along with international and European Institutions as the UNECE and the European Union agree that participation is significant. In general, participation is an important factor in achieving environmental justice[448]. Specifically, institutions accept the need for participation, though there is a major debate over the extent to which citizens should be granted participatory rights, especially in the context

[448] See Chapter 1

of European regulatory scheme[449]. On the one hand, participation can be aimed solely at producing substantive results. In order to achieve this, an interaction between decision-makers and the public could stop at the minimal degree of consultation. Still, participation can take a more deliberative approach that includes "the emphases on reflection, discussion, communication and attempted persuasion"[450] and can be aimed at either legitimization of political decisions or solving environmental problems., there are a number of benefits of participation. Firstly, on the one hand citizens tend to disagree with decisions and projects when they are not part of the process and lack understanding as to goals, methods or timing of proposed change. The outcome of not involving citizens can inhibit the developments[451]. On the other hand, decisions are more likely to be accepted by citizens if the latter have been offered a possibility of providing their input[452]. Secondly, citizens' knowledge can have complementary, if not the same, value to experts' knowledge, given the complexity of environmental cases[453]. Moreover, Barkenbus stresses the importance of citizens' experience with local issues, which should be taken into account, alongside expertise in decision-making processes[454]. Local knowledge can also contribute to well designed projects and to the "long-term viability of a project"[455] and it appears that a discontinuation of participation in a number of World Bank's projects contributed to failure. Thirdly, participation can be

[449]John S Dryzek, *The Politics of the Earth* (Oxford University Press 1997); Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) 21(3) *Oxford Journal of Legal Studies* 415

[450] Steele, 'Participation and Deliberation...' Ibid, p. 428

[451] Desmond M Connor, 'Preventing and Resolving Public Controversy' (Public Affairs and Forest Management Conference, Toronto 1985) (Revised 1994) <http://www.islandnet.com/~connor/preventing.html> accessed 3 July 2010

[452] Frank Fischer, *Citizens, Experts, and the Environment. The Politics of Local Knowledge* (Duke University Press 2000)

[453] Alan Irwin, *Citizen Science: A Study of People, Expertise and Sustainable Development* (Routledge 1995)

[454] Jack Barkenbus, 'Expertise and the Policy Cycle' Energy' (Environment and Resource Center, The University of Tennessee 1998) < http://www.gdrc.org/decision/policy-cycle.pdf > accessed 3 July 2010

[455] Environmental Law Institute (1997 'Transparency and Responsiveness: Building a Participatory Process for Activities Implemented Jointly Under the Climate Change Convention' (Environmental Law Institute, Washington 2997) <http://www.elistore.org/reports_detail.asp?ID=412> accessed 6 July 2010, p. 8

complementary to official and sometimes scarce avenues of inspection or research on particular issues[456]. Fourthly, it can additionally enhance citizens' awareness of environmental matters, thus performing an educational role."[457]

The participatory pillar consists of three articles: Article 6 is entitled 'Public Participation on Specific Activities'; Article 7 covers 'Public Participation Concerning Plans, Programmes and Policies Relating to the Environment' and Article 8 concerns 'Public Participation During the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments'. These elements of the second pillar will be considered and analysed in the subsequent subparagraphs.

Participation on Specific Activities

Article 6 provides opportunities to engage in decision-making processes concerning specific activities that are listed in the Annex 1 to the Convention. Without reviewing that list here, it is sufficient to mention that the content of the Annex is extensive and includes inter alia the energy sector, chemical and mineral industries and waste management. Interestingly, according to the Annex these activities are exempt from the provisions of Article 6 if they are undertaken "exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health".[458] It is debatable how the threshold of the 'significant adverse effect on environment or health' could be applied in such cases, which aim at testing new methodologies. Moreover, the Implementation Guide highlights the fact that the Annex 1 consists of activities that "may have a significant impact"[459] making it even more difficult to determine when the

[456] Ibid
[457] Ibid
[458] Aarhus Convention, Annex 1, art. 22
[459] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 93

research activities can be exempt from public participation.

In addition, activities that are not listed in the Annex can also be open to public participation provided that they may pose a significant environmental impact. The states are allowed discretion to determine whether such unlisted activities can be subject to the provisions of this article.[460] On the other hand, the specific activities can be exempt from public participation if they serve national defence purposes: "if that Party deems that such application would have an adverse effect on these purposes"[461].

The minimum standards that should be met in order to inform the public concerned of the coming decision-making process are considered below. These are written in a passive voice, thus, the Parties can place the obligation of informing the public concerned about the decision-making process on different actors, either public authorities or operators and applicants. It appears that some countries, such as Sweden[462], require applicants to inform the public concerned. The public concerned differs from the 'public' and encapsulates:

> "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest"[463]

It is clear that the aforementioned definition favours those members of the public likely to be located closely to the site of the proposed development and environmental NGOs regardless of their interests and residence. This has received some criticism from the

[460] Aarhus Convention, art. 6(1b)
[461] Ibid, art. 6(1c)
[462] Swedish Environmental Code 1998, Chapter 6, Section 4
[463] Ibid, art. 2(5)

academia and grassroots' activists since it might highlight the privileged position of large and well resourced NGOs, whose aims do not have to be in accordance with the needs of the disadvantaged public.[464]Additionally, some public authorities, having their representatives in the EU Committee of the Regions, issued their concerns over the emphasis put on NGOs engagement by stating that:

> "...in practice it is likely to increase the extent to which environmental interest and pressure groups are able to delay the implementation of necessary development projects, even where every effort has been made to avoid, minimise, mitigate or compensate for environmental impacts of that development"[465]

The above concern has recently been confirmed by Poland, where environmental NGOs used their privileged position to delay or block developments[466]. This may impede the general public participation and minimise attention being placed upon the distinct input of local people.

The public concerned should be given specific information concerning the decision-making process "early in an environmental decision-making procedure, and in an adequate, timely and effective manner".[467] The information should consist of, inter alia, the specific activity, the nature of possible decisions or outline of decisions, the authority responsible for taking the decision, the underpinning procedure and "the fact

[464] Lee and Abott, 'The Usual Suspects?...' supra note 406
[465] Opinion of the Committee of the Regions of 14 June 2001 on the Proposal from the Commission for a Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EC and 96/61/EC (COM(2000) 839 final - 2000/0331 (COD)), art. 1.5
[466] http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_POL_e.pdf
[467] Aarhus Convention, art. 6(2)

that the activity is subject to a national or transboundary environmental impact assessment procedure".[468]

The participatory process must "include reasonable time-frames for the different phases"[469]allowing the public to make sufficient preparatory work in order to participate effectively. The Implementation Guide notes that the 'reasonable time-frames' should also take into account the fact that the public concerned may wish to submit a request for information under the Article 4 of the Convention during the decision-making procedure. As a result, the additional time for public authorities to respond to such request (which may amount to 30 days or more) should not undermine the effective participation.[470] In addition, the States are required to "provide for early public participation, when all options are open and effective public participation can take place".[471] This means that the public authority responsible for taking the decision might have some idea as to the possible outcomes, but should be at the stage of collecting (additional) information and must be ready to consider public concern's opinions and concerns and change its preliminary position. Moreover, complex environmental decisions-making may require public authorities to take a number of decisions having significant impact on the environment at various stages. Effective participation means that the public concerned should be consulted at all such stages.[472]

The next paragraph of Article 6 addresses directly prospective applicants, including the private sector:

"Each Party should, where appropriate, encourage prospective applicants to

[468] Ibid, art. 6(2e)
[469] Aarhus Convention, art. 6(3)
[470] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 102
[471] Aarhus Convention, art. 6(4)
[472] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 102

identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit"[473]

This paragraph concerns the time-frame before the commencement of the decision-making process. It differs from the earlier paragraphs, which require engagement of the public concerned early in the decision-making process. Therefore, the parties may wish to encourage the prospective applicants for the permit to identify the public concerned and establish with them some relationship. The developers should not restrict their communication to 'selected' members of the public but rather identify and discuss with all members of the public concerned[474]. It might be a case that prospective applicants try to identify certain members of the public in order to placate them before the entering the regulated stage of the decision-making process. Thus, this Article encourages states to regulate this preliminary stage by issuing some guidance or through another form.

The above Article carries an advisory character (through such words as 'should', and 'where appropriate', 'encourage'), therefore allowing Parties not to comply with this provision. This stems from a recognition, as the Implementation Guide highlights, that the prospective applicants may use such a process for "propaganda purposes to influence the public concerned, even going so far as to lobby a subset of the public during 'consultations'".[475]

The above assertion is somewhat problematic. First of all, it is uncertain that the operators might wish to resort to sophisticated avenues of influencing the public concerned during the actual decision-making procedure. They might still to choose to

[473] Aarhus Convention, art. 6(5)
[474] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 103
[475] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 103

use language for propaganda purposes and emphasis the 'benefits' of their projects and downplay the negative sides. Secondly, Article 6(5) may contradict Article 5(6) described above. The latter requires parties to encourage operators to communicate the impact of their environmental activities to the public whereas the former requires parties to *consider* whether or not they want to encourage operators to communicate the objectives of their prospective application to the public concerned. However, logically, the operators may just want to use the latter Article to inform whomsoever they want (from the public rather than the public concerned) about their environmental activities including vague future activities. The operators might even not deliberately raise issues concerning the objective of the future applications but simply respond to the public's questions asking about the future activities.

In practice, the advisory character of Article 6(5) lost its weight when the EU decided not to incorporate it into the Directive implementing the Article 6 of the Convention. As a result the Convention could be more decisive as to the operators' communication with the public or the public concerned before applying for a permit. The parties could be obliged to issue some guidelines as to how the operators could identify the public concerned and adhere to the rules of objective discussion.

According to the following paragraph, the Convention requires competent public authorities to provide, free of charge, access to information concerning the decision-making matters to the public concerned. This paragraph makes a direct connection with the informational pillar and recognises the fact that genuine and effective participation cannot take place without access to information. The public concerned should be provided with, at least, a description of the site including: the amount of expected emissions; a depiction of the significant impact that the proposed activity can pose to

the environment; non-technical summaries and the like. The obligation to provide such information is of course subject to exceptions entrenched into the informational pillar.

The next paragraph concerns the decision-making procedures and grants both the public concerned and the whole public the possibility of issuing comments, opinions or analyses in writing or orally during public meetings with the applicant[476].

The remaining articles concern the actual decision and post-decision process. Thus:

> "Each Party shall ensure that in the decision due account is taken of the outcome of the public participation".[477]

The substance of the participation concerns the degree of information that has been taken into account by decision-makers. There are various ways of engaging citizens into the process; however, according to the classical understanding of participation, there is always a question regarding the extent to which peoples' concerns influence the actual decision[478]. It appears that the Aarhus Convention places little emphasis on the substance highlighting only that 'due account' of the participation should be taken into account. The Implementation Guide accepts that "standards for taking into account the outcome of public participation are in development in the countries of the UN/ECE region".[479]In many states, the due account means that the public authority includes a discussion as to how the outcome of the public engagement was scrutinised. It can also mean that the public authority documents the substance of the concerns and includes them in the motivation of the decision. However, it might also be "facilitated by certain logistical measures, such as the registration of written comments and recording of

[476] Aarhus Convention, art. 6(7)
[477] Aarhus Convention, art. 6(8)
[478] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) in R T LeGates and F Stout (eds), *The City Reader* (Routledge 2003) 245
[479] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 109

public hearings"[480]. It is therefore up to the states and not the Convention to establish the meaning of the 'due account'. It seems that states or public authorities can decide to placate the public or engage them substantially into shared decision-making process.

Article 6 strengthens the obligation of the public authorities to take 'due account' of the consultation's outcome by granting the public right to "be promptly informed of the decision" and given "the text of the decision along with the reasons and considerations on which the decision is based".[481] The public is due to be given the text of the decision, which must include reasons on which the decision was based. Whereas the Implementation Guide notes that "the decision-maker can show that it examined the evidence presented by the participants and considered their arguments on any relevant question of law",[482] the Convention fails to make this obligatory. This Article infuses more confusion as to the meaning of the 'due account' in the Convention and, whereas some countries can provide for more detailed provisions concerning this matter, others may apply a minimalistic approach.

Moreover, Article 7 also requires public authorities to take 'due account' of the outcome of public participation concerning plans and programmes relating to the environment.[483] However, it fails to reinforce this concept by a requirement of informing the public of the rationale behind the decision, which could include some reflection on peoples' concerns. As a result the Convention fails to establish a meaningful requirement and floor regarding the 'due account'.

The next paragraph concerns the problem of the application of the Article 6 to the reconsiderations or updates in relation to 'the operating conditions' of the activities

[480] Ibid
[481] Aarhus Convention, art. 6(9)
[482] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 110
[483] For discussion of the Article 7 see below

listed in the Annex 1. The paragraphs 2-9 must be applied "mutatis mutandis, and where appropriate."[484]

Public Participation Concerning Plans, Programmes and Policies Relating to the Environment

Article 7 consists of one extended paragraph and distinguishes between plans and programmes on the one hand and policies on the other. As regards the former:

"Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied."[485]

By making the reference to Article 6 the public should be granted reasonable time-frames, opportunities for early engagement and information in order to ensure effective participation. In addition, their opinions should be given 'due account' by public authorities.

As to the latter, the Convention states only that the parties "shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment"[486] and makes neither explicit nor direct reference to the Article 6. The 'policies' are not defined and, as the Implementation Guide explains, the Convention makes the distinction between plans, programmes and policies because the latter are "typically less concrete"[487] than the former and require a more thorough and profound understanding of the legalities and political context of a particular place", which

[484] Aarhus Convention, art. 6(10)
[485] Aarhus Convention, art. 7
[486] Ibid
[487] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 118

includes “history and culture and entire legal frameworks that extend beyond the finite area in which they are developed.”[488]

Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments (hereafter executive regulations)

Article 8 carries a broad definition of the executive regulations in order to prevent any narrowing by the States, who use various terminologies for different forms of normative acts.[489] The Article consists of one paragraph with a number of specific provisions but does not make any reference to the provisions of the Article 6. Thus, the parties should endeavour to “promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations...”,[490] which may pose an environmental impact. Participation should occur within ‘time-frames’ and the public should be given access to draft executive regulations, a possibility to comment directly or through their “consultative representative bodies” and the outcome of the engagement “shall be taken into account as far as possible.”[491] The phrase ‘as far as possible’ is definitely less rigid than the ‘due account”, which is entrenched into Articles 6 and 7. This stems from the fact that the developments of specific activities covered by Article 6 affect interests of specific individuals or groups.[492]

Summary

[488] Ibid
[489] Ibid 120
[490] Aarhus Convention, art. 8
[491] Ibid
[492] Casey- Lefkowitz, Stec and Jendroska, ‘The Aarhus Convention...’, op cit., p. 109

The participatory pillar offers good and expanded procedural right of involving the public concerned into participation in decision-making in environmental matters. The whole pillar is incomplete, however, due to its limitations concerning the public engagement regarding the legislative process. In addition, the pillar is controversial because it provides greater rights to the NGOs and leaves the issue of defining the 'due account' of the outcome of the consultation to the discretion of the parties.

Access to Justice

The third pillar of the Convention is entrenched into Article 9, which consists of five paragraphs. The general implementation requirements include: the availability of impartial courts and review bodies; rules regarding standing; accessibility of remedies such as injunctive relief; and, of course, the availability of the assistance mechanism and information to citizens concerning the procedures under this pillar[493]. Let us consider the specific provisions below.

The first paragraph provides the public with the right to seek review of information, which was refused, incompletely answered or dealt with inadequately with the provisions of the Article 4. This can include any provisions that were broken including the timing, the form in which the information was provided and the grounds for refusal. The review procedure should be held "before a court of law or another independent and impartial body established by law".[494] The final decisions reached during the review process are binding on the public authorities. Crucially:

> "In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious

[493] Ibid 124
[494] Aarhus Convention, art. 9(1)

> procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law."[495]

Apart from the access to courts, citizens' appeals can be subject to 'reconsiderations' by a public authority within the administrative process. This may be speedy and citizens could, as in Poland, resort to the court if the appeal by higher administrative body if deemed necessary.[496] The idea of the 'independent and impartial body established by law' was developed by the ECHR[497] and can include quasi-judicial bodies as long as they are impartial and free from governmental or political influence. This can also include the institution of ombudsman known well in many European countries[498].

The second paragraph allows the members of the public concerned to "challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law..."[499] either in the court or other impartial and independent body.

As to the standing, the above provision regards the 'public concerned' and some provisions of Article 6 (paragraphs 3, 6 and 7) concern 'the public'. The latter, for example, can submit their opinions in writing or orally during the public hearings. By doing this they gain the status of the public concerned and such persons are also granted access to justice under Article 9(2). In addition, the persons wishing to file for review must prove that they have a sufficient interest or maintain an impairment of a right. The

[495] Ibid
[496] Ibid
[497] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, art. 6 mentions an independent and impartial tribunal established by law
[498] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 127
[499] Aarhus Convention, art. 9(2)

former encapsulates NGOs promoting environmental protection because, by definition, such organisations are "deemed to have an interest".[500] It can also include other members of the public concerned (or the public, who were granted the status of the public concerned) in accordance with the national law and "consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention".[501] The status of the sufficient interest enabling the standing can also be granted if a person's right was impaired and can be applied in legal systems, where such a requirement already exist. Furthermore, the access to court or other judicial body must not be prevented by a preliminary challenge in the administrative authority.

The third paragraph grants additional rights, without prejudice to the two above sections and in line with national law, namely members of the public have:

> "access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"[502]

The first two paragraphs give the right to redress the harm, whereas that above grants citizens (upon requirements of the national law) the right to enforce the law, either directly or indirectly. The former is performed by standing in the court and the latter by issuing complaints through various mechanisms as citizens' petition or complaints. [503]

Fourthly, the procedures under the three above paragraphs must provide "adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."[504]

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[500] Ibid, art. 2
[501] Ibid, art. 9(2)
[502] Aarhus Convention, art. 9(3)
[503] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 130
[504] Aarhus Convention, art. 9(4)

The above reflects the aim of the judicial or administrative mechanism to remedy the situation that provided ground for the challenge. This should be adequate, therefore allowing the plaintiff to receive compensation if the irreversible damage occurred. If the harm is reversible, or can be lessened, the court may issue an order, injunctive relief, forcing the defendant to stop their activity or undertake certain action. The remedies must also be effective; therefore, 'enforceable' and the states "should try to eliminate any potential barriers to the enforcement of injunctions and other remedies".[505]Decisions should be given in writing and be publically available. Crucially, the ability to receive a remedy under the Convention should not be restricted by the costs associated with, inter alia, court, expert, transport fees.

The final paragraph of the pillar concerns the barriers to access to justice; the States should endeavour to provide information and assistance regarding the procedures including the 'removal or reduction' of the financial barriers.

Summary

Article 3 aims at safeguarding the provisions granted by the first two pillars of the Convention. It relies on the Principle 10 of the Rio Declaration and Sofia Guidelines, which focused on the availability of the administrative and judicial proceeding with no detailed ambitions of eliminating the various barriers which people and NGOs face before filing cases. Article 9 consists of such extended details and its ultimate goal goes beyond being a mere safeguard mechanism. It has become a substantial part of the Convention; a true pillar on access to justice.

[505] Casey- Lefkowitz, Stec and Jendroska, 'The Aarhus Convention...', op cit., p. 133

The first paragraph provides an efficient safeguard for Article 4. Any person whose request for information has been violated can challenge the decision of the public authority. This further reinforces the strong and comprehensive informational pillar. In addition, despite the ambiguous wording, this paragraphs aims at allowing citizens to seek justice by resort to alternative mechanisms, namely judicial and administrative. Of course, this might not be novel in some countries such as the UK, where little change is needed in order to implement this provision.[506]

The second paragraph provides broad access to justice for those dissatisfied with the procedural and substantive legality of decisions taken under Article 6. The ability to challenge the procedural issues can directly enforce the features of public participation provided by the Convention, whereas the substantive challenge is less clear. It may refer to traditional mechanisms in the English law such as *ultra vires* and Wednesbury unreasonableness but may also concern the appeal on the merits[507]. However, on closer reading, the Aarhus Convention substantive ground in the Article 9(2) is qualified by the word 'legality'. This implies that there must be an error of law that the applicant must identify rather than the mere reference to the merits of administrative decisions. Still, the substantive may especially pose problems in the UK. There is some concern over the general preparedness of judges to deal with environmental cases, which may be associated with the poor understanding or lack of sympathy to such concepts as 'sustainable development' or 'precautionary principle'. In addition, many cases are currently filed in order to review merits and courts seem to be reluctant to handle them.[508] McAllister argues convincingly that the broad access to justice is "diluted in

[506] Lee and Abott, 'The Usual Suspects?...' op. cit., p. 91
[507] Ibid 103
[508] Carol Hatton, Pamela Castle, and Martyn Day, 'The environment and the law - does our legal system deliver access to justice? A review' (2004) 6(4) *Environmental Law Review* 240

strength"[509] due to the limitations inherent to the difficult interpretation of the 'sufficient interest'. This hits the members of the public in particular since environmental NGOs are automatically granted such a status.

The following paragraphs allow the public to enforce the law and obtain remedies if their rights have been violated. Additionally, the pillar emphasises the problem of barriers preventing access to justice. The latter is of great importance in countries, such as the UK, where the barriers are especially apparent.

[509] Sean T McAllister, 'The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (1998) 10 *Colorado Journal of International Environmental Law and Policy* 187, 199

Implementation of the Aarhus Convention in the UK

The implementation of the three pillars of the Aarhus Convention required multitude of alterations of the existing legal mechanisms in the UK and an establishment of new instruments. Much of the implementation was carried out through the transposition of the European Union legislation. This stems from two major reasons: firstly, much of the UK environmental law has originated from the EU law; secondly, the EU has approved and transposed the Aarhus Convention "on behalf of the European Community"[510]. The purpose of part of the thesis is to sketch the implementation of the first two pillars and provide a wider description of the issues relating to the transposition of the third pillar.

The informational and participatory pillars

The first pillar has been implemented primarily through the Environmental Information Regulations 2004, which came into force on 1st January 2005. The Regulations give effect to the EU Directive 2003/4/EC on public access to environmental information.[511] The above provisions are supported by the existing regulations concerning the Environmental Impact Assessment[512] and the Strategic Environmental Assessment[513]. The second pillar's implementation results predominantly from the EU Directive[514], which amended the EU Environmental Impact Assessment and IPPC directives.

[510] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters
[511] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC
[512] The Town and Country Planning (Environmental Impact Assessment) Regulations 2011
[513] The Environmental Assessment of Plans and Programmes Regulations 2004
[514] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

Access to justice pillar

The EU intends to implement the third pillar by way of a single directive, which is at the draft stage[515]. The implementation is to some extent effective through the above mentioned directives relating to access to information and public participation. Thus, Directive 2003/4/EC[516], like Aarhus's Article 9(1) provides for a review procedure administratively or "by an independent and impartial body established by law"[517]. Article 9(2) of the Aarhus Convention was implemented through the Directive 2003/35/EC[518] which amended the IPPC Directive and Environmental Assessment Directive. The former states that the public with sufficient interest

> "have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."[519]

The latter Environmental Impact Assessment Directive uses similar language in implementing Article 9(2) of the Convention.

The above implementation measures provide the right to access to justice for members of the public with sufficient interest. The author reviewed in Chapter 1[520] the UK's approach to standing in public law cases. The study underpinning the EU draft Directive on access to justice confirmed the generous and liberal approach to standing in the UK:

[515] Directive of the European Parliament and of the Council on access to justice in environmental matters COM/2003/0624 final
[516] Supra note 511
[517] Directive 2003/4/EC Art 6(1)
[518] Supra note 514
[519] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, Art 16
[520] See p. 80

> "A special situation exists in the UK in comparison with continental law systems. Whilst the situation in the UK resembles that requiring that a "sufficient interest" be demonstrated before an environmental association may have standing before the courts, the fact that this is a common law system means that case law has a major role. Through developments in the case law the position regarding standing for NGOs has recently been considerably expanded. In the case of well-established environmental associations, standing is sometimes taken for granted and not questioned further by the courts. In this regard, the approach in the UK could be categorised as extensive, even though it is far from representing an actio popularis."[521]

The study indicated that costs constituted a single barrier to justice in the country echoing the national discussion. The next paragraph will review the issue of costs which, at the time of writing this thesis, is claimed to be satisfied by the PCO[522] instrument available in the courts. The issue has recently been well documented and summarised[523] and we will take a chronological approach in this summary.

Cost capping was an issue in *R (Buglife, the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation*[524]. There the NGO challenged

[521]Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, 'Access to Justice in Environmental Matters' (Final Report) (European Commission 2002) <http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf> accessed 1 September 2011, p. 22

[522] See p. 88

[523] Robert G Lee and Radoslaw Stech, 'Access to Environmental Justice in England and Wales: Funding Representation for Court Reviews of Administrative Action' in Jenny Steele, Willem H Van Boom (eds), *Mass Justice. Challenges of Representation and Distribution* (Edward Elgar 2011); James Maurici, 'Aarhus and Access to Justice' (2011) *Judicial Review* 253; Radoslaw Stech, Robert G Lee and Deborah Tripley, 'Costs Barriers... supra note 32; Paul Stookes, 'The environment: public involvement and constraints in access to justice' (2008) 20(4) *Environmental Law and Management* 165; Ole W Pedersen, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law' (2011) 31(2) *Legal Studies* 279; Lord Justice Brooke, 'David Hall Memorial Lecture: Environmental Justice: the cost barrier' (2006) 18(3) *Journal of Environmental Law* 341

[524] *R (Buglife, the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209

the decision of the local planning authority to grant consent to the development of a Royal Mail distribution centre on land which provided a habitat to endangered species of invertebrates. Although it was accepted that while in granting a PCO in favour of a claimant it was open to the court to make an order capping the liability of the defendant also, such reciprocal caps were entirely discretionary. The Court of Appeal ruled out any assumption that where the claimant's liability for costs was capped, the defendant should equally benefit from a back to back cap on liability. Such an order lay within the courts' discretion but whether or not this was exercised in this manner would depend entirely upon the circumstances of the case.

Environmental cases pitch one into the heart of uncertainties inherent in the PCO principles particularly regarding public and private interests. There is no definition as such of the public interest and it has been suggested that a broad purposive approach be taken to this question[525]. It has been asserted above that environmental issues naturally entail public interests involving questions of protection of the environment rather than narrowly drawn personal rights[526]. In the case of a local project there may be considerable local interest but the development itself may be of a type commonly found in other locations (as are, for example, phone masts or wind turbines). In part, as a consequence, opposition to the project may raise few novel or interesting points of law.[527]

[525] Sir Maurice Kay, 'Litigating in the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation' (Liberty 2006)
[526] *R v Somerset County Council* supra note 212
[527] An example of this might be the case of *R (Bullmore) v. West Hertfordshire Hospitals NHS Trust* [2007] EWCA Civ. 609 where the closure of a local hospital was said not to raise issues of such general public interest that they should be litigated under the protective costs regime but *R(Compton) v Wiltshire PCT* [2008] EWCA 749 (also about hospital closures) in which it was said that *Corner House* did not demand that the issue had to be of national importance in order to qualify for a PCO.

Balanced against this, because so much of environmental law in the UK emanates from EU law, the adequacy of the UK response to its EU obligations may be at issue. Moreover, if one treats the rights under the Aarhus Convention as a package, then rights of access to the courts, in line with Article 9, may be seen as an issue of wider public interest in ensuring environmental justice. That is to say that the public interest is served in establishing effective court access in its own right. This is, however, a rather different matter than saying that it is the resolution of the issues involved in a claim that serves the public interest. This more limited formulation is written into the CPAG principles[528], but one might argue that these principles encompass many areas of public law including environmental law, which might be seen as a special case, post-Aarhus. Significantly the CPAG case pre-dates the UK ratification of the Convention while the revision of the principles in Corner House were handed down by the Court of Appeal the day after ratification. Understandably, therefore, neither of these two leading cases may take full account of international obligations relating to environmental justice.

The notion that a claimant has no private interest in the outcome of a case sits uneasily with the rule on standing that requires a sufficient interest[529] in the subject matter of the application[530] but the position is not entirely irreconcilable. As noted in Chapter 1,[531] English law has one of the most generous approaches to *locus standi* such that any established environmental NGO is unlikely to be refused permission to bring an environmental judicial review application on grounds of standing. That being the case, it might be said that such a body has sufficient interest in a case even though it has no private interest as such. For individual claimants, however, the sufficient interest in the litigation will often take the form of an immediate private interest in the matter.

[528] See p. 89
[529] Section 31(3) Supreme Court Act 1981
[530] Richard Stein and Jamie Beagant, 'Protective Cost Orders' (2005) 10(3) *Judicial Review* 206
[531] Supra note 206

Since *Corner House* the Kay Report concerning the litigation in the public interest,[532] the Sullivan Report concerning the environmental litigation[533] and the Courts[534] have doubted the workability of a strict rule that there is no private interest whatsoever. The Sullivan Report (2008) was a report of a Working Party chaired by Mr Justice Sullivan, a nominated Administrative Court Judge, The Working Party was made up of lawyers from claimant and defendant law firms and from government, academia and WWF-UK[535]. Although it had no official status, its Chair and its composition gave it great credibility. The introduction, which was written by Mr Justice Sullivan was likely to represent[536] his genuine opinion and predicted the pronouncement of the UK's breach of the Aarhus Convention by the Aarhus Convention Compliance Committee:

> "When it signed up for the Aarhus Convention nearly a decade ago the United Kingdom undertook to ensure that ordinary members of the public who wished to pursue environmental law challenges should have access to procedures that were 'fair, equitable, timely, and not prohibitively expensive'.[...] Unless it is changed, our costs regime will perpetuate the inevitable inequality of arms between the publicly funded bodies that take decisions in the environmental field and the individuals and environmental groups who have to rely on their own resources if they wish to challenge those decisions [...] Unless more is done, and the court's approach to costs is altered so as to recognise that there is a public interest in securing compliance with environmental law, it will only be a

[532] Sir Maurice Kay, 'Litigating in the Public Interest...' supra note 525
[533] Lord Justice Sullivan, 'Ensuring Access to Justice in England and Wales' (May 2008) (Sullivan Report)
[534] See Sir Mark Potter in *Wilkinson v Kitzinger* [2006] EWHC 835 and Lord Justice Carnwath in *R (on the application of Derek England) v Tower Hamlets LBC* [2006] EWCA Civ 1742 and Smith LJ in *R (Compton) v Wiltshire Primary Care Trust* [2008] C.P. Rep 36 but in *Goodson v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172 the rule of 'no private interest' was said to be expressed in 'unqualified' terms in *Corner House*
[535] Sullivan Report, supra note 533, p. 37
[536] See David Wolfe, 'Accessing justice: implications of the Sullivan Report' (2008) 20 *Environmental Law and Management* 215

matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus"[537].

The Report concluded, in line with the above discussion, that judicial review filed for the purpose of protecting the environment is "inherently a matter of public interest".[538] It noted that the Aarhus Convention contains "no exclusion on cases involving private interests" and the requirement of public interest excludes the overall usefulness of PCO in satisfying the Aarhus Convention requirement. The following paragraph will provide a review of judicial interpretation and modification of the public interest condition attached to the PCO.

In *R. (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust*[539] Lloyd Jones J observed that the *Corner House* requirement of 'no private interest' has been "diluted in the later case law"[540]. In judge's opinion the concept was elusive and troubling to apply in practice in cases where a person sought a private remedy on behalf of a larger group of interested persons. He suggested that the private interest of the applicant should not disqualify the challenge altogether and that it should be "a flexible element in the court's consideration"[541]. In *R (on the application of McCaw) v City of Westminster Magistrates Court and Middlesex S.A.R.*[542] Latham LJ heard an application for a PCO to support a challenge to the decision of a district judge in the Westminster Magistrates Court in a statutory nuisance case. Noting that *Corner House* seemed not to take into account considerations of the Aarhus Convention, and acknowledging the

[537] Sullivan Report, supra note 533, p. 2
[538] Ibid 20
[539] supra note *527*
[540] Ibid 19
[541] Ibid
[542] *R (on the application of McCaw) v City of Westminster Magistrates Court and Middlesex S.A.R.* [2008] EWHC 1504 (Admin)

Sullivan Report, he ruled that the apparent requirement that there should be no private interests in the outcome of the case had, in practical terms, been reinterpreted as an approach whereby private interest is merely one of the material considerations when the court comes to its conclusions. This might suggest that it is a matter for the court to determine if there are issues of public interest that rank at least equally alongside any private interest. In *R. (on the application of Compton) v Wiltshire Primary Care Trust*[543] some clarification of the rule was provided. Walter J argued that the relevant *Corner House* paragraphs should not "be read as statutory provisions, nor to be read in an over-restrictive way".[544]

The Government was satisfied, even before the clarification in *Compton* that: "provisions on costs capping and PCOs can help to provide certainty to a party as to their potential exposure to an adverse costs order if they are ultimately unsuccessful."[545] The author argues to the contrary and the data analysis in Chapter 8 will show that not many ELF clients took an opportunity of applying for the PCO[546]. While the recent judicial intervention seems fair it is not helpful for intending litigants because it is difficult to assess whether the court is likely to take less restrictive view of the facts of the particular case. This lack of certainty may deter environmental litigation from the outset given that the PCO application is itself not cost-free but more importantly that exposure to the heavy costs of a defendant may act as "a potent factor in deterring litigation"[547].

Legal challenges against the UK government

[543] supra note 527
[544] Ibid 23
[545] UNECE 'Implementation Report submitted by the United Kingdom', supra note 250 p. 21
[546] See Chapter 8, p. 296
[547] Brooke LJ in *R (on the application of Burkett) v Hammersmith and Fulham LBC* [2004] EWCA Civ 1342 at 80

One of the reasons for conducting this research was to inform the debate and provide evidence in relation to the costs barriers to judicial review in the UK[548]. The following paragraphs will provide a short overview of three legal challenges that the Government has faced since 2005.

Firstly, in December 2005 WWF-UK filed a formal complaint with the EU Commission in relation to an alleged failure of the UK Government to comply with the Article 9(4) of the Aarhus Convention as implemented by Council Directives 85/337/EEC and 96/61/EC. The complaint was lodged with a view to supporting the EU Commission in its role as the 'guardian of the Treaty'. Specifically, Article 258 of the Treaty on the Functioning of the European Union[549] prescribes that:

> "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

Following the complaint, the EU Commission issued a reasoned opinion on the UK Government's compliance with the Aarhus Convention in March 2010[550]. It highlighted that it was

[548] See Introduction, p. 21
[549] Formerly Article 226 of the Treaty on the European Community
[550] European Commission 'Environment: Commission warns UK about unfair cost of challenging decisions' (IP/10/312) (Brussels 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/312&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 1 September 2011

> "concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases against public bodies".

In line with Article 258 TFEU the UK Government had a chance to submit its observations concerning the reasoned opinion. Such communication is not open to the public thus it is not possible to establish the UK Government's arguments in this case. By April 2011, however, the EU Commission was still not satisfied with the UK Government's compliance and brought the matter before the Court of Justice of the European Union[551]. The case is pending at the time of writing this thesis.

Secondly, in December 2008, Client Earth, the Marine Conservation Society and Mr. Robert Latimer lodged a communication to the Aarhus Convention Compliance Committee[552] in relation to *Port of Tyne* case. The case concerned an alleged failure of the UK Government to provide access to justice to challenge a licence granted to the Port of Tyne. The licence allowed for the "disposal and protective capping of highly contaminated port dredge materials at an existing marine disposal site".[553] The case concerned also the general failure of the UK Government's to fulfil its obligations under Article 9 of the Aarhus Convention[554]. The Committee reviewed the material facts of the case and the existing policies, laws and rules (such as PCOs) concerning the issue of costs in judicial review in the UK. It found that:

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[551] European Commission, 'EC takes UK to court on cost of environment cases' (Brussels 2011) <http://ec.europa.eu/unitedkingdom/press/frontpage/2011/1152_en.htm> accessed 1 September 2011

[552] The Compliance Committee was constituted under Article 15 of the Aarhus Convention:
"The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention."

[553] Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland; adopted by the Compliance Committee on 24 September 2010, p.3

[554] Ibid

> "the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest."[555]

In 2010 the Compliance Committee issued the final findings in which it pronounced that the UK Government:

> "has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider."[556]

Thirdly, the earlier cited case of *R (on the application of Edwards) v Environment Agency*[557] reached the Supreme Court of the United Kingdom[558]. The Supreme Court was unsure whether to use an objective or subjective test in relation to the apportionment of costs in the case. The difference between the two tests is that, in the former, a court makes a reference to an objective basis (such a 'an ordinary member of the public'), and in the latter, by reference to the means of the applicant, when deciding on costs. The Sullivan Report[559] suggested that the objective test should be followed

[555] Ibid 135
[556] Ibid 136
[557] Supra note 319
[558] Ibid
[559] Supra note 533

when deciding on PCOs and the apportionment of costs in judicial review in the UK. However, in *R (Garner) v Elmbridge Borough Council* [2011] 1 Costs LR 48, Lord Justice Sullivan expressed uncertainty as to which test should be applied in the UK and suggested a possibility of using "some combination of the two bases".[560] Thus, in *Edwards* case, the Supreme Court of Justice referred the question as to which test conforms with the Article 9(4) of the Aarhus Convention to the Court of Justice of the European Union. That reference, under Article 267 TFEU, will provide an answer to the question and should allow the UK Supreme Court to deliver a final ruling in *Edwards* case.

Reform of civil litigation costs (environmental cases)

In November 2008 Sir Anthony Clarke (then Master of Rolls) announced a need for setting up a complete review into the costs of litigation. Lord Justice Jackson was appointed to lead a thorough review including a review of environmental cases. He published a final report in December 2010 and made recommendations. Essentially, the Report recommends an application of "qualified one way cost shifting" which constitutes an elaboration of a "one way cost shifting". Both terms are explained below:

> One way cost shifting is: "A regime under which the defendant pays the claimant's costs if its claim is successful, but the claimant does not pay the defendant's costs if the claim is unsuccessful."[561]

> Qualified one way cost shifting is: "A system of one way costs shifting which may become a two way costs shifting system in certain circumstances, e.g. if it **is just that there be two way costs shifting given the resources available to**

[560] *R (Garner) v Elmbridge Borough Council* [2011] 1 Costs LR 48, at 42
[561] Lord Justice Jackson, 'Review of the Civil Litigation Costs: Final Report' (The Stationery Office 2010), p. XIII

the parties."[562]

Jackson provided the following reasons in support of the qualified one way cost shifting:

> "(i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.
>
> (ii) [...] it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases.
>
> (iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.
>
> (iv) [...] it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.
>
> (v) One way costs shifting in judicial review cases has proved satisfactory in Canada [...]
>
> (vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value."[563]

Following the publication of the Jackson Report, the Ministry of Justice, published a consultation paper on the review of the costs in environmental judicial review in October 2011[564]. As this thesis was being submitted, the Ministry published a summary

[562] Ibid, p. XVI (emphasis in bold original)
[563] Ibid 310-311
[564] Ministry of Justice ' Cost Protection for Litigants...' supra note 4

report and initial policy formulation in relation to this matter. The consultation suggested the need for greater clarity about the level of costs perhaps through a codification of the rules on PCOs.

The summary report accepts that respondents felt that high costs were a barrier to judicial review and that protection as to costs would allow environmental challenges through judicial review in line with the Aarhus Convention, not least by negating uncertainty as to exposure to defence costs. A number of respondents suggested that the full one way cost shifting for an individual (that is an exposure to costs set to zero) would be an appropriate way of satisfying the compliance with the Aarhus Convention. Ultimately the Government's initial proposal is to set the cap on applicants' costs to £5000 for an individual, and £10000 for an organisation.

Further, the Government recommended that there should be a cross-cap set at £35,000. The cross-cap relates to the amount of money that a successful applicant could recover from a defendant. Environmental NGOs opposed the recommendation arguing it might inhibit the claimant from making a proper claim or mean that not all costs may be recovered even if the claim succeeds. It was said it would make it more difficult for solicitors acting under a conditional fee agreement because they will face not only the risk of losing but the risk of not being able to recover full costs if successful. Again this amount would not be open to challenge.

However, in December 2012, following the Prime Minister's speech at the CBI Conference,[565] the Ministry of Justice published a consultation paper[566] containing

[565] David Cameron's speech to the CBI's Annual Conference 2012. Available at: www.cbi.org.uk/media-centre/videos/2012/11/david-cameron-cbi-annual-conference-speech.

[566] Ministry of Justice 'Judicial Review: Proposals for Reforms' Consultation Paper CP25/2012) (London, 2012). Available at: https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf.

firm[567] proposals concerning its plans to reform judicial review in the UK. Although the proposals concerned various categories of judicial review, including notorious asylum and immigration claims, the following analysis will concentrate on those relating to environment. First, the government intends to reduce the time limits for decisions of planning authorities from a liberal three months to six weeks. This would put the time limit in line with statutory review under section 288 of the Town and Country Planning Act 1990. This section provides a basis for challenging the decisions of the Secretary of State following appeal, or commonly named 'call-in' applications. Further, the government proposes:

"that any challenge to a continuing breach or cases involving multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds".[568]

Secondly, the government opposes the number of opportunities that the claimant may enjoy in applying for permission for judicial review.[569] It sets out the following proposals to rationalise the process:

"the first would remove the right to an oral renewal in cases where there has already been a prior judicial process involving a hearing considering substantially the same issue as raised in the Judicial Review claim;

the second would remove the right to an oral renewal in cases which the Judge, on

[567] The consultation paper resembles more of a White Paper setting out clear proposals and, in light of the Prime Minister's announcement, offered only a six-week consultation period as opposed to the usual three-month period.
[568] Ministry of Justice,supra note 566 at 65.

written submissions, has determined to be 'totally without merit".[570]

Thirdly, the government intends to make changes to the fees system. This should be read in light of the earlier announcement by Ministry of Justice.[571] This was published in November 2011 and sets out proposals to increase the fees.[572] The proposals include an increase in the fees for both the permission (currently £60) and substantive (currently £215) stages to £235 for both. Further, the government intends to introduce an additional fee for an oral renewal which would stand at £235.

Summary

Chapter 3 analysed the UNECE Convention on access to information, participation in decision-making and access to justice in environmental matters (Aarhus Convention) which is binding in the UK through EU law. It is alleged by the Aarhus Convention Compliance Committee and the EU Commission that the UK Government is in breach of the Convention's third pillar which requires access to a review procedure not to be "prohibitively expensive" (art 9(4)).

[570] Ibid at 76.
[571] Ministry of Justice *Fees in the High Court and Court of Appeal*, CP 15/2011, (London 2011).
[572] Since the government has not published a response to the 2011 consultation paper these proposals will be dealt with alongside the proposals set out in the 2012 Ministry of Justice paper (December 2012).

Part II Research settings and methodology

The second Part of the thesis is divided into two Chapters. First one will review the research settings and the E.L.F. *modus operandi*. The subsequent Chapter will provide an overview of the methodological approach.

Chapter 4 Research settings – Environmental Law Foundation

The empirical research which forms part of this thesis was conducted in Environmental Law Foundation (E.L.F). This section will explain the way in which E.L.F. handles environmental cases. The extensive explanation is necessary for two important reasons. Firstly, this will provide an overview of the research field, an elementary part of any research; secondly, this is needed to meet the requirements of the pragmatist, epistemological perspective.

Environmental Law Foundation – an overview

E.L.F. was established in January 1992 by a group of environmentalists, lawyers and scientists. The initiators emphasised that access to healthy and sustainable environment is essential for securing a human right to just and fair society and understood their mission as requiring a cross-disciplinary approach to address the complex environmental concerns. E.L.F.'s role has been consistent over the years and has focused on raising awareness of environmental rights, pursuing community empowerment projects, and providing access to law for individuals and communities in order to protect their environment. Its activities predate, but have centred around, the three pillars of the Aarhus Convention. E.L.F. helps the public to gain access to

environmental information, facilitating their participation in environmental decision-making and supporting them in litigation.[573]

E.L.F. has been primarily focused on fortifying local people and communities as they organise themselves in an ad hoc manner to work on particular issues. Cases should have an environmental aspect and all such cases are accepted for potential referral within the Advice and Referral Service (hereafter A&R Service). This makes E.L.F. a distinctive organisation in the UK since other environmental NGOs tend to provide legal advice to projects that are likely to receive media attention and become high profile cases. E.L.F.'s focus has been consistent from its establishment and was relatively quickly recognised nationally.[574]

In addition to the A&R Service, E.L.F. runs a Sustainable Communities Project aiming at empowering the public in English regions by running seminars, workshops, surgeries and other events. Moreover, E.L.F. engages in the wide training and educational activities and conducts policy analyses and research projects.[575]

Funding arrangements

The question of funding is of utmost importance for the purpose of this thesis. If a thesis that E.L.F. is publicly funded (at the time of conducting this research) can be proved then in contributes to the UK Government's aim of satisfying the requirements of Article 9(5) of the Aarhus Convention.[576]The author asked the trustees whether they could provide details of the funding arrangement concerning the A&R Service to no

[573] Environmental Law Foundation, <http://www.elflaw.org/site/index.php?id=2> accessed 15 August 2011

[574] J Vidal, 'The defenders Communities which clash with corporate Goliaths face an uphill struggle. Now the green arm of the law can offer help' *The Guardian* (Manchester, 9 April 1993) <http://www.newsuk.co.uk/newsuk/advancedSearchDisplayRecord.do?SortType=reverseChronological&PageSize=50&ItemNumber=64&QueryType=quickSearch> accessed 15 February 2010

[575]Environmental Law Foundation 'What we do' <http://www.elflaw.org/site/index.php?id=3> accessed 15 February 2010

[576] See p. 313 for analysis

avail. E.L.F. is currently struggling to secure funding to continue its activity and it might explain the trustees reluctance to disclose details of funding arrangements. The E.L.F. website indicates that the charity is;

> "[f]unded by private donors, our members, the Department for Communities and Local Government and the Tides Foundation. The Environmental Law Foundation is a registered charity (number 1045918) and a non-profit company limited by guarantee in England (number 2485383)."[577]

However, the previous website indicated that the charity was also funded by Big Lottery Fund (hereafter BIG)[578]. The author checked the publicly available Big Fund website and found that E.L.F. received £203,314 in 2007[579]. The website allows a search of some details concerning the grants, which are held on an Excel document. It states the purpose of the grant:

> "This project represents a major expansion of an existing service and will provide a free telephone tax advice service across England and Wales, although it is estimated that calls from Wales will represent a very small proportion of the total. Individuals will be supported with more in-depth advice provided by specialist caseworkers where necessary." [580]

The above offers a clear indication that the A&R Service has been funded by BIG at some time covered by this research. It is significant given the nature of the Fund explained below.

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[577] Environmental Law Foundation, <http://www.elflaw.org/?> accessed 15 August 2011
[578] Ibid, accessed 1 January 2010. The author has taken part in designing the new website as part of his consultancy work for E.L.F.
[579] Big Lottery Fund 'Big delivers £24 million advice package across England' <http://news.biglotteryfund.org.uk/pr_130607_nat_adv_big_delivers_24_million?regioncode=-nw&status=theProg&title=Big%20delivers%20%C2%A324%20million%20advice%20package%20across%20England?> accessed 1 October 2011
[580] Big Lottery Fund, Grant details <http://www.biglotteryfundgrants.org.uk:8080/grant-search/gs_003.xsql> accessed 1 October 2011

BIG is “a non-departmental public body sponsored by the Cabinet Office”. It distributes “46 per cent of all funds raised for good causes (about 13 pence of every pound spent on a Lottery Ticket) by The National Lottery”[581]. The Fund is governed by Part II of the National Lottery Act 1993 and s.21(1) stipulates that it is

> “maintained under the control and management of the Secretary of State and known as the National Lottery Distribution Fund”

The Secretary of State receives money from the sale of the lottery tickets and transfers it to the Fund which allocates the grants through “the distributing bodies”[582]. The latter must allocate the grants under the directions of the Secretary of State[583] who has the “power to prohibit distribution in certain cases”[584]. In *Paul Stuart Allen, (Valuation Officer) v English Sports Council/Sports Council Trust Company*[585] the Upper Tribunal (Lands Chamber) recognised the powerful position of the Secretary of State:

> “One matter that is to be noted, however, is that it is SE [Sports England] that it is the lottery distributor, and it can be assumed that it would not have awarded the grant unless in its view it represented value for money. Moreover the result of the section 27 process, under which the Secretary of State has power to prohibit a distributing body from distributing the grant, implies that the Secretary of State was of the same view”[586]. [*explanation added*]

[581] Big Lottery Fund ‘About the Big Lottery Fund’ < http://www.biglotteryfund.org.uk/index/about-uk/about_blf.htm> 1 October 2011
[582] National Lottery Act 1993 s. 23
[583] Ibid s. 26(1)
[584] Ibid s. 27
[585] *Paul Stuart Allen, (Valuation Officer) v English Sports Council/Sports Council Trust Company* [2009] UKUT 187 (LC)
[586] Ibid 72

Moreover BIG published 'Good Governance Guide',[587] which was available at the time[588] the E.L.F received funding for A&R Service. The Guidance states that BIG is "a statutory body, accountable for public funds" and, before allocating the grants it must "look at an organisation's capacity to handle public funds"[589]. The high threshold of good governance applies in the same way to the charities, private and public bodies. The latter have received much funding, which distribution patterns attracted researchers' attention[590]. Further, BIG is also perceived as supporting the current coalition government's Big Society policy as expressed recently by Tourism and Heritage Minister John Penrose:

> "Protecting lottery funding for these types of projects is an important way of building and maintaining the kind of voluntary and community action that is an integral part of the Big Society."[591]

Given the above analysis the author argues that the E.L.F.'s A&R Service has received some public funding for its administration and functioning. It is uncertain what other funding arrangement have been in place during the research period. Yet, as the Chairman (at that time) of E.L.F Pamela Castle at that time admitted, following the BIG funding decision in 2007, E.L.F. delivers public service to the communities:

> "As a small private charity that provides a large public service, we are thrilled to have received this grant. It will make a real difference to those who most need

[587] Big Lottery Fund 'Good Governance Guide' (undated) <http://www.biglotteryfund.org.uk/good_governance_guide2.pdf> accessed 1 October 2011
[588] Big Lottery Fund 'Community Buildings' <http://www.biglotteryfund.org.uk/prog_community_buildings> accessed 1 October 2011
[589] Big Lottery Fund 'Good Governance Guide' supra note 587
[590] Patrick Feehan and David Forrest, 'Distribution of UK National Lottery grants across local authority areas' (2007) 14 *Applied Economics Letters* 361
[591] John Penrose cited in Department for Culture, Media and Sport, 'Lottery funding for voluntary and community sector protected' (News Release) (7 December 2010) <http://www.culture.gov.uk/news/media_releases/7627.aspx> accessed 1 September 2011

help with local environmental concerns that cause human misery and damage to the environment".[592]

E.L.F.'s Advice and Referral Service

Comprehensive rules governing the A&R Service are set in the 'Guidance note for the Caseworkers' published in January 2009.[593] This is a 49-page technical document, and its main provisions are summarised in the following paragraphs.

The A&R Service relies on the work of the interns, who work in E.L.F. at least 2-3 days per week for three months or longer. They can be engaged in various projects in the office but must give priority to the A&R Service. They predominantly perform their duties of receiving inquiries on the telephone due to space constraints.

There are a number of the 'categories' of people involved in running the A&R service. Firstly, there are interns, who, at the beginning of their internship, can answer telephone calls but not get involved in the caseworker's work. Secondly, there are caseworkers, who deal with the telephone interviews, research and making decisions as to whether the case can be referred further. Thirdly, there is the A&R Coordinator, who coordinates the interns' work and helps them to establish whether the concern has an environmental aspect. Fourthly, there are advisers to whom potential cases are referred. These consist of solicitors, barristers and technical consultants. The advisers must participate in the A&R Service; they must have become members of the E.L.F. and confirm their willingness to work on the inquiries and the referrals. The A&R service is supervised by the Chief Executive.

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[592] Pamela Castle cited in UK Idymedia, 'Big Lottery Fund to help people tackle environmental problems' (9 August 2007) <http://www.indymedia.org.uk/en/regions/nottinghamshire/2007/08/377862.html> accessed 1 September 2011

[593] Environmental Law Foundation, 'Advice and Referral Service. Guidance Notes for Case Workers' (E.L.F, 2009) (hereafter E.L.F. Guidelines)

As regards the clients, E.L.F. accepts inquiries from individuals, community groups, businesses, academics and other professionals. E.L.F. highlights that it does not discriminate against the inquirer "on grounds of age, disability or health, gender, race, religious or cultural beliefs or sexual preference or income".[594]

Initial telephone inquiry

Each new inquiry is given a unique reference number. A telephone attendance note is filled in and later included in a file. The intern, or other person dealing with the telephone call[595], should take the basic details of the inquirer (name, address, etc) alongside making a note of the issues raised. All initial inquiries are registered on the 'Initial Inquiries File'. However, inquiries which do not concern environmental issues are registered elsewhere, namely in the 'General Inquiries File'.

It is important to obtain sufficient information during the initial telephone inquiry in order to be able to make a judgement whether the problem carries an environmental aspect. When E.L.F. is contacted by a client by email or post, the caseworker should take active steps to contact the inquirer by telephone, if possible, in order to obtain more information. The decision as to action is taken by a caseworker and often they decide to ask the inquirer to provide more details in a form of documentation in order to make the final decision.

Determining the environmental aspect of the case

E.L.F. accepts genuine environmental inquiries and tries to refer them to an adviser. The responsibility for determining whether the inquiry has a genuine environmental angle is that of the caseworker. However, caseworkers often discuss the matter with the A&R

[594] Ibid
[595] Most of the inquiries are received on the phone. Some people contact E.L.F. by email or post.

Coordinator or even with the Chief Executive if the issue appears to be very complex. Crucially, the caseworker must adhere to the Guidelines and in particular Appendix 1[596] of the Guidelines which sets out certain criteria.

The case is likely to possess a necessary, environmental aspect if it covers one or more of the following areas: air pollution; noise pollution; land pollution; water pollution; landfill and mining; waste disposal; roads; transport; housing development; industrial development; poisoning or personal injury (caused by radiation for example); conservation; habitats; and other developments concerning the environment or elements of the environment. E.L.F.'s remit is therefore very wide. It covers the environment, its elements and human health impacts of environmental pollution. Thus it is in line with a broad approach taken by the Aarhus Convention. [597]

The above list is not exhaustive and some inquiries with a genuine environmental aspect will not be referred on to an adviser. E.L.F.'s policy is that they do not deal with the neighbour disputes, criminal prosecutions, disputes between tenants and landlords, commercial concerns and planning applications on behalf of the applicant. Crucially, E.L.F. emphasizes that "[t]here usually needs to be some element of public interest"[598].

Cases raising no environmental concern are rejected by E.L.F. but signposted to relevant organisations. Thus, for example, clients with concerns over planning technicalities are advised to contact another organisation, Planning Aid. The caseworker has an access to a contact list of the other organisations with the Quality Mark to which they might forward the matter. The caseworker can also provide the inquirer with the telephone number of the Community and Legal Service, who can provide contacts to other organisations.

[596] not attached to this thesis due to confidentiality
[597] see p. 133
[598] E.L.F. Guidelines p. 1

When the caseworker determines that the inquiry falls under the E.L.F.'s scope they will ask the inquirer whether or not they have taken any steps to address the issue:

> "find out whether the client has taken the normal steps to address the problem themselves e.g., Have they asked for the environmental harm to stop? Have they involved the local authority and/or the Environment Agency? Have they asked for the appropriate information? Have they made written requests? Have they formed a group? Is there a community organisation with which they are involved or has been set up to tackle the problem? If not, encourage them to take these initial steps."[599]

The above questions are relevant since in some circumstances the clients are unaware of any rights that they possess.

When the caseworker is certain that they want to accept the case they should inform the client about E.L.F.'s procedures and its *modus operandi*. This will ensure that the expectations of the client will not exceed E.L.F.'s scope in providing support.

Dealing with the case

E.L.F. will try to refer an accepted case to an adviser with suitable expertise, who will preferably have their office in the proximity of the client's location. In addition, the E.L.F. tries to spread cases over many advisers so that none of them becomes overloaded.

The caseworker will approach a potential adviser on the phone. E.L.F. asks caseworkers to contact one adviser at the time in order to avoid situations in which more than one member wished to accept the case. If a contacted adviser does not reply to the request,

[599] Ibid 11

the caseworker should wait about three working days before contacting another one. This requirement can be lifted and flexibility allowed if the case is urgent.[600]

The solicitor/technical consultant might not be able to accept the case due to the conflict of interest including the possibility that they already represent the organisation from which the client demands an action or have worked for such organisation in the past. In addition, the cases from the London area can be referred to E.L.F.'s in-house service called E.L.F. Plus, which is still under development. E.L.F. Plus's cases can also be referred to the external adviser for further advice or clarification. In both instances E.L.F. relies on the goodwill of its members and tries its best to find the relevant adviser. However, support cannot be guaranteed.

It is usually an external solicitor or E.L.F. Plus solicitor that refers the case to a barrister by preparing written 'Instructions to Counsel'. The case can be referred to a barrister by using four different approaches relevant for different circumstances, as explained below.

Firstly, E.L.F.'s solicitor can request barrister's opinion when the case comes in. In this situation E.L.F. asks its solicitor to send the 'Instructions to Counsel' to the office. The solicitor may ask the client to pay the fee for writing the instructions if such service would go beyond the remit of the free initial advice. After receiving the instructions the caseworker will choose a potential barrister according to expertise and the track record of recent work done for E.L.F. The idea is to spread the work over as many barristers as possible in order to avoid overloading them. The chosen barrister(s) are then approached by the caseworker's contact with the chambers' clerk. A case successfully referred to the barrister will receive a second referral number.

[600] Ibid 29

Secondly, the client themselves may request a barrister's opinion. In such cases the client is asked to approach his / her solicitor to write the instructions. If the client does not have a solicitor, the caseworker should refer the matter to the A&R Co-ordinator who may refer the case via the Bar Direct Service.

Thirdly, the client may wish to receive a barrister's opinion by instructing a non-E.L.F. solicitor to write the instructions. This is possible provided that the case has a genuine environmental concern and the instructing solicitor fills in the Request for Assistance Form.

Finally, E.L.F. has a licence to contact barrister directly on behalf of E.L.F. and its clients. E.L.F. resorts to this option on rare occasions, namely when they could not refer the case to a solicitor and "there is a real issue of law to advise upon or there is a tight deadline or sometimes where we cannot get the matter taken on by an ELF solicitor".[601] This approach requires significant co-operation between the caseworker and the A&R co-ordinator since E.L.F. must ensure that all the procedural requirements are met and that the written instructions are completed promptly.

The referred cases will be considered by the adviser within the scope of the initial consultation that can take a form of a face to face meeting or an exchange made by email, telephone or post. The aim of the initial consultation is an opportunity for the adviser "to assess the strengths and weaknesses of the case"[602]. Crucially the initial consultation is free of charge though the adviser may charge the client for additional work required at a reduced fee. The conditions of any extended advice must be discussed between the client and the adviser and E.L.F. does not intervene in such negotiations.

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[601] Ibid 45

[602] E.L.F. Guidelines, p. 12

Second referral

As outlined above, a second referral occurs when an E.L.F. solicitor refers the case to a barrister and the case will be given a second referral number. It is a general policy of E.L.F. not to refer cases concerning the same matter for a second time to the same adviser[603]. If the client is dissatisfied with the solicitor's opinion they will be signposted to another relevant organisation. However, E.L.F. does refer cases from one category of an adviser to another thus the case may receive the opinion of a solicitor and a barrister or both of them together, perhaps, with the technical consultant. In such instances the case is given a second referral number in the relevant documentation. Nevertheless, "the first referral number given remains the case number through the history of the case."[604]

The caseworker sends a copy of the Request for Assistance Form (hereafter the RFA Form) and the Case Referral Form (the CRF Form) to the potential adviser, accompanied by the relevant documentation provided by the client. In case of the referral to the barrister this will be accompanied by the 'Instructions to Counsel'. This provided the opportunity for the adviser to finally accept the case for consideration.

Dealing with the case – the documentation

Upon the caseworker's determination that the case falls under the remit of E.L.F., the RFA Form is generated. The form is normally generated from the Digital Red Book Database[605], which consists of the crucial information concerning the client and the material facts of the inquiry. The RFA Form consists of information about and the

[603] Ibid
[604] Ibid 38
[605] an electronic MS Access database

description of the problem "from the caller's position"[606]. Table 2 below shows the information that can be found on the RFA Form alongside the rationale of obtaining such information as explained in the E.L.F. Guidelines.

Table 2 The Request for Assistance Form (RFA)

The data on the RFA Form	The explanation and additional information
Date of the opening of the case and sending the RFA Form to the client	for the purpose of chronology
Enquiry number	for tracing the cases
Caseworker's name	not stated in the Guidelines
Referral number	the number assigned after the inquiry has been accepted by the adviser; in order to easily trace the referral
Client's contact details	this should be a postal address but the availability of an email address can be beneficial in urgent cases (for example the RFA Form can be quickly sent by email to the client for the latter's acceptance and signature)
Environmental concern	As explained above the case must have a genuine environmental aspect; this part of the form will usually have a brief description of the environmental concern including any perceived substantial or procedural breaches of law as perceived by the client
The cause of the problem	this could include a planning decision, a lack of enforcement of the law, breach of the planning conditions
Number of affected people	this should be a reasonable estimate and this helps proving that the case has a public interest
The details of the potential defendant	this may include business, developer, a Council or other organisation
The important deadlines	The deadlines may include the date of the decision taken by the Council or the date scheduled for the Planning Committee Meeting; this is extremely important from the point of view of E.L.F. as a potential adviser may not accept the case close to the deadline let alone the case, where the deadline passed;

[606] E.L.F. Guidelines, p. 14

The character of possible assistance	The clients should be acknowledged with the scope of the E.L.F.'s work and should be able to choose whether they wish their case to be considered by a solicitor, a barrister or a technical consultant; there are also cases where clients may ask for assistance in organising a workshop, forming a community group or running publicity activities
Relevant documents	The client should have access to the relevant documents supporting the case such as the planning decision, independent reports or timetables; the caseworker will provide information what documents may be helpful however the E.L.F. will allow the client to decide which documents they send to the office; the documentation should be in two copies (one for the adviser and one for the office file) and concise
Terms of referral	this is the extract from the conditions on which the E.L.F. provides assistance, namely the initial free consultation, the possibility of additional work done by the adviser subject to (reduced) fee, the fact that after the referral the E.L.F. does not take part in the relationship between the adviser and the client and finally, the explanation that E.L.F. requires its members to report back to E.L.F. for monitoring purposes and needs an approval of this by the client
Other information	whether the client have contacted E.L.F. before and how they heard about E.L.F.

Source: The RFA form held in E.L.F. and attached as Appendix 2

The RFA Form with relevant information is sent to the client who must duly sign it in order to commence the referral process. After receiving the form back it usually takes between 2-3 weeks for E.L.F. to find an adviser or provide other assistance.[607] When an adviser agrees to provide the assistance he/she will be provided with the Case Referral Form (CRF). The crucial data in the CRF is presented in Table 3 below.

Table 3 Case Referral Form (CRF)

The data on the CRF Form	Explanation and additional information
Basic information regarding the case	the case referral number, the name of the client, the short description of the matter (for example noise pollution or judicial review) and the date of sending the CRF to the

[607] Ibid 19

	adviser
The list of supporting documents	the documents which the client chose (with support of the E.L.F. caseworker) are enclosed to the form and sent to the adviser; these documents will normally be held in the case file in the office
Description of the matter	this is crucial part of the document including a brief description of the matter; this will often resemble the description provided by the client in the RFA form but will often be shorter
The adviser's acceptance	the potential adviser will sign the form and date it upon their acceptance

Source: The CFR form held in E.L.F. and attached as Appendix 3

The clients were provided an Equal Opportunities Form which they could complete in confidentiality and return to E.L.F. Table 4 below explains the data that the clients were asked to provide.

Table 4 Equal Opportunities Form

Equal Opportunities Form data	
The data on the EOs Form	Explanation and additional information
Gender	in most cases the person who contacted the E.L.F. put his or her gender; there were cases where both female and male boxes were circled reflecting the fact that the client regarded themselves a group, where more than one person was involved in contacting the E.L.F.
Age	banded, consisting of seven categories
Income	banded, consisting of seven categories

Profession	the client could freely describe their profession; the examples included: ‘student’; ‘housewife’; ‘unemployed’; ‘self-employed’; ‘manager’; ‘working for in a shop’ etc;
Region	banded, 10 categories
Disability	the form asks “Are you registered disabled?’ and asks for giving the title of the disability; some people could not answer the first question and provided some description of a disability; I was only interested whether the client answered Yes or No to the first question
Nationality	the form asks “What is your nationality?”; I was concerned whether the client’s nationality was British or not
First language	whether English or another
Ethnic origin	banded, 19 categories

Source: The CFR form held in E.L.F. at the time of conducting the research

Further, E.L.F. circulates a Client Monitoring Questionnaire Form[608] to each client who received free initial advice. The form was largely qualitative with questions concerning the conclusion of the case.

Summary

This Chapter provided an overview of the research settings by analysing how Environmental Law Foundation handles environmental cases. It reviewed the E.L.F.'s funding arrangements by highlighting the fact that the charity has received some public funding for its administration and functioning. The Chapter provided a summary of crucial documentation that E.L.F. uses to deliver assistance to the public facing environmental problems.

[608] E.L.F. Guidelines, p. 37

Chapter 5 Methodology

This Chapter describes and defends the ontological and epistemological underpinnings of the study, the choice of mixed methodology and, stemming from these, the ethical and political issues associated with the research. Furthermore, the Chapter shall illustrate how the author collected and analysed the data and how he incorporated the procedures of reflection. The timing of the study is attached as the Appendix 1.

Pragmatist ontology and epistemology

Advanced postgraduate researchers are urged to locate their inquiries in a selected ontological and epistemological paradigm. Both ontology and epistemology relate to the nature of being and the former answers a question "What kind of being is the human being? What is the nature of reality?" whereas the latter answers a question "What is the relationship of the inquirer and the known"'.[609] The research was based in the organizational settings and involved the use of mixed methodology in line with the chosen pragmatist paradigm. The research deliberately rejects the positivist understanding of social science and law which assumes an existence of objective reality. The positivists argue that the reality can be objectively measured and analysed by a detached researcher using the quantitative means of inquiry. The interpretivists, who rejected the positivistic views in the Twentieth Century, argue that the reality is not objectively measurable and suggested using a qualitative means of inquiry. Amongst them the constructivists have gained considerable influence arguing that the social reality is constructed[610]. The sections below will show that the database on which the

[609] Norman K Denzin and Yvonna S Lincoln, *Sage Handbook on Qualitative Research* (Sage 2005) 22
[610] John A Hannigan, *Environmental Sociology: A Social Constructionist Perspective* (Routledge 1995)

research is based has been constructed by multiple actors though the author rejected the constructivist paradigm which suits better the qualitative, in-depth collection of data and analysis. The author is convinced that he could have used the constructivist paradigm if he decided to focus on the analysis of the database itself, namely the in-depth study of the construction of variables. The author could also use this paradigm to conduct documentary analysis of available cases and capture data on the variety of interests. This analysis would be limited given the scarcity of information in legal cases themselves[611].

Pragmatist paradigm explained

Pragmatism emerged as a movement at the end of the Nineteenth Century and became a school of thought at the turn of that century. It is associated with the works of Charles S. Peirce, William James, Josiah Royce, John Dewey and George Herbert Mead. For the purpose of this thesis the author shall emphasize the ontological and epistemological characteristics of pragmatism.

In terms of ontology, pragmatism rejects the existence of set beliefs and institutions upon which knowledge is based. Our concepts are not indubitable but we can make sense of our existence on the basis of a number of undoubted occurrences that have not been questioned by experience. Therefore, pragmatism elevates the practice, where the 'truth' is an entity, which has not been contradicted by experience. Furthermore, the reality is pluralistic and in constant development so that indeterminacy and chance play a significant role.

In terms of epistemology, the human mind is part of the world therefore 'knowing the

[611] See p. 118

world' is not a detached activity. The inquirer will focus their efforts on reconstructing the doubted concepts in order to make a better sense of them and the process of inquiry will change both the subject and the object. They will also be aware of the reality being in constant development and will use experience and experiment for the purpose of making sense of this reality.

At the social and political level, pragmatism propagates the distinct worthiness of every individual. The individual is seen as being intertwined with their context and pragmatism sees them as part of a community. Each individual can make a worthy contribution to the society and participatory democracy is supported. This is associated with the assumption that the world is in constant development and in need of reform.[612]

Pragmatism and constructivism

The author used a constructivist paradigm in his earlier work[613] and the turn towards pragmatism in this thesis builds upon this experience. Scholars have identified a number of similarities between constructivism and pragmatism. Firstly, both reject metaphysical, idealist and absolutist concepts of knowledge and emphasise the importance of experience in the process of reasoning. Social constructivism holds that the objective knowledge is an end result of different perspectives glued together by means of language and institutions.[614] Pragmatism also recognises the powerful forces of language and descriptions that do not necessarily reflect the reality. It encourages

[612] Kelly A Parker, 'Pragmatism and Environmental Thought' in Andrew Light and Eric Katz (eds), *Environmental Pragmatism* (Routledge, London 1996) 21-37

[613] Robert G Lee and Radoslaw Stech, 'Mediating Sustainability: Constructivist Approaches to Sustainability Research' in Alex Franklin and Paul Blyton (eds), *Researching Sustainability: A Guide to Social Science Methods, Practice and Engagement* (Earthscan 2011); Radoslaw Stech, 'Environmental Information, Participation and Citizen Activity: Case Studies from Poland and the UK' in Sivaram Vemuri (ed), *Connected Accountabilities: Environmental justice and Global Citizenship* (InterDisciplinary Press 2010)

[614] Peter L Berger and Thomas Luckman, *The Social Construction of Reality. A Treatise in the Sociology of Knowledge* (Penguin Books 1991)

debates and recognises that particular voices are stronger because they are uttered by powerful interest groups or within a particular cultural environment. Secondly, both constructivism and pragmatism assert that facts are constructed and alter over time. Every-day knowledge is shaped by experience. Thirdly, both paradigms support democratic openness, where a variety of groups holding distinct beliefs can interact to promote improvement and development. Fourthly, both emphasise experience and interaction in the learning process. The learners are perceived as active participants in the learning process rather than mere receivers and spectators and provided with an opportunity for experimentation. Education leads to growth that brings more opportunities for those involved in it.[615]

Pragmatism and environmental thought

As explained in the Chapter 3, the Aarhus Convention reflects the ideas that the public should be allowed more opportunities for making input into decision-making processes. The analytical chapters of this thesis consider whether judicial review should be seen as part of that input. Pragmatism is in line with environmental thought. Pragmatism is anthropocentric as is the underlying theoretical layer of the Aarhus Convention. Crucially, pragmatism values a contribution of every individual and, as is widely recognised, the complexity of the environmental problems requires the input of the public. Finally, the environment is in constant change and development: new forms of products and technology have had considerable impact on our surroundings, health and well-being. This suggests constant reform of our regulatory systems; pragmatism is pro-

[615] Kersten Reich, 'Constructivism: Diversity of Approaches and Connections with Pragmatism' in Larry A Hickman, Stefan Neubert and Kersten Reich (eds), *John Dewey between Pragmatism and Constructivism* (2009, Fordham University Press, New York) 39-64; Brad M Hastings, 'Social Constructivism and the Legacy of James' Paradigm' (2002) 12 *Theory Psychology* 714

reform.[616]

Pragmatism and mixed methodology

The use of qualitative and quantitative methodologies in a single research project has been regarded by some as inferior to the use of one discrete methodology. Some academics have rejected possibility of retorting to the contrasting paradigms to underpin such research.[617] However, the pragmatist paradigm has been accepted and used by many as the relevant theoretical underpinning for the mixed methodology.[618] The paradigm is still debated and subject to evaluation.

Pragmatism highlights the end result of the research rather than the process itself: 'the end justifies the means'. The researchers are allowed to determine what works well during the process of inquiry in order to answer the research questions. This implies a possibility of moving from an inductive to a deductive approach as Morgan explains

> "The pragmatic approach is to rely on a version of *abductive* reasoning that moves back and forth between induction and deduction—first converting observations into theories and then assessing those theories through action".[619]

This author decided to use the pragmatist approach because, as it is explained below, he had to 'experiment' with the collection of the data by using various techniques in order to answer the research questions. The research was initially influenced by the needs of the research organisation with which the author was engaged and he had to integrate the

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[616] Ibid
[617] John K Smith and Lous Heshusius, 'Closing Down the Conversation: The End of the Quantitative-Qualitative Debate' (1986) 15(1) *Educational Researcher* 4
[618] David L Morgan, 'Paradigms Lost and Pragmatism Regained Methodological Implications of Combining Qualitative and Quantitative Methods' (2007) 1(1) *Journal of Mixed Methods Research* 48
[619] Ibid 71

needs of the thesis into the negotiated tasks . Although the author supports the idea that the 'end justifies the means' it is necessary to explain the whole process of the inquiry in detail, paying attention to the way in which the organisation works and the way in which the data was collected and analysed. The previous Chapter reviewed the E.L.F.'s *modus operandi* and the sections below will explain how the data was collected and analysed.

Pragmatism and planning law

Upon starting the research the author was broadly aware that the majority of the public would contact E.L.F. with environmental problems related to the planning law in the UK. This was later confirmed with the findings. The pragmatist approach is also in tune with the wider area of planning since it is "a philosophy of social reform and reconstruction".[620] Blanco argues that because planning seeks to apply the best available knowledge and the techniques of rational reasoning to address social problems it is "the practising heir of the philosophy of pragmatism."[621]

Pragmatism and socio-legal studies

Finally, the pragmatic theoretical underpinnings are in line with socio-legal studies, where the author wish to position the research. The socio-legal movement in its early formative years adopted the sociological techniques of analysis as opposed to those rooted in law, what "attracted criticism by those who accused socio-legal scholars of eclecticism and almost intellectual burglary"[622]. As Lee highlighted, the socio-legal scholars wished to distance themselves from and challenge the traditional and orthodox

620 Hilda Blanco, *How to think about Social Problems. American Pragmatism and the Idea of Planning* (Greenwood Press Westport 1994) 3
621 Ibid
622 Robert G Lee, 'Socio-Legal Research – What's the Use?' in P A Thomas (ed), *Socio-Legal Studies* (Aldershot 1997) 84

approach to law "in particular the desire to move away from seemingly meaningless searches for coherence and consistency as laid down by the judiciary or the legislature"[623].

The pragmatic approach allows for experimentation and inductive mode of analysis, which is in tune with socio-legal studies. Again, however, there is a need to be completely transparent in explaining all the steps and stages of the inquiry. Moreover, socio-legal approach emphasizes the interaction between the lawmaker and the citizens.

> "[T]he positivist recognizes in the functioning of a legal system nothing that can truly be called a *social dimension.* The positivist sees the law at the point of its dispatch by the lawgiver and again at the point of its impact on the legal subject. He does not see the lawgiver and the citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential ingredient of the law itself."[624]

The theme of collaboration and participation in adjudication will be discussed and analysed in Chapter 9[625].

The data collection

The following paragraphs will deal with data collection in the organisational settings. The author shall deal with the access issue, the purpose of using the mixed methodology and the process of collecting the data.

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[623] Ibid 83
[624] Lon Fuller, *The Morality of Law* (Yale University Press 1969)
[625] See p. 315

The access problem in organisational research

The collected the data in an organisation, namely the Environmental Law Foundation. The vast majority of researchers conducting research in organisations mention the problem of access, that is the problem of getting entry into the organisation and working well with the people in the organisation during the inquiry.[626] There have been a number of 'tactics' employed in order to get the entry, including the use of friends, relatives and professional friends. Some researchers gained access by getting into trustworthy relationship with the members of the organisations. Furthermore, some researchers offered a possibility of writing a report of their findings.

The author used a number of the above tactics. First of all, he gained the initial entry to the organisation thanks to my supervisor who was the trustee of the E.L.F. at that time. The author negotiated the terms and conditions of the stay in the organisation in May before deciding whether to do the research. He agreed with the Chief Executive that part of his research could be used by the organisation, however he did not know at that time that it would be published as a report. Finally, the author established friendly relationship based on trust with the employees of the organisation and the interns. This was not achieved by employing any purposeful tactics: it appears that the people working there had a similar attitude to life.

The preliminary research

The author made several visits to E.L.F. in May 2009 to do preliminary research on the electronic database (the Digital Red Book)[627] and the files kept in organisation. At this stage he established some crucial variables, acquainted himself with the workings of the

[626] Alan Bryman, 'Introduction: 'inside' accounts and social research in organizations' in Alan Bryman (ed), *Doing Research in Organisations* (Routledge 1988)
[627] See p. 185

organisation, and met the employees and interns. Moreover, the author came to a conclusion that there were significant gaps in the electronic database so that he decided to do content analysis of the paper files. Finally, the Chief Executive informed that she was interested in the answers to the following question in order to provide evidence to the ongoing debate concerning the costs barriers to judicial review:

> 'how many cases in which clients were advised to pursue judicial review were prevented from proceeding due to the cost barrier?'

The author agreed to provide an answer to the above question by breaking it into two research questions identified in the Introduction[628]. The two questions are repeated below:

1. What proportion of judicial review referrals received a negative opinion as to the prospects of success at judicial review? What is the proportion of judicial review cases where clients were advised to take further steps towards judicial review?
2. Given the answer to the above question, did clients not proceed primarily because of costs?

The purpose of using mixed methodology

The utilisation of mixed methodology can serve a number of purposes, as was summarised in the Table 5 below.

The author used the content analysis of the documentation found in the case files held in E.L.F. for the purpose of developing variables for quantitative analysis. The variable

[628] See p. 20 (questions 3-4)

'stage of cases'[629] provides a good example of the usefulness of the documentary analysis. A number of clients asked for advice at the stage of consultation which was reflected in the Request for Assistance Form[630]. There was a need to perform thorough analysis of the documentation to check whether or not the case reached a further stage such as public inquiry or judicial review. Moreover, some clients mistakenly thought that their case was amenable to judicial review where, in truth, it was a civil dispute such as a private nuisance case. Another example might be the content analysis of descriptive documents such as solicitors' or barristers' opinions procured in order to establish whether a case received a positive or negative opinion as to the prospects of success. The use of various documentation in developing the quantitative analysis served also as a tool to triangulate the validity of the results. However, the primary purpose in using the mixed methodology was 'development' (see Table 5 below).

[629] See p. 263
[630] See p. 185

Table 5 The data collection – a design

Title	Purpose	Rationale
Triangulation	"seeks convergence, corroboration, correspondence of results from the different methods"	to maximise the validity of the inquiry and minimise the occurrence of bias results by using various sources
Complementarily	"seeks elaboration, enhancement, clarification of the results from one method with the results from the other method"	to maximise the validity, interpretability and meaningfulness of the results by both "capitalising on inherent method strengths and counteracting inherent biases in methods and other sources"
Development	"seeks to use the results from one method to help develop or inform the other method, where development is broadly construed to include sampling and implementation, as well as measurement decisions"	to maximise the validity of the research results and constructions by using the inherent strengths of the chosen methods
Initiation	seeks the discovery of paradox and contradiction, new perspectives of frameworks, the recasting of questions or results from one method with questions or results from the other method!	to maximise the depth and breadth of the research results and interpretations "by analysing them from the different perspectives of different methods and paradigms"
Expansion	seeks to extend the breadth and range of inquiry by using different methods for different inquiry components"	"to increase the scope of inquiry by selecting the methods most appropriate for multiple components"

Source[631]

[631] Jennifer C Greene and others, 'Toward a Conceptual Framework for Mixed-Method Evaluation Designs' (1989) 11(3) *Educational Evaluation and Policy Analysis* 255, 260-274

Validity

Scott,[632] makes a distinction between four significant factors that must be kept in mind during the documentary analysis. The first factor focuses on authenticity, that is whether or not the evidence is genuine. The second factor concerns credibility and whether or not documentation is free from distortion and omission. The third factor addresses representativeness and whether documents represent the phenomena. The last factor relates to the meaning; are documents clearly and comprehensively written?. The author shall now analyse an extent to which documentation adhered to the above criteria.

As to the authenticity, the collected documents are held in the E.L.F.'s office in secure drawers and there are no grounds to claim that the documents are not authentic. The documents are on headed paper and contain signatures and dates. As regards the credibility, there are issues of concern. The documents clearly represent different points of view, namely the Request for Assistance Form[633] form reflects the clients' views on the case, the Case Referral Form[634] reflects the clients' views but often in a shortened and summarized form created by the caseworker for the purpose of quickly informing the adviser what the case is about. Moreover, the 'Instruction to Counsel' documents reflect the legal and often technical view on the case given by a solicitor at an initial stage counsels' and the advisers' opinion following the initial free advice (solicitors' letters to the E.L.F. or the barristers' opinions on the litigation prospects) can consist of highly detailed and reasoned opinion or a brief opinion that 'the case is good for judicial review' or 'the case is weak'. In assessing the credibility of the documents the final opinion of the document can depend on the initial understanding of the case by the

[632] John Scott, *A Matter of Record: Documentary Sources in Social research* (Polity Press 1990)
[633] See p. 185
[634] Ibid

client and the caseworker. As highlighted above[635], the client is responsible for finding those relevant documents with support of the caseworker which they think will be useful for the adviser. Any omission at this stage could influence the final opinion given the limited time resources. Moreover, there were many files which included very limited description of the matter generating omissions and gaps in the quantitative database.

As regards the representativeness, the analyzed documents represented the phenomena (understandings of, for example, a 'planning case' or a 'judicial review' case) fairly well. It was possible to capture the clients' views on the case as well as the opinion of the adviser. Crucially, the researcher could capture basic information concerning cases including: the stage; the nature of the problem; the area of law; and the socio-economic information about the clients. Some cases, however, were not representative as some files lacked one or more crucial documents.

As to the meaning, there were documents that consisted of limited information thus not allowing the capture of the necessary data or even causing confusion. The confusion could be caused by a note in the file that the judicial review was undertaken in particular case but, upon a check of the party names in legal databases, the case could not be found. Upon further examination by making contact with the adviser it transpired that the case was actually settled. In such cases the also sought support from the employees in the E.L.F.

Collection of the quantitative data

The quantitative data has been drawn from the three main sources: firstly and crucially the analysed documentation (dealt with in the preceding paragraph); secondly, the

[635] See Table 2 above, p. 186

electronic database (Digital Red Book)[636] in a form of the Microsoft Access database consisting of basic information such as short overview of the case, funding of the case and the name and address of the inquirer; and, thirdly, from the Equal Opportunities Forms[637] completed and sent in confidentiality by the clients.

The sources were, in some cases, incomplete and as a result of this the researcher made an intensive and extensive attempt to contact the clients and the advisers. The contacts were made within the *modus operandi* of the E.L.F. The author did not create any additional interview questionnaire but used the same questions and similar emails that the E.L.F.'s caseworkers or employees would use in their normal monitoring activities. This also ensured coherence between the answers which had already been given by the clients and the advisers and the answers which the author obtained. However, initially he could not perform many interviews during the E.L.F.'s working hours and had to work in the evenings and weekends. The author was given access to the office during these off-hours on a trust basis. Below is a set of questions that the author and E.L.F. send to the clients and the advisers to fill the gaps:

- Did the matter reach the Courts?
- Did you apply for a Protective Costs Order (PCO)?
- What was the probability of success estimated?
- If the case did reach the Courts, was it successful?
- If the case did not reach the Courts, did it resolve successfully? Did it not reach the Courts solely because of lack of funding?[638]

[636] See p. 185
[637] See p. 188
[638] Source: Reflexive diary as explained below, see p. 210

Linking the data

The retrieved quantitative data was uploaded into the statistical software package, SPSS, which is widely used by governmental, non-governmental and private organisations. The author had also been trained in using the SPSS during the Master's course on Socio-legal Methodology at Cardiff University.

The SPSS dataset (hereafter dataset) included the details gathered from the above sources. It was especially important to link the socio-economic data with data from the electronic database. This could be done by means of a postcode. The electronic database with a unique referral number consisted of the postcode, which was searched for in the folder containing the Equal Opportunities Forms. This was time consuming but successful and not prone to error. The researcher did the scanning twice: firstly, reaching around 60% of referrals having linked socio-economic data; and, secondly, establishing a 70% link.

Data Analysis

The analysis of the quantitative database was undertaken by means of the SPSS, which offers basic and advanced analytical tools. The author decided to focus on descriptive statistics, as opposed to complex probability modelling, due to the limited number of cases and missing variables within the cases. Similar approach was taken in E.L.F. 2003 study[639]. The author could also use cross-tabulation as a form of the multivariate analysis of the judicial review cases. The margin of error was established at 5 percent[640]. The following paragraphs will describe the tools of analysis.

[639] Paul Stookes, 'Civil Law Aspects...' supra note 29
[640] Alan Bryman, Duncan Cramer *Quantitative Data Analysis with SPSS 14, 15 and 16* (Routledge 2009)

Frequency distribution is often a first step in summarising quantitative data. It shows the number of cases in a given category. The number of cases were underpinned by percentages to show the proportion of cases in a given category[641]. The proportion is rounded up to one decimal place in order to facilitate the analysis and allow the reader to capture the differences comfortably. The frequency distribution was used to present socio-economic variables and some variables related to the cases, concerning, for example, the area of law.

Data Presentation

The analysis of each variable will be accompanied by relevant background information including the method of compiling. The presentation in the following Chapters will be structured in the following manner. Firstly, each variable will be analysed over the whole study period. If there is an opportunity for making a comparison with E.L.F. 2003 Report[642] this will be done in the same table allowing for easier understanding and reducing the space. Secondly, an annual analysis of the variable will be performed in one table to highlight any noticeable trends. The annual analysis of data in E.L.F. 2003 Report[643] will not be included since there is a two year gap between the two studies.. Thirdly, the exploration of the variables will be followed by a part entitled 'Analysis and summary'. This will include performing any additional analysis and cross-variable comparisons using cross-tabulation if required to achieve fuller analytical picture. Tables in this part will have a slightly different layout because they have been copied directly from the SPSS system to ensure authenticity and to allow the reader to compare proportions with missing values included with valid proportions. Finally, certain passages will refer the reader to the relevant and associated paragraphs of the thesis by way of footnotes to enhance understanding and reduce unnecessary repetitions.

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[641] Ibid
[642] Paul Stookes, 'Civil Law Aspects of Environmental Justice' supra note 29
[643] Ibid

Measuring polycentricity

The main purpose of the thesis is to better understand the concept of environmental justice in light of polycentricy. The concept of polycentricity will be further reviewed in the Chapter 9. The literature review suggests[644] that environmental justice is polycentric thus giving rise to conflicts within the environmental justice cohort. The polycentricity lies in the substantive and procedural aspect of environmental justice. The substantive polycentricity stems from the heterogeneity of parties claiming the right to better quality environment at various levels of governance (global, national, regional, local, family and individual). Thus, exposure to environmental hazards can be studied through numerous variables (age, disability etc) at these levels to measure the degree of environmental justice of different groups. Secondly, procedural rights, mainly access to information and participation in decision making, have twofold functions. Firstly, as an 'integral' part of environmental justice concept thus the catalyst for or tool through which environmental justice can be achieved. Secondly as a corollary of substantive polycentricity, allowing various environmental justice parties to assert their rights to the healthier environment at the cost of other environmental justice parties.

The following three Chapters will make an attempt to measure polycentricity of E.L.F. referrals and judicial review cases. Chapter 6 will focus on analysing the main characteristics of the E.L.F. clients by analysing various variables. Chapter 7 will address the key characteristics of the referrals and provide an opportunity to further explore the interests which could be involved in the cases. Chapter 8 will focus on measuring the access to judicial review. This Chapter will also match the English judicial review cases with the English Indices of Multiple Deprivation to identify the potential interests involved in the cases.

[644] See p. 71

The English Indices of Deprivation (IMD), created by the British Department for Communities and Local Government, is a set of data that measures multiple forms of deprivation in small areas of England called Lower Layer Super Output Areas. First such index was released in 2004, next in 2007 and the latest on March 24, 2011 (called The English Indices of Deprivation 2010, in which the data mostly comes from 2008).

Seven distinct dimensions of deprivation called Domains are distinguished and they make up the indices: Income domain; Employment domain; Health deprivation and disability; Education, Skills and Training domain; Barriers to Housing and Services domain; Crime domain; and Living Environment domain[645].

Education, Skills and Training domain comprises two sub-domains: the children/young people sub-domain and the skills sub-domain, both connected with educational disadvantage. The barriers to Housing and Services domain also fall into two sub-domains related to access to housing: wider barriers sub-domain and geographical barriers sub-domain. There are two sub-domains included in Living Environment: the indoors living sub-domain and the outdoors living sub-domain. They are about housing and air quality / road traffic accidents respectively.[646]

Supplementary indices concerning children and older people - the Income Deprivation Affecting Children Index (IDACI) and the Income Deprivation Affecting Older People Index (IDAOPI) are subsets of the Income Domain.

The Indices of Multiple Deprivation is a useful means of recognising the most

[645] David McLennan, Helen Barnes, Michael Noble, Joanna Davies, Elisabeth Garratt, Chris Dibben 'The English Indices of Deprivation 2010' (Technical Report of the Department for Communities and Local Government) (London, 2011)
<http://www.communities.gov.uk/publications/corporate/statistics/indices2010technicalreport> accessed 1 April 2011
[646] Ibid

disadvantaged areas which should be the focus of government policy. IMD is used to support decision-making policies. Therefore some necessary activities of local authorities and policy makers can be performed. The results from the latest report show, for instance, how many people lived in the most deprived areas in England in 2008 and how many of them were income deprive; the local authorities with the highest proportion of Lower layer Super Output Areas amongst the most deprived in England; the proportion of deprivation in urban areas to that across rural areas; and a comparison of deprivation of an area with 2007.[647]

There has been a critique of this method of quantifying deprivation. The Indices of Multiple Deprivation "represents a commendable advance' but provides a reliable tool to a certain degree and 'there remain significant limitations that future approaches could profitably address"[648].

There are also claims that such assessments of deprivation are short-sighted since 'they are not able to account formally for the spatial context of individual locations'. A different approach of measuring deprivation is offered by Alasdair Rae - combining spatial statistical approaches with a much-used deprivation index.[649]

[647] Ibid
[648] Iain Deas, Brian Robson, Cecilia Wong, Michael Bradford 'Measuring neighbourhood deprivation: a critique of the Index of Multiple Deprivation' (2003) 21(6) *Environment and Planning C: Government and Policy* 883
[649] Alasdair Rae 'Isolated Entities or Integrated Neighbourhoods? An Alternative View of the Measurement of Deprivation' (2009) 46(9) *Urban Studies* 1859

Ethical and political dimensions of the study

The chosen methodology posed a number of ethical issues, which included one 'hard' ethical issue that university departments are particularly concerned with: the researcher dealt with the sensitive information and received information in confidence.

Firstly, access was given to the electronic database and the paper files of E.L.F.'s cases consisting of personal information of thousands of inquirers and clients. The Equal Opportunities Forms could be inspected and, thanks to the research design, the confidential data included there could be linked with the personal information of the clients. The author regarded this access as a significant opportunity for a researcher but also as a responsibility. He signed a non-disclosure agreement with E.L.F.'s Chief Executive. In addition, he agreed that the research work would be done solely on E.L.F.'s premises. As a result the author conducted the additional evening and weekend interviews from the office in London also using E.L.F.'s electronic space to conduct the email interviews if needed. He did not use his own email account.

Secondly, the author received information in confidence especially from the clients during the interviews within E.L.F.'s monitoring activities. He resorted to normal and ethically accepted conduct which he had applied before and during earlier semi structured interviews[650]. Hence, he firstly informed the clients/respondents that he was a researcher from Cardiff University doing a piece of research on access to justice in environmental matters in the offices of the Environmental Law Foundation. In most cases the clients expressed their utmost willingness to be interviewed. However, the author followed the further procedures, namely asking the clients "whether or not they

[650] Radoslaw Stech 'Environmental Information...' supra note 445

wanted to take part in the research voluntarily and informing them about the risks and nature of my research.

The author was also funded by the Environmental Law Foundation, receiving 2,500 pounds to conduct the research. In this case he followed the guidance of Lee who considered the issue of obtaining sponsorship from various organisations, including commercial bodies. Lee does not advise the automatic rejection of the funding but rather the need of every researcher to take the responsibility "at the outset of the research to fully explore the confines and constraints of the sponsorship offered – even if that leads to the withdrawal of the funding".[651] In light of this, a number of preliminary meetings with E.L.F. establishing the confines and constraints of the sponsorship, were initiated. It was agreed that the author would deliver certain data which could be used by E.L.F. for their purposes and agreed that the data would be gathered starting from January 2005 (rather than from February 2005 as in this research). However, it was also agreed that the author's input was much greater, including the reliance on ESRC funding and the use expensive SPSS software, which E.L.F. did not possess. As a result there was little possibility of E.L.F. influencing the research unduly.

Reflexivity and precision of the research

Reflexivity is an important tool that helps in obtaining more objective and valid material through qualitative methodology. Reflexivity was significant for the author given that the documentary analysis was performed to develop a number of quantitative variables Reflexivity is difficult to define, but it includes the researcher's own feedback at all stages of the research; this should be ongoing, habitual and thoroughly thought-through process. Reflexivity should be applied during data collection and analysis (Alvesson,

[651] Robert G. Lee, 'Socio-Legal Research...' supra note 622, p.93-94

Skoldberg 2000, Mauthner, Doucet 2003). The author aimed at executing the research in the most precise and rigorous way and developed the following tools of reflexivity.

Firstly, the author conducted the research independently in a separate and silent room in the E.L.F. headquarters. Nevertheless, he enjoyed an easy access to the E.L.F. employees and the interns if he wished to ask a question or clarify certain information found in the documents. The author used this opportunity frequently especially when he could not find the relevant information or had to contact a lawyer or the client to receive that information. The author also contacted E.L.F. to obtain additional information when necessary during the data analysis.

Secondly, the author developed a diary at the stage of initial research and had been updating it throughout the data collection and analysis. The diary was kept in an electronic form in a Microsoft Office One Note document. The diary allowed the researcher to keep the note of interesting referrals and identify the links between the referrals. Moreover, in line with the pragmatist mixed-methods approach, the information in the diary helped the researcher to develop and cross-check the quantitative variables. The author referred explicitly to the data in the diary in this thesis when necessary.[652]

Summary

The Chapter reviewed the methodological underpinnings of the study, the overview of the data collection and analysis. The statistical analysis of 774 referrals will allow measuring various interests involved and will allow for limiting the pool of cases to judicial review referrals for further analysis. The latter will form a basis for establishing

[652] See the following headings in Chapter 7 for example: 'Human Rights and Wellbeing' (p. 255), 'Concerns over the Aarhus Pillars' (p. 259), 'Bias' (p .262) or in Chapter 8: 'Likelihood of success' (p.278)

whether or not costs were the barrier for some claimants in starting judicial review proceedings. It would also form a basis for measuring polycentricity of environmental judicial review cases.

Part III Results

This part of the thesis consists of three chapters which will present the results of the statistical analysis of the E.L.F. referrals. Chapter 6 will focus on the socio-economic characteristics of the clients; Chapter 7 will then turn to analysing the features of the referrals and Chapter 8 will be devoted to referrals at the judicial review stage at the time of conducting the study. The overall aim is to answer the first five research questions and the relevant questions will be marked at the beginning of each chapter.

Chapter 9 will provide a further analysis of the findings to answer the final question set in the Introduction.[653]

Chapter 6 Results: focus on E.L.F. clients

This Chapter will present results of the quantitative analysis of variables concerning regional representation, the socio-economic background of the clients and their status as categorised by E.L.F. The following variables will be explored: regional representation; gender; age; employment status; income; registered disability; nationality; first language; ethnic origin; and client status.

The Chapter aims at answering the first research question, namely:

> What are the key characteristics of the ELF clients whose cases have been referred to an adviser? Do these characteristics suggest polycentricity?

Overall, the study focused on 774 enquiries referred to the advisers between February

[653] See p. 20

2005 and December 2009. Table 6 below depicts the annual number of enquiries referred during the study period. It shows the gradual decrease in the numbers every year from 188 in 2005 to 120 in 2009. There is no particular explanation for the drop.

Table 6 A number of referred enquiries: annual representation

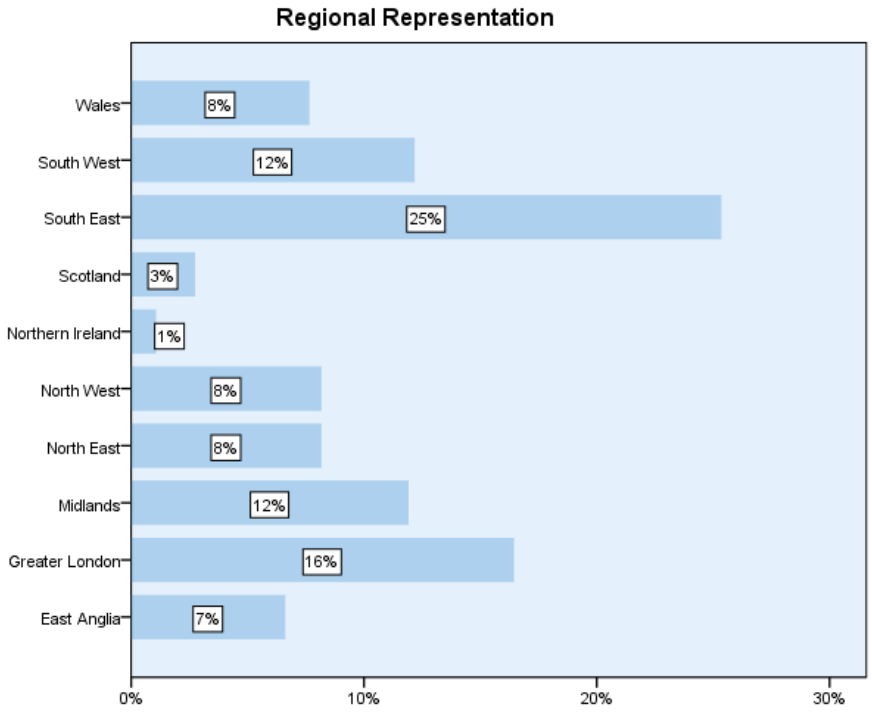
Referred enquiries between 2005-2009	
Year	*Count*
2005	188
2006	160
2007	170
2008	136
2009	120

Regional representation

N	Valid	774
	Missing	0

Though based in London, E.L.F. receives enquiries from all regions of the UK including Scotland and Northern Ireland. Figure 1 presents the regional representation of E.L.F. referred enquiries between February 2005 and December 2009. The majority of cases (196, 25 percent) originated from the South East and from Greater London (127, 16 percent). The fewest cases came from Northern Ireland (8, 1 percent) and Scotland (21, 3 percent), where E.L.F. is currently building its network of advisers.

Figure 1 Regional representation of E.L.F. referred cases 2005 – 2009



The first important finding is that the regional representation of E.L.F. enquiries does not fully reflect the demographic distribution of the UK population. This can be explained by the fact that E.L.F. has an expanded network of advisers working for Greater London and among South Eastern law firms. The second noticeable result is that, bearing in mind the agreed conventional margin of statistical error set at 5 percent[654], the regional representation is confined to the regions of England and Wales. The author knew this result at the time of writing the Report[655] and limited the review of the legal system in Chapter 1 to that of England and Wales.

[654] See p. 204
[655] The BRASS Report, supra note 32

Table 7 Regional representation of E.L.F. referrals: annual analysis

Annual number and percentage of E.L.F. cases according to region										
	2005		2006		2007		2008		2009	
Region	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
East Anglia	10	5%	13	8%	15	9%	5	4%	8	7%
Greater London	30	16%	31	19%	31	18%	20	15%	15	13%
Midlands	18	10%	13	8%	19	11%	17	12%	25	21%
North East	17	9%	9	6%	15	9%	12	9%	10	8%
North West	13	7%	12	8%	12	7%	15	11%	11	9%
Scotland	6	3%	5	3%	5	3%	3	2%	2	2%
Northern Ireland	0	0%	1	1%	4	2%	2	2%	1	1%
South East	52	28%	40	25%	46	27%	30	22%	28	23%
South West	23	12%	19	12%	19	11%	20	15%	13	11%
Wales	19	10%	17	11%	4	2%	12	9%	7	6%
Totals	188		160		170		136		120	

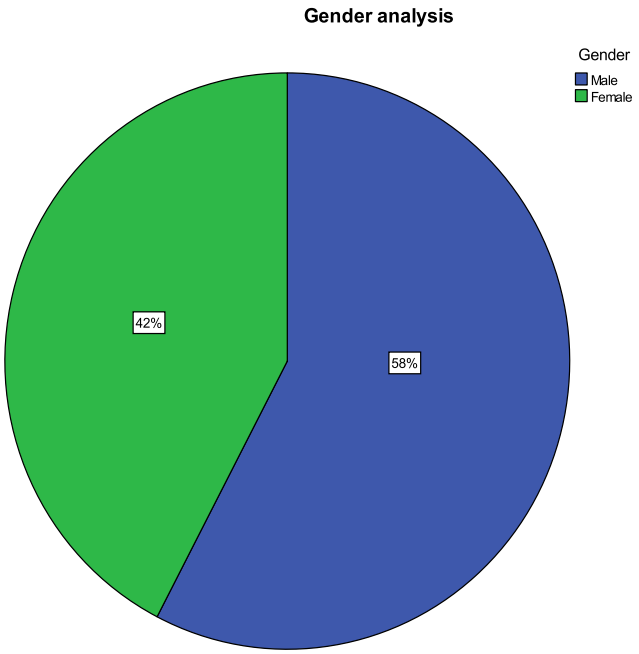
Table 7 above shows the annual representation of the enquiries. The proportion of cases from the South East was particularly high (over 25 percent) over the first three years and dropped slightly to 22-23 percent in 2008 and 2009. A similar trend relates to the proportion of enquiries from Greater London, the number of which dropped slightly in 2008-2009. The smaller proportion of cases from the above overrepresented regions did not lead to an increase in a proportion in any one specific region over the last two years; it rather spread across a number of regions. However, there is a significant increase in the proportion of Midlands' enquiries in 2009 up to 21 percent from the average of 10% between 2005-2008. This might mark a significant change in the representation of E.L.F. cases. Yet, this could also be an anomaly, comparable to that of the Welsh enquiries, which dropped suddenly in 2007 and re-established at the usual rate in 2008. Finally, the proportion of cases from the Northern regions of England remained steady over the five year period of time.

Gender

N	Valid	767
	Missing	7

The gender of the inquirers was established on the basis of the *Equal Opportunities Forms*, the *Digital Redbook* and the *Case Referral Forms*. Figure 2 below breaks down the study results by gender: 58 percent of men and 42 percent of women. The 2003 E.L.F. report found a more equal representation of the 54 percent to 46 percent ratio.[656]

Figure 2 Gender analysis 2005-2009



[656] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 21

Table 8 Gender representation of E.L.F. referred cases: annual analysis

Annual gender representation										
	2005		2006		2007		2008		2009	
Gender	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Male	113	60%	93	58%	93	55%	77	57%	66	56%
Female	75	40%	67	42%	75	45%	56	41%	52	44%
Totals	188		160		168		133		118	

The annual analysis indicates that the ratio was particularly unequal over the first two years of the analysis and established itself at the average between 2008 and 2009. Interestingly, none of the analysed years saw an equal representation (50:50) of cases unlike 2002 indicated in the 2003 E.L.F. Report[657].

Chapter 1 highlighted a theory according to which women could play a particular role in achieving environmental justice.[658]The results above suggest that women have been less engaged in taking active part in reporting the problems to E.L.F.

Age

The age of the contacting persons was established solely upon the *Equal Opportunities Forms*. The number of missing cases amounted to 27 percent and was significant.

Count	Valid	568
	Missing	206

[657] Ibid
[658] Rachel Stein 'Introduction' supra note 123, Luke W. Cole, Sheila R. Foster. *From the Ground Up...* supra note 124, Dorcetta Taylor 'Women of Color...' supra note 125

Table 9Age of E.L.F. clients with a comparison

Age of E.L.F. clients with a comparison				
	1999-2003		2005-2009	
Age group	*Count*	*%*	*Count*	*%*
under 21	0	0%	6	1%
21-30	21	4%	24	4%
31-40	95	17%	53	9%
41-50	142	25%	123	22%
51-60	182	32%	177	31%
61-70	97	17%	139	25%
over 70	24	4%	46	4%
Totals	561		568	

Table 9 above indicates that most of the enquirers were in the 41-70 bracket range (78 percent): 22 percent in the 41-50 bracket, 31 percent in the 51-60 bracket and 25 percent in the 61-70 bracket. The next significant age group of 31-40 attracted 9 percent of E.L.F. clients, leaving the under 31s and over 70s significantly underrepresented. This representation differs slightly from the earlier report. Between 1999 and 2002 the under 31s and over 70s were also significantly underrepresented (each at 4 percent). However, the 31-40 bracket attracted 17 percent and formed part of the mainstream age bracket of 31-69 consisting of 91 percent of all clients. Thus, the most enquirers in the current study are elder than those clients between 1999 - 2002.

This can be partially confirmed by examining the annual age representation in Table 10 below. The 61-70 age bracket consisted of more persons in the last two years of the study than in the first two years. Another important finding is that the under 21s contacted E.L.F. only in 2005 and 2006 therefore statistically they are insignificant. Moreover the count in the age group of 21-30 decreased over the study years.

Table 10 Age of the enquirers: annual representation

Annual age representation										
	2005		2006		2007		2008		2009	
Age group	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
under 21	3	2%	3	3%	0	0%	0	0%	0	0%
21-30	7	5%	8	7%	4	3%	2	2%	3	4%
31-40	18	13%	9	8%	7	5%	13	13%	6	8%
41-50	35	25%	25	21%	28	21%	22	22%	13	18%
51-60	42	30%	39	33%	43	33%	33	32%	20	27%
61-70	22	16%	28	23%	40	30%	23	23%	26	36%
over 70	14	10%	8	7%	10	8%	9	9%	5	7%
Totals	141		120		132		102		73	

Chapter 1 showed that age has become an important variable for environmental justice scholars.[659] These are especially children or the elderly who suffer from the exposure to environmental hazards. The results above do not reveal the number of children that could be involved in the reported issues as the Equal Opportunities Forms did not carry such information. Still, nearly 80% of cases were reported by the clients in the 41-70 brackets and one can assume that many of them could have children or even grandchildren. The question whether the clients' motivations were associated with the health and wellbeing of their children (if any) is important but could not have been answered by this study.

[659] Gordon Mitchell, Danny Dorling 'An Environmental Justice Analysis of British Air...' supra note 86

Employment status

Income are the core variables that had been distinguished in early environmental justice research both in US and the UK[660]. Income is associated with the employment status.

The employment status variable was not considered in *E.L.F. 2003 Report*[661] since it was not directly included in the Equal Opportunities Forms[662]. The enquirers were only asked to provide their 'profession' and the author developed, in an inductive way, categories input later into the SPSS database. It was possible to establish whether the clients were employed, unemployed, retired, students, or unable to work due to incapacity. Housewives' were included with that of voluntary work and, indeed, many clients indicated that they did both. The number of missing values was comparable to other socio-economic variables.

Work status: statistics		
Count	Valid	554
	Missing	220

Table 11 E.L.F. clients works status

Work status 2005-2009		
Work status	Count	%
Employed	253	46%
Unemployed	45	8%
Self-employed	31	6%
Retired	178	32%
Student	8	1%
Voluntary/housewife work	37	7%
Unable to work/Incapacity benefit	2	0%
Totals	554	

[660] See Chapter 1
[661] Paul Stookes, 'Civil Law Aspects...' supra note 29,
[662] See p. 188

According to Table 11 above, nearly half of the clients were employed at the time of submitting an enquiry to E.L.F., whereas a third of the clients were retired and both groups formed the significant proportion (78 percent). There was a small proportion of self-employed (6 percent), unemployed (8 percent) and housewives or people doing voluntary work (7 percent). Students and those unable to work accounted for insignificant proportion in the sample.

By reading the annual composition of the work status in Table 12 below a significant trend must be noted. There was a steady and slight decrease of employed people over the years and a steady and slight increase of the retired. For the work status of both groups, 2008 was the year of anomaly (increase in employed and decrease in unemployed). The recent two years of the study marked a decrease in the number of the unemployed and the voluntary professions. The remaining status groups maintained their average level throughout the study period.

Table 12 Work status of E.L.F.'s enquirers: annual analysis

Annual number and percentage of E.L.F. cases according to the clients' work status										
	2005		2006		2007		2008		2009	
Employment status	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Employed	66	48%	54	47%	53	41%	52	51%	28	39%
Unemployed	13	10%	11	10%	10	8%	6	6%	5	7%
Self-employed	10	7%	4	3%	6	5%	7	7%	4	6%
Retired	32	23%	36	31%	50	39%	30	29%	30	42%
Student	5	4%	2	2%	0	0%	1	1%	0	0%
Voluntary / housewife work	10	7%	9	8%	9	7%	5	5%	4	6%
Unable to work / Incapacity benefit	1	1%	0	0%	0	0%	1	1%	0	0%
Totals	137		116		128		102		71	

Income

This variable was captured exclusively on the basis of the Equal Opportunities Forms (EOFs)[663] and below information indicates that the number of the missing values was slightly bigger than the corresponding numbers in other variables captured solely on the basis of the EOFs. This could be explained by the fact that people are, in general, hesitant to disclose their income. The major governmental surveys face similar problems.

Count	Valid	519
	Missing	255

Table 13 Income of E.L.F. clients

Income of E.L.F. clients with a comparison				
	1999-2002		2005-2009	
Income Band (£ per annum)	*Count*	*%*	*Count*	*%*
under 10,000	209	45%	230	44%
10,000-14,999	95	20%	74	14%
15,000-19,999	58	12%	54	10%
20,000-29,999	54	12%	69	13%
30,000-39,999	23	5%	40	8%
40,000-49,999	15	3%	23	4%
50,000 or over	11	2%	29	6%
Totals	465		519	

[663] See p. 188

Table 13 above compares the income of the enquirers between the current study and the *E.L.F. 2003 Report*[664]. A large proportion of the clients (230, 44 percent) stated that their gross annual income did not exceed £10,000. Nearly 60 percent of the clients earned less than £15,000 and nearly 70 percent earned less than £20,000 per year. A small fraction of the clients (13 percent) earned between 20,000 and 29,999 and higher income brackets attracted smaller number of the enquirers. Only 29 clients (6 percent) benefited from the large wages over £50,000.

A comparison with E.L.F. 2003 Report[665] suggests that the respondent's financial situation has moderately improved. Similarly, 45 percent of the clients earned less that £10,000, however 65 percent earned less than £15,000 and nearly 80 percent earned less than £20,000. There was a similar proportion of the clients receiving the average salary between £20,000 and £29,000 and a significantly lower proportion of people earning higher salaries. Only 2 percent benefited from the highest income.

The above comparison and the statement that the financial situation of the clients improved over the years should not be overestimated. One has to include the changes in inflation and the typical increase of the salaries and the national minimum wage. Nevertheless, the significant finding is that the majority of the enquirers remain in the poor income group.

[664] Paul Stookes, 'Civil Law Aspects...' supra note 29
[665] Ibid

Table 14 E.L.F. clients' income: annual representation

Annual number and percentage of E.L.F. cases according to income										
	2005		2006		2007		2008		2009	
Income	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
under 10,000	69	51%	51	52%	51	42%	31	34%	28	40%
10,000-14,999	16	12%	14	14%	20	16%	17	19%	7	10%
15,000-19,999	11	8%	8	8%	14	12%	13	14%	8	11%
20,000-29,999	17	13%	12	12%	21	17%	10	11%	9	13%
30,000-39,999	10	7%	8	8%	7	6%	8	9%	7	10%
40,000-49,999	5	4%	1	1%	3	3%	8	9%	6	9%
50,000 or over	8	6%	5	5%	6	5%	5	5%	5	7%
Totals	136		99		122		92		70	

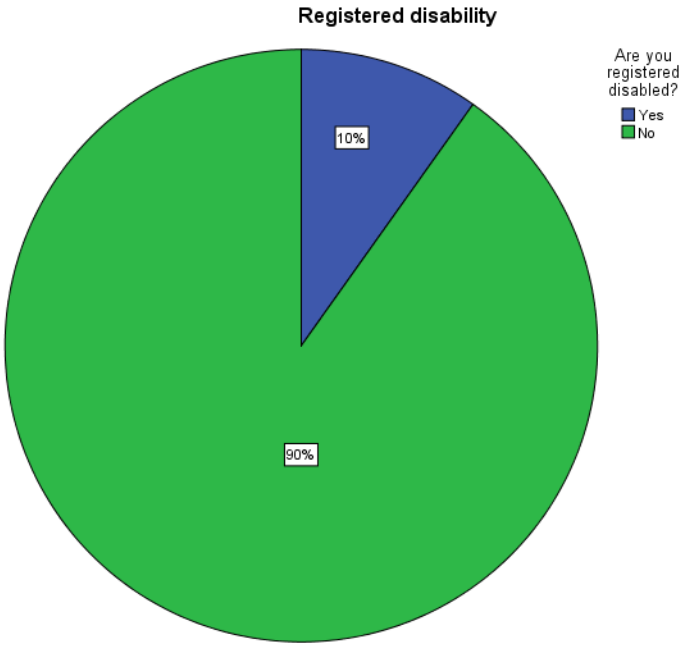
Table 14 above which breaks down income by year indicates the following trends. Firstly, the proportion of the people on the lowest income dropped over the five years from around 50 percent to around 40 percent (with an exception in 2008). This may suggest that the future proportion of the poorest seeking E.L.F.'s advice will be smaller. On the other hand, the proportion of the clients earning between £30,000 and £49,999 per annum rose steadily over the study period.

Registered disability

This variable was also compiled solely on the basis of the Equal Opportunities Forms[666] and the missing numbers were relatively low. The clients were asked whether they were 'registered' as disabled. Such registration is regulated by the Disability Discrimination Act 1995 at the time of conducting this research.

Count	Valid	569
	Missing	205

Figure 3 Disability analysis



There are approximately 7 million disabled people of working age in the UK which constitutes a significant proportion of around 19 percent in the whole working population[667]. The pie chart above (Figure 3) illustrates the proportion of registered disabled people, reaching 10 percent, in the study sample. This proportion does not

[666] See p. 188
[667] Family Resources Survey 2009/10

differ significantly from the 11 percent proportion reported in E.L.F. 2003 Report.[668]

Table 15 Registered disabled: annual analysis

Annual representation of the registered disabled										
	2005		2006		2007		2008		2009	
Disability	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Yes	16	11%	16	13%	12	9%	4	4%	8	11%
No	126	89%	103	87%	120	91%	97	96%	67	89%
Totals	142		119		132		101		75	

Table 15 above indicates that the proportion of the registered disabled fluctuated through the study period between 9 and 13 percent. The number of the disabled clients was particularly low in 2008 (4, 4 percent).

Nationality

The following 3 variables, namely nationality, first language and ethnicity, were core variables in early environmental justice research in the US. The studies showed that the non-Whites have suffered disproportionate exposure to environmental hazards.[669]

This variable was acquired wholly on the basis of the Equal Opportunities Forms (EOFs)[670]. The clients were asked to state their nationality and this allowed the British/non-British differentials to be input into the SPSS database. The reason for this was that the number of other nationalities was very low and dispersed. Missing values in this variable were particularly low. It must be highlighted that the EOF's question referred to the 'nationality' and not the 'citizenship'. The clients were subsequently asked to state their ethnic origin thus nationality was understood to be closely associated

[668] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 22
[669] Robert D *Bullard Dumping in Dixie*... supra note 73, Dorceta E Taylor, 'The Rise of the Environmental Justice Paradigm...' supra note 36
[670] See p. 188

with citizenship. Clients holding dual nationality were linked to one of the groups depending on whether one of their nationalities was British.

Count	Valid	577
	Missing	197

Figure 4 Nationality of E.L.F.'s clients

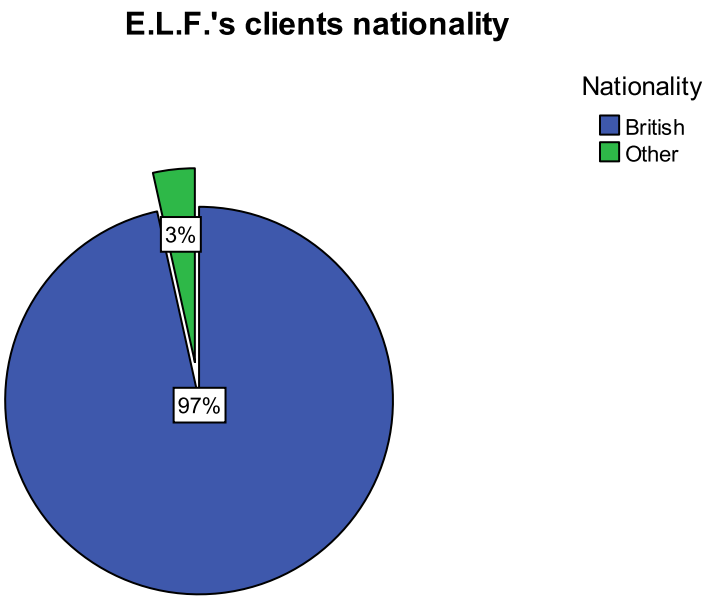


Figure 4 above shows that the proportion of non-British was extremely low, much below the statistical error and the proportion of non-British in the whole UK population.

Table 16 Clients' nationality: annual analysis

Annual representation of the nationality										
	2005		2006		2007		2008		2009	
Nationality	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
British	141	98%	116	96%	127	96%	100	97%	73	96%
Other	3	2%	5	4%	6	4%	3	3%	3	4%
Totals	144		121		133		103		76	

Table 16 above shows that the annual representation of the clients' nationality indicates no particular trends. These were the British citizens who had their cases referred to in the overwhelming majority over the study period.

First language

Having considered the citizenship of the clients this researcher may assume that the similar overwhelming majority would speak English. This was also compiled on the basis of the Equal Opportunities Forms[671] that asked the clients about their first language. Missing values were exactly the same as with the 'nationality' variable.

Count	Valid	577
	Missing	197

Figure 5 below indicates that the proportion of the clients using English as their first language is the same as the proportion of British nationals.

[671] See p. 188

Figure 5 Clients' first language

Table X above shows no particular trends except one anomaly in 2008 when the proportion of native English users dropped to 93 percent.

Table 17 Representation of first language: annual analysis

Annual representation of the first language										
	2005		2006		2007		2008		2009	
First language	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
English	140	98%	121	98%	128	96%	95	93%	73	96%
Other	3	2%	2	2%	5	4%	7	7%	3	4%
Totals	143		123		133		102		76	

Ethnic origin

Count	Valid	562
	Missing	212

This variable was acquired entirely on the basis of the Equal Opportunities Forms (EOFs)[672]. It could not be compared with *E.L.F. 2003 Report* even though that report considered ethnic origin of the clients contacting E.L.F. between 1999-2002. The results were not fully comparable to be included in one table. The 2003 Report used vague descriptions such as "English/French", "English/Irish", "English/Welsh"[673] with no specific ethnic origins such as "English" or "Welsh". The author's descriptions were taken from the EOFs used throughout the study period with an exception of "British". The clients used this name to describe their ethnic origin and, in line with the mixed pragmatic methods, this label was added to the SPSS dataset.

The author admits that the EOFs available descriptions for ethnic origin were imperfect and posed certain problems for the analysis. Take for example "European" which may include all English, Welsh, British, French and Polish etc.

The ethnic origin analysis is useful in capturing the definite number of Asians, Blacks and Indian people in view of separating their origins from the Whites. This is not ideal as people who described themselves as British or European could be non-Whites. The analysis of Table 18 below indicates a minimal presence of non-Whites in the group of the clients whose cases were referred to advisers during the study period (15, 2 percent). The English constituted the highest proportion of the clients (369, 66 percent) followed by the Europeans (66, 9 percent).

[672] See p. 188
[673] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 22

Table 18 Ethnic origin

Ethnic origin of E.L.F.'s clients		
Ethnic origin	*Count*	*%*
Asian British	8	1%
Black African	1	0%
Black British	1	0%
Black Caribbean	2	0%
English	369	66%
Indian	3	1%
Irish	20	4%
Scottish	20	4%
Turkish	1	0%
Welsh	27	4%
European	66	9%
British	10	1%
Other	34	4%
Total	562	1%

Table 19 below shows no particular trends except one for the Europeans. Their proportion stood above 10 percent during the first three study years and slumped to 4 percent between 2008 and 2009. It appears that people described themselves as British only in 2007 which might be explained by the way EOFs were processed during this year.

Table 19 Representation of the clients' ethnic origin: annual analysis

Annual number and percentage of E.L.F. cases according to the clients' ethnic origin										
	2005		2006		2007		2008		2009	
Ethnic origin	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Asian British	5	4%	1	1%	1	1%	1	1%	0	0%
Black African	0	0%	0	0%	0	0%	0	0%	1	1%
Black British	1	1%	0	0%	0	0%	0	0%	0	0%
Black	0	0%	1	1%	0	0%	0	0%	1	1%
English	97	70%	61	52%	80	62%	79	78%	52	68%
Indian	0	0%	0	0%	1	1%	1	1%	1	1%
Irish	2	1%	7	6%	5	4%	1	1%	5	7%
Scottish	5	4%	3	3%	9	7%	1	1%	2	3%
Turkish	0	0%	0	0%	0	0%	1	1%	0	0%
Welsh	8	6%	5	4%	3	2%	6	6%	5	7%
European	16	12%	24	20%	18	14%	5	5%	3	4%
British	0	0%	0	0%	10	8%	0	0%	0	0%
Other	4	3%	16	14%	2	2%	6	6%	6	8%
Total	138		118		129		101		76	

Client status

Count	Valid	740
	Missing	34

Chapter 1 showed that environmental justice claims (both legal and political) and research have been lodged and conducted predominantly by community groups and NGOs.[674]

The clients who contact E.L.F. represented themselves and their families or acted on behalf of community groups. E.L.F. can also be contacted by lawyers representing firms in situations where their clients cannot afford to pay further fees. E.L.F. can also be contacted by other legal persons such as charities and associations.

[674] See Chapter 1, p. 45; see also *R v H.M. Inspectorate of Pollution ex parte Greenpeace (No 2)*supra note 206

Table 20 below shows that nearly all contacts were made by individuals (380, 52 percent) and the community groups (350, 48 percent). Enquiries were also made by an insignificant proportion of practitioners and legal persons.

Table 20 Client status

Client status 2005-2009		
Client status	*Count*	*%*
Community group	350	48%
Individual	383	52%
Practitioner	3	0%
Legal person	4	1%
Totals	740	

Table 21 below illustrates trends: the proportion of community groups' enquiries rose and the proportion of the individuals' calls decreased with a few fluctuations. Over the last two years of the study period the proportion of the individuals was slightly lower than the proportion of the community groups contrary to the overall average. This result is nevertheless insignificant due to the nearly equal overall division.

Table 21 Client status: annual analysis

Annual representation of the clients' status										
	2005		2006		2007		2008		2009	
Client status	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Community group	63	37%	91	58%	68	42%	66	52%	62	52%
Individual	105	62%	66	42%	95	58%	61	48%	56	47%
Practitioner	1	1%	1	1%	1	1%	0	0%	0	0%
Other	1	1%	0	0%	1	1%	1	1%	1	1%
Totals	170		158		165		128		119	

Summary and analysis

E.L.F. provides a referral opportunity to anybody in the UK as long as their concern is environmental and carries a public interest element. However, E.L.F. is based in London and its network is well developed in this part of the country including South East. It is no surprise that the regional representation does not reflect the demographic distribution of the UK population. The analysis shows that the over-representation in the aforementioned regions is decreasing and this may be the beginning of a better representation for E.L.F. in other UK regions. Nevertheless, in the author's opinion the better reflection of the 'census distribution' should not be the most important ambition for E.L.F. It is rather the ability to support those who face environmental problems, which are not dispersed geographically in the same way as the population. In addition, the analysis in Chapter 8 will show that many judicial review cases stopped by cost barriers came from the most deprived UK districts and, in light of environmental justice, such representation is crucial.

As for the less contentious variables in terms of the traditional environmental justice socio-economic factors, most clients were male (58 percent) and middle-aged or old. The almost insignificant proportion of young people, in their 20s or 30s, is somewhat unsurprising given the fact that this fraction of the population is less concerned with biodiversity and the environment when compared with the population in their 40s and older[675]. However, it is surprising given the proportion of people in their 30s in *E.L.F. 2003 Report*. Furthermore, 10 percent of the clients were disabled people and this is well below the UK average.

[675] DEFRA, 'Attitudes and Knowledge Relating to Biodiversity and the Natural Environment, 2007 – 2011. From the Survey of Public Attitudes and Behaviour Towards The Environment' (National Statistic Report for DEFRA, 13 April 2011, London)

Let us now turn to the more controversial variables which are potent in environmental justice discourse: the nationality and ethnic origin and employment/income status.

Firstly, the clients were British with an insignificant proportion (3 percent) of the clients possessing solely non-British passports. The same result relates to the use of the first language: the statistically irrelevant minority uses other than English as their first (often native) language. Moreover, the majority of the clients are of English/Welsh and European ethnic origin. Only 2 percent of the clients declared to be non-Whites. This finding is worthy of attention as it suggests that the concerns about race are limited or even non-existent in the UK unlike in the US.[676]

Secondly, the majority of the clients were employed or self-employed (52 percent) during the referrals. A third of the group was retired which can be linked to and explained by their age. A very small number of enquirers were either unemployed or incapable to work: the least active did not seek the charity's advice. Conversely, the overwhelming majority were professionally active or had been active (retired). What links them is the drive and courage to act when facing environmental problems. Furthermore, the income of the overwhelming majority is either tiny or low with a minority benefiting from high wages.

In light of the above a question arises whether low income is accounted for by the majority of the retired or is it somewhat equally shared by clients in various employment statuses. Table 24 below[677] indicates that nearly third (61, 27 percent) of all employed are on the lowest income compared with 44 percent (68 persons) of the retired. Moreover, half of all self-employed are on the lowest income. Compare this

[676] See p. 38
[677] See p. 240

result with the professionally inactive: the overwhelming majority of students (7, 88 percent), volunteers and housewives (29, 85 percent) and incapable (2, 100 percent) are in the same bracket of the lowest income. The finding is significant since it suggests that even the professionally active constitute a large proportion of the people on a very low income. Table 24 below also indicates that the employed with the lowest income constituted a significant proportion in the whole sample (12 percent) compared with the retired (14 percent). Crucially, if we compute the employed with the self- employed on the lowest income we will obtain the highest proportion in the whole dataset (15 percent). The professionally active earning less than £10,000 per annum constitute the highest proportion of all categories within employment status/income group.

Finally, the clients are divided, almost equally, between those representing themselves or their families and those acting on behalf of the community group. This finding must not be underestimated as community groups are better placed to choose the person on the lowest income who could ask for advice and request further (financial) support. This was tested in Tables 22 and 23 below.

Table 22 Income in the 'individuals' category

Income of individuals

		Frequency	Percent	Valid Percent
Valid	under 10,000	135	35%	49%
	10,000-14,999	39	10%	14%
	15,000-19,999	26	7%	10%
	20,000-29,999	32	8%	12%
	30,000-39,999	21	6%	8%
	40,000-49,999	10	3%	4%
	50,000 or over	11	3%	4%
	Total	274	72%	100%
Missin	Lack of data	106	27%	
	does not apply	2	1%	
	System	1	0%	
	Total	107	28%	
Total		383	100%	

Table 23 Income in the 'community group' category

Income of people representing community groups				
		Frequency	Percent	Valid Percent
Valid	under 10,000	88	25%	39%
	10,000-14,999	32	9%	14%
	15,000-19,999	24	7%	11%
	20,000-29,999	33	9%	15%
	30,000-39,999	18	5%	8%
	40,000-49,999	12	3%	5%
	50,000 or over	18	5%	8%
	Total	225	64%	100%
Missi	Lack of data	125	36%	
Total		350	100.0	

The finding is highly significant. There is much bigger proportion of the people on the lowest income within the 'individuals' category (35 percent) than in the 'community group' category. When assessing the valid cases, thus excluding those individuals whose income bracket could not be determined, nearly half of individuals earned in the lowest income compared with 39 percent of the representatives of the community groups. This analysis suggests that the community groups did not choose a particular

person to make the enquiry.

E.L.F. clients – polycentricity

The above analysis tracked the major characteristics of the E.L.F. clients in the overall sample. It suggests weak polycentricity as it is possible to identify the mainstream interest of the clients in the sample. Most of the persons who reported an environmental issue seem to reflect the needs of the economically disadvantaged British people. In this sense the above results reflect the traditional understanding of environmental justice.

Table 24 Income in the employment status group

Income of the clients according to employment status									
		Work status							
Income band		Employed	Unemployed	Self-employed	Retired	Student	Voluntary work/housewife	incapacity	Totals
under 10.000	Count	61	35	15	68	7	29	2	217
	% within whether working	27%	85%	50%	44%	88%	85%	100%	44%
	% of Total	12%	7%	3%	14%	1%	6%	0%	44%
10.000-14.999	Count	28	3	6	30	1	2	0	70
	% within whether working	12%	7%	20%	19%	13%	6%	0%	14%
	% of Total	6%	1%	1%	6%	0%	0%	0%	14%
15.000-19.999	Count	33	1	2	17	0	0	0	53
	% within whether working	15%	2%	7%	11%	0%	0%	0%	11%
	% of Total	7%	0%	0%	3%	0%	0%	0%	11%
20.000-29.999	Count	43	0	3	19	0	2	0	67
	% within whether working	19%	0%	10%	12%	0%	6%	0%	14%
	% of Total	9%	0%	1%	4%	0%	0%	0%	14%

30.000-39.999	Count	29	1	1	9	0	0	0	40
	% within whether working	13%	2%	3%	6%	0%	0%	0%	8%
	% of Total	6%	0%	0%	2%	0%	0%	0%	8%
40.000-49.999	Count	12	1	2	6	0	0	0	21
	% within whether working	5%	2%	7%	4%	0%	0%	0%	4%
	% of Total	2%	0%	0%	1%	0%	0%	0%	4%
50.000 or over	Count	20	0	1	6	0	1	0	28
	% within whether working	9%	0%	3%	4%	0%	3%	0%	6%
	% of Total	4%	0%	0%	1%	0%	0%	0%	6%
Totals	Count	226	41	30	155	8	34	2	496
	% within whether working	100%	100%	100%	100%	100%	100%	100%	100%
	% of Total	46%	8%	6%	31%	2%	7%	0%	100%

Chapter 7 Results: Focus on referrals

This Chapter will present results of a quantitative analysis of the variables relating to the referred enquiries. The following variables will be analysed: an estimate of the number of affected people; the funding of cases; the type of environmental problem; the area of law; human rights issues; Aarhus pillars engaged; bias; the stage of cases and remedies sought. Unlike in the previous chapter the problem of missing values does not occur save for the variable relating to the funding of enquiries. Moreover, a greater number of variables were available on the basis of the content analysis. The chapter following this one narrows the focus to a chosen fraction of the database, namely the judicial review cases. Thus, for clarity and orderly transition in presentation the variables concerning the stage of cases and remedies sought are explored at the end of the Chapter.

The Chapter aims at answering the second research question, namely:

What are the key features of the referrals? Do these features suggest polycentricity?

Number of people affected

The analysis of E.L.F.'s *modus operandi* in Chapter 5 (Methodology) highlighted that the organisation focused on public interest cases and not on the private disputes including those with neighbours.[678] It is for the case workers and other members of staff to assess the enquiry prior to referral in order to satisfy this requirement. Such an

[678] See p. 179

analysis can be performed by following the rules of legal analysis of material facts underpinned by advice of the supervisors in more complicated situations. To highlight and recap, this requirement should be satisfied for E.L.F. to continue to receive public funding and meet its objectives.

The issue whether the referrals carry an element of public interest is significant since environmental justice movement exposed a pattern whereby a certain cohort of the population faced disproportionate exposure to environmental hazards[679]. Environmental justice claims are therefore a matter of public interest given the ambition of the democratic society to create opportunities for all citizens.

E.L.F. adopted a supplementary method of assessing whether the enquiries carry a public interest element by way of a survey. Enquirers were asked to assess how many people could be affected by the reported environmental problem. The clients were asked to state a number which was subsequently noted in the *Digital Red Book*[680] and in the paper file. The author acquired clients' self-assessments and input the numbers into SPSS.

The *E.L.F. 2003 Report* analysed the same variables albeit by employing a different method. Stookes noted a difficulty in analysing this variable, which was shared by the author:

> "In some instances, the inquirer was not able to specify the numbers of people affected in numerical form and, instead, provided a description such as '10

[679] See Chapter 1(the groups include Blacks, poor, children, women, disabled etc)
[680] See p. 185

neighbours' or 'a small village'".[681]

In these circumstances Stookes performed the following estimation which resulted in the below numbers:

> "a best estimate was made to provide the total number of people likely to be directly affected by the problem. The numbers recorded tend to be conservative, with under-estimating of numbers wherever there was uncertainty. For the purpose of the study, referrals that were county-wide, regional or that related to general environmental government policy, were recorded as nought to avoid distorting the final analysis. Similarly, concerns that were identified as primarily causing harm to wildlife were not registered as directly affecting people. According to information from inquirers when requesting assistance, the total number of people affected by the specified environmental problems was 98,981 during 2001 and 224,141 in 2002. Overall, these figures provided an average of 869 people affected by each environmental problem."[682]

The author decided to record all numbers without interfering with the clients' self-assessments. Indeed certain clients stated large numbers reflecting their belief that a given environmental problem could affect a whole region or even the whole country. Table 25 below indicates that the minimum number was nought and, according to the diary from the content analysis, this was a case involving animal welfare where the client could be persuaded that humans were not affected. At the extreme, a client estimated a maximum number of people affected at 60 million: close to the UK population. There were a few other large numbers in the database. The overall sum

[681] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 19-20
[682] Ibid 20

exceeded 20 million and the average mean was calculated at just above 36,000 people. The average differs significantly from that stated in *E.L.F. 2003 Report* and may be improbably skewed. This is also reflected in a high standard deviation.

Table 25 Statistical analysis of persons affected: enquirers' viewpoint

Estimated number of persons affected	
Valid	570
Missing	204
Mean	35768
Median	200
Mode	1000
Std. Deviation	350301
Minimum	0
Maximum	6000000
Sum	20388004

There are various methods of calculating average; median and mode are more appropriate in the current analysis. These include all numbers into the equation. Therefore the median equals 200, which is very close to the Stookes' result[683] albeit calculated differently. Crucially, the value which occurred more frequently, the mode, was estimated at 1000. The latter is cited as the average in the later passages of the thesis.

The result is significant since the author will match judicial review referrals with the Indices of Multiple Deprivation in the next Chapter[684]. The analysis will be performed by matching the postcodes that the clients declared with the Lower Layer Super Output Areas, which include minimum population of 1000 and the mean amounts to 1500[685].

[683] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 19-20
[684] See p. 299
[685] Lower Layer Super Output Area <http://www.datadictionary.nhs.uk/data_dictionary/nhs_business_definitions/l/lower_layer_super_output

Thus the above analysis suggests that, according to the clients, the alleged environmental problems affect the majority or the whole area in which they reside.

Funding of cases

N	Valid	544
	Missing	230

This variable was collected from the *Digital Red Book* and the *Monitoring Questionnaires*[686] found in the paper files. Following the referral, and after receiving advice, clients were asked how they funded their case. The E.L.F. questionnaire was inaccurate as it did not specifically ask the clients to distinguish between the funding of E.L.F. enquiries and any other activities performed prior to or during the enquiry such as campaigns, additional legal advice etc. We should also note that all cases at the outset are done for free and certain cases are considered entirely on this basis.

Table 26 Funding of cases according to the clients

Funding of cases		
Type of funding	Count	%
CFI	2	0%
Group "fighting	82	15%
Legal Aid	11	2%
None	80	15%
Private	147	27%
Pro bono	166	31%
Insurance	2	0%
Not needed	42	8%
Other	2	0%
Mixture of	10	2%
Totals	544	

The majority of cases were considered without asking for payment (166, 31 percent)

_area_de.asp?shownav=0> accessed on 1 May 2012

[686] See p. 185

(Table 26) and we may assume that the *pro bono* work has been done solely by E.L.F or E.L.F. members. The questionnaire allowed the clients to indicate that they used no funding ('none') for their cases (80, 15 percent) or that funding was 'not needed' (42, 8 percent). As was indicated above, all cases benefited from pro bono advice, thus, the author understands values such as 'none' or 'not needed' to mean *pro bono* advice only is required. On balance, at least 287 clients (54 percent) benefited from free advice. This indicates the importance of *pro bono* legal work: without it more than half of the clients would not be able to obtain any legal advice whatsoever. On the other hand, the reliance on the *pro bono* work could entirely stem from a negative opinion of the adviser suggesting that any other investment would be economically unwise. Clients were allowed to indicate that funding was 'not needed' and this category could embrace enquiries where the enquirers were dissuaded from any investment. Further analysis excludes therefore values of 'none' and not needed'.

The second highest source of funding (142, 26 percent) came from a private pocket. The third source of funding was collections by a group, such as a 'group fighting fund', (82, 15 percent) and is surprisingly low when compared with the proportion of groups/communities which made the enquiry to E.L.F. (see below).[687] This may indicate that people are likely to run or take part in organised campaign but not inclined to contribute money to the common purpose. This assumption may not be true though earlier work, including work by the author, indicates that only a few people in a group or community are ready to donate money.[688] The least frequent sources of funding were a 'mixture' of funding (11, 2 percent), legal aid (10, 2 percent) and conditional fee arrangements (hereafter CFI). The proportion of legal aid is a meaningful finding as this source is a form of state support for those on very low income or people relying on

[687] See p. 266
[688] Radoslaw Stech 'Environmental Information...' supra note 445

benefits. The analysis of income in the previous chapter indicated that a large proportion of 44 percent of clients[689] benefited from very low income below £10,000 and we might assume that they would satisfy the legal aid criteria. The analysis of the criteria that one has to meet to qualify for legal aid is beyond the scope of this thesis. It is sufficient to note a few procedural problems which clients face when trying to obtain legal aid. First, the case should carry good prospects of success and it is difficult to meet this test in environmental cases. Secondly, alongside low funding the administrator will have to take other factors such as the owned property which value may exceed the statutory threshold. This may explain the low reliance on legal aid in relation to E.L.F. enquires. Finally, only two clients benefited from their insurance (mostly covering the value of property) but this source of funding is unpopular in general and subject to even higher procedural thresholds.[690]

Table 27 Funding of enquires: annual analysis

Annual number and percentage of E.L.F. cases according to source of funding										
	2005		2006		2007		2008		2009	
Region	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
CFI	0	0%	0	0%	0	0%	1	1%	1	2%
Group "fighting fund"	20	19%	22	16%	19	14%	14	14%	7	11%
Legal Aid	6	6%	0	0%	1	1%	2	2%	2	3%
None	17	16%	22	16%	15	11%	23	22%	3	5%
Private	29	27%	30	22%	45	33%	29	28%	14	23%
Pro bono	22	20%	38	28%	51	38%	19	19%	35	57%
Insurance	1	1%	1	1%	0	0%	0	0%	0	0%
Not needed	13	12%	14	10%	3	2%	12	12%	0	0%
Other	0	0%	1	1%	0	0%	1	1%	0	0%
Mixture of	0	0%	6	4%	2	1%	2	2%	0	0%

[689] See p. 223
[690] Lord Justice Jackson 'Review of the Civil Litigation Costs: Final Report' (The Stationery Office 2010) p. 304-307

funding					
Totals	108	134	136	104	62

The annual analysis of enquiries according to the source of funding in Table 27 above indicates that the reliance on *pro bono* funding rose gradually over the study period except for 2008. In 2009 this reached the proportion of 57 percent and could be explained by significant drops in 'none' and 'not needed' values. This can be explained by the change of E.L.F. strategy in understanding *pro bono* bracket capable of capturing the two other categories as explained above. Moreover, the reliance on group fighting funds decreased steadily over the five year period from 19 percent to 11 percent. The private capital, with small fluctuations, remains at a high level of 23-25 percent on average.

Type of environmental problems

N	Valid	770
	Missing	4

The definition of environment is wide, as reflected in the definition of 'environmental information' in the Aarhus Convention[691]. The Aarhus's categorisation[692] of state of elements of the environment, environmental factors and the state of human health (including built environment) are mirrored in the author's SPSS category, which was compiled on the basis of the *Digital Red Book*[693] in which E.L.F.'s case workers and the staff made categorisation decisions which remain unchanged in this analysis.

Table 28 Environmental concerns in enquires

Environmental concern with a comparison		
Environmental concern	1999-2003	2005-2009

[691] See p. 132
[692] Aarhus Convention Art. 2(3)
[693] See p. 185

	Count	*%*	*Count*	*%*
Air pollution	110	13%	37	5%
Built Environment	33	4%	66	9%
Conservation	139	17%	105	14%
EIA	12	1%	19	3%
Flooding	25	3%	12	2%
Human Health	80	10%	9	1%
Land	157	19%	324	42%
Light Pollution	22	3%	14	2%
Noise pollution	144	17%	90	12%
Other	33	4%	19	3%
Radiation	34	4%	17	2%
Waste	20	2%	37	5%
Water Pollution	27	3%	21	3%
Totals	836		770	

Table 28 above breaks down types of environmental concerns found in enquiries between *E.L.F. 2003 Report*[694] and the current study. The right-hand side of Table 28 indicates that clients were predominantly concerned about the state of elements of the environment relating specifically to land (324, 42 percent). This includes concerns over open spaces, landscape or visual amenities. The second highest category also relates to the state of elements of the environment peculiar for conservation (104, 14 percent) including habitat conservation and biological diversity. Other elements of the environment are poorly reflected in the referrals. As for the environmental factors only noise pollution constituted a noticeable proportion of environmental concerns during the study period (90, 12 percent). Other factors such as radiation or light pollution amounted to insignificant proportions. Finally, the third category of the Aarhus's definition relating to human health and built environment constituted a relatively small proportion of all cases. Built environment was fairly significant, with 65 cases (9 percent) whereas human health was a potent aspect in 9 cases only (1 percent).

[694] Paul Stookes, 'Civil Law Aspects...' supra note 29

The comparison with *E.L.F. 2003 Report*[695] is somewhat surprising. The concerns about land constituted nearly half (42 percent) of those in the current study with a much higher proportion of other elements of the state of environment including air (110, 13 percent) and conservation (139, 17 percent). Some factors of the environment were also higher with noise pollution amounting to 17 percent and radiation to 4 percent. This can be explained by looking into methodology as Stookes indicated that:

> "[m]people contacting E.L.F. stated that there were two or more environmental concerns. For example, proposals to develop a rail freight yard in a residential area raised concerns about dust, vibration and noise. Where there was clearly more than one environmental concern these were recorded as separate items."[696]

The present analysis records only primary environmental concern as indicated in the *Digital Red Book*[697]. Nevertheless, the comparison shows that land has been the most significant environmental concern in the earlier and the current study.

Table 29 Type of environmental concerns: annual analysis

Annual number and percentage of E.L.F. cases according to environmental concern										
	2005		2006		2007		2008		2009	
Environmental concern	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Air pollution	11	6%	7	4%	6	4%	4	3%	9	8%
Built Environment	11	6%	9	6%	13	8%	21	15%	12	10%
Conservation	16	9%	20	13%	24	14%	27	20%	18	15%

[695] Ibid (data presented in Table 28)
[696] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 17
[697] See p. 185

EIA	1	1%	1	1%	10	6%	2	2%	5	4%
Flooding	3	2%	0	0%	2	1%	3	2%	4	3%
Human Health	2	1%	1	1%	3	2%	1	1%	2	2%
Land	74	39%	91	57%	78	46%	45	33%	36	31%
Light Pollution	2	1%	5	3%	4	2%	2	2%	1	1%
Noise pollution	38	20%	9	6%	10	6%	22	16%	11	9%
Other	5	3%	1	1%	7	4%	2	2%	4	3%
Radiation	6	3%	3	2%	4	2%	2	2%	2	2%
Waste	6	3%	8	5%	8	5%	2	2%	13	11%
Water Pollution	11	6%	5	3%	1	1%	3	2%	1	1%
Total	186		160		170		136		118	

An annual analysis of the cases according to the type of environmental concern in Table 29 above indicates that the proportion of land-concerned enquirers dropped significantly from 39 percent in 2005 to 31 percent in 2009 (34 percent in 2008). The proportion of conservation-related cases rose gradually with some fluctuations over the study period. Noise pollution fluctuated widely being 20 percent, 6 percent, 16 percent and 9 percent in various years. Built environment problems rose considerably and human health issues remained at the very low level over the years.

Area of law

N	Valid	770
	Missing	4

Enquiries consisting of various environmental concerns can be assessed by lawyers specialising in specific areas of law. In fact, most of environmental lawyers decide, at some point of their career, to focus on specific legal terrain since environmental law is a broad discipline. This is reflected in E.L.F.'s network embracing advisers with various specialities. 'Area of law' variable was also compiled on the basis the caseworkers' and

staff's choices recorded in the *Digital Red Book*[698] with which this analysis did not interfere. The input related to the primary area of law and the secondary one was omitted.

The analysis of Table 30 below shows that planning law was linked to the overwhelming majority of the enquirers (618, 81 percent). The second highest category constituted nuisance law including statutory and common law strands with 81 referrals (11 percent). The remaining categories constituted overwhelming minority when analysed individually and were grouped together to be labelled as 'other'.

E.L.F. 2003 Report[699] indicated that "some concerns may have been based on two or more legal areas"[700] and categorised accordingly. The comparison, as with the environmental concerns, cannot be performed precisely. Nevertheless, the proportion of planning law in the earlier report was also highest with 409 enquiries (56 percent). Nuisance constituted the second highest category with a proportion significantly higher than that in the current report (25 percent to 11 percent ratio). This suggests that nuisance law categorised as primary area of law may constitute a relatively significant secondary area of law. Finally, 19 percent of enquires in *E.L.F. 2003 Report* were dispersed over other legal specialisations.

Table 30 Legal area of the referrals

Area of law with a comparison				
Area of law	1999-2003		2005-2009	
	Count	*%*	*Count*	*%*
Contaminated land	3	0%	9	1%
Housing	15	2%	5	1%

[698] See p. 185
[699] Paul Stookes, 'Civil Law Aspects...' supra note 29
[700] Ibid 18

IPCC	7	1%	2	0%
Intellectual Property Rights	3	0%	1	0%
Negligence	18	3%	9	1%
Nature conservation	3	0%	6	1%
Nuisance	183	25%	81	11%
Planning law	409	56%	620	81%
Transport	11	2%	13	2%
Waste	9	1%	1	0%
Water	15	2%	1	0%
Other	58	8%	22	3%
Total	734		770	

An annual analysis of the referrals according to the area of law in Table 31 below indicates that planning law remained at a similar level, slightly above 80 percent over the latest 3 years of the study, save for small fluctuations during the first two years. Interestingly, the proportion of enquiries linked to the nuisance law was significantly high (20 percent) in 2005 and remained at the average 7 percent in the following years. This may suggest that nuisance law was indeed at the high level prior to 2006 when compared with *E.L.F. 2003 Report*. This cannot be fully tracked however due to the lack of data from 2003-2004. Table 31 below does not show any other significant trends.

Table 31 Area of law: annual analysis

Annual number and percentage of E.L.F. cases according to area of law										
	2005		2006		2007		2008		2009	
Area of law	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Contaminated land	2	1%	0	0%	3	2%	3	1%	1	1%
Housing	0	0%	3	2%	2	1%	0	0%	0	0%
IPCC	2	1%	0	0%	0	0%	0	0%	0	0%
Intellectual Property Rights	0	0%	0	0%	1	1%	0	0%	0	0%
Negligence	6	3%	1	1%	1	1%	0	0%	1	1%
Nature conservation	0	0%	1	1%	1	1%	1	1%	3	3%
Nuisance	36	20%	13	8%	13	8%	12	9%	7	6%
Planning law	137	74%	137	86%	140	82%	109	80%	97	82%
Transport	0	0%	2	1%	5	3%	3	2%	3	3%
Waste	0	0%	0	0%	0	0%	0	0%	1	1%
Water	1	1%	0	0%	0	0%	0	0%	0	0%
Other	1	1%	3	2%	4	2%	8	6%	6	5%
Totals	185		160		170		136		119	

Human Rights and wellbeing

This variable was composed on the basis of the inductive content analysis performed entirely on the clients' 'voices'. The author noticed that the enquirers indicated explicitly human rights aspects at the early stage of research. This had been noted in the diary with corresponding referral numbers and then input into SPSS after realising that the numbers could be significant. Inductive analysis was appropriate to report the human rights concerns of the clients rather than linking people's concerns with a wide catalogue of rights in a deductive manner. The reason for focusing on this variable is associated with the wider environmental justice's claims concerning the wellbeing[701]. In addition, another reason for compiling this variable resulted from the fact that Aarhus

[701] See p. 61

Convention links the environment with human rights:

> "Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself"[702]

There is a question as to whether or not the clients voluntarily expressed their concerns about human rights or whether they were prompted by case workers to do so. At the time of performing the research E.L.F. highlighted its environmental focus and clients were expected to prove that their concerns were solely environmental. E.L.F. started advertising its human rights focus in 2010 after obtaining funding from the Equality and Human Rights Commission suggesting that this variable reflects the true concerns about human rights expressed in a voluntary way.

N	Valid	766
	Missing	8

Table 32 below indicates that 76 clients (10 percent) were concerned over life and health aspects of enquires. The second highest category related to matters over property and personal possessions (60, 8 percent) and family life (51, 7 percent). Interestingly, two clients were worried about discrimination and one client about the right to education. There were 6 cases where a mixture of rights was indicated. Overall, 27 percent of all enquires carried a human rights aspect according to the clients.

[702] Aarhus Convention Preamble

Table 32 Human rights aspects of enquires

Human Rights aspect		
Type of funding	*Count*	*%*
Life/Health concerns	77	10%
Family life	54	7%
Property/possessions	59	8%
Fair trial	1	0%
Right to education	1	0%
Non-discrimination	3	0%
Mixture of rights	6	1%
Unidentified	565	74%
Totals	766	

An annual analysis of the cases according to the human rights aspect in Table 33 below indicates that concerns of life and health remained at the average of around 10 percent over the final three years of the study period. The first year showed a particularly large proportion of such concerns (17 percent) and 2006 a low proportion at 6 percent. The fraction in relation to the concern about property and possessions fluctuated over the first three years to establish itself at 7 percent during the last two years. The family life category did not show any particular trend whereas cases with a mixture of human rights aspect remained fixed at the level of 1-2 cases every year.

Table 33 Human Rights aspect: annual analysis

Annual number and percentage of E.L.F. cases according to region										
	2005		2006		2007		2008		2009	
Human rights aspect	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Life and health concerns	29	15%	9	6%	13	8%	12	9%	14	12%
Family life	16	9%	3	2%	15	9%	10	7%	10	9%
Property and possessions	18	10%	19	12%	5	3%	9	7%	8	7%
Fair trial	1	1%	0	0%	0	0%	0	0%	0	0%
Right to education	1	1%	0	0%	0	0%	0	0%	0	0%
Non-discrimination	0	0%	0	0%	1	1%	2	2%	0	0%
Mixture of rights	1	1%	0	0%	2	1%	1	1%	2	2%
Unidentified	121	64%	128	80%	134	79%	101	74%	81	70%
Totals	187		159		170		135		115	

The rule against private interests has also been said to conflict with the notion that where human rights claims are at issue in judicial review, these must be brought by 'victims'[703]. It is entirely possible for environmental claims to entail some associated infringement of the European Convention on Human Rights, such as the right to family life or the right to enjoyment of property.[704] If as part of an environmental judicial review claim, it is asserted that the administrative action amounted to a breach of human rights under the Convention, does the applicant's status of a 'victim' mean that the interest is private? One might argue entirely the opposite case, of course, that a plausible claim of a breach of human rights should be supported in the public interest. This demonstrates the fallacy of the implicit position that private and public interests are mutually exclusive. In a sense all NGOs pursuing an environmental manner will be exhibiting a private interest since their trust objectives will often commit them to promoting certain interests. In the *Thames Gateway*[705] litigation Buglife's wish to protect invertebrates was its passion and its *raison d'etre*.

Concern over the Aarhus pillars

N	Valid	764
	Missing	10

The concerns about procedural hurdles were also generated from content analysis on the basis of the clients' information which was precisely distinguished from other voices as reported in the Methodology Chapter. Such concerns, if identified by the caseworkers and the staff as primary environmental concern, would be categorised as 'other'

[703] Within the meaning of Article 34 of the European Convention of Human Rights and by virtue of section 7 of the Human Rights Act 1998
[704] See Article 8 and Article 1 of Protocol 1 respectively.
[705] *R (Buglife, the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* supra note 524

environmental concerns described and analysed above[706]. If secondary, they would also be captured by *E.L.F. 2003 Report*.[707] In the latter there were 33 such cases and 19 in the current study. The 'other' category includes such problems as 'tax' and 'trusts', as well.[708]

The clients' perceptions differ noticeably from the legal analyses performed by the E.L.F. team. As Table 34 indicates a large proportion of clients (207, 27 percent) signalled procedural problems relating to participation in decision-making. Such problems included a lack of participatory process, delays and flawed engagement. A small proportion of clients (24, 3 percent) declared that their enquiries carried associated problems with access to environmental information. The small fraction can be explained by the fact that E.L.F. refers such enquiries to the relevant section of the Friends of the Earth [709] or Planning Aid[710].There were also a small number of enquiries (26, 3 percent) where clients signalled problems with both access to information and participation in environmental decision-making. On balance, in 231 referrals (30 percent) assumed difficulties with participation. This finding clashes significantly with the number of referrals linked to such concerns by E.L.F.'s caseworkers and staff. Finally, only one client complained about the access to justice which may indicate that they were unaware of the potential barriers to justice. In addition, the content analysis and notes in this researcher's diary show that in majority of cases these were the advisers or caseworkers who informed the clients about the potential difficulties with access to justice. Moreover, the insignificant proportion of the clients who complained about the access to justice might suggest that the alleged environmental problems were

[706] See p. 249
[707] Paul Stookes, 'Civil Law Aspects...' supra note 29, p. 16
[708] Ibid
[709] Rights & Justice Centre at Friends of the Earth
[710] Advice Helpline at Planning Aid

premature.

Table 34 Concerns about Aarhus Convention's pillars

Aarhus pillars' concerns		
Pillar	*Count*	*%*
Information	24	3%
Participation	207	27%
Both	26	3%
Access to justice	1	0%
Unidentified	506	66%
Totals	764	

An annual analysis of the referrals according to the in Table 35 below indicates no particular trends except that concerns about participation remained steadily at a level above 24 percent over the study period with two exceptions in 2006 and in 2008, when the proportion exceeded 30 percent. The worries about access to information and about 'both' concerns fluctuated over the study period and dropped to 1 percent in the end. Interestingly, there were no complaints about the access to justice in the last two years when the issue became more potent in the country.

Table 35 Concerns about the Aarhus pillars: annual analysis

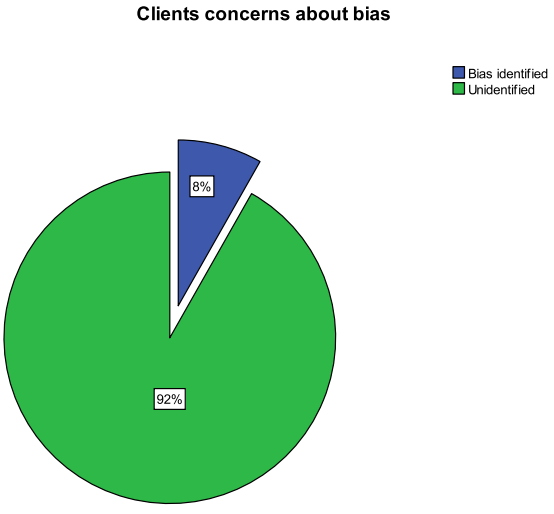
Annual number and percentage of E.L.F. cases with alleged Aarhus's pillar concern										
	2005		2006		2007		2008		2009	
Pillar	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Information	7	4%	5	3%	5	3%	6	4%	1	1%
Participation	41	22%	48	30%	48	28%	42	31%	28	24%
Both	5	3%	9	6%	4	2%	7	5%	1	1%
Access to justice	0	0%	0	0%	1	1%	0	0%	0	0%
Unidentified	132	71%	98	61%	112	66%	79	59%	85	74%
Totals	185		160		170		134		115	

Bias

N	Valid	739
	Missing	35

This variable was generated in a similar inductive way to the two categories above. The notes in the author's diary indicate that some clients directly expressed concerns about bias thus a creation of this variable and input into SPSS would be useful. In addition, this decision was made at the time of the *Redcar*[711] decision involving bias and this problem was expressly discussed in E.L.F.'s headquarters. The issue is important and distinct from the procedural difficulties discussed above. If clients think that public authorities are prejudiced an atmosphere of distrust posing barriers to any cooperation can be created.[712]

Figure 6 Perceived bias in enquiries



[711] *R (Lewis) v Redcar and Cleveland BC and others* [2007] EWHC 3166
[712] Radoslaw Stech 'Environmental Information...' supra note 445

The Figure 7 above illustrates that the perception of bias in *Redcar* case was shared by 8 percent of E.L.F. clients (62 referrals). This is a low proportion, yet above the accepted statistical error of 5 percent. The conclusion, underpinned by the annual analysis in Table 36 below, is that the problem of perception of bias exists among the clients. It must be highlighted that the author captured explicit complaints about bias without prompting or directing the enquirers.

Table 36 Bias: annual analysis

Annual number and percentage of E.L.F. cases with alleged bias										
	2005		2006		2007		2008		2009	
Bias	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Bias identified	12	7%	17	11%	14	8%	12	9%	7	6%
Unidentified	150	93%	142	89%	156	92%	120	91%	109	94%
Totals	162		158		168		131		116	

Stage of cases

N	Valid	769
	Missing	5

The variable was generated from the detailed content analysis of the electronic database and the paper files. The author could establish the stage at which the enquiry was made by indicators, where clients and/or advisers directly referred to, inter alia, judicial review, consultation, early participation. However, there were enquiries, where such conclusions could not be drawn easily and an analysis of the material facts had to be performed. This included checking the dates of decisions; whether planning applications

were submitted or were due to be submitted by a developer; or whether a label ‘appeal’ meant ‘judicial review’ or ‘public inquiry’ or proceedings before the ombudsman. The variable was captured on the basis of all available material and does not reflect any particular person’s viewpoint.

Table 37 below indicates that majority of referrals (227, 30 percent) were at the stage of consultation followed by almost equal proportion of enquiries at judicial review stage. The third highest group constituted complaints (96, 12 percent), where clients expressed dissatisfaction over certain issues such as noise pollution or fumes travelling from a nearby industrial plant. The following group constituted public inquiry cases (71, percent). The complaints must be distinguished from 44 (6 percent) grievances about an alleged lack of enforcement or monitoring action by a public authority in relation to certain activities. The enquiries were classified to be at the stage of complaints if the grounds for dissatisfaction arose from acts not related to statutory obligations of public authorities. In turn, the enquiries were classified at the stage of enforcement if the grounds for dissatisfaction arose from the public authority’s breach of its enforcement duties. Further, a small and tangible proportion of enquiries (45, 6 percent) stood at the early participation stage where planning applications were due to be submitted by a developer. The clients sought advice on how they could influence the course of events before a formal consultation was commenced. Finally, there was a significant group of enquiries (58, 8 percent) which were classified as ‘other’ and included a range of cases: guidance sought how to set up an environmental charity, guidance on how to use a specific legislation, complaints to European institutions etc.

Table 37 Stage of enquiries 2005-2009

Stage of enquiries 2005 – 2009		
Stage	*Count*	*%*
Consultation	227	30%
Early participation	45	6%
Public Inquiry	71	9%
Enforcement	44	6%
Complaint	96	12%
Ombudsman	4	1%
judicial review	224	29%
Other	58	8%
	769	

Table 38 Stage of enquiries: annual analysis

Annual representation of the stage of enquiries										
	2005		2006		2007		2008		2009	
Stage	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Consultation	44	23%	58	36%	47	28%	45	33%	33	29%
Early participation	20	11%	5	3%	10	6%	6	4%	4	3%
Public Inquiry	20	11%	8	5%	18	11%	8	6%	17	15%
Enforcement	13	7%	12	8%	8	5%	7	5%	4	3%
Complaint	34	18%	16	10%	14	8%	15	11%	17	15%
Ombudsman	0	0%	1	1%	1	1%	0	0%	2	2%
judicial review	51	27%	51	32%	54	32%	47	35%	21	18%
Other	6	3%	9	6%	18	11%	8	6%	17	15%
Totals	188		160		170		136		115	

Table 38 above indicates that proportions of consultation and judicial enquiries fluctuated over the study period and the former was higher only in 2006 and 2009. The difference is particularly visible in 2009 when 29 percent of cases stood at the consultation stage and only 18 percent at the judicial review. Setting aside this year, the judicial review stage was most prominent followed by the consultation stage.

Summary and analysis

This Chapter focused on referrals and provided an exploration of types of enquiries, some aspects of their substance and their stage. A number of variables were generated from the *Digital Red Book*[713], whereas another set of variables could only be established upon content analysis of paper files. The number of missing values did not exceed the conventional five percent error and we can summarise the findings with absolute confidence.

[713] See p.185

The quantitative analysis confirmed that the enquiries carried a significant public interest element affecting, on average, 1000 persons. This confirms the operational principles of E.L.F. highlighted in the Methodology Chapter[714]. Given the significant public interest it is worth noting that only a few cases were funded from the public purse in the form of legal aid. This can be explained and justified by the high threshold of requirements that must be met before legal aid can be provided. Most of the referrals were analysed for free or funded privately. It is striking that only a small fraction of enquiries benefited from the groups' fighting funds given the large proportion of groups as established in the previous chapter. Table 39 below provides further analysis of the funding of cases within community clients and clarifies that communities did not rely significantly on the common funds. The proportion is higher than in the whole sample yet, nonetheless, 20 percent of clients relied on private funding and *pro bono* work by E.L.F.

Table 39 Funding of cases in the 'community group' category

Funding of cases by community groups				
		Count	%	Valid %
Valid	CFI	2	1%	1%
	Group "fighting fund"	66	19%	25%
	Legal Aid	6	2%	2%
	None	33	9%	13%
	Private	54	15%	20%
	Pro bono	80	21%	30%
	Insurance	1	0%	0%
	Not needed	15	4%	6%
	Other	1	0%	0%
	Mixture of funding	7	2%	3%
Missing	Total	265	75.7	100
	Lack of data	74	21.1	
	System	11	3.1	

[714] See p. 181

Total	85	24.3
Total	350	100%

A further significant finding is that more than 50 percent of the clients were concerned about the state of the environment relating to land and conservation. Factors of the environment, built environment and human health constituted significantly smaller proportions of enquiries as classified by E.L.F. The human health constituted only 1 percent of enquiries; however, it does not mean that such concerns were non-existent. The variable focus on human rights shows that in 10 percent of the enquiries clients were concerned about their health and life. Furthermore, 7 percent of the clients were concerned about their family life which also includes human health concerns as interpreted by the European Court of Human Rights[715]. This is an example how content analysis shed deeper insight into the content and type of cases alongside the conventional quantitative analysis.

Table 40 below sheds more light on the occurrence of human rights aspects in the environmental concerns classified by E.L.F.'s caseworkers and staff. Most cases in which clients expressed anxiety about human life and health were classified to be primarily concerned with land (16), air pollution (13), radiation (11) and noise pollution (9). This finding is important since, as it was indicated in Section 3 above, there were only 37 enquiries concerning air pollution and 17 regarding radiation. Conversely, there were 324 referrals relating to land. Thus, the concerns about life and health amounted to 5 percent of all land referrals and 35 percent of all air pollution and 65 percent of all radiation enquiries. Interestingly, the cross-tabulation in Table 40 indicates 7 life and human health concerns in the group 'Human Health' as classified by E.L.F. Section 3 above noted that E.L.F. classified 9 such cases therefore we would expect that these are captured these cases in the content analysis.

[715] See p. 96

The author went back to the files at the time of writing up this Chapter at the end of 2010 and found that the two cases that he had not marked as possessing life or health aspect were wrongly classified by E.L.F.'s caseworkers. The two cases concerned housing developments. There is an explanation for the caseworkers' error that seems viable. The *Digital Red Book* consisted of abbreviations for environmental concerns and 'HH' meant 'Human Health'. It might me that the caseworkers mistook HH for 'Housing' or 'Housing Development'

Further, Table 40 below indicates that the majority of complaints concerning family life were classified under noise pollution. This finding is in accord with a general importance given to noise pollution in environmental law and the recognition that an exposure to noise may breach human rights and interfere with the enjoyment of private and family life. In fact many cases which reach the European Court of Human Rights are interwoven with noise pollution and its impact on private and family life.[716] Further, Table 40 shows that most complaints relating property and possessions were later classified under land (22 enquiries), flooding (8), noise pollution (8), built environment (6), waste (3), water pollution (3) and air pollution (2). The findings seem logical since property issues can be dispersed within a variety of environmental concerns. Even noise can lead to problems with property where the clients are expected to undertake insulation work to limit the pollution.

[716]See p. 96

Table 40 Environmental problems and human rights: crosstabulation

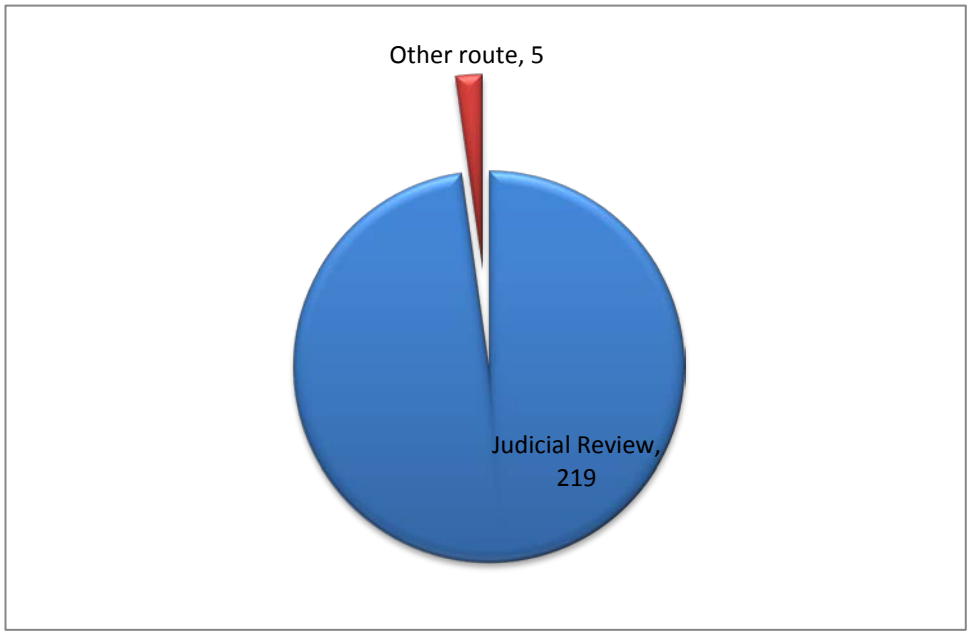
Environmental problems and human rights										
		Life/Health concerns	Family life	Property/ possessions	Fair trial	Right to education	Non-discrimination	Mixture of rights	Unidentified	Total
Air Pollution	Count	13	5	2	0	0	0	2	14	36
	% within human	17%	9%	3%	0%	0%	0%	33%	3%	5%
Built	Count	2	2	6	0	0	1	0	54	65
	% within human	3%	4%	10%	0%	0%	33%	0%	10%	9%
Conservation	Count	2	3	0	0	0	0	0	100	105
	% within human	3%	6%	0%	0%	0%	0%	0%	18%	14%
EIA	Count	1	0	1	0	0	0	0	17	19
	% within human	1%	0%	2%	0%	0%	0%	0%	3%	3%
Flooding	Count	0	0	8	0	0	0	0	4	12
	% within human	0%	0%	14%	0%	0%	0%	0%	1%	2%
Human Health	Count	7	0	0	0	0	0	0	2	9
	% within human	9%	0%	0%	0%	0%	0%	0%	0%	1%
Land	Count	16	11	22	0	0	1	1	269	320
	% within human	21%	20%	38%	0%	0%	33%	17%	48%	42%
Light Pollution	Count	1	4	4	0	0	0	0	5	14
	% within human	1%	7%	7%	0%	0%	0%	0%	1%	2%
Noise Pollution	Count	9	26	8	0	1	0	1	45	90
	% within human	12%	48%	14%	0%	100%	0%	17%	8%	12%
Other	Count	0	1	0	0	0	0	1	17	19
	% within human	0%	2%	0%	0%	0%	0%	17%	3%	3%
Radiation	Count	11	0	1	0	0	0	1	4	17
	% within human	14%	0%	2%	0%	0%	0%	17%	1%	2%
Waste	Count	12	2	3	0	0	1	0	17	35

	% within human	16%	4%	5%	0%	0%	33%	0%	3%	5%
Water pollution	Count	3	0	3	1	0	0	0	14	21
	% within human	4%	0%	5%	100%	0%	0%	0%	3%	3%
Total	Count	77	54	58	1	1	3	6	562	762
	% within human	100%	100%	100%	100%	100%	100%	100%	100%	100%

Further, the majority of enquiries were classified primarily under planning law. As a result, it comes as no surprise to learn that the majority of cases were either at early participation, consultation, public inquiry or judicial review stage. Planning law is one of the most contentious areas of law yet it offers broad opportunities for the public to use law at various stages, which is reflected in the E.L.F. database. Planning law procedures are closely associated with the pillars of the Aarhus Convention: in both instances there is an emphasis on access to information, participation in decision making and access to justice in a wider sense including public enquiries, judicial review and resort to the ombudsman. The variable which focused on the pillars shows that there was a considerable proportion of clients complaining about participation. An insignificant fraction of clients was concerned about access to information since such cases had been referred to the Friends of the Earth specialist service. An insignificant proportion of the clients complained about access to justice and we can assume that they would not be knowledgeable about the barriers to justice at this initial stage of sending an enquiry to E.L.F. Finally, the author found that eight percent of the clients complained about biased and prejudiced public authorities, which constitutes serious accusations, posing problems for the entire relationship between the public and their representatives in public authorities.

Finally, the author identified 224 referrals at the judicial review stage. Such enquiries concerned situations where decisions had been made and other forms of appeal were not available. Nevertheless, judicial review cases often involve more than one defendant and included legal persons. For this reason it was important to establish how many clients with enquiries at judicial review stage decided to use or wanted to use judicial review rather than private law challenges based on common law. Other clients could be persuaded not to pursue judicial review claims but rather continue influencing public authorities prior to any opinion on prospect of success in judicial review. The author found five such instances, two in which clients decided to challenge the private part in courts and three where they decided to continuing exerting their demands on pubic authorities. The figure 8 below indicates that there were 219 cases at judicial review stage pursuing this route. This number is a base number for further analysis in the following chapter.

Figure 7 Referrals at judicial review stage



E.L.F. referrals – polycentricity

The above analysis tracked the major characteristics of the E.L.F. referrals in the overall sample. The confirmed that the enquiries carried a significant public interest element affecting, on average, 1000 persons. The variable focus on human rights shows that in 10 percent of the enquiries clients were concerned about their health and life. Furthermore, 7 percent of the clients were concerned about their family life which also includes human health concerns. Moreover, planning law was linked to the overwhelming majority of the enquirers. The above suggest that there are many interests involved in each case.

Chapter 8 Results: Focus on referrals at judicial review stage

Chapter 8 will focus on 219 referrals which were at the stage of judicial review during the study period. The main purpose of the Chapter is to address the two questions relating to the narrower purpose of the study:

1. What proportion of judicial review referrals received a negative opinion as to the prospects of success at judicial review? What is the proportion of judicial review cases where clients were advised to take further steps towards judicial review?

2. Given the answer to the above question, did clients not proceed primarily because of costs?

Thereafter the Chapter will focus on measuring polycentricity of the judicial review cases which originated in England only. The author will match the clients' postcodes with the Indices of Multiple Deprivation in order to observe the wider context in which the cases are embedded. The aim is to answer the following question:

Are judicial review referrals polycentric?

Type of legality challenged

The type of legality challenged variable was generated from the content analysis of the clients' complaints and was compiled solely on the basis of their views. The variable was compiled following the preliminary research during which the author understood that it was possible to distinguish between the complaints regarding broad substantive or procedural legality of an administrative decision in question. Chapter 2 reviewed the grounds for judicial review[717] and Chapter 2 showed that courts in England and Wales

[717] See p. 85

may be unprepared to deal with certain substantive aspects of the environmental cases[718]. The variable was compiled by matching the content of clients' complaints with the grounds of judicial review depicted in the previous Chapter. The variable was particularly difficult to establish given the nature of legal skill required in matching the merits of the case with particular grounds. The variable distinguishes the clients which solely complained about the merits of the decision such as claiming that 'it was wrong', 'unreasonable' or 'against the environment'. Such clients' complaints were labelled as 'substantive challenge'. The clients who chose to complain about the procedural impropriety and included claims that the decision substantively flawed were included into the 'mix of procedural and substantive' category. There were also clients who only attacked the procedural aspect of the decision and were classified accordingly.

Table 41 below indicates that there was a fairly small proportion of clients (41, 19 percent) who complained solely about the merits of the decision affecting the environment. The reflexive diary[719] indicates that most of such complaints were related to pure dissatisfaction with the decision. Such disenchantment would not probably serve as a basis for ground in judicial review. The overwhelming majority complained either about the procedural impropriety (80, 37 percent) or about the mixture of grounds (91, 42 percent). It is important to note that the complaints were mostly written by the interns following the initial telephone interview or email exchange. It might be true that the interns interrogated the clients only about the procedural impropriety. The test of irrationality is difficult to pass. The establishment of procedural impropriety is likely to improve the chances of receiving a positive opinion as to the prospects of success by the adviser.

[718] See p. 156
[719] See p. 210

Table 41 Type of challenge in judicial review referrals

Type of challenge		
Challenge	Count	%
procedural challenge	80	37%
substantive challenge	41	19%
mix of procedural and substantive	91	42%
not stated	6	3%
Total	218	

However, Table 42 below, which shows the annual representation of the same variable, suggests that the substantive complain can form the fair share of all complaints as it occurred in 2005 (33 percent) and 2009 (29 percent).

Table 42 Type of judicial review challenge: annual analysis

Annual representation of the type of challenge										
	2005		2006		2007		2008		2009	
Type of challenge	***Count***	***%***	***Count***	***%***	***Count***	***%***	***Count***	***%***	***Count***	***%***
procedural challenge	14	29%	25	50%	19	35%	17	38%	5	24%
substantive challenge	16	33%	8	16%	6	11%	5	11%	6	29%
mix of procedural and substantive	15	31%	16	32%	29	54%	22	49%	9	43%
not stated	3	6%	1	2%	0	0%	1	2%	1	5%
Total	48		50		54		45		21	

Likelihood of success

The likelihood of success variable was generated through the content analysis of the

advisers' opinions attached to the referral files. A number of files carried an extensive opinion of counsel while some included solely a brief note as to the likelihood of success in the courts. The preliminary research informed the author that it was impossible to make a basic distinction between referrals with either a negative or positive opinion as to the prospects of success. A number of advisers were reluctant to give either but advised that there was a need for further work on the case before giving a clear opinion. The author classified such cases as 'advised to proceed'. This categorisation was also consulted with and influenced by E.L.F. as the organisation wished to distinguish such scenario[720]. The referrals were classified as with 'negative prospects' when the adviser specified clearly that the referral would not succeed before the courts or estimated the chances of success at 49% or less. Finally, the category of referrals with 'prospects of success' requires further explanation. The cases that received 50 percent or more chances of success were included in this category. In addition, the referrals which were assessed to have "reasonable grounds for judicial review" were included into this category. This is in line with the literature review and especially with the *Corner House* case which lowered the threshold of the initial opinion as to the merits of the cases which would qualify for the PCO.[721] The author deducted from the content analysis that 'arguable case' was that where the adviser pronounced 50 percent or more chance of success, which is in line with the *Corner House* principle.

[720] See political dimension of the study, p. 209
[721] Supra note 267

Table 43 Prospects of success in judicial/statutory review

Prospects of success in the High Court		
Challenge	**Count**	**%**
prospects of success	60	27%
negative prospects	109	50%
advised to proceed	40	18%
not stated	10	5%
Total	219	

Table 43 above indicates that half of the referrals at the stage of litigation received a negative opinion as to the prospects of success in or available grounds for judicial review. It is important to note that some of these referrals could have been arguable cases but did not pass the prospects of success test due to time delay[722]. It was mentioned in Chapter 2 of this thesis[723] that claimants had 3 months to commence judicial review following the final decision. This timeframe has been widely criticised for being too short to commence complex litigation. In addition, it is possible that lack of funding caused the delay as poor clients could be unaware as to the possible avenues of obtaining legal redress in line with a theoretical concept presented by Galanter and described in Chapter 9 of this thesis. The reflexive diary indicates that the clients who received negative opinion as to the prospects of success were advised to seek alternative support from European Commission, local MP or Ombudsman[724].

The second largest group of clients (60, 27 percent) received a positive opinion as to the prospects of success in the courts and another 40 clients (18 percent) were advised to proceed further. Thus, in total, nearly 50 percent of clients (100) were encouraged to

[722] However the research did not trace the time limits and it is impossible how many arguable cases could not proceed further due to time delay.
[723] See p. 82
[724] See p. 210

take their cases onto the avenue of litigation. The author found 10 cases (5 percent) where he could not establish the advisers' opinion.

Table 44 Prospects of success in judicial/statutory review: annual analysis

Annual representation of the advisers' opinions										
	2005		2006		2007		2008		2009	
Opinion	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
prospects of success	8	17%	15	30%	18	33%	13	28%	6	29%
negative prospects	22	46%	26	52%	28	52%	25	54%	8	38%
advised to proceed	16	33%	7	14%	7	13%	6	13%	4	19%
not stated	2	4%	2	4%	1	2%	2	4%	3	14%
Total	48		50		54		46		21	

An annual analysis in Table 44 above shows that the referrals with a negative opinion remained at approximately 50 percent in the first four years of the study period. The number plummeted to 38 percent in 2009. Conversely, the proportion of the referrals with positive prospects of success in the courts was noticeably low in 2005 and established itself at the average of 30 percent in the remaining years. The cases which were advised to proceed reached a very high proportion of 33 percent in 2005 and established itself at the average of 13 percent between 2006 and 2008. Such cases were at higher proportion of 19 percent in the final study period. The annual analysis shows that the referrals with a negative opinion dominated the sample throughout the study period. In addition, the observed fluctuations concerned the referrals that were either advised to proceed further or received positive prospects of success, proving the difficulty in drawing clear boundaries between them. It is also interesting to note the swing in the final year and further research could be conducted to establish whether the proportion of cases with a negative opinion dropped in the following years not included

in the sample.

Conclusion of cases

This variable was compiled on the basis of E.L.F.'s client monitoring questionnaires[725] complemented by the author's extensive telephone interviews and email contacts with the clients and the advisers. The search was conducted towards the end of the secondment in E.L.F. and in the periods afterwards to ensure the accuracy of data and rigour. At the time of writing the BRASS Report[726] in December 2009 the author found 15 cases which reached the courts. This number resulted from the client monitoring and the advisers' statements. Yet, in the follow-up research conducted in the legal databases such as Lawtel, Westlaw and LexisNexis the judicial review reports could not be found. Subsequent contact with the advisers on the phone or email revealed that some of them understood settlement in the High Court by means of court order as 'judicial review'. Following this discrepancy in understanding the meaning of judicial review The author conducted additional searches and established a large number of possible conclusions reflecting the complexity of litigation. The final check was performed at the time of writing-up in July 2011.

Table 45 Conclusion of judicial/statutory review cases

Judicial/statutory review cases conclusions		
Challenge	Count	%
Court judgment	8	4%
Barred from court due to cost	56	26%
Barred from court due to other reasons	117	53%
Resolved successfully by chance	2	1%
Settled out of court	9	4%
Quashed at permission stage for judicial	7	3%

[725] See p. 185
[726] Radoslaw Stech, Robert G Lee and Deborah Tripley, 'Costs Barriers...' supra note 1

review		
Settled with consent order	7	3%
Progressing	4	2%
Not found	8	4%
Ombudsman	1	1%
Total	219	

Table 45 above indicates that there were 8 referrals (4 percent) which reached the courts. The author was able to find that 7 of these cases were reported in the widely available legal databases online. One of these cases was reported by the advisers and the clients to have reached the courts without further details. It might be possible that the case was litigated under a different name and not reported. The further analysis on the conclusions of the judgments conducted on the basis of judgment transcripts revealed that there were 3 successful and 3 unsuccessful judicial challenges. The outcome of one case could not have been determined. The author was unable to confirm the final result of the one case mentioned above.

Table 45 indicates that there were 56 cases which did not reach the courts due to the cost barrier and 117 cases due to other reasons. The latter concerned primarily reasons associated with time delay but also clients' ill health or even death.[727] Further, there were 2 cases which were resolved successfully 'by chance'. This category was compiled when the clients stated that it was luck resulting from developer's bankruptcy or financial crisis which contributed to the final outcome rather than the work of E.L.F. or its advisers.

The further three categories relate to the settlement and quashing order by the court in

[727] There was one case with positive prospects of success which did not proceed further due to the death of the claimant. (Source: Reflexive diary)

the permission stage. The author accepted the general definition of settlement proposed by Bondy and Sunkin, which is relevant for E.L.F. out of court settlements:

> "[A]n outcome agreed by the parties as opposed to an outcome achieved by adjudication. Overwhelmingly, this is reached in correspondence, telephone communication and discussions outside court on hearing dates."[728]

Eisenberg offers a definition which draws a line between settlement and adjudication:

> "Adjudication is conventionally perceived as a norm-bound process centred on the establishment of facts and the determination and application of principles, rules, and precedents. Negotiation, on the other hand, is conventionally perceived as a relatively norm-free process centred on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff."[729]

Settlement can also include formal ADR such as mediation. The analysis of the Client Monitoring Forms and the contacts made with the clients and their advisers did not show that such methods have been used. As mentioned above and earlier, the advisers were reluctant to disclose any details concerning the settlement.

The second category of cases which settled with consent order requires further discussion. The consent order can be granted by the court in line with s 40(6) of the

[728] Varda Bondy and Maurice Sunkin, 'Settlement in judicial review Proceedings' (2009) *Public Law* 237, 240
[729] Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' 1976 89(4) *Harvard Law Review* 637

CPR[730]. In *The Practice Direction (Administrative Court: Uncontested Proceedings)*[731] Collins J. provided guidance as to the practical implementation of the rules:

> "Where the parties are agreed as to the terms on which proceedings in the Administrative Court can be disposed of and require an order of the court to put those terms into effect they should lodge with the Administrative Court Office a document (with one copy thereof) signed by the parties setting out the terms of the proposed agreed order and a short statement of the matters relied on as justifying the making of the order, authorities and statutory provisions relied on being quoted.
>
> [...], if the court is satisfied that the order should be made, the order will be made without the need for attendance by the parties or their representatives. The making of the order will be publicised on the Court Service website.
>
> If the court is not satisfied on the information originally provided or subsequently provided at the court's request, that the order can properly be made, the proceedings will be listed for hearing in the normal way"[732].

Moreover, the settlement, though made by parties, requires judicial intervention because the court must be satisfied that the consent order should be made. In order to assist the court the parties should enclose their justification for settlement in the document. The court must be primarily satisfied that it is in the public interest to make the order and if the agreement does not meet this threshold "[t]he court will not make an order"[733]. There is an instance where the court rejected making the consent order as in *R. v St*

[730] Supra note 218
[731] [2008] 1 W.L.R. 1377
[732] Ibid
[733] Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's judicial review (Sweet & Maxwell 2007)

Helens Justices Ex p. Jones.[734] The lodging of the consent order is not prohibitively expensive as it amounts to £45[735] unless the claimant qualifies for a remission. Moreover, it can be submitted prior to or after the permission stage order with an important variation. According to the Administrative Court Guidance the lodging of the draft consent order prior to the permission consent "must include provision for permission to be granted."[736] The court will consider the documents and can either issue a consent order or refer the case for a full hearing. As a result, settlement by way of Rule 40(6) of the CPR must be distinguished from the above definitions of the settlement[737]. It includes some degree of judicial intervention, which extent varies and depends on the stage of the overall proceedings. In all cases the judge must be satisfied that the consent order will benefit the wider society and, as the Administrative Court Guidance suggests, the judge could consider the merits of the case if the lodging is made prior to the formal permission consent.

There were 7 cases which were settled with a consent order issued by the Court. This means that the parties reached a settlement agreement certified by the court. This category is different from the settlement out of court (9 cases, 4 percent) where the parties did not seek such a certification. Furthermore, there were 7 cases which were quashed at the permission stage by the judge. Finally, there was one case which was reported to have reached the Ombudsman, 4 cases progressing and 8 which outcome could not be found.

[734] [1999] 2 All E.R. 73
[735] Administrative Court Guidance, 'Notes for Guidance on Applying for judicial review' (London 2011) <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/administrative-court/judicial-review.pdf> accessed 15 June 2011, 16
[736] Ibid
[737] See p. 284

Annual representation of the advisers' opinions										
	2005		2006		2007		2008		2009	
Opinion	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*	*Count*	*%*
Court judgment	1	2%	1	2%	3	6%	3	7%	0	0%
Barred from court due to cost	15	31%	11	22%	14	26%	11	24%	5	24%
Barred from court due to other reasons	25	52%	26	52%	29	54%	27	59%	10	48%
Resolved successfully by chance	0	0%	1	2%	1	2%	0	0%	0	0%
Settled out of court	3	6%	2	4%	3	6%	1	2%	0	0%
Quashed at permission stage for jr	1	2%	2	0%	3	6%	0	0%	1	5%
Settled with consent order	1	2%	5	10%	0	0%	1	2%	0	0%
Progressing	0	0%	0	0%	0	0%	2	4%	2	5%
Not found	2	4%	2	4%	0	0%	1	2%	3	14%
Ombudsman	0	0%	0	0%	1	2%	0	0%	0	0%
Total	48		50		54		46		21	

Table 46 Conclusion of judicial/statutory review cases: annual analysis

The annual analysis of the conclusions in Table 46 above indicates that referrals barred from litigation due to other reasons than costs remained at the fairly steady proportion of average 50 percent throughout the study period except 2008. Moreover, the referrals stopped by the cost barrier were at the highest 31 percent in 2005 and remained close to the overall average between 2006 and 2009. There are no other trends worthy attention in Table 46.

Cost barrier to environmental judicial review

The analysis above showed the descriptive statistics concerning judicial/statutory review referrals. In order to answer the research question of how many positive cases

were stopped by the cost barrier the author had to perform cross-tabulation in the SPSS. The two variables were crossed, namely the opinion on the prospect of success in the courts and the cases' conclusions.

Firstly, Table 47 (Case Conclusions) below indicates that there were 7 cases which reached the courts and concluded with a judgment following the positive opinion as to the prospects of success by E.L.F.'s advisers. There was also one case that concluded in the same fashion with no clear opinion by E.L.F. The content analysis of this case revealed that it was the only statutory review in the sample of cases with positive prospects of success or 'advised to proceed' opinion. The case did not receive the opinion of the adviser due to unavailability yet the client managed the challenge and was unsuccessful.[738] As it was indicated above[739] 3 cases were successful, 3 unsuccessful and the author could not determine the final outcome of one case. Initially the number of judicially reviewed cases, and the successful ones in particular, seems very low. Yet when compared with other reported statistics the number of 6 judicial review cases which started in E.L.F. appears to be a significant figure. Table 47 below illustrates the number of judicial reviews taken by various groups and individuals between 1995 and 2001 in the UK. The overall number of such cases (110) brought over a seven year period of time is not striking and renders E.L.F.'s work in this aspect to be of high significance.

[738] Referral 2629 (Source: Reflexive diary)
[739] See p. 283

Table 47 Estimated number of public interest court cases brought by environmental NGOs, citizen groupings and individuals 1995-2001

Category of applicant	Total number of cases
Established environmental NGOs	25
Ad hoc identifiable grouping	20
Ad hoc collection of individuals	21
Individual applicants	42
Other	2

Source[740]

This result gains even further significance when compared with a number of judicial reviews pursued in their own right by major UK NGOs between 2005 and 2009. Table 48 below indicates that Friends of the Earth, Greenpeace and WWF undertook 8 judicial reviews over the study period altogether.

Table 48 Summary of judicial reviews undertaken by a selection of NGOs between 2005-2009

NGO	Total number of cases	Total number of court judgments
Friends of the Earth	4	
Greenpeace	2	
WWF	2	
Total	8	

Source[741]

Further, Table 45 demonstrates that there were 56 cases which were stopped by the cost barrier which constituted 26 percent of all judicial review referrals. Out of these 26 (12 percent) referrals received a clear-cut opinion as to the good prospects of success in the courts and 28 (13 percent) required further work before estimating the likelihood of success. There were also 2 cases where clients stated that they could not proceed further

[740] Sheridan M, 'United Kingdom Report' in N de Sadeleer, G Roller and M Dross (eds), *Access to Justice in Environmental Matters*... Supra note 249
[741] Aarhus Convention's Compliance Committee, <http://www.unece.org/env/pp/compliance/Compliance%20 Committee/27TableUK.htm>

because of costs but the author could not establish whether these received negative or positive opinion on further litigation. This result is deeply significant when compared to the number of judicial reviews undertaken by E.L.F. and other NGOs (described above). It indicates that were 26 cases that potentially lost an opportunity of the court judgment predominantly because of costs. There were also 28 cases which could be subject to further work potentially leading to litigation but were immediately chilled by the cost barrier.

The significance of the outcome

The author is not suggesting that the 26 cases would succeed in the courts. This would be overly optimistic given the complexity of environmental cases. Yet, it is possible to develop an additional argument that these cases should be worthy of attention at the litigation stage on the basis of results found in Table 49, 50 and 51. The author will firstly look at Table 49 to establish in what area of law the cases arose and, secondly, at the Table 50 to ascertain possible outcomes.

Firstly, Table 50 demonstrates that the vast majority of all judicial/statutory review referrals (197 out of 219) were primarily concerned with the area of planning law. Specifically, 7 out of 8 cases which concluded with the court judgment and 50 out of 56 cases which were advised to proceed/said to be arguable were primarily concerned with planning law. This is important given the fact that environmental concerns constitute only one of many material considerations in making the planning decisions. This produces a difficulty at the outset of litigation because the advisers are not able to envisage the approach of the courts to such disputes. Moreover, planning law is closely linked to government policy and certain environmental concerns, even if strong, might fall victim of the wider economic or political interests. Furthermore, any litigation in

this area threatens substantial delays in pursuing developments rendering a probability of significant economic loss for the developer and communities. As a result, courts took a strict approach to the time limits attached to the litigation. To compensate for these shortcomings the system is equipped with ample opportunities for participation. The author will not review the participatory aspect of the planning law because it would be beyond the scope of this thesis. It is sufficient to note that the planning system meets the procedural requirement of the second pillar of the Aarhus Convention[742]. Nevertheless, the opportunities for participation may not be satisfactory for the public in terms of substantive opportunities for influencing the decision-making process[743]. Table 34 in Chapter 5 indicated that there were 231[744] E.L.F. referrals (30 percent) in which clients expressed difficulties with participation[745]. When limited to judicial/statutory review referrals the results are particularly striking as shown in Table 49 below. The clients signalled problems with participation in 95[746] judicial/statutory review referrals out of all 219. More importantly, nearly half (27[747]) of all 56 arguable/advised to proceed referrals which were stopped by cost barrier were said to hold procedural flaws associated with participation. When limited to 26 cases with good prospects of success barred by cost barrier 13[748] such referrals were concerned with flawed participation according to the clients Setting aside whether or not the problems with participation would constitute an arguable element in potential litigation this is an important result. It demonstrates that the notable part of E.L.F. clients who were advised to commence a court challenge had been dissatisfied with and signalled concerns over inadequate participation. It is therefore logical to suggest that litigation may offer further

[742] See Chapter 3
[743] Supra note 445
[744] For simplicity the author compiled the categories where clients expressed sole problems with participation and compound problems with participation and access to information
[745] See p. 259
[746] For simplicity the author compiled the categories where clients expressed sole problems with participation and compound problems with participation and access to information
[747] See ibid for information concerning the calculation
[748] See ibid for information concerning the calculation

opportunities for participation and influencing the final decision on a particular planning case with a significant environmental aspect.

Secondly, referring back to Table 47 it is clear that a fairly significant number of cases (7, 12 percent of all cases with good prospects of success) were quashed at permission stage of judicial review. The primary goal of permission stage, which is done on papers and can be followed by oral appeal if unsuccessful, is to weed out the weak cases. It suggests that a fair share of the 26 cases with good prospects of success but barred by costs could be quashed at this stage of litigation. Nevertheless the larger number of referrals with positive prospects of success has been settled either out of court or by way of a consent order. The former might imply more of a political agreement to avoid further litigation whereas the latter might imply more of a legal agreement to avoid the expensive challenge in the courts.[749]This suggests that a bigger share of the 26 cases with good prospects of success but barred by costs could conclude in the settlement which is favoured by most stakeholders.[750] Crucially, three out of seven cases which were judicially reviewed were successful for the claimant. The unsuccessful cases might have contributed to the development of law by clarifying legal uncertainties and thus avoiding similar attempts by other clients. They could also be waste of time and money. To sum up the second part of the argument the figure of 26 is significant because, given the other results, as it suggests that some of these cases could lead to settlement or judicial review contributing to the final resolution of the dispute or establishment/alteration of the rule of law.

[749] In fact the settlement with a consent order issued by the judge were reported by the advisers to mean "judicial review" as explained above, see p. xx
[750] See above definitions of settlement and s 40(6) of CPR

Table 49 Opinion on the prospects of success and cases conclusions: cross-tabulation

		Case conclusion										
		Judgment	Barred (costs)	Barred (other)	Successful	Settled	Quashed	Consent order	Progressing	Not found	Ombudsman	Totals
prospects of success	Count	7	26	2	2	5	7	7	3	1	0	60
	% within advice	12%	43%	3%	3%	8%	12%	12%	5%	2%	0%	100%
	% within conclusion	88%	46%	2%	100%	56%	100%	100%	75%	13%	0%	27%
	% of Total	3%	12%	1%	1%	2%	3%	3%	1%	0%	0%	27%
negative prospects	Count	0	0	109	0	0	0	0	0	0	0	109
	% within advice	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	100%
	% within conclusion	0%	0%	93%	0%	0%	0%	0%	0%	0%	0%	50%
	% of Total	0%	0%	50%	0%	0%	0%	0%	0%	0%	0%	50%
advised to proceed	Count	0	28	5	0	4	0	0	1	1	1	40
	% within advice	0%	70%	13%	0%	10%	0%	0%	3%	3%	3%	100%
	% within conclusion	0%	50%	4%	0%	44%	0%	0%	25%	13%	100%	18%
	% of Total	0%	13%	2%	0%	2%	0%	0%	0%	0%	0%	18%
not stated	Count	1	2	1	0	0	0	0	0	6	0	10
	% within advice	10%	20%	10%	0%	0%	0%	0%	0%	60%	0%	100%
	% within conclusion	13%	4%	1%	0%	0%	0%	0%	0%	75%	0%	5%
	% of Total	0%	1%	0%	0%	0%	0%	0%	0%	3%	0%	5%
Totals	Count	8	56	117	2	9	7	7	4	8	1	219
	% within advice	4%	26%	53%	1%	4%	3%	3%	2%	4%	0%	100%
	% within conclusion	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
	% of Total	4%	26%	53%	1%	4%	3%	3%	2%	4%	0%	100%

Table 50 Area of law and conclusion of cases

Count												
primary		court (whether case went to court)										Total
		yes	no due to costs	no due to other reasons	no but resolved successfully	settled out of court	yes but quashed at permission stage	settled with court consent	progressing	do not know	ombudsman	
Contaminat	positive		1						1			2
	advised to proceed		1						0			1
			2						1			3
Housing	negative			1								1
				1								1
Negligence	positive							1				1
								1				1
Nuisance	negative		0	7								7
	advised to proceed		2	1								3
			2	8								10
Planning	positive	6	25	2	1	4	7	6	2	1	0	54
	negative	0	0	99	0	0	0	0	0	0	0	99
	advised to proceed	0	25	4	0	4	0	0	1	0	1	35
	not stated	1	1	1	0	0	0	0	0	6	0	9
		7	51	106	1	8	7	6	3	7	1	197
Transport	positive		0	0	1	1						2
	negative		0	1	0	0						1
	not stated		1	0	0	0						1
			1	1	1	1						4
Other	positive	1		0						0		1
	negative	0		1						0		1
	advised to proceed	0		0						1		1
		1		1						1		3

Table 51 Aarhus pillars and conclusion of cases

		yes	no due to costs	no due to other reasons	no but resolved successfully	settled out of court	yes but quashed at permission stage paper	settled with court consent	progressing	do not know	ombudsman	
problems with access to info	positive	0	2	0								2
	negative	0	0	4								4
problems with participation	not stated	1	0	0								1
		1	2	4								7
	positive	1	9	0		3	2	5		1		21
	negative	0	0	43		0	0	0		0		43
both	advised to proceed	0	11	1		2	0	0		0		14
	not stated	0	2	0		0	0	0		1		3
		1	22	44		5	2	5		2		81
	positive		4	0				1		0		5
	negative		0	6				0		0		6
unidentified	advised to proceed		1	1				0		0		2
	not stated		0	0				0		1		1
			5	7				1		1		14
	positive	6	11	2	2	2	5	1	2	0	0	31
	negative	0	0	56	0	0	0	0	0	0	0	56
	positive secondary	0	16	3	0	2	0	0	1	1	1	24
	not stated	0	0	1	0	0	0	0	0	4	0	5
		6	27	62	2	4	5	1	3	5	1	116

Protective Costs Orders

PCO were reviewed in Chapter 2 where we concluded that the current rules sit uneasily with the Aarhus Convention. Moreover the rules are uncertain and capable of discouraging the legal adviser from pursuing the application for the PCO. For the purpose of the E.L.F./BRASS Report[751]and this thesis this author sought cases whose clients applied for judicial review. The following is a rare example of comprehensive qualitative analysis given the confidentiality agreed with ELF at the outset of the research.[752] It is replicated from the BRASS/E.L.F. Report.

"'The research discovered that an application for a Protective Cost Order (PCO) was lodged in only one out of 26 cases with supposedly good prospects of success. There were a few cases in which the clients stated that they had considered an application for a PCO but found it still to be prohibitively expensive. The case where an application for a PCO was lodged concerned local residents wishing to register an area, consisting of a pond surrounded by land on two sides, as a village green. The land has been used and the pond has been fished for many years by the local community; facts which were underpinned by witnesses' testimony. Subsequently, a significant part of the pond was purchased with an intention of establishing a fish farm. The Council stated that there had been an interruption to the use of the land and the local community would have to issue a further application with regard to the status of the land. The latter proceeded to a public inquiry where an Inspector excluded the pond from any protected status.

The client, who was retired but ineligible for legal aid, was advised by an E.L.F. adviser (in this instance Queen's Counsel) to judicially review the above decision. The prospects of success were estimated at 50 percent but the insurance could not cover the legal costs. The matter proceeded ultimately by way of a Conditional Fee Arrangement together with Counsel's application for the PCO. The PCO was not granted because, in the judge's view, the issues

[751] Radoslaw Stech, Robert G. Lee, Deborah Tripley 'Costs Barriers to Environmental Justice' (Report for Environmental Law Foundation and BRASS) (Alen & Overy 2009), see supra note 1
[752] See p. 209

raised were not of general importance and the public interest did not require that they should be resolved. In addition, the judge added:

> "Further, I would only consider it just to make a protective cost order if the same or similar cap was applied to the costs which the claimant might recover from the Defendant and/or the interested party. The cap would be set so far below the estimates of recoverable costs under the conditional fee agreement made by the claimant as to defeat its purpose"[753]

Counsel, who is a specialist on the law relating to village greens, advised on issuing an application for the PCO by way of an oral hearing. The client could not risk the potential costs at this stage. There is one other example of a case in which an application for a PCO was considered by an adviser. A client opposed planning permission for commercial and residential development in a woodland area, which is part of the green network. The development included the erection of retail units, houses and more than 50 apartments.

Counsel identified numerous grounds for judicial review suggesting that this would be a good arguable case in the Courts. For example, the Council had failed to take into account relevant considerations and to give adequate reasons for the decision. Counsel advised:

> 'However the claimant will no doubt be advised that there is no guarantee of success. There is always a risk of an order for costs if the application for permission or the substantive claim fails. On the information presently available to me I do not think that an application for a protected costs order is likely to succeed because the issues, while of great importance to the claimant and the local community, are unlikely to be considered 'of general public importance'; nor can it be said that it is in the public interest for those issues to be resolved'[754]

[753] *R v. Sunderland City Council [2008] CO/6798/2008 (Application for a protective costs order)*
[754] Opinion of Counsel, taken from the cases file

The client decided not to proceed with the case in the light of this advice.'"[755]

[755] E.L.F. Report 20-21

Polycentricity of E.L.F. judicial review referrals

This section will analyse the referrals in context of spatial distribution. Chapter 1 showed that environmental justice can be measured spatially on the basis of the Indices of Multiple Deprivation (IMD)[756]. The researchers focused on measuring the exposure of communities living in the most deprived areas of the UK. Thus the focus was on establishing the aggregate exposure to environmental elements and factors. Yet, environmental justice concerns the procedural mechanisms, notably access to information and participation in decision-making. Chapters 2 and the above analysis in this Chapter showed a limited usefulness and success of judicial review in addressing the equality concerns. Crucially, the author argues that it is important to measure the aggregate access to the procedural mechanisms related to environmental justice. This section will focus on judicial review referrals in England only. The rationale for this choice alongside more detailed methodological note will be explained immediately below. Thereafter the author will present the results in a form of a visual 'polycentric matrix' (Appendix 4). Given the pragmatist epistemological underpinnings the matrix is a result of the author's experimentation as to how the results could be best presented and analysed. The aim was to produce a simple, user-friendly, matrix with the use of different colours. Similarly to the Fuller's spider web[757]the 'polycentric matrix' illustrates the variety of centres in the results.

Methodology note

The author analysed the spatial distribution of the E.L.F. referrals at the time of collecting the data. The postcodes of all referrals were input alongside other variables in SPSS. The description of the IDM was provided in the main Methodology Chapter earlier in this thesis[758]. Given the pragmatist approach, the agreement with E.L.F[759] and the limited time and financial resources it

[756] See p.50
[757] See p. 316
[758] See p. 206
[759] See p. 190

was decided to focus on presenting the spatial distribution of the judicial review referrals only. Moreover, this focuses on the aggregate index rather than on the individual indices.

The matrix includes the case ordinal number, the year, the name of the district. Further, the measurement is conducted at the national and district level. The former includes the overall score and each of the 32,480 Lower Super Output Areas is assigned a unique score. It also includes two ranks of each of the 326 districts at the national level. The inclusion of two ranks stems from the complexity of measuring the districts as explained in the IDM Technical Report

> "There are a number of reasons why districts are complex to describe as a whole and to compare. Districts can vary enormously in both geographic and population size. Districts also have very different populations. Some contain more variation in deprivation while in other places deprivation may be concentrated in severe pockets rather than being more evenly spread. This makes an overall picture more difficult to establish. All areas experiencing high levels of deprivation will be identified by one or more of these six measures, as they are designed to capture deprivation in areas of different sizes with different levels of heterogeneity." [760]

Table 52 below summarises the six measures:

[760] IMD Technical Report, supra note 645, p. 54

Table 52 IDM measures

Name	Description	Aim and methodology
Local concentration	"Population weighted average of the ranks of a district's most deprived LSOAs that contain exactly 10% of the district's population".	Allows the identification of districts' 'hot spots' of deprivation. Created by "taking the mean of the population weighted rank of a district's most deprived LSOAs that capture exactly 10% of the district's population".
Extent	"Proportion of a district's population living in the most deprived LSOAs in the country".	Measures "how widespread high levels of deprivation are in a district. It only includes districts containing LSOAs which fall within the most deprived 30% of LSOAs in England. Therefore some districts do not have an overall score for this measure and they are given a joint rank of 294. In this measure, 100% of the people living in the 10% most deprived LSOAs in England are captured in the numerator, plus a proportion of the population of those LSOAs in the next two deciles on a sliding scale – that is 95% of the population of the LSOA at the 11th percentile, and 5% of the population of the LSOA at the 29th percentile".
Income	"[T]he number of people who are income deprived"	Gives an indication of "the sheer number of people experiencing income deprivation" at district level. It "is a count of individuals experiencing income deprivation".
Employment	[Th]e number of people who are employment deprived	Gives an indication of "the sheer number of people experiencing employment deprivation" at district level. It "is a count of individuals experiencing employment deprivation".
Average of LSOA ranks		"This measure is useful because it summarises the district taken as a whole, including both deprived and less deprived LSOAs. All the LSOAs in a district need to be included to obtain such an average, as each LSOA contributes to the character of that district. This measure is calculated by averaging all of the LSOA ranks in each district. The LSOA ranks are population weighted within a district to take account of the fact that LSOA size can vary. The nature of this measure means that a highly polarised district would not score highly because extremely deprived and less deprived LSOAs will 'average out'. Conversely, a district that is more homogenously poor will have a greater chance of scoring highly on an average measure."
Average of LSOA scores	**Population weighted average of the combined scores for the LSOAs in a district**	This measure also describes the district as a whole, taking into account the full range of LSOA scores across a district. The advantage of this measure is that it describes the LSOA by retaining the fact that more deprived LSOAs may have more 'extreme' scores, which is not revealed to the same extent if the ranks are used. This measure is calculated by averaging the LSOA scores in each district after they have been population weighted.

Source

The following steps were taken in creating the polycentric matrix.

1. There is no direct way of matching the postcode with the IMD, which is based upon the LSOAs and districts. The matching is possible through the 'Neighbourhood Statistics' on the Office for National Statistics Website[761]. As a result the author established the overall score of the LSOA from which the referral originated in England (hereafter "REF LSOA") and the name of the district (hereafter "REF DISTRICT"). The author focused on the referrals originating from England because the IMD are different in Ireland, Scotland and Wales.

2. The author captured the average of LSOA rank and score for the district summaries available online[762].

3. The author found the LSOA score in the overall LSOA summary available online[763]. The document consists of the scores of all 32,480 LSOAs arranged according to the district name. The author established the number of LSOAs within the district.

4. The author copied all scores within a given district to a blank Excel spreadsheet and sorted them from smallest to largest. He identified the rank of the REF LSOA within the REF DISTRICT.

5. The author input income of the client. Overall, there are 219 judicial review referrals and 193 based in England. Further, 62 out of 193 referrals had missing income variable. The

[761] Office for National Statistics 'Neighbourhood Statistics' <http://www.neighbourhood.statistics.gov.uk/dissemination/LeadHome.do;jessionid=GpQvTNsL0vyCtVnM5LCWslvLPVCWnQc0X4z5QWmn7FqJ1FTGG2Mk!-40454641!1322085416594?m=0&s=1322085416875&enc=1&nsjs=true&nsck=true&nssvg=false&nswid=1280> accessed 1 May 2011 – 1 July 2011

[762] Department for Communities and Local Government 'The English Indices of Deprivation 2010: Local Authority District Summaries' (London 2011) <http://www.communities.gov.uk/publications/corporate/statistics/indices2010> accessed 1 April 2011

[763] Department for Communities and Local Government 'The Indices of deprivation 2010: Overall' (London 2011) < http://www.communities.gov.uk/publications/corporate/statistics/indices2010> accessed 1 April 2011

analysis focused therefore on 131 referrals consisting of the income variable.

6. The table was created consisting the following five variables subject to further analysis: LSOA score, average district rank, average district, rank within district and income representing the interests at national, regional and personal level.

7. Each variable established upon the IMD was weighted accordingly:

- Values within the first 10 percent were assigned a RED colour;
- Values between 10-20 percent were assigned an colour ORANGE colour;
- Values between 20-30 percent were assigned a BRIGHT YELLOW colour;
- Values between 30-50 percent were assigned a LIGHT GREEN colour;
- Values between 50-100 percent were assigned a DARK GREEN colour.

8. Income variable was weighted accordingly:

- under 10,000 was assigned a RED colour;
- 10,000-14,999 was assigned an colour ORANGE colour;
- 15,000-19,999 was assigned a BRIGHT YELLOW colour;
- 20,000-29,999 was assigned a LIGHT GREEN colour;
- 30,000 and above was assigned a DARK GREEN colour.

9. The referrals which all 5 variables were assigned the same colour or colours within the range of two corresponding colours are non-polycentric or uniform. This is represented in highlighting the ‘Case No’ with the colour.

The cases are polycentric when there is a clear contrast between the colours which represents different centres.

Results

The results are presented in the polycentric matrix (Appendix 4) below. Out of 131 referrals 42 (32 percent) are non-polycentric. Further, 8 (6 percent) are purely environmental justice (with all IMD variables within the first 30 percent of deprivation and income below £20,000) and 34 (26 percent) are purely environmental (with all IMD variables below the 30% threshold and income above £20,000). The remaining 89 referrals (68 percent) are polycentric and can be characterised as follows:

- Claims of poor individuals living in a relatively non-deprived area altogether (for example referrals 12 and 13).

- Claims of poor individuals living in a relatively deprived LSOA which is one of the most deprived within a district. Yet the district is one of the least deprived when compared with other districts nationally (referrals 9, 88, 102).

- Claims of poor individuals living in a relatively non-deprived LSOA and district. Yet, still, their LSOA is one of the poorest in the district (referrals 2, 3, 17, 21, 93, 94).

- Claims of poor individuals living in one of the most deprived districts. Yet, their LSOA is non-deprived and highly ranked within the district (referral 19).

- Claims of poor individuals living in deprived LSOA and district. Yet their LSOA is highly ranked within the district (referral 20).

- A claims of an individual on average or high income living in a deprived area altogether (referral 46).

- Claims of individuals on average or high income living in a non-deprived LSOA highly ranked within the district. Yet the district itself is one of the most deprived nationally (referral 7, 27, 56, 62, 63, 78, 79, 83, 105, 113).

- Claims of individuals on average or high income living in a non-deprived LSOA based in a non-deprived district. Yet, still, the LSOA is one of the most-deprived within the district (referral 11, 64, 77).

- A claims of an individual on average or high income living in a deprived LSOA and district. Yet, their district is one of the least deprived in the country (referral 102).

Summary

Chapter 8 showed that the judicial review sample consisted of planning law-based claims which are said to be polycentric due to the variety of involved interests. A half of these referrals received a negative opinion as to the prospects of success at judicial review and the remaining half were advised to proceed. In the latter pool there were 54 cases which were prevented by the cost barrier. A small number of referrals ended with a full judgment in the High Court and a significant number concluded in out-of-court/in-court settlement. Chapter 8 analysed spatial distribution of the referrals which originated in England by matching the postcode with the English Indices of Multiple Deprivation. Such methodology allowed for measuring interests involved in each judicial review referral. It found that the majority of cases were polycentric.

Chapter 9 Ramifications of the findings

Chapter 9 will discuss the ramifications of the findings and will be followed by a short conclusion. It will attempt to answer the final research question.

The thesis has reviewed the *modus operandi* of E.L.F. in detail[764] and noted the organised flow of information in place; a specific set of documents used for accepting and reviewing enquires and taking them further to the referral stage. It is crucial to note that E.L.F. does not aim specifically at lower income or disadvantaged communities in its referral service. Everybody who faces an environmental problem can make an enquiry but the research showed that there was increased demand from lower socio-economic class in the UK. It makes E.L.F. one of the main environmental justice organisations alongside others recently recognised in the literature.[765] Above, we concluded the interdependence of the type of funding and experts' opinion on the referrals' suitability for litigation. In this section The author will argue that the expertise which E.L.F. provides through its network of solicitors and barristers is unique in the sphere of environmental justice in the UK. The author will underpin his thesis with the theoretical structure developed by Marc Galanter which has become one of the most frequently cited pieces in socio-legal community.

Have-nots and litigation: theory

Galanter's article[766] concerns the structural features of the litigation parties and, more broadly, the organisation of the society and the legal system. The author made the distinction between Repeat Shooters and One Players:

> "Because of differences in their size, differences in the state of the law, and differences in

[764] See p. 174
[765] Ole W Pedersen, 'Environmental Justice in the UK...' supra note 170
[766] M Galanter, 'Why the "Haves" Come Out Ahead" <http://marcgalanter.net/Documents/papers/WhytheHavesComeOutAhead.pdf>, see also Marc Galanter, 'Afterword: Explaining Litigation' (1974-75) 9 *Law and Society Review* 347

> their resources, some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; others do so only rarely. We might divide our actors into those claimants who have only occasional recourse to the courts (one-shooters or OS) and repeat players (RP) who are engaged in many similar litigations over time. The spouse in a divorce case, the auto injury claimant, the criminal accused are OSs; the insurance company, the prosecutor, the finance company are RPs. Obviously this is an oversimplification; there are intermediate cases such as the professional criminal. So we ought to think of OS-RP as a continuum rather than as a dichotomous pair."[767]

The litigation itself can take various combinations: OS vs OS, OS vs RP, RP vs OS and RP vs RP. The RP are expected to behave differently to OS during the litigation due to a number of reasons. Firstly, they possess experience, expertise and can rely on the "economies of scale and have low start-up costs for any case"[768] Secondly, they enjoy opportunities to develop informal relationship with various institutions. Thirdly, they develop reputations unlikely to be achieved by the OS which is then utilised as a resource in bargaining procedures. Fourthly, the OS tend to act in a way so that they can minimise the probability of maximum loss; whereas the RP can 'invest' in a long series of lawsuits, therefore maximise the loss in certain cases. Fifthly, the RP can make efforts to change the rules, through lobbying for example, as well as secure immediate gains in particular cases. Sixthly, "RP can also play for rules in litigation itself, whereas an OS is unlikely to."[769]The latter tends not to be interested in similar litigation elsewhere. Moreover, the RP "by virtue of experience and expertise, are more likely to be able to discern which rules are likely to penetrate and which are likely to remain merely symbolic commitments"[770]. As a result they can give in symbolic for the tangible gains. In addition, given usefulness of various resources for the 'penetration', "RPs are more likely to be able to invest the matching resources

[767] Ibid 3
[768] Ibid 4
[769] Ibid
[770] Ibid 9

necessary to secure the penetration of rules favorable to them".[771]

Galanter considers the position of lawyers who are themselves the Repeat Players. Nevertheless, an assumption can be made that the RP party can have a better access to the legal services and better advice, which they can buy *en mass* and higher rates. In short, they have access to more talent that the One Shooters.

Galanter highlights a number of features of the legal services, which OS has access to. The first demands a full citation:

> "First, they tend to make up the "lower echelons" of the legal profession. Compared to the lawyers who provide services to RPs, lawyers in these specialties tend to be drawn from lower socioeconomic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession. Of course the correlation is far from perfect; some lawyers who represent OSs do not have these characteristics and some representing RPs do. However, on the whole the difference in professional standing is massive)."[772]

Secondly, the OS tend to possess lower awareness about the availability of the service thus the lawyers face problems with mobilising their clients. In addition, the clients "encounter "ethical" barriers imposed by the profession which forbids solicitation, advertising, referral fees, advances to clients, and so forth"[773]

Thirdly, lawyers servicing the OSs are stereotyped as "uncreative brand of legal services"[774] due to their sporadic and intermittent relationship. They also face accusations of being unethical

[771] Ibid
[772] Ibid 23
[773] Ibid 24
[774] Ibid

when adopting similar strategies to lawyers acting for the benefit of the RPs.

Importantly for this thesis, Galanter considers the distribution of legal facilities which benefits the RPs due to passivity and overload. Passivity refers to the notion that the legal services must be mobilized by the potential claimants. Nevertheless, they must give advantages to the claimants to initiate the process by providing information on how to overcome the procedural requirements. The overload refers to the truism that there are many more cases than resources to cover the expenses of adjudication thus the claimants are under pressure to seek or agree to the settlement.

Finally Galanter considered the rules, where he noted that the laws in general do not benefit either party, nevertheless, the OSs have limited resources for implementing the rules. Moreover, various procedural requirements pose barriers for the potential claimants. Finally,

> "the rules are sufficiently complex and problematic (or capable of being problematic if sufficient resources are expended to make them so) that differences in the quantity and quality of legal services will affect capacity to derive advantages from the rules".[775]

The Galanter's thesis seems to be accepted by UK scholars:

> "the poorer salaries of legal aid lawyers relative to nonlegal aid work mean that more poorer-quality lawyers tend to do legal aid work."[776]

Analysis

In relation to the OS-RP dichotomy it is clear that the vast majority of E.L.F. clients would be classified as the One Shooters whereas the potential defendants as Repeat Players. The author

[775] Ibid 31-32
[776] Richard Moorhead, Avrom Sherr, Alan Paterson 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37(4) *Law & Society Review* 765, 797

starts with this premise relying on the results concerning income of the clients and the primary area of law linked to the judicial review referrals. It is very unlikely that people with income below £15,000 would engage in repetitive recourse to the courts. Moreover, having all judicial review referrals linked to planning law the author concludes that the defendants are likely to be public authorities and, in some instances, public authorities and developers. Such entities tend to have experience with litigation.

In relation to the problem of access to legal services OS tend to receive advice from the less experienced lawyers. However, this is not the case in relation to our study cohort. E.L.F. clients have access to the network of commercial and renowned lawyers following the initial consideration made by the in-house lawyers. The *raison d'être* of E.L.F. is its connections with the network of advisers who practice law and serve the wider society on the everyday basis rather than specialising in providing advice to the poor or disadvantaged part of the society. There is irrefutable evidence supporting this argument. Firstly, the analysis of the Members' Database in E.L.F. Digital Redbook reveals that there were 543 advisers as for October 2009 on the list.[777] Crucially, there were 108 barristers and 16 Queen's Counsels who tend to charge considerable amount of money for their advice. Moreover, the author noted in Methodology Chapter[778] that a solicitor to whom inquiry is referred in the first instance can refuse the referral due to conflict of interest. The probability that the adviser will be serving the potential defendant of E.L.F.'s enquirer is written into the organisational code of conduct. It suggest, nevertheless, that the communities who contact E.L.F. will eventually receive advice from the 'higher echelons' of the legal profession rather than, as Galanter suggests, from the less experienced and qualified peers.

[777] E.L.F. Member's Database, Digital Redbook, accessed 1 October 2009
[778] See p. 182

ELF expertise and funding

This study showed almost equal representation of individuals and community groups which contacted E.L.F. between 2005 and 2009. This proves a considerable organisation of people facing environmental problems and reflects the established fact that E.L.F. referrals concern the public interest. Yet, when the author looked at funding of referrals in previous Chapter[779] he found that 'group fighting funds' constituted a small proportion of funding (15 percent) when compared with the proportion of community groups. Moreover, when taken together with the proportion of 'private funding' (27 percent) nearly 60 percent of the referrals did not receive financial support from the proponents.

Similarly, nearly 60 percent of referrals did not obtain funding of the claimants in judicial review cases as Table 53 below indicates. In this scenario, however, the author could cross-tabulate the funding variable with the variable concerning the advisers' opinion as to the prospects of success of judicial review cases. The cross-tabulation aims at measuring whether there is a correlation between the type of funding and the advisers' opinion. The analysis of Table 53 indicates that the two variables are fairly independent of each other. Whether or not the client funded the case by means of their funding there was a similar chance of receiving a positive or negative opinion as to the prospects of success in judicial review. The much greater number of *pro bono* referrals with a negative opinion suggests a potential link which is weakened by a clear majority of privately funded referrals with a negative opinion. The finding is significant for the understanding of environmental justice. It shows the importance of the expertise being a sole determinant of the referrals' chances in litigation. The analysis shows that it is crucial to obtain access to expert's opinion regardless of the type of funding. It is also reflected in case law as the example of *R v H.M. Inspectorate of Pollution ex parte Greenpeace (No 2*[780]*)* proves.

[779] See p. 246
[780] Supra note 206

Table 53 Funding and advice on success in judicial review cases

Funding * advice on success of judicial review Crosstabulation					
	Advice on success of judicial review				Total
	positive	negative	advised to proceed	not stated	
CFI	2	0	0	0	2
Group "fighting fund"	11	10	2	0	23
Legal Aid	2	3	0	0	5
None	10	11	11	0	32
Private	15	22	10	3	50
Pro bono	5	29	7	2	43
Not needed	0	11	0	0	11
Mixture of funding	3	1	1	1	6
	48	87	31	6	172

E.L.F. and Aarhus Convention

E.L.F. is not an environmental NGO that advises directly on the right of access to information or participation in decision-making. E.L.F. serves the public by empowering them to make the fuller use of their rights. This assistance helps achieving the objective of the Aarhus Convention. The author will suggest here that E.L.F.' s role is more direct and tangible in relation to access to justice pillar. This role is of particular importance in light of the study results and environmental justice.

The Aarhus Convention's Article 9(5) encourages the Parties to establish assistance mechanism in the area of access to justice. Let us look at the Article below:

> "In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance

mechanisms to remove or reduce financial and other barriers to access to justice."[781]

This Article is divided into limbs: Parties should firstly, ensure that the public is informed about administrative or judicial review procedures and, secondly, consider the establishment of assistance mechanism to minimise barriers to access to justice. The UK government has been convinced that they satisfied the requirement which is reflected, for example, in their implementation report sent in 2008:

> "The UK has engaged in extensive activity to provide information to the public on accessing administrative and judicial review procedures, and to remove any financial and other barriers to access to justice or to consider how they could be removed."[782]

The extensive activity includes information available at Community Legal Service Direct,[783] DEFRA,[784] and the Magistrates' Association.[785] This information is complemented with E.L.F.'s activity, which provided opinion as to the litigation avenue in at least 219 scenarios between 2005-2009. Moreover, given the results from the previous Chapter, E.L.F. is an important and acknowledged[786] provider of information concerning the structural barriers to access to courts in the UK. More importantly, E.L.F. constitutes one of the mechanisms which contribute to reducing financial barriers to access to justice. Indeed, E.L.F. was not established directly by the government but it has relied on public funding to deliver its Advice and Referral Service[787]. This fact is sufficient to include E.L.F. as one of the mechanisms entrenched into Article 9(5) of the Convention according to the reasoning written into implementation Guide to the Convention:

> "Article 9 requires access to justice to be affordable for members of the public. The

[781] Aarhus Convention, Art 9(5)
[782] UK Implementation Report, supra note 250, 111
[783] Ibid 112
[784] Ibid 114
[785] Ibid 116
[786] BRASS/E.L.F. report was cited in UNECE case; supra note 3
[787] See p. 175

earlier discussion under article 9, paragraph 4, gives examples of how to overcome some of the financial barriers to access to justice such as no-cost alternatives to courts, shifting fees for court expenses to the violator, reducing court costs, and finding alternatives to bond requirements. In addition, some countries establish and support legal assistance offices that provide free or low-cost legal advice to individuals and citizens' organizations. In Poland, individuals or associations that cannot pay the costs associated with going to court may be entitled to a court-appointed lawyer. Other countries, such as Armenia, Canada, the Czech Republic, Hungary, the Netherlands, the Republic of Moldova, the Russian Federation, Slovakia, Ukraine, the United Kingdom and the United States have privately funded or university-based legal assistance centres. In these cases, elimination by the government of technical obstacles to the creation, operation and funding of a not-for-profit organization is crucial to ensuring that such privately funded legal assistance centres continue to exist."[788]

Fostering participation through access to litigation

Thirdly, given the above, litigation can contribute to further participation of the dissatisfied claimant. Of course, much of the work in such circumstances is done by the solicitor and counsel and the claimant is limited in their participation. This may be insignificant since meaningful participation in decision-making is done by representatives. Consult the ladder of participation developed by Arnstein where it was argued that meaningful participation would place demands on the side of the public such as the need for paid representatives.[789] Moreover, the commencement of judicial review proceedings opens a possibility for settlement negotiations which can provide additional opportunities for the more active involvement of the claimant. This is particularly tangible in circumstances where the claimant decided not to engage the lawyers following the commencement of legal action due to lack of funds for example. Such a client

[788] Aarhus Convention Implementation Guide supra note 375, p. 135
[789] S Arnstein, (1969) 'A Ladder of Citizen Participation' in T. R. LeGates and F. Stout (eds), *The City Reader (*Routledge 2003) 245-255

could enter the stage where the defendant takes the possibility of lengthy proceedings seriously and approaches the client directly to reach an agreement.

Participation thesis

Alongside the primary function of settling disputes Fuller saw adjudication as form of social ordering, "as a way in which the relations of men to one another are governed and regulated"[790]. The other two forms of social ordering are contract, which requires negotiation, and election which is based on voting. The adjudication is distinguished because of its intrinsic feature namely "that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour".[791] This proposition was later[792] referred to by Eisenberg as the "participation thesis"[793], which the author accepts for the clarity of further analysis. The originality of the approach lies in the chosen departure point where adjudication is considered from the view of participants rather than the judge. Placing the latter as the departure point would amount to agreeing that the office of the judge constitutes "the essence of adjudication"[794]. Instead, the adjudication is a device which gives "formal and institutional expression to the influence of reasoned argument in human affairs."[795] The participation in the adjudication, unlike in other forms of social ordering where emotions and preferences can take the lead, is based upon the rules and principles; the claimants must underpin their claims by revoking the law. It is therefore undisputable that the clients are advised to seek legal advice before engaging in legal challenge in order to embed their claims in the existing legislation, case law and guidance. The judge's role is to attend the to the parties' evidence. Fuller then introduces the crucial drawback of litigation, namely its "relative incapacity [...] to solve "polycentric" problems"[796]. The polycentric disputes have many "interacting points of

[790] Lon Fuller,'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353, 357
[791] Ibid 364
[792] Fuller published his article *post mortem*
[793] Melvin Aron Eisenberg, 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller' (1978-1979) 92 *Harvard Law Review* 410, 411
[794] Lon Fuller, 'The Forms and Limits... supra note 790, 365
[795] Ibid 366
[796] Ibid 371

influence”[797] and “normally involve many affected parties and a somewhat fluid state of affairs”[798]. Fuller gives a metaphor for the polycentric disputes:

> “We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions”[799].

Fuller gives a number of examples of polycentric disputes which are difficult to adjudicate as the task of assigning football players to particular positions on the pitch. Another example was described in Chapter 1[800] of this thesis and involves the distribution of water for the purpose of litigation and dykes for flood control. Fuller was fairly convinced that, in general, “that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication.”[801] The polycentric disputes should not be subjected to litigation because the lack of adequate and full information about the interests of all involved parties. Instead, Fuller proposed “managerial and contract”[802] systems as adequate methods for solving polycentric disputes. The former requires a manager who provides the direction and assigns the tasks by using intuition to some degree. The human judgment is also indispensable in resolving complex economic problems:

> “In the solution of some economic polycentric problems, recently developed

[797] Ibid 395
[798] Ibid 397
[799] Ibid 395
[800] See p. 39
[801] Lon Fuller, ‘The Forms and Limits... supra note 790, 400
[802] Lon Fuller, ‘The Forms and Limits... supra note 790, 398

> mathematical methods, like those of Leontief, may reduce the necessity to rely on intuition, though they can never eliminate the element of human judgment."[803]

The latter is "a reciprocal adjustment of each center of interest with those with which it interacts"[804]. Fuller was largely sceptical as to the usefulness of game theory and voting and noticed a possible adequacy of parliamentary method which he called the "political deal"[805]. In summary, the Fuller's concept of adjudication and its limits can be framed in the wider socio-legal discourse in which this thesis is embedded[806].

Participation thesis – reception, critique and elaboration

The 'participation thesis' has received wide attention from scholars aiming at criticism and elaboration both in the US and UK. Importantly, it was recognised as an abstract and ideal model[807]. The below analysis will primarily focus on the UK reception, which has never been immune to borrowing ideas from the US literature.

First of all, the model was criticised and elaborated by Eisenberg in the same issue of *Harvard Law Review*[808]. The author challenge the premise that what distinguishes adjudication from other forms of social ordering is the parties' right to present the evidence and the judges' obligation to attend. Instead, Eisenberg introduced the concept of "strong responsiveness",[809] which distinguishes adjudication from other forms of social ordering. It follows that "the decision ought to proceed from and be congruent with those proofs and arguments" where

> "strong responsiveness does not follow from the Participation Thesis, but is an independent norm which both helps define adjudication and gives a special meaning to

[803] Ibid 399
[804] Ibid
[805] Ibid 400
[806] See p. 195
[807] Jeffrey Jowell, 'The Legal Control of Administrative Discretion' (1973) 1 *Public Law* 178
[808] Eisenberg, 'Participation, Responsiveness... supra note 793
[809] Eisenberg, 'Participation, Responsiveness... supra note 793, 412

participation through proofs and arguments".[810]

Eisenberg proposed another form of social ordering where parties are able to present reasoned arguments and, "to varying degrees, proofs for a decision in their favour".[811] This is called the consultative process which is

> "The consultative process is distinguished from adjudication by the fact that the norm of strong responsiveness is inapplicable - that is, the decision need not proceed from or be congruent with the parties' proofs and arguments. Instead, the decision maker may base his decision solely on evidence he has himself collected, on his own experience, on his institutional preferences, and on rules neither adduced nor addressed by the parties"[812].

Given the lack of the requirement for a decision maker to base their decision logically on the basis of attendants' arguments, Eienberg asked himself about the purpose of consultative process. In return he offered the following reasons:

> "(i) Where a decision will have a serious impact on a discrete set of persons, preservation of individual dignity points to the desirability of an ordering process in which those persons will be able to express their view of the matter to the decisionmaker before the decision is made; (ii) Requiring the decisionmaker to attend to the parties' proofs and arguments serves the societal interest of assuring that decisions are well informed. (iii) Requiring decisions to proceed from and be congruent with the parties' proofs and arguments is often inappropriate or infeasible, either because of the nature of the subject-matter or the nature of the setting. (iv) Decisionmakers will normally accommodate their decisions to convincing proofs and arguments even though not obliged to do so, and are more likely to make such accommodation in shaping decisions than in unmaking or

[810] Ibid 413
[811] Ibid 414
[812] Ibid

revising them."[813]

The above reasons for resorting to consultative process are in line with the identified benefits of environmental participation in Chapter 3[814]. Although environmental justice advocates often argue that the properly run consultation process leads to the longetivity of the project. It follows from the second Eisenberg's argument that the decision are well informed. Moreover, the author noted that

> "In major variants, the process can be coupled either with judicial review of the decision on the basis of the facts and rules properly considered by the decisionmaker, or with an adjudicative hearing afforded only after the decision has been given provisional effect."[815]

In the UK Jowell provided a seminal response to the participation thesis of adjudication in context of planning law. Firstly, the author summarised the merits and limits of adjudication in the UK. The former include the ability of the parties to participate in the judgment to advance "the strongest case for their position",[816] the strong responsiveness, "the tendency of adjudication to promote administrative integrity" arising from the requirements that the judgment is justified "by a rule, standard or principle"[817]. Further, adjudication limits the involvement of political or private interests, provides legitimacy and the fact that the judgment is based on the previous case law. In terms of drawbacks of adjudication Jowell emphasised the limits of responding to the nature of substantive rights and costs of deteriorating the relationship of the parties. Further adjudication is not well suited to accommodate the polycentric cases which call for compromise rather than the outcome in which "[o]ne side must win and the other

[813] Ibid 417
[814] See p. 140
[815] Ibid 415
[816] Jowell, 'The Legal Control... supra note 807, 197
[817] Ibid

must lose; the defendant is liable, guilty or not guilty".[818]Moreover, adjudication is complex and can pose problems for the lawyers let alone the lay public. Further, Jowell emphasises the conflict between rights and administrative duties and wider interests:

> "The adjudicative decision concerns individual rights, and may thus bear little or no relation to the primary administrative function, which involves the performance of a particular task. A particular case, for example may raise questions wider than the questions at issue [...] Furthermore, although the specific decision may affect parties similarly situated to the direct participants in the litigation the decision-maker is not required to consult or notify these wider interests".[819]

Jowell provides urban planning as the "most obvious form"[820] of polycentric disputes. It is because the planning decisions are largely based upon development plans which carry vagueness as to the meaning of 'public interest' or 'best planning principles' and the nature of planning itself where the placement or relocation of one element interacts with or creates problems in another area.

The concept of polycentricism received judicial attention albeit, as King's useful analysis provides[821], it was predominantly indirect. In *Council of Civil Service Unions v Minister for the Civil Service Respondent* Lord Dipock, in context of irrationality ground, pronounced that certain decisions would not be suitable for judicial review:

> "Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right

[818] Ibid 199
[819] Ibid
[820] Ibid 214
[821] Jeff A King, 'The pervasiveness of polycentricity' (2008) *Public Law* 101

answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise."[822]

In certain cases the courts considered the polycentricity directly[823]. In *R, on the application of British Telecommunications Plc v Secretary of State for Business, Innovation & Skills* [824] the court considered the polycentricity of material facts relating to intellectual property rights and made an express referral to Lon Fuller. In *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [825] Lord Hadley made an indirect reference to polycentric disputes and reiterated the limitations of judicial review in planning:

"The whole justification for a national planning policy is based on the idea that there are wider interests than those of the applicant himself and his neighbours e g environment policy. The limitations on the scope of judicial review reflect a distribution of powers between the executive and legislative branches and the courts. Planning adjudications are not between competing private interests but made in the public interest […] In the language of the European Court of Human Rights this is a discretionary decision i e one taken on behalf of a wider public interest which outweighs private rights. The role of the Secretary of State makes the planning system coherent and consistent across the country.

[822] Supra note 232, at 411
[823] *R. v Home Secretary and Criminal Injuries Compensation Board Ex p. P* [1995] 1 All E.R. 870, CA; *R. (on the application of Hooper) v Secretary of State for Works and Pensions* [2002] EWHC Admin 191; [2002] U.K.H.R.R. 785 at [160], *R. (on the application of Cityhook Ltd) v Office of Fair Trading* [2009] A.C.D. 41,
[824] *R, on the application of British Telecommunications Plc v Secretary of State for Business, Innovation & Skills* [2011] EWHC 1021 (Admin)
[825] *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [2001] UKHL 23

> Local authorities prepare development plans which reflect national policy and must be adhered to. The right of appeal to an inspector and the Secretary of State's right to call in a case are essential features of the scheme. If it is legitimate to have a national planning policy it is also legitimate to have it decided and applied by accountable elected ministers which the courts only oversee to the extent of ensuring decisions are taken lawfully"[826]

In seminal guide on judicial review, Woolf, Jowell and Sueur consider polycentricity as the limitation to adjudication. The authors pay a particular attention to the "allocative decisions" which involve "the distribution of limited resources."[827] One of the reasons for the unsuitability is that "the re-allocation of resources in consequence of the judicial review will normally involve the interests of those who were not represented in the initial litigation"[828].

Polycentricity of E.L.F. referrals

It follows from the Chapter 1 that environmental justice claims are polycentric in nature[829]. They involve the diversity of substantial demands and involve multiple interests[830]. The author has argued that the E.L.F. referrals carry the polycentric interests accordingly. The analysis pays particular attention to the suitability of the referrals to be resolved by way of judicial review in context of the above deliberations.

Firstly, the referrals were reported to carry a substantial human rights element, which complicates the environmental cases and renders them as polycentric[831]. The clients' claims about a number of ECHR rights at stake could, subject to the minimum severity test, lead to complex judicial considerations. Yet, the Human Rights Act 1998 eliminates another drawback

[826] Ibid 288
[827] Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's judicial review (Sweet & Maxwell 2007) 20
[828] Ibid 21
[829] See p.71
[830] Ibid
[831] See also Jason Coppel and Michael Supperstone, 'Judicial review after the Human Rights Act' (1999) 3 *European Human Rights Law Review* 301

of adjudication proposed by Jowell namely the inability of courts to the wider and individual interests at stake. As a result, though human rights are polycentric, the procedural opportunity entrenched in the UK legal system addresses the kernel of the problem to some extent.

Secondly, while most of the clients identified the procedural impropriety in the decision or process in their referrals, still many of them presented substantive claims. Chapter 3[832] showed the relative inability of British courts to satisfy the requirements of the Aarhus Convention in terms of providing the substantive review of decisions. Some substantive claims will inevitably carry the polycentric interests where a decision in favour of the claimant may cause disturbances in the wider web of interests.

This leads us to the third aspect of E.L.F. referrals, namely the fact that the vast majority of them relates to the planning law. The current planning regime, although largely reformed since Jowell's paper, is still an 'obvious' example of polycentric disputes[833].

Fourthly, and most importantly, the E.L.F. judicial review referrals carry polycentric economic interests of individuals and the wider society in terms of access to environmental justice (Appendix 4).

[832] See p. 165
[833] Patrick Bishop and Victoria Jenkins, 'Planning and nuisance: revisiting the balance of public and private interests in land-use development' (2011) 23(2) *Journal of Environmental Law* 285

Negotiation and settlement: solution to E.L.F. polycentric disputes?

This final heading in the thesis does not aim to provide a comprehensive answer to a question whether negotiation and settlement could provide solution to polycentric disputes.

Negotiation and settlement have been proposed as a distinguishable form of resolving complex polycentric disputes[834]. Boyer proposed "a true bargaining approach in which affected interests negotiate solutions by compromise or agreement" with a decision maker.[835] This can take various forms where the decision-maker or its subdivision "is a party to the bargaining", acts as a "surrogate for affected segments of the general public" or "merely serves as a mediator between conflicting claims"[836]. Allisson suggests that Galanter's "sociological observations"[837] could serve as a mechanism of improving the social ordering. Galanter noticed an increase in the use of settlement and negotiations, often triggered by judges, in resolving disputes in the US. He coined a term "litigotiation" and "bargaining in the shadow of the law" for:[838]

> "[T]he strategic pursuit of resolution through mobilizing the court process. In this process, full-blown adjudication is an infrequently occurring alternative to negotiated settlement - though one that remains a compelling presence even when it doesn't occur."[839]

Galanter reiterated and highlighted a number of advantages of settlement, for example, the reduction of court caseload and limited court resources and the increased satisfaction of the parties with the process. Crucially, he noticed that "settlement is thought to permit compromise

[834] For review see J W F Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *Cambridge Law Journal* 367
[835] Barry B Boyer, 'Alternatives to Administrative Trialtype Hearings for Resolving Complex Scientific, Economic, and Social Issues' (1972-73) 71 *Michigan Law Review* 111, 167
[836] Ibid
[837] Allison 'Fuller's Analysis... supra note 834
[838] Marc Galanter, '" •• A Settlement Judge, not a Trial Judge:" Judicial Mediation in the United States' (1985) 12(1) *Journal of Law and Society* 1
[839] Ibid 1

positions that are unattainable through adjudication" without, however, explicitly calling the problem of polycenticity.[840] Galanter supported judicial intervention as part of 'litigotiation'.

Table 45 in the previous Chapter[841] indicates that there were 16 settled cases and 8 cases which reached the full court judgment. Moreover, 7 cases were settled with a consent order. Such settlement, though made by parties, requires judicial intervention because the court must be satisfied that the consent order should be made. In order to assist the court the parties should enclose their justification for settlement in the document. The court must be primarily satisfied that it is in the public interest to make the order and if the agreement does not meet this threshold "[t]he court will not make an order"[842].

Given the findings concerning the judicial review cases' conclusion the author suggests that the costs barrier to judicial review prevents the public access to settlement in the first instance. The removal of the barrier will increase a chance of cases reaching the negotiation stage which might be more appropriate for polycentric disputes. As a result the third pillar of the Aarhus Convention is closely related to the first and the second one. The third pillar provides opportunities for further participation of the claimants in the resolution of the complex polycentric disputes.

Judicial review reforms – analysis

Following the submission of this thesis, Advocate-General Kokott provided her opinion on the meaning of 'prohibitively expensive' in *R (Edwards & Pallikaropoulos)* v *Environment Agency*[843] which reached the Court of Justice of the European Union through a reference for a preliminary ruling from the Supreme Court. The case was described below in this thesis. [844]The Advocate-General first expressed her concern about giving 'a comprehensive and definitive answer' due to the discretion that Member States enjoy in implementing Article 9(4) and

[840] Ibid 3
[841] See p. 282
[842] Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's judicial review (Sweet & Maxwell 2007)
[843] Case C-260/11 *R (on the application of Edwards and Pallikaropoulos)* v *the Environment Agency & Ors* (Advocate General Kokott's opinion).
[844] See p. 168

because ‘of the many possible scenarios’.[845] She recognised the ‘two-fold interest’ of the environmental litigation discussed briefly above. Thus, the award of costs amounting to £5,130 in a private nuisance case involving neighbours, disputed before the Aarhus Convention Compliance Committee,[846] was not prohibitively expensive. However, the existence of private interests should not preclude the courts from taking due account of the wider public interest and assessing the exposure of costs in accordance with this assessment. The prospect of success may be an important factor in assessing the public interest. All in all, the Advocate-General advised the use of both tests:

“in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue”.[847]

Crucially, the Court of Justice of the European Union preferred a mixture of subjective and objective factors to be taken by the Supreme Court in the *Edwards & Pallikaropoulos* and similar cases under the Aarhus Convention[848].

The proposals to set the cap on the applicant’s exposure to costs are welcome as they are capable of providing certainty and clarity[849]. As noted above[850], the courts enjoy much discretion as to which form of PCO to grant in a given case and the clear-cut caps should resolve the matter. It may be more difficult to implement the recommendations especially when ‘it may prove difficult in practice to define and determine quite which environmental judicial review cases might be said to involve public participation issues based on Aarhus’.[851] Indeed, the Aarhus Convention

[845] Case C-260/11 (Advocate General Kokott's opinion) at 33
[846] Communication ACCC/C/2008/23 *Morgan* v *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107
[847] Case C-260/11 (Advocate General Kokott's opinion), at 49
[848] Case C-260/11 *R (on the application of Edwards and Pallikaropoulos)* v *the Environment Agency & Ors* (Judgment of the Court on 11 April 2013)
[849] See p. 169
[850] See p. 88
[851] R. Lee ‘Environmental Justice Costs’ (News) ERIC Group, 27 September 2012. Available at: www.eric-group.co.uk/news_story.php?content_id=306. Indeed, the recently amended Civil Procedure Rules 1998 (Civil

concerns a wide array of cases given a liberal definition of environmental information.[852] It is striking, however, that the cap for an organisation is likely to be set at £10,000, which is twice as much as for an individual. As noted above by reference to *Greenpeace (No 2)*,[853] environmental organisations play an important role in litigation by offering precious expertise. It may be argued, on the basis of *Garnett*,[854] that higher protection should be offered to organisations as they are more likely to be granted standing regardless of their geographical proximity to the disputed source of the environmental pollution. Further, the data collected by E.L.F. indicates that the community groups initiated almost half of the inquiries; the remainder originated from individuals.[855] The opposing argument is that organisations, especially well-established NGOs, are more likely to collect the necessary financial resources from affected individuals. It is difficult to assess the potential effect of these proposals. The £10,000 cap may constitute a burden for organisations unless the affected individuals are organised and able to fund the claims. It remains to be seen how many cases will proceed to judicial review with the cross-cap figure set at £35,000.

Given the above, the government intends to increase the fees for access to the permission stage and substantive stage to £235, alongside a proposed new fee for the oral renewal to be set to £235. This is likely to pose an additional burden[856] for the claimants – as mere access to a judicial review judgment may cost about £700. The focus on increasing the access costs sits

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Procedure (Amendment) Rules 2013/262, which came into force on 1 April 2013) indicate difficulties faced by the drafters. Rule 45.41 provides a definition of 'Aarhus Convention claim', which means 'a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject'. The claimant must state in the claim form that 'the claim is an Aarhus Convention claim', which can be challenged by the defendant (see Rule 45.44)

[852] Aarhus Convention, Art. 2(3); See also p. 132

[853] See *Greenpeace (No 2)* above, n. 206

[854] See *Garnett* above, n.214

[855] See p. 233

[856] In the Equality Impact Assessment, the government could not, with certainty, indicate the income of the individuals who tend to apply for judicial review. See Ministry of Justice 'Equality Impact Assessment Initial Screening' (London 2011). Available at: https://consult.justice.gov.uk/digital-communications/appeal-high-court-fees-cp15-2011/supporting_documents/appealhighcourtfeesconsultationeia.pdf. The ELF data indicates that about 60 per cent of claimants had an income below £15,000 (see p. 223)

uneasily with the government's intention[857] to decrease the number of judicial reviews. The fees are dwarfed by the costs awards, thus the government should logically direct its policy to the latter to deter the applications. Further, the introduction of a fee for oral renewal is surprising as, in light of proposals to remove the oral renewal for weak cases, it will affect cases with good prospects of success. It is important to note that, potentially, many such cases will be filtered out at the application for judicial review which is undertaken on a paper basis. This offers few possibilities for the careful consideration of the skeleton arguments of the parties and often requires an oral hearing. The data collected in E.L.F. indicates that out of 100 cases which were advised to proceed, seven were quashed at the permission stage and 16 were settled either out of court (nine) or by consent order (seven). The former seems to imply more of a political agreement to avoid further litigation, whereas the latter implies more of a legal agreement to avoid an expensive challenge in the courts.

The proposal to limit the time available to make an application for judicial review to six weeks is most unwelcome. Although, the government emphasises that it will apply to 'planning cases' and omits references to environmental cases, it is clear that these will be affected. This is a setback to the recommendation by the Law Lords that the planning system should be used to resolve complex environmental disputes.[858] Indeed, almost 90 per cent of the 197 E.L.F. environmental judicial review inquiries between 2005 and 2009 were concerned with planning law.[859] Crucially, it is a backwards proposal in light of the *Burkett*[860] ruling which criticised judicial discretion concerning time limits and provided clarity as to the three-month period. It is difficult to envisage the tangible effect if the proposal is implemented. Certainly, some of the 109 E.L.F. cases which received a negative opinion as to the prospects of success were filtered out because they breached the three-month time period for making an application. Thus,

[857] Ibid (Equality Impact Assessment). at p. 1.
[858] Supra note n. 247
[859] See p. 290 and Table 50. Crucially, ELF has rigorously filtered out the non-environmental planning inquiries and those carrying no public interest element, see above p. 180 Further, the filtered out inquiries were transferred to other organisations such as Planning Aid.
[860] See above n. 219

logically, some potential cases with a good prospect of success may never reach the courts because there will be no time to assess their material facts. A further consequence may be that the courts become littered with applications of poorer quality under tighter time limits.

Judicial review process in environmental justice context

The government intends to rationalise the judicial review process by eliminating the possibility of a renewed oral hearing at the permission stage for weak cases. As indicated above[861], the judicial review process is highly complex and attempts to streamline it are welcome. However, these proposals, coupled with the proposals to increase the fees at the point of entry and reduce the time limits for making a judicial review application may provide fewer possibilities for reviewing cases with good prospects of success. This may significantly reduced the possibilities for success in the narrower sense discussed in the Introduction.[862] Crucially, in the wider context of success, the judicial review process offers ample opportunities for negotiation and settlement both out-of-court and by consent order. The latter is of particular importance. As discussed above[863], *Collins* J provided guidance as to the practical implementation of the rule. Thus, at any stage of the judicial review process, the parties can agree the terms of the settlement and apply to the court for a consent order. The settlement, although made by the parties, requires judicial intervention because the court must be satisfied that the consent order should be made. To assist the court, the parties should enclose their justification for settlement. The court must be primarily satisfied that it is in the public interest to make the order and '[t]he court will not make an order' if the agreement does not meet this threshold.[864] Lodging the consent order costs £45,[865] unless the claimant qualifies for a remission. It can be submitted prior to, or after, the permission stage order with an important variation.

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[861] See p. 79
[862] See the discussion on the meaning of success in judicial review, p. 25
[863] See p. 732
[864] H. Woolf, J. Jowell and A. Le Sueur, supra note *733*
[865] Administrative Court Guidance, 'Notes for Guidance on Applying for Judicial Review' (London 2011). See www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/administrative-court/judicial-review.pdf (last accessed 28 January 2013) at 16.

Summary

This thesis analysed unique data collected in the Environmental Law Foundation (E.L.F) with a particular emphasis on judicial review (JR) in context of environmental justice (EJ). Its main purpose was to prove that costs constitute a cost barrier to judicial review in the UK. The thesis had a second main purpose, namely to understand better the EJ concept and the EJ claims which are said to be polycentric. The empirical study reviewed 774 cases referred by E.L.F to an adviser between 2005 and 2009. The thesis was organised into nine Chapters.

Chapter 1 analysed the concept of EJ by looking into its inception, evolution and conceptualisation. EJ focuses on patterns of disproportionate exposure to environmental hazards and promotes increased access to information and participation in decision-making. EJ researchers focused originally on two variables to measure the extent of environmental inequalities, namely race and income. The Chapter argued that the concept of EJ is multi-faceted thus covering a multitude of matters beyond purely environmental issues such as: medical issues, food justice, 'toxic environments' and the overall wellbeing of the populations. Crucially, Chapter 1 suggested that EJ is polycentric due to a variety of interests that have to be addressed. Thus, EJ concerns various groups and is measured through such variables as age, gender, disability.

Chapter 2 focused on analysing the usefulness of judicial review in overcoming environmental inequality in the UK. It looked initially at the US literature which insisted that EJ movement should not resort to a legal challenge. As to adjudication in the UK, Law Lords had favoured preventive public law based claims over private law claims requiring proprietary interests. The Chapter provided an overview of judicial review and Protective Costs Orders system in England and Wales. It also argued that it was difficult to measure polycentricity in environmental litigation. The Chapter suggested that one possible avenue is to conduct statistical analysis of available cases, as was conducted in E.L.F.

Chapter 3 analysed the UNECE Convention on access to information, participation in decision-making and access to justice in environmental matters (Aarhus Convention) which is binding in the UK through EU law. It is alleged by the Aarhus Convention Compliance Committee and the EU Commission that the UK Government is in breach of the Convention's third pillar which requires access to a review procedure not to be "prohibitively expensive" (art 9(4)).

Chapter 4 provided an overview of E.L.F, which is a London-based charity with a network of legal advisers located throughout the UK. It receives calls for support from primarily poor communities (thus EJ claimants) facing environmental problems and refers the viable ones to a legal adviser for free initial advice. The Chapter captured the E.L.F.'s *modus operandi* by analysing the relevant terms of references and forms that the charity uses to refer inquiries to the lawyers.

Chapter 5 provided an overview of the methodology for analysing the referrals to address the main purposes of this thesis. Firstly, the statistical analysis of 774 referrals would allow measuring various interests involved and would allow for limiting the pool of cases to judicial review referrals for further analysis. The latter would form a basis for establishing whether or not costs were the barrier for some claimants in starting judicial review proceedings. It would also form a basis for measuring polycentricity of environmental judicial review cases.

Chapter 6 measured the key characteristics of the E.L.F. clients whose cases have been referred to an adviser. It was possible to establish the mainstream characteristics of the whole sample that is the majority of the clients were British, middle-aged and poor. The findings suggest weak polycentricity - most of the persons who reported an environmental issue seem to reflect the needs of the economically disadvantaged British people. In this sense the results reflect the traditional understanding of EJ.

Chapter 7 measured the key characteristics of the referred cases over the study period. The quantitative analysis confirmed that the referrals carried a significant public interest element

affecting, on average, 1,000 persons. Further, the majority of referrals were classified primarily under planning law which suggests strong polycentricity. Finally, the Chapter identified 219 judicial review cases which was a base number for further analysis in the following Chapter.

Chapter 8 showed that the judicial review sample consisted of planning law-based claims which are said to be polycentric due to the variety of involved interests. A half of these referrals received a negative opinion as to the prospects of success at judicial review and the remaining half were advised to proceed. In the latter pool there were 54 cases which were prevented by the cost barrier. A small number of referrals ended with a full judgment in the High Court and a significant number concluded in out-of-court/in-court settlement. Chapter 8 analysed spatial distribution of the referrals which originated in England by matching the postcode with the English Indices of Multiple Deprivation. Such methodology allowed for measuring interests involved in each judicial review referral. It found that the majority of cases were polycentric.

Given the polycentricity of the JR referrals and a small number of full judicial reviews, it was appropriate to see the data through the participatory thesis of judicial review and the limits of adjudication developed by Lon Fuller and Melvin Eisenberg cited occasionally by the UK judiciary and scholars. Chapter 9 suggested that polycentric EJ claims were unsuitable for adjudication and suitable for negotiation and settlement. The cost barrier to JR prevents access to settlement and negotiations. Settlement creates opportunities for considering wider options which may include greater input by claimants. The Aarhus Convention's third pillar – typically seen by lawyers as having a solely remedial function – is seen in this thesis as a continuation of the participatory Aarhus pillar. Thus access to adjudication may create opportunities for engagement and contributes to achieving EJ.

Overall, the thesis addressed the first main purpose of the thesis successfully by proving that there was a cost barrier to judicial review in the UK. This finding was released into the public domain earlier through the BRASS/E.L.F Report and informed the public debate on this matter. The second main purpose of the thesis relating to polycentricity of environmental judicial review

cases was addressed albeit with certain limitations. The limitations stemmed from the limited resources and time allowing for narrow statistical analysis of the spatial distribution of the referrals which originated in England only. Nevertheless, the analysis suggests that the cases are indeed polycentric and that the cost barrier to judicial review prevents access to both negotiations and settlement.

All in all, the judicial review process, as it currently stands, encourages settlement supported by judicial intervention which is important in the context of environmental justice and polycentricity. The proposals to streamline the process would certainly strengthen incentives to settle the case. If not, the proposed cap to limit the exposure to costs following the full substantive hearing and judgment may present further stimulus for claimants to defend their arguments. However, additional government proposals concerning time limits and fees at the point of entry constitute a setback to earlier liberal judicial developments. Despite the liberal standing rules, fewer environmental cases may reach the judicial review process. Further, government proposals to fix recoverable costs to £5,000 for an individual and £10,000 for an organisation may not be in line with Advocate-General Kokott's opinion discussed above[866]. In light of the Court of Justice's ruling the UK Government may consider allowing some flexibility into the costs regime. Fixed recoverable costs, accompanied by a subjective test, which could be triggered in cases involving large degree of public interest brought by individual claimants, would probably constitute a good solution.[867]

Finally, the author would like to acknowledge that judicial review is not and should not be the only avenue to address the issues of environmental justice. As this thesis attempted to show, the

[866] Supra note 843

[867] As of 1 April 2013 Civil Procedure Rules 1998 incorporated the cost regime policy by reference to Practice Direction 45 (r. 45.43). The latter fixes recoverable costs to £5,000 for an individual and £10,000 for an organisation. Further, Rule 45.43(2) states that 'Practice Direction 45 may prescribe a different amount' [...] 'according to the nature of the claimant'. This seems to be accommodating Advocate-General Kokott's opinion in advance of the Court of Justice's ruling.

environmental justice disputes involve many interests at local, regional or even national level[868]. Such complex cases could be better suited for informal or formal settlement out of courts, political lobbying or alternative dispute resolutions.

[868] See Appendix 4

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Appendix 1: Timing of the research

April 2009	Drafting research questions and making initial contact with Environmental Law Foundation (E.L.F.)
May 2009	Preliminary research in E.L.F.; negotiating the relationship
June - December 2009	Data collection in E.L.F.
January 2010	Publication of a BRASS/E.L.F. report based on initial findings
February 2010- May 2010	Analysis of the data and a collection of additional data
June 2010 - June 2011	Further analysis and write-up
July 2011 - September 2012	Write-up stage

Appendix 2: Request for Assistance Form

Form 10: RFA

Date …….. *Caseworker ……..* *Inquiry no. ……..* *Referral no.*

Environmental Law Foundation

Request for Assistance

If you would like to use ELF's Advice & Referral Service please check, complete and sign this form. Your details will remain confidential and be used to match your request for assistance to an ELF member for advice and information.

1. Name

……

Address ……

Postcode ……

Tel …….. Fax …… e-mail: ……..

Organisation ……..……Position ……..

2. What is the environmental problem?

……
……
……
……
……

3. What is the likely cause of the problem? (eg. planning decision)

……
……
……

4. No. of people being affected?

……
……

5. Who is your complaint against? Business ☐ Developer ☐ Council ☐ Other ☐

a) Name

……
……

Address

……
……..

b) Name

……
……

Address:

……
……..

6. Are there any deadlines? (eg, judicial time limits, dates of hearings, inquiries or meetings)

……
……

7. How would you like ELF to help?

Refer me to a a) solicitor □ b) a barrister □ c) technical consultant □

Assist me with d) a workshop □ e) publicity □ f) forming a community group □

8. Please list the relevant documents supporting your case

……
……..

9. How did you hear about ELF? ……. Have you had any previous contact? ……..

Please read the following terms carefully. If you agree to the terms please sign in the space provided below.

Terms of Referral

a) If you request a referral, the solicitor, barrister or consultant you are referred to will be an ELF member who will provide an initial free consultation to identify and clarify how the law might assist. This may be in the form of a meeting, written correspondence and/or telephone advice.

b) If legal action or further assistance is recommended, ELF members agree to charge reduced rates (whether or not public funding can be obtained) and, where possible, to provide further voluntary assistance. ELF is unable to fund cases directly and costs must be agreed between the ELF member and you, the client.

c) Once referred, the case is co-ordinated by the member. ELF takes no part in the advice and is unable to accept responsibility for how the solicitor conducts the case. If you have a query about the service you receive, or comments about how the service was delivered, we would like to hear from you.

d) ELF monitors referrals through periodical reporting by both members and their clients. ELF therefore requires your authority for the member to report to ELF.

e) ELF is, in certain circumstances, able to help with publicity. If you would help, please indicate this in Section 6 above.

10. Please read and sign the following:

- I give my permission to the Environmental Law Foundation to refer me to a legal and/or technical expert.
- I agree to the Terms of Referral detailed above.
- I authorise the solicitor, barrister and/or technical consultant to periodically report to the Environmental Law Foundation.

Signed …… Date ……

ELF may send information about its activities and services from time to time. If you prefer not to receive this, please tick this box. ☐

ELF may be contacted by other groups with similar concerns as yours. If you prefer not to be put in contact them, please tick ☐

Please return this completed form together with **two** copies of any relevant documents to:

The Advice and Referral Service
Environmental Law Foundation, Suite 309, 16 Baldwins Gardens, London EC1N 7RJ
t. 020 7404 1030 f. 020 7404 1032 email. info@elflaw.org web. www.elflaw.org

As a small charity ELF welcomes donations or stamps to help cover its administration expenses

ELF's Advice & Referral Service is supported by the Community Fund, the Esmée Fairbairn Foundation and Bridge House Estates Trust Fund.

Appendix 3 Case Referral Form

FORM 11 CASE REFERRAL FORM

Environmental Law Foundation

Case Referral Form

To:

Case Reference: …… Date: ……
Client name: ……...
Re:
……
……
..

With the agreement of the above client, this case has been referred to you through the Environmental Law Foundation ("ELF"). Please refer to the Terms of Referral on the 'ELF Membership' form that you received when becoming a member.

Please find enclosed:
Copy of the completed Request for Assistance Form
Copies of support documents
……
……
……
……
……

Description of matter:
……
……
……
……
……
……

On accepting this case please update the Environmental Law Foundation as to how the case develops and any action taken. You will find the client's authorisation for this activity on the Request for Assistance form.

I accept this case and acknowledge receipt of the enclosed documents

……..
……...……..
Signed *(for and on behalf of the above named barrister, solicitor(s) and/or technical consultant)* Date:

Please return this form to ELF at: Suite 309, 16 Baldwins Gardens, London, EC1N 7RJ.
Tel: 020 7404 1030 Fax: 020 7404 1032 DX: ELF 138300 LDE
PTO

Appendix 4 Polycentricity Matrix

Case no	Year	District	Number of SOAS	Income	District average score	District average Rank	SOAS rank nationally	Rank within district
1	2005	Wycombe	107	7	254	258	21812	42
2	2005	South Lakeland	59	1	242	231	18453	14
3	2005	Uttlesford	43	2	312	311	25070	13
4	2005	South Lakeland	59	7	242	231	20524	22
5	2005	Liverpool	291	2	1	5	1600	113
6	2005	Salford	144	1	18	26	1747	33
7	2005	Durham	320	4	62	70	22850	270
8	2005	City of Derby	147	1	88	108	8532	53
9	2005	Swindon	119	1	178	201	2880	8
10	2005	Tunbridge Wells	68	4	249	246	23419	32
11	2005	Uttlesford	43	4	312	311	24275	11
12	2005	Aylesbury	112	2	284	288	24534	42
13	2005	Canterbury	90	1	166	163	23758	72
14	2005	Richmond	114	5	261	261	28387	89
15	2005	Camden	133	1	74	55	4826	12
16	2005	Cheshire East	99	1	226	243	24142	41
17	2005	York	118	1	234	244	15341	28
18	2005	Adur	42	4	145	135	20465	31
19	2005	Tameside	141	1	42	34	15079	100
20	2005	Brighton & Hove	164	2	66	67	8971	61
21	2005	Torridge	37	2	130	101	10480	7

22	2005	Reading	93	7	129	125	30227	90
23	2005	East Lindsey	80	1	73	58	11134	39
24	2005	Rochdale	135	1	23	29	26445	132
25	2005	City of London	5	3	262	259	22503	3
26	2005	Epping Forest	78	1	209	203	23733	50
27	2005	Enfield	181	7	64	63	28606	174
28	2005	Shropshire	192	7	180	166	22159	140
29	2005	Purbeck	29	2	218	199	20636	17
30	2005	Cannock Chase	60	1	128	123	23195	48
31	2005	Richmond	114	1	261	261	31492	112
32	2005	Daventry	45	5	248	253	27639	36
33	2005	Richmond	114	5	261	261	25861	56
34	2006	Redbridge	159	1	134	116	16358	95
35	2006	Guildford	84	1	300	300	31917	75
36	2006	Richmond Upon Thames	114	7	261	261	30689	109
37	2006	South Tyneside	103	1	52	47	14941	73
38	2006	Three Rivers	53	5	291	297	21176	18
39	2006	Camden	133	1	74	55	23137	122
40	2006	West Oxfordshire	64	6	316	317	30158	50
41	2006	Brighton & Hove	164	1	66	67	18046	119
42	2006	Doncaster	193	1	39	39	8496	90
43	2006	King's Lynn and West Norfolk	87	2	123	120	14914	44
44	2006	East Hampshire	72	2	301	302	25581	32
45	2006	Greenwich	143	2	28	19	23291	141
46	2006	Tendring	90	4	86	81	7872	22

47	2006	South Lakeland	59	2	242	231	17387	12
48	2006	Wirral	207	1	60	103	11706	95
49	2007	East Dorset	57	2	302	304	18827	10
50	2007	East Lindsey	80	2	73	58	6883	18
51	2007	Kensington and Chelsea	103	1	103	98	10633	39
52	2007	Sunderland	188	3	44	38	21620	163
53	2007	Islington	118	1	14	6	10558	104
54	2007	Bristol	252	1	79	93	11174	106
55	2007	Cambridge	68	4	193	188	30447	67
56	2007	Camden	133	7	74	55	13445	80
57	2007	Mid Suffolk	54	4	283	274	22467	23
58	2007	Thanet	84	3	49	50	17992	64
59	2007	Forest of Dean	50	1	186	164	19077	30
60	2007	Suffolk Coastal	71	4	258	257	22819	36
61	2007	Enfield	181	1	64	63	11099	93
62	2007	City of Peterborough	104	4	71	79	12526	61
63	2007	Telford and Wrelin	108	5	96	105	23141	85
64	2007	Windsor and Maidenhead	88	4	303	303	11377	2
65	2007	Ashford	70	4	198	192	24290	52
66	2007	Haringey	144	1	13	11	16138	130
67	2007	Wiltshire	281	1	245	245	31181	266
68	2007	Erewash	73	4	148	150	30538	70
69	2007	Haringey	144	1	13	11	23239	144
70	2007	Elmbridge	81	4	320	322	31734	68
71	2007	Stevenage	52	6	173	158	23104	43
72	2007	Rother	58	2	139	132	23036	48

73	2007	Daventry	45	1	248	253	27639	36
74	2007	East Lindsey	80	1	73	58	17086	60
75	2007	Sunderland	188	2	44	38	6712	75
76	2007	Basildon	110	3	131	141	19857	70
77	2007	Harrogate	104	4	282	283	18208	18
78	2007	Middlesbrough	88	4	8	27	23613	76
79	2007	Hull	163	4	10	15	13191	118
80	2007	West Oxfordshire	64	4	316	317	29423	42
81	2007	Harrow	137	5	194	184	19891	79
82	2007	Southwark	165	2	41	25	13120	134
83	2007	Telford and Wrelin	108	4	96	105	30350	104
84	2007	North Devon	58	1	137	126	17166	37
85	2007	Newark and Sherwood	69	1	147	147	24995	56
86	2007	Daventry	45	3	248	253	27311	33
87	2007	Islington	118	1	14	6	13041	113
88	2007	North Somerset	124	1	201	224	6758	14
89	2008	Sevenoaks	74	7	276	279	31907	70
90	2008	Bexley	146	1	174	180	23058	92
91	2008	Purbeck	29	1	218	199	13426	2
92	2008	Camden	133	1	74	55	21065	114
93	2008	Bracknell Forest	74	1	296	291	19181	19
94	2008	East Dorset	57	3	302	304	23122	15
95	2008	Taunton Deane	66	5	181	183	21170	42
96	2008	West Lancashire District	73	3	136	153	14444	29
97	2008	Waltham Forest	145	3	15	7	4662	40
98	2008	Camden	133	1	74	55	12965	79

99	2008	Doncaster	193	1	39	39	6472	72
100	2008	Spelthorne	60	1	260	262	22188	26
101	2008	Arun	94	6	154	151	23329	73
102	2008	Carlisle	68	2	109	109	6968	16
103	2008	Wycombe	107	7	254	258	22396	44
104	2008	Torbay	89	3	61	49	7884	25
105	2008	Sandwell	187	7	12	9	17623	173
106	2008	Camden	133	1	74	55	11259	66
107	2008	Richmond	114	5	261	261	27798	81
108	2008	Stockport	190	3	151	167	20189	106
109	2008	East Devon	82	2	215	209	13671	13
110	2008	Epping Forest	78	4	209	203	26418	59
111	2008	Forest of Dean	50	1	186	164	17884	26
112	2008	Shropshire	192	5	180	166	22337	142
113	2008	Plymouth	160	4	72	80	29278	158
114	2008	West Dorset	57	1	190	170	14344	12
115	2008	Herefordshire County	116	5	157	145	22011	95
116	2008	Southwark	165	2	41	25	2813	2
117	2008	Elmbridge	81	1	320	322	32029	76
118	2008	Lewisham	166	1	31	16	2678	4
119	2008	Liverpool	291	2	1	5	380	49
120	2008	Bath and North East Somerset	115	1	247	254	24732	60
121	2009	Mid Devon	43	1	165	155	14147	13
122	2009	City of Derby	147	1	88	108	2092	9
123	2009	Canterbury	90	7	166	163	22956	66

124	2009	Barnet	210	1	165	176	23868	163
125	2009	Lewisham	166	1	31	16	6218	59
126	2009	Northumberland	199	1	135	144	13714	79
127	2009	Canterbury	90	5	166	163	22864	64
128	2009	Stroud	69	3	255	256	27774	53
129	2009	Fareham	74	6	315	311	28281	34
130	2009	Aylesbury	112	7	284	288	31488	102
131	2009	Brentwood	45	6	295	294	24624	21